

## Hayek Session, September 17, 2004

Core idea of the rule of law is, roughly, the following: government is to guide and limit the exercise of its coercive power—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. To achieve this, there needs to be a judiciary that operates independent 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, the general welfare, 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 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, which promotes the general welfare. 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.

Hayek provides a more ambitious argument for the rule of law. He thinks that the rule of law is a more or less sufficient condition for the protection of liberty, which he takes to be the basic political value. While it is possible for a system with rule of law to have severe restrictions on liberty, it is very unlikely. So Hayek is saying the following:

1. Necessity of Rule Law: IF you are aiming to protect personal liberty, then there are compelling reasons for doing so via rule of law: that the rule of law is more or less necessary for the protection of liberty. So it is consistent with this first thesis that there could be a legal order that is not protective of liberty: what it says is that there could not be a free society without the rule of law; but there could be an oppressive society with the rule of law.
2. Sufficiency of Rule of Law: But he is also saying, more strongly, that if you have the rule of law—if the exercise of coercion is confined to the enforcement of abstract and general rules—then the result is very likely to be a secure protection of liberty. He is arguing for a strong connection between, so to speak, form and content: the form of law as such is strongly liberty-protecting, meaning that the rule of law is (with some possible exceptional cases) is sufficient for the protection of liberty.
3. Priority of Liberty/Rule of Law: As a corollary of the first thesis: if there are values that are difficult to advance in a system with the rule of law—because it is hard to advance them through abstract, general rules, because they require discretion, contextual judgment—then advancing those values will be destructive of liberty.

This is true, for example, of equality, except if that means equality before the law. These other values must therefore be sacrificed, inasmuch as liberty is basic.

4. So where Rawls advances an ideal of justice founded on the aim of reconciling liberty and equality, Hayek sees a deeper tension, embraces the ideal of a “free society” or “state of freedom” and sees the rule of law as lying at the heart of this ideal: upholding the rule of law is both necessary and (under certain reasonable conditions) sufficient for the state of freedom.

1. What is liberty?

- a) State of liberty or freedom: reduces coercion as much as possible. So liberty is the absence of coercion, and state of liberty is situation in which coercion is reduced as low as we can. Conception of liberty: (i) **Negative**: Not ability to do things, but the absence of a specific kind of interference, viz. by other intentionally acting agents. Robinson Crusoe is fully free. (ii) **Distinctive Value**: The account of (personal) liberty is not making a point about the meaning of the word “liberty,” but about a distinctive evil, viz. coercion. Thus personal freedom is said to be a fundamentally different value from political freedom, inner freedom (not being enslaved by passions), and power; (iii) **Arbitrary?** Sometimes says liberty is absence of *arbitrary* interference by others. But not consistently affirmed, and apparently for good reason. What does arbitrary mean? Either no good reason or no prior rule (153). If no good reason, then murderers are free when they are jailed because there is a good reason for the interference. If

presence of prior rule suffices for non-arbitrariness, then argument that rule of law gives liberty is a matter of definition.

- b) **Three Differences:** Distinguishes liberty, as absence of coercion from: (i) **political freedom**, as consent to the political order and its rules. Hayek thinks this is the distinct idea of an absence of collective subordination. Case that political freedom is fundamentally different from personal freedom depends on alienability of political freedom: can consent to dependence on tyrant. But if you think that political freedom is a standing condition, not an initial state, then the distinction may not be so sharp, because will need to preserve the conditions required for giving consent;
- (ii) **inner freedom**, as mastery of passions and emotions, strength of will, which is distinct from presence or absence of interferences from others;
- and (iii) **power**, as ability to achieve aims: related to what Rawls calls the “worth of liberty,” that is, what a person is able to do with his/her liberty, understood as absence of coercion. Focusing on the third of these: essential point is that limited choices or inability to achieve aims is no restriction on freedom, unless it results from coercion.
- c) **Unity of Liberty:** Unlike Rawls, Hayek emphasizes the “unity of liberty.” He think there is one good, which is the absence of coercive interference, and that liberty as such is the basic value. He does not distinguish a class of liberties that are especially important to protect, but focuses on the importance of liberty as such. (Lochner era)

## 2. Coercion

- a) What is it? Person P is coerced just in case (i) P is threatened with harm by another person Q (134); (ii) in this threat, Q acts with the intention of making it the case that P serves Q's purposes (134, 137); and (iii) Q pursues that intention by threatening to impose or imposing specific requirements on P's conduct (134: "certain conduct"). I put this here as if coercion does not come in degrees, but Hayek supposes that it does. So, greater coercion when the specificity of the demands is greater, threat is larger.
- b) So, we do not have coercion (i) when there is a highly specific, customary code of acceptable conduct that everyone follows in an unreflective way, but that is not enforced through a system of threats of harm: but under these conditions there does seem to be an absence of freedom (151). Also, (ii) if P serves Q's purposes not because of threats of harm from anyone, but because of lack of options on part of P (where that lack is not itself the result of threats of harm), then we do not have coercion. This seems to be the force of the example at 137, and of Nozick's examples about how restrictions on choices do not imply coercion. And (iii) reduced coercion when P threatens Q with harm with then aim of making Q serve P's purposes, but leaves P lots of latitude about how to do it. So less coercion when P says "pay me \$100 a week" than when P says "work for me on building the dog house on the side yard."
- c) Why is it bad? (i) **Equality** argument is that coercion is bad because it represents an insult to person by making the person act for your purposes

