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.

K. Mannheim.

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——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 entrusted are fallible men, the essential point, that the discretion left to the executive organs 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 government 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, 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 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 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 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 behaviour of those with whom they must collaborate, rather than as efforts towards the satisfaction of particular needs.

6. 计划与法治

根据一般的合理性规矩，所有案例判决都须遵循形式法基本原则。该基本原则以逻辑为前提，尽可能无例外。最近法律的社会学研究再一次证实，该基本原则只有在资本主义自由竞争时期才能广泛实施。

卡尔. 曼海姆

观察自由国家被称为法治的伟大原则最能清楚地看出自由国家和强权政府国家境况的差别。抛开所有的技术细节，这意味着政府所有的行为能够为一个明确的、事先公布的规则所制约，这一规则使得人们能够相当确定地预见政府在给定情况下会如何使用其强制权力，进而基于这一知识计划个人事务。因为立法者和执法者都是人，可能犯错，这一理想永远不可能完美地实现，但是基本的一点是显然的，即留给权力强制执行机构自由量裁的权力应该越少越好。每一条法律都通过改变人们用以追求目标的手段在一定程度上限制了个人自由，法治能防止政府采用即兴作为，使个人努力前功尽弃。在已知游戏规则情况下，个体能自由地追求个人目标与愿望，确定不会有人用政府权力来故意刁难。

我们之前已经指出，建立一个永久性法律框架，在其中个人自由决定生产活动，与中央政府指挥经济活动，两者是截然不同的。这实际上是法治与专制政府更一般差别的一个具体例子。在第一种情况下，政府职能局限于确定规则，在何种条件下可以支配资源，至于资源用于何种目的则留给个人决定。在第二种情况下，政府指挥生产资源用于具体目的。第一类规则能够事先确定，以成文规则的形式，不针对具体人的意愿和需求。其用意仅仅是在追求个人不同目标中一些方法性的规则。并且它们针对或应该针对相当长的时期，以致无法事先知道更有利于哪些具体人群。几乎可以说它们是一种生产工具，帮助人们预测合作伙伴的行为，而不是致力于满足具体需要。

[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 there new problems, in the early nineteenth-century discussions in Germany about the nature of the Rechtsstaat.

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 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 are to be reared or how many buses are to be run, which coal mines are to operate, or at what prices boots 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 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.

集体主义那类人的经济计划必然恰恰相反。计划部门不能把自己局限在给未知的普罗大众提供机会，让他们随心所欲。它不能事先让自己束缚于一般的、形式化的、以防专权的规则。它必须服务于人们的实际需求，并且在不同需求之间特意权衡选择。它所面对的问题不能仅根据形式原则来解决，必须不断地具体问题具体决策，为了决策必须在不同人不同需求之间分出孰轻孰重。当政府必须决定要养多少头猪，要跑多少公交车，哪个煤矿要开，或者靴子卖什么价，显然这些问题的答案无法通过形式原则予以推断，或提前相当长时间事先确定。他们无可避免地得取决于当时的情况，并必须在平衡各个人、集团利益的基础上做决定。最终，不得不基于某人的意见，决定谁的利益更重要；这些意见必定作为该国法律的一部分，是政府专政机器强加于人民头上新的等级差别。

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The distinction we have just used between formal law or justice and substantive 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 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 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 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 or particular people, because we just cannot know beforehand by whom and in what way they will be used.

