

Law, Legislation, and Liberty: Hayek's Completed Trilogy

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IN 1976 Professor Hayek published the first volume, under the heading *Rules and Order*, of a trilogy entitled *Law, Legislation and Liberty*.^{*} Its place in the long development of his thought in the field of legal and political theory was examined in "The New Thought of F. A. Hayek" (*Modern Age*, Winter 1976), which offered the observation: "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."

The trilogy has now been completed. The second volume, *The Mirage of Social Justice*, was published not long after the first, but the world had to wait until May 1979 for the appearance of the third, *The Political Order of a Free People*. It is now possible to see whether the high expectations aroused by the first volume have been fulfilled.

The Mirage of Social Justice opens with an examination of the rules governing the spontaneous order or cosmos, which was presented as the order of the free society in the first volume of the trilogy. The rules, we are told,

are a device for coping with our inevitable ignorance of more than a small part of our relationships with other persons in the Great Society. If we were omniscient, there would be little need for general rules, for we could then deal with each other in the *ad hoc* way which we normally apply within our small families. Here Hayek rests his analysis on what has been for many years the rock bottom of his most profound work, namely the role of knowledge, or more importantly the absence thereof, in human relationships. It is because freedom's famous but too often misunderstood "invisible hand" enables us to produce a system despite the narrow limits of our knowledge, that the free society is so superior to all unfree societies, which need a degree of knowledge beyond the capacity of man to encompass. This is not a matter only of economic relationships. It extends to all the relationships which make up the spontaneous order of the Great Society.

The rules of a spontaneous order are abstract, normally negative in character, and long-term in application. Thus the commandment "thou shalt not steal" names no specific article or person of which or from whom there is to be no theft, lays down only a negative, not a positive, duty in relation to other people's property, and has a timeless horizon. By contrast the rules of a made order are concrete, positive, and subject to frequent change. Hence there arises the fundamental difference between the functions of a judge or lawgiver and those of an administrator.

What is the relation between the rules of a

^{*}F. A. Hayek, *Law, Legislation and Liberty*, three volumes (Chicago: University of Chicago Press, 1973-1979) and (London: Routledge and Kegan Paul); Vol. I: *Rules and Order* (1973), pp. xi and 184; Vol. II: *The Mirage of Social Justice* (1976), pp. xiv and 195; Vol. III: *The Political Order of a Free People* (1979), pp. xv and 244.

spontaneous order and justice? In the first volume of his trilogy Hayek lingered for a considerable time on the nature of law, but here he takes it further in an onslaught on the doctrines of legal positivism, namely that all law is the expression of the will of a legislator, and that justice has no meaning other than the prescription of such law. From Hobbes, Bentham, and Austin to Kelsen these doctrines have had a powerful influence, all the more because they have been expounded by scholars of very high eminence.

Hayek is not the first to criticize these doctrines, but his insight into the difference between a spontaneous and a made order gives his criticism a thrust which is especially his own. Thus he says (page 46): "It is evident that so far as legal rules of just conduct, and particularly the private law, are concerned, the assertion of legal positivism that their content is always an expression of the will of the legislator is simply false. This has been shown again and again by the historians of private law and especially of the common law. It is necessarily true only of those rules of organization which constitute the public law; and it is significant that nearly all the leading modern legal positivists have been public lawyers and in addition usually socialists—organization men, that is, who can think of order only as organization, and on whom the whole demonstration of the eighteenth century thinkers that rules of just conduct can lead to the formation of a spontaneous order seems to have been lost."

And (page 53): "Legal positivism is in this respect simply the ideology of socialism and of the omnipotence of the legislative power"; and further (page 55): "It was the prevalence of positivism which made the guardians of the law defenseless against the new advance of arbitrary government."

Hayek's lengthy and painstaking analysis of legal positivism ranks with the most profound work which he has ever produced, and by itself would make this volume of his trilogy an outstanding achievement. But it is only an introduction to the volume's central argument.

