

THE RULE OF LAW IN HAYEK'S *THE ROAD TO SERFDOM*¹

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Friedrich A. Hayek was awarded the Nobel Prize in Economics in 1974. The press release announcing this award recognized that “Hayek’s contributions in the field of economic theory are both profound and original,” but concluded with an apparent slap at his best known work: “For him it is not a matter of a simple defense of a liberal system of society as may sometimes appear from the popularized versions of his thinking.”

What the Nobel Prize announcement did not make clear was that these “popularized versions of his thinking” were written, not by some journalistic hack as one might assume, but by Hayek himself, and that these too were profound and original. *The Road to Serfdom* (1944) and *The Constitution of Liberty* (1960) each had an impact far beyond that of the standard academic treatise on economics. Historian Alan Brinkley, in *The End of Reform: New Deal Liberalism in Recession and War*, argues that with *The Road to Serfdom* Hayek “forced into public discourse the question of the compatibility of democracy and statism.”

The Road to Serfdom is significant for understanding the trajectory of Hayek’s interests and thought. He was an important technical economist from the beginning of his career, but even his earliest economic essays contained the seeds of ideas far beyond those encompassed in economic science, ideas of interest for the fields of psychology, anthropology, history of science, politics, and philosophy. *The Road to Serfdom*

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represents for Hayek the movement onto a broader stage than economics, and he characterized this work as a “political” book. Later, with *The Constitution of Liberty*, which he characterized as a work of political philosophy, he moved onto perhaps the broadest stage of all. In these remarks I focus on Hayek’s discussion of the Rule of Law in *The Road to Serfdom* and briefly situate this work within his intellectual biography.

In a 1939 pamphlet on “Freedom and the Economic System”² Hayek had begun to outline in detail what a legal system should entail and how such a system of “general and permanent” laws would help overcome uncertainty and thus provide a framework for individual initiative and action. While the shape of his mature thought was starting to emerge at this point, he was still primarily concerned with developing a critique of planning and he had yet to come to grips with the concept of rule of law. An examination of *The Road to Serfdom* shows that Hayek had fine-tuned his critique of planning in the intervening five years. He had thought a great deal about the role of law in a free society, and it is in *The Road to Serfdom* that Hayek provided his first extended and systematic treatment of, not law, but of Rule of Law.

The Road to Serfdom and the Rule of Law

In the introduction to the original edition of *The Road to Serfdom* Hayek acknowledged that this work was an extension of the argument he had begun to develop in his essay on “Freedom and the Economic System.”³ Hayek characterized *The Road to*

² F. A. Hayek, *Freedom and the Economic System*, Public Policy Pamphlet No. 29 (Chicago: University of Chicago Press, 1939), reprinted in *Socialism and War: Essays, Documents, Reviews*, edited by Bruce Caldwell (Indianapolis: Liberty Fund, Inc., 2009), pp. 89-116.

³ F. A. Hayek, *The Road to Serfdom: Text and Documents*, edited by Bruce Caldwell (Chicago: University of Chicago Press, 2007), p. 38. Hereafter RS.

Serfdom as a “political book” in which “all that I shall have to say is derived from certain ultimate values” (RS, p. 37). But while *The Road to Serfdom* grew out of “certain ultimate values,” its purpose was not to examine or justify those values. Thus *The Road to Serfdom* occupies a position somewhere between Hayek’s earlier scientific studies (if one takes economics to be a science, as did Hayek) and his later work in *The Constitution of Liberty*, which he characterized as a work dealing with the “basic issues of political philosophy”⁴ which offers a statement of “principles which claim universal validity” (CL, p. 4).

As was the case with “Freedom and the Economic System,” in *The Road to Serfdom* Hayek was attempting to combat the drift toward totalitarianism through centralized planning which characterized much of European civilization during the mid-twentieth century. His interest in law again grew out of his interest in presenting an alternative to planning as a foundation for advanced (and advancing) industrial society. Hayek offered a much more detailed discussion of the nature of planning and the way in which planning inevitably leads to an effort to control or regulate every aspect of social life than in his earlier essays, but I will focus on why this work is important in the development of his thought. *The Road to Serfdom* was the first place in which Hayek articulated the importance of “Rule of Law” in a free society.

