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### **Reconciling freedom and order**

Far into the first volume of his magnum opus, *Law, Legislation and Liberty*, Hayek points to the bridge between his theoretical analysis of the development of social order and his normative position as an advocate of liberalism in the classical tradition:

The understanding that ‘good fences make good neighbours’ [...] is the basis on which all known civilization has grown. Property, [...] the ‘life, liberty and estates’ of every individual, is the only solution men have yet discovered to the problem of reconciling individual freedom with the absence of conflict. Law, liberty, and property are an inseparable trinity.<sup>1</sup>

The quote can serve as a powerful argument in support of the classical liberal theory of law. Property and liberty have many detractors but lawlessness has few advocates. Surprisingly, Hayek made no systematic attempt to defend his inseparability thesis. Never reaching the status of a firmly established conclusion it remained a presupposition that friends could accept readily and enemies could dismiss as an ideological expression without theoretical support. Moreover, Hayek often seemed reluctant even to use the term ‘property’. Most of the time, he preferred to speak of an otherwise unspecified ‘private sphere demarcated by general rules’—a notion that might have delighted a Rousseau or a Burke but not a Frédéricq Bastiat. His theory of law also refers to unspecified general ‘rules of just conduct’ but remains vague about what justice is or how it relates to classical liberal conceptions of property or freedom. Thus, the supposed trinity of law, liberty and property resolves itself in a nondescript order of undefined scope, generated by rules of unspecified generality. It may have seemed obvious to Hayek that one can describe an order of human affairs that respects the property and freedom of individuals only in terms of general rules but that is not a sufficient basis for his claims. In any case, good fences and general rules are different things—and so are conflict and the sort of disorder upon which he focussed his analysis.

Hayek, appropriately, discussed law in the context of his theory of order. However, the primary motive for that theory appears to be a desire to invalidate rationalistic schemes of total social reconstruction,<sup>2</sup> not an ambition to formulate a coherent philosophy of freedom. That is a pity because without such a philosophy Hayek could not formulate a serious rejoinder to a critic who would say: “Very well, I’ll grant that Property is

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<sup>1</sup> F.A. Hayek, *Law, Legislation and Liberty*, Volume 1: *Rules and Order*. Routledge & Kegan Paul, London, 1974, p.107. (Hereafter R&O)

<sup>2</sup> F.A. Hayek, *The Counter-Revolution of Science: Studies on the Abuse of Reason*, LibertyPress, Indianapolis, 1979 (first edition 1952).

the only solution men have yet discovered to the problem of reconciling individual freedom with the absence of conflict. But what about the problem of reconciling the absence of conflict with other nice things: security, equality, carefree enjoyment of life, happiness, or whatever? What is so special about freedom anyway, if it only means ‘not being subject to coercion by the arbitrary will of another’<sup>3</sup> and in fact means nothing until we have a non-arbitrary determination of the meaning of ‘arbitrary?’”

Moreover, in his criticism of constructivist rationalism, Hayek chose to leave aside the appeals to human nature that a philosophy of freedom traditionally makes.<sup>4</sup> Instead, he focussed on ‘the pretence of knowledge’ of constructivist rationalism. This gave him the opportunity to deploy his characteristic strategy of showing that ‘social order’ and ‘civilisation’ are embedded in a spontaneous process of social evolution, the complexity of which eludes our limited resources of knowledge and capacities of understanding. Consequently, he could argue persuasively that it is folly to tamper with the social order on the assumption that we have knowledge of it that ‘in fact, we do not possess’. With respect to immediate *total* social reconstruction, the argument is easy; but why should utopian engineers be impatient? A long march through the institutions need not discourage them—being a revolutionary with a well-paying job and considerable public standing has its charms—and a good case can be made that the Fabian approach to total social reconstruction has succeeded where every other has failed.<sup>5</sup> Hayek may have grown wary of Popperian piecemeal engineering<sup>6</sup>, but his grand theory of spon-

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<sup>3</sup> F.A. Hayek, *The Constitution of Liberty*. Routledge & Kegan Paul, London, 1960 (hereafter CoL), p.11.

<sup>4</sup> Thus not only John Locke’s *Two Treatises of Civil Government* but also Trenchard’s and Gordon’s famous *Cato’s Letters*, written in the early 1720’s, edited and annotated by Ronald Hamowy and published in two volumes by Liberty Fund, Indianapolis 1995. However, it is important to realise that while classical liberalism can be understood historically only in the context of the rise of the State in Europe, its philosophical roots are in the medieval Natural Law tradition, which stressed that human persons could not be reduced to mere ‘members of a society’: they are social because they are human, not human because they have a place in a society. Therefore, the fundamental law or order of the human world is defined by human nature, which is not a human invention, product or even an unintended consequence of human acts. Classical liberalism differs from socialism or conservatism not because it aims at the same end but proposes different means to attain it: its ‘end’ is different, namely to see to it that human actions, traditions and institutions respect the given order of natural persons, not to make natural persons conform to any social scheme, be it historically given or only held out as a promise for the future of mankind.

<sup>5</sup> The evolutionary approach to socialism was promoted in Britain by the Fabian Society, founded in 1884 and named after the Roman general Q. Fabius Maximus, nicknamed Cunctator (the delayer), who wore down Hannibal’s force with his tactics of avoiding battle (<http://www.fabian-society.org.uk>).

<sup>6</sup> K. Popper, *The Open Society and Its Enemies*, Volume 1, Routledge & Kegan Paul, London 1966 (first published 1945), chapter 9. Hayek was close to Popper and dedicated his *Studies in Philosophy, Politics and Economics* (1966) to him.

taneous order is not effective against an unhurried middle-of-the-road policy that nevertheless systematically erodes not only the traditions that he valued but also the prospects for realising his idea of a free society.<sup>7</sup> On the contrary, with his stress on evolution and the gradual adaptation of habits of thought and action he may well have given it unintended intellectual support. At the very least, the Fabians can argue that they move with, never against, the sentiments and other components of collective subconsciousness where Hayek eventually located the roots of the social order.

The absence of a coherent philosophy of freedom showed also in other ways. His own numerous proposals for institutional reform and commentaries on actual policies<sup>8</sup> often were ambiguous compromises that were likely to elicit no more than a dismissive ‘Even Hayek concedes that...’ Time and again we find that he followed up hard-hitting criticism, informed by the lasting insights of his economic analysis, with a proposal for institutional reform that was at best an arbitrary variation on an existing scheme.<sup>9</sup> Without a coherent philosophy of freedom, his theory is open-ended and inconclusive with respect to specific questions. Where ‘first best’ hangs in the air, ‘second best’ is a matter of opinion. His later works offered little more than the hope that at some time in the future ‘evolution’ will vindicate him by eliminating every non-liberal social order.<sup>10</sup> However, evolution is as evolution goes. So far, it is not on Hayek’s side.

All of this would give classical liberals a bleak outlook, if, as some writers allege, Hayek is the most formidable intellectual proponent of

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<sup>7</sup> Playwright G.B Shaw, a prominent Fabian, accurately predicted the erosion of institutions such as property and marriage in chapter 2 of his *The Revolutionist’s Handbook*, appendix to *Man and Superman* (1903). Compare his remarks on marriage with recent legislation in The Netherlands and Belgium and the debates about ‘gay marriage’ in the United States of America. The indirect expropriation of physical property by means of fiscal, safety, health and environmental regulation and the fact that for most people wealth is paper wealth (which can be confiscated continually by means of a monetary policy of controlled inflation) also illustrate to degree to which Hayekian ‘social institutions’ have become mere legal forms.

<sup>8</sup> See Col and *Law, Legislation and Liberty*, Volume 3: *The Political Order of a Free Society*. Routledge & Kegan Paul, London, 1976, and many occasional writings.

<sup>9</sup> E.g. his proposals for the de-nationalisation of money (Hobart Special Paper, number 70, Institute of Economic Affairs, London 1978) or for parliamentary reform (“Economic Freedom and Representative Government”, Wincott Lecture, the Institute of Economic Affairs, London 1973).

<sup>10</sup> Hayek’s notion of evolution is ambiguous. On the one hand, it refers [in the manner of, say, Aristotle] to processes of cultural growth and ‘internal’ development within a group. On the other hand, it refers [in the manner of Darwin] to a process of selection which stunts the growth of, or eliminates, groups whose culture is not as fit as that of others. It is typical of Hayek’s willingness to discard the main philosophical traditions of classical liberalism that he chooses to frame his argument in the modernist tautological terms of ‘evolution’ rather than the classical contingent terms of ‘history’. With respect to human affairs, ‘evolution’ all too often is history without a reference to human agency and choice.

their position.<sup>11</sup> In truth, his idiosyncratic theory of social order ignores—or all too implicitly presupposes—many arguments about human nature and law and order in the human world that are more directly supportive of the philosophy of freedom.<sup>12</sup> Without these the gap between the general theory of complex orders and the appreciation of the peculiarities of the human condition remains too wide to be bridged by suggestive allusions to, say, the history of the Common Law or egregious examples of monetary mismanagement. Taken by themselves, Hayek's many contributions to our understanding of complex orders do not provide a strong foundation for personal freedom and its institutionalisation in a regime of property-based law. I propose to visit some of the places in Hayek's vast theoretical edifice where a dose of philosophical realism would reveal the meaning and the strength of the inseparability thesis far better than his writings on the epistemic aspects of complex orders ever did.

### Hayek's conception of order

Hayek's theory of law is embedded in his theory of order, which starts out as a general and abstract theory that is intended to cover every conceivable pattern of order in the universe. For Hayek, an order is

a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of being correct.<sup>13</sup>

This definition applies to all sorts of orders (or systems) within the purview of every science, from nuclear physics and molecular biology to economics and cultural anthropology. Note that an order merely is an unspecified state of affairs, with no other distinguishing characteristic than 'our'<sup>14</sup> ability to form reasonably accurate expectations about it. Order appears when we get an inkling of the 'rules' that the elements seem to follow. Not surprisingly, Hayek easily shifted between 'orders of

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<sup>11</sup> See Plant, R., "Hayek on Social Justice: A Critique", in Birner, J. & Van Zijp, R (eds), *Hayek, Coordination and Evolution: His legacy in Philosophy, Politics, and the History of Ideas*. Routledge, London 1994.

<sup>12</sup> As an economist, he readily acknowledged the lasting contributions of the late-Scholastic theologians whose thinking was based on the notion of a natural order or law of the human world. As a political and social thinker he referred far more often to 'modernist' thinkers such as Vico and Hume as his main sources of inspiration.

