Essay on “the Rule of Law in Decline”

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The fundamental principles of democracy have not changed since its creation. Yet, the ways in which the rules apply have developed and evolved through trials and errors until today. The test of a majority vote, which is the primary representation of a democratic system, offers us an opportunity to choose a representative body that can best serve our opinion. However, now we face a wider gap and cacophony between different individuals, classes, and interest groups, regardless of which representative body governs. As the gap widens, the divergent agendas of society are not equally shared by different individuals and interest groups and the ruling majority is often blamed for not being able to include all members of society. In fact, when there are rising concerns about disharmony and discrepancy in society, especially in a democracy where the majority opinions shape the social agendas for all, it may indicate that the direction of the ruling majority may have an adverse effect on many individuals and groups or may leave out many members of society who do not conform with the majority opinion. If the test of a majority vote leaves out the considerable number of constituents in society and only stands for the will of the majority, there will be increasing conflicts between the majority and the minority. Furthermore, if the majority can adjust the rule of law and apply in their favor, it will enhance the welfare of the majority at the expense of the individual freedom of the minority. Then the question is, what is the true nature of the rule of law that is impartial and consistent regardless of the preference and the will of the ruling majority? And, what is the responsibility of the ruling majority that can equally enhance the rights of all members of society without sacrificing the interests of the minority? This paper explores Hayek’s ideas on the rule of law, especially what the nature of the rule of law ought to be in the context of a democratic system.

The philosophers and economists in history have distinguished the inherent discrepancy between the public and private interests. Jean-Jacques Rousseau has identified “the will of all” as a sum of particular private interests, whereas he defined “the general will” as the common interest that binds and favors everyone equally (Philips and Huckaby, 1972, p.183). In regulating and conforming a multiplicity of the general will, the laws are the necessary condition and a guidance for judging whether the relevant issue serves the common interests. Yet, the public may
face difficulty distinguishing or prioritizing “the will of all” from “the general will”. Thus, they are in need of cooperation to understand and agree on their wills and the potential outcomes of their wills, which in turn makes the role of the legislator or the representative body essential in order to overlook the process as a whole. The legislator is granted to undertake actions to alter or support the general will on behalf of his people. While the role of the legislator or the ruling regime is necessary to balance the private wills and the general wills, this leads to a constant conflict between liberty and the authority. Throughout the history, starting from Greece to Rome to the present days, liberty is found to be restricted proportionately to the rising power of the authority (1976, vol.2).

The struggle between the authority and liberty can be abated when the legislature provides the means for individuals to pursue their interests and attain their goals within the boundary of the individual freedom that does not infringe on someone else’s. However, there always exists a compulsory legislation which will require everyone’s agreement though some will not agree. Especially in the system of the representative government, only the strongest opinion will directly affect the legislation through the majority votes. Hayek insisted that this system will only be politically efficient at reaching the consent quickly at the cost of producing potentially adverse results, largely due to the excess number of tasks relative to the range of scope that can be understood and discussed among the individuals before agreement (1976, vol.3). Therefore, the representatives are likely to be better equipped on their specific agenda in terms of depth and breadth of understanding in order to secure and retain their groups and their interests. In this process of gaining comprehensive information on the issue and safeguarding their benefits, a problem arises as to whether their pursuit is politically or socially just, because the unknown third party will be affected by it (1976, vol.3). As there always are unknown groups at disadvantage, Hayek argues that the main objective of the representative system is to extort resources from a minority and share it with the majority without knowing whether the majority opinion is right or whether the intervention of the legislature can be justified (1976, vol.3).

Within the system of the representative government which serves as a delegate of the majority opinion and a ruling authority, the social standards and the rule of law in their emphasis are subsequently arbitrary and socially just in relative terms, because the consent of the majority
is considered politically necessary and pseudo-just in the decision making process. A majority rule incentivizes politicians to bribe certain interest groups for their benefits in exchange of votes. On the other hand, the stronger the influence such groups can exert, the more incentives the members in such groups have in organizing actions to coerce politicians in their favor. As they increase their influence over the politicians, they gain political power and their interests dominate the primary agenda of the society, distorting the distribution of benefits from the small groups to the majority (1976, vol.3). The representative government on behalf of the will of the people can stay in office only by meeting the demand of large groups of voters. If it does not get elected again, it means that the ruling regime failed to satisfy a sufficiently large number of voters, which also implies that it did not share a common ground amongst diverse interest groups. Due to these divergent interests, the outcome could be nothing but aggregate desires of different individuals and groups, which would generate an outcome that does not meet any one’s expectations (1976, vol.3). Even if the current representative government succeeds in drawing a satisfactory majority opinion, Hayek expressed his concern about the change of rules by future majorities. He suggested that while individuals abide by the current rules consistently, there is no assurance that future majorities will abide by the same rules nor the rules that favored by current majorities can be obtained without infringing already established rules (1976, vol.3).

