
TWO DIMENSIONS OF THE RULE OF LAW: A REMINDER FROM HONG KONG

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Abstract

In this article, two dimensions of the rule of law, namely the ‘rule of’ dimension and the ‘law’ dimension, are discussed with reference to the ongoing protests in Hong Kong. The meaning and the linguistic boundaries of ‘rule of’ and ‘law’ are explored, and relevant theories of the rule of law are also considered. By analysing the dimensions of ‘rule of’ and ‘law’, we understand that the usage of the term may reveal the ambit of rule of law. The question of whether some ideas count as conceptions of the rule of law can be answered to some extent. More importantly, on the view of the rule of law that I defend, governments are not free to blame the governed for undermining the rule of law, and they are bound to do what the rule of law requires when making their official representations and statements.

Keywords: rule of law, Hong Kong, public order, obedience, police powers, discretion

[A] INTRODUCTION

The rule of law has always been a matter for debate amongst legal scholars. Different theories of the rule of law may be categorized as thick or thin theories (Tamanaha 2008). The emphasis of thick theory is on substantive justice, while thin theory concerns mainly procedural fairness and formal legality (Dworkin 1985: chapter 1; Raz 2009: chapter 11; Tamanaha 2004, 2008).¹ Due to the plurality of conceptions, there are some recurring issues surrounding the rule of law. For example,

¹ Brian Tamanaha (2008: 4) said ‘more substantive or “thicker” definitions of the rule of law ... include reference to ... democracy.’ However, he did, on a different occasion, include democracy in the formal or thin version of the rule of law (2004: 91). Potentially, this gives rise to a contradiction in his construction of the rule of law.

whether we should include the respect for human rights as a principle of the rule of law (see e.g. Bingham 2011; Dworkin 1985: chapter 1; cf. Raz 2009: chapter 11, 2019), and whether social welfare is also something of which the rule of law should take care (see e.g. Barber 2004; King 2018). These issues are highly relevant to the development and our understanding of the theory of the rule of law. However, there are more basic questions to be answered.

When scholars propose their versions of the rule of law and argue against others, they tend not to take reality and history into consideration. There is a fresh attempt by Joseph Raz to update his account of the rule of law, the major aim of which 'is to avoid *arbitrary government*' (2019: 5 emphasis in original). The 'obvious advantages' of the doctrine of rule of law (Raz 2019: 11–12) may be obvious in countries which have a culture or tradition of the rule of law but may not be so obvious to people who are not speaking in the same tradition. The doctrine will be more relatable if the wrongs committed by arbitrary governments are sufficiently depicted. Even if we think that the pervasiveness of arbitrary governments is evident, for the sake of argument, it may be necessary to point to some specific social issues that can be resolved by invoking the principles of the rule of law. Brian Tamanaha (2004) noted the endorsement of the rule of law by autocratic regimes, such as China (2), but as his study unfolds, the reflection, let alone criticism, on the reception and application of the rule of law in these countries is limited.² This illustrates a wider tendency within the rule of law discourse to focus on theory, with inadequate attention paid to the implications of such theories in the real world.

Nonetheless, various academic writings seek to put the theories of the rule of law into practice or apply those theories as standards to assess whether legal systems comply with the principles of the rule of law. It can be noted, however, that when the practice of the rule of law is at issue, a 'rule-and-application' approach is often adopted.³ In other words, the evaluation of facts and events affecting the rule of law is preceded by the

² Tamanaha (2004) referred to China again when he attempted to make the points that rule by law 'is the Chinese government's preferred understanding of the rule of law' (92), that 'China can implement formal legality without democracy' (112), and that the rule of law understood in terms of formal legality 'is also consistent with authoritarian or non-democratic regimes, as illustrated by the respective examples of Singapore and China' (120). However, these claims sound like bare assertions without sufficient proof or at the very least extended discussion.

³ For example, Albert Chen (2016) applied the thin conception of the rule of law to assess whether China had been moving towards or turning against the rule of law. Chen summarized Randall Peerenboom's evaluation of China's compliance with the rule of law (2016: 10–11, 29–30) which Chen likened to Lon Fuller's account (2016: 27). See also *The World Justice Project Rule of Law Index 2019* in which the World Justice Project measured the practice of the rule of law in different countries by a set of factors (2019: 10).

delineation of the concept and does not deviate from existing discourses on the theories of the rule of law. Yet, human interaction with, utilization of and subjection to the law may raise doubts about the nature of law, politics and government. As we attempt to clear the doubts, we may come to realize that the theories of the rule of law can be revisited and reformulated.

If we want to connect our theorization of the rule of law to reality and reflect upon how this could lead to advancement of the theories of the rule of law, the ongoing protests in Hong Kong may be a meaningful starting point. Two aspects of the protests are of specific interest. First, protesters have reportedly engaged in serious unlawful behaviour. Second, the police have been shown to be involved in grave misconduct and violence. We may gain insights into the ‘rule of’ dimension of the rule of law by reviewing the former and further learn about the dimension of ‘law’ in the rule of law by scrutinizing the latter. The major lesson from this analysis, I suggest, is that people, and more importantly governments, cannot attach the term to any idea relating to the law, and ‘rule of’ and ‘law’ in the term may serve as constraints on those who rule and govern. If a government is unwilling to observe those constraints, then it should not make claims that it operates on the basis of the rule of law.

