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Understanding the Rule of Law in Joseph Raz's Positivist Doctrine / Понимание верховенства права в позитивистском учении Дж. Раза

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Аннотация: Предметом исследования выступает интерпретация доктрины верховенства права в учении ведущего представителя эксклюзивного юридического позитивизма Джозефа Раза (1939 - 2022). Значимость изучения доктрины верховенства права в данном ракурсе обусловлена тем, что такое исследование способно выявить принципиальные идеи позитивистского понимания права и правопорядка с позиций пост-хартианского этапа его эволюции. В статье раскрываются два основных подхода к пониманию верховенства права в современной британской юридической литературе - материальные и формальные концепции. Взгляды Раза на верховенство права сопоставляются с классическими идеями А.В. Дайси, принципами "внутренней моральности" права Л.Л. Фуллера и позицией Ф.А. фон Хайека. Научная новизна статьи состоит в том, что впервые в российской юридической литературе предпринята попытка раскрыть различия между формальными и материальными концепциями верховенства

права в британской юриспруденции. Идеи Дж. Раза о природе и целях верховенства права не носят общепринятого характера в английском государствоведении, но достаточно показательны в отношении позиции пост-хартианского юспозитивизма на проблему построения стабильного и предсказуемого правопорядка. С одной стороны, принципы верховенства права, раскрываемые в учении Раза, относятся исключительно к юридической форме, что в целом характерно для неопозитивизма XX века. С другой стороны, в учении Раза можно выделить и социологические установки, что позволяет утверждать, что пост-хартианский юспозитивизм сочетает в себе ряд идей "классического" и социологического позитивизма.

Ключевые слова:

дискреционная власть, Л Фуллер, Дж Раз, пост-хартианский позитивизм, правопорядок, принципы права, верховенство права, юридический позитивизм, аналитическая юриспруденция, Ф А Хайек

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The doctrine of the rule of law is a fundamental component of the unwritten Constitution of Great Britain and is one of the foundations of British constitutionalism. The doctrine of the rule of law expresses the specifics of the historical development of English case law and forms the basis of the prevailing legal ideology of common law states. In this regard, it is significant that the terminological formalization of the *Rule of Law doctrine* does not have an adequate translation into other European languages [1, p. 4; 2, p. 7]. This feature demonstrates that the professional language of lawyers reflects the peculiarities of legal awareness and value-oriented structures that develop in the minds of lawyers and the entire intellectual elite of a certain society.

Modern British legal literature has developed two main approaches to understanding the doctrine of the rule of law: formal and substantive. Some legal scholars argue that the rule of law is exclusively a formal or procedural ideal, neutral in relation to goals; the law only has to satisfy formal restrictions of the general nature of the rules, advance notice, clarity, etc., to be applied procedurally in an honest and respectable manner [3, p. 61]. Representatives of the substantive (material) approach reject formalism and closely link the rule of law with the protection of human rights. For example, the authoritative English lawyer Tom Bingham, who held high positions in the judicial system for 16 years, stated in his book *The Rule of Law* (2011) that "a state that barbarously suppresses or persecutes some groups of its population cannot be considered as observing the rule of law, even if the transportation of the persecuted minority to concentration camps ... is the subject of detailed laws adopted in accordance with due process and scrupulously observed" [4, p. 67].

According to supporters of the substantive concepts of *The Rule of Law*, the rule and universality of legality, compliance with the procedural form of the law-making process, and the implementation of the law are far from sufficient as guarantees of the rule of law as they are not able to exclude or even minimize the possibility of the formation of a totalitarian state-political regime that tramples on fundamental human rights. By themselves, compliance with legally established procedures and the implementation of actions in accordance with the requirements of legislation cannot make the illegal content

of the current law legal; to achieve the rule of law, it is necessary to comply with a number of substantive principles, first of which is the principle of the legal nature of the current laws.

