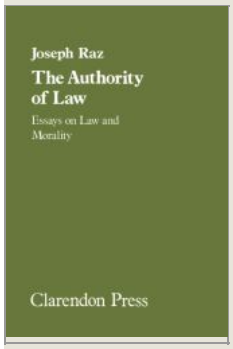

The authority of law: Essays on law and morality
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The Rule of Law and its Virtue*

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[–] Abstract and Keywords

This chapter examines the argument that there are certain procedural values inseparable from the law which forms its internal morality. It analyses the ideal of the rule of law in the same manner in which F.A. Hayek formulated his ideal of the rule of law and aims to show why some of his conclusions cannot be supported. The chapter begins with the basic idea of the rule of law wherein the doctrine of the rule of law explains that the law must be capable of guiding the behaviour of its subjects. It also discusses some the principles that can be derived from the basic idea of the rule of law. These principles include: all laws should be prospective, open, and clear; laws should be stable; the making of laws should be guided, open, clear, and general rules; the independence of the judiciary must be guaranteed; natural justice must be observed; courts must have reviewing power over some principles; courts should be accessible; and the discretion of crime-preventing agencies should not be allowed to pervert the law. In addition, the chapter discusses the value and essence of the rule of the law and some of the problems and issues concerning conformity to it.

Keywords: procedural values, law, internal morality, rule of law, Hayek, principles, value, doctrine

F. A. Hayek has provided one of the clearest and most powerful formulations of the ideal of the rule of law: 'stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge'.[1] At the same time the way he draws certain conclusions from this ideal illustrates one of the two main fallacies in the contemporary treatment of the doctrine of the rule of law: the assumption of its overriding importance. My purpose is to analyse the ideal of the rule of law in the spirit of Hayek's quoted statement of it and to show why some of the conclusions which he drew from it cannot be thus supported. But first we must be put on our guard against the other common fallacy concerning the rule of law.

Not uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated. The fate of 'democracy' not long ago and of 'privacy' today are just two examples of this familiar process. In 1959 the International Congress of Jurists meeting in New Delhi gave official blessing to a similar perversion of the doctrine of the rule of law.

> The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, **(p.211)** economic, educational and cultural conditions which are essential to the full development of his personality.[2]

The report goes on to mention or refer to just about every political ideal which has found support in any part of the globe during the post-war years.

If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.

Given the promiscuous use made in recent years of the expression 'the rule of law' it is hardly surprising that my claim will alarm many. We have reached the stage in which no purist can claim that truth is on his side and blame the others for distorting the notion of the rule of law. All that I can claim for my account is, first, that it presents a coherent view of one important virtue which legal systems should possess and, secondly, that it is not original, that I am following in the footsteps of Hayek and of many others who understood 'the rule of law' in similar ways.

(p.212) 1. The Basic Idea

'The rule of law' means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it.[3] But in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it. The ideal of the rule of law in this sense is often expressed by the phrase 'government by law and not by men'. No sooner does one use these formulas than their obscurity becomes evident. Surely government must be both by law and by men. It is said that the rule of law means that all government action must have foundation in law, must be authorized by law. But is not that a tautology? Actions not authorized by law cannot be the actions of the government as a government. They would be without legal effect and often unlawful.

It is true that we can elaborate a political notion of government which is different from the legal one: government as the location of real power in the society. It is in this sense that one can say that Britain is governed by The City or by the trade unions. In this sense of 'government' it is not a tautology to say that government should be based on law. If the trade union ruling a country breaks an industrial relations law in order to impose its will on the Parliament or if the President or the F.B.I. authorize burglaries and conspire to pervert justice they can be said to violate the rule of law. But here 'the rule of

law' is used in its original sense of obedience to law. Powerful people and people in government, just like anybody else, should obey the law. This is no doubt correct, and yet does it exhaust the meaning of the rule of law? There is more to the rule of law than the law and order interpretation allows. It means more even than law and order applied to the government. I shall proceed on the assumption that we are concerned with government in the legal sense and with the conception of the rule of law which applies to government and to law and is no mere application of the law and order conception.