<sup>13</sup> R&O, p.36

<sup>14</sup> I used to instruct my students in class never to use the words 'we' and 'ours' unless they could name names. The publisher of *Law, Legislation and Liberty* should have told Hayek the same thing. The number of states of affairs that qualify as Hayekian orders will vary enormously depending upon whether one quantifies his definition of order in terms of the expectations of 'some particular person or group of persons', 'at least one person' or 'every person'. A theory of order is not the same thing as a theory of why one believes there is order.

actions' and 'systems of rules'. Indeed, for him, a rule primarily is 'a regularity' or 'a propensity to act or not to act in a certain manner, which will manifest itself in what we call a practice or custom.'<sup>15</sup> Here, too, we have a general definition that we can apply to the behavioural regularities and propensities of inanimate objects or animals as easily as to those of human agents. Moreover, Hayek interprets those regularities and propensities as a peculiar sort of practical, non-propositional knowledge. The elements in an order behave *as if* they know how to maintain it. In that sense, every order is a store of knowledge.<sup>16</sup>

A Hayekian order is a system of propensities, practices or customs—intangible objects that defy direct observation and unambiguous identification, but about which we nevertheless can form reasonably accurate expectations. However, those expectations too are intangibles, and perhaps no more than another sort of propensities to act or not to act. Conceivably, some orders may be also or primarily orders of expectations. This possibility allowed Hayek to link his economic analysis of the market<sup>17</sup> process, which focuses on the congruence of individual expectations and the co-ordination of individual plans<sup>18</sup>, into his general theory of order. The market is his primary 'model' of a dynamic system in

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<sup>15</sup> R&O, p.43 and p.75

<sup>16</sup> Obviously, in that sense the term 'knowledge' is taken far beyond the meaning it has in ordinary speech. Hayek's use of it to refer to what hardly anybody else would call by that name certainly is a significant part of the reason why so many people find his theory of order at best intriguing but more often simply confusing and mystifying. Hayek occasionally referred for support to M. Polanyi's *The Logic of Liberty*, Routledge & Kegan Paul, London, 1951, who tried to construct a theory of liberty from 'the example of science' (the title of Part I of his book). Polanyi made much of the role of implicit beliefs and hunches of scientists in the development of science and extended his argument "by way of analogy" to other domains (especially in his *Personal Knowledge*, which appeared in the same year, 1959, as Popper's *The Logic of Scientific Discovery*). He also developed the concept of spontaneous order and presented as his central theorem the proposition that "the management of polycentric tasks requires a set of free institutions." (*Logic of Liberty*, Chapter 10, The Manageability of Social Tasks). However, he stated up front that 'freedom is not our primary consideration' (p.vi), that '[p]rivate individualism is no important pillar of public liberty' and that 'economic liberty' is no more than 'a social technique' that may be exchanged for another if the occasion arises (p.vii). Hayek's debt to Polanyi is clear; but a classical liberal may feel some reluctance in relying on a theory that reduces freedom to a managerial technique.

<sup>17</sup> Here, and elsewhere in the text, 'market' is used in the abstract sense that the word has in discussions of basic economic principles. Thus, the market is the free market (with freedom of entry and exit and no regulation except for the application of the laws of personal property, contractual obligations and liability, which are constitutive of, not external to, the market). Fairs, bourses, stock and commodity exchanges, and the like are markets only in the sense that to a certain degree those who are permitted to participate in them have rights and obligations that are close analogues of the rights and obligations people would have on the free market (if it existed).

<sup>18</sup> Hayek, F.A., *Individualism and Economic Order*, Routledge & Kegan Paul, London (first published 1949), especially chapters 2-5. On plan-coordination, see I. Kirzner, "Hedgehog or Fox? Hayek and The Idea of Plan-Coordination", *Journal des Economistes et des Etudes Humaines*, IX, 2/3, 1999, 217-234.

which certain patterns of order endure, despite incessant change in the particular circumstances of every agent. The market process is his paradigm of the spontaneous evolution of social order.<sup>19</sup> This choice of paradigm, however, may be more confusing than enlightening. Markets and the market order and societies and their social orders are different things. There are social orders that permit almost no market activity and markets often overflow the boundaries of any social order without becoming disorderly. Internal markets—markets that operate wholly within the confines of a single society, under the authority of its government or rulers—rarely are spontaneous orders.

Hayek certainly was well aware of the fact that the market is not a ‘social organisation’ but in offering the unplanned order of the market as an exemplary case of social order he blurred the importance of that insight. Surely, he would not have dreamed of saying that the market is an example of what an individual firm should be. A firm is a society of sorts—if it is an order of things, it is not the same kind as the market order. The failure to distinguish properly between social order (which necessarily is the order of *a* society) and market order (which is the order of reference for *each and every* market) vitiates Hayek’s theory of order in so far as it applies to human affairs. In particular, it reduced the market order to a type of social order, thereby cutting loose the theory from the anchor of classical liberalism: natural persons come first; their claims override those people make as holders of a social position in any society.<sup>20</sup> With respect to the market order, the rights and obligations of corporations of any kind or size are mere analogues of those that natural persons have regardless of their position in any society. With respect to social orders the contrary is true: to find out about a person’s social rights and obligations one has to know his social position. In Hayek’s theory, however, ‘person’ and ‘position’ are hard to distinguish. One looks in vain for a clear delineation of person-to-person relations as distinct from the position-to-position relations defined by general rules or traditions within a particular social order.<sup>21</sup> This lack of clarity explains

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<sup>19</sup> Bruno Leoni, in *Freedom and the Law* and especially in the appended essay “The Law as Individual Claim” (Liberty Fund, Indianapolis, 1991), was among the first to exploit this notion with an attempt to bring ‘legal phenomena’ within the general economic category of exchange.

<sup>20</sup> The French *Declaration of the Rights of Man and Citizen* (1789) made that absolutely clear. Unfortunately, Edmund Burke’s quite unnecessary and unjustified indictment of the Rights of Man (which are the classical natural rights of life, freedom and property) as the concept responsible for the aberrations of the French Revolution that followed its proclamation left only the Rights of Citizens, which one easily can assimilate to Burke’s own conception of historical or traditional social rights (see E. Burke, *Reflections on the Revolution in France*, 1790, Penguin Classics Reprint 1987, p.150). Hayek’s admiration for Burke is well known; while he did not explicitly repudiate the classical natural rights doctrine he also did not put it to any use in his own work.

<sup>21</sup> Edward Feser, “Hayek on Tradition”, *The Journal of Libertarian Studies*, Volume 17, number 1, Winter 2003, p.53 suggest that a synthesis of Hayek’s theory of order and an Aristotelian ethics of virtue will remedy “the one significant gap in Hayek’s posi-

why Hayek, despite his protestations<sup>22</sup>, could become a hero of conservatism even after most conservatives had ceased to be liberals.<sup>23</sup> For a conservative the social order with which he wants to identify himself defines everybody's social position and the social 'rights' and 'obligations' that go with it. Persons without a well-defined social position consequently are loose elements, existing in a normative vacuum. To say that their natural rights (the rights they have as natural persons) trump those of the established social order is anathema.

In any case, Hayek's analysis of social order took a different turn than his economic analysis. It had to, because whereas the market order arises from the competition of individual persons and their organisations for scarce resources, his social orders (or cultures, as he sometimes called them<sup>24</sup>) themselves were supposed to be competitive entities. Notwithstanding the fact that they too are shaped by competitive forces, one cannot consider these on a par with competition in the market order. The concept of the market, as Hayek understood it, implied that people competing on the market conform their actions to the requirements of justice. Crooks, thieves, robbers, frauds and embezzlers there may be but they are 'out of order', outside the law of the market. At best, their actions are intrusions (interventions) from outside in the market. The market has a law of its own that is quite independent of any social regulation or social tradition. In contrast, the competition within or between social orders or cultures is an evolutionary process without a law that could tell us which actions or events are or are not part of it. In the evolutionary process nothing is out of order. Indeed, the social order that survives *is* the law, for no other reason than that it survived. One easily can apply one's reason to the human condition to discover the law or order of the market even if there is no and never has been a functioning market. But one cannot in the same way discover any law of society nor, a fortiori, the law of any society in particular. One can only arrive at a statement of the abstract form of a (any) society, namely that it must have superior and inferior positions.<sup>25</sup> These conceptual differ-

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tion, the lack of a satisfactory moral-theoretic foundation." However, Aristotelian ethics was very much concerned with the virtues associated with social positions (including not only the virtues of slaves but of the institution of slavery itself). One would have to take a lot of Aristotle out of Aristotelian ethics before one could use it to fill Hayekian gaps.

<sup>22</sup> F.A. Hayek, "Why I Am Not a Conservative", Postscript to CoL, p.395-411.

<sup>23</sup> There are probably few conservatives left for whom the heyday of classical liberalism (or what passed for it) still is a period of reference. Except for a few of those who aspire to be conservative theorists, most conservatives seem to look back no further than the popular myths with which they grew up. Ronald Reagan could adulate Franklin Delano Roosevelt without raising a conservative eyebrow. For a conservative, typically, the day before yesterday never was.

<sup>24</sup> Whether 'culture' is a full synonym of 'social order' in Hayek's work is debatable. Neither term is defined with any precision.

<sup>25</sup> Egalitarian socialists do not deny this: they never get farther than the desire to make the superior positions collective bodies in which a seat is reserved for every

ences between market order and social order have far-reaching implications, to which we shall have to return.

If Hayek's sociological analysis still is connected to the economist's methodological individualism—as some interpreters claim—then the connection is obscured by its focus on patterns of rules and expectations that persist as institutions. For Hayek, the salient fact about social order is that people 'follow rules'. However, these rules are but expectations that people expect to be fulfilled somehow by anonymous others; or behavioural propensities to fulfil the expectations of anonymous others. People, moreover, follow such rules most of the time without much awareness. As a general observation that seems mere common sense; however, the theoretical meaning of that statement in Hayek's work is far more potent. For him, human beings are themselves complex sensory orders<sup>26</sup>, incapable of detailed self-knowledge and not essentially different from other complex sensory orders. They *are* systems of rules and regularities caught up in larger systems of rules and regularities—like almost everything else that moves.

With his emphasis on rule following, Hayek, notwithstanding his deep liberal convictions, turned away from the classical attempt to explain the peculiar phenomena of the human world in terms of the peculiarities of human nature, especially speech and deliberative action. Instead, he embarked on a thoroughly modernist project of explaining the human world as if the rational aspects of human nature were irrelevant.<sup>27</sup> Human persons are little more than the physical media by means of which rules propagate themselves. Admittedly, there is a margin of conscious choice among rules. However, the tendency of Hayek's theory is to suggest that, because of pervasive ignorance of the full complexity of the

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member of the society. The implication is that whatever one does outside the meetings of the general assembly is subject to its rulings: in all such things the member is supposed to act as the occupant of an inferior social position. Akin to Rousseau's conception of popular sovereignty, it is an egalitarianism that seeks to put everybody in the top position without equalising positions or doing away with the authoritarianism that goes with hierarchy. Of course, the market order is not a positional system.

<sup>26</sup> F.A. Hayek, *The Sensory Order: An Inquiry into the Foundations of Theoretical Psychology*. University of Chicago Press, 1952.

