



Hayek Reader: Liberty and Rule of Law

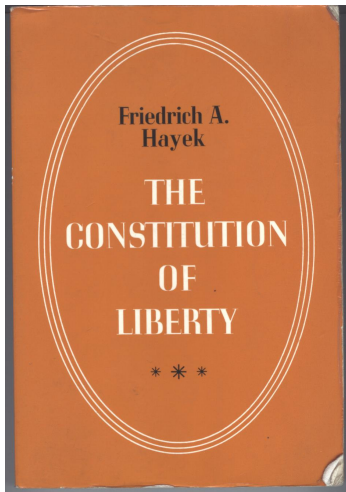
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June 20, 2008

I. Introduction

My first encounter with Friedrich A. Hayek's writings was a condensed version of his book, "The Road to Serfdom". That was in April 2004 when I got an international fellowship by the Atlas Economic Research Foundation (www.atlasusa.org) in the US and they gave me that pamphlet among my readings. After reading the booklet, I thought that book was "just fine" for readers to be reminded of the dangers of socialism where the state has all the power to forcibly socialize and collectivize various facets of human lives, including collectivizing people's income, savings and liberty.

This all changed when I got hold of Hayek's "The Constitution of Liberty" (1960, University of Chicago Press). I was "forced" to read many chapters of that book when Atlas organized the 2nd Asian Resource Bank meeting in Phuket, Thailand, in September 2005, where I was one of the 20+ participants. Our task was to read and discuss that book and reflect Hayek's writings on our respective national and regional experience.

I have to admit that reading that book was very difficult for me initially. My academic training in the university, undergrad and graduate, was Economics. And my work for 2 decades after my undergrad was mainly economic research and policy writing. I very seldom read political philosophy for a decade or more. So when I began reading Chapter 1 alone, I literally fell off my chair. If Hayek was discussing about supply-demand, marginal cost and marginal returns, or the politics of monetary policy and international trade, fine, not much sweat with me. But the man talked about "liberty and liberties,... while the uses of liberty are many, liberty is one." I wondered, hey man, what was that?



(The book and the author)

To record my thoughts and reflections of the book, chapter by chapter, I created a separate blog on this book alone. It's <http://hayekreader.blogspot.com>.

After going through a few chapters, I began to realize and appreciate why Hayek was recognized as the intellectual leader of many classical liberal or libertarian thinkers, even by those who simply consider themselves as believers of the free market and limited or minimal government.

The foregoing are 3 of my latest discussions, slightly revised from the original post in the said blog. It started with Chapter 7, I did not include here my notes on earlier chapters because they were too raw and would require longer time to revise and update. But I should do it in the future, should I decide to pursue writing a book later.

II. Dangers of majority rule

This is Chapter 7 of the book, entitled "Majority Rule".

The "rule of the majority" is often considered a good thing. That democracy is good for society. Unfortunately, Dr. Hayek said in this chapter, "Not necessarily". He started the chapter with a discussion about the difference between liberalism and democracy. He wrote,

"Liberalism (in the European 19th century meaning of the word) is concerned mainly with limiting the coercive powers of all government, whether democratic or

not, whereas the dogmatic democrat knows only one limit to government -- current majority opinion... Liberalism regards it as desirable that only what the majority accepts should in fact be law, but it does not believe that this is therefore necessarily good law.

"To him (doctrinaire democrat), majority rule is unlimited and unlimitable. The ideal of democracy, originally intended to prevent all arbitrary power, thus becomes the justification for a new arbitrary power... demagogues began to argue that since the power was now in the hands of the people, there was no longer any need for limiting that power."

This is a very powerful warning. Not because the majority wants something, they are considered right and the things they demand will be sustainable over the long-term. Consider a situation where the majority wants all forms of subsidies to make their lives "humane": free education until tertiary level, free health care and hospitalization, free or highly-subsidized nutrition and food allowance, housing, public transportation, communication, recreation and travel, and so on. Then those wants for various subsidies are enacted into laws and subsequently implemented.

We will possibly have a society that encourages large families and irresponsible parents as almost everything that their families need have been transformed from "parental responsibility" to "social and government responsibility". And woe unto the productive and hard-working sectors of society who carry the full burden of high taxation to finance those subsidies. Pretty soon the ambitious and hard-working ones will either become lazy too, or migrate to other lands where personal responsibility is more treasured than "collective" responsibility.

