

DENYING HUMAN RIGHTS, UPHOLDING THE RULE OF LAW: A CRITIQUE OF JOSEPH RAZ'S APPROACH TO THE RULE OF LAW

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I INTRODUCTION

This essay provides a critical analysis of Joseph Raz's formal conception of the rule of law and his provocative statement that:

[a] non-democratic legal system, based on the denial of human rights, or extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.¹

It first develops a framework for this analysis centred on differing definitions of 'the rule of law'. Further, it demonstrates that these definitions are borne out of the polarised natural and positive law theories that describe what 'law' is. Building on this framework this essay highlights contradictions in Raz's statement, and his approach in general, which leave it vulnerable for criticism. It further argues that Raz's

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¹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 211.

approach to the rule of law is meaningless, as it does not protect fundamental unalienable individual rights. This essay is somewhat sympathetic to Raz's approach as it argues that it limits judicial activism. Beyond this point, this essay argues strongly in favour of the substantive conception. It concludes by suggesting an approach to the rule of law that can protect fundamental individual rights across varied cultures.

II DEFINITION DEBATE

A *Polarising Statement*

Joseph Raz's well-known, perhaps infamous, statement polarises legal theorists and naturally sparks a debate about the definition of the rule of law. This debate concerns the very core meaning of the concept and not just differing opinions on the margins.² On one side, the formalist conception is deeply entrenched in legal positivism and is ultimately concerned with the *law as it is*. Conversely, the substantive conception, linked with natural law theory is concerned with *law as it should be*.³ Therefore, this debate is primarily driven by a person's perspective of the concept of 'law'.⁴

This essay critically analyses the validity of Raz's statement through the contrasting lenses of the formal and substantive conceptions. Before doing this however, it provides a brief description of each approach.

B *Basic Concepts of the Rule of Law*

² Jeremy Waldron 'Is the Rule of Law and Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137, 148.

³ Mark Bennett, "'The Rule of Law' Means Literally What it Says: The Rule of Law' (2007) 32 *Australian Journal of Legal Philosophy* 90, 91.

⁴ Paul Craig, 'Formal and Substantive Conceptions of the rule of law: an Analytical framework' (1997) (Autumn) *Public Law* 467, 487.

There is no universally accepted definition of the rule of law. This is quite peculiar as it is arguably ‘the preeminent legitimating political ideal in the world today, without agreement upon precisely what it means.’⁵ However, there is a ‘general agreement’ that the rule of law includes protecting citizens from unpredictable and arbitrary interference with their vital interests’ by other citizens and the government.⁶

C *Formal Conception and Positive Law*

Raz’s formal conception of the rule of law is borne out of legal positivism.⁷ As such, it focuses on the rules and procedures that are ‘inseparable’ from the rule of law and pays no attention to the substance of the law.⁸ According to Raz, the rule of law is not the ‘rule of good law’.⁹ Therefore, concepts such as justice, equality and even democracy should be divorced from the rule of law. If this was not the case, Raz argues, the rule of law would lose its function and independence and would no longer be ‘law’ but a meaningless social philosophy.¹⁰ Therefore, under this approach, the rule of law is viewed as one element of legal system and not the overall picture by which it should be judged.¹¹

⁵ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004) 4 cited in Mark Bennett, “‘The Rule of Law’ Means Literally What it Says: The Rule of Law’ (2007) 32 *Australian Journal of Legal Philosophy* 90, 92.

⁶ Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 83.

⁷ Mark Bennett, “‘The Rule of Law’ Means Literally What it Says: The Rule of Law’ (2007) 32 *Australian Journal of Legal Philosophy* 90, 91.

⁸ Raz, above n 1, 210.

⁹ *Ibid* 211.

¹⁰ *Ibid* 211.

¹¹ *Ibid* 211.

Divorcing the rule of law from moral conceptions highlights that the formal approach is purely instrumental.¹² For example, Raz likened the rule of law to a knife, which of course had no moral value, but could be used effectively for both good and bad purposes.¹³ Hence Raz's provocative statement that 'gross violations of human rights' are compatible with the rule of law.¹⁴

According to Raz, the basic premise of the rule of law is that law should be capable of guiding behaviour.¹⁵ For this to occur, laws must be prospective, open, clear and relatively stable.¹⁶ Other necessary requirements include: an independent judiciary, natural justice, easily accessible courts and a restriction on crime-preventing agencies from perverting the law.¹⁷

This essay argues, below, that Raz's conception is meaningless as it fails to protect citizens from oppressive and tyrannical regimes. It is merely an empty vessel into which any law, harsh as it may be, can be poured. Further Raz's statement contains inherent contradictions that leave it open to criticism.