The problem is that now we are back with our initial puzzle. If government is, by definition, government authorized by law **(p.213)** the rule of law seems to amount to an empty tautology, not a political ideal.

The solution to this riddle is in the difference between the professional and the lay sense of 'law'. For the lawyer anything is the law if it meets the conditions of validity laid down in the system's rules of recognition or in other rules of the system.[4] This includes the constitution, parliamentary legislation, ministerial regulations, policemen's orders, the regulations of limited companies, conditions imposed in trading licences, etc. To the layman the law cŏnsists only of a subclass of these. To him the law is essentially a set of open, general, and relatively stable laws. Government by law and not by men is not a tautology if 'law' means general, open, and relatively stable law. In fact, the danger of this interpretation is that the rule of law might set too strict a requirement, one which no legal system can meet and which embodies very little virtue. It is humanly inconceivable that law can consist only of general rules and it is very undesirable that it should. Just as we need government both by laws and by men, so we need both general and particular laws to carry out the jobs for which we need the law.

The doctrine of the rule of law does not deny that every legal system should consist of both general, open, and stable rules (the popular conception of law) and particular laws (legal orders), an essential tool in the hands of the executive and the judiciary alike. As we shall see, what the doctrine requires is the subjection of particular laws to general, open, and stable ones. It is one of the important principles of the doctrine that *the making of particular laws should be guided by open and relatively stable general rules*.

This principle shows how the slogan of the rule of law and not of men can be read as a meaningful political ideal. The principle does not, however, exhaust the meaning of 'the rule of law' and does not by itself illuminate the reasons for its alleged importance. Let us, therefore, return to the literal sense of 'the rule of law'. It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it. As was noted above, it is with the second aspect that we are concerned: the law must be capable of being obeyed. A person conforms with **(p.214)** the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed *it must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it.

This is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behaviour of its subjects. It is evident that this conception of the rule of law is a formal one. It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice. It may even be thought that this version of the doctrine is formal to the extent that it is almost devoid of content. This is far from the truth. Most of the requirements which were associated with the rule of law before it came to signify all the virtues of the state can be derived from this one basic idea.

2. Some Principles

Many of the principles which can be derived from the basic idea of the rule of law depend for their validity or importance on the particular circumstances of different societies. There is little point in trying to enumerate them all, but some of the more important ones might be mentioned:

(1) *All laws should be prospective, open, and clear*. One cannot be guided by a retroactive law. It does not exist at the time of action. Sometimes it is then known for certain that a retroactive law will be enacted. When this happens retroactivity does not conflict with the rule of law (though it may be objected to on other grounds). The law must be open and adequately publicized. If it is to guide people they must be able to find out what it is. For the same reason its meaning must be clear. An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.

(2) *Laws should be relatively stable*. They should not be changed too often. If they are frequently changed people

will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it was. But more important still is the fact that people need to know the law not only for short-term decisions **(p.215)** (where to park one's car, how much alcohol is allowed duty free, etc.) but also for long-term planning. Knowledge of at least the general outlines and sometimes even of details of tax law and company law are often important for business plans which will bear fruit only years later. Stability is essential if people are to be guided by law in their long-term decisions.[5]

Three important points are illustrated by this principle. First, conformity to the rule of law is often a matter of degree, not only when the conformity of the legal system as a whole is at stake, but also with respect to single laws. A law is either retroactive or not, but it can be more or less clear, more or less stable, etc. It should be remembered, however, that by asserting that conformity to the principles is a matter of degree, it is not meant that the degree of conformity can be quantitatively measured by counting the number of infringements, or some such method. Some infringements are worse than others. Some violate the principles in a formal way only, which does not offend against the spirit of the doctrine. Secondly, the principles of the rule of law affect primarily the content and form of the law (it should be prospective, clear, etc.) but not only them. They also affect the manner of government beyond what is or can usefully be prescribed by law. The requirement of stability cannot be usefully subject to complete legal regulation. It is largely a matter for wise governmental policy. Thirdly, though the rule of law concerns primarily private citizens as subject to duties and governmental agencies in the exercise of their powers (on which more below), it is also concerned with the exercise of private powers. Power-conferring rules are designed to guide behaviour and should conform to the doctrine of rule of law if they are to be capable of doing so effectively.