Who can be just or unjust?, asks Hayek. Only human beings acting purposively. Hence

individuals can be just, groups acting as groups can be just, governments can be just. But society cannot. For society is an abstract or spontaneous order, not a purposive group. Social or distributive justice is meaningless in a spontaneous order (a cosmos); it can have meaning only in an organization (a taxis). Hence the idea of social justice is a mirage. It is well known that in practice it turns out to be institutionalized envy and hatred. But it is worse than that, for it is built on ideological sand. As between men justice and injustice have meaning only when it is men who do right or wrong. We all understand that it makes no sense to talk of human injustice if a volcano or lightning kills one man and not another, if it rains gently on one farmer but destructively or not at all on another, or if some are born clever and others stupid, for no man was responsible for fortune or misfortune in these cases. We also understand that if a virtuous woman whose price is beyond rubies chooses to marry one man and not another, the latter cannot claim to be the victim of injustice, even though here purposive human action is the cause of his discomfiture; for no man has a right to command the affections of any woman, and the woman in this case has done no injustice in exercising her choice. We may even understand that it is not injustice if some are born with the cultural heritage of an Eskimo and others with that of a European, though here again chains of human action are behind the difference. But when we see one man to be richer than another, with no discernible moral superiority or perhaps with a clear moral inferiority, many of us easily succumb to the seductive notion that injustice must be at work. Hence those who talk of social justice can persuasively declare in such a case that success (except their own) is due to injustice, and that therefore they must take by force from the more successful to give to the less successful (as long as the latter are their clients). In practice, as we shall see below, they only promise to give to the less successful. Once they have the power so to do, what they do turns out to be somewhat different.

In the spontaneous order of freedom, the

best society known to us, income or wealth arises from payment freely agreed and given by those whose wants are satisfied to those who satisfy them. Hence differences in income or wealth have no relation to merit unconnected with the satisfaction of human wants. Saints and sinners may reap their just rewards in a future life, and they may perhaps get some spiritual rewards in this life, but their material rewards can only be determined by the value which others, free from compulsion, put upon their services. In some fields this is or used to be well understood. By all accounts the late Babe Ruth was a man of odious personal character, but the fans made him rich because they prized not his personal merits but his ability with a baseball bat. Henry Ford was a pitiable ignoramus outside engineering and industrial management, and not very pleasant a man; but the people, acting without compulsion, made him a multimillionaire not for his moral or intellectual qualities but for his ability to put them on wheels at an unprecedentedly low cost. Nowadays the Babe Ruth case continues to be understood; thus rich sportsmen and entertainers are generally exempt from assault by champions of social justice. But the Henry Ford case has changed. Now his wealth would be assailed as unjust even if he were a saint or an intellectual titan as well as a marvellous producer of wealth.

We still understand that surgeons must pass examinations before they can be certified competent to operate upon us, and that it is just to pay surgeons for their competence in surgery, not for any other merit or any need which they may have. A surgeon of mediocre skill who is known to be a saint or to have numerous children to support would not receive payment from us on the scale of one of high skill, and in this we do not think that we act unjustly. But too few of us understand that where men are free, they conduct similarly just examinations every moment of the day as they decide whom to reward for the service of their wants, and whom not to reward.

This principle is sometimes misunderstood even by supporters of free enterprise. In the Samuel Smiles and Horatio Alger type of

exposition, there is a tendency to stress the moral qualities of materially successful men, giving the impression that it is these qualities which we reward. Of course the man who makes two blades of grass grow where there was formerly one, or the man who makes a better mousetrap, may be led to do so by his high moral qualities, but he receives his just payment for the abundance of the grass or the quality of the mousetrap and for nothing else. Sometimes his achievement is justified on the ground that it has social value or a value to society. However there is no such thing as a value to society, except the value of its rules. Goods and services can have value only to persons, or to groups of persons acting as a group. Society does not so act.

