

The Road to Serfdom

by Friedrich A. Hayek
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CHAPTER 6

PLANNING AND THE RULE OF LAW

Recent studies in the sociology of law once more confirm that the fundamental principle of formal law by which every case must be judged according to general rational precepts, which have as few exceptions as possible and are based on logical subsumptions, obtains only for the liberal competitive phase of capitalism.

—Karl Mannheim

1 Nothing distinguishes more clearly conditions in a free country from those in a
country under arbitrary government than the observance in the former of the great
principles known as the Rule of Law. Stripped of all technicalities, this means that
government in all its actions is bound by rules fixed and announced beforehand—
5 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 Though this ideal can never be perfectly achieved,
since legislators as well as those to whom the administration of the law is intrusted
are fallible men, the essential point, that the discretion left to the executive organs
10 wielding coercive power should be reduced as much as possible, is clear enough.
While every law restricts individual freedom to some extent by altering the means
which people may use in the pursuit of their aims, under the Rule of Law the govern-
ment 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,
15 certain that the powers of government will not be used deliberately to frustrate his
efforts.

The distinction we have drawn before between the creation of a permanent
framework of laws within which the productive activity is guided by individual
decisions and the direction of economic activity by a central authority is thus
20 really a particular case of the more general distinction between the Rule of Law
and arbitrary government. Under the first, the government confines itself to fixing

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1 rules determining the conditions under which the available resources may be used,
leaving to the individuals the decision for what ends they are to be used. Under the
second, the government directs the use of the means of production to particular ends.
The first type of rules can be made in advance, in the shape of *formal rules* which
5 do not aim at the wants and needs of particular people. They are intended to be
merely instrumental in the pursuit of people's various individual ends. And they are,
or ought to be, intended for such long periods that it is impossible to know whether
they will assist particular people more than others. They could almost be described
as a kind of instrument of production, helping people to predict the behavior of those
10 with whom they must collaborate, rather than as efforts toward the satisfaction of
particular needs.

Economic planning of the collectivist kind necessarily involves the very opposite
of this. 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
15 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. When the government has to decide how many pigs
20 are to be raised or how many busses are to be run, which coal mines are to operate,
or at what prices shoes are to be sold, these decisions cannot be deduced from
formal principles or settled for long periods in advance. They depend inevitably
on the circumstances of the moment, and, in making such decisions, it will always
be necessary to balance one against the other the interests of various persons and
25 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.

The distinction we have just used between formal law or justice and substantive
30 rules is very important and at the same time most difficult to draw precisely in
practice. Yet the general principle involved is simple enough. The difference
between the two kinds of rules is the same as that between laying down a Rule
of the Road, as in the Highway Code, and ordering people where to go; or, better
still, between providing signposts and commanding people which road to take. The
35 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
40 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. In fact, that we do *not* know their concrete effect, that we do *not* know what

1 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. They do not involve a choice between particular ends
 5 or particular people, because we just cannot know beforehand by whom and in
 what way they will be used.

In our age, with its passion for conscious control of everything, it may appear
 paradoxical to claim as a virtue that under one system we shall know less about the
 particular effect of the measures the state takes than would be true under most other
 10 systems and that a method of social control should be deemed superior because of
 our ignorance of its precise results. Yet this consideration is in fact the rationale of
 the great liberal principle of the Rule of Law. And the apparent paradox dissolves
 rapidly when we follow the argument a little further.

15 This argument is twofold; the first is economic and can here only briefly be
 stated. The state should confine itself to establishing rules applying to general types
 of situations and should allow the individuals freedom in everything which depends
 on the circumstances of time and place, because only the individuals concerned in
 each instance can fully know these circumstances and adapt their actions to them.
 20 If the individuals are to be able to use their knowledge effectively in making plans,
 they must be able to predict actions of the state which may affect these plans. But 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: and the particular effects of such actions will be unpredict-
 25 able. If, on the other hand, the state were to direct the individual's actions so as to
 achieve particular ends, its action would have to be decided on the basis of the
 full circumstances of the moment and would therefore be unpredictable. Hence the
 familiar fact that the more the state "plans," the more difficult planning becomes
 for the individual.

