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RULE OF LAW; ONE, BUT NOT THE ONLY VIRTUE

By Joseph Raz

AUTHORED BY - ALANKRITA MALVIYAⁱ

Professor Joseph Raz, in his work 'The Rule of Law and its Virtues' published in 'The Authority of Law: Essays on Law and Morality,' gracefully undertook an analysis of the contributions of Professor F.A. Hayek, renowned for his insights into the 'Rule of Law'. Drawing heavily from Hayek's work, Professor Raz articulated his eight principles of the 'Rule of Law'. While acknowledging the immediate value of Hayek's meticulous and closely-knit exposition and interpretation of the 'Rule of Law', Prof. Raz also critically examined whether it represented the ultimate understanding of the concept.

Prof. Raz is greatly admired by the work of Prof. Hayek wherein he formulated the ideals of the 'rule of law' as 'stripped of all technicalities, the government in all its actions should be bound by rules fixed and announced beforehand and rules which make it possible to foresee with fair certainty as how the authority will use its coercive powers in given circumstances so that an individual can plan one's affairs based on this knowledge'ⁱⁱ. While recognizing that the 'rule of law' is a crucial aspect of the legal system, concluding that it may be immediate but not ultimate, is not wrong, in essence, the 'Rule of Law' is merely one of the virtues that the legal system must possess and not the only virtue. It does stabilize social relations and provides a predictable environment for individual planning; however, it doesn't ensure freedom from government intervention or prevent violations of human dignity involving the recognition of autonomy and protection from insult, enslavement, and manipulation. It, to a certain extent, does safeguard personal freedom enabling free choices, but to what extent? Freedom by definition is promiscuous. Different for all and subjective.

Prof. Hayek's understanding of freedom is narrow, twisty, and skewed. To him, freedom is where the actions of one are not deliberated to serve the will of the other (absence of coercion)ⁱⁱⁱ, but is that real freedom? He qualifies coercion based on whether certain actions are crucial to one's existence or the preservation of what one values most. If coercion rules apply equally to everyone in similar circumstances, they are akin to natural obstacles rather than personal impositions. Is this a meaningful understanding of freedom? Raz's idea of freedom is broader and more

reasonable emphasizing the legal rules allowing individuals to act according to their own will. This understanding becomes clear in cases of ‘Bans – Mobile application ban in India and Interracial marriage bans in the USA before the 20th century’. While such laws may technically align with the ‘rule of law’, they still deny individuals their respective freedom.

‘Rule of law’ is a touchstone, standard, and an inherent characteristic of law itself. Concurring with the confirmation of Prof Raz with Prof. Lon Fuller that deviation from this standard is acceptable as long as it still conforms to some degree of it. An absolute degree of conformity is preferable but it may not always be practical, desirable, and guarantee moral virtue. All the actions must sieve through the ‘rule of law’ whether they are narrower than the sieve or perfect to the dimensions of the sieve, adjustments and exceptions may be based on other considerations as fit from case to case. It is not a matter of complete or naught but rather a matter of ‘degree’. It has a very context-dependent nature and has to be balanced with other societal values and objectives. In a society where criticizing the government is prohibited by law, while technically complying with legal principles, it undermines moral virtues like freedom of speech. Despite being consistently enforced; this restriction violates fundamental rights and hampers public discourse. Hence, the ‘rule of law’, while upheld, fails to ensure moral integrity as it suppresses basic human liberties. Actions are ‘is’ and the ‘Rule of Law’ is ‘ought to’, the ‘is’ must not be in blatant abuse of the ‘ought to’.