我们刚才谈到的形式法或者说公道与具体法规之间的差别非常重要，但同时在实际运用中最难以精确区分。然而，涉及的普遍原则却够简单。这两类规则的差别就象制定交通规则，例如英国交规，和命令大家往哪里走的差别；或者更象是，设置路标和指挥大家走哪条路的差别。形式规则基于通用条款，事先告诉大家，在何种情况下政府如何作为，而不提及具体的时间、地点或人群。规则涉及的是每一个人都可能遇到的典型情况，在该典型情况下存在这样的规则有利于广大群众追求千差万别的个人目的。了解在那些情况下政府会照章行事或者要求群众照章行事，这些知识是给各人做各自安排的工具。我们可以期望，形式规则当事人身份无从事先知晓，应用场景细节无法事先预料，应用目的由当事人自行决定，在这个意义上，形式规则是方法性的。事实上，不知道规则的具体作用，不知道规则最终导致什么样的具体结果，或者哪些人会受益，规则仅被赋予一个对所有当事人整体上来说最可能有益的形式，这是使用形式规则这个术语最重要的判别准则。正因为我们事先无法知道谁会以何种方式运用这一规则，它不涉及具体人群、具体目标的选择。

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 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.

我们这个时代，热衷于对任何事情都自觉控制，但又认为对政府所作所为造成的具体效果应该了解得越少越好的制度是好制度，不了解确切结果的社会管理方法才是好方法，这看起来很矛盾。然而，事实上，这个思考正是法治的伟大的自由主义原则的合理所在。随着我们进一步探讨，这个明显的悖论很快自然消解。

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This argument is two-fold; 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. 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 neither be foreseen nor taken into account beforehand: and the particular effects of such actions will be unpredictable. 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.

这个说法有两重意思。首先是经济上的，在这里只能简要阐述。政府应该把自己的职能局限在制订适用于通用型情况的规则，允许具体时空环境下所有事情上的个人自由，因为对个例而言，只有相关利益人才能充分了解其环境并采取合适行动。如果个人要能有效地运用知识制订计划，那么他们必须要能够预测到可能影响其计划的政府行为。但是，如果政府行为要可预测，他们必须遵循明确的、与既无法预料也无法事先纳入考虑的具体环境无关的规则，就是说，政府行为的具体效果无法预测。另一方面，如果政府试图指挥个人行为以期达到特定目的，其行为必须基于当前全部的环境信息，因此政府行为必然无法预测。这样，一个常见的事实是，政府"计划"越多，个人计划就变得越难。

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. If we want to create 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 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. But 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 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 law-giver 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 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.

其次是道德上或者政治上的，这与我们讨论的问题更直接相关。如果政府要精确地预见到其行动的发生，那意味着相关的人没有选择的余地。无论何地，如果政府能准确地预见可替代行动方案对于具体人群的作用，那么也就是政府在不同的结果中作选择。如果我们想创造对所有人都敞开的新机会，为大家提供随心所欲的可能，那么确切的结果一定是不能预见的。普遍的规则、真正的法律与特定的命令截然不同，必须拟用于细节无法预见的情况，这样也无法事先知晓对具体个人、结果的作用。仅仅在这个意义上，立法者就完全可能做到不偏不倚。不偏不倚就是意味着对确定的问题——如果一定要答，只能抛个硬币随机决定的那类问题，没有答案。在一个事事都可以精确预见的世界，政府很难做一件事，同时不偏不倚。当政府确知政策对于具体人群的效果，当政府直接瞄准该具体效果，就必然会知道结果，那怎么能公正呢。他必然选边站，把其价值强加于人民头上，为他们选结果，而不是帮助人民去追求他们自己的目标。当法律制订时其具体结果已可以预见，那它已经不再是人民的工具，而是法律"授予"者为其自身目的作用于人民的工具。国家不再是帮助个人充分发展其个性的实用性机构，它成为一个"道德性的"机构——这里道德不是不道德的反义词，而是指一个机构将其对于所有道德问题的观点强加于其成员，这些观点可以是道德或者是高度不道德的。在这个意义上，纳粹或者其他集体主义政府就是"道德性的"，而自由政府不是。

Perhaps it will be said that all this raises no serious problem because in the 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 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 labour in an industry agree 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 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 recognised 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, 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" 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 formula into legislation and jurisdiction, and of the increasing arbitrariness and 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 before Hitler came into power, and that a policy well advanced towards totalitarian planning had already done a great deal of the work which Hitler completed.