(3) *The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules*. It is sometimes assumed that the requirement of generality is of the essence of the rule of law. This notion derives (as noted above) from the literal interpretation of 'the rule of law' when 'law' is read in its lay connotations as being restricted to general, stable, and open law. It is also reinforced by a belief that the rule of law **(p.216)** is particularly relevant to the protection of equality and that equality is related to the generality of law. The last belief is, as has often been noted before, mistaken. Racial, religious, and all manner of discrimination are not only compatible but often institutionalized by general rules.

The formal conception of the rule of law which I am defending does not object to particular legal orders as long as they are stable, clear, etc. But of course particular legal orders are mostly used by government agencies to introduce flexibility into the law. A police constable regulating traffic, a licensing authority granting a licence under certain conditions, all these and their like are among the more ephemeral parts of the law. As such they run counter to the basic idea of the rule of law. They make it difficult for people to plan ahead on the basis of their knowledge of the law. This difficulty is overcome to a large extent if particular laws of an ephemeral status are enacted only within a framework set by general laws which are more durable and which impose limits on the unpredictability introduced by the particular orders.

Two kinds of general rules create the framework for the enactment of particular laws: those which confer the necessary powers for making valid orders and those which impose duties instructing the power-holders how to exercise their powers. Both have equal importance in creating a stable framework for the creation of particular legal orders.

Clearly, similar considerations apply to general legal regulations which do not meet the requirement of stability. They too should be circumscribed to conform to a stable framework. Hence the requirement that much of the subordinate administrative law-making should be made to conform to detailed ground rules laid down in framework laws. It is essential, however, not to confuse this argument with democratic arguments for the close supervision of popularly elected bodies over lawmaking by non-elected ones. These further arguments may be valid but have nothing to do with the rule of law, and though sometimes they reinforce rule of law type arguments, on other occasions they support different and even conflicting conclusions.

(4) *The independence of the judiciary must be guaranteed*. It is of the essence of municipal legal systems that they institute judicial **(p.217)** bodies charged, among other things, with the duty of applying the law to cases brought before them and whose judgments and conclusions as to the legal merits of those cases are final. Since just about any matter arising under any law can be subject to a conclusive court judgment, it is obvious that it is futile to guide one's action on the basis of the law if when the matter comes to adjudication the courts will not apply the law and will act for some other reasons. The point can be put even more strongly. Since the court's judgment establishes conclusively what is the law in the case before it, the litigants can be guided by law only if the judges apply the law

correctly.[6] Otherwise people will only be able to be guided by their guesses as to what the courts are likely to do—but these guesses will not be based on the law but on other considerations.

The rules concerning the independence of the judiciary—the method of appointing judges, their security of tenure, the way of fixing their salaries, and other conditions of service—are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the rule of law.

(5) *The principles of natural justice must be observed*. Open and fair hearing, absence of bias, and the like are obviously essential for the correct application of the law and thus, through the very same considerations mentioned above, to its ability to guide action.

(6) *The courts should have review powers over the implementation of the other principles*. This includes review of both subordinate and parliamentary legislation and of administrative action, but in itself it is a very limited review—merely to ensure conformity to the rule of law.

(7) *The courts should be easily accessible*. Given the central position of the courts in ensuring the rule of law (see principles 4 and 6) it is obvious that their accessibility is of paramount importance. Long delays, excessive costs, etc., may effectivelyturn the most enlightened law to a dead letter and frustrate one's ability effectively to guide oneself by the law.