Hayek also noted that "the conception that government should be guided by majority opinion makes sense only if that opinion is independent of government... the case for democracy and the case for freedom of speech and discussion are inseparable."

This is to give allowance for various ideas and opinions, some of which may be dissenting to the majority opinion and government bureaucracy. To give allowance to spontaneous and independent views that run counter to the desires of the majority. Why is this leeway and allowance necessary?

Because according to Hayek, "Advance consists in the few convincing the many. New views must appear somewhere before they can become majority views. There is no experience of society which is not first the experience of a few individuals... It is because we normally do not know who knows best that we leave the decision to a process we do not control. But it is always from a minority acting in ways different from what the majority would describe that the majority in

the end learns to do better... The imposition of the will of the majority's coercive, monopolistic, and exclusive character destroys the self-correcting forces which bring it about in a free society that mistaken efforts will be abandoned and the successful ones prevail."

So, what is now majority opinion was minority opinion in the past. Its evolution from being a "distant" idea many years ago to "contemporary" idea of the current decades should have been a tumultuous one. Or conversely, certain minority opinions in the past have not achieved the majority opinions of the present yet. Either way, the main and common reason/s for them are the various layers of dogmas and taboos in society -- political, philosophical, religious, cultural, sub-cultural -- that inhibit the early emergence of a superior idea. It is not easy to disregard those dogmas because there are stiff penalties, from minor to fatal ones, that correspond to non-obedience to those dogmas.

And why is it so? Because ideas are non-material, unlike chairs, houses, cars and other material things. Ideas are by nature, revolutionary and evolutionary, and they spread through the minds, the written words, and policies of various institutions, both voluntary and involuntary (ie, government).

Hayek continued with this explicit observation: "A phenomenon which is now familiar to us is that of governments which start out with the proud claim that they will deliberately control all affairs and soon find themselves beset at each step by the necessities created by their former actions."

Yes, the root of all government interventions is government intervention itself. A temporary lack of supply of a certain commodity due to various reasons (natural disaster, change in tastes and preferences of consumers, technological modernization, etc.) is declared as "market failure" by government, and it proceeded with creating a regulatory body that will intervene whenever supply substantially increases or decreases, or the same changes in the demand side. Such continued and endless intervention and regulation slows down adjustment of supply and demand dynamism, and it often creates an army of corrupt administrators and bureaucrats who require that their signatures and approval be secured first by producers and consumers before both sides can engage in voluntary exchange and trade.

Later on, government has to create various oversight and anti-corruption bodies and in the process, appropriate more funds (and create new taxes to finance these new expenditures) to hire more bureaucrats, maintain new offices, to find out how much money have been wasted or stolen already, to see how much distortions in the economy and society have been created already. One oversight body's findings (say from Congress) can be contradicted by another oversight body (say from the Executive branch or from a constitution-created body), and

the spiral of confusion and interventions continue endlessly.

Intellectuals (academics, think tank and media leaders, among others) have the burden of dissociating themselves from the grinds of daily realities, according to Hayek. They need to step back and generalize, to gather those pieces of facts and form an abstraction out of those details and material realities. He wrote,

"The influence of the abstract thinker on the masses operate only indirectly... The influence of the political philosopher may be negligible. But when his ideas have become common property, through the work of historians and publicists, teachers and writers, and intellectuals generally, they effectively guide developments... Changes in political and social beliefs filter slowly downward from the top of a pyramid, where the higher levels represent greater generality and abstraction and not necessarily greater wisdom. As ideas spread downward, they also change their character."

So, how should political philosophers and intellectuals respond to majority opinions? Again, Hayek made this rather discomfoting advice: "If opinion is to advance, the theorist who offers guidance must not regard himself as bound by majority opinion. The task of the political philosopher is different from that of the expert servant who carries out the will of the majority... he will often serve democracy best by opposing the will of the majority."

Among political philosophers and intellectuals themselves, they are divided between the majority-rule and the minority-innovator philosophy. On the issue of whether governments should retain (if not increase) or decrease their current level of intervention, subsidies and taxation, I think majority of intellectuals are on the idea of retaining such intervention. For instance, many of them are working as consultants and staff of various government (national and local) and foreign aid institutions, and one will hardly find them advocating drastic tax cuts and subsidy cuts.