<sup>27</sup> This is not in contradiction with, say, the proliferation of rationalistic and constructivistic schemes of social organisation. The common presupposition of those schemes is that 'we' (the organisers of society) are not like the human material with which 'we' have to construct our society. 'We' are rational; *it* is not. Hayek, following Adam Smith (*The Theory of Moral Sentiments*, Part VI, section 2), had no good word for these 'men of system'. However, he did not get beyond reminding them that they were not different from the animal or machine-like human 'it' they wished to organise. As for the 'it', he left it in the same state of unreason or illusory rationality in which they had put it. Reducing human beings to some reactive substance that can be represented mathematically as maximising one 'function' or another became the norm when the old 'moral sciences' gave way to modern social science and its scientific supposition that social scientists are as different from the human objects of their studies as the astronomers are different from stars and nebulae.

order of rules, such choices almost always are wild stabs in the dark. They provide the theory with a set of essentially random variations without which it would not be a theory of evolution. Moreover, they usually are swamped by the accidents of communication that are inevitable when, say, parents teach their children things they themselves do not fully understand and children are supposed to carry on ‘the tradition’ without ever having learnt what is and what is not part of it.

Within that context, it is quite logical that the ‘problem of order’ should refer to the concept of an order of expectations and behavioural regularities rather than to the classical concept of an order of persons. However, there is no warrant to assume that frustrated expectations and behavioural irregularities are the essence of disorder (conflict!) in the human world, at least if one is looking for a concept of order that is relevant to classical liberal values and convictions. Hayek lived through one of the most tumultuous periods in history but the problems of war, crime and fraud and their institutionalisation in modern society rarely make an appearance in his theoretical speculations. And why should they? War and crime and fraud can be studied scientifically; it is possible to make theories about them, to have expectations about them that have a reasonably good chance of being correct. In short, they are orders of things, in the Hayekian sense, which is to say that his conception of order is far too general to be relevant for his liberal agenda. So Hayek had to find a way to distinguish good orders from bad. He might have realised that what he needed was a way to distinguish between actions that upset the order of persons and actions that do not upset it, but that option was foreclosed by his increasing focus on holistic systems of rules and expectations. Thus, he embarked upon the project of trying to identify the things that upset an order of rules and expectations in the hope that they would turn out to be close enough to the relevant notions of crime and fraud and other offences against the order of natural persons to count as vindication of the classical liberal outlook. The project was interesting but the hope proved vain.

*Expectations and Hayek’s taxonomy of orders.* Given that ‘our’ expectations are part of Hayek’s definition of order, we can restate his well-known taxonomy<sup>28</sup> of orders in terms of the relations between ‘our’ expectations and the behaviour of the elements in an order.

*Cosmos.* Consider what Hayek calls a ‘cosmos’. Natural orders—orders of natural things such as the sun’s planetary system or the ecology of a tropical forest—are paradigmatic cosmic orders. With respect to a natural order, we have no alternative but to wait and see whether or not the behaviour of its elements is as we—more often, some experts among us—expect it to be. A natural order does not exist for the purpose of

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<sup>28</sup> F.A. Hayek, “The Confusion of Language in Political Thought”, in his *New Studies in Philosophy, Politics, Economics and the History of Ideas*. Routledge & Kegan Paul, London, 1978 (hereafter CLPT).

fulfilling our expectations. Its patterns of order (laws, or, as Hayek calls them, 'nomoi') are merely the observed, often aggregated, results of the interplay of the behavioural propensities and regularities of elements that owe nothing to our expectations.

Because the relevant expectations of, say, physicists and bacteriologists are strictly external to the things that they study, there is a sense in which they can learn about and discover the behavioural rules of nuclear particles, celestial bodies, or bacteria. If there is order in nature, we should expect the expectations of the scientists to converge through a process of elimination of systematically disappointed hypotheses. The same is true where ordinary people are concerned. Although they have few expectations about nature that they can formulate and express as testable hypotheses, they nevertheless will learn from their experience of what works and what does not work. Natural orders provide an objective test of the truth of our expectations.

*Taxis.* Obviously, not all orders are natural orders of law-like interactions. Some orders are 'made orders'. They are of a type Hayek calls 'taxis', and that we may call 'artificial order' or 'organisation'. An artificial order is a state of affairs in which some persons, the organisers, have arranged for a multiplicity of elements to relate to one another in ways that are supposed to fulfil the organisers' expectations. In other words, the rules that define the position, role and function of the elements in an artificial order are formulations of its organisers' expectations, not the propensities to act or not to act of the elements themselves. Thus, all the elements of an artificial order, and the rules that guide their behaviour, serve the same purpose, namely to fulfil the organisers' expectations. Clearly, unlike a natural or cosmic order, an artificial order always is some persons' means to their ends. Those ends constitute the ratio of the rules. For this reason, Hayek, following Michael Oakshott,<sup>29</sup> refers to an artificial order as a teleocracy,<sup>30</sup> an entity that is organised for the achievement of more or less particular ends.

Hayek uses the term 'thesis' to designate a rule that defines an organisation.<sup>31</sup> A useful substitute is 'legal rule' or 'imposed rule'.<sup>32</sup> Although he seems to regard 'thesis' as merely a particular sort of rule, it is far from clear that we meaningfully can interpret it as a propensity or

<sup>29</sup> See the references in CLPT, p.89, note 19, and in *Law, Legislation and Liberty*, Volume 2: *The Mirage of Social Justice* (hereafter MSJ), Routledge & Kegan Paul, 1976, p.15

<sup>30</sup> From the Greek 'telos', goal, and 'kratein', to rule, specifically, to rule by force.

<sup>31</sup> 'Thesis' means 'any rule which is applicable only to particular people or in the service of the ends of rulers'. See CLPT, p.77. Hayek assumes that this is enough to characterise *thesis* as a particular rule, in contrast to *nomos*, which is a general rule. However, in large organisations ruling is effected through general rules that do not apply only to particular people and may be quite independent of the ends of rulers. A man owning five or six slaves will manage with particular rules; a man or corporation owning thousands of slaves will need a system of government by general rules, many of which will be concerned with what one slave may do to another (regardless of its relation to the owners' particular ends). See below in the text.

<sup>32</sup> See R&O, p. 126.

from clear that we meaningfully can interpret it as a propensity or regularity, even if regularities obviously appear where such rules are followed or enforced. This ambiguity arguably is the result of Hayek's failure to distinguish clearly the formal aspects of an artificial order from its material aspects. The former correspond to the design of the order, the latter depend on its implementation. A mathematician can make an exhaustive study of the game of chess without ever having played one, even without knowing that there are people who actually play the game. Chess buffs enjoy the playing of the game and hardly ever mind the mathematics of its formal design. Examples of formal artificial orders (designs or legal systems) are the plans of a building, computer programmes, game rules (chess, football) and plays (scenario's for the stage or the screen), and of course the rules of social organisations or societies<sup>33</sup> such as households, clubs, associations, companies, firms, states, and their subdivisions and combinations.

An implemented artificial order necessarily involves physical elements, the properties of which may interfere with the proper execution of its legal rules. The present shape of an old building is determined not only by the original architect's design but also by his choice of building materials, by centuries of wear and tear, and greater or smaller disasters such as fires, floods, storms and earthquakes. Other determinants are the renovations and the modifications applied by a long line of owners, each of which adapted the building to his own purposes using the means that he was able and willing to devote to it.

Something similar is true for virtually every artificial order, not the least for human organisations. At more or less regular intervals, they fall under the control of other persons who may have other purposes and priorities and different views of organisational efficiency than their predecessors. Moreover, to implement their plans they usually use or employ human persons, who may introduce interests, practices, values and opinions that were no part of the organisers' designs. This risk is common knowledge. Disciplinary Boards, Human Relations Officers and Human Resources Managers are parts of the formal structure of most large artificial orders. As Plato and Rousseau already pointed out, the success of a truly artificial social order depends on its organisers' ability so to socialise—educate, train, indoctrinate, brainwash, control—the human material at their disposal that it fits perfectly into the slots of the social machinery. Then, the natural men and women, transformed into legal creatures (Plato's 'guardians', Rousseau's 'citizens'), suppos-

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<sup>33</sup> Notwithstanding his careful etymological distinction between, on the one hand, the catallactic order of the market and the cosmic order of human relations and, on the other hand, economic and other types of organised activities, Hayek's use of the terms 'social' and 'society' remains ambiguous. Consequently, the central claim of MSJ, that 'social justice' is a meaningless expression, is puzzling in the light of his insistence that the free society that he envisions will be a just society. If 'just society' is meaningful, why is 'social justice' not equally so?

edly take every motive for their movements exclusively from the legal specifications of their social position. Both philosophers warned that even in the best of circumstances such an arrangement is bound to decay. At one time or another, civic education will fail and the next generation of educators will magnify that failure in transmitting it to its successors. After all, the children of even the most perfectly socialised citizens will be born as natural human beings. Socialisation must be total, relentless and perfect if it is to escape the law of unintended consequences—but then it must be socialisation at any price, an arrangement that is bound to produce another set of unintended consequences.

It is quite common, therefore, for implemented artificial orders to pass sooner or later into the Hayekian category of ‘results of human action but not of human design’. Nevertheless, to the extent that they continue to function, they remain implementations of artificial orders governed by legal rules even when they prove to be less efficacious or efficient than they were meant to be. An artificial order does not become a natural order of law-like behaviour by the mere passage of time. With respect to a natural order, if its elements behave otherwise than we expected then that proves the insufficiency of our knowledge of the determinants of its patterns of order. If the elements of an artificial order behave otherwise than the organisers expected then that proves that they have insufficient control over the elements, that they chose the wrong sorts of elements to fill or control the positions in the rule-defined order, or perhaps that its rules are inconsistent.

### **Social order and nomocracy**

The conceptual distinctions between ‘cosmos’ and ‘taxis’ and between ‘nomos’ and ‘thesis’ are sharp and pertinent for the analysis of human affairs. However, when he got to discuss ‘the order of society’, Hayek looked elsewhere: to the notion that social order is the result of human action but not of human design, and therefore a spontaneous or unplanned order. A spontaneous social order comes into being and evolves as the unintended outcome of the actions of a great many persons in several generations. While all of those actions are purposeful, there is no purpose that is common to all of them. Thus, we can understand the development and the maintenance of spontaneous social order only in terms of factors that are not a part of any person’s intentions. For example, markets are orders of human actions, although there is no common goal that all market participants jointly pursue and no ‘market action’ that they jointly execute.

The notion of spontaneous order led Hayek to see the order or law of society as a cosmos defined by nomoi, although most of the rules that define a social order are not natural laws but at least in origin eminently artificial or conventional practices. A social order, in that respect, is like an old building—but that was not the analogy Hayek had in mind. He wanted the social order to be like the market order, which in his way of

thinking is such that interference with it will inevitably be counter-productive, producing not only unintended but also unwanted effects. However, the transition from liberal economist to theoretician of the free society proved not so easy. “Don’t tamper with the market” cannot be generalised simply to “Don’t tamper with the social order”.

In terms of expectations: ‘our’ social order obviously is not independent of ‘our’ expectations but it is also not simply the expression of the expectations of any one, least of all of a single organising mind. So, what sort of expectations defines the social order? Hayek’s answer was that they must be expectations within the social order itself. Social action is guided by the expectation that it will be rewarding to fulfil the expectations of others. Likewise, people have social expectations—expectations that they expect others to fulfil. Hence, we can analyse and criticise a social order sensibly only ‘from within’. The only logically possible *ex ante* test of the social order seems to be the consistency of the expectations that constitute it. The problem is that to perform the consistency test we must be able to formulate our expectations and opinions in a logically precise form—as explicit knowledge of the rules that define our social order. However, the central claim of Hayek’s social philosophy is that we cannot do that. No mind can grasp all the facts and mental processes by means of which other minds get to have one set of expectations and opinions rather than another. In fact, according to Hayek, we can only wait and see whether the social order will grow and prosper or wither and wane.