The key chapter in *The Road to Serfdom* for understanding the role of law in Hayek’s system is entitled “Planning and the Rule of Law.” Hayek built his argument around the distinction between “a free country” and “a country under arbitrary government” (RS, p. 112). The crucial element in this distinction is that a free country

⁴ F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), p. 5. Hereafter CL.

recognizes and observes “the great principles known as the Rule of Law” (RS, p. 112). In essence the Rule of Law “means that government in all its actions is bound by rules fixed and announced beforehand” (RS, p. 112). A key component of binding government is the reduction of executive discretion “as much as possible”⁵ (RS, p. 112).

The system of Rule of Law has a number of important features. First, the legal system is a set of formal rules “intended to be merely instrumental in the pursuit of people’s various individual ends” (RS, p. 113). These laws are designed to provide a long-term framework for individual action, and therefore are not based on the possibility of assisting particular individuals or groups; rather, they are designed to allow all individuals or groups to maximize their own interests.

The formal rules tell people in advance what action the state will take in certain types of situation, defined in general terms, without reference to time and place or particular people. They refer to typical situations into which anyone may get and in which the existence of such rules will be useful for a great variety of individual purposes. The knowledge that in such situations the state will act in a definite way, or require people to behave in a certain manner, is provided as a means for people to use in making their own plans. Formal rules are thus merely instrumental in the sense that they are expected to be useful to yet unknown people, for purposes for which these people will decide to use them, and in circumstances which cannot be foreseen in detail (RS, p. 114).

This “formal” nature of law relates to the question of impartiality, which I will touch on below. The formal nature of law is so important for Hayek that he punctuated the foregoing argument by again stressed the impersonal nature of law, or to put it slightly differently, stressing the fact that the legislator has no idea of who specifically the laws will assist.

⁵ Hayek, much to the chagrin of those who might be called “ideological libertarians,” always kept one eye on the practical realities confronted in the political and social world. Thus he recognized that “this ideal [of the Rule of Law] can never be perfectly achieved, since legislators as well as those to whom the administration of the law is entrusted are fallible men” (RS, p. 112). This final point indicates the problem of slippage that always occurs in enacting and implementing public policy, a problem that is the bane of all ideological reformers of every political persuasion.

In fact, that we do *not* know their concrete effect, that we do *not* know what particular ends these rules will further, or which particular people they will assist, that they are merely given the form most likely on the whole to benefit all the people affected by them, is the most important criterion of formal rules in the sense in which we here use this term. (RS, p. 114)

Thus formal laws “do not involve a choice between particular ends or particular people, because we cannot know beforehand by whom and in what way they will be used” (RS, p. 114).

The second characteristic of Rule of Law is impartiality. Impartiality in enacting law is important to maintain because this impartiality helps to keep both the legislator and legislation within its appropriate bounds. “Where the precise effects of government policy on particular people are known, where the government aims directly at such particular effects, it cannot help knowing these effects, and therefore it cannot be impartial” (RS, p. 115). In such a situation, Hayek argued, government “must, of necessity, take sides, impose its valuations upon people and, instead of assisting them in the advancement of their own ends, chose the ends for them” (RS, p. 115).

Knowledge of specific effects of law at the time the law is being made has an impact both on the law and on the government. When law is made with these particular effects in mind “it ceases to be a mere instrument to be used by the people and becomes instead an instrument used by the lawgiver upon the people and for his ends” rather than for the various ends chosen by various individuals (RS, p. 115). Likewise, the nature of government changes when specific effects rather than a general framework of laws are sought. “The state ceases to be a piece of utilitarian machinery intended to help individuals in the fullest development of their individual personality and becomes a

‘moral’ institution—where ‘moral’ is not used in contrast to immoral but describes an institution which imposes on its members its views on all moral questions” (RS, p. 115).⁶

Hayek argued that legislative impartiality can only be achieved by restricting legislation to principles so general and formal that the legislator cannot know the effect of these laws on particular ends or particular individuals. As Hayek put it, “To be impartial means to have no answers to certain questions” (RS, p. 115)—no answers perhaps especially to questions of how one should structure one’s life and spend one’s time, but it also means having no answer to the question most frequently asked by constituents: “What does this law mean for me?” The appropriate answer to that question, if the law enacted is actually formal and instrumental in Hayek’s sense, is always the same—the law means for you what you make of it.