It is common at this point to argue that wealth differences may be justified by personal success in the satisfaction of wants, but that the inheritance of wealth cannot be justified since the legatee satisfies no wants. Many supporters of the rights of private property have needlessly agonized about this. In a free society the state has no part in the transactions which put the property in the hands of the testator except that of guardian of the rules, and the state has no more *locus standi* to take it out of the hands of the legatee (except for its taxing power which has a quite different basis) than any other bystander. That it may tax the legatee does not mean that his inheritance belongs to it, any more than its power to tax incomes means that it owns the incomes. When the state claims the right to deprive the legatee of his inheritance, apart from the taxing power exercised for other purposes, it does so on the false pretense that it is itself the society or is in some manner clothed with the rights of society, which is the essential claim of the totalitarian state.

The mirage of social justice beckons men to the unattainable goal of substantive equality. Though the goal is unattainable, the pursuit of it is one of the most corrosive of all human influences. It not only produces envy and hatred. It also drives men into submission to tyranny, for only tyranny can plausibly offer to reach the unattainable goal; and with tyranny there also comes poverty. Thus are

lost the blessings which men came upon when almost inadvertently they constructed the Great Society.

Hayek expounds the nature and consequences of the pursuit of substantive equality with his customary insight, thoroughness, and felicity. For many it will be almost equally important that he also explodes the concept of the alternative which is commonly called equality of opportunity. If by this is meant *la carrière ouverte aux talents*, it is unexceptionable, but that is not equality of opportunity. If equality of opportunity is truly meant, it is as unattainable as substantive equality and its pursuit is almost as destructive as that of the latter.¹ The only form of equality consistent with the rules of the free society is equality before the law.

A most important aspect of the pursuit of substantive equality is that, since genuine equality of condition is highly repugnant to almost everyone and extremely difficult to define or even conceive, right from the beginning the self-styled champions of substantive equality pursue something else. In its more obviously odious form it is the desire to pull down certain selected groups who are declared to be immorally rich but who often are neither rich nor immoral. In its less obviously odious form, which is indeed widely approved by men of goodwill, it is the protection of accustomed or established positions. This is so obviously different from equality that it is only the remarkable perversity which is so often found among ideologues and their political pupils that enables the one to be sought under the banner of the other. Few persons command so ready a sympathy as those who, without apparent fault, lose their jobs because those who have bought their produce now decide to buy from some cheaper source, especially if that source is foreign. Since Hume, Smith, and Ricardo, economists have always understood the folly of allowing this sympathy to propel us into protectionism, and of course Hayek knows all about this. Here however he goes deeper than the exposition of mere economic folly. He demonstrates with a full and acute analysis that the protection of established positions

strikes at the heart of the spontaneous order, and all the more once that order has expanded into the Great Society.

Thus we come to Hayek's conclusion on social justice. It is a *cri de coeur* from a scholar who has spent a lifetime watching the corrosive effect of this slogan upon many minds which might have been expected to perceive its true character (page 97): "What I hope to have made clear is that the phrase 'social justice' is not . . . an innocent expression of goodwill towards the less fortunate, but has become a dishonest insinuation that one ought to agree to a demand of some special interest which can give no real reason for it. If political discussion is to become honest it is necessary that people should recognize that the term is intellectually disreputable, the mark of demagoguery or cheap journalism which responsible thinkers ought to be ashamed to use because, once its vacuity is recognized, its use is dishonest. I may, as a result of long endeavors to trace the destructive effect which the invocation of 'social justice' has had on our moral sensitivity, and of again and again finding even eminent thinkers thoughtlessly using the phrase, have become unduly allergic to it, but I have come to feel strongly that the greatest service I can still render to my fellow men would be that I could make the speakers and writers among them thoroughly ashamed ever again to employ the term 'social justice.'"

If the cry of "social justice" does cease to be heard in the land, no man in all the history of political and legal philosophy will have done more to produce that devoutly desirable consummation than Hayek.

Let us now pass to the third volume of the trilogy, "The Political Order of a Free People." In the first two volumes Hayek laid a foundation for a program for the renovation of the once-liberal, once-successful, but now sadly crumbling, Western political order. In the third volume the program is set out in much detail and with a full envelope of argument.

