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“Spontaneous order”: Friedrich August von Hayek’s view on law (“Rules and Order”)

BOOK REVIEW

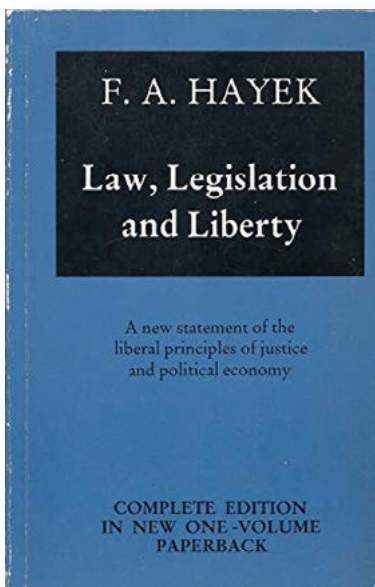
August von Hayek
Law, Legislation and Liberty

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

“Spontaneous order”: Friedrich August von Hayek’s view on law (“Rules and Order”)



When thinking of “the law,” the average person in continental Europe thinks of codexes and books. The criminal code, the civil code, the *Bürgerliches Gesetzbuch* (BGB, or German Civil Code), the *Code Civil*, and so on are collections of legal rules that seem to be created by parliaments and governments in a top-down, rather than bottom-up, manner. The legal order—the way we understand it in the twenty-first century and the way it is taught at universities—thus appears to be an order that someone has created and designed.

Friedrich August von Hayek provides an alternative view on the issue. In “Rules and Order,” the first part of Hayek’s *Law, Legislation and Liberty*, the Austrian thinker claims that law does not have to be the result of deliberate action and design. Contrary to the beliefs of legal positivists, he claims that for most of human history, the law has been the result of a spontaneous order similar to the market. Law is not “made,” “designed,” or “created,” but it is the result of a process of growth and evolution. Citing the Scottish philosopher Adam Ferguson, Hayek claims that the legal order, just like the market order, is a “result of human action, but not human design.”

He makes parallels with the self-regulating tendencies of markets and economy best expressed by the term “spontaneous order.” What does he mean by that, however? How does—or did—this actually work?

Two traditions

The Austrian claims that the confusion regarding the emergence of law lies in the sphere of ideas. He pins the confusion on a set of ideas that he calls “constructivist rationalism,” the origin of which he sees in the works of French philosopher René Descartes.

Hayek claims that “human institutions will only serve human purposes if they have been deliberately designed for these purposes.”¹ He sees the root of this idea in primitive

1 Hayek, F. A. *Law, Legislation and Liberty* (Routledge Classics) (p. 10). Taylor and Francis. Kindle Edition.

thinking patterns, which assume that any kind of regularity found in phenomena must be interpreted anthropomorphically.² By that, Hayek most likely refers to thinking that attributes all order and creation to a certain entity—such as a deity, a personified creature that humans have used to explain phenomena.

This view, which Hayek connects to thinkers such as René Descartes, Voltaire, Thomas Hobbes, and Jeremy Bentham and which can also be safely attributed to Hans Kelsen or the majority of today’s legal scholars, lies in the tradition of the French Enlightenment.

Hayek claims that highly complex orders, such as the society or the market, can only be created through spontaneous forces due to the sheer amount of dynamically changing relations of which those orders are comprised. The elements’ actions cannot be predetermined with certainty.

Another tradition, however, descends not from continental Europe but from the Island of Britain: the Scottish Enlightenment—a tradition best represented by Adam Smith, Adam Ferguson, or David Hume. According to this view, the social and legal order are not the result of deliberate design but of the aforementioned growth. The social order and the rules of conduct have emerged through the adoption of certain practices and customs. The reason why those rules were adopted and preserved is that they gave the groups that adopted them an advantage over others. In other words, they led to a social order that allowed the groups adopting them to prosper better than groups with other customs—similar to an evolutionary advantage in biology.³

To better understand Hayek’s view, we address his argumentation, starting with his explanation of two kinds of orders: Cosmos and Taxis.

Two kinds of order: Cosmos and Taxis

The term “order” is perhaps the central one in Hayek’s book. The role of the social order is connected to certain expectations that one creates when engaging in society.⁴ A social order cannot emerge in an individual alone, but it is interpersonal and only makes sense in the context of conduct between multiple people. Hayek argues that, in a society, we depend on those expectations as we only can reach our aims through direct or indirect cooperation with others. To act in a society, we must be able to predict—at least to some degree—how our actions will affect others. We rely on the assumption that most of society will respect our property or that if we pay for an item, we will receive it.

However, the question is what the source of this order, social contract, or sum of arrangements that regulate our interactions is. The kind of order in which the elements have been or are being deliberately arranged by somebody or something (e.g., an institution) is

² Ibid.

³ Ibid.