30 The second, moral or political, argument is even more directly relevant to
 the point under discussion. If the state is precisely to foresee the incidence of its
 actions, it means that it can leave those affected no choice. Wherever 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. It we want to create
 35 new opportunities open to all, to offer chances of which people can make what
 use they like, the precise results cannot be foreseen. General rules, genuine laws
 as distinguished from specific orders, must therefore be intended to operate in
 circumstances which cannot be foreseen in detail, and, therefore, their effect on
 particular ends or particular people cannot be known beforehand. It is in this sense
 40 alone that it is at all possible for the legislator to be impartial. To be impartial
 means to have no answer to certain questions—to the kind of questions which, if
 we have to decide them, we decide by tossing a coin. In a world where everything
 was precisely foreseen, the state could hardly do anything and remain impartial.

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1 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. It must, of necessity,
take sides, impose its valuations upon people and, instead of assisting them in the
5 advancement of their own ends, choose the ends for them. As soon as the particular
effects are foreseen at the time a law is made, 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. The state ceases to be a piece of utilitarian machinery
intended to help individuals in the fullest development of their individual personality
10 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, whether these views be moral or highly immoral. In this sense
the Nazi or any other collectivist state is “moral,” while the liberal state is not.

Perhaps it will be said that all this raises no serious problem because in the
15 kind of questions which the economic planner would have to decide he need not
and should not be guided by his individual prejudices but could rely on the general
conviction of what is fair and reasonable. This contention usually receives support
from those who have experience of planning in a particular industry and who find
that there is no insuperable difficulty about arriving at a decision which all those
20 immediately interested will accept as fair. The reason why this experience proves
nothing is, of course, the selection of the “interests” concerned when planning is
confined to a particular industry. Those most immediately interested in a particular
issue are not necessarily the best judges of the interests of society as a whole. To
take only the most characteristic case: when capital and labor in an industry agree
25 on some policy of restriction and thus exploit the consumers, there is usually no
difficulty about the division of the spoils in proportion to former earnings or on
some similar principle. The loss which is divided between thousands or millions is
usually either simply disregarded or quite inadequately considered. If we want to
test the usefulness of the principle of “fairness” in deciding the kind of issues which
30 arise in economic planning, we must apply it to some question where the gains
and the losses are seen equally clearly. In such instances it is readily recognized
that no general principle such as fairness can provide an answer. When we have
to choose between higher wages for nurses or doctors and more extensive services
for the sick, more milk for children and better wages for agricultural workers,
35 or between employment for the unemployed or better wages for those already
employed, nothing short of a complete system of values in which every want
of every person or group has a definite place is necessary to provide an answer.

In fact, as planning becomes more and more extensive, it becomes regularly
necessary to qualify legal provisions increasingly by reference to what is “fair”
40 or “reasonable”; this means that it becomes necessary to leave the decision of the
concrete case more and more to the discretion of the judge or authority in question.
One could write a history of the decline of the Rule of Law, the disappearance
of the *Rechtsstaat*, in terms of the progressive introduction of these vague
formulas into legislation and jurisdiction, and of the increasing arbitrariness and

1 uncertainty of, and the consequent disrespect for, the law and the judicature,
 which in these circumstances could not but become an instrument of policy. It
 is important to point out once more in this connection that this process of the
 decline of the Rule of Law had been going on steadily in Germany for some time
 5 before Hitler came into power and that a policy well advanced toward totalitarian
 planning had already done a great deal of the work which Hitler completed.

There can be no doubt that planning necessarily involves deliberate discrimina-
 tion between particular needs of different people, and allowing one man to do what
 another must be prevented from doing. It must lay down by a legal rule how well
 10 off particular people shall be and what different people are to be allowed to have
 and do. It means in effect a return to the rule of status, a reversal of the “movement
 of progressive societies” which, in the famous phrase of Sir Henry Maine, “has
 hitherto been a movement from status to contract.” Indeed, the Rule of Law, more
 than the rule of contract, should probably be regarded as the true opposite of the rule
 15 of status. It is the Rule of Law, in the sense of the rule of formal law, the absence of
 legal privileges of particular people designated by authority, which safeguards that
 equality before the law which is the opposite of arbitrary government.

