

Rule of Law

I have emphasized at several points that Nozick's possessive libertarian view does not include a requirement of the rule of law. In particular, he aims to show that a minimal state is legitimate, but the rule of law is not an ingredient of a minimal state. Such a state emerges from a network of bilateral agreements in which individuals, endowed with rights, buy protective services to better ensure the protection of those rights. There is no reason to suppose that the purchase of such services will result in a rule of law. That's because, in Nozick's view, people buy services as individuals: they are not owed the protection of law as citizens or persons.

What I want to do today is to explore the idea of the rule of law and to focus the discussion in particular on a pair of theses in Hayek's own classical liberal view: namely that the rule of law is both necessary for a free society, and also sufficient. The Hayek arguments are extremely interesting in themselves, but are also of interest because they indicate the distance between Nozick's libertarianism and other strands of classical liberal and libertarian thought.

1. **Rule of Law.** The rule of law—the idea of a "government of laws, not men"—is a fundamental ideal in modern democratic societies, and in a wide range of non-democratic societies as well. Locke provides a classic statement of the idea in the *Second Treatise*. Whether government is a democracy, aristocracy, or monarchy, "the ruling power ought to govern by declared and received laws, and not by extemporaneous dictates and undetermined

resolutions. For then [i.e., in the absence of the rule of law, with settled and received rules] mankind will be in a far worse condition than in the state of nature..."¹—far worse, because insecurity will be greater with power concentrated but unbound by rules.

Why has the rule of law been thought to be so important? Answering that question requires at least a rough idea of what the rule of law is. I take the core idea to be, roughly, the following: we have a rule of law when government guides and limits the exercise of its power—whether legislative, executive, and administrative—by reference to norms that are *general*, rather than focused on particular people; *public*, rather than secret decrees; *announced in advance*, rather than after the fact; and *reasonably stable*. Government ought consistently and impartially to enforce such norms, and it ought to use its power only to enforce them, no matter how attractive or honorable the ends it aims to advance. How this cabining of the exercise of power is achieved is a complicated matter, but a standard part of the story is that there needs to be a judiciary that operates independently of political branches and parties and that has an obligation to be faithful to the legal materials.

The diverse arguments in favor of the rule of law suggest that this restriction on the use of collective power serves values of personal security, liberty, equality, and community. The requirement of generality is said to promote the value of *personal security* by limiting the discretionary exercise of power, thus protecting people from abuse. The conditions of generality and stability serve the value of *liberty* in part by requiring that individuals not be subordinate to (at the

¹ *Second Treatise*, §137.

mercy of) the demands of other individuals; and the conditions of publicity and prior announcement serve liberty by requiring that people in effect be informed in advance about which forms of conduct are permissible. This makes the exercise of power more predictable, enabling people to plan, to regulate their own conduct, and coordinate their conduct with others. The restrictions serve the value of *equality* because the generality of rules and consistency in their enforcement ensures, in at least certain minimal ways, that equal cases will be treated equally, regardless of the particular people involved. And generality serves the value of *community* by establishing a common framework of norms for all in the society.

I will come back to some of these points later, in the discussion of Hayek.

2. Hesitations. First, I want to mention two lines of criticism of the rule of law.

The first line of criticism emphasizes the shortcomings of general rules when it comes to complex practical matters. The philosopher-kings of Plato's *Republic*, for example, were to rule not by reference to laws but on the basis of their knowledge of what is best in particular cases. According to this criticism, the requirement of generality—that we treat individual cases as instances of general kinds—forces us to be inattentive to the particulars of cases, to what distinguishes the members of a kind from one another: the law may be blind, but justice isn't. Why not aim instead to make the best decision in light of full knowledge of the specifics of a case? Close inspection of the specifics might lead us, for example, to be more lenient in punishment, or alternatively more stringent

in penalty; less worried about restricting someone's speech, or less worried about the dangers of their speech. The requirement of fidelity to general norms may limit the scope for reasonable discretion.

A second sort of concern is suggested by Hobbes, who thought that one of the most pernicious errors in Aristotle's political theory was his embrace of the confused idea that laws not men ought to govern.² Here the idea is not that the rule of law is normatively deficient, but that it is a tissue of illusions, and a rationalizing mask for the exercise of power. According to one line of criticism, individual laws (e.g., the constitutional guarantee of free speech) are often so completely indeterminate—lacking in definite implications—and groups of legal rules and standards so contradictory with one another that any conclusion can always be rationalized by reference to some law or other.