There can be no doubt that planning necessarily involves deliberate discrimination 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 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 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.

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也许有人会说这一切不会引起什么严重的问题，因为对这类必须决策的问题，经济计划者既不必要也不应该为个人偏见所左右，可以凭借对公平与合理总的信念。这一论调通常得到在某一具体行业从事过计划工作的人的支持，他们发现达成一个直接利害各方都可以接受的公平的决定并不是难到做不到。这一经验并不能说明什么问题，原因当然是，当计划者局限在某一具体行业，所关心的“利害”是有选择的。大多数特定问题的最直接利害相关人不一定是整个社会利害问题最好的裁判。只举一个最具特色的案例：一个行业的资方和劳工方在限制生产的问题上取得一致意见，剥削消费者利益，通常很容易达成基于资方所得按比例分成、或者类似原则的分赃方案。那些被千千万万消费者分担的损失通常直接被忽略不计或者不够予以重视。如果我们想检验“公平”原则在处理经济计划中出现的那类问题时的作用，我们必须选取那些得与失两方面同等清楚明白的问题。在那些例子中，会很容易认识到，象公平这样的一般性原则并不能解决问题。当我们必须在提高医护工资与为病患提供更多服务中做选择，在为儿童提供更多牛奶与提高农民收入中做选择，在为无业人员提高就业与增加就业人员收入中做选择时，要得到答案，就必须有一个完整的价值系统，在其中每一个人或者集团的每一项需要都有确定的位置。

事实上，当计划越来越广泛，越来越有必要经常地参照“公平”或者“合理”的原则来说明法规的适用性；这意味着针对具体案例越来越有必要让相关法官或者政府部门自行判断作出决定。你可以写一本法治衰落、法治国家消亡史，在立法和司法中逐步引入模糊的定则，逐步增加随意性、不确定性，随即藐视法律和司法，在这样状况下，法律和司法不能不成了政策的工具。于此相关，很重要地再一次指出，在希特勒掌权之前有段时间，德国法治早已稳步衰落；在希特勒手中最后完成的独裁，政策上早已有过大量的铺垫。

毫无疑问，计划对不同人的具体需求必然刻意区别对待，只准州官放火不准百姓点灯。它必然通过法律规则奠定了某些人富某些人穷、不同人允许有、允许做的都不同。这意味着，事实上，转回了人治，逆“社会进步运动”，而用亨利.缅因爵士著名的话说，“社会进步运动是迄今为止从人治到契约的转变”。的确，法治比契约更适合作为人治的反义词。在形式法的意义上，法治不存在权力机构指派给任何个人法律意义上的特权，这确保了法律面前人人平等，对立于霸道的政府。

A necessary, and only apparently paradoxical, result of this is that formal 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 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 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 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 "socialisation 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 important 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 us to predict other people's behaviour 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 realise various ideals of substantive justice and equality on the other, also accounts for the widespread confusion about the concept 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 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 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 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 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.

由此而来一个必然的并且显然矛盾的结果就是，法律面前形式上的平等和政府刻意针对不同人物质上或者实质上的相等的行为是矛盾的、事实上不兼容的。旨在实现分配实质性公平的理想付诸任何政策实施都必然导致对法治的破坏。为了对不同的人产生相同的结果，必须对他们区别对待。给不同的人同样的客观机会不等于给他们同样的主观可能。无可否认，法治产生了经济上的不平等——对此，所有能说的就是，这个不平等不是设计来以特定的方式对待特定的人。非常重要、有特色的是，社会主义者（和纳粹分子）一直反对“仅仅是”形式上的公正，他们反对对具体人群应该多富裕不持任何观点的法律，他们总是要求“法律的社会化”，攻击司法独立，同时支持象“自由权利学派”那种颠覆法治的运动。