[B] THE ‘RULE OF’ DIMENSION

Since the protests in Hong Kong started in June 2019, we have frequently heard that protestors or—according to the Hong Kong and Chinese governments—‘rioters’, damage the ‘rule of law’ through ‘violence’ and unlawful deeds (see the news reports and editorials of the Chinese state-owned newspaper, e.g. *China Daily* 2019a; 2019b; 2019c).⁴ That breaking the law is breaking the rule of law is a propaganda-like governmental slogan in Hong Kong.⁵ The ‘rule of law’ in this sense means ‘public order’ which requires compliance with the law on the part of the citizens. Having all of the ruled subject to the commands of the sovereign is perhaps many

⁴ The ‘violence’ at this stage involved, inter alia, ‘clashes between police and radical protesters, paralyzing core administrative and business areas’ (*China Daily* 2019d). It may be difficult to see how ‘paralyzing core administrative and business areas’ alone is violent, and it is equally perplexing that the expression of the word 奪 *duo*—to seize in English—is violent according to some judges in the Court of Appeal in Hong Kong (*Secretary for Justice v Wong Chi Fung* (2018)), but it is not the purpose of this article to discuss the dubious and shifting meaning of ‘violence’ according to the Hong Kong and Chinese governments and their aides.

⁵ The saying is nothing new. It was propagandized during the Occupy Central Movement in 2014 (see e.g. *China Daily* 2014).

rulers' dream.⁶ Some commentators have argued that this is not what the rule of law means, citing a variety of theories of the rule of law (see, e.g., Dupré 2019; Eu 2019). Different interpretations of the rule of law continued to oppose each other at the ceremonial opening of the new legal year in Hong Kong (see Lau & Ors 2020). However, people are not persuaded by one another. This shows that we are unable to denounce rival theories of the rule of law as wrong simply by being in line with the government position or drawing on the reasoning of renowned jurists.

Raz (2019: 2) is right that '[t]here is no point in verbal disputes about which ideals deserve to be called the rule of law', but the reason is not that 'the term "the rule of law" is used to designate somewhat different ideals'. The problem we are encountering is that different idea(l)s are being labelled as the rule of law, by governments, and people—including Raz—but an authoritative and conclusive understanding of the rule of law has yet to emerge. The Razian account of the rule of law is correct only if the 'two premises—that governments may act only in the interests of the governed, and that honest mistakes about what that is and what it entails are the stuff of ordinary politics'—are correct (see Raz 2019: 14). While Raz (2019: 14) believed that his 'defence of the doctrine of the rule of law depends on the soundness of the premises, not on everyone's agreement with them', he seemed to have neglected, in reality, the absolute power of some governments to 'disagree with' the premises and the adverse consequences such 'disagreement' brings. It is troublesome when some authoritarian governments disagree with the premises. The disagreement would come in the form of the premises being 'unsound'. Raz has not really defended his premises by exploring their moral force and political attractiveness, for example why governments may act only in the interests of the governed. Advantages of the doctrine of rule of law that Raz presented may point to this premise, but the premise itself is not justified. It seems that the premises were expected to be convincing to many, but if they are rejected from the very beginning, we will not be able to bring up the Razian account of the rule of law. It is possible that a government would base the doctrine of the rule of law on the premises that governments may act only in the interests of the ruling party, and that decisions about what that is and what it entails are the stuff of General Secretary of the Central Committee of that party. Thus, the cardinal principle of the rule of law based on these two premises would be 'the governed must obey the orders of the ruling party'. The reply might be that it would be evil, immoral, unethical and without virtue for the regime to espouse a theory of the rule of law based on those premises. It may

⁶ The 'command' theory of law by John Austin is alluded to here (see Austin 1995: Lecture 1).

even be contrary to the rule of law from the Razian perspective, but the unfortunate fact is that nothing stops governments from making theories parallel to the premises proposed by Raz. The objects of government Raz identified (2019: 2) cannot resist competing claims, such as ‘people are born into a strong community which values sacrificing individual rights for group interests’, and ‘the government is not here to protect personal autonomy but to monitor the operation and growth of the country’. One can build a doctrine of the rule of law on any foundations of the state, whether good or evil. We must look for something irrefutable or universal, but political theories based on an assumption that the government must govern in the interests of the governed, like liberalist theories which (over)emphasize the importance of reason, tend not to be universal (see e.g. Young 1989).⁷

Raz (2019: 13) did qualify his account of the rule of law by declaring that the doctrine ‘can be observed, while respecting significant variations between countries that express their local traditions’, and, in a footnote that follows this declaration, he felt that ‘[n]eedless to say, it [the rule of law] will not be compatible with all possible traditions’.