⁴ Ibid, p. 35.

a made order, which Hayek describes with the term “Taxis.”⁵ The other kind of order, which according to Hayek is the right term to describe a society, is the spontaneous order—an order that grows and keeps evolving, which he describes with the term “Cosmos.”

These two orders are quite different. The Taxis, or the organization, is a relatively simple, uncomplex order that is concrete, that is, easy to intuitively perceive. Most importantly, the made order serves a certain purpose, namely that of its organizer, administrator, or creator.⁶

In contrast, spontaneous orders can, according to Hayek, reach any degree of complexity. They are not deliberately made up or designed but are the result of a process of growth or evolution. For that reason, due to the lack of a creator, they do not have a predefined aim or purpose. While spontaneous orders have a function—the preservation of the underlying order, or in the context of society, the possibility to reach individual aims based on interpersonal conduct—they do not serve that function because somebody has designed them as such.⁷

Hayek claims that highly complex orders, such as the society or the market, can only be created through spontaneous forces due to the sheer amount of dynamically changing relations of which those orders are comprised.⁸ The elements’ actions cannot be predetermined with certainty. However, certain rules and regularities govern the actions of the elements in such a system; this makes the understanding of the general order possible to some degree.⁹ Those regularities, or rules, occur whether the elements can state the rules or not. The deciding factor is that the elements abide by certain rules, customs, or regularities, even without being able to state them. Nevertheless, often, the predictions can only be made with a certain level of probability.¹⁰

Law as a spontaneous order

Hayek’s “Rules and Order” is a part of his larger work titled *Law, Legislation and Liberty*. What are the differences between “law” and “legislation”? Are they not essentially the same thing? The modern person will—not without good reasons—associate both terms with the same phenomenon. Most “laws” in today’s world originate from deliberate creation by parliaments and governments.

Hayek, however, claims that “the law” and “legislation” are fundamentally different concepts. According to him, law is in fact older than legislation and the concept of government or state itself. Legislation, in contrast, is a relatively new invention that emerged quite late in human history.¹¹

⁵ Ibid, p. 36.

⁶ Ibid, p. 37.

⁷ Ibid, p. 36, 107f.

⁸ Ibid, p. 37.

⁹ Ibid, p. 61.

¹⁰ Ibid, p. 41.

¹¹ Ibid, p. 69.

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As Hayek argues, law emerged because of the observance of common rules among groups, which in turn made peaceful social coexistence possible. Those rules did not need to be explicitly known or formulated and were therefore abstract. It is through this abstraction that people could utilize the knowledge they did not possess.

For thousands of years, those rules were not considered something that humans or societies could change or make at will. They existed as an abstract concept: people learned the proper behavior contextually, by imitating the actions of their peers.¹²

These principles still apply today, even in the context of small groups. I am sure that the listener of this podcast at some point of their life became a member of a new group; for example, when entering a school, university, workplace, or even a friendly get-together with new people. All those environments and groups

can have radically different sets of rules and regularities of behavior. While we do not explicitly know how to act and cannot state in words all the things that we must consider, through intuition and trial and error, we learn the proper kind of conduct. While those rules of conduct among small groups do not become universal legal rules, the essential process of their observance without being able to state their precise content is the same as that of general rules of conduct in a greater society.

The articulation of the rules of conduct was therefore not a process of creation of law but rather a summary of rules that already existed without being explicitly known. Early collections of law, such as the “Sachsenspiegel” from Saxonia or the early Roman law, were not the creation of any mind or organization. They had not been proclaimed yet were widely practiced and executed before being articulated in writing.

Their articulation, according to Hayek, became necessary along with the advancement of civilization. Hayek contends that a chief or ruler of a community (74) would use their power for two purposes¹³:

1. To enforce or teach the general rules of conduct,
2. To give commands for actions to reach certain purposes.

In the first instance, articulating the rule is necessary because its existence and/or meaning might be questioned. Additionally, articulation becomes necessary in the case of disputes that the ruler had to settle as the “intuitive” knowledge mentioned is often not precise enough to settle a particular problem. This long and tedious process would create new problems and rules because it is very difficult—if not impossible—to express all implicit knowledge contained in them in words.¹⁴

¹² Ibid, p. 73.

¹³ Ibid, p. 74.

¹⁴ Ibid.

As Hayek shows, this is the process that leads to the development of early law, such as the Codex Hammurabi or early Roman law. In fact, even the Code of Justinian, which was (and to some degree, implicitly still is) contended as the creation of a ruler, was an invention only to a small degree, while most rules were derived from an already existing legal order.¹⁵

Therefore, according to Hayek, the Rule of Law, or “under the law,” must be understood quite literally. The ruler, or government, was not allowed to alter the law, which, as a concept, was above them. Quite often the law itself opposed the ruler’s aims, effectively being a check on their power.¹⁶

Hayek attributes the most important shift of thinking of the law as the result of deliberate legislation to the time of absolute monarchy in Europe, which notably never occurred in the history of the British common law. Hayek states that a level of freedom impossible for the inhabitants of continental Europe¹⁷ was enabled by two aspects. The first was the common law tradition, which builds on an understanding of the law that is independent of anyone’s will; the second was the independent position of the common law judge, which prevented the formation of an absolute monarchy on the British islands.