A necessary, and only apparently paradoxical, result of this is that formal
 20 equality before the law is in conflict, and in fact incompatible, with any activity of
 the government deliberately aiming at material or substantive equality of different
 people, and that any policy aiming directly at a substantive ideal of distributive
 justice must lead to the destruction of the Rule of Law. To produce the same result
 for different people, it is necessary to treat them differently. To give different
 25 people the same objective opportunities is not to give them the same subjective
 chance. 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. It is very significant and characteristic that socialists
 (and Nazis) have always protested against “merely” formal justice, that they have
 30 always objected to a law which had no views on how well off particular people
 ought to be,² and that they have always demanded a “socialization of the law,”
 attacked the independence of judges, and at the same time given their support to
 all such movements as the *Freirechtsschule* which undermined the Rule of Law.

It may even be said that for the Rule of Law to be effective it is more impor-
 35 tant 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. To revert to a former example: it does
 not matter whether we all drive on the left- or on the right-hand side of the
 road so long as we all do the same. The important thing is that the rule enables
 40 us to predict other people’s behavior correctly, and this requires that it should
 apply to all cases—even if in a particular instance we feel it to be unjust.

The conflict between formal justice and formal equality before the law, on
 the one hand, and the attempts to realize various ideals of substantive justice and
 equality, on the other, also accounts for the widespread confusion about the concept

1 of “privilege” and its consequent abuse. To mention only the most important
instance of this abuse—the application of the term “privilege” to property as such.
It would indeed be privilege if, for example, as has sometimes been the case in
the past, landed property were reserved to members of the nobility. And it is
5 privilege if, as is true in our time, the right to produce or sell particular things is
reserved to particular people designated by authority. But to call private property
as such, which all can acquire under the same rules, a privilege, because only
some succeed in acquiring it, is depriving the word “privilege” of its meaning.

The unpredictability of the particular effects, which is the distinguishing
10 characteristic of the formal laws of a liberal system, is also important because it
helps us to clear up another confusion about the nature of this system: the belief
that its characteristic attitude is inaction of the state. The question whether the state
should or should not “act” or “interfere” poses an altogether false alternative, and
the term “laissez faire” is a highly ambiguous and misleading description of the
15 principles on which a liberal policy is based. Of course, every state must act and
every action of the state interferes with something or other. But that is not the
point. The important question is whether the individual can foresee the action of
the state and make use of this knowledge as a datum in forming his own plans, with
the result that the state cannot control the use made of its machinery and that the
20 individual knows precisely how far he will be protected against interference from
others, or whether the state is in a position to frustrate individual efforts. The state
controlling weights and measures (or preventing fraud and deception in any other
way) is certainly acting, while the state permitting the use of violence, for example,
by strike pickets, is inactive. Yet it is in the first case that the state observes liberal
25 principles and in the second that it does not. Similarly with respect to most of the
general and permanent rules which the state may establish with regard to production,
such as building regulations or factory laws: these may be wise or unwise in the
particular instance, but they do not conflict with liberal principles so long as they
are intended to be permanent and are not used to favor or harm particular people.
30 It is true that in these instances there will, apart from the long-run effects which
cannot be predicted, also be short-run effects on particular people which may be
clearly known. But with this kind of laws the short-run effects are in general not
(or at least ought not to be) the guiding consideration. As these immediate and
predictable effects become more important compared with the long-run effects, we
35 approach the border line where the distinction, however clear in principle, becomes
blurred in practice.