The cold hard truth is that, even if we regard some traditions or cultures non-compliant with the doctrine of rule of law, the possible reaction nowadays of a non-Razian state will be that it is committed to its version of rule of law. The introduction of ‘adaptation’ and ‘local traditions’ risks substantial departure from the Razian notion in the theorization of a conception of the rule of law, although this might not have been intended by Raz. Moreover, to conclude that some traditions are inconsistent with the (Razian) doctrine of rule of law does not sound like a condemnation here since the acknowledgment of different local traditions would make non-compliance with the rule of law excusable. Thus, the need for adaptation may hurt both the construction and operation of the doctrine. To put it crudely, the characterization of a state as flouting the rule of law does not relieve the pain of a human being who suffers in a non-Razian state dominated by the propaganda that the state

⁷ See also Richard Rorty (1997) who criticized the universalist arguments of Jürgen Habermas and John Rawls for the case of ‘Western’ liberalism. I shall not enter the debates on theories of justice, liberalism and communitarianism here.

complies with its particular ‘ideal’ of rule of law.⁸ The thorny issue for Raz or indeed everyone is how to establish firmly the premises and hence a doctrine of the rule of law and deny extreme premises and a totalitarian rule of law.⁹

Notwithstanding the ambiguities that the rule of law ‘will not be compatible with all possible traditions’ (Raz 2019: 13 note 11) and that the rule of law is ‘a universal doctrine applying to all legal systems’ (Raz 2019: 15), we may ignore the former and consider the universality of the rule of law if we want to confirm whether certain theories are properly labelled as the rule of law, for example whether the demand of obeying the law is equal to the rule of law.¹⁰ ‘Flexibility and adaptability’ in applying the rule of law and the ‘respect for local traditions’, as embraced by Raz,¹¹ are somewhat elusive. Imagine a government controlled by a single political party which rules ‘in accordance with the law’, and its body of law consists of a piece of legislation criminalizing ‘inciting subversion of state power’ vaguely defined. There are also arrest, detention and

⁸ My unease with ‘local traditions’ stems from Raz’s invocation of international documents (2019:10). Although he did not use them on the point of ‘adaptability of the rule of law to local traditions’ (2019:13), we should not overlook that there is the ‘Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels’ adopted by the General Assembly of the United Nations in 2012, which allows ‘a broad diversity of national experiences in the area of the rule of law’ (paragraph 10; see also Burnay 2018: 225). Matthieu Burnay commented that:

The rule of law is, in other words, recognised as a home-grown concept whose definition and content vary by state depending on the legal culture, constitutional tradition as well as economic, social and political system at hand. This innovative approach negates the universal character of the rule of law and recognises the existence of a multiplicity of rule of law experiences across legal cultures and traditions (2018: 225).

I do not have to speculate that the Declaration was carefully drafted in a way not to anger some non-Razian states. Raz certainly does not dominate the conversation of the rule of law. The fear is that universality—which Raz rightly attached to the rule of law—would be true only to the extent that ‘rule of law’ remains as a label.

⁹ Raz anticipated that ‘securing the rule of law is a condition for respect for human rights, for principles of justice and more’ (2019: 15), so the version of the rule of law that is unwanted is at least something open to ‘the denial of human rights’, ‘extensive poverty’, ‘racial segregation’, ‘sexual inequalities and religious persecution’ (cf. Raz 2009: 211).

¹⁰ Raz (2009: chapter 12) explained in detail to us that there is no obligation to obey the law while the president of the Law Society of Hong Kong, who has often sided with the Hong Kong and Chinese governments, preached without reasons that ‘[I]est it be forgotten that obedience of the law, safeguard of the law are not only our duties, but our core values’ (see Ng 2020).

¹¹ The example of local traditions Raz had in mind was trial by jury (2019: 13), but traditions may be big or small. Local traditions may be taken by autocrats in Asia to mean ‘Asian values’ employed by autocrats to justify developing the economy at the expense of political virtues, such as the rule of law, human rights, democracy and justice (Sen 1997). The ‘adaptability of the rule of law to local traditions’ would not, as Raz claimed, ‘help[] refute criticism that it is a manifestation of one culture imposing its norms on others,’ (2019:1 3) but invite the ‘clash of civilizations,’ to borrow the term of Samuel Huntington (1996).