A meaningful approach to understanding the rule of law often referred to as the term "legality," draws its origins from the ideas of one of the representatives of the "revived" natural law in post-war Europe, Gustav Radbruch, who, in his work *Lawful Wrong and Lawless Law* (1946) linked the legal quality of the law with *justice as equality* (equal treatment of equals), arguing that with the blatant incompatibility of the law with justice, the law as an "unfair right" is by its nature illegal "because the law, including positive law, cannot be defined otherwise than the order and totality of laws (*Satzung*), designed essentially to serve justice" [5, p. 234].

The formal approach to understanding the rule of law is associated with the name of the American lawyer Lon L. Fuller, who, in his "procedural" concept of "natural" law, justified a number of formal requirements for the legal system that ensure its legal nature and the achievement of goals. The central idea of the doctrine of the "internal morality" of Fuller's law was that law is impossible without observing a number of principles of binding morality, which the American jurist interpreted as natural laws of "subordination of human behavior to the guidance of rules" [6, p. 118]. The necessary conditions for the existence of a legal system are: firstly, the existence of *general* rules of conduct. Secondly, the mandatory *publication* of these rules. Thirdly, their *direct (prospective) effect*. Fourth, their *clarity* for addressees. Fifth, their mutual consistency, *consistency*. Sixth, fundamental—the *possibility of their execution*. Seventh, the *constancy of* the rules. Eighth, the *compliance of law enforcement practice with the established rules* [6, p. 65–82]. Following Fuller, the British constitutionalists recognize the prohibition of the adoption of secret acts, the reverse (retrospective) action of norms, and the imposition of criminal liability for behavior not defined in criminal legislation but perceived as undesirable by officials as intrinsic principles of law [7; 8, p. 85].

A leading representative of Anglo-American legal positivism, one of the most famous students of G. Hart, Professor of Oxford University Joseph Raz (1939–2022) built his understanding of the doctrine of the rule of law on the position of Friedrich Hayek, who understood this concept as the principle of limiting the activities of the government by pre-established public rules that allow foreseeing with great accuracy "what coercive measures will be used by the authorities in a given situation" [9, p. 90].

It is fundamentally important to note that even such a "formal" understanding of the doctrine of the rule of law is based on the idea that the power of the state is not absolute or unlimited, which was characteristic of the early concepts of legal positivism both in England and on the European continent. It is impossible not to agree with the British jurist Roger Cotterrell that "Austin's theory is not a theory of the rule of law: a government subject to the law. This is the theory of the "rule of people": the government using the law as an instrument of power" [10, p. 70]. It is possible to reveal the content of the concept of the rule of law even within the framework of a formal approach only if it is recognized that "legal systems not only consist of rules but are also based on them" [11, p. 211]. The key idea of the doctrine of the rule of law is reduced to the need and possibility to subordinate the activities of the mechanism of the state to legal rules, and this idea was only recognized by neo-positivist concepts formed in the Anglo-American philosophy of law at the end of the nineteenth to twentieth centuries, thanks to the ideas of the legal teachings

of J.W. Salmon and G. Hart [12, p. 110; 13, c. 98–99].

Starting to reveal his understanding of the doctrine of the rule of law, Raz claims that it has become used in a meaning that has nothing to do with its original content. Thus, the jurist rejects the understanding of the rule of law as a principle of proper law, in which it is reduced to the requirement of such functioning of legislative bodies, in which not only the civil and political rights of citizens are recognized, but also the creation of social, economic, educational and cultural conditions necessary for the full development of the individual is ensured [14, p. 353]. This approach, the rule of law, according to Raz, does not perform any useful function. The rule of law is only one of the virtues based on which it is possible to evaluate the legal system. At the same time, he admits that the implementation of the rule of law does not exclude autocratic power, widespread poverty, gender inequality, and religious persecution [14, p. 354].