Law or legislation?

Hayek calls this kind of spontaneously evolved law with the Greek term “nomos,” in opposition to law that was made, which he calls “thesis.” The function of this law is connected to the already-mentioned expectations arising through interpersonal conduct. As Hayek puts it, those rules “enable an order of actions to form itself wherein the individuals can make feasible plans.”¹⁸

Not all expectations can be protected. According to Hayek, the goal should be the highest match of expectations established through the existence of protected domains, such as the rights to property and life and other rights that are now taken for granted.¹⁹

We observe that Hayek’s concerns with the overall order are very similar to those of his teacher, Ludwig von Mises. While *Law, Legislation and Liberty* is a far less utilitarian defense of freedom than that in the works of Mises, both thinkers ultimately see the functioning social order as the central concept of their philosophies. Only through the ability to make plans based on limited expectations can an individual participate in social life. It is this very concept that makes society and civilization possible. Hayek, therefore, is not primarily concerned with certain “natural rights” but with a system in which the individual can strive for the achievement of their individual aims through the peaceful cooperation of society.

Conversely, the role of a judge is to make decisions that, according to this set of rules, best coincide with the expectations that could be formed. The common law judge is

¹⁵ Ibid, p. 77-79.

¹⁶ Ibid, p. 81.

¹⁷ Ibid, p. 80, 81.

¹⁸ Ibid, p. 81.

¹⁹ Ibid, p. 101-105.

therefore not concerned with any particular values, such as the public good, but with the upholding of the legal order as such. When making a decision in a dispute, a judge needs to analyze the behavior on the standard of expectations that the parties could have reasonably had on the basis of the existing body of rules.²⁰

While Hayek sees those spontaneously emerged rules as a check on power and a decisive barrier for totalitarian tendencies, he does contend that the evolved law does not always lead to acceptable results. The Austrian states that, in such cases, a correction through deliberate legislation might be inevitable. Hayek names

examples of laws regarding the relations between master and servant, landlord and tenant, creditor and debtor, which have been shaped in a time when only one of the sides found representation in the judges’ profession²¹.

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However, according to Hayek, the early legislative bodies were concerned with the rules of not only conduct but also with the rules of the government’s organization. These rules concerning the behavior of government and government agents were initially laid down by rulers, who, as time progressed, needed the approval of representative bodies to establish and change those rules²². Therefore, initially, parliaments were not concerned with “the law” in the sense of the rules of interpersonal conduct but with the rules within the organization and regulation of government.²³ In this way, such laws are directed at a certain purpose and have an aim that the legislature is trying to achieve. However, they are not laws in the narrow sense. Although legislation came to be subsumed under the same term as the rules of conduct for multiple reasons, those two concepts have become entangled only quite recently. Hayek claims that even in the seventeenth century, “law” in the narrow sense and “legislation” were terms that described different kinds of legal rules.²⁴ The reasons for this misconception lie in the sphere of ideas, which we have already touched upon, but also in the tendency of the executive to try to limit the

influence of the legitimate powers of legislation that necessarily limited the government’s scope of actions. The combination of those two phenomena lead to an expansion of the powers of the legislature, which, from a certain point, could call any kind of purposeful act a law.²⁵

²⁰ Ibid, p. 95.

²¹ Ibid, p. 84-85.

²² Ibid, p. 119f.

²³ Ibid, p. 118, 119, 120, 127, 129, 130.

²⁴ Ibid, p. 122-123.

²⁵ Ibid, p. 123-124.

Conclusion

"Rules and Order" is an incredibly abstract and complicated book, one that must be read multiple times to fully understand its concepts and how they relate to one another. Especially tricky is the concept of abstract rules, which are observed but not explicitly formulated or known.

In short, Hayek's main idea is that the law understood as the general rules of just conduct is not the result of deliberate design but of a process of evolution and growth. According to him, the assumption that this kind of law results from a deliberate process of design is based on the ideas of constructivist rationalism, which Hayek considers wrong. In contrast, he claims that a clear difference exists between the rules of just conduct, which are the law in the narrow sense, and the rules of legislation, which are the rules of the government's organization and are specifically created to reach a certain goal.

In the larger context, "Rules and Order" must be seen as the defense of the great open society and freedom-based social order. The confusion in terminology results in a political order in which an increasing number of aspects of everyday life are determined by a deliberate, goal-oriented legislative process. Therefore, a proper understanding of the term "law" is an important check to governmental power and interference, which is most strongly conveyed by the expression "government under the law." By protecting the order of rules of conduct and limiting the government's ability to interfere with it, we can protect the larger spontaneous order of society from both totalitarian and authoritarian tendencies.






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