

Friedrich A. von Hayek on the safeguards of individual liberty and the rule of law¹

(...)

1. It is time to try to pull together the various historical strands and to state systematically the essential conditions of liberty under the law. Mankind has learned from long and painful experience that the law of liberty must possess certain attributes. What are they?

The first point that must be stressed is that, because the rule of law means that government must never coerce an individual except in the enforcement of a known rule it constitutes a limitation on the powers of all government, including the powers of the legislature. It is a doctrine concerning what the law ought to be, concerning the general attributes that particular laws should possess. This is important because today the conception of the rule of law is sometimes confused with the requirement of mere legality in all government action. The rule of law, of course, presupposes complete legality, but this is not enough: if a law gave the government unlimited power to act as it pleased, all its actions would be legal, but it would certainly not be under the rule of law. The rule of law, therefore, is also more than constitutionalism: it requires that all laws conform to certain principles.

From the fact that the rule of law is a limitation upon all legislation, it follows that it cannot itself be a law in the same sense as the laws passed by the legislator. Constitutional provisions may make infringements of the rule of law more difficult. They may help to prevent inadvertent infringements by routine legislation. But the ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal. It will be effective only in so far as the legislator feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority.

It is this fact that makes so very ominous the persistent attacks on the principle of the rule of law. The danger is all the greater because many of the applications of the rule of law are also ideals which we can hope to

¹ Chapter 14 (slightly abridged and excluding footnotes) of *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960, pp. 205-219).

approach very closely but can never fully realize. If the ideal of the rule of law is a firm element of public opinion, legislation and jurisdiction will tend to approach it more and more closely. But if it is represented as an impracticable and even undesirable ideal and people cease to strive for its realization, it will rapidly disappear. Such a society will quickly relapse into a state of arbitrary tyranny. This is what has been threatening during the last two or three generations throughout the Western world.

It is equally important to remember that the rule of law restricts government only in its coercive activities. These will never be the only functions of government. Even in order to enforce the law, the government requires an apparatus of personal and material resources which it must administer. And there are whole fields of governmental activity, such as foreign policy, where the problem of coercion of the citizens does not normally arise. We shall have to return to this distinction between the coercive and the non-coercive activities of government. For the moment, all that is important is that the rule of law is concerned only with the former.

The chief means of coercion at the disposal of government is punishment. Under the rule of law, government can infringe a person's protected private sphere only as punishment for breaking an announced general rule. The principle "nullum crimen, nulla poena sine lege" is therefore the most important consequence of the ideal. But clear and definite as this statement may at first seem, it raises a host of difficulties if we ask what precisely is meant by "law." Certainly the principle would not be satisfied if the law merely said that whoever disobeys the orders of some official will be punished in a specified manner. Yet even in the freest countries the law often seems to provide for such acts of coercion. There probably exists no country where a person will not on certain occasions, such as when he disobeys a policeman, become liable to punishment for "an act done to the public mischief" or for "disturbing the public order" or for "obstructing the police." We shall therefore not fully understand even this crucial part of the doctrine without examining the whole complex of principles which together make possible the rule of law.

2. We have seen earlier that the ideal of the rule of law presupposes a very definite conception of what is meant by law and that not every enactment of the legislative authority is a law in this sense. In current practice, everything is called "law" which has been resolved in the appropriate manner by a legislative authority. But of these laws in the formal sense of the word only some—today usually only a very small proportion—are substantive (or "material") laws regulating the relations between private persons or between such persons and the state. The great majority of the so-called laws are rather instructions issued by the state to its servants concerning the manner in which they are to direct the apparatus of government and the means which are at their disposal. Today it is everywhere the task of the same legislature to direct the use of these

means and to lay down the rules which the ordinary citizen must observe. This, though the established practice, is not a necessary state of affairs. I cannot help wondering whether it might not be desirable to prevent the two types of decisions from being confused by entrusting the task of laying down general rules and the task of issuing orders to the administration to distinct representative bodies and by subjecting their decisions to independent judicial review so that neither will overstep its bounds. Though we may wish both kinds of decisions to be controlled democratically, this need not mean that they should be in the hands of the same assembly.

The present arrangements help to obscure the fact that, though government has to administer means which have been put at its disposal (including the services of all those whom it has hired to carry out its instructions), this does not mean that it should similarly administer the efforts of private citizens. What distinguishes a free from an unfree society is that in the former each individual has a recognized private sphere clearly distinct from the public sphere, and the private individual cannot be ordered about but is expected to obey only the rules which are equally applicable to all. It used to be the boast of free men that, so long as they kept within the bounds of the known law, there was no need to ask anybody's permission or to obey anybody's orders. It is doubtful whether any of us can make this claim today.