The Rule of Law was consciously evolved only during the liberal age and is one
of its greatest achievements, not only as a safeguard but as the legal embodiment
40 of freedom. As Immanuel Kant put it (and Voltaire expressed it before him in very
much the same terms), “Man is free if he needs to obey no person but solely the
laws.” As a vague ideal it has, however, existed at least since Roman times, and
during the last few centuries it has never been so seriously threatened as it is today.
The idea that there is no limit to the powers of the legislator is in part a result of

1 popular sovereignty and democratic government. It has been strengthened by the
 belief that, so long as all actions of the state are duly authorized by legislation, the
 Rule of Law will be preserved. But this is completely to misconceive the meaning
 of the Rule of Law. This rule has little to do with the question whether all actions of
 5 government are legal in the juridical sense. They may well be and yet not conform
 to the Rule of Law. 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. It may
 well be that Hitler has obtained his unlimited powers in a strictly constitutional
 10 manner and that whatever he does is therefore legal in the juridical sense. But
 who would suggest for that reason that the Rule of Law still prevails in Germany?

To say that in a planned society the Rule of Law cannot hold is, therefore, not
 to say that the actions of the government will not be legal or that such a society
 will necessarily be lawless. It means only that the use of the government's coercive
 15 powers will no longer be limited and determined by pre-established rules. The law
 can, and to make a central direction of economic activity possible must, legalize
 what to all intents and purposes remains arbitrary action. If the law says that such
 a board or authority may do what it pleases, anything that board or authority does
 is legal—but its actions are certainly not subject to the Rule of Law. By giving
 20 the government unlimited powers, the most arbitrary rule can be made legal; and
 in this way a democracy may set up the most complete despotism imaginable.³

If, however, the law is to enable authorities to direct economic life, it must
 give them powers to make and enforce decisions in circumstances which cannot be
 foreseen and on principles which cannot be stated in generic form. The consequence
 25 is that, as planning extends, the delegation of legislative powers to diverse boards
 and authorities becomes increasingly common. When before the last war, in a case
 to which the late Lord Hewart has recently drawn attention, Mr. Justice Darling said
 that "Parliament had enacted only last year that the Board of Agriculture in acting
 as they did should be no more impeachable than Parliament itself," this was still a
 30 rare thing. It has since become an almost daily occurrence. Constantly the broadest
 powers are conferred on new authorities which, without being bound by fixed rules,
 have almost unlimited discretion in regulating this or that activity of the people.

The Rule of Law thus implies limits to the scope of legislation: it restricts it to
 the kind of general rules known as formal law and excludes legislation either directly
 35 aimed at particular people or at enabling anybody to use the coercive power of the
 state for the purpose of such discrimination. It means, not that everything is regulated
 by law, but, on the contrary, that the coercive power of the state can be used only in
 cases defined in advance by the law and in such a way that it can be foreseen how it
 will be used. . . .

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NOTES

1. According to the classical exposition by A. V. Dicey in *The Law of the Constitution* (8th ed.), p. 198, the Rule of Law “means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government.” Largely as a result of Dicey’s work the term has, however, in England acquired a narrower technical meaning which does not concern us here. The wider and older meaning of the concept of the rule or reign of law, which in England had become an established tradition which was more taken for granted than discussed, has been most fully elaborated, just because it raised what were new problems there, in the early nineteenth-century discussion in Germany about the nature of the *Rechtsstaat*.
2. It is therefore not altogether false when the legal theorist of National Socialism, Carl Schmitt, opposes to the liberal *Rechtsstaat* (i.e., the Rule of Law) the National Socialist ideal of the *gerechte Staat* (“the just state”)—only that the sort of justice which is opposed to formal justice necessarily implies discrimination between persons.
3. The conflict is thus *not*, as it has often been misconceived in nineteenth-century discussions, one between liberty and law. As John Locke had already made clear, there can be no liberty without law. The conflict is between different kinds of law—law so different that it should hardly be called by the same name: one is the law of the Rule of Law, general principles laid down beforehand, the “rules of the game” which enable individuals to foresee how the coercive apparatus of the state will be used, or what he and his fellow-citizens will be allowed to do, or made to do, in stated circumstances. The other kind of law gives in effect the authority power to do what it thinks fit to do. Thus the Rule of Law could clearly not be preserved in a democracy that undertook to decide every conflict of interests not according to rules previously laid down but “on its merits.”