Obviously, Hayek’s conception of social order is inspired by, and gives an interesting twist to, the economist’s notion of general equilibrium.<sup>34</sup> As Hayek-the-economist would say, social order is the degree of plan-coordination. Again, however, we must question how relevant it is as an argument for the inseparability of law, liberty and property.

Logically, the notion that social order is a congruence of actions and expectations implies that in a perfect order all actions are co-ordinated and no expectation is frustrated. That is a utopian conception of order. Moreover, in conjunction with the modernist fallacy<sup>35</sup> that rights reflect what a person would befall in an ideal society, it suggests that frustration is the essence of injustice. Hayek may have believed—indeed, did believe—that overall the degree of frustration will be less in a society that keeps its politics as much as possible out of the market and other orders of daily life and work, but that belief cuts no ice with those who believe the opposite. What is worse, it concedes that the rights of life, liberty

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<sup>34</sup> F.A. Hayek, “Economics and Knowledge”, in his *Individualism and Economic Order*, Routledge & Kegan Paul, London 1976 (first published 1949), p.33-56.

<sup>35</sup> That fallacy is the direct negation of the classical natural law theory, which finds a person’s rights in what he or she *is* or has done or said, and not in what he or she (or some social theorist or ideologue arrogating the right to speak for them) *desires*. See Frank van Dun, “Human Dignity: Reason or Desire?” in *Journal of Libertarian Studies*, Volume 15, number 4, Fall 2001, p.1-28.

and property are merely instrumental policy-variables, means to the end of maximising welfare.<sup>36</sup> They are not rights of individual persons but measures to be implemented or not by those who happen to be in the social position where such instrumental judgements are made. This may be compatible with conservatism or socialism but it is not compatible with classical liberalism. If my right not to be frustrated trumps your rights of freedom and property and your right not to be frustrated trumps my rights of freedom and property, then the government need not concern itself with safeguarding property and freedom but only with massaging our little ego's. However, classical liberalism does not say: 'Let the economists of different persuasions argue at length about what will make all people happy, meanwhile let the rulers and their experts shoulder the responsibility of actually doing something about it'. It certainly does not say: 'A constitutional government is one in which the rulers use and believe the rhetoric of social welfare.' As does the idea of constitutional government, classical liberalism stands or falls with the defensibility or indefensibility of the notion that some things simply are "not done" and should not be subject to negotiation or expressions of preference (including voting). However, there is no anchor for that notion in Hayek's theoretical conception of social order.

How did Hayek get himself in this fix? The basic mistake, I submit, was his endeavour to assimilate the concepts of market order and social order without realising that with respect to the market property and freedom are not instrumental values but absolutely essential presuppositions for understanding what a market is. A society, however, is about the organisation of actions and the mobilisation of human and other resources for the achievement of some goal. As such it cannot avoid allocating, distributing and redistributing those resources among the various positions its organisational scheme defines. By blurring the line between market order and social order Hayek unintentionally but effectively undercut the case for quarantining politics, which is what classical liberalism was all about.<sup>37</sup> He landed himself in a position where only

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<sup>36</sup> "[M]y concrete differences with socialist fellow-economists on particular issues turn inevitably, not on differences of value, but on differences as to the effects particular measures will have." F.A. Hayek, "Socialism and Science", in his *New Studies in Philosophy, Politics, Economics, and the History of Ideas*, p.296. Here again we may point to the influence of Michael Polanyi (see note 16 above) and, of course, Ludwig von Mises, *Liberalism*, The Foundation for Economic Education, Irvington-on-Hudson, NY 1995 (originally published in German in 1927): "Liberalism is distinguished from socialism [...] not by the goal at which it aims, but by the means that it chooses to attain that goal" (p.7-8). See note 4 above for the reason why this is wrong.

<sup>37</sup> The idea goes back to Plato (*The Republic*, especially book 2, 369b-375e) who organised his political thought around the corruption of the original 'Golden Age' in which people lived in a natural *economic* order. That corruption came with the appearance of 'specialists in violence and coercion' (warriors). Having become rulers, the warriors were able to satisfy their greed systematically in non-economic ways. Plato's diagnosis: the combination of politics and economics is an unwholesome mix. His remedy: isolate politics in a citadel (a barracks) on the hill and deprive its denizens of

the formal notion of general or abstract rules could hide his predicament. However, there is an ocean of difference between justifying limits to the scope of organised political action and justifying restrictions on its form or decorum.

In part the mistake reflected the ambiguity of the English word ‘society’ and ‘social’ (and their counterparts in other major European languages such as French, Spanish, Italian, and Latin). In its strict etymological sense, ‘society’ refers only to an organisation with a system of governance, a more or less intricate but in any case hierarchical structure of socially defined positions, roles and functions, formal conditions of membership, and social resources (human or material) which are available to the leaders or directors of the organisation for pursuing the social purpose, rewarding members, paying the society’s debts, and so on. However, in current use, the words ‘society’ and ‘social’ also refer to unorganised yet orderly forms of human relations, for which I prefer the term ‘convivial’<sup>38</sup> as in ‘convivial order’ or ‘order of conviviality’. They denote the networks of relations among natural persons when they act ‘as themselves’, not as occupants or representatives of one position or another in one or more social organisations.<sup>39</sup> The market order

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everything that would incline them to pursue mundane human interests. Nineteenth century political liberalism was a faint echo of that Platonic idea: intellectually it insisted on a radical separation of the political (‘public’) and the economic (‘private’) sphere but politically it lacked the drive to remove the State’s soldiers and civil servants physically from the economic order. In medieval times the civil servants had been monks, separated from the world by the discipline of their orders; in the age of absolutism and far into the nineteenth century, the regular forces (soldiers and officers) were confined to barracks and further separated from the outside world by their uniforms, peculiar codes of conduct and special tribunals. Since then these political occupations largely have been ‘socialised’—while the multitude of small and local societies have been submerged in the large political society of the State. The socialisation of politics and the politicisation of society go hand in hand.

<sup>38</sup> From the Latin *convivere*, to live together. Hence the contrast, in Dutch, between ‘samenleving’ (the convivial order) and ‘maatschappij’ (the order of mates, cf. the Latin *societas*, an organised group comprising *socii*, that is, mates).

<sup>39</sup> Just a few generations ago, most societies were relatively small and local affairs, all of them under the rule of law (which historically connotes the law of conviviality or the natural law of the human world rather than the formal system of government of the societies themselves). Hence it made sense to contrast ‘society’ (the welter of societies that acquired their social means without recourse to military power) and ‘the state’ (the one society that secured its means of action through the possession and use of military power). ‘Society’, in essence, simply meant other people. American libertarians (following A.J. Nock, *Our Enemy, The State*, 1935, and the many writing of M.N. Rothbard, especially *For a New Liberty*, Libertarian Review Foundation, New York 1985 reprint) still prefer to use the term in that sense. In Europe, however, the rise of the centralised unitary State in the nineteenth century made society coextensive with the state. Society, in effect, was nationalised. In a more restricted sense, ‘society’ began to connote those parts of the State that the government was supposed to rule only indirectly, by means of general ‘civil laws’ rather than administrative measures. Instead of the rule of law, the constitutional requirement of a rigorous separation of ‘public’ and ‘private law’ became the hallmark of the European ‘formal Rechtsstaat’. This was

is an aspect of the convivial order, not of a society or social organisation. Hayek was reluctant to make that distinction because he had already resolved that ‘society’ refers to a spontaneous (even if not natural) order and not to some artificial construction. Thus, his category of social order became a hybrid. The distinction between natural and artificial persons, between a person and his social role, receded into the background. Yet that distinction, irrelevant as it may seem to a conservative, is axiomatic for a liberal. On it turns the proper interpretation of the ‘rules of justice’: do they refer to natural persons or to positions within any of the myriad forms of social organisation known from the study of history?

*Liberty versus freedom.* Wedded to his conception of social order as an order of expectations, Hayek failed to distinguish between liberty and freedom (CoL, p.11). It is a distinction that most European languages can express only indirectly, whereas it is easy to make in English. Etymologically, ‘liberty’ denotes the legal status of a full member in a tribe or society. It is either an inherited status<sup>40</sup> or one that is acquired through adoption or as an official favour. In established political society, it typically is an attribute of citizenship. As a legal status, liberty is not a person’s own; it is something he enjoys as the occupant of a position in some society or other corporate entity. To determine whether one has liberty in a given society and just what that liberty is requires an investigation of its legal codes. Liberty in one society does not imply liberty in another. ‘Freedom’, in contrast, does not connote a social position or status; it is not a legal concept.<sup>41</sup> It belongs to the field of natural law studies, which focus on order and disorder in person-to-person or convivial relations (as distinct from order and disorder in social structures or organisations where individuals are occupants of socially defined positions). Freedom is freedom among likes. A free man is ‘his own man’; he belongs to himself and to no other natural or artificial person. Hence, a natural person, being free by nature, is a free person everywhere, even where his freedom is not respected. One’s nature does not change merely because others fail to respect it, but one’s liberty is nothing else than what the rule makers in one’s society declare it to be.

In the juxtaposition of freedom and liberty, and its moorings in the contrast between natural persons and their convivial order, on the one hand, and artificial persons and legal orders, on the other hand, we readily see the fundamental divide in the philosophy of the human world—

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supposed to be the necessary and sufficient condition for ensuring that political power would not be used for private interests. Its effect was to ensure that private interests could use political power all the more freely if they succeeded in cloaking themselves in one or another ideology of the public good.

<sup>40</sup> The Latin *libertas* is akin to *liberi*, children (in the sense of descendants).

<sup>41</sup> ‘Freedom’ belongs to the same etymological family as ‘friendship’ and ‘Frieden’ (German for peace), the Latin ‘*privus*’ (independent, separate, particular, proper, own), ‘*privare*’ (to set free) and ‘*proprius*’ (one’s own, hence property).

whether human nature should be moulded according to the day's canons of social correctness, or whether 'society' should be a fit place for humans to live in.