(p.218) (8) *The discretion of the crime-preventing agencies should not be allowed to pervert the law*. Not only the courts but also the actions of the police and the prosecuting authorities can subvert the law. The prosecution should not be allowed, for example, to decide not to prosecute for commission of certain crimes, or for crimes committed by certain classes of offenders. The police should not be allowed to allocate its resources so as to avoid all effort to prevent and detect certain crimes or prosecute certain classes of criminals.

This list is very incomplete. Other principles could be mentioned and those which have been mentioned need further elaboration and further justification (why—as required by the sixth principle—should the courts and not some other body be in charge of reviewing conformity to the rule of law? etc.).[7] My purpose in listing them was merely to illustrate the power and fruitfulness of the formal conception of the rule of law. It should, however, be remembered that in the final analysis the doctrine rests on its basic idea that the law should be capable of providing effective guidance. The principles do not stand on their own. They must be constantly interpreted in the light of the basic idea.

The eight principles listed fall into two groups. Principles 1 to 3 require that the law should conform to standards designed to enable it effectively to guide action. Principles 4 to 8 are designed to ensure that the legal machinery of enforcing the law should not deprive it of its ability to guide through distorted enforcement and that it shall be capable of supervising conformity to the rule of law and provide effective remedies in cases of deviation from it. All the principles directly concern the system and method of government in matters directly relevant to the rule of law. Needless to say, many other aspects in the life of a community may, in more indirect ways, either strengthen or weaken the rule of law. A free press run by people anxious to defend the rule of law is of great assistance in preserving it, just as a gagged press or one run by people wishing to undermine **(p.219)** the rule of law is a threat to it. But we need not be concerned here with these more indirect influences.

3. The Value of the Rule of Law

One of the merits of the doctrine of the rule of law I am defending is that there are so many values it does not serve. Conformity to the rule of law is a virtue, but only one of the many virtues a legal system should possess. This makes it all the more important to be clear on the values which the rule of law does serve.

The rule of law is often rightly contrasted with arbitrary power. Arbitrary power is broader than the rule of law. Many forms of arbitrary rule are compatible with the rule of law. A ruler can promote general rules based on whim or self-interest, etc., without offending against the rule of law. But certainly many of the more common manifestations of arbitrary power run foul of the rule of law. A government subjected to the rule of law is prevented from changing the law retroactively or abruptly or secretly whenever this suits its purposes. The one area where the rule of law excludes all forms of arbitrary power is in the law-applying function of the judiciary where the courts are required to be subject only to the law and to conform to fairly strict procedures.[8] No less important is the restraint imposed by the rule of law on the making of particular laws and thus on the powers of the executive. The arbitrary use of power for personal gain, out of vengeance or favouritism, is most commonly manifested in the making of particular legal orders. These possibilities are drastically restricted by close adherence to the rule of law.

'Arbitrary power' is a difficult notion. We have no cause to analyse it here. It seems, however, that an act which is the exercise of power is arbitrary only if it was done either with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them. The nature of the purposes alluded to varies with the nature of the power. This condition represents 'arbitrary power' as a subjective concept. It all depends on the state of mind of the men in power. As such the rule of law does not bear directly on the extent of arbitrary power. But around **(p.220)** its subjective core the notion of arbitrary power has grown a hard objective edge. Since it is universally believed that it is wrong to use public powers for private ends any such use is in itself an instance of arbitrary use of power. As we have seen the rule of law does help to curb such forms of arbitrary power.

But there are more reasons for valuing the rule of law. We value the ability to choose styles and forms of life, to fix long-term goals and effectively direct one's life towards them. One's ability to do so depends on the existence of stable, secure frameworks for one's life and actions. The law can help to secure such fixed points of reference in two ways: (1) by stabilizing social relationships which but for the law may disintegrate or develop in erratic and unpredictable ways; (2) by a policy of self-restraint designed to make the law itself a stable and safe basis for individual planning. This last aspect is the concern of the rule of law.