甚至可以这样说，要法治起作用，比规则是什么更重要的是，应该有一个普适无例外的规则。如果同样的规则普遍实施，规则的内容往往确实是次要的。回到以前的一个例子：如果大家都遵守，驾驶无论靠左或者靠右都可以。规则最重要的是让大家可以正确预测他人的行为，这要求规则应适用于所有情况——即使在某些特例下，我们觉得它不公正。

一方面是法律面前的形式公正与形式平等，另一方面是尝试实现各种实质上的公正与平等，二者的冲突也导致了“特权”的概念广泛的混淆和随之而来的滥用。仅提一个最重要的滥用的例子：象那将特权一词用于财产。如果，例如象历史上某些时期，地产预留给贵族成员，那倒确实是特权。在我们的时代，如果政府规定生产和销售某些特定的产品的权利仅授予特定的人群，那是特权。但是，大家按照同样的规则竞买地产，只有某些人成功购得，我们把这样的私有产权叫特权，就是剥夺了特权这个词真正的含义。

具体作用不可预测是自由主义制度下形式法的独有特色，这也很重要，因为它帮助我们厘清了另外一个关于制度本质的误解：认为自由主义的典型态度就是政府的不作为。政府该不该“作为”或者“干涉”的问题是一个完全错误的选择题，放任主义这个词是对自由主义政策基本原则高度歧义和误导的一个描述。当然，每个政府必须有所为，政府每一作为干涉这样或那样的事情。但这不是重点。我们要说的重点是，个人能否预见政府的行为，能否利用这一知识作为基准，形成他自己的方案达到以下结果：政府不能控制政府机器的用途；并且个人能够精确地了解他在多大程度能得到保护免于他人干涉，或者政府是否有办法阻扰个人努力。

[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 idea of the *gerechte Staat* (the just state) – only that the sort of justice which is opposed to formal justice necessarily implies discrimination between persons.

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 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 favour or harm particular people. 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 approach the border line where the distinction, however, clear in principle, becomes blurred in practice.

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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 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 as 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 popular sovereignty and democratic government. It has been strengthened by the belief that so long as all actions of the state are duly authorised 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 government are legal in the juridical sense. They may well be and yet not conform to the Rule of Law. The fact that somebody 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 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 powers will no longer be limited and determined by pre-established rules. The law can, and to make a central direction of economic activity possibly must, legalise 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 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].

政府控制度量衡（或者防止其他形式的欺诈、欺骗）肯定是在作为的，而政府允许譬如罢工纠察队使用暴力则是不作为的。在第一个例子政府是遵守自由主义原则，而在第二个则不是。类似地，针对生产，政府可能制订的大多数通用的、长久的规则，譬如建筑规范、工厂法规：对具体实例，它可能合理也可能失策，但只要他们旨在长久，不用来偏袒或者伤害具体的人群，那么就不与自由主义原则冲突。避开长期效果不可预测不谈，这些实例中，确实有可能清楚地了解对于具体人群的短期效果。但这类法律，短期效果总的来说并非（或者至少不应该是）其指引性考量。当短期可预料的效果变得比长期效果更重要时，我们就接近了边界，原则上尽管清清楚楚，实践中却模模糊糊。

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法治只有在自由主义的时代才得到自觉地演化，法治是一个伟大的成就，不仅仅是自由的保障，也是自由的法律体现。正如伊曼努尔.康德这样说（伏尔泰在他之前也说过差不多同样的话）“如果一个人仅需服从法律，无需服从人，那么他是自由的。”然而，自由作为一个朦胧的理想，至少从罗马时代就已经存在，但在过去的几个世纪，它从来没象今天这样受到严重威胁。立法者权力无限的观念，部分是民粹主权和民主政府导致的结果。如下信念又使情况更严重：只要政府所有作为得到立法正当授权，那就是法治。但这是完全误解了法治的含义。法治与政府所作所为是否在司法意义上合法的问题无关。他们很可能合法但并不符合法治精神。有人行为方式完全有合法授权并不能回答一个问题，是否法律授权他为所欲为，或者是否法律明确地规定他必须如何做。很可能，希特勒通过严格合乎宪法的方式获取了他无限的权力，那么他所做的一切都是司法意义上合法的。但有谁会认为，基于这个原因，法治仍然盛行于德国呢？

