THE RULE OF LAW

Professor Lon Fuller and the rule of law

The writing of Professor Lon Fuller (1964) – who stands in contrast to Raz – may be invoked here in order to develop further this idea. Fuller’s focus is on the ‘morality of law’. For Fuller, the requirements of law, which are substantially the same as those of Raz, lay down the basic minimum requirements, not just of a system in accordance with the rule of law, but for the very existence of a system to which he would accord the label ‘legal’. These basic prerequisites form the ‘morality of duty’ or ‘inner morality of law’. These principles provide the basic foundations of a legal system. To draw an analogy with building construction, failure to lay sound foundations will result in the edifice resting on an insecure and fragile base. In addition to a secure foundation, for a legal system to be worthy of recognition – and to impose the duty of obedience upon its members – it must serve the needs of the people. Law does not exist in a vacuum separate from the society it regulates. Recognition of this vital characteristic of law demands that the legal system be directed towards altruistic, beneficial ends. This is the ‘morality of aspiration’ towards which each valid legal system must strive. Thus, a government must seek to provide the environment in which each citizen may realise to his or her maximum potential the rational plan of life to which he or she aspires. Society must be free and directed to the good of each of its members. Any government which fails in a material degree to meet these requirements may fail to deserve the label of a ‘legal system’.

The important point here is that Fuller is quite prepared to argue that a system of government which contravened the basic requirements of a ‘good’ system of law might be recognised as some form of governmental regime but would not be a government according to law, and hence would not be a ‘legal’ system. In order to deserve recognition as a system of law, the system must respect the very fundamental moral requirements which Fuller identifies.

Professor HLA Hart has argued that even a dictatorial regime with no respect for morality or fundamental rights would be capable of meeting Fuller’s requirements (see Hart, 1958). Fuller disputes this, arguing that an evil regime, such as that of Nazi Germany, sooner or later would be compelled to pass retrospective law or secret laws in order to pursue its evil objectives. Moreover, Fuller argues that there is an additional quality of morality which must be present in a system of law: that the law serves the interests of the people it governs. Thus, the law must be pursuing altruistic moral ends if it is to have recognition. If it is not, then Fuller would have no difficulty in denying that a ‘legal system’ existed at all.

Raz rejects the linkage between the rule of law and morality and claims that Fuller’s thesis fails to establish a necessary connection between law and morals. And yet, for some, the distinction may be a fine one.

Friedrich Von Hayek and the rule of law

A further perspective of the rule of law is provided by Friedrich von Hayek. The Road to Serfdom was written against the background of the Second World War, and expressed von Hayek’s fundamental concern with the prospect of the expansion of the state. This von Hayek opposed, other than at a basic level necessary to guarantee freedom, and von Hayek describes the rule of law in the following manner:

‘...stripped of all technicalities this means that government in all its action is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.’

[1944, p 54]

The idea of a welfare state and the entailed notion of distributive justice which entails the state operating under discretionary rules in order to provide a minimum standard of living was firmly opposed by von Hayek. The rule of law, for von Hayek, should be confined to the provision of clear, certain rules which would enable people to plan their lives in a free society. To require that people should contribute to the less well off in society through a system of graduated taxation, coupled with discretion to determine entitlement and quantum of recipients, violated his perceived ideal state.

Modern expression of many of von Hayek’s ideas is to be found in the writings of Robert Nozick, a clear and forceful advocate of the ‘minimal state’. Nozick rejects any concept of distributive justice. Instead, he argues for
perceptions of justice based on the concept of rights expressed in the name of entitlements. A state of affairs – and hence a state – will be ‘just’ if it respects the principle of entitlement. As Nozick puts it:

> Things come into the world already attached to people having entitlements over them. From the point of view of the historical entitlement conception of justice in holdings, those who start afresh to complete ‘to each according his . . .’ treats objects as if they appeared from nowhere, out of nothing. [1974, p 160]

Justice therefore lies in the recognition of the justice of holdings. If the manner in which property is acquired is lawful, if the manner in which property is transferred is lawful, the society will be just. To deny the justice of this situation – from a Nozickian perspective – and to argue for the forced redistribution of wealth in society, is to defeat the rights of the individual property holder.

### John Rawls’s theory of justice and the rule of law

Opposed to von Hayek and Nozick stands John Rawls, whose *Theory of Justice* provides a detailed exposition of, and justification for, the interventionist state committed to distributive justice. In essence, a society will be ‘just’ if it is organised according to principles established by all its members in the ‘original position’ behind a ‘veil of ignorance’. Suffice to note here that the ‘original position’ and ‘veil of ignorance’ relate to a stage of decision making about constitutional arrangements wherein the participants know nothing of their own personal attributes and wants and little of the society in which they live. They will accordingly choose principles of justice which are not self-interested but based on maximising the position of those persons (of whom the decision maker may turn out to be but one) who are in the least enviable position in society. The principles they will choose will be, first, the priority of liberty for all, subject to the need to redistribute goods in society in order to improve the lot of the ‘worst off’.

The rule of law, according to Rawls, is ‘obviously closely related to liberty’ (1973, p 235). Rawls calls for the ‘regular and impartial administration of public rules’ which is the essence of a just legal system characterised by the ‘legitimate expectations’ of the people. Several requirements must be met: rules of law must only command action which is possible; those who enact laws must do so in good faith; like cases must be treated alike. Echoing Dicey, Rawls states that there is no offence without a law – *nulla poena sine lege* – and this requirement in turn demands that laws be known, that they be general, and that penal laws should not be retroactive to the disadvantage of those to whom they apply. Finally, the legal system must respect the dictates of natural justice.¹

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¹ See, further on this, Chapter 26.