This second virtue of the rule of law is often, notably by Hayek, identified as the protection of individual freedom. This is right in the sense of freedom in which it is identified with an effective ability to choose between as many options as possible. Predictability in one's environment does increase one's power of action.[9] If this is freedom well and good. The important thing is to remember that this sense of freedom differs from what is commonly meant by political freedom. Political freedom consists of: (1) the prohibition of certain forms of behaviour which interfere with personal freedom and (2) the limits imposed on the powers of public authorities in order to minimize interference with personal freedom. The criminal offences against the person are an example of the first mode of protecting personal freedom, the disability of the government to restrict freedom of movement—an example of the second. It is in connection with political freedom in this sense that constitutionally guaranteed rights are of great importance. The rule of law may be yet another mode of protecting personal freedom, But it has no bearing on the existence of spheres of activity free from **(p.221)** governmental interference and is compatible with gross violations of human rights.

More important than both these considerations is the fact that observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future. A person's control over his life is never complete. It can be incomplete in any one of several respects. The person may be ignorant of his options, unable to decide what to do, incapable of realizing his choices or frustrated in his attempts to do so, or he may have no choice at all (or at least none which is worth having). All these failures can occur through natural causes or through the limitations of the person's own character and abilities.

Naturally, there are many ways in which one person's action may affect the life of another. Only some such interferences will amount to an offence to the dignity or a violation of the autonomy of the person thus affected. Such offences can be divided into three classes: insults, enslavement, and manipulation. (I am using the last two terms in a somewhat special sense.) An insult offends a person's dignity if it consists of or implies a denial that he is an autonomous person or that he deserves to be treated as one. An action enslaves another if it practically denies him all options through the manipulation of the environment. (Though it may be for a length of time—as in real slavery—I mean to include here also coercing another to act in a certain way on a single occasion.) One manipulates a person by intentionally changing his tastes, his beliefs or his ability to act or decide. Manipulation—in other words—is manipulation of the person, of those factors relevant to his autonomy which are internal to him. Enslavement is the elimination of control by changing factors external to the person.

The law can violate people's dignity in many ways. Observing the rule of law by no means guarantees that such violations do not occur. But it is clear that deliberate disregard for the rule of law violates human dignity. It is the business of law to guide human action by affecting people's options. The law may, for example, institute slavery without violating the rule of law. But deliberate violation of the rule of law violates human **(p.222)** dignity. The violation of the rule of law can take two forms. It may lead to uncertainty or it may lead to frustrated and disappointed expectations. It leads to the first when the law does not enable people to foresee future developments or to form definite expectations (as in cases of vagueness and most cases of wide discretion). It leads to frustrated expectations when the appearance of stability and certainty which encourages people to rely and plan on the basis of the existing law is shattered by retroactive law-making or by preventing

proper law-enforcement, etc. The evils of uncertainty are in providing opportunities for arbitrary power and restricting people's ability to plan for their future. The evils of frustrated expectations are greater. Quite apart from the concrete harm they cause they also offend dignity in expressing disrespect for people's autonomy. The law in such cases encourages autonomous action only in order to frustrate its purpose. When such frustration is the result of human action or the result of the activities of social institutions then it expresses disrespect. Often it is analogous to entrapment: one is encouraged innocently to rely on the law and then that assurance is withdrawn and one's very reliance is turned into a cause of harm to one. A legal system which does in general observe the rule of law treats people as persons at least in the sense that it attempts to guide their behaviour through affecting the circumstances of their action. It thus presupposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations.

Conformity to the rule of law is a matter of degree. Complete conformity is impossible (some vagueness is inescapable) and maximal possible conformity is on the whole undesirable (some controlled administrative discretion is better than none). It is generally agreed that general conformity to the rule of law is to be highly cherished. But one should not take the value of the rule of law on trust nor assert it blindly. Disentangling the various values served by the rule of law helps to assess intelligently what is at stake in various possible or actual violations. Some cases insult human dignity, give free rein to arbitrary power, frustrate one's expectations, and undermine one's ability to plan. Others involve only some of these evils. The evil of different violations of the rule of law is not always the **(p.223)** same despite the fact that the doctrine rests on the solid core of its basic idea.