Are the laws as embodiment of majority opinion, and administrators or implementers of those laws, one and the same? That is, the laws will apply to both the governed and administered, and governors and administrators? And the latter will not mess around with the laws entrusted to them by the majority to be implemented properly? Unfortunately, the answer is No. See Hayek's observation:

"The individual has little reason to fear any general laws which the majority may pass, but he has much reason to fear the rulers it may put over him to implement its directions. It is not the power which democratic assemblies can effectively wield but the powers which they hand over to the administrators charged with the achievement of particular goals that constitute the danger to individual freedom

today... The most enthusiastic supporters of such unlimited powers of the majority are often those very administrators who know best that, once such powers are assumed, it will be they and not the majority who will in fact exercise them."

Finally, the man concluded the chapter with a definition of "limited government", as well as the limits of democracy. He wrote:

"Democracy will remain effective only so long as government in its coercive actions confines itself to tasks that can be carried out democratically... Though democracy is probably the best form of limited government, it becomes an absurdity if it turns into unlimited government. Those who profess that democracy is all-competent and support all that the majority wants at any given moment are working for its fall."

III. Rule of law means No Exception

Chapter 10, "Law, Commands and Order".

The chapter opened with this quote:

"A sphere belonging to each individual is determined, not by the demarcation of a concrete boundary, but by the observation of a rule – a rule that is not known as such by the individual but that is honored in action."

One of the key concepts when people discuss individual liberty, political democracy and economic freedom, is law. And too often, law is regarded as anything that comes out of the legislative mill, anything that is crafted by the law-creating body in specific milieu of a given society. Some laws complement, some contradict, previous laws. And some laws are created or enacted even if there are no accompanying mechanisms like budgetary appropriation (often called "unfunded laws"). Nonetheless, they are all called "laws". Hayek says this is wrong. For him,

"Law in its ideal form might be described as a 'once-and-for-all' command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time.... "By 'law' we mean the general rules that apply equally to everybody... As a true law should not name any particulars, so it should especially not single out any specific persons or group of persons."

This is a very straightforward and clear definition of “law” – that it applies equally to everybody, no particulars or group of persons ever targeted or mentioned. Thus, the law/s against killing any person and stealing any private property is true “law” in the Hayekian sense. While laws on income tax is not, because people who work for foreign governments and multilateral or foreign institutions, among others, are exempted from paying income tax. So that what we normally refer to as “laws”, are actually “commands”. According to Hayek,

“Difference between laws and commands... command determines uniquely the action to be performed and leaves those to whom it is addressed no chance to use their own knowledge or follow their own predilections. Law, on the other hand, provides merely additional information to be taken into account in the decision of the actor.”

One wonders sometimes and asks this question, “What do you call those thousands of rules we have, from traffic rules to laws enacted in the village, county, municipal, city, provincial, state, federal, national, international, levels?” The answer is that majority of them are commands, not laws. Because they specify the things that people should do, or not do, as well as the corresponding fines and penalties to be applied when caught violating those commands. In addition, by virtue of the strict “laws = no exception” rule, it follows that laws should be few, not numbering in thousands, because it will be impossible for the “law enforcers” not only to remember all those thousands of laws, but also not to grant exceptions to some violators who also are not aware of the thousands of laws in existence, or willingly violate certain rules because they know that “law enforcers” are busy remembering and enforcing the laws elsewhere. Hayek added,

“When we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and are therefore free... Because the rule is laid down in ignorance of the particular case and no man’s will decides the coercion use to enforce it, the law is not arbitrary.

“Even general, abstract rules, equally applicable to all, may possibly constitute restrictions on liberty. But this is unlikely. The chief safeguard is that the rules must apply to those who lay them down and those who apply—that is, to the government as well as the governed – and that nobody has the power to grant exceptions.”