The nature of democratically elected government and its power as a representative of the will of its power has been subjected to the scrutiny of many philosophers. M.J.C. Vile wrote in his book that “the realisation that legislatures must also be subjected to restriction if individual freedom was not to be invaded” (1976, vol.3, p.20). Also, John Locke argued that the legislative authority should be governed by established laws, not by particular cases (Philips and Huckaby, 1972). The potential threat to partiality towards certain groups or agendas is initiated by nonexistence of general laws or principles that have been set and practiced regardless of who is in power. The laws that can only be applied to particular cases tend to be geared toward confined ends that only serve private interests (1976, vol.3). Therefore, the ideal way of achieving the impartial and equitable ends for the public is to have legislatures and law markers to design general, comprehensive laws and follow accordingly. However, the function of democratic institutions is limited to effectuate this ideal way of regulation owing to the fact that the representative government has the responsibility over many different tasks (1976, vol.3). The
issues with general laws not only come from the conflicting interests but also do arise from contrasting directions of end results. Then, would it be a sufficient condition for an ideal resolution if the representative body does not commit to any private ends? In fact, the primary purpose of the representative government is to effectively control and manage certain agendas rather than determine whether each agenda is valid under general laws. The representative body decides on particular matters in such a way that the opinion of the majority is fully reflected while it has the limited knowledge on the legitimacy of its conducts and whether the outcome will produce the impartial effect on the public (1976, vol.3).

For Hayek, individual freedom must be within the boundary of maximizing his freedom without infringing on the others’ (Hayek, 1976, vol.3). As the gap between wealth accumulations deepens, higher wealth and knowledge lead to a better chance of acquiring more of these tangible and intangible resources. Therefore, the rule of law should not act as a mere regulation or preference of the acting government (1976, vol.3). It has to include all members of society regardless of whether or not they have a stronger influence over the representative body with their majority opinions. However, in the general process of determining the priority of social agendas, one should accept constraints and compromise in exchange for the goods through interactions with other individuals in society. In this process of prioritization, the benefits of the universal rule of law can be limited in scope and can be obtainable at the expense of limiting individual freedom for those who are less recognized. Thus, the rule of law determines the extent to which individual’s freedom is limited or secured for public goods. Since the rule of law and public goods are interlinked, it is often difficult to achieve the overall efficiency due to the different quantitative and normative properties of the two (1976, vol.3). As much as weighing the efficiency by maximizing collective utility at the cost of individual freedom is difficult, adjusting the direction and intensity of the two is difficult to choose (1976, vol.2). Then, how does individual freedom relate to the role of different groups with different political power?

Hayek’s idea on individualism relates to the role of group selection in the age of vastly changing consumer preferences at a smaller level and evolution of the rule of law in a society at a greater scale (Zywicki, 2004). Individuals are not separable from groups; every individual belongs to families, firms, interest groups, and nations. In the same notion, it is inevitable for
groups to convey preferences and ideas of individuals within the groups. In fact, individual choices shape the society as a whole, which is defined as “Methodological individualism” by Douglas Glen Whitman (Zywicki, 2004, p.3). Since individual selection as well as group selection is the force that drives social outcomes, the question arises as to how group selection and individual selection are inter-winded and influence each other. Hayek suggested that an isolated group that never communicate with other groups will not be able to participate in a between-group competition, meaning that a mechanism in enabling interactions between different groups is necessary (1976, vol.2). The concern for the insufficient between-group competition arises when superior groups displace others and isolate them from competition. This displacement can be explained in warfare where one group conquers and rule the others (1976, vol.2). The mechanism for enabling a successful between-group-competition may need to include the following; it must encourage every individual to exercise his own right to the full extent and to freely compete with others, and it should not result in unreasonable losses from external forces (1976, vol.2). Therefore, the role of government will be about how to distribute the incentives for competition, equally within the group and amongst different groups, rather than how to redistribute the end results (1976, vol.2).