*Non-spontaneous spontaneous orders.* Hayek made a distinction between 'the spontaneity of the order' and 'the spontaneous origin of regularities in the behaviour of elements determining it'. The motive for this distinction is the observation that some artificial orders may encompass a simulation of a 'cosmic' order. A simple example is a football match. The rules of the game are not formulations of the independently existing propensities to act or not to act of the players. They are legal rules, laid down by an authority (the football association, which is itself a taxis). However, because they are the same for every participating team, they are not tailored to ensure that a team will reach its goal, which is to win the matches it plays, and which also is prescribed by the imposed rules. They are impartial, general, yet imposed rules of conduct. The teams are supposed to play by the rules in their endeavour to win. A referee and linesmen, and higher up in the hierarchy committees and boards of review (all of them rule-defined positions) are added to make sure that they do. However, the playing of the game is supposed to generate a sort of cosmic order, as each player must anticipate the actions of all the others, who act independently of him, and adjust his own actions accordingly. We properly can characterise such a taxis-generated cosmic-like order as a *nomocracy*: an order defined by *imposed* general rules conduct.<sup>42</sup>

More important examples of nomocracies are certain kinds of markets—fairs, bourses, and commodity or stock exchanges. They are organised by particular 'private' or 'public' organisations, which set the price of admission to the market, stipulate who may trade on their market, when the market will open and close, which practices are permitted in trading, and so on. A still more important form of nomocracy is the so-called 'private sector' of a 'national economy', which is defined and organised by the legal and regulatory authorities of the State, and also imposes criteria of admission, fiscal conditions, general rules of conduct, and so on. As with the football game, the rules apply more or less equally to all participants—they are not designed to ensure that any one of them achieves his goals. However, it is reasonable to suppose that

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<sup>42</sup> The emergence of a nomocratic order often follows the codification of pre-existing informal rules, when the codification becomes an imposed legal code. Then, the rules no longer function as an educational source of knowledge but as an authoritative set of instructions to the occupants of certain positions within an artificial order. The code derives its social authority from being adopted by the rulers or organisers of the society. Consequently, it is assimilated to other organisational rules and in time ceases to function as an independent criterion of proper action. Here lies the tragic error of nineteenth century European Liberalism, which entrusted the administration of justice to a highly centralised political society endowed with 'legislative sovereignty' and equipped with a nationalised monopolistic judicial system.

they are designed to ensure that the organisers achieve their goals and so profit from the arrangement. The organisers obviously are in a position and have an incentive to intervene and change the rules whenever they deem it profitable to do so.

*Implications for law and politics.* Neither the ‘private sector’ of any national economy nor any set of commodity or stock exchanges corresponds with the market that is named in the study of economic principles. That market is the free market. It is not a nomocracy but a genuine cosmic order, arising—in Adam Smith’s memorable phrase—from the propensity to truck and trade of so many specimens of the human species. Its principles of order must and can be discovered without reference to any legal code or book of regulations. Smith still thought of these principles as ‘the laws of justice’.<sup>43</sup> He did not think of them as nomocratically imposed ‘general rules’.<sup>44</sup> The laws of justice are universal, and the concept of a free market accordingly is universal too. There is no such thing as a French, a British or a Chinese free market. Economic principles do not come with an expiration date or a warning ‘Valid only in Denmark’. In contrast, there is a private sector in France, which is different from the private sector in the United Kingdom, China, or any other country. Consequently, whereas the problems of identifying justice and injustice are the same everywhere and always, the problems of state judges and legislators in maintaining or improving the consistency of their legal system vary from country to country and from one period to another. Nomocratic orders may be phenomenologically similar to cosmic orders in some respects but they essentially are artificial orders. Unlike the laws of justice, their general rules apply to legally defined positions—to artificial rather than natural persons.<sup>45</sup>

Unfortunately, Hayek, like Michael Oakeshott, tended to use the term ‘nomocracy’ as a synonym for ‘non-teleocratic order’. Market order and social order—both non-teleocratic systems characterised by general rules—were fused into something that encompasses what earlier generations had called the natural order (or natural law) of the human world as well as the infinite variety of legally defined nomocratic artificial orders

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<sup>43</sup> Adam Smith, *The Wealth of Nations*, Cannan Edition, Modern Library, Random House, New York, 1937, p.651. An older tradition refers to these rules as ‘the laws of God’ but the proper understanding of this expression is that they are not man-made, not dependent on human discretion.

<sup>44</sup> Already J.-B. Say dismissed the principles of justice as the foundation for the study of the free market by insisting that economists are not concerned with the ‘origin’ but only with the ‘certainty’ or ‘stability’ of property. See, J.-B. Say, *A Treatise on Political Economy or the Production, Distribution, and Consumption of Wealth* (Reprint, Augustus Kelley, New York 1971), p.127.

<sup>45</sup> For example, the rules distinguish between ‘national citizens’ and ‘registered’ and ‘unregistered aliens’, and they define different fiscal and regulatory categories. People who happen to find themselves assigned to one of those categories face a different situation and different incentives than they would, if they only had to conform to the laws of justice.

(or legal systems) *in* the human world. Consequently, Hayek's taxonomy of orders blurs the distinction between questions of justice and questions of legality. The former, which belong to the study of natural law, presuppose that the reciprocal relation of speech between mutually independent natural persons is the natural relation of order in the human world.<sup>46</sup> One can talk to or command a dog or a computer but one can only speak to another natural person, and then only while recognising his capacity for independent speech and action. The *ius*-relationship is the basic element of interpersonal order,<sup>47</sup> and *iniuria* the common form of acting without consideration for the independent existence of other natural persons. Hence, justice, the pursuit of and respect for the *ius*-based order, is the primary virtue of human natural persons.

We notice that the concept of a natural person, capable of speaking and acting independently of what other persons with a similar natural constitution concurrently are doing or saying, implies the concepts of freedom and property that remain so elusive in Hayek's theory. For 'freedom', in its strict etymological meaning, refers to a person's self, to what is a person's own, and hence to the *objective* boundaries and distinctions between that person and every other and between what is his and what is another's. Regrettably, Hayek has little to say about natural persons<sup>48</sup> or the natural order of persons, leaving his readers to make sense of orders of actions and expectations that abstract from the naturalness or artificialness of persons.

In contrast to questions of justice, questions of legality presuppose reference to an artificial order in which all positions are defined by an imposed set of rules. Not reciprocal *ius*, but unilateral *lex* is the basic element of order.<sup>49</sup> It is a rule of the organisation or a command within

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<sup>46</sup> See Frank van Dun, 'Natural law: A Logical Analysis', *Etica é Politica*, Volume 5, Number 2, 2003 (an online journal, <http://www.units.it/~etica>, no pagination).

<sup>47</sup> *Ius* (plural *iura*), from Latin *iurare*, to make commitments in speech. The faculty of speech (also known as ratio, logos) is the traditional mark of rationality (before that term was reduced to mean little more than transitivity of preferences). Hence, natural law used to be equated with the law of reason—the law of the animal *rationis capax*. Note that Aristotle sharply distinguished between 'speech' (which connotes argumentation and commitment) and 'voice' (which connotes expression of feeling or preference). Hence, the aversion of natural law theorists for 'mass democracy', which is the triumph of expressive behaviour over action constrained by argumentative justification.

<sup>48</sup> He prefers to talk about individuals. Certainly, a natural person is an individual: there is no way one can split up a natural person to get two or more smaller persons or to merge two natural persons into a larger one. However, the same is true of horses and cats. Social persons (personified social positions), in contrast, are not individuals.

<sup>49</sup> *Lex* (plural *leges*), from Latin *legere*, to pick, to choose. In its original sense, 'lex' had obvious military connotations. Cf. 'dilectus' (raising an army), 'legio' (legion). 'Lex' eventually came to stand for a general command or standing rule issued by an authority or commander. Thus, the proper context for the application of the term 'legal' is a particular organisation, which is the only context in which issuing and obeying general commands make sense. A natural order, obviously, is not a structure of command-

the organisation. Being out of order does not signal injustice but illegality, that is, insubordination or acting without legal warrant or authorisation. Whereas justice directly involves natural human persons, legality does so only if and in so far as they are occupants of social positions within the relevant organisation. The concepts of freedom and property do not apply to such positions or artificial persons, which have no own being or individual existence. The boundaries between artificial persons are conventional and only conventional: they can be obliterated or moved at will; and artificial persons can be merged or split up without any physical effect in the world of natural persons. There is an obvious sense in which, say, France or IBM, or their Chief Executive Officers exist only on paper. What they are or are not, or can or cannot do is defined in the relevant legal documents, but what a natural person is or can do is not so defined. It is true that many people identify with their social position to such an extent that they appear to have forgotten ‘who and what they are’; but that they are oblivious to the order of natural persons does not imply that it does not exist.

In Hayek’s nomocratic perspective, ‘the law’ has an ill-defined quality as questions of justice and legality coalesce in the category of ‘general rules’ and the concept of ‘rule follower’ renders moot the distinction between natural persons and the roles they play in this or that society. In particular, the distinction between finding and making rules, to which Hayek attaches considerable importance, loses its sharpness when the natural law perspective is abandoned. His notion of discovering rules remains vague. True, there is no problem if rules are mere behavioural regularities; or if there is a definite end that one should reach (such as justice, that is to say, respect for law): one can discover regularity and one can discover a method for achieving an end and formulate it as a practical rule of action. However, a nomocracy is not concerned with *discovering* regularities and it certainly need not be concerned with respect for any other rules than those it wishes to be obeyed.

Nor is the student of natural law primarily concerned with discovering rules. For the natural law is not an order of rules but an order of natural persons, and to discover *it* one must first discover the natural or objective boundaries that define its elements (human persons) and the characteristic actions (including speech acts) that belong to them. Respect of those boundaries forestalls confusion between persons and other things and between one person and another—a confusion that we find in every injustice. What is more unjust than to treat a person as if she were a thing? In what sense could it be just to ascribe the actions or words of one person to another, thereby giving credit or blame where it is not due? Thus, in the perspective of the natural law of persons, the corresponding practical task for jurists (experts in *iuris*) is to search for, pro-

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and-obey. See, F. van Dun, ‘The Legal and the Lawful’, *Journal des Economistes et des Etudes Humaines*, VI, 4, 1995, 555-579.

pose, and criticise rules of justice. These rules, if followed, hopefully will guide and constrain people's actions in ways that minimise the risk of confusing persons and other things or one person and another. Note that these rules of justice are not 'the law' or 'the natural law' (that is, the natural order of the human world). They are not even rules of law, which are *logical* implications of the rule that law ought to be respected—for example, the implications that one ought to respect persons, their property, and their contracts and other *iura*. Instead, they are means for maintaining, strengthening and eventually restoring the respect for 'the law', especially in circumstances where there is a lack of knowledge of, or conflicting information about, the relevant facts or intentions of parties. The rules of justice are, in the traditional sense of the word, technical rules or rules of skill—similar to the rules that physicians, architects and engineers use to achieve particular ends in particular [classes of] circumstances with due respect to the natural order of the physical world. In short, they are practical hypotheses, 'inventions' as much as 'discoveries'. As such, they are open to revision, adaptation and improvement—actions that make no sense in connection with either the natural order of the human world or the rules of law. Jurisprudence, in so far as it is based on natural law, has an inherent finality, the quest for justice, in the same way that science once was characterised as a quest for truth. In contrast, the fundamental law of a nomocracy is not some order of things that needs to be discovered before one can start making rules to ensure respect for it. It is itself a system of rules. Meron's nomocracy also obfuscates questions of rule-enforcement. In natural orders, the 'rules' are not enforced at all. Alternatively, one might say that they are self-enforcing. For example, we can explain the sun's planetary system in terms of the laws of nature without wondering about who enforces those laws. Even in the human world, some orderly phenomena such as the use of a common language or currency require no more than an explanation in terms of self-enforcing patterns of order. These so-called pure co-ordination equilibria exist because a person cannot gain anything by insisting on speaking another language or using another currency than do those around him.