Raz argues that in a narrow sense, the doctrine of the rule of law is understood as the principle of the rule of law, not people, the duty of state bodies to be guided in their activities by positive law and obey it. At the same time, such an understanding of the rule of law is tautological, as the actions of the government, not authorized by law, are illegal, have no legal force, and, in principle, cannot be the actions of the government as a government [14, pp. 355–356]. It seems that in this matter, one follows the position of the pure doctrine of law by G. Kelsen, who proceeded from the identity of the state and law; state power does not represent any independent instance but is the reality of the legal order [15, p. 34; 16, p. 67]: "Law ... is the very order of coercion, as the state appears to jurisprudence" [17, p. 153]. Accordingly, if we proceed from the legal constitution of the state and its organs, then the doctrine of the rule of law should be broader than the "tautological" principle of the legality of the activities of state organs.

It reduces the concept of the "rule of law" exclusively to values traditionally associated with the legal system and expressing a legal form. The jurist contrasts the everyday and professional legal understanding of the term "law." In the understanding of the law, Raz follows the central figure of legal neo-positivism, Hart, and recognizes as law any rules that correspond to the conditions of validity laid down in the rules of recognition of the legal system or its other norms [14, p. 356]. According to Raz, law consists of general and relatively stable laws in the ordinary legal consciousness. However, if the law is understood in this way, then the rule of law will "establish too strict a requirement that no legal system can fulfill and which has very little merit" [14, p. 357]. For the legal system to properly perform its functions, it requires not only general (normative) but also individual legal prescriptions. The latter, in particular, are used in their activities by both the executive branch and the courts. At the same time, the adoption of individual legal acts should be governed by open, clear, and general rules.

According to Raz, in its original meaning, the doctrine of the rule of law includes two aspects. Firstly, in their activities, people should be guided by the law and obey it. Secondly, the law should be such that people are able to be guided by it. In other words, it should be able to guide human behavior [14, pp. 359–362]. Once he emphasizes that such an understanding of the doctrine of the rule of law is exclusively formal, he says nothing about a democratic or autocratic way of creating law, the recognition or non-recognition of fundamental human rights, social equality, or justice [14, p. 358].

At the same time, he denies that the formal approach to understanding the rule of law is

devoid of any content. The jurist believes that from the basic requirement of the ability of law to guide people's behavior, it is possible to deduce a number of requirements (principles) with which the concept of the rule of law was initially associated until it was unreasonably identified with all the political ideals of a democratic rule of law state [14, p. 358].

The first principle, following from the ability of law to direct people's behavior, is the requirement of direct action, openness, and clarity of laws. People are unable to be guided by retroactive, unpublished, and unclear laws, as these defects act as objective barriers to proper knowledge of the operation of the law and therefore lead to the inability to be guided by them in their activities [14, p. 359].

The second principle, which is derived from the need for the law to act as a regulator of the behavior of addressees, is the requirement of the relative stability of the law. Excessively frequent changes in the law lead to the fact that it becomes extremely difficult for the addressees to determine the content of the law at any particular moment, to the constant fear that since the last time they were interested in the law, changes have been made to it. According to Raz, the law's relative stability is required not only for making short-term decisions but also for long-term planning [14, pp. 359–360]. The jurist emphasizes the fact that the compliance of the law with the requirement for clarity and stability is always a matter of degree, which does not mean that it is possible to quantify compliance with such principles. Raz believes that the principles of the rule of law directly affect not only the content and form of laws but also the nature of public administration. In his opinion, the requirement of the stability of the law cannot be made the subject of exhaustive legal regulation; it can be implemented only with a wise state policy [14, p. 360].

The third principle, following from the basic requirement of the rule of law, is the provision that the creation of individual legal acts should be based on open, clear, and general rules. Firstly, such general rules transfer the necessary powers for the adoption of individual legal acts and, secondly, impose duties on executive bodies, establishing how the transferred powers should be exercised. Similarly, general regulatory legal acts of administrative law-making, which, according to Raz, are capable of introducing unpredictability into the process of legal regulation for the purpose of stability, should obey detailed basic rules enshrined in framework laws [14, p. 362].

