

THE STUDENT SCHOLARSHIP BLOG

Does greater compliance with the Rule of Law make a Legal System better?

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Introduction

When people say something is “better”, they could mean different things. In arguing whether greater compliance with rule of law make a legal system better, we risk talking past each other and ending up in a chorus of confusion. In this essay, I propose to look at “better” in three senses. First, whether the principles of the rule of law improve the efficacy of laws. Second, whether higher compliance with the rule of law in itself a *moral* merit for a legal system. Third, whether a sound rule of law in a legal system promotes better compliance of its laws with other substantive principles of morality.

These are related but separate questions to be answered, although they are unfortunately entangled in the debate among Fuller, Raz and other philosophers. Their contrasting views will be analyzed only where necessary in answering the question I posed above. One contentious aspect that I am only able to briefly analyze is the so-called thick/thin conception of rule of law. Adopting Lamond’s middle-course approach, I argue for an affirmative answer to all three questions above, albeit for different reasons and with important qualifications.

The elements and meaning of rule of law

It is easier to start explaining what rule of law is by raising widely accepted discrete principles of rule of law than to state a universally accepted overarching theme. Fuller formulated eight desiderata of law. In short, the law should be general, publicized, prospective, clear, coherent, not requiring the impossible, generally stable and its rules as announced should be congruent with its application.¹ Two points should be made clear at this juncture. First, a total failure in any of these eight directions would mean that this system could not even be called a legal system at all, since such system is unable to provide guidance to how one should behave.² It follows that the rule of law must be present in a legal system, although the degree of its manifestation can vary across a wide spectrum. Second, the rule of law is not expected to attain perfection in each and every desideratum – they often conflict with each other and also with principles of substantive morality. An example would be amendments to law are often necessary (at the cost of stability) since shifting circumstances render compliance no longer possible. A greater compliance with the rule of law means that the balance between these elements is well struck.

Although Fuller’s account has the attraction of simplicity, there is no overarching theme underlying these desiderata telling us what rule of law actually means. It also does not tell us whether these desiderata are exhaustive, and puts little emphasis on institutional aspect

¹ Fuller, *The Morality of Law* (Yale University Press 1969) 46-91.

² For instance, if all laws require the impossible one can hardly say that there is a functioning legal system that people could in any sense follow its rules.

of the rule of law (e.g. the judiciary). Raz (in broad agreement with Fuller's list of desiderata) went further to emphasize the need of independent judiciary and natural justice in ensuring the impartial and correct application of the law.³ He sees the basic idea of the rule of law as a requirement that it must be capable of guiding behaviour of its subjects. The difficulty with this formulation is this: the positivist tradition sees law as rules that provide guidance of behaviour. As laws by definition must be capable of guidance, any system of law will have a sound "rule of law", the latter becoming a redundant concept, because it misses out how the rule of law demands rulers to act in a certain way within the law. Raz is also wrong to see the rule of law as being purely "formal" if what he meant was the irrelevance of content: the objection to demanding the impossible and the requirement of clarity clearly have something to do with the substantive content of the law.

On the other hand, to say that the rule of law is the rule of the good law also renders such concept devoid of meaning, and it is true to say that on this conception that a legal system is better with the rule of law.⁴ Therefore Lamond's conception of the rule of law is commendable.⁵ Lamond's conception consists of an effective legal system with laws that can be obeyed by its participants, and the state is governed by and through law. Governance through law is an additional element to the requirement that the legal officials should obey the law vis-à-vis their private capacity. Meaning, the internal procedures of policy or law-making should also be regulated by law. This conception enshrines requirements for formulating laws and institutional protection to these laws in a non-ideal world open to abuse.

Great compliance with rule of law improves efficacy of individual laws in guiding behaviour

As the rule of law requires that it must be possible for participants in a legal system to obey the law, greater compliance means that the rules function better *as rules*. Clearer wording of statutes and judicial case law allow individuals and their legal advisers to understand their legal position and make corresponding arrangements to avoid illegality. Contradictory rules are sources of confusion rather than guidance, as individuals are told that they are compelled to do something simultaneously prohibited.

³ Raz, 'The Rule of Law and its Virtue' in his *The Authority of Law* (2nd edn, OUP 2009).

⁴ This is indeed Dworkin's position "The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice."

⁵ Lamond, 'The Rule of Law' in Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012).

Raz offered a vivid analogy to illustrate the point: The rule of law makes better law (*rules*) in the sense that a sharper knife is a better knife (*cutter*).⁶ Yet this sheds no light on whether it entails better moral consequences. Just as a sharper knife could be used to carve stunning artwork or chopping off people's heads, a more efficacious law can be used to promote beneficial activities or suppress fundamental rights.

In my view, having an accurate view of Raz's analogy means that much criticism directed to this aspect is misguided. For instance, Lamond argues that to tackle designer drugs maybe it is better to criminalize and punish them retroactively.⁷ But to say this is to suggest the law operates in a gun-man model to punish and deter with threats of penalty. This is not what Raz meant when he said that laws in compliance with rule of law work better as laws. To put the matter crudely, one could not argue that sharper knives are not better cutters since they are less aesthetically pleasing than those with round and blunt blades.