punishment, if not torture, for any act of the people the government dislikes in the name of 'going to prostitutes'. This government may be a regime of the rule of law. Since there are 'threats' to national unity and security, the legislation to combat subversion is protecting the people as a nation and 'in the interests of the governed' (Raz 2019: 7). The only ruling party of the government advertises itself, internally and internationally, as the 'custodian' of the governed (see Raz 2019: 7). Arrest, detention and punishment of the dissidents always come with the reason of 'visiting prostitutes', and the 'evidence' for this behaviour is abundant. The measures and tactics to eradicate anybody the government sees as 'anti-party' and 'counter-revolutionary' flow from the tradition of this country. We have to consider whether we should adapt the rule of law to conclude that this imaginative regime satisfies the requirements of the rule of law. It is doubtful how flexible we should be, and above all, how valuable and respectable traditions are when they refer to oppression, persecution and subjugation. The role traditions should play in formulating theories and principles of the rule of law is questionable. Raz would not wish to strip the rule of law of its moral quality as he insisted that 'it is a moral doctrine' (Raz 2019: 5, 9, 12, 13, 14, 15). To admit that the rule of law is incompatible with some traditions implies that the rule of law may be an irrelevant consideration to these traditions from their perspectives, and this admission may be intentionally perceived as an excuse for some legal systems to evade the universality of the Razian doctrine of rule of law. The result is usually not that these legal systems are regarded as immoral due to the lack of the rule of law, but that they are simply immune from appraisal since our attitude becomes: this culture does not conform to the rule of law, but it does not matter as it is a deep rooted problem of that tradition which is fundamentally different from ours.

It is clear that our task is to set out a genuinely universal theory of the rule of law which is invariably a moral virtue that the law should have. The Hong Kong and Chinese governments are not amongst the first to assert that the rule of law means obeying the law. According to Raz (2009: 212), "[t]he rule of law" means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it.' Ivor Jennings, whom Raz referred to, went further. Jennings (1943: 42) declared that 'the people became law-abiding; the rule of law was established. The rule of law in this sense implies, therefore, simply the existence of public order.' While Raz did not dwell on the rule of law in this sense as he focused on the rule of law 'in political and legal theory' (Raz 2009: 212), Jennings recounted the history of the

rule of law and the liberal tradition and moved on from the rule of law in terms of 'public order' and being 'law-abiding' (Jennings 1943: 44–45). The parlance of political and legal theorists or the literature of political and legal theory and the shift of popular attitude through the course of history obviously do not compel rejection of the rule of law as the obedience of law. The Hong Kong and Chinese governments will happily rely on the aforesaid statements of Raz and Jennings to push us into equating the rule of law with obeying the law, although it can be recalled that Raz (2019: 7) eventually attached his account of the rule of law to some arguably sound and plausible premises on 'what it is to act as a government'.

It is unfortunate that Raz did not really enquire about what the 'rule of' law literally means. Theorists should ensure both the form and substance of their theories, and the connection between the two make sense. Bringing the concept of the rule of law within its linguistic boundaries may allow us to have a picture of the rule of law without the stains of 'public order' and 'abiding by the law'.¹² The term itself does not permit the inclusion of whatever ideals in the rule of law. It may be perfectly legitimate to ask for order and obedience, but one is not free to do so by naming the two 'virtues' the rule of law. The 'rule of' element of the rule of law determines its fate as a doctrine imposed on the ruler, the government and the administration. Regardless of how people theorize it and thought of it in the past, the rule of law stands as a quality about the 'rule' but not 'being ruled', 'being governed' or 'being administered'. Were the meaning that the rule of law connoted the condition of being ruled, governed, administered or even controlled, the expression of it would be phrases such as the doctrine of being subject to the law, the virtue of being ruled, governed, administered or controlled by law and the ideal of being subject to the rule, governance, administration and control of law.

The first impression of 'the rule of law' is that it is put in active rather than passive terms. The obligations surrounding the rule of law fall unequivocally on the ruler or the government instead of the ruled or the governed. Even if the rule of law can be transformed into a doctrine of being subject to the law, we do not know who or what is called upon to follow the law. There is nothing preventing anybody, especially

¹² We are concerned here with the situation where, first, we use the term 'rule of law', and then, we sense that the way in which the concept is expressed prevents it from burdening the governed with a duty to obey laws. The worry that a society may not have the expression of the rule of law but is up to the standard of the rule of law is irrelevant. The focus on language does not mean the rule of law exists only in societies where the term exists. Rather, it is inviting people to reflect upon whether it is accurate and sensible to associate the term with the desire of some governments for an obedient herd.

governments, from pleading for or requiring public order and compliance with the law (on the part of the ruled or the governed), but the one making the call or issuing the command shall not invoke the rule of law for this purpose. Otherwise, the name so used does not match the meaning so intended. The same can be put forward for the ‘rule of’ dimension in the ‘rule of law’ translated into Chinese. 法治 *Fazhi*—the most common translation of the rule of law in Chinese—is constituted by 治 *zhi* which as a noun means ‘rule’ or ‘governance’. Some may argue that *zhi* can also denote 治安 *zhian*—public order. If this were true, *fazhi* would be the abbreviation of 法律 治安 *falü zhian*—law and order. Then, this *fazhi* points not to the rule of law but law and order, and ‘law and order’ shall be used all along.