The fourth principle that makes up the content of the doctrine of the rule of law in Raz's teaching is the provision of the need to guarantee the independence of the judiciary. He rightly believes that the correct application of the rules of law by judges is a necessary condition for the parties to the trial to be guided by the rules of law. The rules guaranteeing the independence of judges, concerning the method of their appointment, guarantees of retention of office, the method of setting salaries for judges, and other significant working conditions—all these rules are designed to ensure the freedom of judges from external pressure and their independence from any authorities other than the authority of the current law itself [14, p. 363].

The fifth principle of the doctrine of the rule of law in Raz's teaching, in fact, adjoins the fourth and is also designed to ensure the correct application of the law and its ability to guide the behavior of the parties to trial. To do this, he believes, it is necessary to observe the principles of natural justice, which exclude the bias of judges and guarantee an open, honest, and generally fair nature of the court hearing [14, p. 364]. At the same time, the

English jurist does not enter into the discussion of the natural-legal nature of such principles, does not analyze their content, indicates only some of them, and considers them only as appropriate means to achieve the impartiality of judges, the judicial process and the jurisdictional decision. In such an instrumentalist position of the times, one should see a change in the attitude of legal positivism to ideas and principles that are recognized as natural: if J. Bentham or J. Austin, obviously, would not recognize their legal nature (since the establishment of the sovereign generates the law, and not by "self-evident" justice), then he puts them forward as necessary requirements of the rule of law.

Raz's sixth principle considers the provision according to which the courts should have the authority to supervise laws, regulations, and administrative decisions to ensure compliance with the rule of law [14, p. 364].

In his seventh principle forming the content of the doctrine of the rule of law, Raz considers the requirement of easy accessibility of courts. It follows from the special place of the courts in ensuring the rule of law. Excessive and lengthy judicial delays "can actually turn the most enlightened law into a dead letter and damage the ability to be guided by the law" [14, p. 364].

In the eighth principle of the rule of law, Raz considers the requirement that the law should not be distorted by the arbitrariness of law enforcement agencies—the police and the prosecutor's office [14, p. 364].

According to Raz, the designated eight principles of the rule of law are divided into two groups. The first three principles aim to ensure that the law meets standards that ensure its ability to guide the behavior of addressees. The following five principles already have as their object a legal mechanism for enforcing laws and are aimed at ensuring that, due to its own defects, it does not deprive the law of its ability to guide and "be able to monitor compliance with the rule of law and provide effective remedies in case of deviation from it" [14, p. 365].

Although the above principles can ensure formal compliance with the rule of law, Raz emphasizes that they do not guarantee the absence of violations of human dignity [14, p. 370]. In his opinion, compliance with these principles of the rule of law is a matter of degree due to the need to balance competing values [14, p. 382].

Joseph Raz's position

The difference with respect to legal principles, which necessarily follow from the requirement that the law should be able to direct the behavior of addressees, partially coincides with Lon L. Fuller's teaching on the principles of the internal morality of law. He once recognized Fuller's list of principles as similar to his own and believed that the analysis of many of the principles of the author of the "procedural" concept of natural law "is filled with common sense" [14, p. 382]. However, elsewhere in his essay, Raz evaluates Fuller's theses as numerous and difficult to isolate, and many of them as weak and unprovable [14, p. 372]. At the same time, he only gives brief assessments but does not specifically analyze the principles of the "internal morality" of Fuller's law and their argumentation, which does not allow for reconstructing his position and understanding the grounds for rather contradictory assessments.

Unlike Fuller, Raz, firstly, does not call the principles of the rule of law the internal morality

of law, adhering to the position of G. Hart, who denied the moral character of Fuller's principles [18, p. 1286; 19, p. 56–58], and, secondly, disagrees with Fuller in his views on conflicts between the norms and rights of one system [14, p. 382].

