

The New Thought of F. A. Hayek:

His Political and Legal Theory

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AFTER PROFESSOR HAYEK had published his *Constitution of Liberty*, he could perhaps have sat back to enjoy the fame and ease that what appeared to be the culminating work of a great career of scholarship had made his due. However, that was not in the character of the man. His mind has never ceased to probe the fundamentals of political and legal theory. Hence, despite its monumental character and stature, *The Constitution of Liberty* has proved to be not only *not* his last word on the immensely important and difficult problems of its subject, but a platform for deeper exploration.

Of course, as all know who have followed closely the development of Hayek's thought, it was already marked by a high degree of maturity many years ago. Thus his ceaseless search for new and deeper truth, or for ever more precise formulations of it, displays the rare integrity of his scholarship. The quest for truth is obviously an endless adventure, but most of us are content to scale the mere foothills of knowledge and understanding and then to rest upon our laurels. In contrast here in the late evening of his life is Hayek, who at a youthful age was already opening up new paths in economics, and in early middle age rocked the world of political thought with *The Road to Serfdom* (1944), still exploring, still finding new seams of truth, still showing us the way to deeper understanding.

Since there is a consistency in all Hayek's work (not the consistency which is

blind to other views, but that of the man who long ago found the right road), his ideas at any stage in the development of his thought are the further flowering of those of earlier stages. Thus *The Road to Serfdom* principally argues the thesis that central economic planning means the death of the liberal society which is mankind's highest social achievement, and woven into the argument is the substance of the famous proposition of Adam Smith's contemporary, Adam Ferguson, that social institutions are the product of human action but not of human design. Then in *Individualism and Economic Order* (1948), *The Constitution of Liberty* (1960), and *Studies in Philosophy, Politics and Economics* (1966) Hayek turns the proposition over further and subjects it to ever more minute examination. Indeed, it was also already more than hinted at in *Scientism and the Study of Society* (1942-44) which was mainly written just before *The Road to Serfdom*, and its further elucidation proceeds in part from the ideas adumbrated in that work.

Similarly, in *Individualism and Economic Order* Hayek distinguishes between the individualism which arises with the development of the institutions of freedom (the English path) and that which springs fully formed from the head of the constitution designer (the French path; not, as it may seem, the American path, for that was an extension of the English path); and then in *The Constitution of Liberty* his deeper

probe of this distinction leads him to fundamental aspects of the nature of liberty.

Then again, in *The Constitution of Liberty* Hayek sets about an examination of the distinction between "evolutionary" rationalism (that of Mandeville, Hume, Smith, Burke *et al*) and "constructivist" rationalism (that of Bacon, Descartes, Hobbes, Rousseau, Bentham *et al*) which sheds light on the fundamental problems before him. But, never at the end of his work, he finds more of importance to tell us about it in his *Studies in Philosophy, Politics and Economics*.

Or consider the problem of knowledge which faces the social scientist or philosopher. What facts can we know about the infinitely numerous and infinitely varied aspects of the relations between men in society? And what facts can men know about each other when they set up mutual relations? Does a society arise because of, and are its institutions shaped by, the facts that men know about each other? Or is there some way in which facts which are unknown and unknowable to each of us play a part in the formation of societal relations? Hayek began his probe of this problem in *Scientism and the Study of Society*, which to this day remains the most powerful and penetrating study of the errors which spring from the attempt to apply the concepts and methods of the natural sciences to the social sciences. But he has never contented himself with his achievement in that work. In all his later works he has sought to dig deeper into the relevance of the problem of knowledge for the student of society.¹

Now Hayek has begun to gather together the wisdom of all these works, explore its meaning still further, and derive therefrom a prescription for new political institutions to turn Western society from the disastrous road on which it is now headed. The first fruits of this exploration are presented in the first volume of a trilogy entitled *Law, Legislation and Liberty*. This volume is subtitled *Rules and Order*. The second volume will be entitled *The Mirage of Social*

Justice, and the third *The Political Order of a Free Society*. If we may judge from the standard established by the first volume, the scholarly world can await a feast of analysis and argument of masterly vigor and profundity. The whole three-part work will surely be a landmark in the development of fundamental political and legal philosophy.

