The Myth of the Rule of Law
Guest: John Hasnas
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WOODS: Some years ago I read your article "The Myth of the Rule of Law." Let me tell you: I emphatically and indignantly rejected the thesis of this article. I could not accept it. And I think, judging from the tone of the article, that's the response you were expecting from a lot of people. But I was already more or less a libertarian, and yet I thought what you were saying was so out of bounds—even though I couldn't refute it. It ate away at me for years until finally I said, "All right, that Hasnas is right after all." So I want other people to have their eyes opened the same way that mine were. Let's start off by having you explain the myth of the rule of law, that is to say, what it is that people think of when they hear this very attractive sounding phrase, the rule of law?

HASNAS: Okay, I will try to do that, but you are asking me about an article that now is quite old, so I will do my best to recall it and reconstruct it. I have to say I appreciate your reaction. I find that, with regard to my work, if someone agrees with me in less than two years, I know they are not thinking about it very deeply.

WOODS: Okay, well, thanks. (laughs)

HASNAS: The article, "The Myth of the Rule of Law," does require a little bit of clarification. There's a widespread belief in the philosophical community, and I believe also reflected in the general community, that the outcome of legal cases is controlled entirely by the language of the rules of law. That is the phrase: the rule of law and not men, or the rule of law and not people. And the idea that somehow it's the law that's determining the outcome, that this is a neutral and objective set of rules that determine an outcome, that there is one right answer, and that this is not a matter of human whim or one group of people controlling the behavior of others. Now, there's a lot of ways in which "the rule of law" is used that have other meanings, but that's the one that the article's about. It's a very, very widespread belief, and that particular article you are talking about is one that says that idea is a myth at least when it's applied to the law that comes from the legislative front and to some extent even the law that comes out of common law courts. Their argument is, when it's human beings making the law, it's the human beings that control and not the rules themselves. The article tries to illustrate this with many examples.

The example I use that's most common, or most familiar to Americans, is the First Amendment to the Constitution. The language of the First Amendment says, "Congress shall make no law abridging the freedom of speech and of the press." If it was the language of the rule there that was controlling outcomes, then almost everything that people believe in—I am a libertarian so I write for libertarians, and this is something that most libertarians would subscribe to also— would produce much different results than what we usually get.

For instance, if I ask most people whether the Congress can pass a law prohibiting someone revealing military secrets in a time of war, they will say yes. But that means that they are interpreting the word "no" to mean "some." If I ask, especially libertarians, whether the president can issue an executive order that stops people from criticizing his administration, most people will say no. That's because they interpret

“Congress” to include the president. Does the First Amendment prohibit flag burning? And a lot of people will say It shouldn’t. But then you are interpreting the action of burning a flag as speech or press.

Every single word in the phrase is interpreted on the basis of the pre-existing political beliefs or ethical beliefs that the speaker already has. As a libertarian, I will interpret the First Amendment to create the greatest possible protection for freedom of speech that I can imagine. On the other hand, people who disagree with me—people who are advocates of campaign finance reform and think that rich people shouldn’t have the ability to spend a lot of money to articulate their political positions, will read the same language and come up with an entirely different conclusion. It’s not the words that are controlling things, it’s the presuppositions of the individuals who are in the position of making the decision. Now in regard to constitutional law, that can be the Supreme Court. In regard to ordinary state-level law, it can often be common law courts. But as long as it’s human beings, it’s always the rule of some people over others. It’s never the rule of some objective, impersonal law that somehow exists out there.

WOODS: What I like about this First Amendment example is that you’re saying that if we take a statement that we’re all familiar with, and whose meaning we all think we know, and then we note just how broadly it’s interpreted by so many people in ways that clearly depart from that text, well, if the First Amendment, which is a canonical statement, can be interpreted in such varying ways, then what hope have we for just the ordinary case? In the article you give numerous examples—I won’t ask you to try to recall them now—in which you are disputing the claim that every time there’s a legal dispute, there is, at least according to the myth of the rule of law anyway, a single, determinate outcome that is demanded by words on a page.

For instance, I recall one of the examples having to do with somebody having something that was of indeterminate worth, a good, he didn’t know how much it was worth, so he sold it for $100. And then it turned out to be an item of priceless value, so he sued to invalidate the contract. It turns out even a matter like this, where there would be a law of how to deal with such situations, you can still find precedents that would go both ways.