Defining the rule of law as a standard for positive law, Raz, at the same time, admitted that deviations from the ideal of the rule of law take place and can be significant and even ubiquitous [14, p. 373]. In contrast to Fuller's position, who considered the principles of the internal morality of law as mandatory and necessary for the existence of a legal system as he believed that the principles stemming from the essential position of the rule of law could be observed minimally, allowing gross violations of human rights [14, p. 374]. At the same time, Raz's essay does not disclose the concept of the minimum necessary standard for compliance with the rule of law. It does not contain any criteria by which it is possible to determine it. Such a position, in fact, leads to the fact that it becomes impossible to draw a dividing line between, on the one hand, gross violations of human rights, which allows us to assert that the "minimum standard" of the rule of law is not violated, and, on the other hand, such human rights violations that indicate a violation of the rule of law.

Raz's position regarding the possibility of human rights violations with minimal respect for the principles of the rule of law is also recognized by other British jurists. So, Lord J. Stein argued in an article: "History has shown that ... strict observance of the rule of law is not a guarantee against tyranny… In Nazi Germany, pockets of the principle of legality were sometimes preserved in the conditions of the Holocaust. The defendants sentenced to terms of imprisonment before the Second World War served their sentences, and only when their terms expired the Gestapo sent them to death camps" [20].

Unlike the author of the "procedural" theory of natural law, he denies any moral dignity behind the principles of the rule of law, believing that their value has a negative character and is aimed not at achieving benefits but at preventing evil. Raz believes that the doctrine of the rule of law is designed to minimize the dangers of the most positive law, particularly the threat of broad discretionary powers, ambiguity, instability, and retrospective norms of positive law [14, p. 374]. Raz draws a parallel between the dignity of the rule of law and honesty. In his opinion, the benefit of honesty is that a person capable of deceiving deliberately avoids causing harm by deception [14, pp. 374-375]. If, due to the complete lack of universality, clarity, or perspective of the norms, the legal system is, in principle, incapable of generating arbitrariness or encroaching on freedom and dignity, then it is impossible to see any moral dignity in it. Similarly, the virtue of the rule of law consists in the fact that the legal system capable of causing the specified harm (arbitrary power, ambiguity, instability, retrospectivity, etc.) consciously, by self-restraint, following the principles discussed above, refrains from causing such harm. The benefit of the rule of law, in fact, consists solely in minimizing the harm that the current positive law can cause. Therefore, in observing the principles of the rule of law, Raz does not find a "positive" moral virtue and concludes that "Fuller's attempt to establish an indispensable relationship between law and morality fails" [14, p. 375].

Let's briefly examine the concept of "discretionary power." By the discretionary exercise of powers, the Mind understands actions performed either with indifference to whether the goals that are the only ones capable of justifying the use of such powers will be achieved or with confidence that such goals will not be achieved [14, p. 367]. Such an understanding of officials' discretionary powers can hardly be considered generally accepted. In legal literature, it is not customary to define discretion through elements of the subjective side

of the "composition" of an administrative act (relation to the purpose of the powers). The Russian legal doctrine does not equate administrative discretion with the arbitrariness of an official. At the same time, it believes that various forms of despotic government fall under the concept of discretionary power [14, p. 366]. Apparently, Hart's disciple understands discretionary power as arbitrarily exercised power, which cannot be considered the only or dominant position in the legal literature [21, pp. 76–78].

Raz's position on the issue of the ability of the rule of law doctrine to exclude the use of discretionary power is that the implementation of the stated principles following the essential idea of the rule of law is not able to exclude all manifestations of arbitrary power. He admits that some such manifestations are compatible with the principles of the rule of law. At the same time, implementing the principles of the rule of law dramatically reduces the possibility of using discretionary powers for personal purposes when adopting individual legal acts by executive officials [14, p. 366].