Emphasizing only adherence to law on the part of the people without subjecting those who rule and govern to the same duty resembles ‘rule by law’, and legal theorists are conscious of the marked difference between rule by law and the rule of law (see e.g. Postema 2014: 22–23). It is hardly enough to point out the rule-by-law character of an authoritarian government for instance. The propaganda that such a rule-by-law mode of governance is the authentic rule of law persists. We must have a device that excludes in our discourse the ‘rule by law as rule of law’ (mis)understanding. Confining any construction of a theory of rule of law to thinking from the perspective of the ruler or government through stressing ‘rule of’ in the term may help clarify the matter. The general saying that rule of law means no one, including the government and the ordinary public, is above the law sounds unobjectionable, but I do not know whether this is to forge a sense of fairness between the government and the governed so that the former would readily subscribe to the rule of law. Roughly speaking, there is always an imbalance between the government and the governed, the former of which usually monopolizes political power. It is doubtful if we should judge the latter with equal harshness or apply the concept of rule of law to the latter at all.¹³ More importantly, to include public order in the doctrine of rule of law may be a reaction to the fear for lawlessness, but one should not forget the power and duty to maintain public order are in the hands of the government, and complete failure to keep peace in the society may be a form of misuse of power which is dealt with by the rule of law in supervising the exercise of power. To require the governed to adhere to the law appears redundant. Furthermore, to understand the rule of law as public order and obedience

¹³ I note in passing that Gerald Postema (2014) argued for fidelity to law from everyone in a society as a *condition* of the realization of the rule of law. Arguably, fidelity on this account is then not an intrinsic part of the contents of rule of law.

to the law may cripple the rule of law to the extent that there no longer exists any legal system which is up to the standard of the rule of law in the world. This is because, in each and every jurisdiction, there are outlaws and criminals disobeying the law and hence eroding the so-called 'rule of law'. To the disappointment of the president of the Law Society of Hong Kong, who spoke at the ceremonial opening of the new legal year in Hong Kong,¹⁴ the 'rule of law' by her definition is too unrealistic to be taken seriously.

Giving a speech on the same occasion, the Secretary for Justice of the Hong Kong special administrative government portrayed the 'state of turmoil' in Hong Kong in 2019 as 'rule of mob' (see Ng 2020). 'Rule of mob' and the 'rule of law' are then seemingly antonymous. However, we may consider, as a peripheral issue, how the rule of mob can happen. As long as the Hong Kong government is exercising a tight grip on Hong Kong, there is no rule of mob. The one who rules and governs is the Hong Kong government (under the omnipotent Chinese government and with the uncontrolled or uncontrollable police) but not the protesters or 'rioters'. It never has been. To adopt the rhetoric of 'rule of mob' and with accusing the protesters of destroying the rule of law risks giving the subversive idea that the Hong Kong government has been overthrown, one-party dictatorship ended and the police condemned.

[C] THE 'LAW' DIMENSION

While 'rule of mob' is not the opposite of the rule of law, the rule of men may be truly antithetical to the latter. 'The rule of law asks what it means to be governed by law, rather than by men', wrote Barber (2004: 474) at the beginning of his article on the social dimension of the legalistic conceptions of the rule of law. 'Rule of law, not man' is one of the three key themes Tamanaha (2004: 122) gleaned from the pool of theories of the rule of law. Raz (2009: 212) also noted '[t]he ideal of the rule of law in [the narrower sense in political and legal theory] is often expressed by the phrase "government by law and not by men"'. Barber (2004) and Raz (2009: chapter 11) did not pursue the enquiry about the notion of rule of men, thinking perhaps such an enquiry would not be helpful. Tamanaha (2004: 122) on the other hand mentioned, amongst other things, 'law is non-discretionary, man is arbitrary will'. In the recent months of protests, it is well-known that the Hong Kong Police have committed many wrongdoings ranging from unnecessary stop and search, and unlawful

¹⁴ 'Every wilful disobedience of the law is an erosion on our rule of law', said the president (see Ng 2020).

detention and arrest to violence, torture and excessive use of weapons and live ammunition (see Amnesty International Hong Kong 2019). The Police have categorically denied that they committed any misconduct and alleged that every action they took in handling the protests was lawful, proclaiming themselves the symbols of justice (see Cheng 2020). The police are given a wide range of powers and discretion which are barely and rarely constrained, for instance the power to arrest and detain suspects and the discretion to employ weapons, including pepper spray, tear gas, batons and firearms. It is probably generally acknowledged that the existence of too much police power itself threatens the rule of law let alone the abuse of it. By virtue of the Razian account of the rule of law, unreasonably great police power and serious police misconduct may amount to arbitrary government which should be avoided. Nevertheless, the Hong Kong Police would argue that what they did was no more than necessary and was authorized by the law. Thus, we are bound to be confronted with the age-old problem of how to hold the opponents to a certain account of the rule of law.