Prof. Hayek envisions a society governed by the ‘rule of law’ where laws conform to generality, stability, and equal applicability to all members of society. According to Prof. Hayek, true laws should always look forward, affecting future actions and not looking back to punish past behavior, and should not single out individuals or groups for special treatment but should instead apply uniformly to everyone. He believes that this approach protects individuals from arbitrary government actions and ensures the rule of law’s integrity. No matter how broadly we wish to value Prof. Hayek’s interpretation of the ‘Rule of Law’, it remains rooted in the principle of ‘government by law and not by men.’ This means that all government actions must be based on and authorized by the law. He assumes that individual freedom is only secure under a government governed by the ‘rule of law’, free from bureaucratic encroachments by administrative agencies empowered to make ad hoc decisions. However, it must be noted that many forms of arbitrary rule can coexist with the ‘rule of law’. It is somewhat flawed in its conception as it juxtaposes discretionary powers with arbitrary government and puts the ‘Rule of law’ against both. For this, it is important to understand what arbitrary power is. When the discretionary power of the

authority is conducted with due consideration for its alignment with legitimate justifications and with a sincere belief in its capacity to fulfill those justifications, would that be arbitrary? For Hayek, it would still be. For Raz, it is workable. Prof. Raz acknowledges the importance of general laws that apply prospectively and equally to all but recognizes the necessity of particular laws tailored to specific groups based on unique characteristics. However, he insists that such distinctions should be justified and accepted by both those within and outside the affected group. As much as it can be agreed, we need particular laws to actualize the wisdom and objective of the general laws. Could we have thought about the Right to Education without Article 21-A and actualization without the 'Right of Children to Free and Compulsory Education Act, 2009'? The concept of intelligible differentia and progressive taxation is not arbitrary as it does not mindlessly serve equality; it consciously serves equity. If the principle of Generality is to be strictly applied, all the upliftment schemes, subsidies, scholarships on merit, and economic conditions will be arbitrary actions.

The 'Rule of Law' primarily concerns the procedural aspects of the legal system. It doesn't inherently address the health or ethical justifications of the law itself. A government can strictly adhere to legal procedures and 'Rule of Law' principles, yet still perpetuate inequality and arbitrariness if its laws support such inequality in substance. Arbitrary power and the rule of law coincide and become congruent when the law in itself is arbitrary. Obeying the arbitrary law is still the rule of law. Simply put, blindly following the letter of the law and 'Rule of Law' ideals may not necessarily ensure fairness or justice if the laws themselves are unjust. We must note that the 'Rule of Law' in itself is not Justice, Democracy, or Equality. It is a ladder that must be used to reach Justice, Democracy, and Equality. Prof. Raz's principles derived from the 'rule of law' offer more realism and tangibility for the functioning of legal systems although he also sets the premise of his principles as the 'rule of law' is the rule of 'Good' Law. He rightly argued for forward-looking, transparent, and stable laws. Specific laws are to be tested on the tenets of 'open, stable, and clear' general laws. Finding the core from Prof. Hayek's model of predictability and stability, these are essential traits of law ensuring a consistent legal environment. He emphasizes judicial independence for upholding justice and asserts that courts possess the authority to review the application of these principles, ensuring their proper implementation. Discretion is acceptable but law enforcement agencies must refrain from abusing their discretion to manipulate legal outcomes.

'Rule of Law' is transcendental but Justice that is, in general, the ultimate goal of the 'Rule of

Law' is not Transcendental. I humbly believe that it has to be seen through various lenses. An innocent man who is imprisoned for 50 years if after all, is acquitted, following the black letters of the 'Rule of Law', Justice has been served. But is that, Justice? We aren't in utopia and therefore adherence to the rigid legal formalism of Prof. Hayek might not be possible.

For the actualization of Justice in the real sense we might need to move away from the deontological understanding of the 'Rule of Law' and look forward to a consequentialist approach. We would need to come out of the theoretically crisp understanding of the 'Rule of Law' and look at it broadly from a functionalist approach, whether it is workable or not.

Hayek's 'Rule of Law' is Ideal, but can we touch that and realize Freedom and Justice? Perhaps in an ideal world.

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<sup>i</sup> The author is pursuing an LL.M (Business Law) from the National Law University, Jabalpur (DNLU).

<sup>ii</sup> Joseph Raz, *The Authority of Law: Essays on Laws and Morality* (Oxford University Press, NY, 1997, ©1979, n.d.).

<sup>iii</sup> Ronald Hamowy, "Freedom and the Rule of Law in F.a. Hayek," *Il Politico* 36, no. 2 (1971): 349-77, <https://www.jstor.org/stable/43207383>.