因此，说计划的社会里法治不存在，并不是说政府的行为不合法或者那样的社会必然没有法律。它仅仅意味着政府强权不再有限制，不再为事先制订的规则所约束。法律能够，为了实现中央指挥经济活动也许必须，合法化无论出于何种目的或意图都是独裁的行为。如果法律说部门或政府可以为所欲为，那么部门或政府做的任何事情都是合法的——但是他的行为肯定不符合法治精神。通过给予政府无限的权力，最独裁的规则都能被合法化：通过这样的方式，民主可以建立起一个能想到的最彻底的独裁国家。

[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 before hand, 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".

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 is that as planning extends, the delegation of legislative powers to divers 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 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 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. A particular enactment can thus infringe the Rule of Law. Anyone ready to deny this would have to contend that whether the Rule of Law prevails today in Germany, Italy, or Russia, depends on whether the dictators have obtained their absolute power by constitutional means4.

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不管怎样，如果法律允许政府指挥经济生活，它必须给予政府在各种不可预见、原则上无法以通用形式陈述的情况下做决定并强制实施的权力。后果就是，当计划应用越广，立法权被授与各部门或政府也越普遍。一战前有个个案，已故的霍华德勋爵最近引起了大家的关注，法官达林先生说“议会去年才立法，代理农委应该和议会一样不受弹劾”，这在当时尚属罕见。到今天这就几乎变成了每天都在发生的事。广泛的权力源源不断地授予给了新的政府部门，他们不受固定规则的约束，在监管群众这样那样的活动时几乎具备有了无限的自行量裁权。

法治因此意味着限制立法的范围：把立法局限在通则，也就是形式法，排除在外若或直接针对具体人群、若或授权他人使用政府强制权达到人分九等目的的立法。这表示，不是一切都要法律来规范；但，对政府的强权，正好相反，只有在法律事先定义的情况下、并以可以预见的方式才能得以使用。一项特定的法规因此也可能违反法治精神。任何人准备否认这一点，恐怕得力挑以下观点：今天的德国、意大利或俄罗斯法治是否盛行，取决于独裁者是否已经通过宪法途径获取了绝对的权力。

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[4] Another illustration of an infringement of the Rule of Law by legislation is the case of the bill of attainder, familiar in the history of this country. The form which the Rule of Law takes in criminal law is usually expressed by the Latin *tag nulla poena sine lege*-no punishment without a law expressly prescribing it. The essence of this rule is that the law must have existed as a general rule before the individual case arose to which it is to be applied. Nobody would argue that, when in a famous case in Henry VIII's reign Parliament resolved with respect to the Bishop of Rochester's cook "that the said Richard Rose shall be boiled to death without having the advantage of his clergy", this act was performed under the Rule of Law. But while the Rule of Law had become an essential part of criminal procedure in all liberal countries, it cannot be preserved in totalitarian regimes. There, as E. B. Ashton has well expressed it, the liberal maxim is replaced by the principles *nullum crimen sine poena*-no "crime" must remain without punishment, whether the law explicitly provides for it or not. "The rights of the state do not end with punishing law breakers. The community is entitled to whatever may seem necessary to the protection of its interests-of which observance of the law, as it stands, is only one of the more elementary requirements" (E. B. Ashton, The Fascist, His State and Mind, 193 7, p. 11 9). What is an infringement of "the interests of the community" is, of course, decided by the authorities.

Whether as in some countries, the main applications of the Rule of Law are laid down in a Bill of Rights or a Constitutional Code, or whether the principle is merely a firmly established tradition, matters comparatively little. But it will readily be seen that whatever form it takes, any such recognised limitations of the powers of legislation imply the recognition of the inalienable right of the individual, rights of man.