In *The Constitution of Liberty* Hayek sought, as he says, to restate and clarify the traditional doctrine of liberal constitutionalism. But it was only after he had completed that work that he came to see, as he believes, why liberal constitutionalism had gone wrong. Why has it lost its grip upon the minds even of most of those who adhere, or believe that they adhere, to its ideals? Why has Western society gone further and further along paths leading away both from liberalism and from constitutionalism, while retaining the forms of government that they bequeathed to it? Thus he asks

. . . what those founders of liberal constitutionalism would do today if, pursuing the aims they did, they could command all the experience we have gained in the meantime. There is much we ought to have learned from the history of the last two hundred years that those men with all their wisdom could not have known. To me their aims seem to be as valid as ever. But as their means have proved inadequate, new institutional invention is needed.²

The nature of the new institutions required will be expounded in the third volume of the trilogy, but we are given a hint of it in the proposition that

the predominant model of liberal democratic institutions, in which the same representative body lays down the rules of just conduct and directs government, necessarily leads to a gradual transformation of the spontaneous order of a free society into a totalitarian system conducted in the service of some coalition of organized interests.³

In *Rules and Order* Hayek is concerned to lay the foundation for proposals for institutional invention by the exposition of the fundamental propositions that "a self-generating or spontaneous order" and "an organization" (*i.e.*, a planned order) are distinct, that their distinctiveness is related to two different kinds of rules or laws, and that the spontaneous order is the order of free societies while the organization is the order of unfree societies. It goes without saying that the idea that spontaneous order is no order at all, which is widespread among champions of organization, is a naive misconception. It is under the influence of this misconception, and under that of the perhaps less naive misconception that, though spontaneous order may be an order of sorts, it is in its nature inferior to organization, that democracy has fallen into the hands of unlimited government. What makes the descent from liberal democracy to totalitarian democracy an even more terrible degeneration than it might have been, is the fact that its recognition is hindered by the retention of liberal democracy's institutions and forms of government. The shell presents the same appearance long after the kernel has been transformed. But of course it is only a matter of time before the shell decays or is torn away and the new kernel displays itself to all.

In summary form Hayek's argument proceeds as follows:

1. There are two schools of thought which both carry the description "rationalism," but which are fundamentally opposed. One is "constructivist" rationalism, the other is "evolutionary" rationalism. The former, enmeshed in factual and conceptual error, is the source of the belief that all social institutions are, and ought to be, the product of deliberate design. The latter leads to the opposite view that institutions arise by a process of growth or evolution not designed by any single mind, whether it be the mind of one man or the concerted mind of men in society (acting, say, by some form or other of a social contract).
2. Constructivist rationalism requires that men's actions, to be successful, should be taken with knowledge of all relevant facts. Insofar as it has to be taken without knowledge of some relevant facts, its results must be inferior to what they ought to be. Evolutionary rationalism shows how action is most successful when it is adapted not only to known facts but also to facts which are not, and cannot be, known. This last adaptation is produced by the observance of rules which no single mind devised, or could have devised.
3. The spontaneous order (for which we may conveniently use the Greek name *cosmos*) is consistent with any degree of complexity of society. Thus it facilitates success in the development of the highest forms of human society. The made order or organization (for which we may use the Greek name *taxis*) needs the nexus of relationships to be simple for any degree of success. It is therefore inimical to the higher and richer development of society. In a *cosmos* the rules are of a general character, subject to which individuals take action in the light of particular facts as they arise, which themselves are not specified by the rules. In a *taxis* the rules are the commands of those in authority, and for their efficacy are directed to particular facts.
4. The reconciliation of individual freedom with order is effected in a *cosmos*, but not in a *taxis*. Freedom is preserved by adherence to principles (which may be explicit laws or may be merely generally accepted feelings of right behavior). It is destroyed by measures which are contrary to principle but are held to be expedient because they offer to secure particular desired results.
5. Law is coeval with society and is therefore older than legislation. The original purpose of legislation was normally not to make new law but to restate or clarify existing law. This was not legislation in the modern sense. The task of judges or juriconsults was thus conceived to be to find the law, not make it; and all men in the society concerned, including the rulers, were

held to be subject to it. The law of a free society, which we may give the Greek name *nomos*, is of the character of such original found, not made, law or rules of just conduct.

6. Legislation in the sense of made law, not found or clarified original law, arose sometimes in order to head off original law from some undesirable development to which its momentum was propelling it. In such cases the making of new law was conceived in a spirit of respect for the old law, and with a desire to enhance its appeal to feelings of justice. But mainly legislation arose from the growth of rule making for the organization and the exercise of power of government. Thus the misconception arose that such rule makers, either monarchs or the representative assemblies whose advice or concurrence they sought in support of their powers, were the sole true fountain of law. Since they made rules for government on the footing that they held the sovereign power to do so, the false deduction was made that all rules, *i.e.*, laws, emanated from sovereign power and required a sovereign to be laws. Law thus made we may give the Greek name *thesis*. The growth of the belief in the supreme authority of *thesis* undermines the *nomos* of a free society and propels it along the road to a servile society.