4. The Rule of Law and its Essence

Lon Fuller[10] has claimed that the principles of the rule of law which he enumerated are essential for the existence of law. This claim if true is crucial to our understanding not only of the rule of law but also of the relation of law and morality. I have been treating the rule of law as an ideal, as a standard to which the law ought to conform but which it can and sometimes does violate most radically and systematically. Fuller, while allowing that deviations from the ideal of the rule of law can occur, denies that they can be radical or total. A legal system must of necessity conform to the rule of law to a certain degree, he claims. From this claim he concludes that there is an essential link between law and morality. Law is necessarily moral, at least in some respects.

It is, of course, true that most of the principles enumerated in section 2 above cannot be violated altogether by any legal system.[11] Legal systems are based on judicial institutions. There cannot be institutions of any kind unless there are general rules setting them up. A particular norm can authorize adjudication in a particular dispute, but no number of particular norms can set up an institution. Similarly retroactive laws can exist only because there are institutions enforcing them. This entails that there must be prospective laws instructing those institutions to apply the retroactive laws if the retroactive laws are to be valid. In the terminology of H. L. A. Hart's theory one can say that at least some of the rules of recognition and of adjudication of every system must be general and prospective. Naturally they must also be relatively clear if they are to make any sense at all, etc.

Clearly, the extent to which generality, clarity, prospectivity, **(p.224)** etc., are essential to the law is minimal and is consistent with gross violations of the rule of law. But are not considerations of the kind mentioned sufficient to establish that there is necessarily at least some moral value in every legal system? I think not. The rule of law is essentially a negative value. The law inevitably creates a great danger of arbitrary power—the rule of law is designed to minimize the danger created by the law itself. Similarly, the law may be unstable, obscure, retrospective, etc., and thus infringe people's freedom and dignity. The rule of law is designed to prevent this danger as well. Thus the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself. It is thus somewhat analogous to honesty when this virtue is narrowly interpreted as the avoidance of deceit. (I do not deny that honesty is normally conceived more broadly to incorporate other virtuous acts and inclinations.) The good of honesty does not include the good of communication between people, for honesty is consistent with a refusal to communicate. Its good is exclusively in the avoidance of the harm of deceit—-and not deceit by others but by the honest person himself. Therefore, only a person who can deceive can be honest. A person who cannot communicate cannot claim any moral merit for being honest. A person who through ignorance or inability cannot kill another by poison deserves no credit for it. Similarly, that the law cannot sanction arbitrary force or violations of freedom and dignity through total absence of generality, prospectivity, or clarity is no moral credit to the law. It only means that there are some kinds of evil which cannot be brought about by the law. But this is no virtue in the law just as it is no virtue in the law that it cannot rape or murder (all it can do is sanction such actions).

Fuller's attempt to establish a necessary connection between law and morality fails. In so far as conformity to the rule of law is a moral virtue it is an ideal which should but may fail to become a reality. There is another argument, however, which establishes an essential connection between the law and the rule of law, though it does not guarantee any virtue to the law. Conformity to the rule of law is essential for securing whatever purposes the law is designed to achieve. This statement

to two kinds: those which are ty with the law or of knowledge of its existence which the law is intended to secure. Thus a law prohibiting racial discrimination in government employment has as its direct purpose the establishment of racial equality in the hiring, promotion, and conditions of service of government employees (since discriminatory-action is a breach of law). Its indirect purposes may well be to improve race relations in the country in general, prevent a threat of a strike by some trade unions, or halt the decline in popularity of the government.

Conformity to the rule of law does not always facilitate realization of the indirect purposes of the law, but it is essential to the realization of its direct purposes. These are achieved by conformity with the law which is secured (unless accidentally) by people taking note of the law and guiding themselves accordingly. Therefore, if the direct purposes of the law are not to be frustrated it must be capable of guiding human behaviour, and the more it conforms to the principles of the rule of law the better it can do so.