It is pathetic, but characteristic of the muddle into which many of our intellectuals have been led by the conflicting ideals in which they believe, that a leading advocate of the most comprehensive central planning like Mr. H. G. Wells should at the same time write an ardent defence of the Rights of Man. The individual rights which Mr. Wells hopes to preserve would inevitably obstruct the planning which he desires. To some extent he seems to realise the dilemma, and we find therefore the provisions of his proposed "Declaration of the Rights of Man" so hedged about with qualifications that they lose all significance. While, for instance, his Declaration proclaims that every man "shall have the right to buy and sell without any discriminatory restrictions anything which may be lawfully bought and sold", which is admirable, he immediately proceeds to make the whole provision nugatory by adding that it applies only to buying and selling "in such quantities and with such reservations as are compatible with the common welfare". But since, of course, all restrictions ever imposed upon buying or selling anything are supposed to be necessary in the interest of the "common welfare", there is really no restriction which this clause effectively prevents, and no right of the individual that is safeguarded by it. Or, to take another basic clause, the Declaration states that every man "may engage in any lawful occupation" and that "he is entitled to paid employment and to a free choice whenever there is any variety of employment open to him". It is not stated, however, who is to decide whether a particular employment is "open" to a particular person, and the added provision that "he may suggest employment for himself and have his claim publicly considered, accepted or dismissed" shows that Mr. Wells is thinking in terms of an authority which decides whether a man is "entitled" to a particular position——which certainly means the opposite of free choice of occupation. And how in a planned world "freedom of travel and migration" is to be secured when not only the means of communication and currencies are controlled, but also the location of industries planned, or how the freedom of the press is to be safeguarded when the supply of paper and all the channels of distribution are controlled by the planning authority, are questions to which Mr. Wells provides as little answer as any other planner.

In this respect much more consistency is shown by the more numerous reformers who, ever since the beginning of the socialist movement, have attacked the "metaphysical" idea of individual rights and insisted that in a rationally ordered world there will be no individual rights but only individual duties. This, indeed, has become the much more common attitude of our so called progressives, and few things are more certain to expose one to the reproach of being a reactionary than if one protests against a measure on the grounds that it is a violation of the rights of the individual. Even a liberal paper like The Economist was a few years ago holding up to us the example of the French, of all people, who had learnt the lesson:

如在某些国家，法治的主要应用无论是写在权利法案或宪法条文里，还是法治原则仅是一个牢牢建立的传统，关系不大。但是，我们很容易看到，无论它采取一种什么样的形式，任何对立法权的公认限制都意味着对个人权利不可剥夺，人权不可侵犯的承认。

赫伯特.乔治.威尔斯这样一个倡导最全面中央集权的人居然大张旗鼓地为人权法案写文辩护，真是悲哀，但，这是知识分子被他们所相信的一些自相矛盾的理想主义牵着鼻子犯糊涂的特色。威尔斯希望保留的个人权利将不可避免地阻碍他想要的计划。在一定程度上，他好像意识到了这个两难困境，我们因此发现他所建议的“人权宣言”的条款附带了很多条件，左支右绌，完全失去了意义。譬如他的宣言声称每一个人“应该有权买卖任何可以合法被买卖的东西，不得受任何歧视性限制”，这很好，他随即加上一条，这仅应用于买卖“一定数量，得有所保留而不致于影响公共福利”，这使得整个条款成为一句空话。当然，所有加之于买卖的限制都会假定是维护“公共福利”所必须的，因此这个条款真地不能有效地排除任何限制，个人的权利完全没有得到它的保护。又比如另一个基本条款，宣言声称，每一个人可以“从事任何合法的职业，有权获取报酬、有权自由选择对他敞开的各种就业机会”。但它没有说明，谁来决定哪个具体的就业机会是否对哪个具体的个人“开放”。并且增加条款称，“他可以自荐，并请求公开考虑、接受或拒绝”。这一点就说明，威尔斯脑子想的是政府部门，它来决定这个人是不是有权获取某个职位——这肯定与自由选择职业背道而驰。并且，在一个计划的世界里，不仅仅通信手段、货币流通被控制，连工业区位置都被规划，“人口流动和迁徙的自由”怎么能确保；纸张的供给、所有分销渠道都被计划部门控制，出版的自由怎么能保护，这些问题威尔斯跟其他任何计划者一样，都没有给出什么答案。