rather than his/her own: in treating other as means rather than end, coercion establishes subordination; (ii) treating someone as means is denial of the dignity of the person which owes to the person's **autonomy**, understood as capacity for self-regulation, of making a plan of life and acting pursuant to that plan. So here the evil of coercion and the case for a state of freedom is that people are entitled to be treated with respect as autonomous agents; (iii) makes the person's life worse because it suppresses the development and expression of a **person's capacities** (134); (iv) bad for **community welfare** because you lose the special contribution that comes from person acting on his own knowledge and purpose (emphasis on dispersed knowledge).

- d) Some concerns: (i) suppose that lack of options in the case of the badly compensated job comes from enforcement of property rights. So if I took some of your stuff, I would not have to take the bad job. So we have threat without intention to make the person serve purposes of another. Why isn't this a case of being coerced—my options are restricted by threats of harm—and therefore when I take the bad job, I do act under coercion (whether it is justified is another matter); (ii) Not clear that freedom is absence of coercion by others: so for example, we have restricted freedom without threat of harm in the Custom case (151). This looks like a case in which there are limits on reflective self-direction, and that advancing freedom would not consist in reducing coercion but in enabling people to engage in reflective self-direction: life is not your own (p. 13); (iii)

not obvious how to fit together what is said about what freedom is—viz. limiting coercion—and what is said about freedom is good and coercion is bad. If coercion is bad because it restricts guidance of conduct by my own plans and knowledge or self-development, then why isn't it bad to fail to ensure that people have the circumstances they need to guide their plans by their own plans and knowledge or what they need for self-development (education, resources, information). The same reason for thinking it is bad to make other people follow your designs is also a reason for thinking it is bad not to ensure that people are in a position to follow their own.

3. When do we have justified coercion?

- a) When it is needed to protect against private coercion: where this is understood protecting each person's private sphere, in which he/she can plan activities. For reasons we will come back to later, the coercion used to prevent private coercion is (or can be) less objectionable than the private coercion itself: because it is more predictable and avoidable, and thus leaves greater scope for individuals to formulate and act on plans.
- b) Protect against fraud, which is bad for the same reason that coercion is (using other as means).
- c) Permissible to coerce people by taxing them for the general welfare (supply of public goods). Why isn't this a matter of improperly subordinating liberty to some other value? When we have public good, not making someone serve another person's design: better for all, but cannot be achieved through voluntary decisions. Not an insult: not denying

capacity for self-regulated conduct. Also, the coercion that is necessary (viz. taxation) less objectionable form of coercion because it is predictable even if not avoidable.

- d) Not permissible for mere dislikes (145), though it is not clear why enforcing morality is punishing a dislike.
- e) Not permissible to use coercion for paternalistic reasons.
- f) Not permissible to use coercion in support of just distribution. Two cases:
  - (i) Equality is not an acceptable rationale, even if it is a desirable goal. H focuses on fact that “egalitarians generally” regard inequalities due to birth or inheritance as somehow different from and more objectionable than inequalities due to natural differences of talent (89). Considers family, inheritance, and education: are they objectionable inequality-generating conditions. Taking just the first: “It seems to be widely believed...” But you might defuse the polemical edge—the suggestion that there is some sort of unprincipled inconsistency—by rejecting the asymmetry, and by challenging inequalities of advantage (opportunity and reward) with both sources.
  - (ii) distribution according to merit, which Hayek supposes to be the main thrust of ideas of distributive justice (objecting to a failure of match between rewards and the merit of persons, or how deserving they are). Hayek rejects the idea of distribution

according to moral merit, as opposed to distribution according to the value that others place on your services: (a) one problem is that we lack the information required for distributing according to merit (essentially, effort). One reason for valuing freedom is that we want to leave people to act on their separate information. (b) second problem is that it takes people too sensitive to assessments of others, which may lead them not to act on information that they have; (c) Because information is not available, a scheme of distribution according to moral merit would end up being an invitation to highly discretionary judgments, which would be destructive of the equal treatment, predictability, fair notice that comes with rule of law...and thus destructive of liberty.

4. If there is to be coercion to prevent coercion—that is, to protect liberty—why should it happen in enforcing abstract and general rules, announced *ex ante*? Why necessary to have rule of law: confining coercion to the enforcement of abstract and general rules, set out *ex ante*,

- a) Meaning of abstract and general: if abstract, then does not command specific actions; if general, then does not single out specific persons.

Though H does acknowledge that we can have rules that are general in the way that he requires even though they “refer to properties that only some people possess” (154). Come back to this.