D *Substantive Approach and Natural Law*

The substantive conception of the rule of law is linked with natural law theory. This approach, while acknowledging the importance of the rules and formalities in any legal system, seeks to extend the formal conception

¹² Robert P George, 'Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition' (2001) 46 *The American Journal of Jurisprudence* 249, 251.

¹³ Raz, above n 1, 225.

¹⁴ *Ibid* 221.

¹⁵ *Ibid* 213.

¹⁶ *Ibid* 214.

¹⁷ *Ibid* 216–218.

so that it protects individual rights.¹⁸ Simply put, the substantive approach is concerned with what law *ought to be*.¹⁹

According to this conception a society cannot rely on the validity of laws just because they have been enacted according to proper rules. This would:

completely ... misconceive the *meaning* of the rule of law. ...The fact that somebody has full legal authority to act in the way he does gives no answer to the questions whether the law gives him power to act arbitrarily or whether the law prescribes unequivocally how he has to act.²⁰

Therefore, this approach has been seen as an attempt to loosen the positivist's grip on legal theory.²¹ It recognises that laws must be measured according to a higher, unchangeable and eternal standard. One perspective of natural law theory is that this standard is derived from God and can be found in eternal 'fundamental law[s] of nature'.²² A further argument concerning this higher standard is that mankind, as creations of God, have an understanding of this standard through their God-given conscience.

As Paul stated,

For when the Gentiles, which have not the law, do by *nature* the things contained in the law, these, having not the law, are a law unto themselves: Which shew the work of the law *written in their hearts*, their *conscience also*

¹⁸ Craig, above n 4, 1.

¹⁹ Friedrich A Hayek, *The Constitution of Liberty* (Chicago University Press, 1960) 206 cited in Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 87.

²⁰ Ibid 87 (emphasis added).

²¹ Arthur Ripstein (ed) *Ronald Dworkin* (Cambridge University Press, 2007) 57.

²² John Locke, *Second Treatise of Government* (c 1681) Ch 11, s 135 cited in Zimmerman, above n 5, 31.

bearing witness, and their thoughts the mean while accusing or else excusing one another[.]²³

As will be shown, below, this conception is not without opposition. A key criticism is that the concept of ‘good law’ is subjective and requires someone to draw up criteria for what is right or good law.²⁴ This will be addressed in the following section.

III CRITICAL ANALYSIS

Using the formal and substantive approaches, the following section critically analyses the validity of Raz’s statement.

A *Inherent Contradictions*

It has been shown, above, that Raz’s provocative statement is only valid when viewed from the formal perspective. However, even when viewed through the formal lens, aspects of Raz’s approach appear inherently contradictory. For example, Raz states that a key virtue of the rule of law is to protect individual freedom.²⁵ However, he appears to be at pains to stress that this ‘freedom’ is limited. It only includes an individual’s ability to predict their future environment based on their knowledge of prospective, clear, open and relatively stable laws.²⁶ It does not offer any protection against a government implementing oppressive laws, even slavery.²⁷ Indeed, this system is ‘compatible with gross violations of human rights.’²⁸

²³ *Holy Bible* (King James Version) Romans 2:14–15 (emphasis added).

²⁴ Lord Bingham, ‘The Rule of Law’ (2007) 66 (1) *The Cambridge Law Journal* 67, 76–77.

²⁵ Raz, above n 1, 220.

²⁶ *Ibid.*

²⁷ *Ibid* 221.

²⁸ *Ibid* 220–221.

Raz goes further to state that a legal system that does not afford its citizens this predictability offends human dignity as it breeds the evils of uncertainty and frustrated expectations.²⁹ It seems perplexing and contradictory that a legal system would speak of ‘human dignity’ while simultaneously acknowledging that gross violations of human rights are permitted. Further, it seems absurd, for example, that a country with institutionalised child slavery would be held to respect human dignity as long as the servitude laws were prospective, clear, open and relatively stable while a country that protects human rights but has rather complicated³⁰ taxation laws would not.

Another contradiction in Raz’s conception is that it addresses concepts such as human dignity, autonomy and individual freedom while claiming to be completely divorced from moral elements. Based on this point Trevor Allan argues that Raz’s approach is actually ‘based upon substantive foundations.’³¹ This contradiction strikes at the heart of Raz’s approach.

