



KURT R. LEUBE

## Hayek's Perception of the "Rule of Law"

OF society's many organizations, the biggest one called Government, has the double task of enforcing the general rules of society and providing those services to the citizens which have to be provided by the organization of government. But society itself is not an organization, but a spontaneous order. To help understand government in relation to society it is useful to keep the two functions apart, distinguishing between legislation and government in a sense in which this distinction was once used, but has been forgotten.

Professor Hayek uses legislation in the sense of the laying down of general rules equally applicable to all citizens and intended to be applied in an unknown number of future instances. Government consists of the activity of telling those people who are members of the governmental organization what particular things they must do in order to provide specified services to the Government and the people. These tasks must be clearly separated in a free society. They have become hopelessly mixed up in modern developments.

Men have the natural desire to have both, the laying down of general rules and the conduct of current governmental affairs to be decided in accordance with the wishes of the majority. But we have put these two fundamentally different tasks in the hands of one and the same representative, democratic assembly. The result is that Parliament, or Congress, or whatever we call it, has long ago ceased to be a purely legislative assembly as it was originally intended to be. The main function of these elected assemblies has no longer

been to make those general rules, which, at one time were singled out with the honorable name of laws. Now their main function is to direct and control the activities of government and to tell government to do particular things. Our representative assemblies are in the strict sense of the word no longer only law-giving, but also governing bodies. They combine both functions in the same authority, with an extraordinary result.

Man had hoped in the 18th century to achieve a reign of freedom by separating the task of legislation from the task of government. Many people still believe that we have achieved this by, on the one hand, having a democratic assembly which legislates and on the other hand an executive which carries out the laws passed. What we overlook is that this present system corresponds to the ideal only because we have stated using the same word "law" in two entirely different senses.

While law used to mean a general rule equally applicable to all, we have come to call a law whatever the representative assembly resolves, irrespective of whether it has the inner character of the law or whether it is a specific order to execute such and such a thing. The consequence is, that the classic concept with which the idea of freedom under the law was connected, that government ought to be under the law, has not been fully realized. Government under the law means that those

Dr. Kurt R. Leube is an associate of Friedrich Hayek at the Institut für Nationalökonomie at the University of Salzburg.

people who govern should have no power over private people except to enforce the general rules of law. But in fact, in modern development, the same people who govern also lay down laws.

As he points out, modern democracy does not really lead to a majority opinion deciding what government ought to do. It is a machinery the result of which we call majority opinion, but which describes something as majority opinion in which probably not a single member of the majority really believes. It is a product of the machinery and not of an ascertained majority opinion. The inevitable result is that we create an ultimate holder of power, who is bound by no rules whatever, but who can make whatever rules he needs in order to achieve those aims he has to achieve to retain power and to unite a majority in its support.

Professor Hayek maintains that if we want government as well as legislation to be in democratic hands, we must put these things in the hands of two different democratic bodies and not in the hands of the same. His suggestion therefore, is to divide the so-called legislative and democratic bodies: One of which would be concerned exclusively with law-giving in the old sense, with agreeing on those general rules equally applicable to all members and which provide the only excuse for applying coercion to the private citizen; and the other with the task of directing the use of the governmental apparatus, partly for the purpose of enforcing the rules, but chiefly for the purpose of rendering to the citizens the great variety of services which we want government to render.

This second governmental assembly would have power over that part of the resources of society which are set aside for the purposes of government. Its only power over the private citizen would be in enforcing those general rules laid down by the first assembly.

For the purposes of government, you need more than one assembly of representatives which will form and

express a true common opinion. Professor Hayek thinks, and history demonstrates, that for the tasks of government you need a party organization, committed to carrying out a program of action. Society might begin by organizing a legislature proper on the basis of an election for long periods with periodical replacements of only part of the members.

Once a truly legislative body is constituted in this manner, society might well delegate the whole task of conducting current government to another democratic assembly elected exactly on the same lines as now, based on party organization, and with almost unlimited power of controlling the use of those means which have been placed at the disposal of government, but with no power at all to coerce private citizens, to discriminate between private citizens or do what we usually call interfere in private life.

The tasks of government in this case of the central government would, in many ways, become rather similar to the tasks of local government. It would be bound by a higher law. It would be able to concern itself about particulars, about concrete services to be rendered to the citizens, but it would not be in the position, in which it is today, to adjust the general laws to the specific purposes of current government. The evil of the so-called democratic system under which we are now living, is precisely that law has become subservient to government rather than the other way round. What we now call law are rules which can be adjusted from day to day in whatever manner the ruling majority thinks required to achieve the particular results which it wants. It is exactly this which Professor Hayek had in mind in arguing that government in the present system no longer is in any sense under the law.

It is seen as a degeneration of the idea of majority government, due to the particular institutions which we have created, that we have come to call every action of government a law rather than only those general rules which can get the approval of the ma-

jority. So long as we have this situation, Professor Hayek is afraid the tendency of democratic government to direct, according to the will of the majority, more and more of the whole life of society, cannot be stopped. He thinks this trend towards an

omnipotent and all controlling government is built into the particular kind of institutions which we have, and we will not stop it unless we change the nature of our institutions.

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