However, though this program is in an important sense the culmination of Hayek's thought on the problems of society, it did not

arise in his mind as a late flowering of his analysis of law, order, and justice in society. There is no surprise in finding that all Hayek's ideas are the product of a long, slow development in his mind, so that they display the rich maturity to be expected from years of thought and experience, of examination and re-examination, of testing and re-testing. Thus those who have followed the development of Hayek's work will already be familiar with the essentials of his proposals for a new political order. He first presented them in a brief discourse to the Mont Pelerin Society at Vichy in 1967. He offered them in more developed form in 1973 in his "Economic Freedom and Representative Government."² In this volume he presents them in what is perhaps their finished form, though it will not be open to us to think of any of Hayek's ideas as having reached their ultimate form until he lays down his pen once and for all.

Why is the Western political order crumbling about our ears? And why do we need to devise fundamentally new political machinery to preserve such freedom as we have, restore the freedom we have lost, and give all our freedoms the protection of a stable order? Because, Hayek argues, we have failed to distinguish between *nomos* and *thesis*, between the rules of just conduct and the orders required for the tasks of government, between legislation in the true sense and administration.³ We entrust the same body, Parliament, Congress, National Assembly, etc. with the task of deliberating upon and determining both *nomos* and *thesis*. From this, in Hayek's view, the degeneration of modern democracy has developed.

The degeneration of democracy into plebiscitary dictatorship and perhaps ultimately into totalitarian tyranny proceeds visibly before our eyes, but we are powerless to arrest it, Hayek tells us, as long as, while still prizing the principle of democracy, we think that existing democratic forms are the only forms. For it is by these very forms that we are betrayed.

We are surely right to prize the principle of democracy. A system in which government is responsible and accountable to the governed

offers the best chance for liberty under law, for peaceful political change and peaceful rivalry for office or power that mankind has known. Yet if it be the case that existing democratic forms are a mechanism for the decay of democracy, the time will come, and perhaps soon even in the apparent citadels of democracy of the North Atlantic, when the people will abjure democracy. For as it decays, mounting disorder will arise in which even democrats will come to believe that only the agonizing choice between authoritarian and totalitarian government remains open to them. Fortunate will be those who then get an authoritarian Franco, Salazar or Pinochet rather than their alternatives. Yet the authoritarian dictator fails to produce a durable system. His system tends to last no longer than he himself. Where has there been a better dictatorship in modern times, if dictatorship people must have, than the "*ditadura sem ditador*" (dictatorship without a dictator) of Salazar? How many rulers have given the Spanish people as long a period of peace and prosperity as did Franco? Yet Salazar and Franco were not long in their graves before their peoples dismantled the systems which they had so laboriously constructed. The lesson is clear. If democracy can be saved, there can be no higher political duty than to save it.⁴

The process of democratic degeneration displays itself as the general interest becomes subordinated to various sectional group interests, so that the legislature ceases to be a forum for the determination of the general interest (for which the rules of just conduct are the basis), but becomes an arena in which special interests jostle and bargain with each other for the favors of the state. The democratic process thus comes to betray not only the general interest but majority rule itself. It is not the wishes, still less the interests, of the majority which prevail, but the desires of fluctuating coalitions of minorities. Each group in the coalition bargains with other groups so that each may feed at the public trough, and the rapacity of each is thus constrained not by any attention to, or concept of, the commonweal but by the need

to accommodate itself to the rapacity of the others. However, such a system is unstable. It is not merely that its true nature cannot be concealed from the people, however adept at camouflage by way of democratic slogans and mob flattery the coalition leaders may be. What must bring it down and in due course end even the pretense of majority rule is the fact that it must produce mounting discontent, which by the irony of the gods turns out to be even more destructive among the coalition in-groups than among the outer groups which are the victims of their plunder. For in the first place the betrayal of the general interest itself undermines economic stability and produces general unease as well as reducing the scope for plunder; and in the second place the appetite for plunder grows with eating. Hence the coalitions must constantly regroup themselves, enmity among them growing apace, until the strongest among them, probably with a charismatic leader at their head, assume full power. When this happens the majority of the people sigh with relief as chaos yields to apparent order, and the forms of democracy follow the long evaporated principles of democracy into oblivion.

