

Liberal Read

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The Mirage of Social Justice

BOOK REVIEW

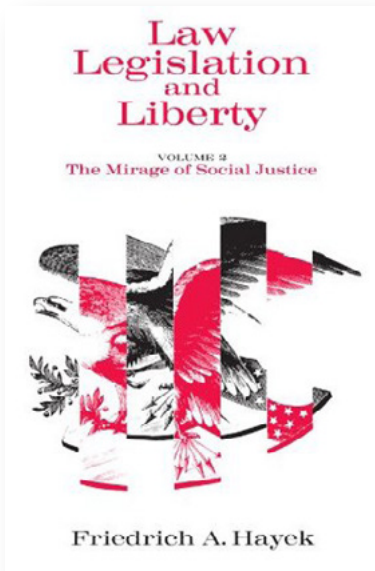
Friedrich von Hayek
*Law, Legislation and Liberty,
Volume 2: The Mirage of Social Justice*
University of Chicago Press, 2012

By Adam Mazik

A series of crises has put many liberal ideas under question. Inspired by a popular commercial concept, Liberal Reads are packaged in an easily accessible format that provides key insights in 30 minutes or less. The aim of Liberal Reads is to revisit and rethink classical works that have defined liberalism in the past, but also to introduce more recent books that drive the debate around Europe's oldest political ideology. Liberal Reads may also engage critically with other important political, philosophical and economic books through a liberal lens. Ideological discussions have their objective limits, but they can still improve our understanding of current social and economic conditions and give a much needed sense of direction when looking for policy solutions in real life problems.

Liberal Read

The Mirage of Social Justice



Introduction

To the modern person, the term social justice almost seems self-explanatory. From the moment one gets interested in politics, “social justice” seems to have always been part of the argumentation of politicians from both the left and the right. But what does “social justice” mean? And is it always used in the same way? What is the relationship between “justice” and “social justice”? Can “social justice” actually be achieved?

These and other questions are answered in “The Mirage of Social Justice”, the second part of one of Friedrich August von Hayek’s most important books, *Law, Legislation and Liberty*. Its three parts are perhaps the essence of Hayek’s socio-philosophical thought. The great Austrian economist and social philosopher published a variety of articles and books, some of which deservedly became classics of modern 20th-century liberalism.

Here we will mainly focus on the second part of Hayek’s magnum opus.

In “The Mirage of Social Justice” Hayek tries to prove that not only is the term “social justice” empty and meaningless, but the ideas behind the term as well as the execution of policies aimed at reaching “social justice” are a grave danger to the “Great Society” and our liberal civilisation. According to Hayek, “social justice” and its proponents have the potential to destroy the very institutions and concepts that make a free society and civilisation possible.

Spontaneous orders and organisations

The central point of Hayek’s argumentation is his understanding of different kinds of orders and rules. Hayek differentiates between spontaneous orders, which he calls “cosmos”, and organisations, which he calls “taxis”. Spontaneous orders are orders “of human creation, but not human design”.

A designed order (an organisation) has been deliberately planned and has some clear and formulated goals. Organisations are associations, corporations, governments, and other types of orders which exist to reach a certain individual end. The main aim of a government is to protect and enforce the rights of its citizens (and others in the geographical reach of the government). Other organisations are, for example, corporations and companies. The goal of Ford, BMW, or Kia is to produce and sell cars.

Spontaneous orders, on the other hand, do not have any differentiated aims or ends. They are not created to reach a certain goal but are the results of a complex interplay of different agents who act according to a set of rules. The market is such an order: through the price mechanism, it coordinates the voluntary actions of self-interested agents who

buy and sell products and services and use all of society's dispersed knowledge to reach their respective individual goals.

What markets do make possible is the use of combined information and knowledge that no individual and no organisation possesses or even can possess. The market and its outcomes do not emerge either because someone has planned them or because someone has aimed to create them. They are the visible result of many different individual actions of agents working within a framework of rules. The best example of this is the mechanism of supply and demand on the market.

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Society is a spontaneous order. Society, according to Hayek, consists of the individuals and organisations in it, as well as their actions. These happen in accordance with different kinds of rules. But what exactly are those rules, and what is their nature?

What is the law? What is legislation?