This, I guess, is the heart and soul of the rule of law: the law applies to the government and the governed, no one is exempted and no one has the power to grant exceptions. The abstractness and all-encompassing applicability of these general rules assure their liberating aspect, their capacity to protect the freedom of everyone who respects those rules, and their capacity to punish anyone who

disobeys those rules. This is possible only because, as explained by Hayek, the laws were designed with no particular case, no particular time, and no particular group of persons, are targeted to be the object of restrictions. Any exception to the rule of law immediately becomes “rule of men”, by people who blatantly violate the rules, or those who designed the rules that explicitly exempt themselves from the restrictions imposed by those rules.

Those hundreds of traffic rules, for instance, that say “no left turn”, “no U-turn”, “no counter-flow”, “no parking”, and so on, when the traffic enforcers perfectly know that there are people who will be exempted – from top politicians, top police and military officials, other economic and political leaders of society – are commands, not laws. Those traffic rules are not expected to be followed by everyone. Traffic congestion is a social and engineering problem which has social and engineering solutions. For instance, if building a U-turn slot on an existing road is dangerous for motorists, an elevated U-turn road is one solution. If allowing left-turn on a busy intersection will cause more traffic congestion and more risks to crossing pedestrians, an elevated or underground left-turn slot is one solution. If allowing parking on the shoulder of a road will still cause traffic, then facilitating and encouraging the construction (especially by private entities) of a sprawling or multi-level parking building nearby is one solution. The point is to build infrastructures that will create the minimum, if not zero, prohibitions and restrictions in traffic flow, so that no one, especially those in government, will be tempted to break and violate those prohibitions.

On the Legislature or Parliament, Hayek’s words on this are the following:

“The ‘law’ that is a specific command, an order that is called a ‘law’ merely because it emanates from the legislative body, is the chief instrument of oppression. The confusion of these two conceptions of law (general rules vs. legislative law) and the loss of the belief that laws can rule, that men in laying down and enforcing laws in the former sense are not enforcing their will, are among the chief causes of the decline of liberty.”

I find this statement controversial because Hayek called Legislative command as the “chief instrument of oppression.” I have always thought that the chief instrument of oppression are rules made by dictators, by gangs and political parties that rose to power and retain such power by armed means, who make no hesitation in arresting or killing those who want to disobey their rules. Maybe Hayek was referring here to a Legislature or Parliament that derives its mandate not from popular vote, but from appointment by dictators and/or armed gangs and political parties.

But like the above discussion on hundreds of traffic rules, even a Legislature that derives its mandate from popular vote or direct vote by the citizens, can indeed be a “chief instrument of oppression.” When such legislature through the years

has created thousands of laws, then the citizens will find themselves swamped with thousands of commands – whether as new restrictions or new subsidies and entitlements to certain groups of people -- that also require plenty of taxes, charges and fees so that those laws will be funded and implemented. Because the “rule of law” requires that the laws should be as few as possible, so that they can be easily appreciated, understood and respected by all, from private citizens to government “law enforcers”.

This interpretation is supported by Hayek’s succeeding statements. He wrote,

“If ‘to rule’ means to make men obey another’s will, government has no such power to rule in a free society. The citizen as citizen cannot be ruled in this sense... He can be ruled, however, in the sense in which “to rule” means the enforcement of general rules, laid down irrespective of the particular case and equally applicable to all. For here no human decision will be required in the great majority of cases to which the rules apply; and even when a court has to determine how the general rules may be applied to a particular case, it is the implications of the whole system of accepted rules that decide, not the will of the court.”

This statement by Hayek has serious implication: that government can make “rules” that will make people subservient to someone else, only in unfree society. And since laws – whether enacted by popularly-elected or dictators-appointed legislators -- tend to be more of commands, not general rules, then it is imperative that any government, if it is serious in maximizing the freedom of the citizens, must make as few laws as possible. Aside from its philosophical and moral virtue, less laws (and less legislators) also has fiscal and financial wisdom in the face of “pork barrel” practices by many legislatures around the world.

In discussing commands and laws, Hayek has touched on what could be the essence of the “role of government” in society. He wrote,

“The main features of all somewhat more advanced legal orders are similar to appear as mere elaborations of what David Hume called the ‘three fundamental laws of nature, *that of the stability of possession, of transference by consent, and of the performance of promises.*’

Hume here is referring to (a) right to private property, (b) right to exchange or dispose such property, and (c) respect of contract. Many classical liberal thinkers also wrote along this line. And Hayek said that the legal infrastructure of more modern societies are derived from these “fundamental laws of nature”. We can extend the logic to say that a government’s right to exist is justified only if it can assure the citizens of their 3 fundamental rights. Plus the government’s duty to protect the citizen’s right to life from aggressors.