在这个方面，更多的改革派倒是表现得一致得多。他们，甚至从社会主义运动开始，就批判个人权利的“抽象”说法，坚持认为在一个合理有序的世界里没有个人权利只有个人义务。确实，这成为所谓进步分子普遍得多的共同态度。如果一个人对某项措施基于侵犯个人权利的理由来进行抗议，非常肯定，马上会招致非难，被称为反动。即使如《经济学人》这样的自由派刊物几年前也给了我们有如下法国人、所有人都吸取了教训的例子：

that democratic government no less than dictatorship must always [sic] have plenary powers in posse, without sacrificing their democratic and representative character. There is no restrictive penumbra of individual rights that can never be touched by government in administrative matters whatever the circumstances. There is no limit to the power of ruling which can and should be taken by a government freely chosen by the people and can be fully and openly criticised by an opposition.

This may be inevitable in wartime when, of course, even free and open criticism is necessarily restricted. But the "always" in the statement quoted does not suggest that The Economist regards it as a regrettable wartime necessity. Yet as a permanent institution this view is certainly incompatible with the preservation of the Rule of Law, and it leads straight to the totalitarian state. It is, however, the view which all those who want the government to direct economic life must hold.

How even a formal recognition of individual rights, or of the equal rights of minorities, loses all significance in a state which embarks on a complete control of economic life, has been amply demonstrated by the experience of the various Central European countries. It has been shown there that it is possible to pursue a policy of ruthless discrimination against national minorities by the use of recognised instruments of economic policy, without ever infringing the letter of the statutory protection of minority rights. This oppression by means of economic policy was greatly facilitated by the fact that particular industries or activities were largely in the hands of a national minority so that many a measure aimed ostensibly against an industry or class was in fact aimed at a national minority. But the almost boundless possibilities for a policy of discrimination and oppression provided by such apparently innocuous principles as "government control of the development of industries" have been amply demonstrated to all those desirous of seeing how the political consequences of planning appear in practice.

民主政府在不牺牲其民主性、代表性特征的前提下，必须一直【原文如此】拥有跟独裁政府一样绝对的权利。无论何种情况下，在个人权利领域里，没有任何不能为政府行政行为所触及的禁区。对于人民自由选出的、能为反对党全面公开批评的政府，它能够拥有并且应该拥有无限的统治权。

这在战时可能无法避免，当然，那种时候甚至是自由、公开的批评也有必要加以限制。但是引文中“一直”一词表明《经济学人》并不认为必须是令人遗憾的战时。然而，作为永久的制度，这一观点肯定与维护法治不相容，直接导致专制国家。不管如何，它是所有希望政府来指挥经济生活的人必持的观点。

中欧几国的经验充分表明，对个人权利、或者少数族裔的平等权利的正式承认是怎样在一个对经济生活实施完全控制的国家名存实亡的。我们在那里看到，完全可能通过使用经济政策认可的手段推行针对少数族裔无情歧视的政策，这些经济手段并不违背对少数族裔权利法定保护的文本。某些特定的行业或者特定的经济活动很大一部分在某一少数族裔手中，这一情况方便了采用经济政策手段对少数族裔进行压迫，使得很多表面上针对一个行业或者阶层的措施实际上瞄准了少数族裔。这一切向那些想要了解实践中计划带来怎样政治后果的人充分地表明，象“政府调控产业发展”这种表面上无害的原则能为歧视、压迫的政策提供几乎无限的可能。