The general, abstract rules, which are laws in the substantive sense, are, as we have seen, essentially long-term measures, referring to yet unknown cases and containing no references to particular persons, places, or objects. Such laws must always be prospective, never retrospective, in their effect. That this should be so is a principle, almost universally accepted but not always put into legal form; it is a good example of those meta-legal rules which must be observed if the rule of law is to remain effective.

3. The second chief attribute which must be required of true laws is that they be known and certain. The importance which the certainty of the law has for the smooth and efficient running of a free society can hardly be exaggerated. There is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which has prevailed here. This is not altered by the fact that complete certainty of the law is an ideal which we must try to approach but which we can never perfectly attain. It has become the fashion to belittle the extent to which such certainty has in fact been achieved, and there are understandable reasons why lawyers, concerned mainly with litigation, are apt to do so. They have normally to deal with cases in which the outcome is uncertain. But the degree of the certainty of the law must be judged by the disputes which do not lead to litigation because the outcome is practically certain as soon as the legal position is examined. It is the cases that never come before the courts, not those that do, that are the

measure of the certainty of the law. The modern tendency to exaggerate this uncertainty is part of the campaign against the rule of law, which we shall examine later.

The essential point is that the decisions of the courts can be predicted, not that all the rules which determine them can be stated in words. To insist that the actions of the courts be in accordance with pre-existing rules is not to insist that all these rules be explicit, that they be written down beforehand in so many words. To insist on the latter would, indeed, be to strive for an unattainable ideal. There are "rules" which can never be put into explicit form. Many of these will be recognizable only because they lead to consistent and predictable decisions and will be known to those whom they guide as, at most, manifestations of a "sense of justice." Psychologically, legal reasoning does not, of course, consist of explicit syllogisms, and the major premises will often not be explicit. Many of the general principles on which the conclusions depend will be only implicit in the body of formulated law and will have to be discovered by the courts. This, however, is not a peculiarity of legal reasoning. Probably all generalizations that we can formulate depend on still higher generalizations which we do not explicitly know but which nevertheless govern the working of our minds. Though we will always try to discover those more general principles on which our decisions rest, this is probably by its nature an unending process that can never be completed

4. The third requirement of true law is equality. It is as important, but much more difficult, to define than the others. That any law should apply equally to all means more than that it should be general in the sense we have defined. A law may be perfectly general in referring only to formal characteristics of the persons involved and yet make different provisions for different classes of people. Some such classification, even within the group of fully responsible citizens, is clearly inevitable. But classification in abstract terms can always be carried to the point at which, in fact, the class singled out consists only of particular known persons or even a single individual. It must be admitted that, in spite of many ingenious attempts to solve this problem, no entirely satisfactory criterion has been found that would always tell us what kind of classification is compatible with equality before the law. To say, as has so often been said, that the law must not make irrelevant distinctions or that it must not discriminate between persons for reasons which have no connection with the purpose of the law is little more than evading the issue.

Yet, though equality before the law may thus be one of the ideals that indicate the direction without fully determining the goal and may therefore always remain beyond our reach, it is not meaningless. We have already mentioned one important requirement that must be satisfied, namely, that those inside any group singled out acknowledge the legitimacy of the distinction as well as those outside it. As important in practice is that we ask whether we can or cannot foresee how a law will affect particular

people. The ideal of equality of the law is aimed at equally improving the chances of yet unknown people but incompatible with benefiting or harming known persons in a predictable manner.

It is sometimes said that, in addition to being general and equal, the law of the rule of law must also be just. But though there can be no doubt that, in order to be effective, it must be accepted as just by most people, it is doubtful whether we possess any other formal criteria of justice than generality and equality—unless, that is, we can test the law for conformity with more general rules which, though perhaps unwritten, are generally accepted, once they have been formulated. But, so far as its compatibility with a reign of freedom is concerned, we have no test for a law that confines itself to regulating the relations between different persons and does not interfere with the purely private concerns of an individual, other than its generality and equality. It is true that such "a law may be bad and unjust; but its general and abstract formulation reduces this danger to a minimum. The protective character of the law, its very *raison d'être*, are to be found in its generality."