HASNAS: You are right, and I have to be careful because I understand that this a radio show, and as a professor, if you get me started, I could talk for much too great a length on very arcane topics, but at least part of the article that you’re referring to is one that was written, and would be familiar too, in a sense, and would be familiar to almost anybody who has taken a first-year law school course in contracts. Because the cases I pick, the illustrations, are absolutely familiar. The one that you’re referring to is a rule of law that is fairly well known to a first year contracts student, and that’s the rule that says when two parties to a contract are both mistaken as to what some essential element of the subject they are negotiating about is, the contract is rescindable; it’s not a valid contract. That’s called the rule of mutual mistake. The question is, when are both parties mistaken about something? So there’s two different cases out there. One is a case where a woman finds an interesting rock, brings it to a dealer, it’s actually a rough diamond, neither party knows what it is. She sells it as a rock of unknown quality. Then it turns out to be a rough diamond. So she wants to rescind the contract and get it back, and the answer is, there’s no mistake. Both parties knew it was a rock of unknown value. No mistake. You apply the rule directly that says the contract is not rescindable. Then there’s another case that’s about a picture purchased at auction for $100. It turns out to be a lost masterpiece worth much, much more. There’s a suit to rescind the contract. In this case the court finds that there is a mutual mistake about the subject of the contract because both parties thought it was some cheap work—actually it was a lost masterpiece. So the contract is rescindable.

Now, what matters here is not the language of the law. What matters here usually is whether the decision-maker thinks it’s going to be a fair result to uphold the contract or not. In the legal system, and here’s where I’ll try not to get too arcane—there are always enough precedents so that you can find a good argument for a conclusion that you think is just. This is not that someone is out there manipulating things for some kind of nefarious purposes. Most judges, most decision-makers want to do what they think is just and right, and we have enough precedents in our law that will allow them to find an argument for that result. The chief explanation of why is our legal system, the Anglo-American legal system, is a fascinating legal system, and it’s actually a combination of two legal systems that were merged in the nineteenth century. One was the courts of equity, and one was the common law courts, which were dealing with rules.

The principles of equity was to relieve injustice; the principles of the common law were the rules of law. Both of the principles were in there to make sure the rules of law didn't work too much injustice. So they would undo unjust results. And then in the nineteenth century they combined the two different branches of law into one, so that now our legal system contains both principles of equity and rules of common law, and the result is that you can hopefully find a rule and its antithesis or a rule or some principle that will undo it that will allow the decision-maker to say what he or she thinks is a just result. So the rules are not controlling anything. What controls things is the beliefs about justice of the people in the role of making decisions. The article I wrote is basically to say there are only two options. One is you're going to have to get involved in the struggle to control the people making the decision if you want the law to come out your way. Or the option is to go in the other direction and try to remove as much as you possibly can from the realm of the law and leave it in the realm of private decision making.

WOODS: So in other words, you're saying that the reason that, let's say, court decisions are not completely random or completely unpredictable is not that there's the rule of law keeping them semi-determinate or predictable, but probably the judges have at least some ballpark resemblance in their visions of what is just, and that's what drives whatever stability we see in the law. Is that what you're claiming?

HASNAS: That's a great statement. That's very well put. That is what I am claiming. When someone says that the rule of law is a myth, or that the law is indeterminate, what that person is saying is that the rules are not controlling things. Something else is. But that doesn't mean that you can get any decision from a legal case. It doesn't mean that law is unpredictable. It's perfectly predictable based on what the people in the decision-making role share. If we pick almost all of our judges from, let's say, rich, Bostonian, Harvard graduates, and they all have a common background, you can bet that the outcome of cases will be predictable and will be fairly uniform. But a big complaint in the last few decades has been that the law is becoming scattershot, and it's becoming more and more unpredictable. Well, that corresponds to a time period in which we're trying to diversify the bench, where we get people as judges from different backgrounds, different socioeconomic classes. The diversity movement makes it less likely that the judges will share the same predispositions and the law becomes less predictable.

But even within that realm, in our system to get to be a judge you have to have a fairly conventional range of opinions. Someone like me, a professor who sits around and writes articles like the one you read—we know for sure I will never be a judge. I am too far outside the range of what's conventionally acceptable. But that's what controls. It's the common belief structure of the people in the decision-making capacity.

WOODS: I can still anticipate an objection, though, and it's one that you've anticipated in your article: couldn't we somehow word the congressional legislation or just word the legal principles in such a way that a diversity of interpretations would be impossible, so that we could really put a straightjacket around judges?