Because of this pervasive fact of legal "indeterminacy"—because there is typically no right answer to legal questions—appeal to the rule of law and the idea of power being cabined by legal requirements is just a pretence. It serves as a way for those with power—say, appellate judges—to disguise decisions, values, and judgments as though they were out of their hands—as though the results were dictated by the rules themselves. Moreover—and here the critique shifts from intellectual to political—because those with power typically want to preserve the status quo, the impact of appeals to the rule of law is in fact profoundly conservative. In a world in which political decisions were not presented as mandatory legal rulings, made in the name of the law, but were transparently presented as political, the outcomes might well be very different.

² *Leviathan*, p. 699.

3. **Necessity of Law.** Turning now to Hayek's defense of the rule of law, it has two components: that the rule of law is necessary and sufficient for the protection of liberty—that is, to prevent coercion. Lets start with necessity. So if we are going to use coercion to prevent coercion—that is, to protect liberty—why should we confine it to the enforcement of law? Why pursue policies and regulations by using the legal form of regulation?

Hayek's idea is that we want to confine the exercise of coercive power to rules that are announced *ex ante*, rather than *ex post*, and that are abstract and general. A rule is abstract rather than concrete just in case it does not command specific actions. And a rule is general rather than particular just in case it does not single out specific persons, though he acknowledges that we can have rules that are appropriately general even though they "refer to properties that only some people possess" (154). I will come back to this point later.

In explaining why it is important to rule through law, Hayek's thought is that law is liberty-protecting because it is avoidable and predictable. As to the first, laws announce sanctions—threats of harm. But individuals who are subject to the laws can avoid the sanctions and, because of the requirement of *ex ante* announcement, know how to avoid: by not engaging in the conduct to which the sanctions attach. So even though the sanctions are themselves coercive, they are *avoidable*. In this respect they are like natural facts that we need to take into account in deciding what to do. The laws do not tell us what to do, but only inform us that if we do a certain thing, then we will be coerced for doing it: this is the force of Hayek's point that "provided that I can avoid putting myself in such a

position, I need never be coerced” (142). This is a fair and important point, but easy to exaggerate. After all, I *can* avoid putting myself in a position of violating a law that tells people never to go out after 8 PM, namely by staying in, but that does not seem very liberty-protecting. Or I can avoid violating a law that says that should never wear anything on my head by never wearing anything: which violates my religious liberty. But these may be reasons for resisting the idea that the rule of law is sufficient for liberty, not that it is necessary.

Now not all laws are avoidable. What about taxes in support of essential functions: projects of advancing the general welfare? Though these laws raising revenue through taxes are not avoidable, Hayek observes that they are not so invasively coercive as other measures that would promote the general welfare because they are *predictable*, and—in contrast with corvee, requiring individuals to work—not inconsistent with planning activities and deciding how I will spend my time. Because they are predictable, I can work around them.

So “the interference of the coercive power of government with our lives is most disturbing when it is neither avoidable nor predictable” (143). Hayek’s thought is that the main evil of coercion is not the threat of being harmed, but that unavoidable and unpredictable intrusions—of a kind that violate the conditions of *ex ante*, generality, and abstractness—keep me from formulating and acting on a plan of life: “from shaping one’s own life.” Making interferences avoidable and predictable “deprives them largely of the evil nature of coercion” (143) by enabling me to plan around them.

4. **Sufficiency.** Now it is one thing to say that the rule of law is necessary for the protection of liberty—that coercion should only be exercised in support of ex ante, general, and abstract rules. It is quite another to say that it is sufficient. Why is rule of law **sufficient** for liberty? Why suppose that the legal form has such determinately libertarian content?

To be more exact, Hayek does not quite say that a system of liberty-denying abstract and general rules is impossible. But he does think that it is very unlikely that we will get a system of general and abstract rules that impose severe constraints on liberty. And he offers two arguments for this conclusion: one bad argument and one better one for this conclusion.