In relation to the principles of the rule of law's ability to exclude the manifestations of arbitrary power in the relationship between the state and the citizen, one can see a qualitative difference from the ideas of Albert Venn Dicey. If, for the British statesman, the very first meaning of the rule of law was to exclude the broad and arbitrary coercive power of the government [22, p. 209–210], then he does not believe that the implementation of the principles of the rule of law is capable of excluding any manifestations of broad discretionary power. So, for example, the head of state can support the general rules, guided by a whim or personal interest, and this, according to Raz, will not violate the rule of law [14, p. 366]. If, for Dicey, the rule of law and government arbitrariness were mutually exclusive concepts, then he does not consider them as such. For Dicey, the rule of law in the first sense meant a strict regime of legality, strictly observed by both officials of the executive branch of government and ordinary citizens, provided by the "regular" judicial system. Raz's position is devoid of such optimism. The jurist believes that the forms of discretionary power are broader than the rule of law, which means that the latter cannot effectively exclude government arbitrariness, as Dicey believed. Raz writes that following the principles of the rule of law can only "dramatically reduce" the possibilities of discretionary use of power for personal gain, out of a sense of revenge, or for patronage, which is by no means identical to their complete exclusion.

In his essay, Raz directly writes that he has no intention of analyzing the complex concept of discretionary power, although the "classical" understanding of the rule of law for British constitutional law (A. V. Dicey, E. S. Wade, etc.) is directed precisely against such power. On the one hand, Raz states that "many forms of despotic government are compatible with the rule of law" [14, p. 366], but on the other hand, he asserts that "many of the most common manifestations of discretionary power come into conflict with the rule of law" [14, p. 366]. Moreover, the jurist believes that the rule of law does not directly impact the degree of discretionary power [14, p. 367]. However, it was true for Dicey that "where there are broad powers, there is arbitrariness" [22, p. 210–211], which is incompatible with the rule of law. The mentioned points highlight the uncertainty of Raz's position regarding the possibility of drawing a clear line between the forms of manifestation of discretionary power incompatible with the rule of law and such manifestations as can be consistent with the rule of law. In the end, it all boils down to the fact that each specific manifestation of discretionary power should be evaluated from the position of being compatible with the requirements of the rule of law, but since the latter are set out using several evaluative concepts, the final result

will largely depend on the interpretation of the relevant subject. In our opinion, this significantly reduces the practical importance of the requirements of the rule of law as a tool to counteract the arbitrary power of executive bodies and their officials.

Against the background of Raz's more than restrained attitude to the possibility of the principles of the rule of law to exclude manifestations of the arbitrary power of executive bodies, his position regarding limiting the courts' discretion seems inexplicably optimistic. Although the footnote stipulates that the rule of law itself "does not exclude all possibilities of discretionary judicial lawmaking" [14, p. 367], nevertheless, in the main text of the essay, he states that a judge's law enforcement activity is the only area where the rule of law excludes all forms of arbitrary power, ensuring the subordination of courts exclusively to the law and compliance with fairly strict procedures [14, p. 367]. At the same time, it does not demonstrate how the rules ensuring the independence of the courts and the principles of natural justice can lead to such an impressive result. Moreover, inconsistency is seen in the position of the times: if a set of principles and rules as requirements of the rule of law can eliminate judicial arbitrariness, what prevents establishing similar requirements for the professional activities of officials and executive authorities and thereby achieving a comparable result? As it does not explain how judicial activity differs qualitatively from the activities of executive bodies, why can the former be organized so that judges will obey only the law, and the latter is fundamentally beyond the reach of a similar exclusion of the discretionary power of officials?

According to Raz, the value of the rule of law lies in the ability to provide a policy of self-restraint, making it possible to make the law a stable and reliable basis for people to set long-term goals and lifestyle choices. The rule of law not only protects but also expands individual freedom, as it increases the predictability of the external environment [14, p. 368]. At the same time, he distinguishes such an understanding of individual freedom from the traditional meaning of political freedom, considering that the rule of law does not ensure the existence of spheres of activity free from state interference. Accordingly, the rule of law is compatible with gross human rights violations [14, p. 369]. For example, the legal consolidation of slavery, according to Raz, does not violate the rule of law.