Raz (2019) invited us to reason with him. He highlighted only ‘familiarity’ and ‘predictability’ as crucial to the process of people ‘acculturating’ and ‘learning to make their own life’, so ‘[t]he rule of law consists of principles that constrain the way government actions change and apply the law—to make sure, among other things, that they maintain stability and predictability, and thus enable individuals to find their way and to live well’ (2019: 2). That people ‘acculturate ... creatively using the opportunities and observing the limits set by their cultural norms’ (Raz 2019: 2) may be circular. Since cultural norms are determined by the people who are the authors of the limits of the society, it is difficult to see why they must observe the norms and limits without regard to the reasonableness and justification of those norms and limits. If people create a culture of respecting human rights, then perhaps the preservation of humanity and personhood as reflected in principles of human rights will be integral to people ‘learning to make their own life’. It is inconceivable that only the stability and predictability of norms and government actions are ‘essential for the well-being of individuals’ (see

Raz 2019: 2).¹⁵ This looks similar to the theory of F A Hayek (1982) that laws are generated by the spontaneous social order and should not be disturbed by legislation. Beside stability and predictability, liberty, as Hayek observed, is also essential for the well-being of individuals since laws originally came from how people conduct their own affairs, and government actions and legislation may offend the social order, causing injustice and affecting the stability and predictability of the norms under the social order. In any event, Raz seemed to have disagreed with Hayek regarding liberty or whether the rule of law protects liberty (see Raz 2009: chapter 11), but he chose ‘what are essential for the well-being of individuals’ as the starting point of thinking about the rule of law in his 2019 article, so it is unlikely that he can evade any challenge flowing from his omission of protection of human rights and civil liberties in his revised account of the rule of law. Raz did not stop at reasoning from the essentials for the well-being of individuals and said repeatedly that the rule of law shall be premised on ‘the interests of the governed’ (2019: 7). The governed are human beings. James Griffin (2010: 346) stated that ‘human rights are protections of our human status ... normative agency’ or ‘personhood’. There is therefore no room for ‘ordinary politics’ and ‘honest mistake’ in determining what the interests of the governed are in the aspect of human rights (see Raz 2019: 14). The question of ‘what are necessary to ensure people can pursue their good life and hence demonstrate their normative agency’ must be answered (see Griffin 2008: 45–48). The interests of the governed must involve the respect and protection of human rights. Raz (2010) himself might have had a sceptical view on human rights under which he thought there were no human rights but human rights practices, but he seemed to welcome human

¹⁵ It may be argued that Raz thought of the rule of law or law in response to disorientation and chaos resulting from lawlessness, which is similar to the ‘state of nature’ of ‘perpetual war’ put forward by Thomas Hobbes. However, the Hobbesian version of the state of nature is no more ‘truer’ than other versions, such as John Locke’s. Postema citing both Hobbes and Locke said:

Law, on this ancient idea, is a bulwark against domination by others. In this vein, some, such as Hobbes, thought of law narrowly as a ‘hedge’ against power wielded by one’s fellows, whereas others, such as Locke, construed it more broadly as a framework of common rules giving equal status in the community to each member. (2014: 21 footnotes omitted)

We have no reason to stick to the Hobbesian state of nature. Further, as the scholarship of liberalism has developed for decades, it is hard to see why the Hobbesian state of nature should be chosen or prevail over the more liberal ‘original position’ imagined by John Rawls (1999). Humanity, human dignity, human rights and so on are not some ordinary valuable pursuits, such as classical music, but the fundamentals of being human. If they were pursuits just like classical music, then stability and predictability in government actions would be no more different. Raz should have justified his choice of the state of nature and explained why a reflection on humanity was unnecessary.

rights when he recognized that ‘securing the rule of law is a condition for respect for human rights’ (2019: 15).¹⁶

Raz’s arguments from the essentials for the well-being of individuals and the interests of the governed may not be without flaws.¹⁷ Efforts have been made, but the outcome is not so satisfactory. Dealing with the dimension of ‘law’ in the rule of law may be more convenient and effective. Indeed, in his earlier account of the rule of law, Raz considered the meaning of ‘law’: ‘Government by law and not by men is not a tautology if “law” means general, open, and relatively stable law.’ (2009: 213) He said that this is the lay sense of law. In order for law to guide, and fulfil the requirements of the rule of law, particular laws have to conform to the lay sense of law. However, it is extremely doubtful whether a law ordering the killing of a group of people, however general, open and stable, can guide human behaviour nowadays. Personal conscience and social psychology vary, but a law intended to be a guiding norm cannot be possible without justifying its substance to a certain extent.¹⁸ There is also no reason to insist that the rule of law requires the law to guide but not to educate and moralize. Raz did not endorse the legal positivist meaning of law as ‘law’ in the rule of law. He (2009: 213) said ‘[f]or the lawyer anything is the law if it meets the conditions of validity laid down in the system’s rules of recognition or in other rules of the system’, citing H L A Hart’s *The Concept of Law*, and the rule of law means subjecting such ‘legal orders’ to the law in the lay sense. This proves that Raz was not unwilling to adopt an understanding of law different from the legal positivist conception.¹⁹ The

¹⁶ This is a charitable reading of Raz’s view, I guess. He did not stress the centrality of the rule of law as a condition for securing human rights when he said ‘while the rule of law does not secure conformity to the other principles the law should conform to, it is *close* to being a condition for the law’s ability to conform to them’ (2019: 15 emphasis added). Raz was aware of the fact that his article was not chiefly about the relationship between the rule of law and human rights, so he did not speak with certainty that the rule of law *is* a condition for human rights but merely *close* to such a condition. This can be contrasted with Postema’s (2014) treatment of fidelity to law as central to the discussion on the rule of law.