In section 2 we saw that conformity to the rule of law is one among many moral virtues which the law should possess. The present consideration shows that the rule of law is not merely a moral virtue—it is a necessary condition for the law to be serving directly any good purpose at all. Of course, conformity to the rule of law also enables the law to serve bad purposes. That does not show that it is not a virtue, just as the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives. At most it shows that from the point of view of the present consideration it is not a moral good. Being sharp is an inherent good-making characteristic of knives. A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value. It is of the essence of law to guide behaviour through rules and courts in charge of their application. Therefore, the rule of law is the specific excellence of the law. Since conformity to the rule of law is the virtue of law in itself, law as law regardless **(p.226)** of the purposes it serves, it is understandable and right that the rule of law is thought of as among the few virtues of law which are the special responsiblity of the courts and the legal profession.

Regarding the rule of law as the inherent or specific virtue of law is a result of an instrumental conception of law. The law is not just a fact of life. It is a form of social organization which should be used properly and for the proper ends. It is a tool in the hands of men differing from many others in being versatile and capable of being used for a large variety of proper purposes. As with some other tools, machines, and instruments a thing is not of the kind unless it has at least some ability to perform its function. A knife is not a knife unless it has some ability to cut. The law to be law must be capable of guiding behaviour, however inefficiently. Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such.

The special status of the rule of law does not mean that conformity with it is of no moral importance. Quite apart from the fact that conformity to the rule of law is also a moral virtue, it is a moral requirement when necessary to enable the law to perform useful social functions; just as it may be of moral importance to produce a sharp knife when it is required for a moral purpose. In the case of the rule of law this means that it is virtually always of great moral value.

5. Some Pitfalls

The undoubted value of conformity to the rule of law should not lead one to exaggerate its importance. We saw how Hayek noted correctly its relevance for the protection of freedom. We also saw that the rule of law itself does not provide sufficient protection of freedom. Consider, however, Hayek's position. He begins with a grand statement which inevitably leads to exaggerated expectations:

> The conception of freedom under the law that is the chief concern of this book rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application **(p.227)** to us we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to

> which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule.... As a true law should not name any particulars, so it should especially not single out any specific persons or group of persons.[13]

Then, aware of the absurdity to which this passage leads, he modifies his line, still trying to present the rule of law as the supreme guarantor of freedom:

> The requirement that the rules of true law be general does not mean that sometimes special rules may not apply to different classes of people if they refer to properties that only some people possess. There may be rules that can apply only to women or to the blind or to persons above a certain age. (In most instances it would not even be necessary to name the class of people to whom the rule applies: only a woman, for example, can be raped or got with child.) Such distinctions will not be arbitrary, will not subject one group to the will of others, if they are equally recognized as justified by those inside and those outside the group. This does not mean that there must be unanimity as to the desirability of the distinction, but merely that individual views will not depend on whether the individual is in the group or not.[14]

But here the rule of law is transformed to encompass a form of government by consent and it is this which is alleged to guarantee freedom. This is the slippery slope leading to the identification of the rule of law with the rule of the good law.

Hayek's main objection is to governmental interference with the economy:

> We must now turn to the kinds of governmental measures which the rule of law excludes in principle because they cannot be achieved by merely enforcing general rules but, of necessity, involve arbitrary discrimination between persons. The most important among them are decisions as to who is to be allowed to provide different services or commodities, at what prices or in what quantities—in other words, measures designed to control the access to different trades and occupations, the terms of sale, and the amounts to be produced or sold.
>
> There are several reasons why all direct control of prices by government is irreconcilable with a functioning free system, whether the **(p.228)** government actually fixes prices or merely lays down rules by which the permissible prices are to be determined. In the first place, it is impossible to fix prices according to long-term rules which will effectively guide production. Appropriate prices depend on circumstances which are constantly changing and must be continually adjusted to them. On the other hand, prices which are not fixed outright but determined by some rule (such as that they must be in a certain relation to cost) will not be the same for all sellers and, for this reason, will prevent the market from functioning. A still more important consideration is that, with prices different from those that would form on a free market, demand and supply will not be equal, and if the price control is to be effective, some method must be found for deciding who is to be allowed to buy or sell. This would necessarily be discretionary and must consist of *ad hoc* decisions that discriminate between persons on essentially arbitrary grounds.[15]

Here again it is clear that arguments which at best show that certain policies are wrong for economic reasons are claimed to show that they infringe the rule of law and the making of supposedly misguided but perfectly principled particular orders is condemned as an arbitrary exercise of power.