Adding to the contradictions above, Raz’s provocative statement describes a totalitarian regime that would be compatible with the rule of law. As mentioned above, a key element of this approach is an independent judiciary, structurally free from political influence and that operates according to law.³² However, experience shows that judicial independence ‘does not fit with the classic understanding of authoritarianism.’³³ For example, in Nazi Germany, judicial

²⁹ Ibid 222.

³⁰ For a discussion on complicated law in a democratic society see Bingham, above n 24, 70.

³¹ Craig, above n 4, 9.

³² Raz, above n 7, 219.

³³ Peter H Solomon Jr, ‘Courts and Judges in Authoritarian Regimes’ (2007) 60 *World Politics* 122, 123.

independence was totally absent. Laws were introduced to expel ‘non-Aryan’ judges and those who opposed National Socialism.³⁴ The remaining judges became mere indoctrinated conduits of the oppressive regime. This was highlighted in the sentencing of 80 000 citizens to death, without an avenue of appeal, for minor political crimes.³⁵

Arguably, short of invalidating the statement, this inconsistency leaves Raz’s statement and rule of law conception vulnerable to criticism. This is because it is highly unlikely that an authoritarian regime, that legalises gross violations of human rights, would allow a judiciary to act independently.

B *The rule of law must protect human rights*

Perhaps the biggest flaw in Raz’s approach is that it provides no protection of fundamental human rights in an oppressive regime.³⁶ The substantive approach on the hand, while accepting the formal approach is a good place to start,³⁷ seeks to extend the conception of rule of law so that it upholds fundamental rights that are ‘based on, or derived from the rule of law.’³⁸

Adding to the above point, Arthur Chaskalson, former Chief Justice of South Africa, pointed out that the oppressive and discriminatory laws

³⁴ Kenneth F Ledford, ‘Judging German Judges in the Third Reich: Excusing and Confronting the Past’ in Alan E Steinweis and Robert D Rachlin (eds), *Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* (Berghahn Books, 2013) 167.

³⁵ Ibid 169–170.

³⁶ Mark Ellis, ‘Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice’ (2010) 72 *University of Pittsburg Law Review* 191, 194.

³⁷ Bingham, above n 24, 84.

³⁸ Craig, above n 4, 1.

enacted in the Apartheid era adhered to the formal conception of the rule of law. However, he further stated:

What was missing was the substantive component of the rule of law. The process by which the laws were made was not fair ... And the laws themselves were not fair. They institutionalised discrimination ... and failed to protect fundamental rights. Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is “an empty vessel into which any law could be poured”.³⁹

Bingham echoes this point when referring to the formalist conception.

A state which savagely repressed or persecutes sections of its people could not in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed.⁴⁰

As described in section one, the substantive conception of the rule of law is a manifestation of natural law theory.⁴¹ And natural law generally states that all people are ‘created equal’ and ‘are endowed by their Creator with certain *unalienable* Rights, that among these are Life, Liberty and the pursuit of Happiness.’⁴² Therefore, according to this perspective, ‘laws’ that offend fundamental human rights are not laws at all!

Bingham further argues that the rise in international law and human rights treaties places a responsibility on all governments to acknowledge that

³⁹ Arthur Clarkson, Remarks at the World Justice Forum, 1 July 2008 cited in Ellis, above n 36, 194–195.

⁴⁰ Bingham, above n 24, 76.

⁴¹ George, above n 12, 249.

⁴² *United States Declaration of Independence* (emphasis added).

protection of human rights is linked with the rule of law.⁴³ As an example, he quotes the Preamble to the Universal Declaration of Human Rights 1948 that states, ‘it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.’⁴⁴

Therefore, a rule of law conception that does not include a substantive element to protect human rights is meaningless⁴⁵ and contrary to natural law.

C *Limits on Judicial Activism*

Perhaps a positive aspect of Raz’s formal conception is that it limits ‘judicial activism’.⁴⁶ Raz argues that if the virtue of the rule of law is judged by the *substance* of the law then it becomes a meaningless social philosophy lacking any useful function.⁴⁷ As discussed above, this concept fits naturally⁴⁸ with positive law theory that states that the validity of a law is determined by the rules (‘norms’) that enacted them and not by their content.⁴⁹

Closely linked to the above point is the positivist’s view that the judiciary is in the ‘shadow of legislation.’⁵⁰ Arguably, the formal approach constrains judges to adjudicate based on what *the law is* and not to import any foreign subjective elements, such as political theory, to determine

⁴³ Bingham, above n 24, 75.