If someone were to ask a modern person on the street what "the law" is, they most likely would receive the answer that it is the text written in the statutes that are produced by the legislatures of all countries. "The law is what the parliament produces, with the legitimate power which it derives from the democratic choice of the people, who it represents." While not wrong in its 21st-century terminology, this vision of the law is very modern.

In the first part of *Law, Legislation and Liberty*, "Rules and Order", Hayek defines two kinds of "laws". Most people nowadays are familiar with the first one, which Hayek calls legislation, or "thesis". "Thesis" includes the rules of the organisation. They are deliberately designed and created by either parliaments or other legislative bodies and aim at certain ends. Legislation is a "public" law, created in the "top-down" fashion, and it serves as the functioning of the government as an organisation. The second, "nomos" or "the law" is a set of rules that has not been designed by anyone in pursuit of his aims but which has "evolved" and "grown" through the repeated actions of individual agents who didn't intend to create a legal system.

The law, in Hayek's understanding, is therefore a set of rules, or regularities, that doesn't aim at a certain end. The basic rules of conduct, like most of the norms of civil or criminal law, are the results of thousands of years of actions, traditions, and adaptations. Such rules of conduct have not been set by a "ruler" in order to reach an aim, like public peace, but are rules which have enabled certain societies to survive in competition with other societies. These rules and regularities don't have to be stated or formulated—the decisive factor is obedience of the rules by coexisting agents. In fact, according to Hayek, the fact that we obey most of the rules every day is not due to knowledge of the verbal formulation of a certain rule but because we implicitly know how to act, owing to the experiences that we and our ancestors have had and the fact that we can deduce the adequate kind

of behaviour from the context of situations we find ourselves in, as part of an ongoing learning process.

Those rules of conduct have continuously been formulated and improved by independent judges and other decision-makers throughout history.

The role of rules

Why do those rules emerge? Why do we need them?

Hayek starts his argument by asking about the meaning of terms like “general welfare” or “public good”.¹ Criticising their unclear definitions, he points out that both terms can be used to plead for any policy which works for the interests of the ruling group. He sees the reason behind this tendency in the wrong assumption that the public interest is the sum of all private interests. However, this cannot be the case, as neither the government nor anybody else could aim at the satisfaction of all individual goals, since no one knows what those aims are.²

In a modern society in which agents use their own knowledge to reach their individual goals, most of the needs of individuals are satisfied as a result of processes that the government and no one else is aware of.³

Hayek concludes from this that the main aim and main public good that the government can and should provide in a society is not the satisfaction of any particular needs. The government’s chief aim should be to defend and secure the foundations that make citizens’ reaching their individual plans possible: it should secure the basic conditions that individuals in a society can use so they can pursue their individual and personal goals.

It is therefore of the greatest importance to preserve the spontaneous order of society and of the market, as it is precisely that spontaneous order that makes possible striving and reaching for individual goals and needs.

The tools that we use to preserve this spontaneous order are generalised, universal rules of conduct. We need them because of the sheer amount of dispersed knowledge in what Hayek calls the “Great Society”. The economist explains that nobody is able to know all the particular facts that constitute the basis of the order of activities in a complex society. In order to use all of that information, individuals have to be able to use their own knowledge for their own aims. This is only possible in the spontaneous order upheld by the rules and regularities of conduct.

A modern and complex society differs significantly from the old tribal society that still influences many of our moral feelings and instincts. The greater and therefore more complex the society, the more difficult it is to come to an agreement on common ends.

Therefore, according to Hayek, we need a different kind of mechanism to ensure peace and the functioning of the system. The agents in the Great Society don’t need to agree about particular goals; they do not need to share a hierarchy of ends. What is needed

1 p. 170

2 Ibid.

3 Ibid.

instead is similarity in opinions and values—views on the desirability or undesirability of different forms of actions and a certain kind of lasting attitude towards particular events. Unlike the end-oriented will of tribal societies or organisations, opinions and values do not determine a certain particular action that needs to be done. They rather create a kind of disposition towards certain actions and tell agents which rules to observe in a particular situation.

Hayek notes that rules and values vary between different societies. For that reason, he finds it impossible to formulate an absolute system of morals applicable to all humans and societies.