If it is often not recognized that general and equal laws provide the most effective protection against infringement of individual liberty, this is due mainly to the habit of tacitly exempting the state and its agents from them and of assuming that the government has the power to grant exemptions to individuals. The ideal of the rule of law requires that the state either enforce the law upon others—and that this be its only monopoly—or act under the same law and therefore be limited in the same manner as any private person. It is this fact that all rules apply equally to all, including those who govern, which makes it improbable that any oppressive rules will be adopted.

5. It would be humanly impossible to separate effectively the laying-down of new general rules and their application to particular cases unless these functions were performed by different persons or bodies. This part at least of the doctrine of the separation of powers must therefore be regarded as an integral part of the rule of law. Rules must not be made with particular cases in mind, nor must particular cases be decided in the light of anything but the general rule—though this rule may not yet have been explicitly formulated and therefore have to be discovered. This requires independent judges who are not concerned with any temporary ends of government. The main point is that the two functions must be performed separately by two co-ordinated bodies before it can be determined whether coercion is to be used in a particular case.

A much more difficult question is whether, under a strict application of the rule of law, the executive (or the administration) should be regarded as a distinct and separate power in this sense, co-ordinated on equal terms with the other two. There are, of course, areas where the administration must be free to act as it sees fit. Under the rule of law, however, this does not apply to coercive powers over the citizen. The principle of the

separation of powers must not be interpreted to mean that in its dealing with the private citizen the administration is not always subject to the rules laid down by the legislature and applied by independent courts. The assertion of such a power is the very antithesis of the rule of law. Though under any workable system the administration must undoubtedly have powers which cannot be controlled by independent courts, "Administrative Powers over Person and Property" cannot be among them. The rule of law requires that the executive in its coercive action be bound by rules which prescribe not only when and where it may use coercion but also in what manner it may do so. The only way in which this can be ensured is to make all its actions of this kind subject to judicial review.

Whether the rules by which the administration is bound should be laid down by the general legislature or whether this function may be delegated to another body is, however, a matter of political expediency. This does not bear directly on the principle of the rule of law, but rather on the question of the democratic control of government. So far as the principle of the rule of law is concerned, there is no objection to delegation of legislation as such. Clearly, the delegation of the power of making rules to local legislative bodies, such as provincial assemblies or municipal councils, is unobjectionable from every point of view. Even the delegation of this power to some non-elective authority need not be contrary to the rule of law, so long as such authority is bound to announce these rules prior to their application and then can be made to adhere to them. The trouble with the widespread use of delegation in modern times is not that the power of making general rules is delegated but that administrative authorities are, in effect, given power to wield coercion without rule, as no general rules can be formulated which will unambiguously guide the exercise of such power. What is often called "delegation of lawmaking power" is often not delegation of the power to make rules—which might be undemocratic or politically unwise—but delegation of the authority to give to any decision the force of law, so that, like an act of the legislature, it must be unquestioningly accepted by the courts.

6. This brings us to what in modern times has become the crucial issue, namely the legal limits of administrative discretion. Here is "the little gap at which in time every man's liberty may go out."

The discussion of this problem has been obscured by a confusion over the meaning of the term "discretion." We use the word first with regard to the power of the judge to interpret the law. But authority to interpret a rule is not discretion in the sense relevant to us. The task of the judge is to discover the implications contained in the spirit of the whole system of valid rules of law or to express as a general rule, when necessary, what was not explicitly stated previously in a court of law or by the legislator. That this task of interpretation is not one in which the judge has discretion in the sense of authority to follow his own will to pursue particular concrete aims appears from the fact that his interpretation of the law can

be, and as a rule is, made subject to review by a higher court. Whether or not the substance of a decision is subject to review by another such body that needs to know only the existing rules and the facts of the case is probably the best test as to whether a decision is bound by rule or left to the discretion of the judge's authority. A particular interpretation of the law may be subject to dispute, and it may sometimes be impossible to arrive at a fully convincing conclusion; but this does not alter the fact that the dispute must be settled by an appeal to the rules and not by a simple act of will.