However, there are also natural orders—multi-species ecological systems are an example—where the laws are not self-enforcing but are themselves the result of the fact that most specimens of most species in the system are fairly successful in defending themselves, their progeny, or their turf against predators and invaders. These competitive equilibria have parallels in the human world, where some of the most impressive examples of orders appear to exist only because most people are fairly successful in defending themselves, their children and their property.<sup>50</sup>

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<sup>50</sup> Almost everywhere and at all times in human history, the order of daily life and work depends far more reliably on the measures people take to protect and defend themselves against petty crimes than on the 'collective security' imposed on them by certain artificial persons. Even in the modern democratic State, few people count on

Hayek, however, does not make much of that possibility. For him, it goes almost without saying that a monopolistically organised coercive power (a State) must confiscate the means for the enforcement of a legal system of ‘general rules of conduct’ and the protection of a legally defined ‘private sphere’ for every individual. In fact, Hayek seems to assume that only a State can guarantee the spontaneity of the market order.<sup>51</sup> Obviously, the argument that in a nomocracy the enforcement of its legal rules is a ‘natural monopoly’ is a mere tautology, but it does not imply that coercively suppressing competitors in the enforcement business is in the interest of the sort of cosmic social order that Hayek eulogises.

The notions of an intervention and interventionism, which are of central importance in Hayek’s work as a critic of policy, also become blurred, even paradoxical. It is quite logical to discuss actions that are incompatible with the laws of justice as interventions in the free market or the natural order of society—especially if they are actions that prevent or render ineffective people’s defences against injustices. However, it is beside the point to make an issue of interventions by governments, legislators, judges or administrators, in a nomocratic order that they or their predecessors have organised in the first place. In Hayek’s nomocratic perspective, with its focus on ‘general rules’, the distinction between ‘political means’ (coercion, violence, forceful takings) and ‘economic means’ (voluntary exchange of one’s own property) is moot.

Finally, we must note the great gulf between the ethics associated with artificial or legal orders, on the one hand, and the natural order of human persons, on the other hand. Ethics is an unintended result of human interaction and in particular of the conditions under which people can argue with one another. Ethics is a rational discipline that cannot be reduced to only partly conscious mores and traditions: it exists only in argumentation—one can teach mores to a dog; one cannot teach him ethics. Among natural persons, it is shaped by the fact that people, interacting as free and equal agents, are responsible and eventually liable to one another for their own, but only for their own, actions, words and

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the police for protection against thieves, burglars and swindlers. They buy locks, alarms, dogs, and insurance policies; hire guards; and take advice from neighbours, friends, and experts. See, e.g., Bruce L. Benson, *To Serve and Protect: Privatization and Community in Criminal Justice*, The Independent Institute, New York University Press, New York 1998.

<sup>51</sup> On the implausibility of this view, see Anthony de Jasay, ‘Who Gave Us Order? On Exclusion, Enforcement and Its Wherewithal’, now reprinted in his *Justice and Its Surroundings* (Liberty Fund, Indianapolis, 2002), p.4-18. Indeed, Hayek (R&O, p.82) cannot completely ignore the historical fact that most of the time the spontaneous orders of the market and daily life define an ‘economic space’ that extends far beyond the borders of any State. There was interregional and even intercontinental trade long before States appeared on the scene, and, except perhaps in an era of Iron Curtains and Berlin Walls, national borders hardly ever prevent people living in border regions from having regular economic and convivial relations with people on the other side.

works. There is no regular or natural way for shifting responsibility to another, least of all to some independent artificial person that is no natural person's responsibility.

In an artificial order, most people, as occupants of one social position or another, are responsible to the proper authorities. These 'officials' are either responsible to no one or authorised to shift the burden of their liabilities ultimately to 'society'. Moreover, the obligations imposed by an artificial order touch people only indirectly, as occupants of a social position. They are, however, defining characteristics of the positions themselves. Thus, the question whether a citizen ought to pay the taxes legally imposed on him is pointless, because a citizen of a society is defined by its rules, including the tax rules. His position is like that of a King in chess—there is no sense in asking whether such a King ought to obey the rules of chess. In contrast, whether a natural person ought to pay taxes that others impose on him depends crucially on how he came to be in the position of a citizen or subject of their society.

The structure of order determines the structure of argumentation. The rights and obligations that follow from the injunction to respect others as free and equal natural persons are at once definite and universal because natural persons are real persons: they can present themselves in word and deed. Because there is no natural hierarchy among them, they cannot claim the authority to determine what the other shall do or say; instead they can only appeal to the other's respect for truth and logic, that is, his reason. In contrast, the rights and obligations that follow from the injunction to obey the rules of organisations are only as definite as the rules are and always particular in that they exist only in a setting where those rules have authority. Moreover, arguments within an organisation are arguments between artificial persons—the General Director versus the Treasurer, the Senate versus the Supreme Court—and such persons never are self-representative. The arguments are between natural persons but are acceptable only to the extent that the real speakers clothe their words in appropriate legalese. Thus, the rights and obligations of artificial persons (or of natural persons as occupants of a social position) cannot be determined *by* the requirements of rational argumentation. On the contrary, what counts as valid argumentation within an organisation is determined by its rules and ultimately by those who make, interpret and enforce them.

Hayek was reluctant to rest his case on ethical arguments, but they are indispensable for bridging the gap that separates his theoretical speculations from his commitment to liberal values.

### **Complexity and the knowledge problem**

*Complexity: interconnectedness and dispersed knowledge.* Because of the factors that give it its shape, the Hayekian social order is complex—far too complex to be understood, let alone controlled, by any person or organisation. It is also an enduring order, spanning at least several genera-

tions. By the time they become aware of it, it is older than all or most of the people who live in it. It is, so to speak, an integral part of the world in which they are born—a part of the world about which they will have learned enough not to get lost in it.

In part the complexity of a Hayekian social order stems from the fact that it is an order of orders. It involves among other things the use of language; religious, educational and commercial practices; methods of conflict resolution; patterns of risk-sharing and attributing responsibility and liability; the structure of families and other forms of bonding, social co-operation, and organisation. It may be an order in which a large number of languages, religions, kinship systems, and so on exist side by side. Moreover, these elements rarely are coeval. They have their own history; they may come and go. Thus, the social order is an intricate network of more or less interdependent orders, the rules of many of which presuppose those of others in ways that are difficult and perhaps impossible to disentangle. For Hayek, this fact alone goes far towards explaining why even carefully considered deviations from, or changes in, any rule are likely to produce unintended consequences and uncertainty. Such deviations and changes are bound to frustrate the expectations of some people who may then have stronger incentives to look for new solutions for their own unexpected problems, thereby further upsetting the patterns of co-ordination of activities to which their expectations had been geared.

In Hayek's view, this potential for confusion is strengthened by another important fact about complex social orders. While people in a social order generally act in pursuance of their various goals in accordance with rules of which they often are not, or only dimly, aware, they also act on 'knowledge' of personal, local and temporary matters. That 'knowledge' too mostly is implicit tacit knowledge—'knowing how' rather than 'knowing that'. As such, it manifests itself in particular skills or intuitive appraisals, not in the ability to say clearly what it is one knows. More importantly, it is not often available to many other people, even one's nearest and dearest. Thus, unlike the genuinely social rules, those skills and appraisals do not represent a knowledge that is shared by everyone in the same social order. Nevertheless, it is a vital ingredient of the Hayekian social order. As long as most people behave in ways that more or less fulfil the expectations of most others, they get the benefit of a dispersed store of knowledge about the contents of which they personally know nothing. That is because at any time most of those others then have little or no reason to change their customs and practices in significant ways. By and large, one can anticipate in what sort of way others will respond to one's actions. People can co-ordinate their plans based on experience even if they have little or no knowledge of, or contacts with, one another.

These certainly are valid observations about complex social orders. However, they beg the question how a complex stable order can exist

and persist at all. Hayek's description appears to imply that complex social orders are fragile things that need long periods of times to adjust to changed conditions. But how long is long? At which point does it begin to make sense to say that there was successful adjustment or failure to adjust to any particular change?

*Socialism and the knowledge problem.* The characteristics of a complex social order that Hayek chose to highlight easily can be used in arguments against the idea of a planned economy of the sort that captured the imagination of so many during much of the twentieth century. The preparation and implementation of a plan for the direction of all or most activities in the production and the use of capital goods would require enormous amounts of data and knowledge. However, one can only collect and process knowledge and data that are available in some explicit propositional or tabular form. No all-encompassing plan could use or deal with the great store of dispersed, tacit and fleeting knowledge that is available in a market economy, where many people and all entrepreneurs act on their own initiative and responsibility. Thus, even if there were ways of coping with the problems of devising and monitoring the implementation of a central plan, a centrally planned economy would have a ridiculously poor knowledge base compared to one where planning and monitoring are left to independent entrepreneurs and artisans. In that sense, a centrally planned economy faces an insoluble knowledge problem.

*Interventionism and the knowledge problem.* Hayek sees the interventionist welfare states of the twentieth century as a 'road to serfdom'<sup>52</sup>, a sort of 'creeping socialism'. Consequently, it might appear that his critique of 'orthodox' socialism also applies to contemporary Western interventionist states. While central planning in such states differs considerably from 'orthodox' socialist planning, it is present nevertheless—and subject to the same knowledge problem, albeit in a diluted form. Every interventionist regulation brings about a cluster of divergent attempts by numerous people to cope as best they can with the new situation. Previously established patterns of co-ordination lose their *raison d'être* as windows of opportunity get slammed shut for some and open wide for others. In the forced process of adjustment new problems arise as unintended consequences of the regulation, which provide new opportunities for politicians and pressure groups to push for more regulation. The interventionist state is locked into a path of continuous and perhaps increasing piecemeal regulation that tends to crowd out the rules, practices and customary ways that were formed during long periods of 'spontaneous evolution'.

Neither successful monitoring of nor even more or less 'spontaneous' compliance with the regulations can avert that risk. In the interventionist state, unlike its socialist counterpart, people still have legal opportu-

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<sup>52</sup> F.A. Hayek, *The Road to Serfdom*, The University of Chicago Press, Chicago 1944.

nities to rearrange their activities so as to get an optimal combination of costs and benefits out of the various regulatory regimes (and their ‘loopholes’) that the state has imposed. In addition, they have opportunities for initiating political action to change at least some of the ‘rules of the game’—that is to say, to initiate another round of interventions.

It is likely that the combined effect of all those individual attempts at adjustment to interventions is detrimental to the emergence of a stable Hayekian spontaneous order. If an essential part of a society’s knowledge base exists only implicitly as unarticulated, subconscious ‘social skills’ then there is no way to restore it once large-scale experiments in planning or interventionism have impaired or destroyed it. The next generation will no longer have it. Those who grow up without it are not likely to know what they are missing.

None of this has anything to do with intentionally egalitarian policies. Like socialism, interventionism can wreak havoc on the social order no matter what its ideological orientation may be. Thus, while Hayek placed the interventionist state somewhere on the road to serfdom, his theory implies that it is as likely to be a gateway to disco-ordination and outright chaos. However, Hayek does not give any conclusive reason why interventionism must lead to either the one or the other of those extremes. After all, interventionism is just another word for ‘muddling through’. There is no reason to suppose that it could not be successful in Hayek’s evolutionary terms, which only require it to beat the competition of other implemented orders. By its very nature, interventionism is a flexible system, capable of maintaining its characteristic abstract patterns of order while its details undergo rapid change.