A third characteristic of a Rule of Law regime is that it is founded upon “formal equality before the law” (RS, p. 117) rather than status or privilege. “Formal equality” means, first, that the law is open for all to know, and second, that the procedures and mechanisms of the legal system apply neutrally to all. Hayek contrasts this formal equality with any attempt to achieve substantive equality between people. Pursuit of substantive equality in effect destroys the Rule of Law because to achieve substantive equality the government must abandon its position of impartiality—“To produce the same result for different people, it is necessary to treat them differently” (RS, p. 117). At a minimum, such differential action on the part of government destroys the legal

⁶ This argument concerning government as a “moral institution” relates to Hayek’s discussion earlier in RS that comprehensive economic planning requires the “conception of a complete ethical code” in which all social and individual goals can be rank-ordered on a comprehensive hierarchy of values (see chapter 5, “Planning and Democracy,” esp. pp. 100-101)

framework of general laws which allow individuals to predict government action and shape their choices with that knowledge in mind.

Hayek recognized that the principle and practice of formal equality before the law may lead to or increase substantive inequality. “It cannot be denied that the Rule of Law produces economic inequality—all that can be claimed for it is that this inequality is not designed to affect particular people in a particular way” (RS, p. 117). Hayek’s argument is reminiscent of a comment in Federalist Number 10:

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties, is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results . . .⁷

The fourth characteristic of Rule of Law is the universal application of law. This requirement flows naturally from the principle of formal equality and is essential for the stability and predictability that the Rule of Law regime is designed to achieve. Hayek went so far as to argue on behalf of universal application “that for the Rule of Law to be effective it is more important that there should be a rule applied always without exceptions than what this rule is. Often the content of the rule is indeed of minor importance, provided the same rule is universally enforced” (RS, p. 117). The principle of universal application of the law minimizes uncertainty because it allows individuals to predict the actions of government, but beyond that, to predict the actions of other people within broad limits (RS, p. 113).

⁷ Alexander Hamilton, John Jay, and James Madison, *The Federalist*, George W. Carey and James McClellan, eds. (Indianapolis: Liberty Fund, 2001), p. 43.

A regime of Rule of Law, therefore, is characterized by formal rules, written impartially, with equality before the law and with the universal application of the law. On all of these points, Hayek argue, centralized economic planning is the exact opposite.

The planning authority cannot confine itself to providing opportunities for unknown people to make whatever use of them they like. It cannot tie itself down in advance to general and formal rules which prevent arbitrariness. It must provide for the actual needs of people as they arise and then choose deliberately between them. It must constantly decide questions which cannot be answered by formal principles only, and, in making these decisions, it must set up distinctions of merit between the needs of different people. . . . it will always be necessary to balance one against the other the interests of various persons or groups. In the end somebody's views will have to decide whose interests are more important; and these views must become part of the law of the land, a new distinction of rank which the coercive apparatus of government imposes upon the people (RS, p. 113).

Hayek made two general arguments in favor of Rule of Law, the first an economic argument and the second a political or moral argument. What Hayek called the economic argument actually turns on the cognitive limits of the state. Because the state cannot know those things which depend on "the circumstances of time and place" it "should confine itself to establishing rules applying to general types of situations" and allow individuals free reign in the realm of specific circumstances "because only the individuals concerned in each instance can fully know these circumstances and adapt their actions to them" (RS, p. 114). For individuals to effectively make use of their local knowledge, however, it is essential that they are capable of predicting government action which might impinge on their plans. Hayek concludes that "if the actions of the state are to be predictable they must be determined by rules fixed independently of the concrete circumstances which can be neither foreseen nor taken into account beforehand" (RS, p. 114).