Discretion in a different and for our purposes equally irrelevant sense is a problem which concerns the relation between principal and agent throughout the whole hierarchy of government. At every level, from the relation between the sovereign legislature and the heads of the administrative departments down the successive steps in the bureaucratic organization, the problem arises as to what part of the authority of government as a whole should be delegated to a specific office or official. Since this assignment of particular tasks to particular authorities is decided by law, the question of what an individual agency is entitled to do, what parts of the powers of government it is allowed to exercise, is often also referred to as a problem of discretion. It is evident that not all the acts of government can be bound by fixed rules and that at every stage of the governmental hierarchy considerable discretion must be granted to the subordinate agencies. So long as the government administers its own resources, there are strong arguments for giving it as much discretion as any business management would require in similar circumstances. As Dicey has pointed out, "in the management of its own business, properly so called, the government will be found to need that freedom of action, necessarily possessed by every private person in the management of his own personal concerns." It may well be that legislative bodies are often overzealous in limiting the discretion of the administrative agencies and unnecessarily hamper their efficiency. This may be unavoidable to some degree; and it is probably necessary that bureaucratic organizations should be bound by rule to a greater extent than business concerns, as they lack that test of efficiency which profits provide in commercial affairs

The problem of discretionary powers as it directly affects the rule of law is not a problem of the limitation of the powers of particular agents of government but of the limitation of the powers of the government as a whole. It is a problem of the scope of administration in general. Nobody disputes the fact that, in order to make efficient use of the means at its disposal, the government must exercise a great deal of discretion. But, to repeat, under the rule of law the private citizen and his property are not an object of administration by the government, not a means to be used for its purposes. It is only when the administration interferes with the private sphere of the citizen that the problem of discretion becomes relevant to us; and the principle of the rule of law, in effect, means that the administrative authorities should have no discretionary powers in this

respect.

In acting under the rule of law the administrative agencies will often have to exercise discretion as the judge exercises discretion in interpreting the law. This, however, is a discretionary power which can and must be controlled by the possibility of a review of the substance of the decision by an independent court. This means that the decision must be deducible from the rules of law and from those circumstances to which the law refers and which can be known to the parties concerned. The decision must not be affected by any special knowledge possessed by the government or by its momentary purposes and the particular values it attaches to different concrete aims, including the preferences it may have concerning the effects on different people.

At this point the reader who wants to understand how liberty in the modern world may be preserved must be prepared to consider a seemingly fine point of law, the crucial importance of which is often not appreciated. While in all civilized countries there exists some provision for an appeal to courts against administrative decisions, this often refers only to the question as to whether an authority had a right to do what it did. We have already seen, however, that if the law said that everything a certain authority did was legal, it could not be restrained by a court from doing anything. What is required under the rule of law is that a court should have the power to decide whether the law provided for a particular action that an authority has taken. In other words, in all instances where administrative action interferes with the private sphere of the individual, the courts must have the power to decide not only whether a particular action was *infra vires* or *ultra vires* but whether the substance of the administrative decision was such as the law demanded. It is only if this is the case that administrative discretion is precluded.

This requirement clearly does not apply to the administrative authority which tries to achieve particular results with the means at its disposal. It is, however, of the essence of the rule of law that the private citizen and his property should not in this sense be means at the disposal of government. Where coercion is to be used only in accordance with general rules, the justification of every particular act of coercion must derive from such a rule. To ensure this, there must be some authority which is concerned only with the rules and not with any temporary aims of government and which has the right to say not only whether another authority had the right to act as it did but whether what it did was required by the law.

7. The distinction with which we are now concerned is sometimes discussed in terms of the contrast between legislation and policy. If the latter term is appropriately defined, we will indeed be able to express our main point by saying that coercion is admissible only when it conforms to general laws and not when it is a means of achieving particular objects of current policy. This manner of stating it is, however, somewhat

misleading, because the term "policy" is also used in a wider sense, in which all legislation falls under it. In this sense legislation is the chief instrument of long-term policy, and all that is done in applying the law is to carry out a policy that has been determined in advance.

A further source of confusion is the fact that within law itself the expression "public policy" is commonly used to describe certain pervading general principles which are often not laid down as written rules but are understood to qualify the validity of more specific rules. When it is said that it is the policy of the law to protect good faith, to preserve public order, or not to recognize contracts for immoral purposes, this refers to rules, but rules which are stated in terms of some permanent end of government rather than in terms of rules of conduct. It means that, within the limits of the powers given to it, the government must so act that that end will be achieved. The reason why the term "policy" is used in such instances appears to be that it is felt that to specify the end to be achieved is in conflict with the conception of law as an abstract rule. Though such reasoning may explain the practice, it is clearly one which is not without danger.