The above summary presents the barest skeleton of the argument, for it is impossible to do justice in short compass to the breadth and depth of Hayek's exposition, to the coordinate, subordinate, and subsubordinate elements of his analysis, or to the abundance of pithy and memorable passages which authors will use as headnotes for the chapters of their works for generations to come. Consider, for example, the following:

We are still as free as we are because certain traditional but rapidly vanishing prejudices have impeded the process by which the inherent logic of the changes we have already made tends to assert itself in an ever-widening field. In the

present state of opinion the ultimate victory of totalitarianism would indeed be no more than the final victory of the ideas already dominant in the intellectual sphere over a merely traditionalist resistance.⁴

Could there be a truer or more perceptive account of the perilous state of Western civilization? The ship's timbers are rotten, the masts are crumbling below the decks, the rudder is fouled, but for the moment the vessel rides the waves because the caulking has not yet given way!

Let us look a little more closely at our skeleton:

1. Our age believes itself to be preeminently an age of reason. The immense success of the natural sciences has given us unprecedented power over our environment and liberated us from superstitions that held our ancestors in bondage. Earthquakes are not the manifestations of the anger of the gods, but simply the concomitant of faults in the earth's surface. Plagues are not to be prevented by sinlessness but by hygiene; or if they come, deliverance is not to be sought by prayers to the saints but by serums and vaccines. Lightning strikes the houses not of the wicked but of those without lightning conductors. Everything about us, we believe can be explained and controlled by the power of our reason. If this applies to natural phenomena, why not also to social phenomena? Thus we take it for granted that our social institutions should pass the scrutiny of our reason or submit to reshaping in our hands. Surely we must be masters of our fate! Submission to our reason, so that we may be masters of our fate, means that institutions either should be made or designed by us, like our machines, or if inherited should be accepted only if they are what we ourselves would design.

Yet was there ever a time when superstition was more rampant in social affairs than in our age of reason? Consider how ludicrous was the French revolutionaries'

deification of Reason in the light of their acts and beliefs. Consider how grotesque, as well as savage, were the superstitions of the Nazis, and in a country that had been the home of philosophy and science. Consider the constant din of untruth, half-truth, and myth which assails the ears of the modern citizen in the West when he listens to "intellectuals," journalists, television pundits, and the rest expatiating on public affairs.

How can this be, in an "age of reason"? Hayek's analysis gives the twofold answer. First, the constructivist rationalism which claims to scrutinize our social institutions is an adolescent reason (hence called "naive rationalism" by Karl Popper).⁵ Evolutionary rationalism looks deeper and sees not only that most successful institutions are not made but grow, but also that they could never have been made. Secondly, the deification of conscious reason itself leads to a revolt against reason. Thus

. . . the constructivist rationalism which knows no bounds to the applications of conscious reason has historically again and again given birth to a revolt against reason. Indeed, this development, in which an over-estimation of the powers of reason leads through disillusionment to a violent reaction against the guidance by abstract reason, and to an extolling of the powers of the particular will, is not in the least paradoxical, but almost inevitable.⁶

2. All men's voluntary and conscious actions address themselves to what are believed to be facts. Whatever we do, from the most trivial to the most momentous, we do with a picture of what we consider to be the relevant facts in our minds. It is not possible to walk a step or lift a cup to our lips, or to act in matters great or small with or against our fellow men, without so doing. The closer the fit between our acts and the true facts, the more successful our acts are. The looser the fit (and how often there is no fit at all!), the less successful they are.

How can we achieve the best possible fit

between our acts and the true facts? Constructivist rationalism, again influenced by the wonderful success of the natural sciences, assumes as if without thinking (repeat, without thinking!) that we must know the facts to which our acts are to be attuned. But as at all times the relevant facts are beyond the count of man, with or without his computers, to fit our acts only to the facts that we know is to simplify reality, in the normal case inevitable crudely, and thus to deprive our acts of the possibility of success.

This is probably best exemplified by the great contrast between the free market and the planned economy. In the free market I seek to buy a loaf of bread. I find that I can buy it for 50 cents. The loaf stands higher on my scale of preferences than 50 cents, and so I buy it. I know nothing about the farmer, the miller, the trucker, the baker, the banker, the merchant, who, amongst many others, have brought it to me. I know nothing about the myriad facts that govern their actions. At the same time countless others go into the market and engage in transactions which are linked with my purchase. No one knows, or needs to know, more than a tiny fraction of the facts relevant to his transactions. Yet all our transactions are attuned to these myriads of unknown facts, well fitted if the market is free from interference, less well fitted if it is not. In the planned economy the planner does need to know all the relevant facts. Of course he cannot. So he fits his plan to the facts he can know. But since the plan in its nature depends on his knowledge, it would be crude, primitive, and hopelessly unsuccessful even if he knew a million times as many facts as any single person in the free market.