Hayek also wrote something similar to Adam Smith's "invisible hand". When people pursue their self-interest for self-preservation, if not to become rich and affluent, so long as they do not harm other people, they are guided by an "invisible hand" to produce goods and services that are needed by other people, so that human welfare is spontaneously assured and expanded. He wrote,

"One of the achievements of economic theory has been to explain how such a mutual adjustment of the spontaneous activities of individuals is brought about by the market, provided that there is a known delimitation of the sphere of control of each individual."

And finally, Hayek believed that humanity is capable of "spontaneous order in society" even without the guiding hand of the state. This is similar to the above discussion. Here he quoted M. Polanyi:

"M. Polanyi has called the spontaneous formation of a 'polycentric order: When order is achieved among human beings by allowing them to interact with each other on their own initiative – subject only to the laws which uniformly apply to all of them – we have a system of spontaneous order in society... The actions of such individuals are said to be free, for they are not determined by any specific command, whether of a superior or a public authority; the compulsion to which they are subject is impersonal and general. (M. Polanyi, *The Logic of Liberty* (London 1951, p. 159)"

It is indeed very ironic that humanity around the world has been guided – or misguided -- to believe that spontaneous order among people is impossible. That we need governments, local, national, and supra-national, to ensure social order. Farther from the truth. More often than not, governments are the chief cause of complaint and discontent by citizens around the world from many countries. The breakdown of the rule of law and subsequent dominance of commands, the failure of having few but general rules that apply to everyone, and the exemptions of many of those who are in government from the various commands that they themselves have enacted and implemented, are the chief causes of citizen discontent.

IV. Safeguards of individual liberty

Chapter 14, "The Safeguards of Individual Liberty".

After defining in earlier chapters the concepts of liberty, equality, rule of law and what constitutes them, it is apt to discuss what will safeguard them. Hence, the importance of this chapter.

Hayek wrote that the law of liberty possesses certain attributes:

“First, the rule of law means that government must never coerce an individual except the enforcement of a known rule. The rule of law is more than constitutionalism: it requires that all laws conform to certain principles... The rule of law restricts government only in its coercive activities.... The chief means of coercion at the disposal of government is punishment.”

To better understand this and the succeeding quotes from Hayek, let us review how the man defined the following concepts:

Liberty means absence of coercion.

Freedom is inseparable from responsibility; fear of responsibility is fear of freedom itself.

Equality before the law; equal treatment of the law to unequal people.

Rule of law means no exception.

Governments usually create thousands of rules, from laws against murder and stealing to traffic laws against left-turn and U-turn on certain streets, laws on what days and hours one can drive his/her car, rules and guidelines how to repair one's house or how to treat dogs and cats. Plus rules on how much taxes to pay for this and that income, taxes and fees for ownership of a house, land and car; fees to get a business permit, marriage and birth/death certificate, police clearance, driver's license, passport, and so on.

When there are 10,000+ or 100,000+ different rules and regulations, and if governments are to strictly follow a rule of law where there is not a single exception, where both governors and the governed should follow all those rules, society can be paralyzed, it can decay and only those who have the political and armed muscles will be free to do what they want.

It is to be assumed therefore, that when governments, through their multilateral, national and local legislative bodies, create thousands of different rules, many of these laws are meant to be disregarded by those who have the power and authority to exempt themselves from those laws: government officials, bureaucrats, their families and friends. And the laws are to be implemented only to those who do not belong to the former. This is because it is impossible for ordinary citizens to know and understand even five percent of those thousands of laws and the corresponding fines and penalties for their violation.

This observation is consistent with Hayek's definition of the limit of legislative action. He wrote,

“Not every enactment of the legislative authority is a law...only a very small proportion are substantive 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.”

For rule of law to be safeguarded, based on Hayek’s first attribute of liberty mentioned above, one precondition is that the number of laws that governments through their respective legislative bodies should make and implement should be as few as possible, and for these very few rules to be known to as many people as possible. Because the state will be prohibited from coercing any individual in obeying certain rules that the individual does not even know exists. The state can only enforce laws that are so general and easily understandable to everyone to make the rule of law effective and individual liberty safely guarded.