¹⁷ Compare what Raz said in *The Morality of Freedom*: ‘All but the biologically determined aspects of a person’s well-being consist of the successful pursuit of goals which he has or should have’ (1986: 308). Goals that a person has or should have are definitely not confined to stability and predictability. In order to ‘enable individuals to find their way and to live well’ (2019: 2), by virtue of Raz’s own ‘autonomy-based doctrine of freedom’, ‘the state has the duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy’ (1986: 425).

¹⁸ See the discussion of *telos* and the law by Peter Railton (2019).

¹⁹ I thank the anonymous reviewer for pointing out the difference between the lawyer and lay senses of law is one between *lex* and *ius*. See also John Gardner (2012: 228). However, this is not obvious from the chapter by Raz (2009: 213), and I concentrate here on Raz’s treatment of the rule of law as the law from the lay perspective instead of digging out the Roman history and the Latin roots of lawyer’s law or laypeople’s law.

law in the lay sense is somewhat moral and is an example of good law.²⁰ It seems there was an opportunity to set the law in the lay sense as just law. Laypeople would think that the law should be just and fair. We do not know what was stopping Raz from checking particular laws in the legal positivist sense against the standard of just law as a considerable amount of laypeople would expect.

While building a theory of the rule of law as the rule of just law is commendable,²¹ ascertaining the meaning of the word 'law' in the rule of law may be a more direct way to address our problems in reality for 'thick' theory or theory of substantive justice of the rule of law may not be a theory to which unscrupulous people or governments would subscribe. Ideally, to discover the 'law' dimension in the rule of law, we should endeavour to suggest the linguistic limits of the word 'law'. The task would then become definitional. A definitional theory of law, the aim of which is to define 'law', may fail spectacularly.²² The matter is further complicated when law may be 'interpretive' rather than 'semantic' (Dworkin 1986) or 'criterial' (Dworkin 2013).²³ Without sailing into the deep sea of jurisprudential debates on the nature of law, we may look not at what law is but at what law is not.

It is a common perception that 'law is non-discretionary' (see Tamanaha 2004: 122). Theories of the rule of law (not men) usually contain a non-discretionary aspect or an aspect of discretionary powers being curbed by laws or legal rules, and the theory of the rule of law expounded on by A V Dicey is classical and representative in this regard.²⁴ That law is the opposite of discretion is a view held by many theorists of the rule of law, but there is some unease in this statement. Either by the rules of recognition or by interpreting the integrity of our legal system which includes all the legal and political principles, rules and standards,²⁵ we must admit that a lot of discretionary powers exist in the legal system.

²⁰ Compare the 'inner morality of law' proposed by Lon Fuller (1969). See also Jeremy Waldron's (2008) account of Fuller's work and the rule of law.

²¹ For example, the theory of T R S Allan (2001).

²² Ronald Dworkin (1978: chapters 2, 3) attempted to show that the law is broader than what legal positivists might have envisaged. However, this may not be an effective criticism on H L A Hart's rule of recognition (see Hart 2012; Shapiro 2007).

²³ Dworkin regarded natural law theories and legal positivism as semantic theories (1986: chapter 1), and legal positivism as a theory treating law as a criterial or sociological concept of law (2013: 10–11).

²⁴ 'Dicey made the further point that the exercise of discretionary powers by government officials to impose constraint on individuals is inconsistent with the rule of law. Discretion and law, for Dicey, are antithetical' (see Tamanaha 2004: 63–64).

²⁵ See the Hartian concept of law (2012) and the Dworkinian interpretivism (1986).

These powers are usually granted by law or legislation to be precise, for example the police powers under the Police Force Ordinance (Cap 232) in Hong Kong. Raz (2019: 4) pointed out that while ‘the principles [of this account of the rule of law] appear to rule out changes in the law and reliance on discretion by legal authorities’, ‘[i]t is impossible for [the authorities] not to have discretion’. Thus, we are actually not concerned with the legality of official discretionary powers, although the fact that something is legal does not alter the nature of that thing. That is, we may say, the authorization or empowerment by law does not transform discretion or power into the law itself. In the end, such an utterance does not clarify the matter much. As cautioned by Raz (2019: 4), ‘[d]iscretion in the application and interpretation of laws is inevitable ... and even in the absence of discretion in interpreting, applying or modifying it, [the law] generates uncertainties and risk’.