The success of the free market thus results not from any person's knowledge of all relevant facts, but from the existence of rules or ways of behavior which enable unknown facts to enmesh with known facts, so that acts are attuned to a far greater array of facts than the known facts. So too is it with all social behavior. The rules of so-

cial behavior bequeathed to us by generations of forefathers free us from the narrow tyranny of known facts and thus expand our success enormously. Though constantly modifiable and modified, which is what social evolution means, they could never have been devised by a single mind or at a single time.

3. The relationship between acts and facts shows why a *cosmos* can produce order however huge or complex a society may be, and why a *taxis* will produce disorder except in social groups so simple that a despot or a group of elders can know a sizeable part of the facts relevant to the group's behavior. This truth is the negation of what must be one of the most powerful superstitions of our day, namely that a spontaneous order may have been all very well in simpler societies but that our enormously complex society requires a made order. Now when the citizen finds his expectations disappointed (that is, his acts are ill attuned to the facts), he instinctively turns to the great power that he feels in his bones can put things right, namely his government. The government thinks of order in terms of *taxis*, not *cosmos*. It intervenes to satisfy the citizen's expectations. But it fails, or if it succeeds it does so only by disappointing some other citizen's expectations. The more it intervenes, the more disorder it produces. The more disorder there is, the more does the citizen call upon the great governmental power to restore order. Thus does disorder spread and deepen. It is the perfect case of the triumph of hope over experience. Here is the great dilemma of our times. Complexity needs a *cosmos* for order. To the average citizen it appears obviously to require a *taxis*.

4. *Cosmos* is not only an order. It is also the order of liberty. Liberty depends on restraint on the use of coercive power. Since in a *cosmos* coercive power is used only to enforce general rules, not particular results, it leaves action within those rules to individual freedom. *Taxis* is an order which seeks particular results. It must therefore deny the freedom of the individual to

choose and seek his own particular results.

The proposition that freedom is preserved by adherence to principle and destroyed by acts of expediency follows from the fundamental natures of *cosmos* and *taxis*, but sounds trite or banal. Principle is a word as commonly and lightly used as love, brotherhood, and comradeship. But the currency of the word is not merely cheapened by its common use. All too often the word is used to cover acts precisely opposed to it. What politician . . . and now, alas, what churchman . . . has not been heard to preach the primacy of principle in the very moment of advocating its opposite? Consider, for example, the ills of the world. No man is an island, we are told. We are all members, one of another. It is our duty to remove the ills of the world. This is the great principle of our social life. And how is this principle to be followed? By governmental action. And what kind of governmental action? Always action to achieve particular results . . . the redistribution of incomes, the relief of poverty, the maintenance of employment, the organization of health services, etc., etc. The prescriptions are legion. Of course this is always expediency masquerading, often in the most odious and hypocritical manner, as principle. Of course, also, the governmental action either fails to achieve the particular results, or if it succeeds it does so at the cost of harm greater than the value of the achievement.

As stated by Hayek, the primacy of principle is by no means trite or banal. The principles which he has in mind are general social rules, not general aims, hopes, or dreams like brotherly love. It is not the purpose of such general rules to make men love each other. It is their purpose to enable men to live together in peace. Of course, under such rules men will also be free to love each other if they so wish. There is a parallel here between the effect of overemphasis on the apparent powers of reason and overemphasis on the social pursuit of brotherly love. Just as the former produces

a revolt against reason, so the latter produces fratricidal hatred.

It is the hardest test of men's understanding of society to be required to hew to the general rules of principle. Particular aims which appear to be imperatively or urgently desirable will always beckon to them. Lawyers understand this when they say that hard cases make bad law, or when they refuse to be enticed by the attractions of palm tree justice. As Hayek says, men will not hew to principle against the enticement of particular aims unless they have a powerful attachment to the ideals which principles are intended to serve, which is why the intellectual guides of society need to grasp the kind of analysis which he presents.

I have said that lawyers understand this when they say that hard cases make bad law. Given any particular state of the law, they generally do. But that does not mean that they can be relied on to prevent the propulsion of the law along the road required by the particular aims of a *taxi*. On the contrary, provided that the changes in the law which transform it from true law into administration are sufficiently gradual, and take apparently constitutional form, lawyers will tend to be actual transmitters of the changes. There is a brilliant analysis of this process on Hayek's pages 65-71, which every lawyer concerned to preserve a bedrock of law for society should read, mark, and inwardly digest.