His main argument—which you find suggested in different ways in Locke and Rousseau—is that if those who make the laws are also bound by them, then they won't make laws that are excessively burdensome on people, because they may end up suffering under the onerous restrictions. Thus Locke says that you don't have to worry about a legislature exercising arbitrary power when membership of legislative assembly varies, because when assembly dissolves, members are “subjects under the laws, like everyone else” (T2§138). And here is Hayek's argument: “It is not to be denied that even general, abstract rules, equally applicable to all, may possibly constitute severe restrictions on liberty. But when we reflect on it, we see how very unlikely this is. The chief safeguard is that the rules must apply to those who lay them down and those who apply them—that is, to the government as well as the governed—and that nobody has the power to grant exceptions” (155). The idea is that it is hard to predict what will

happen to individuals under abstract and general rules. So lawmakers who are required to cast regulations in the form of such rules will have strong incentives not to make onerous restrictions, because they will not want to be subject to those restrictions.

Note that the point here applies regardless of the form of regime: regardless of who the lawmakers are, whether elected or not, so long as they are insiders to the society, who are subject to the rules that they make. The essential point is that, because they are required to cast the regulations in the form of general and abstract rules, and are unable to control the application of the rules they make (independent judiciary), the lawmakers are unable to design rules that confer special advantages on themselves.

5. Three Questions. Let me mention three problems with Hayek's argument about the implications of the rule of law. First, he seems to be making an unwarranted assumption about strong risk-aversion. So suppose rulers are risk takers and decide to allocate master/slave positions on the basis of a lottery to which everyone, including themselves, is subject. They may be willing to accept the risks, esp. if they are small enough, even if they assume that there is an equal chance of each person suffering from the burden. So the requirement of generality does not rule out extreme demands, even if we assume that generality of rules means that each person has an equal probability of facing the demands that come from general rules.

Moreover, second, the generality of a rule of law does not suffice at all to give equal probability of each person being subject to the demands of the rule.

Thus there are cases in which I have a pretty good sense how things will work out under a general and abstract rule: even though a rule is written in general terms, and seems to be neutral on its face, the risks it imposes may be not equally distributed. So suppose for example the lawmaker adopts the rule: there are to be no political rallies in public places. If the lawmaker has resources that will enable him/her to have political influence without organizing rallies, then the lawmaker may be willing to accept this perfectly general regulation which does impose onerous restrictions on others. Or suppose I know that capital punishment is more or less never imposed on people who have the resources for a good lawyer: then I may be willing, precisely because of this predictability, to endorse laws with capital sanctions. Or I may endorse an extremely onerous system of sales taxes on necessities, knowing that the burden on people like me will not be that great. Or I endorse a ban on all public displays of headgear, knowing that the burdens will fall on minority religious groups to which I do not belong and am unlikely ever to belong.

Troubles are still greater, third, because of what Hayek understands by generality. I said earlier that laws can be general even though they single out certain groups: for example, women, or the blind, or people above a certain age. So for example, there is apparently no failure of generality in a law that says that the blind may not drive, or that women must consult a doctor before having an abortion. But if those laws are general, despite mentioning categories of people, then so is a law that says that Native Americans may not be outside at night. Or that Catholics must stay inside on Sunday. These rules are no less general than

a rule against driving blind. And Hayek seems to acknowledge this. Because after mentioning the permissibility of regulations that refer to properties that only some people possess, he says that the distinctions that such laws draw—that is, laws that mention specific categories of people—“will not be arbitrary, will not subject one group to the will of another, *if they are equally recognized as justified by those inside and outside the group*” (154). The force of this point is not very clear, but it seems to be saying that the laws in question will not be coercive—will not subject one group to the will of the other—if insiders and outsiders both believe that the categories they use are justified. But absent a very strong assumption about social harmony, nothing in the requirement that lawmakers make general rules suggests the conclusion that they will use such non-arbitrary categories: that is, categories whose relevance is broadly accepted. Some general rules still may use arbitrary classifications, and therefore are coercive.

For these three reasons, the generality requirement of the rule of law, does not provide strong assurances against coercion or, correspondingly, strong protections of freedom. This is not a surprise: what makes categories non-arbitrary is that they are broadly accepted. But governing through general rules is not the same as governing through broad consent: the rule of law is not the same as democracy.