⁴⁴ *Universal Declaration of Human Rights* 1948 cited in Bingham, above n 24, 75–76.

⁴⁵ Ellis, above n 36, 199.

⁴⁶ See Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) 47 *Quadrant* 9.

⁴⁷ Raz, above n 1, 211.

⁴⁸ Craig, above n 4, 7.

⁴⁹ See Hans Kelson, ‘The Pure Theory of Law – Part One’ (1934) 50 *Law Quarterly Review* 517.

⁵⁰ Ripstein, above n 21, 62.

what *the law should be*. Sir Owen Dixon concurred with this point stating that judges should not depart from what *the law is* ‘in the name of justice or of social necessity or of social convenience.’⁵¹

A recent example of such a departure can be found in the US Supreme Court’s majority decision in *Obergefell v Hodges* (*Obergefell*),⁵² which ruled that same-sex marriage was a fundamental right based on the fourteenth amendment of the US Constitution. Zimmermann points out that the majority’s view in *Obergefell* ‘subverts and invalidates laws due to matters of personal opinion.’⁵³

The majority’s approach in *Obergefell*, and judicial activism in general, is contrary to Raz’s formal approach as it leaves people to be ‘guided by their guesses as to what the courts are likely to do’ and ‘these guesses will not be based on the law ...’.⁵⁴ This is contrary to Dworkin’s ‘rights conception’, a substantive conception of the rule of law, which arguably encourages judicial activism⁵⁵ to ensure individual citizens maintain their moral rights.

IV FINAL REMARKS

The analysis above strongly criticised Raz’s conception of the rule of law as it completely fails to acknowledge its role in protecting ‘unalienable’ human rights. In doing so, it advocated for a rule of law conception that recognises that the content of laws should protect fundamental human

⁵¹ Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) 47 *Quadrant* 9, 20.

⁵² 556 US (2015).

⁵³ Augusto Zimmermann, ‘Judicial Activism and Arbitrary Control: A Critical Analysis of *Obergefell v Hodges* 556 US (2015) – The US Supreme Court Same-Sex Marriage Case’ (2015) 17 *The University of Notre Dame Australia Law Review* 77, 79.

⁵⁴ Raz, above n 1, 217.

⁵⁵ Zimmermann, above n 6, 89.

rights. However, there is an inherent difficulty in this proposition as '[t]here is not ... a standard of human rights universally agreed even among civilised nations.'⁵⁶ Bingham argues for a relative approach to this problem where the legal lines are drawn around individual rights that are viewed as 'fundamental' in each respective country.⁵⁷ This essay however, prefers the slightly different approach of Ellis who optimistically argues for a universal acceptance of 'non-derogable' rights to be protected by the rule of law.⁵⁸ Such rights would include: 'the right not to be subject to torture or other cruel, inhumane or degrading treatment or punishment',⁵⁹ 'the right to a fair trial',⁶⁰ 'the right to freedom of thought, conscience and religion',⁶¹ 'the right to non-discrimination'⁶² and 'the right not to be punished disproportionately'.⁶³

Ellis' approach however, remains flexible, across cultures, by including 'derogable rights' that might need to be compromised 'in order to respect ... cultural values enshrined in individual states.'⁶⁴ This flexible approach can be applied across contrasting cultures to ensure that fundamental human rights are protected while rights, on the 'outer-edge'⁶⁵, can be adapted, or ignored, according to individual cultural sensitivities.

V CONCLUSION

This essay has shown that Raz's statement is only valid through a formalist perspective borne out of positive law theory. Arguably, this

⁵⁶ Bingham, above n 24, 76.

⁵⁷ Ibid 76.

⁵⁸ Ellis, above n 36, 201.

⁵⁹ Ibid 202.

⁶⁰ Ibid 203.

⁶¹ Ibid 204.

⁶² Ibid 205.

⁶³ Ibid 206.

⁶⁴ Ibid 207.

⁶⁵ Bingham, above n 24, 77.

conception of the rule of law is meaningless and it does nothing to protect unalienable individual rights derived from the rule of law. This essay has also shown that Raz's provocative statement, and his approach in general, contain inherent contradictions that leave them vulnerable to criticism. Finally, it has shown that the substantive conception of the rule of law can be applied across varied cultures by distinguishing between 'non-derogable' rights that are universally accepted and 'derogable' rights, on the margins, that can be adapted to individual cultures.