HASNAS: The answer to that is no. What language could be clearer than "Congress shall make no law abridging the freedom of speech and of the press"? Or another example I use in the article: it will be illegal to discriminate on the basis of race, sex, national origin. This is pretty clear language. My favorite example, the one that's in the article, is many libertarians adhere to the principle that if you contract, if you voluntarily enter into a contract without fraud or duress, that should be binding. And another case from when I was a first-year law student is the case of the little old lady named Agnes Syester, I think she was 68, and when her husband died and she was very lonely, Arthur Murray Dance Studios had an interesting way of recruiting customers. They used to send coupons for free dance lessons to widows by going through the obituary columns, and then it was invite them in—these little, lonely, little old ladies. Invite them in and have young, handsome dance instructors dance with them and tell them how wonderful they were. And you had someone like Agnes Syester, who soon signed up for three lifetime memberships and basically signed over her life savings to Arthur Murray Dance Studios. Now there was no fraud here. Let's say that there wasn't anything but, you know, "You're a great dancer." There was no force. There was no fraud. It's a voluntarily entered into contract. It's just completely unfair. Would you really want language that was enforced no matter what the outcome was? I mean, there's a pretty clear example of a contract voluntarily entered into without fraud or force, so Agnes should have to turn over all of her money to the Murray

Dance Studios. I don't really want to live under a legal system with that result, and our legal system doesn't permit that result. That's why we have certain principles of equity built in. Even if it was possible to somehow take the English language and be so that nobody could disagree with what the meaning was, you would never want a legal system in which the rules of law worked that way because you would have created certainty at the cost of justice. And the purpose of the legal system should be justice. You could have a really, really certain legal system which is completely oppressive. I don't see why anyone would want that. So if you want a just system, you're going to have to accept the fact that human beings are imperfect in many ways, and you're going to need some flexibility in the system.

WOODS: Well, that leads us to the most shocking conclusion of your article of all, and it's a conclusion that I think you flesh out a bit more in a much later article, "The Depoliticization of Law," because here you want to consider the question: can anything be done about this? If the law is inherently political and people have been—first of all, wait, before I even get into that. Why are people taught to believe in the rule of law? This is what really blew me away. If it clearly does not correspond to reality, what's the benefit to the regime of encouraging us to think that there's a rule of law?

HASNAS: Yeah, why in the past were people taught to believe in the divine right of kings? Because if they believed that God endowed a king with the power to tell them what to do, they would follow directions. If we can be made to believe that the dictates of our politicians are actually some kind of objective, impersonal statements of an overarching law, we'll follow directions. We will do what the power wants us to do. Another example I use, I think I used it in the article, I actually got from watching the old movie *Gandhi.* The British are a very, very moral people, and yet they were willing to assault and attack Indians who just wanted to make salt in their own country and strike down these defenseless people. Why? Why would ordinary human beings do that? Well, they wouldn't, unless they could be convinced that what they were doing was important because they were upholding the rule of law. They were not oppressing an indigenous population, just upholding the rule of law. The idea that we would uphold the rule of law will lead the public to conspire in all kinds of oppressive and terrible conduct that the government wants us to engage in. It's hard to explain why the southern states would be able to accept extremely racist behavior, considering they are not all racists, unless they thought that what they were doing was upholding the rule of law as it was democratically enacted. I live in a little community, it has a website, and apparently somebody started cutting down trees on their own property, which was close to the lake, and it was a violation of the law. Everyone was up in arms. They wanted to have this person arrested. They were going to meet out in the street to make sure the authorities came in, because what was happening was a violation of the rules of law that were somehow objective and enacted. There is no question about what justice would be to the individual, but most of the rule of law is an important prop to hold up government power. It's impossible to use force to get everybody to do what they want them to do. What you have to do is get us to buy in, to voluntarily support our own oppressors, or the system will collapse. The divine right of kings did it in the past—the idea of rule of law does it now. Once you start to question these things, if you do start to question these things, you're a minority, you have no effect. But if everyone started to question these things, then the power structure would soon decay.

WOODS: All right, we're just about out of time. In fact, I think we are out of time, but I do need to ask you to at least give a tantalizing overview of what your ultimate conclusion is, that if you want to solve this problem, it has to be solved not by trying to change the wording of the law or other fruitless efforts like that. It has to be solved in a much, much more radical way than even some libertarians may be prepared to concede.

HASNAS: Yeah, actually that's the conclusion of the article I wrote back in '95. But I can be a lot more moderate than that, and since time is short, I will do this self-advertisement. One is the article "The Depoliticization of Law." But there's another article called "The Obviousness of Anarchy." Both of these say, if what you want is a system that's going to work better, we don't have to be radical. You don't have to look for something wildly different from what we have now. We live in a system that's been governed by common law for over 1000 years. And the rules of common law, when it evolves in response to actual human cases, provides all of the underpinning contract, tort, commercial law that we need to have a prosperous society. So a legal system that would work to preserve freedom already exists. All we have to do

is peel away the legislative overlay that's run by the politicians. You never hear of people going to war, or fighting, or engaging in strife over the rules of contract law, or some commercial proposition, because that's law that evolved by human beings interacting with each other and settling disputes in a way that's designed to avoid violence and produce peace. We've got a whole system of law that works very well to allow us to cooperate and prosper that already exists. That's not anything that's too radical. We could simply try to go back to the underlying common law system, and we'd be a much more libertarian society as a result.