Purposeful violation of the rule of law in itself encroaches on human dignity. Raz distinguishes two forms of such a violation: the generation of uncertainty and deception, leading to unjustified expectations [14, p. 370-371]. The law's ambiguity and broad discretionary powers of officials lead to uncertainty and an inability to foresee future changes. Raz rightly believes that people's trust in the current law, which allows them to rely on it in planning their behavior, is based on the certainty of its norms. If the legal system creates opportunities to exercise discretionary (arbitrary) power, then the ability of individuals to plan their future is thereby limited [14, p. 371]. Violations of the rule of law, such as adopting retroactive laws and obstructing proper law enforcement, generate uncertainty and deceived expectations. The vice of a legal system that violates the rule of law in a second way is that it leads a person into a trap: first, it calls on them to rely on the law, and then the assurances lose their force and the very reliance on the law turns into a source of harm to a person. The legal system that ensures the rule of law "sees people as individuals, at least in the sense that it tries to control their behavior by influencing the circumstances in which they act" [14, p. 371].

Raz believes that in real public life, the observance of law always remains a matter of degree. Full compliance with all the principles of the rule of law is impossible, as a certain

ambiguity is inevitable, and its maximum possible compliance is generally undesirable, as the presence of some controlled discretionary powers is better than their complete absence [14, p. 371].

Revealing his understanding of the meaning of the rule of law, Raz divides the goals that the law serves into direct and indirect. The former is achieved by observing the positive law itself; the latter represents additional consequences of observing the law [14, pp. 375–376]. According to the jurist, the achievement of indirect legal goals does not always follow from the observance of the rule of law, but the implementation of the principles of the rule of law is important for achieving direct legal goals of the law. The higher the degree of implementation of the principles of the rule of law in the legal system, the better the law copes with its general function of directing human behavior [14, p. 376]. He emphasizes that, in this sense, the rule of law is a necessary condition for the law to be able to carry out any good purpose in principle. At the same time, compliance with the principles of the rule of law allows the law to serve inappropriate purposes. However, this does not negate its value for the legal system. He argues that the rule of law is not a moral good but a useful property (like the value of the sharpness of a knife), which does not depend on the moral dignity of the goals achieved through it. The lawyer writes: "Observance of the rule of law is the dignity of law as such, the law as a right, regardless of the goals it serves" [14, p. 377].

It can be seen that Raz considers the law from the position of an instrumental concept, where it is exclusively a means that performs certain functions. From this perspective, the law cannot be such if it cannot direct the addressees' behavior. According to Raz, this special dignity of law as an instrument is neutral in relation to moral values and goals. At the same time, he sees the moral significance of the rule of law because it allows the law to perform useful social functions [14, p. 378].

Regarding the value of the rule of law for society, Raz significantly diverges from Hayek's position, which he criticized. So, he does not believe that compliance with the principles of the rule of law is sufficient to protect citizens' freedom. As can be seen from the context of the lengthy quotations from Hayek's work, he sees in the latter's position inflated expectations from the concept under consideration, consisting in the fact that the rule of law is seen as the supreme guarantor of freedom—it is able to approve the rule of laws, not people, i.e., effectively assert freedom from the arbitrariness of another person. As mentioned earlier, Raz does not believe that any form of arbitrariness is incompatible with the implementation of the requirements of the rule of law. He criticizes Hayek's attempt to consider the rule of law as a socially legitimate form of public administration because he believes that "this is a slippery slope leading to the definition of the rule of law as the rule of proper law" [14, p. 380]. Raz does not agree with the substantive understanding of the rule of law when it is associated with the realization of the values of freedom, democracy, legal legality, and human rights—what Raz calls "proper law."

Hayek believes state intervention in the economy by fixing prices is arbitrary and thus violates the rule of law. In the absence of a free market, when supply and demand are not equal to each other, the effectiveness of price regulation will require the use of a discretionary method that will inevitably discriminate against people on an essentially arbitrary basis [14, p. 381]. In contrast to this position, Raz believes that Hayek only managed to show that some political measures are wrong for economic reasons, but Hayek's claim that such measures violate the rule of law is groundless. Raz believes that if individual legal acts (against which the pathos of Hayek's criticism is directed) are based on

certain principles, then their adoption is not a violation of the rule of law.