In *Law, Legislation, and Liberty*, Hayek was convinced that having human decision makers choose the rules for society is fundamentally incorrect (1976, vol.2). Since rules are already chosen by the process of group selection, the role of legislators or judges is not to create the rules but only to articulate these rules that have existed before (1976, vol.2). That is, it is not the ruling regime that exerts arbitrary coercion on individuals. The rules are generated spontaneously by the impersonal process of group selection. This notion in the political system applies to the economic system as well. Hayek suggested that a farmer is not coerced when he has sell at a price the price at which he desires to sell, because prices are set by the impersonal process of the market (1976, vol.2). This logical absurdity implies that the rules that are generated by the impersonal process cannot be the cause of restrictions imposed on individuals (1976, vol.2). Individuals choose and experiment with different rules within the group, and the interactions between these individual rules spontaneously create and develop to a system in which the rules are beyond the reach of lawmakers.
Because the system of rules is not created directly by individual choices but is generated spontaneously through the interactions of different rules, individuals are generally unable to distinguish the optimal rules from the worst. This explains the reason why a competition between different rules is required to determine which set of rules is superior to the others. Human history and past experiences also prove the general trends of adopting the best alternative that are expected to prevail in the selection process from the previous time frame. Now, the issue is whether the interactions of different set of rules generate undesirable results. Since it is the rules by themselves, not by a human design that shapes the system of rules, it is expected that the only the optimal system will survive just like the natural selection process. However, if the seemingly best system is actually rejected by the mainstream of people for some reason that is unforeseeable in the past, another rule that nobody wanted may get activated (1976, vol.2). This alternative rule is not likely to draw an agreement among individuals, while it satisfies individualism and group selection process. If the ruling government acts upon this alternative and apply the rule of law accordingly, it not only fails to draw a full agreement from the individuals in that society but it does limit their freedom by applying the rules that nobody wanted. In a democracy where the representative body is comprised of collective activities of different interest groups and political constituents, it is inevitable to see the aggregate outcome to be undesirable or unforeseeable by few people. Since most results are based on the majority opinion, which is proportionally largest among other opinions in relative terms, the end results may leave out the substantial part of the population if there is hardly any common ground although the final decision bears the name of the common will (1976, vol.3).

In the context of the economy, a society itself is a network of many interlinked economies of individual members of society. These economies are not governed by a single entity and there is no hierarchy, and the economy as whole serves the separate ends of all members of society. However, the misleading perception of the economy confines it to the narrower meaning in which the complex market orders are coordinated to generate a specific end result (1976, vol.2). Hayek defines the term “catallaxy” that describes the system of interrelated economies where separate people with incommensurable ends interact and produce the spontaneous order within the rule of law (1976, vol.2, p.112). Though the economy is comprised of different interests of each individual, it is occasionally necessary to have a particular end for
all to serve the common goal for society. Throughout the history, the human race shared some common values universally in order to keep peace and order in place. This basic necessity for the common good was gradually developed into the pursuit of the greater cause which is believed to improve the society as a whole and the individuals therein. However, it is not easy to find the common ground that will serve every one’s needs. Most ends are pulled in different directions with different aims, and there will never be the optimal solution that satisfies all individuals. Looking back at history, it seemed easier to find a common goal when the circumstances were not favorable to have diverse opinions; Nazi Germany, the Great Depression, and other economic hardships or conflicts of different ideologies were justified for uniform actions without much discussion (1976, vol.2). In fact, these hostile environments were often leveraged as a political maneuver to draw a unanimous agreement among all members of society regardless of whether or not it was a socially just conduct. Hayek was also concerned that the full agreement for a particular end would endanger the advancement of the human mind and the society (1976, vol.2). According to him, if the full agreement and approval for the concrete ends is a necessary condition and if the disagreement is a threat to the society, the lack of dissent and the compulsion to comply with the agreement would prevent the intellectual progress and the advance of the human mind, which is the basis of the civilization since the Greeks (1976, vol.2).