Rule of law is itself a moral virtue of a legal system

We should also see rule of law as a moral virtue of a legal system as it allows individuals to choose style and forms of life, and more importantly to fix long-term goals and direct one's life towards them in a meaningful way. This is agreed between Fuller and Raz, although the latter doubts that this is a moral virtue.⁸ As Raz views a law is merely a tool in the hands of men being versatile for a large variety of purposes.

However, in developing Fuller's argument, the point I am making here is distinct from the one above. Fuller sees the rule of law as respecting and safeguarding a man's dignity as a responsible agent.⁹ When the law-abiding citizen follows the law in conducting his own affairs, he can strive to become a self-determining center of action. We can see that a legal *system* with a high compliance with the rule of law allows the additional possibility of individuals making long-term, complex and more meaningful plans. A particular rule of contract may hold that a binding contract requires consideration. This rule, however clear and universally applied, does not give assurance that individuals can be confident in entering into long-term contracts. It is a legal *system*, where there are clear and comprehensible rules governing unforeseen events, circumstances of breach, loss arising out of negligence that individuals can make reasonable and coherent predictions of self-interest to calculate positions in negotiating long-term plans. This interpretation resonates with Fuller's point of seeing the law as providing a sound and stable framework for their interactions with one another, and the role of government being a guardian of such system.

⁶ Raz (n 3).

⁷ Lamond (n 5).

⁸ Raz (n 3).

⁹ Fuller (n 1).

This moral virtue does not result from the existence of one particular law (or the mere absence of contradiction among individual laws), just as the value of shelter provided by a house is more than the discrete existence of four walls and a roof. It only makes sense to make interior renovations when one got a house. Further, this independent moral virtue is also separate and independent from the substantive desirability of these rules. We may have (morally) unsatisfactory rules of apportioning liability in concurrent causation, but this does not deflect from the moral virtue that individuals could therefore construct their plans on the basis of these rules (along with other rules of the legal system, providing that they as a whole are clear, stable etc.) Hart attacked Fuller that it is odd to call internal morality of law “morality” since we could then have an internal morality of poison.¹⁰ Yet, he overlooked the fact that people plan their lives on a legal system but not poisonous substances.

A sound rule of law in a legal system promotes better compliance of its laws with other substantive principles of morality

If we accept that rule of law is an independent moral virtue, then it is itself a substantive principle of morality. Nevertheless, the argument I pursue here can stand on its own even if the preceding view fails. This is because the rule of law contributes to the compliance of other principles of morality such as fairness and respect for human rights. At the very least, the requirement of publicity and clarity means that such laws will be subject to public scrutiny and criticism, perhaps even international pressure. Fuller argues further that the requirement of legality compels the ruler to answer more responsibly to his own conscience when he has to articulate the principles on which he acts.¹¹ As implementing these principles require respect and a capacity for understanding the subjects to that particular law, we may say that the rule of law requires the ruler to “think twice” when he is formulating discriminatory laws.

This view that the rule of law makes the legal system better is correct but subject to two important qualifications. First, it is a weak form of “betterment” since plainly what is said above is inconclusive of the final outcome of the legal system. The rule of law merely promotes the chance of better compliance with substantive moral principles. It may, in Hart’s words, be compatible with “very great iniquity”.¹² Second, Fuller’s arguments only seem to apply to benevolent rulers. A Nazi regime may pursue the principles of publicity and clarity vigorously without second thoughts of the moral desirability of its laws in persecuting its Jewish population. Hart’s remark of “iniquity” could also be invoked in this light.

¹⁰ H.L.A. Hart, ‘Book review – The Morality of Law’ (1965) 78 *Harvard Law Review* 1281.

¹¹ L. Fuller, ‘A Reply to Professors Cohen and Dworkin’ (1965) 10 *Villanova Law Review* 655.

¹² H.L.A. Hart, *The Concept of Law* (OUP 2010) 206-7.

It appears then a distinction could be drawn between benevolent and evil regimes, and the argument of promoting compliance with substantive morality could not stand in the latter class. Nevertheless, there is an argument that although these evil regimes could not be expected to promote substantive principles of morality, conformity to principles of rule of law could restrict the extent and forms of iniquity. The general objection against retroactive laws, selective enforcement, and impossibility at least entails that a Nazi regime (if it complies with these principles) could not, for example, impose penalty solely on the basis that a person is Jewish. It also could not exercise extra-legal beating of the Jews to chill opposition. The crux of the matter is that an evil regime could act in a way much worse when it departs significantly from the ideals of rule of law. Comparing like with the like would lead to the conclusion that Hart's dismissive remark is misplaced.

A final caveat should be made with Lamond's remark that the rule of law is ultimately an alloyed good, as the requirement that the law is consistently applied rather than selectively means that the good laws would be enforced as well as the bad laws.¹³ This argument shifts the focus from whether rule of law improves the moral desirability of *laws* to whether the presence of rule of law makes the legal system in the whole more morally desirable. The latter inquiry is out of scope of this question, and will depend on an extensive investigation of the balance between moral and immoral laws of a legal system.

Conclusion

In this essay, I explored how a legal system can be better in three different senses. Although all three questions yield an affirmative answer, they entail important qualifications and require us to look at the rule of law with less optimism. Perhaps the greatest lesson to be learnt from this inquiry is to have a more precise concept of what is meant by a "better" legal system, and a distinction between laws and the law.

¹³ Lamond (n 5).