5. There are errors and errors, superstitions and superstitions. Most are found lodged in the minds of ordinary men. But sometimes one sees them embedded in the teachings of great men. How many finer minds have there ever been than those of Bacon and Hobbes? And who can deny a deservedly high scholarly repute to, say, Austin and the legal positivists? Yet they propagated the fundamental error that law means legislation and only legislation (which, of course, might take the form of a simple command of a despot as well as the product of the careful deliberations of a legislative assembly), that legislation implies sovereignty, and that law therefore

proceeds from sovereign power and only sovereign power. Hayek had already examined this proposition and in some measure exposed its error in *The Constitution of Liberty*, but in the work before us he probes it deeper and shows with greater force and clarity that law is older than legislation. Law goes back to the origins of society. Society could not conceivably have arisen except by way of the emergence of rules, and the rules would be coeval with society. But the rules would not arise all at once, as by a social contract or by the fiat of a lawgiver. They would arise gradually in a process of trial and error, and no man would be able to trace their ultimate origin. The rules might be called customs or laws; it would not matter which. It is from these early customary laws that, as a society develops, so there develops a more complex and sophisticated system of law. This was the history of the early Roman law, and it is the history of the English common law.

In the course of the growth of such law, the task of judges or juriconsults is well understood. It is to find the law, not make it. Here one must take note of a widespread but erroneous view of this process. It is often said that in the common law world judges may imagine, or say, that they find the law, but in fact they make it. Thus, it is said, the law handed down by the courts is judge-made. It is a seductive view, but false. It implies that if the law were truly found, not made, the judge would be a mere channel through which it would reach the light of day, without development or modification. If the judge does give it a new turn or development, it is thought, he must be making law. The truth is that the law is a living growth. Finding the law is the task of taking its living spirit and finding what that spirit means in new situations and new human relationships. Among the most illuminating passages of Hayek's work are those in which he examines the role of the common law judge and propounds the true nature of the process of finding the law. For English and American lawyers it

is heartening to learn that, after holding the view for most of his life which is inbred in Continental scholars, namely that codified law is more certain than, and therefore superior to, uncoded law such as the English common law, Hayek has at last been brought by long and deep reflection to the opposite view.⁷

But what is the virtue of a law of customary roots, which has to be found, not made? It is that it is by its nature likely to be concerned with general rules of right behavior, not with the particular aims of those in authority. Thus this law, Hayek's *nomos*, is naturally the essential law of the *cosmos*, and therefore of the free society. This does not mean that made law has no place in the *cosmos*. All systems of law have defects. Most of the defects of customary law are likely to be removed by the judicial process to which I have just referred. But not all. Sometimes the law needs to be rescued from a trend that even the supplest judges, acting within its method of development, cannot extricate it from. Hence legislation may then come in and do the necessary work. After this legislative process, the law remains essentially Hayek's *nomos*.

6. In a *cosmos* those in authority are subject to the general law equally with the other citizens. But as they have special tasks to perform, there is room for made law, *i.e.*, legislation, to govern the discharge of those tasks. Thus the law of a *cosmos* includes

both *nomos* and *thesis*. It is when the process of the *thesis* comes to be thought to be the right pattern for all law that the *cosmos* begins to be transformed into a *taxis*, and the stage is set for the ultimate extinction of liberty.

Once *thesis* has become the dominant form of law, the end of true law is in sight. Legislation then becomes the enemy of law. The immense activity of the modern legislature means that laws multiply and the law decays. This is especially the case in the fiscal field. Consider the sorry plight of the typical Western taxpayer. It is not merely that he is grossly overburdened by profligate governments. More fundamentally harmful is the fact that fiscal laws are changed at brief intervals, and changed to prevent him from engaging in tax avoidance (*i.e.*, in planning his affairs lawfully according to the existing state of the law). Thus he cannot plan his affairs in the knowledge that what is lawful today will be lawful tomorrow. The predictability and certainty of the law are sacrificed to the supposed requirements of the rulers, and what is called law becomes in reality a mere system of administrative regulations. In many areas outside the fiscal field, the process has not yet gone so far, but its development on the same lines in all fields is already obvious. The end of the process is the servile society.

⁷Culminating so far in his Nobel Memorial Lecture entitled "The Pretence of Knowledge" (December, 1974).

²*Rules and Order*, pp. 1-2.

³*Ibid.*, p. 2.

⁴*Ibid.*, p. 62.

⁵*Ibid.*, see p. 5.

⁶*Ibid.*, pp. 31-32.

⁷*Ibid.*, see p. 116.