Since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values. Hence Hayek's arguments, to the extent that they show no more than that some other goals inevitably conflict with the rule of law, are not the sort of arguments which could, in principle, show that pursuit of such goals by means of law is inappropriate. Conflict between the rule of law and other values is just what is to be expected. Conformity to the rule of law is a matter of degree, and though, other things being equal, the greater the conformity the better—other things are rarely equal. A lesser degree of conformity is often to be preferred precisely because it helps realization of other goals.

In considering the relation between the rule of law and other values the law should serve, it is of particular importance to remember that the rule of law is essentially a negative value. It is merely designed to minimize the harm to freedom and dignity which the law may cause in its pursuit of its goals however laudable these may be. Finally, regarding the rule of law **(p.229)** as the inherent excellence of the law means that it fulfils essentially a subservient role. Conformity to it makes the

law a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal. This subservient role of the doctrine shows both its power and its limitations. On the one hand, if the pursuit of certain goals is entirely incompatible with the rule of law, then these goals should not be pursued by legal means. But on the other hand one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law. After all, the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.

Notes:

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(1) *The Road to Serfdom* (London, 1944), p. 54 FIND IT.

(2) Clause 1 of the report of Committee I of the International Congress of Jurists at New Delhi, 1959.

(3) Cf., on this sense of the phrase, Jennings, *The Law and the Constitution* (London, 1933), pp. 42–5 FIND IT.

(4) I am here following Hart, *The Concept of Law* (Oxford, 1961), pp. 97–107 FIND IT.

(5) Of course, uncertainty generated by instability of law also affects people's planning and action. If it did not, stability would not have any impact either. The point is that only if the law is stable are people guided by *their knowledge of the content of the law*.

(6) I am not denying that courts also make law. This principle of the rule of law applies to them primarily in their duty to apply the law. As law-makers they are subject to the same principles as all law-makers.

(7) Similar lists of principles have been discussed by various authors. English writers have been mesmerized by Dicey's unfortunate doctrine for too long. For a list similar to mine see Lon Fuller's *The Morality of Law*, 2nd ed., ch. 2. His discussion of many of the principles is full of good sense. My main reason for abandoning some of his principles is a difference of views on conflicts between the laws of one system.

(8) The rule of law itself does not exclude all the possibilities of arbitrary law-making by the courts.

(9) But then welfare law and governmental manipulation of the economy also increase freedom by increasing—if successful—people's welfare. If the rule of law is defended as the bulwark of freedom in this sense, it can hardly be used to oppose in principle governmental management of the economy.

(10) In *The Morality of Law*, 2nd ed. (Yale, 1969) FIND IT, Fuller's argument is complex and his claims are numerous and hard to disentangle. Many of his claims are weak and unsupportable. Others are suggestive and useful. It is not my purpose to analyse or evaluate them. For a sympathetic discussion see R. E. Sartorius, *Individual Conduct and Social Norms* (Encino, California, 1975) FIND IT, ch. 9.

(11) I am not adopting here Fuller's conception of the law, but rather I am following my own adaptation of Hart's conception. Cf. Hart's *The Concept of Law* and my *Practical Reason and Norms* (1975), pp. 132–54. Therefore, the discussion which follows is not a direct assessment of Fuller's own claims.

(12) See further on this distinction Essay 9 above.

(13) F. A. Hayek, *The Constitution of Liberty* (Chicago, 1960), pp. 153–4 FIND IT.

(14) Ibid., p. 154 FIND IT.

(15) F. A. Hayek, *The Constitution of Liberty*, pp. 227–8 FIND IT.