The **second** chief attribute of true law, according to Hayek, is that the “the laws are known and certain... 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.”

When there is rule of law – the existence of very few laws that apply to everyone, no exception – citizen obedience is expected. When there is fear that punishment is certain once one is caught to be violating those very few rules – like laws against murder and stealing – people will feel safe, they become productive, and there will be little or no necessity to short-cut or break laws, say to improve one’s material and economic well-being.

There will be little need for lawyers too, and courts and judges. Society’s energy will be channeled from many unproductive activities and services, towards building and creating many things that people need or still being dreamed of as “futuristic” if not impossible.

The **third** requirement of true law, according to Hayek, is equality.

“That any law should apply equally to all. General and equal laws provide the most effective protection against infringement of individual liberty. 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.”

One big and never-ending problem in many developing countries is corruption and large-scale robbery in government. The selective application of the law against stealing causes this malady. The probability of being caught and imprisoned for stealing is very low while the benefits of stealing and plunder is very high.

Corruption involves not only stealing and plunder of tax money. It also involves creating many laws and prohibitions that are meant to be broken in exchange for bribes. Hence, the more prohibitions to be enacted, the more bribes and special favors to be expected. There is no stealing of tax money in violation of laws against illegal drugs, prostitution and human trafficking that is committed. But these crimes continue both in poor and rich countries because the implementers look the other way once bribes and favors, material or non-material, are given. That is why the existence of too many laws and prohibitions makes a mockery of the rule of law, and the perverse institutionalization of rule of men is created. And these are the conditions by which abuse and disrespect of individual freedom is sown and grown.

Where now lies the protection of private property and citizen privacy and how should they be safeguarded? Hayek wrote,

“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.... 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 the rules which are equally applicable to all.”

This would somehow explain why poverty remains widespread in many societies. Disrespect for social outcome where there is prosperity for the hard workers and misery for the lazy, by forcing social equality or attempting to “narrow the gap” between the rich and poor through various income redistribution schemes has often resulted in more personal irresponsibility. When there is irresponsibility, there is poverty.

One policy by some governments that discourage economic efficiency is land or agrarian reform, where some big and medium-sized landholdings are being forcibly taken by the state, then subdivided and distributed to farm workers. For societies with high entrepreneurial spirit among the people, this policy has worked well. For countries with weak entrepreneurial spirit among their people, the result is bad. Some efficient corporate farms with economies of scale and employ scientific and modern technologies in farming and post-harvest processes are either being discouraged to enter the agri-business sector, or already there but discouraged to pour in additional investments due to the constant threat of land parceling and redistribution by the state. And many farm workers who became beneficiaries of land redistribution were either too poor to invest in modern farming that drastically improves farm output and productivity,

or sometimes too rich to splurge in big parties after selling the land that was just handed over to them.

The treatment by the state that all lands, even those privately-titled lands, are its own and it can interfere into the ownership and utilization of those lands, especially by landowners who are deemed “not friendly” to the politicians and officials of the incumbent government, shows the absence of freedom by some citizens. It betrays the expropriatory tendency or character of the state.

And speaking of expropriation, Hayek has this observation:

“The principle of ‘no expropriation without just compensation’ has always been recognized wherever the rule of law has prevailed. It is, however, not recognized that this is an integral and indispensable element of the principle of the supremacy of the law... Compensation should be fixed as high as possible without opening the door to outright abuse. This means the public gain must clearly and substantially exceed the loss if an exception to the normal rule is to be allowed.”

Land expropriation practices by the state, whether for land reform or to build a new expressway or expand an existing one, or any other infrastructure or administrative projects should indeed be tempered by “compensation as high as possible” principle. This is because land valuation by the state is often very arbitrary and tend to undervalue the real price of the land, and on the premise that the landowner is open to selling the land to the state. Valuation by private buyers who are competing with each other on the other hand, tend to reflect the market value of the land.

The sphere of the individual should be as wide as possible, and the sphere of the state to intervene should be as limited and narrow as possible. The narrowness of the public sphere is clearly delineated by the rule of law principle: the state should enact and enforce only few and general rules that apply equally to everyone, state leaders and administrators included.