As the society cannot have one single end that is desired by each and everyone in it, the society can agree upon a particular end for a particular group instead. Then how can one evaluate the benefits or shortcomings of the policy that is designed to meet this particular end? The “catallaxy” in the economic sense is thought to evaluate the nominal value of a particular end and the corresponding degree of satisfaction (1976, vol.2, p.114). But again, the demands for goods and services differ per each individual and the relative demands cannot be weighed on the same scale of values (1976, vol.2) This, in turn, implies that the catallaxy as an economy cannot have the rule of law that serves the common ends. Therefore, the aim of the rule of law must be directed towards increasing equal chances for every member of society in absence of the measurement for their values or priorities (1976, vol.2). While the rule of law need not guarantee a maximum results in the nominal value, it must reach out to the unknown members of society and improve their access to opportunities in any circumstances. However, the problem with the present-day politics is that the ruling regime tends to select and apply the rule of law such a way
to comply with the majority opinion, rather than extending its arms to include other minority opinions. If a majority demands a change, the ruling regime will add another rule or modify its existing rule of law toward their needs because it seems to increase the common good and satisfaction in such a way. The agendas of the ruling regime, therefore, end up becoming parochial in scope that only meets the particular ends rather than increasing everyone’s chances of reaching his ends “on the whole and in the long run” (1976, vol.2, p.115).

Additionally, any favorable opportunities for one group could be unfavorable to the other, if they are related or dependent to each other. Those at disadvantage will incur a loss and will try to prevent it by expressing their needs in the policy making process. If they are a majority in the whole population, their short-term loss may be offset by the long run profit from their influence on the rule of law. Hayek argued that the ruling body in any country tends to adopt the rule of law that prefers few small neglected ones, giving privileges to those groups currently at disadvantage with the loss (1976, vol.2). Nonetheless, as the catallaxy explains, the market is “the results of continuous adaptations which are unknown to us”, and because the repercussions of changes are unforeseeable, the end results may or may not serve the specific groups as directed without being able to improve the chances of all (1976, vol.2, p.122). While the reciprocal advantages and disadvantages among different groups evolve around the present-day politics, the relative values of them in the past with regard to the present condition is unknown because an adaptation takes equally and separately to both of them (1976, vol.2). The past conditions are not an indicator of what is appropriate in the present because the other part of the conditions without changes will remain unchanged (1976, vol.2). As a result, the selected rule of law that is directed toward a particular end will produce the ones left behind, and it will need to be modified to include them. On the other hand, this will generate unpredictable outcomes for others as the changes in one area will cause a transformation elsewhere. Without the long-run perspective to fundamentally enhance every member’s opportunity regardless of their association and their ends, the ruling regime’s selection on the rule of law and the demand for a change will fall into a vicious cycle.

A democracy is thought to safeguard individual freedom and control the authority by fully expressing the public opinion. A democratic process is thought to fully enable individual
rights in pursuit of their preferences, which will eventually influence the politician and the ruling government. However, each group with particular goals and actions needs to pass the test of a majority vote in order to effectuate their goals, yet it is challenging to draw an agreement even within the group and remain as the majority among the whole array of different groups with different issues. Likewise, special interests with the strong support could weigh more importance in certain circumstances, although it is inconsistent with the fundamental principles. As Hayek discussed, the democratically elected authority may distort the distribution of benefits from the minority to the majority, as they adjust the rule of law toward the preference of the majority. Since the majority has the stronger influence over the representative body, the general rule of law can be geared toward the private interests if the rule of law is unable to include all member of society. Consequently, between-group competitions are necessary because individual selection and group selection influence each other and shape the society as a whole where the representative government is able to distribute the incentive for competition equally among different groups as opposed to redistribute the end results among them. Nevertheless, the interactions of different rules in competition may require priority between different issues and may generate an undesirable result that is an aggregate opinion of the total population where there is hardly any common ground although the final decision bears the name of the common will in a democratic system. Hayek introduced the idea of “catallaxy” to evaluate the nominal value and the degree of satisfaction of benefits or weaknesses of different ends, but concluded that the demand for different ends cannot be weighed on the same scale of values. The ruling authority’s choice on adjusting the rule of law in accordance with the majority opinion on relative priority and preference will fail to narrow the discrepancy and subsequently limit individual freedom as the market is the unknown results of continuous adaptations. Therefore, the ruling authority must not be selective on applying its rule of law according to their preference. Instead, it needs to apply the rule of law that can reach out to the unknown members of society and enhance their access to opportunities. To ensure that everyone can act freely own his own will without necessarily comply with the majority opinion in order to effectuate their opinions onto the representative body, the ruling regime has to provide an equal opportunity or the fair environment that does not discourage anyone from executing their will based on their own resources in comparison to the others.
Bibliography