*How weighty is the ‘knowledge problem’?* Hayek’s ‘knowledge problem’ as a basis for a critique of socialism and interventionism has not met with unreserved enthusiasm even from his ideological allies.<sup>53</sup> For example, his identification of the knowledge problem of the socialist economy is a pale criticism compared to Ludwig von Mises’ theorem about the impossibility of economic calculation under socialism.<sup>54</sup> The impossibility of economic calculation strikes at the root of the concept of a technologically advanced one-plan economy: the problem of determining how many, and just which, resources to devote to organising or expanding the infrastructure and bureaucracy of planning itself rather than to the satisfaction of consumer demand. “How large should Gosplan be relative to the Soviet economy?” No amount of planning could have answered that question.

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<sup>53</sup> See the provocative essay by J.T. Salerno, “Mises and Hayek Dehomogenized”, *Review of Austrian Economics*, Volume 6, Number 2, 1993, p. 113-146.

<sup>54</sup> L. Mises, “Economic calculation in the socialist commonwealth”, in F.A. Hayek (ed.), *Collectivist Economic Planning*, Routledge & Kegan Paul, London 1935, p. 89—130. L. Mises, *Human Action*, The Scholar’s Edition, Ludwig von Mises Institute, Auburn Alabama 1998.

Compared to this Misesian argument, the Hayekian knowledge problem of socialism is only of marginal importance. Market economies may be remarkably effective in mobilising widely dispersed tacit knowledge, but they can give no assurance to anyone about his individual prospects. It is conceivable therefore that aversion to risk motivates many people to prefer the greater ‘security’ of a central plan to the endemic uncertainty of the market, even if the former implies lower productivity. Nothing in Hayek’s argument allows us to criticise such a preference. Indeed, he stated that ‘the proper function of all law [is] guiding expectations’,<sup>55</sup> but did not say much about the sorts of expectations it is proper for ‘the law’ to guide and less about the expectations that guide the formation of ‘the law’. More importantly, his argument leaves the promise of ‘security’ intact as a sound if less productive alternative.<sup>56</sup> In contrast, Mises’ argument conclusively shows that ‘the one plan’ is at best an empty shell or smokescreen.

Moreover, in a somewhat diluted form, the knowledge problem exists in every social order and in particular also in a market economy, where innovations and fads may lead to the ‘creative destruction’ of well-established patterns of co-ordination and community life as effectively as government interventions. Indeed, many advocates of the market economy and capitalism indulge in paeans to dynamic social change and progress<sup>57</sup> that are as embarrassing as their progressive opponents’ celebrations of ever-lasting social security.

The knowledge problem also exists at the level of large firms and organisations. It often is prohibitively expensive to screen candidates for a job in a centrally directed organisation, such as most firms are, for all of their relevant personal characteristics, including their tacit knowledge, as well as for their suitability for performing the tasks prescribed for them by the managers.<sup>58</sup> Moreover, the persistent moves towards automation and computerisation suggest that in manufacturing, services and administration the kind of implicit knowledge that Hayek stresses do not carry that much weight in the deliberations of entrepreneurs and man-

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<sup>55</sup> R&O, p.89

<sup>56</sup> An amusing recent news-item was a report on the nostalgia for the socialist German Democratic Republic among many former East-Germans. To the reporter’s question, why he preferred the former soviet-style system, the interviewee replied, “Who needs kiwis?”.

<sup>57</sup> E.g. Virginia Postrel, *The Future and Its Enemies*, Free Press, New York 1998, now hyped as a ‘dynamist manifesto’ (<http://www.dynamist.com>). While calls for “change” and “innovation” are ubiquitous in political(ly correct) language, it is safe to say that most people want only others to change. Thus, calls for change create the sort of Hobbesian dilemma that strengthens the case for government intervention: individual demands for change are mutually incompatible, consequently it is up to us-the-government to set priorities for change.

<sup>58</sup> Predictably, some economists have interpreted this obvious fact as a ‘market failure’. (J. Stiglitz, “Towards a general Theory of wage and price rigidities and economic fluctuations”, *American Economic Review*, Volume 89, number 2, 1999, p.75-80)

agers. Of course, it also is not the kind of knowledge that is available for reproduction in the context of the programmed ‘mass education’ that is perhaps the outstanding characteristic of the modern state.

*Is there an argument from evolution against interventionism?* Hayek’s critique of interventionism is right on the mark when it identifies the propensity of interventions to feed calls for further interventions. However, given Hayek’s insistence on the limits of reason and our ability to understand social evolution, those who interpret the rise of the Welfare State as the progress of social order have a ready Hayekian answer to its critics. Is it not a clear case of intellectual hubris, they might ask, to claim to know better than the many generations of the recent past who brought about the welfare state in their attempts to solve real problems, the exact particulars of which no observer can reconstruct?

Here, too, we should keep open the possibility that many people actually prefer an interventionist environment to a Hayekian classical liberal order of general rules of just conduct, even if the former is economically inefficient and entails the recurrence of severe crises and the latter does not. If the burdens of one intervention are the price for the benefits of another, it cannot be excluded that in most cases there is a majority of people who believe the price is worth paying. Where in Hayek’s theory is there a basis for saying that subjectivist economics is OK—the right price is what the market will bear—while subjectivist politics is not—the right policy is not what the polls will bear? Hayek himself joins an overwhelming majority in thinking that some sort of tax-funded, politically administered safety net is a good thing. On occasion, he has opined that, although expansionary monetary policies invariably lead to economic downturns, the progress made in the boom phase of an economic fluctuation usually more than compensates for the temporary hardships of the recession that marks its end.

Of course, those are judgments that presuppose that one can make not only interpersonal but also intertemporal utility comparisons. There is no ground for such comparisons in Hayek’s methodology of economics. By nevertheless making them, Hayek seriously compromised his own critique of the notion of ‘social justice’.<sup>59</sup> All that he convincingly could argue is that those who lose out on the free market logically cannot claim to be the victims of injustices committed by others. However, if the market is a nomocratic construction then that argument loses its force. In a nomocracy, the relevant utilities are those of its organisers. If we view the market as a nomocratic imposition then it is as well that the organisers’ utility functions somehow include the utility functions of their subjects. If I were a cow I would appreciate being milked by a farmer who takes ‘animal welfare’ seriously.

*When is an act an intervention?* There is no ground in Hayek’s theory of social evolution to view legislative, regulative, and administrative inter-

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<sup>59</sup> This critique is the central theme of MSJ, 1976.

ventions differently than undertakings such as organising a trading network, or a commercial or religious corporation.<sup>60</sup> They are just phenomena of, and inputs in, the process of social evolution. They are not unique in having unintended consequences. Hayek often gave the impression that we should separate interventionist from non-interventionist acts by looking at their authors. Thus, in his view, the ‘law of liberty’, which primarily is judge-made law, is not an intervention in, but an expression of the social order. Legislation, which comes from the government, is intervention. However, even on Hayek’s own account, this will not do.

Hayek approvingly quoted Lord Mansfield to the effect that the law (as exemplified by the English judge-made common law) ‘does not consist of particular cases, but of general principles, which are illustrated and explained by those cases.’<sup>61</sup> Presumably, however, an apologist for the interventionist welfare state can claim that particular statutes and regulations merely illustrate and explain general principles (democracy, solidarity, etcetera), which are abstract rules of right conduct that do not aim at particular results for particular people. Let us grant that the social order is an abstract order, and that its most abstract principles are the most likely to be hidden from the perception of most persons. In what sense do the practices of common law judges, which Hayek so often praised, necessarily provide better data on its principles than the practices of legislators, regulators and administrators? There is no reason to assume that politicians and bureaucrats cannot learn to fit their interventions smoothly into the evolving patterns of social expectations.

Moreover, Hayek conceded that ‘grown law’ sometimes ‘requires correction by legislation’. Why? Because the fact that grown law ‘has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad.’<sup>62</sup> Here, obviously, ‘good’ and ‘bad’ represent value-judgements that are external to the grown order of law. If that is the case, then apparently Hayek is envisaging a legislature that somehow knows what is good or bad law, independently of what is being selected in the course of the evolution of law. Such a legislature is not supposed to do much but nevertheless should stand ready to move into action whenever it sees ‘the law’ take a ‘wrong’ turn.

It is not easy to imagine how such a hands-off yet effective legislative power can become embedded in a spontaneous social order unless its interventions (‘corrections’) are a common and frequent practice. If it merely intervenes negatively, to stop abuses and aberrations by rebuking

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<sup>60</sup> As Warren Samuels poignantly asks: ‘What would constitute “non-interventionism”?’ Warren Samuels, “Hayek from The Perspective of an Institutional Historian: An Interpretive Essay”, *Journal des Economistes et des Etudes Humaines*, IX, 2/3, 1999, p.282

<sup>61</sup> R&O, p.86

<sup>62</sup> R&O, p.88

the judges and nullifying a particular sort of verdicts, no legislative power is established. However, if it intervenes positively, dictating how judges should decide cases, it does arrogate to itself the power to ‘make law’.

Moreover, the ‘need’ for corrective legislation is hardly explicable unless we suppose that ‘the law’ develops more or less autonomously, for example, because it has been monopolised by a particular professional group or corporation.<sup>63</sup> However, establishing and maintaining such a professional monopoly seem to require the connivance and protection of a powerful, political elite. It appears, then, that the Hayekian opposition between judge-made law and legislation is spurious. Both are different but connected ways in which a ruling social elite and its agents impose rules. This fact undercuts Hayek’s admiration for the English common law.<sup>64</sup>

Hayek always seemed to assume that the administration of justice and legislation are territorial monopolies (‘functions’ of the State) that somehow are necessary for the existence of a social order.<sup>65</sup> Without any warning, he led us from his all-encompassing notion of ‘social order’ to (organised) ‘society’ to ‘political order’. In any case, the idea of a market for justice—competition among providers of conflict resolution and enforcement services—is absent in Hayek’s work. Consequently, his conception of judge-made law as a source of spontaneous order is dissociated from his famous conception of market competition as a procedure of discovery.<sup>66</sup> Conversely, if we accept his thesis of ‘corrective legislation’, what argument is left to oppose the notion that defines

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<sup>63</sup> There probably would be no need for ‘corrective legislation’ in a context in which judges are selected ad hoc and do not feel constrained either to follow or to create ‘binding precedents’—that is, if they see their job as doing justice in the particular case. There also would be no need for it, if professional judges had to compete against each other as on a market. Competition among judges ensures that no judge, law firm or school of judges can stay ‘in business’ and deviate from the social norms for longer than it takes to establish a reputation as an eccentric.