While law and discretion may be two comparable concepts, we can appreciate that discretion is more about the application or non-application of the law. Non-application, it can be noticed, is the point at which the present discussion differs from Raz’s ideas. Discretion allows the official decision to apply or not apply what is prescribed or proscribed in the legal rules, principles and standards. Sometimes, the exercise of discretion is not a manifestation of the application of the law. Notwithstanding that the law may generate uncertainties and risks, there is a difference between, for instance, applying a rule which mandates the police to stop, search or detain any person ‘whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence’ and exercising discretion to or not to stop, search or detain depending on the circumstances.²⁶ The former situation may be that the statute states the police must stop, search or detain a person ‘whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence’ and must not do so if he does not have the requisite reasonable suspicion, whereas the latter can be that ‘it shall be lawful for the police officer’ to stop, search or detain when he has the said suspicion.²⁷ In spite of whether the police factually do as the law says and whether ‘reasonable suspicion’ is reasonably unambiguous, in the former case, the application or operation of the law is straightforward, but in the latter case, we can tell, the ‘application’ of the law is subtle and indirect. There is a substantive decision or judgement made between the law and its realization, which is not merely a determination of the meaning of the

²⁶ See section 54(2) of the Police Force Ordinance (Cap 232) (HK) which is titled ‘Power to stop, detain and search’.

²⁷ Taking the words from section 54(2) of the Police Force Ordinance (Cap 232) (HK).

words. It will be equally lawful for the police not to stop, search or detain a person 'whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence', and the police can decide to omit to exercise the discretion to stop, search or detain.²⁸ The chain of causation may be broken by that decision or judgment, and the law does not in this sense order or lead to the results of exercising the discretion. Arguably, the rule of 'law' at best covers the direct application of laws but does not tolerate the exercise of discretion which is influenced heavily by human factors. By the lay sense of law, we do not consider discretion law even if it passes the tests of being law in the lawyers' sense. The application of discretion in the name of (lawyers') law is not a manifestation of respecting the element of law (in the lay sense) in the doctrine of rule of law. When the Hong Kong Police exercise discretionary powers, they cannot purport that they follow the law, especially the Police Force Ordinance which may not give much guidance on how to conduct policing precisely. They are on their own to follow their own minds. A person exercising discretionary powers may follow his or her impulses, desires and so on in the absence of concrete substances. In this situation, one does not follow the law, and the respect for the rule of law seems improbable. The 'law' of discretion fails its mission to inject stability and predictability in the Razian society which needs a background that can provide directions for individuals (Raz 2019: 2), let alone a bigger project to guarantee the 'well-being of individuals', generously understood.

Kenneth Davis (1969: 3) famously noted that '[w]here law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness'. It is believed that discretionary powers can be properly allocated and utilized. Denis Galligan (1986) viewed discretion in a positive light as well and approached discretion by developing legal principles to regulate the exercise of it. The discomfort, when these theories of discretion are conveyed to the people of Hong Kong, may be that the theories are too grand and general to be plausible given the intensity and extent of police misconduct in Hong Kong. It strikes people that Galligan 'rationalized' and 'justified' the use of discretion due to its inevitability (see 1986: chapters 1, 2). It is acknowledged that discretion will pave the way for justice or tyranny, but it is unknown whether the chance of having discretionary tyranny is comparatively small and whether the benefits discretion may bring are great enough to

²⁸ If the burden on the police to stop, search or detain any suspicious person is too heavy, we may agree that the police must stop, search or detain *as far as reasonably practicable* any such suspicious person. Whether the reasonable practicability requirement is sufficiently clear is another question.

counterbalance the risk and harm of tyranny flowing from discretionary governance. Specific to Hong Kong or everywhere faced with the abuse of power by the police, the ‘law’ dimension of the rule of law invariably requires the curtailment of discretionary powers of the police. Police powers are different from general administrative and judicial discretion not only because the former often result in personal injury and even death, but also because the qualification, experience and skills of the ones who exercise the latter are normally guaranteed.²⁹

[D] CONCLUSION

In the term ‘the rule of law’, the ‘rule of’ dimension informs us that the virtue is about the government which is the one capable of undermining the rule of law unless it is ascertained that the government has collapsed and does not rule anymore, and the dimension of ‘law’ strongly discourages the use of discretion and hence directs that clear rules are maximized while discretion is kept to a minimum. Given the experience of Hong Kong, amongst the approaches that discretion is largely granted with limits and that discretion is only handed to the officials when necessary, one should prefer the latter. The benefits of clarifying the linguistic boundaries of the two dimensions of the rule of law include not merely that some dubious theories can be excluded, but also that the phrase itself binds the ones who invoke it: people, and particularly governments, are not free to exploit the term for whatever purposes, and the words in the term themselves require some basic obligations on the part of those who rule and govern. If a government does not want to fulfil those obligations—to keep its promise of the rule of law—then it should not utter those words at all. It is hoped that we know more by now about what we should talk about when we talk about the rule of law and what to talk about when we start talking about the rule of law.

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²⁹ It is doubtful if it can ever be accepted that some human beings are qualified, experienced or skilled to injure or kill their fellow human beings.

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