Policy is rightly contrasted with legislation when it means the pursuit by government of the concrete, ever changing aims of the day. It is with the execution of policy in this sense that administration proper is largely concerned. Its task is the direction and allocation of resources put at the disposal of government in the service of the constantly changing needs of the community. All the services which the government provides for the citizen, from national defense to upkeep of roads, from sanitary safeguards to the policing of the streets, are necessarily of this kind. For these tasks it is allowed definite means and its own paid servants, and it will constantly have to decide on the next urgent task and the means to be used. The tendency of the professional administrators concerned with these tasks is inevitably to draw everything they can into the service of the public aims they are pursuing. It is largely as a protection of the private citizen against this tendency of an ever-growing administrative machinery to engulf the private sphere that the rule of law is so important today. It means in the last resort that the agencies entrusted with such special tasks cannot wield for their purpose any sovereign powers (no *Hoheitsrechte*, as the Germans call it) but must confine themselves to the means specially granted to them.

8. Under a reign of freedom the free sphere of the individual includes all action not explicitly restricted by a general law. We have seen that it was found especially necessary to protect against infringement by authority some of the more important private rights, and also how apprehension was felt that such an explicit enumeration of some might be interpreted to mean that only they enjoyed the special protection of the constitution. These fears have proved to be only too well founded. On the whole, however, experience seems to confirm the argument that, in spite of the

inevitable incompleteness of any bill of rights, such a bill affords an important protection for certain rights known to be easily endangered. Today we must be particularly aware that, as a result of technological change, which constantly creates new potential threats to individual liberty, no list of protected rights can be regarded as exhaustive. In an age of radio and television, the problem of free access to information is no longer a problem of the freedom of the press. In an age when drugs or psychological techniques can be used to control a person's actions, the problem of free control over one's body is no longer a matter of protection against physical restraint. The problem of the freedom of movement takes on a new significance when foreign travel has become impossible for those to whom the authorities of their own country are not willing to issue a passport.

(...) If bills of rights are to remain in any way meaningful, it must be recognized early that their intention was certainly to protect the individual against all vital infringements of his liberty and that therefore they must be presumed to contain a general clause protecting against government's interference those immunities which individuals in fact have enjoyed in the past.

In the last resort these legal guaranties of certain fundamental rights are no more than part of the safeguards of individual liberty which constitutionalism provides, and they cannot give greater security against legislative infringements of liberty than the constitutions themselves. As we have seen, they can do no more than give protection against hasty and improvident action of current legislation and cannot prevent any suppression of rights by the deliberate action of the ultimate legislator. The only safeguard against this is clear awareness of the dangers on the part of public opinion. Such provisions are important mainly because they impress upon the public mind the value of these individual rights and make them part of a political creed which the people will defend even when they do not fully understand its significance.

9. (...)

It is not the occasional necessity of withdrawing some of the civil liberties by a suspension of habeas corpus or the proclamation of a state of siege that we need to consider further, but the conditions under which the particular rights of individual or groups may occasionally be infringed in the public interest. That even such fundamental rights as freedom of speech may have to be curtailed in situations of "clear and present danger," or that the government may have to exercise the right of eminent domain for the compulsory purchase of land, can hardly be disputed. But if the rule of law is to be preserved, it is necessary that such actions be confined to exceptional cases defined by rule, so that their justification does not rest on the arbitrary decision of any authority but can be reviewed by an independent court; and, second, it is necessary that the individuals affected be not harmed by the disappointment of their

legitimate expectations but be fully indemnified for any damage they suffer as a result of such action.

The principle of "no expropriation without just compensation" has always been recognized wherever the rule of law has prevailed. It is, however, not always recognized that this is an integral and indispensable element of the principle of the supremacy of the law. Justice requires it; but what is more important is that it is our chief assurance that those necessary infringements of the private sphere will be allowed only in instances where the public gain is clearly greater than the harm done by the disappointment of normal individual expectations. The chief purpose of the requirement of full compensation is indeed to act as a curb on such infringements of the private sphere and to provide a means of ascertaining whether the particular purpose is important enough to justify an exception to the principle on which the normal working of society rests. In view of the difficulty of estimating the often intangible advantages of public action and of the notorious tendency of the expert administrator to overestimate the importance of the particular goal of the moment, it would even seem desirable that the private owner should always have the benefit of the doubt and that compensation should be fixed as high as possible without opening the door to outright abuse. This means, after all, no more than that the public gain must clearly and substantially exceed the loss if an exception to the normal rule is to be allowed.

(...)