- b) Laws as such are relatively non-coercive because the sanctions associated with them are typically avoidable. Thus laws announce sanctions (threats of harm) that persons can avoid and (because ex ante announcement) know how to avoid: by avoiding the conduct to which the sanctions attach. So the sanctions, though coercive, are **avoidable**. In this respect they are like natural facts that we need to take into account in deciding what to do. They do not tell us what to do, but only that if I do a specified thing, I will be coerced: “provided that I can avoid putting myself in such a position, I need never be coerced” (142). This does not seem very liberty-protective: I can avoid coercion from law that tells people never to go out after 8 PM; or never to wear anything on the head; or that bans marriage across the color line.
- c) What about the unavoidable? Taxes in support of essential functions are projects of advancing the general welfare? Though not avoidable they are less invasively coercive because they are **predictable**, and—in contrast with corvee—not inconsistent with planning activities and deciding how I will spend my time. Their enforcement is independent of what I choose to do with my time and effort.
- d) So “the interference of the coercive power of government with our lives is most disturbing when it is neither avoidable nor predictable” (143). It is not the threat of harm that is the main evil, but the way that unpredictable intrusions keep me from formulating and acting on a plan of life: “shaping

one's own life." Making interferences predictable "deprives them largely of the evil nature of coercion" (143).

5. Why is rule of law **sufficient**? Why suppose that the legal form has such determinately libertarian content?

- a) Hayek is not saying that a system of liberty-denying abstract and general rules is either logically impossible or politically impossible: he considers the case of severe restrictions with religious foundation, where those who make the laws are prepared to comply with them.
- b) But he does think that it is socially-politically unlikely that we will get a system of general and abstract rules that impose severe constraints on liberty, and the essential idea—which you get in different ways in Locke, Rousseau, and Rawls—is that if those who make the laws are also bound by them, then they won't make excessively onerous laws, because they may end up suffering under the onerous restrictions. Thus Locke: you don't have to worry about arbitrary power when membership of legislative assembly varies, because when assembly dissolves, members are subjects under the laws, like everyone else" (T2§138). Or Rousseau: "why is the general will always right, and why do all constantly want the happiness of each of them, if not because everyone applies the word "each" to himself and thinks of himself as he votes for all" (SC2.4.5). "The chief safeguard..." (155). He has in mind something like Rawls's veil of ignorance: 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. And, but for the special case of a religiously orthodox group, the lawmakers will want not to be subject to such onerous restrictions.

- c) Note that the point here applies irrespective of the form of regime: regardless of who the lawmakers are, so long as they are insiders to the society. What is needed is that the lawmakers cannot design rules that confer special advantages on themselves because they are required to cast the regulations in the form of general and abstract rules; and (as part of the rule of such laws) they cannot control the application of the rules they make (independent judiciary).
- d) One bad argument: “so far as men’s actions toward other persons are concerned, freedom can never mean more than that they are restricted only by general rules” (155). Can’t literally be saying that “p is free” means “p’s conduct is restricted only by general rules.” That would make the defense of the rule of law by reference to the value of freedom an immediate consequence of the definition of the word “freedom.” All that Hayek means is that freedom does not consist in the absence of all rules or restraints on conduct.
- e) Several puzzles:
  - (i) Assumption of risk-aversion: suppose rulers are risk takers and decide to allocate master/slave positions on the basis of a lottery that everyone is subject to. 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 generality does not rule out extreme demands—detailed demands on conduct—even with equal probability of facing the demands that come from general rules;

- (ii) Moreover, generality of a rule does not suffice at all to give equal probability. Thus there are cases in which I have a pretty good sense how things will work out under a general and abstract rule: risks are not equally distributed, though the rule is facially neutral. 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 lawmaker may be willing to accept this perfectly general regulation which does impose onerous restrictions on others (this is a reason for a thicker veil of ignorance than you get from the requirement of generality and abstractness). Or there could be a ban on messages critical of the government. 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 an unlikely ever to belong (again, a thicker veil of ignorance is needed to get a result of religious liberty, because it is needed to establish the possibility that the burdened subject will be you).

- (iii) Troubles are still greater because Hayekian generality does not mean facial neutrality. Recall 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 “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). Translated: this says 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 they are justified. But absent a very strong assumption about social harmony, nothing in the requirement that lawmakers, regardless of regime type, 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 use arbitrary classifications, and therefore are coercive. So nothing in the condition of generality, as now understood, provides 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.

- (iv) Now, as I have said, you can see the Hayekian argument about the rule of law as having affinity with Rawls’s idea of the veil of ignorance: the shared thought is that if you cannot insulate yourself from the onerous burdens of a regulation, then you are not going to pick an onerous regulation. Generality I am saying provides very little insulation. But the common idea is that if people make rules under conditions

which are such that they have to live with the results of the decisions that they make for others, then we will get a freedom protecting set of laws. But Rawls's point about the reconciliation of liberty and equality is that if you impose a thick enough veil of ignorance to get the inability and insulate and thus a compelling case for equal liberties, then you will also get a case for a more egalitarian view of distributive justice because they will also want to ensure themselves that their liberty will be worth something. We will only be indifferent to a severely limited worth of liberty if we are able to insulate ourselves from that limited state.