Hayek's moral argument for Rule of Law turned on the question of the predictability of substantive outcomes as a threat to the impartiality of government action. "If the state is precisely to foresee the incidence of its actions, it means that it can leave those affected no choice." Hayek concluded, "Whenever the state can exactly foresee the effects on particular people of alternative courses of action, it is also the state which chooses between the different ends" (RS, p. 115). The possibility of creating "new opportunities open to all" requires the establishment of a general framework within which individuals can operate rather than the establishment of substantive goals or ends (RS, p. 115). A Rule of Law regime enhances the individual's control over his own life because "the government is prevented from stultifying individual efforts by *ad hoc* action. Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts" (RS, pp. 112-13).

The doctrine of Rule of Law as outlined by Hayek has many opponents, and Hayek identifies some of them. At the most general level, Hayek's Rule of Law regime will be a target of attack for anyone who favors "the deliberate organization of the labors of society for a definite social goal" (RS, p. 100). Substantive "fairness" as a political principle leads to the desire for substantive, rather than formal, policies (RS, p. 116). Distributive justice which aims at "material or substantive equality of different people" undermines the formal equality necessary for Rule of Law (RS, p. 117). The Rule of Law in any meaningful sense is also undermined by the view that "so long as all actions of the state are duly authorized by legislation, the Rule of Law will be preserved" (RS, p. 119). Hayek would explore this question at more length in later works, but here simply

observed that “the fact that someone has full legal authority to act in the way he does gives no answer to the question whether the law gives him power to act arbitrarily or whether the law prescribes unequivocally how he has to act” (RS, p. 119). Thus, to the extent that legal rules allow for arbitrary acts by the government and its agents the practice of the legal system falls short of the Rule of Law. For now it suffices to emphasize the position that mere “legality” is compatible with arbitrary government in a way that Rule of Law is not, and to note that we will examine this issue at length later in this paper.

The Rule of Law in Hayek's Later Thought

As the idea of Rule of Law developed in Hayek's thought through *The Road to Serfdom*, his discussion of this notion was secondary and incidental to his primary concern, which was a critique of central planning. After *The Road to Serfdom*, however, the concept of Rule of Law took center stage in Hayek's thought. Rule of Law became the ideal which provided the foundation for a liberal society and the framework which allowed such a society to thrive. The discussion of Rule of Law as the political ideal motivating liberalism is the heart of both Hayek's Cairo lectures (1955) and *The Constitution of Liberty* (1960).

Just as Hayek had traced the rise and decline of the Rule of Law in *The Constitution of Liberty*, we can trace its rise and decline in Hayek's own thought. In 1973 Hayek published the first volume of a three-volume study entitled *Law, Legislation and*

Liberty. In his introduction he characterized *The Constitution of Liberty* as offering a restatement and clarification of “the traditional doctrine of liberal constitutionalism.”⁸

But it was only after I had completed that work that I came to see clearly why those ideals had failed to retain the support of the idealists to whom all the great political movements are due, and to understand what are the governing beliefs of our time which have proved irreconcilable with them. (LLL, p. 2)

Hayek listed three changes in belief which make contemporary society deaf to the argument for Rule of Law (LLL, p. 2). 1) We no longer believe “in a justice independent of personal interest.” 2) Legislation is now used (by all parties and political persuasions, perhaps) to achieve preferred outcomes “for specific persons and groups.” 3) Separation of powers has been breached by “the fusion in the same representative assemblies of the task of articulating the rules of just conduct with that of directing government.”

The result of all of this, in Hayek’s judgment, was “The first attempt to secure individual liberty by constitutions has evidently failed” (LLL, p. 1). With *Law, Legislation and Liberty* Hayek abandoned his philosophical work on Rule of Law and made a new start to defend individual liberty in a free society. Hayek’s emphasis would now be on institutions rather than principles (LLL, pp. 3-4). His primary objective, however, would remain the same. “It is only in the present book that I address myself to the question of what constitutional arrangements, in the legal sense, might be most conducive to the preservation of individual freedom” (LLL, p. 3).

⁸ Friedrich A. Hayek, *Law, Legislation and Liberty Volume I: Rules and Order* (Chicago: University of Chicago Press, 1973), p. 2. Hereafter LLL.