Rules emerge from an ongoing and continuous process of learning and adaptation to the environment. Through trial and error, agents learn the importance of observing certain rules in certain kinds of situations. The rules that get adopted and passed on are ultimately the rules of more efficient societies, and thus of societies with more efficient rules. The law does not serve any particular ends in the way commands do; instead, their function is to maintain the abstract order of actions in a society, making the pursuit of many individual goals possible.

It is impossible to start a new system of law from scratch. Observable rules operate within a framework of given values and can only be criticised or improved upon by taking into consideration other rules guiding

conduct in that society, as well as its values and opinions. Rules are not completely separable from the entire system of the law but are a part of a complex structure of regularities of conduct created by the experience of generations.

Hayek notes that rules and values vary between different societies. For that reason, he finds it impossible to formulate an absolute system of morals applicable to all humans and societies. Both rules of conduct, like the law, and morals always depend quite a lot on the kind of society in which an agent lives.

But what is the relation of the law (nomos) to justice, in that case?

Does the fact that there can be no absolute system of morals lead to the conclusion that an objective test of justice is impossible, as legal positivists hold? Maybe justice only depends on the will of legislative organs?

According to Hayek, justice is an attribute of human conduct, meaning that descriptions of something being “just” or “unjust” can only refer to the deliberate actions of agents and organisations. It would be a mistake by this logic to call the result of something just or unjust when no person is responsible.

It certainly can appear to be unfair that some people have better opportunities than others. It can appear unfair that certain idle individuals have more than their industrious and hardworking counterparts.

The spontaneous order of society, however, is not a process in which someone actually decides about the outcome. The outcome depends upon millions of actions and a colossal amount of dispersed knowledge that nobody can ever possess, and it is not the result of



FRIEDRICH VON HAYEK

“What is important is not what freedom I personally would like to exercise but what freedom some person may need in order to do things beneficial to society. This freedom we can assure to the unknown person only by giving it to all.”

Friedrich von Hayek (1899-1992) was an Austrian economist and political philosopher who won the Nobel Prize in 1974. In 1944 he published *The Road to Serfdom*, in which he opposed all forms of collectivism on the basis that it always led to tyranny, making reference to both nazism and communism. Central to his viewpoint was his aversion to a state-run economy. He made a passionate plea for the free market as the best way to achieve greater prosperity and peace in the world. In 1947 he founded the greatly influential Mont Pelerin Society in Switzerland, a liberal think tank intended to strengthen free society and the free market economy. Founding members included Ludwig von Mises, George Joseph Stigler, Karl Popper, Wilhelm Röpke and Milton Friedman. During a party policy meeting in 1975, Margaret Thatcher is said to have taken a copy of *The Constitution of Liberty* out of her briefcase, slammed it on the table and declared: “This is what we believe!”¹⁴⁶

any decision made by a ruler, an entity, or an organisation. Even if someone wanted to influence the market in order to produce a certain result for a certain person, they would not have the power to do so. Hayek concludes that in such a spontaneous order there can never be a rule which would determine any person's end position. The results of the market in their details are not intended by anybody and therefore are not the result of a single person's or an organisation's deliberate action. To call such results just or unjust would therefore be a categorical mistake.

The liberal understanding of justice, according to Hayek, is to treat all members of society under the same rules.

He asserts that these rules of just conduct, in the overwhelming majority of cases, are negative and abstract. They developed after the time when old tribal societies had evolved into more complex ones. In a more complex society in which members cannot know all the individual ends and needs of others, rules necessarily have to become general and negative. Rules which may work in a family or a small organisation cannot apply to complex societies.

By abstract Hayek means that they are applicable to an unknown number of future instances. Instead of determining the particular action that ought to be done, they forbid certain kinds of conduct. Their function is to protect the personal domains within which individuals can use their knowledge for their own purposes, allowing them to choose certain actions within these domains, for example, private property belonging to individuals and others in a given society.

Hayek once again emphasises that the results of conduct under these rules do not only depend on the observance of said rules but also on a variety of situations over which agents do not have influence. From that, Hayek once again concludes that these results cannot be called just or unjust. It's not the result that matters but the way in which this result has been reached.