The fundamental difference between Raz's position and Hayek's point of view regarding the rule of law is that if, for Hayek, following the substantive understanding of the rule of law leads to the domination of the free market and democracy, the value of which seems to be undoubted, then for Raz the rule of law is only one of the competing social values. According to Raz, Hayek was able to show that there is an inevitable conflict of other goals with the rule of law, but such a demonstration "does not belong to the category of arguments that, in principle, could prove that the pursuit of such goals through the law is unlawful" [14, p. 382]. For Raz, the conflict between the rule of law and other values is inevitable, and the very value of the rule of law is relative, not absolute. There may be situations in which the observance of other values is no less important than following the requirements of the rule of law. Therefore, for Raz, it is always a matter of degree, which depends on the correlation of the rule of law with other values and goals.

Raz completes the disclosure of his approach to the rule of law by repeating that it is a negative value, as it is designed to "minimize the damage to freedom and dignity that law can cause by pursuing its goals, no matter how laudable they may be" [14, p. 382]. Raz emphasizes the instrumental nature of the rule of law: it makes the law an appropriate tool for achieving certain goals, but in itself is not the ultimate goal. If certain goals are completely incompatible with the rule of law, then they should not be achieved by legal means. At the same time, to achieve the rule of law, it is impossible to abandon the realization of basic social goals with the help of the law. Absolutizing the rule of law and sacrificing other significant social goals can make the law barren and empty [14, p. 383].

Thus, in Raz's approach concerning the rule of law, the idea common to legal positivism is that the law is primarily a normative social regulator. Its purpose and value are expressed in the ability to guide people's behavior. For a British lawyer, the requirements of the rule of law are standards, compliance with which determines the *effectiveness of* positive law. Moreover, in our opinion, he understands the law not as a formal and legal instrument but from the perspective of sociological jurisprudence, for which it is fundamentally important not that legal norms have legal force but that they *actually determine the behavior of addressees*. The sociological aspect of the British lawyer's concept can also be seen in the fact that the goals of the rule of law are considered from the standpoint of public and individual interests, first of all, the need to plan legal behavior based on the norms of current law.

The positivist attitude of Joseph Raz's approach is also seen in the fact that the principles (requirements) of the rule of law he highlighted represent a special legal perspective concerning the legal form exclusively. Clarity, certainty, public promulgation, promptness of action, subordination of individual acts to normative ones, judicial independence, impartiality, supervisory powers, accessibility, as well as the legality of law enforcement activities—all these requirements are directly related to the proper organization of various types of legal equipment and by themselves do not predetermine the quality of the content of positive law, are able to serve a variety of its value orientation to legal institutions. These principles, in our opinion, *concretize only the targeted effectiveness of law as a social regulator* and can equally contribute to the realization of both individualistic and collectivist values, both liberal and statistical ideas, and both democratic and autocratic regimes. Like many legal positivists before him, Raz seeks to present his vision of the proper functioning of the legal system as value-neutral, which means that he denies any over-positive substantive principles or standards that the current law must comply with.

The formalism of Raz's approach to understanding the rule of law is that he does not consider this doctrine as a means to protect fundamental human rights, individual freedom, or social justice. Raz consistently differentiates his understanding of the rule of law from substantive concepts, within which the rule of law is designed to ensure the operation of certain principles and norms that make the law appropriate and correct from the standpoint of liberal, humanistic, and democratic values. One should also see the attitudes of legal positivism, which seeks to strictly delimit the legal ontology (being), in the determination to distance oneself from the concepts of "proper law," the desire to consider the rule of law not as a value in itself, but only as a tool for achieving certainty and universality of the rule of law from legal axiology (due).

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