<sup>64</sup> The Norman kings organised the common law system to strengthen their rule over the land they had conquered. See, A.R. Hogue, *Origins of the Common Law*, Liberty Press, Indianapolis 1985 (first published 1966, Indiana University Press, Bloomington) and R. C. van Caenegem, *The Birth of the English Common Law*, Cambridge University Press, Cambridge (UK) 1973. Eventually, the corporate interests and power of the common law judges grew strong enough not only to eliminate every competing provider of judicial services but also to defy the king. However, it could not resist the rise of Parliament as the seat of a sovereign legislative power.

<sup>65</sup> R&O, p. 90: “But there always existed of necessity an authority which had power to make law of a different kind, namely the rules of the organization of government, and it was to these existing makers of public law that there gradually accrued the power of changing also the rules of just conduct as the necessity of such changes became recognized.” Apparently, the emergence of legislative authority over the rules of social order was a spontaneous evolution, determined by the requirements of ‘necessity’.

<sup>66</sup> See, F.A. Hayek, “Der Wettbewerb als Entdeckungsverfahren”, in his *Freiburger Studien*, J.C.B. Mohr, Tübingen 1969, p. 249-265.

interventionism, that whenever market competition takes a ‘wrong’ turn the State should intervene?

*An invitation to historicism?* Moving to a higher philosophical plane, a critic can point to Hayek’s doctrine that the human mind itself is a rule-governed but evolving spontaneous order. Hence, his critics easily can chide Hayek for assuming, contrary to his own theory, that man has not evolved *pari passu* with the evolution of society, or that ‘the individual’ that gave credence to Humean and Burkean social theories is still with us. If the interventionist state is the fittest adaptation of social order to modern man, or vice versa, we are back at the sort of evolutionist historicism that forever sees the emergence of a new phase in the evolution of the species, with new laws of social order displacing the old. If so, the bottom drops from under Hayek’s criticism of modern society.

Unfortunately, there is no good Hayekian reason why the majority of people could not adjust to the interventionist arrangement and learn to live with it. They may acquiesce to lose ever more control over their own life because in an interventionist State that is a necessary condition for meeting the social expectations of ‘the majority’ (of which most of them are a part).

This is the more likely in the Western World, which by now, after several generations of compulsory, comprehensive ‘public education’, must have the most thoroughly educated (indoctrinated or brainwashed) population in the history of Mankind. Children are forced to spend much of their time in ‘the school system’, a large formal organisation devoted to their proper and comprehensive ‘socialisation’. Much of the remaining time is taken up by mass media produced by slightly older output of the same educational system and also dedicated to idea that people should do what ‘society’ expects them to do. Surely, the mass-production of intellectuals, selected for their ability to repeat the formulas that they have learned in school and to come up with ‘socially correct’ answers, must shape people’s ideas on what counts as social action or as an expectation that should not be frustrated.

Moreover, after school, most people can look forward at best to the life of an employee who is supposed to do as he is told. Spurred on by corporate capitalist greed, many advances have been made in Human Resources Management.<sup>67</sup> The relevance of Hayek’s key category of private, local, temporary and mostly implicit knowledge may be diminishing rapidly in a society in which all the large employers—political and economic corporations—are committed to standardisation, following bureaucratic procedures, and continual reorganisation. Within large organisations that sort of knowledge in any case more likely refers to one’s

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<sup>67</sup> The concept is as old as slavery but the term is a literal translation of the German expression ‘Verwaltung des Menschenmaterials’, which was coined by General Erich von Ludendorff, the main German military planner during World War I and foremost theoretician of the idea of comprehensive mobilisation for total war.

ability to promote one's career by having the right relations within the organisation than to one's ability to get things done without much fuzz. As the distance between those who make decisions and those who have to implement them grows, the relation of the personal knowledge of the latter to the action or strategy chosen by the former inevitably diminishes.

There still may be a margin for the sort of social order that Hayek likes in families and small circles of friends and direct acquaintances. However, that order is not what people recognise as 'the law' of society. For better or worse, the character of Western society now is determined ostensibly by large political, economic and other organisations—states, political parties, trades unions, commercial, industrial and non-profit corporations—and their relentless need to reorganise to meet the challenges posed by the reorganisations of their rivals and competitors. Thus, as Ivor Jennings<sup>68</sup> put it, 'The law is that the law can change at any moment.' People learn to expect rapid social change. They see the point of 'flexibility', even if it means expectations only for the short run. An abstract society of that kind needs abstract people, who expect to be told explicitly what to do next. Well-educated mothers, it seems, no longer dare to raise a child or boil an egg without a manual to guide them through the process. Even so, many would prefer to hire an expert to do it for them.

Socialisation and organisational requirements have obscured the boundaries between the private and the public sectors. Industries and professions often are as thoroughly dependent on political good will, protection and funding as universities and research institutions are. Through their 'representative organisations', keen on maintaining good relations with the political and administrative organs of the state, they have become willing agents for implementing governmental policies and enforcing regulations. They help to collect taxes from, and data about, individual persons. Without the sort of central planning that would bring back memories of Lenin, Stalin or Mao, production and consumption have been thoroughly 'socialised' through taxation, regulation, safety codes, credit manipulation, corporate finance and social security. Theories of management—'governance' in fashionable speech—likewise reflect a way of thinking that is oblivious to the old categorical distinction between economics and politics, because it sees natural persons only as organisational resources or statistical pretexts for organised action.

Hayek may have thought that he agreed with the socialists of his time on the ends but differed on the means to achieve them. However, it seems that there is also significant agreement on the means now that socialists have discovered and have learned to use the techniques of in-

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<sup>68</sup> On Jennings (1903-1965) see M. Loughlin (ed.), "Sir Ivor Jennings and the Development of Public Law", *Modern Law Review*, Volume 67.

direct, nomocratic control. Governments have learned how to play the market while latching countless *general* rules to the ever-expanding catalogue of sociological categories compiled by social researchers. Nearly everybody already assumes that fiscal and monetary policies are merely items in the vast toolbox of social engineering. With equal fervour, politicians and the private sector—especially the ‘services’ industry—encourage the public to clamour for more and more technologies of social control to shield it from the slings and arrows of life. Kept in a state of insecurity by incessant scare mongering and roller coaster economies, that public appears to be a willing buyer and voter.

What we have here is a process that defines the current social order (in the Hayekian sense) by the weight it lends to some expectations and the systematic disappointment it holds in store for other expectations. Given that expectations are endogenous to—or products of—the social order, Hayek’s theory does not appear to give us any handle for social criticism. For that we have to fall back on his expressions of liberal values and convictions.

According to Hayek’s criteria for evolutionary success, the Western interventionist state must be deemed very successful indeed. However, where evolution is the judge, any critical judgement necessarily is premature. There is no way, *ex ante*, to tell which deviations from a historical norm will, and which will not, be the start of a new social or cultural development that eventually will prove ‘to work’ by crowding out societies and cultures that stuck to the norm. In the end, Hayek is reduced to advocating not only that social order and its evolution be constrained by classical liberal principles, but also that these should be imposed from the outside by way of a ‘corrective intervention’. That, however, is a call for an attempt to engineer the intervention that will end all ‘unnecessary interventions’. Unfortunately, his theory dooms such a project to failure. In a society in which expectations have been shaped for generations by an interventionist mindset, a liberal constitution—should it ever be enacted—will be used to fulfil those expectations.

### **Law, property and freedom**

As Hayek tells its story, ‘social order’ is and remains a mystery. Especially in his later writings, it comes to resemble a powerful God who works in ways that our reason cannot fathom.<sup>69</sup> Edmund Burke, whom he admired so much, had a warning about this: ‘A good parson once

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<sup>69</sup> Indeed, for nearly two thousand years, the expression ‘by God’ implied ‘not by man’, even as man was defined as being ‘like God’ (Genesis, 3:20). It was clearly understood that ‘all deliberate efforts to bring about a social order by arrangement or organisation... take place within a more comprehensive spontaneous order which is not the result of such [human] design.’ (CLPT, p.73) In this way, religion certainly helped to inspire awe and reverence for the order in the human world that could not be traced to a human design. When ‘by God’ came to imply ‘by human superstition’ (as opposed to ‘scientific knowledge’), the ‘natural order’ or ‘natural law’ of the human world inevitably was reduced to a superstitious atavism.

said that where mystery begins religion ends. Cannot I say, as truly at least, of human laws, that where mystery begins justice ends?<sup>70</sup> We may grant that a philosopher should not pretend to provide a complete understanding of the details and the particulars of every fleeting phenomenon. However, he should be able to identify the ‘causes’ of recognizable patterns. Hayek-the-economist did so successfully in his analysis of market competition, which is as gratifying to a philosopher as it should be to any economist. He did not succeed as a social philosopher. Why? As an economist he had claimed to be indebted to the Scholastic tradition, which had fostered a realist conception of social order as a natural order—a natural law—of natural persons, real men and women. As a social philosopher, he embraced the skeptical conservatism of Hume and Burke that led him to his conception of order as a system of mostly implicit, subconscious beliefs—in his terminology, ‘knowledge’—embedded in traditions, customs, practices and expectations. Thus, as the objective natural order of the human world dropped out of sight, problems of law and justice were reduced to formal problems of ‘consistency, equivalence, and predictability’ in developing and maintaining rules of conduct.<sup>71</sup>

Probably unwittingly, Hayek joined the modern exodus from philosophical realism,<sup>72</sup> presenting law as an evolving sort of objectified intersubjectivity without a mooring in the structures of human reality. There is no way in which one can extract from that conception of social order an argument for his claims that law, liberty and property form an inseparable trinity, and that property is the only solution men have yet discovered to the problem of reconciling individual freedom with the absence of conflict. Yet, however little support those claims receive from his theory of order, it is important to realise that proof of their truth depends on recognition on something that Hayek left out of his analysis. He could have closed the gap between his positive analysis of the evolution of social order and his normative position, if only he had given more weight to that stalwart of the classical liberal tradition, human nature. It might have alerted him to the fact that what is wrong with orders of human affairs that show little or no respect for human freedom is that they do not do justice to the nature of a human person, not that they are not orders at all or at best inefficient at mobilizing various sorts of ‘knowledge’. It might have led him to consider the cru-

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<sup>70</sup> Edmund Burke, *A Vindication of Natural Society* (1756). Admittedly, that was Burke before he turned conservative—before he became a fulltime politician.

<sup>71</sup> R&O, p.124. Hayek is quoting Paul A. Freund, ‘Social Justice and the Law’, in R. Brandt (ed.), *Social Justice* (Englewood Cliffs, N.J. 1962), p.94: ‘The judge addresses himself to standards of consistency, equivalence, predictability, the legislator to fair shares, social utility and equitable distribution.’

<sup>72</sup> In economics, that exodus had led to a purely formal preoccupation with models that one should validate—not by their conformity to any known structures in the real world but—only by their internal consistency and then evaluate for their compatibility with any available set of ‘data’.

cial question, whether we should prefer the universal and objective requirements of the natural order of conviviality among natural persons to the always changing rules of whatever artificial order is held up subjectively as the social model for the here and now. With its support, Hayek's theory might have shown that the answer is not really a matter of choice for those who do not seek to abolish human persons by reducing them to placeholders in a social scheme. Unfortunately, it did not. The Dutch language has an appropriate saying: 'The riverbank will turn a boat.' Hayek's theory is all boats, no banks.