There is therefore no positive test for justice. We do not have positive criteria. What we do have, in Hayek's view, are negative criteria. Interpreting and applying a rule within a system of rules and values cannot tell us which kind of action is just; however, it might demonstrate unjust conduct. Through this gradual implementation and improvement of rules, through this ongoing process, we can never reach a perfectly consistent system of just rules, as it has to continuously adapt to the changing particular circumstances of a complex modern society. It is through these negative tests of consistency, generalisation, and universalisation that we can adapt and come closer to the ideal of a just system.

Hayek and legal positivism

It is important at this point to emphasise that Hayek's understanding of law and justice has never been the dominating opinion among jurists and philosophers of law, neither at the time of the publication of his book nor today.

Throughout the 20th century and up to the present, the dominating idea in the understanding of jurisprudence has been legal positivism.

Legal positivists do not have Hayek's empiric understanding of the law or rules of conduct.

According to legal positivists, the only kind of real law is the law deliberately made by the legislative branch, essentially what Hayek calls legislation or public law. Just like Hayek, positivists understand that there are no positive criteria for justice. They do, however, draw a very different conclusion: there is no objective test of justice at all. In that

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understanding, the law is purely the subject of the will of the legislator. It doesn't matter to consistent positivists, either, whether the statute has been implemented democratically or not.

Many positivists, e.g., Hans Kelsen, have thus concluded that even the unjust laws and statutes of the national-socialist regime in Germany from 1933 to 1945 were in fact laws, in their understanding of the word, even if they disagreed with it on a moral level.

With his negative test of justice, Hayek demonstrates that their conclusion is false. Just because there is no positive test of justice, it doesn't follow that therefore

no objective statements about justice can be made. What can be done is to consistently apply the negative test of justice to improve the inner consistency of the system. Such adaptations, changes, and improvements should not be the result of lawmakers' arbitrary will but should evolve from the inner necessity of the system.

According to Hayek, the reason for the positivists' misconception is ultimately their ahistorical understanding of the law. Hayek argues the opinion that the entire content of all rules of law is deliberately determined by the arbitrary will of the legislative body making the law is factually false and the result of a constructivist fallacy.

The law (civil and criminal law), in Hayek's view, evolved before the modern understanding of the state or government was known. It does not make any sense to say that all of its content has been determined by deliberate acts on the part of the legislature when, in fact, the kind of law that Hayek mainly analyses is older than the concept of legislation itself.

The abuse of justice

Hayek argues that the whole concept of social justice is based on naive anthropomorphism and the fundamental misunderstanding of spontaneous orders. It is true that some distributions which happen in a market economy would be unjust if they were deliberately created. However, society is not an agent which can aim for particular ends. Society is not an organisation like a corporation, or even a government, but a spontaneous order, one which isn't directed by any deliberate acting or thinking. The results of the market order are the result of the actions of many agents, each of them striving for their own individual goals. These results depend on many factors and circumstances which cannot be known or understood entirely by any individual or government.

Social justice for Hayek is the logical conclusion of socialist thought. After discovering that the socialisation of the means of production is politically hard to achieve, socialists quickly changed their focus and realised that their egalitarian goals could easily be reached via other types of controls, like taxation and redistribution. Hayek sees great danger in this kind of thinking. While the ideal liberal society was to be governed by the principles of

justice, he sees modern society as moving away from those ideals and therefore inevitably in the direction of more control, more organisational thinking, and less freedom, as he demonstrated in one of his books, *Road to Serfdom*—and all of that in the name of social justice.

Conclusion

“The Mirage of Social Justice” represents the complex work of a great mind. What seems to be a simple critique of “social justice” is in fact so much more.

It is a thorough study of the law, legislation, and society. Hayek offers deep insights about the functioning of markets and the spontaneous order of society, as well as a solid critique of contemporary legal philosophy. Together with the first part of *Law, Legislation and Liberty*, in “Rules and Order” Hayek develops an empirical, realistic theory of the law and its development.

He dives into basic concepts like the understanding of different kinds of orders and the rules that govern them and shows that the law as it was understood for thousands of years is not the result of deliberate design. Rather, it comes from the interplay between freely acting agents observing abstract rules of conduct. Hayek explains the importance of values and concepts such as justice and attacks the organisational thinking of legal positivists.

His work teaches humility and demonstrates how much of our actions are determined by traditions and regularities of conduct that were developed over thousands of years among our ancestors.



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