We may readily accept this account of degeneration and yet ask why the failure to distinguish between *nomos* and *thesis*, and to separate their determination, is the spring and origin of this process. Because, Hayek argues, the powers of government offer seductive gains to those who can capture them. Hence if the same persons determine both the deployment of governmental powers and the rules of just conduct, the seductions of the former will in time submerge the constraints of the latter. The most striking example of this process is shown by the very country, Britain, which first in modern times established responsible government and was long its great exemplar. The Parliament which once forced the Crown to submit to the rule of law, has itself become an engine for lawless government, having assumed the uncontrolled sovereignty which it denied to the Crown, and having abandoned the self-imposed conventional restraints which made it conform to the

rule of law for some two centuries after the defeat of the Crown in 1688. The irony for parliamentary democracy is that the sovereignty of Parliament is now only formal, the power to use it having reverted to the Crown's successor, the Cabinet and its party machine, which, behaving like a true plebiscitary dictator, is restrained only by the need to manipulate success in the next plebiscite, which in turn depends mainly on skill in manipulating the competition between various pressure groups.

The analysis indicates the remedy. The determination of *nomos* and *thesis* must be separated and entrusted to two different bodies, both of which must be democratically elected, so that neither can claim to be invested with greater democratic sanctity than the other (thus avoiding the process which enabled the British House of Commons to emasculate the House of Lords and effectively destroy its revising powers). However, though the two bodies will have equal democratic authority, their constituencies, modes and periods of election, and qualifications for election, should be different.⁵

Hayek examines the possible modes, periods, and especially qualifications, for election to the true law-making body (*i.e.* that dealing with *nomos*, which we may call the legislative assembly) in penetrating and illuminating detail. Its members (whom Hayek with his alert eye for classical Athenian parallels, calls the *nomothetae*) would lay down the general rules of just conduct which would govern the deliberations of the *thesis*-making body (which we may call the governmental assembly) and the exercise of the powers of government. In such a constitution there would be a need for a supreme court not merely for the conventional task of construing the decisions of the two assemblies, but also for adjudication in case of disputes between them.

It is impossible within the short compass of this article to do justice to the depth and amplitude of Hayek's analysis. For example his exposition of the proper functions of government, and in particular of the correct approach of authority to problems of competi-

tion and monopoly, is a marvel of sure-footedness as he picks his way to a sound conclusion with immense skill through a minefield thickly strewn with lethal errors. The above statement of his argument is therefore a barely adequate attempt at a very compressed account of its most essential elements.

His diagnosis of the process of democratic degeneration surely merits ready acceptance, but with this qualification which has a bearing upon the effectiveness of his remedy. The entrustment of *nomos* and thesis to the same deliberative body would not have the baleful effect which he rightly describes without the grip on the minds of citizens and legislators of the intellectual errors which he exposes in the first two volumes of his trilogy. Hence his remedy is unlikely to be successful unless at the same time the influence of these errors is removed. But if this influence disappears, it is arguable that his remedy becomes unnecessary.

Consider the case of the United States. The same process of democratic degeneration is visible there as elsewhere, though it may not have gone so far as in some other countries. Yet, though it does not appear to be the case at first sight, it is arguable that the United States already has Hayek's system in its essentials, and has had ever since the Supreme Court invested itself with the power of judicial review.

The essence of Hayek's system is twofold. First, a body concerned with the rules of just conduct which is separate from a second body which deliberates upon the administration of government, and which sets the framework of law for the decision of that second body. Secondly, at least equal popular legitimacy for the first body as for the second, so that when the former's rules restrain the latter's itch for action, the people will accept them and approve the restraint.

The two bodies in the American system are the Supreme Court and Congress, which look different from Hayek's system but, it may be argued, are not. In theory the function of the Supreme Court is to apply the provisions of the Constitution. In practice it has tended to

apply its concept of what is right and just (*i.e.* has sought to distil out of the Constitution Hayek's rules of just conduct), especially during the past forty years or thereabouts. The shift from theory to practice presents little difficulty if one proceeds from the assumption that the Constitution is itself essentially a comprehensive statement of what is right and just. It then calls for no great effort from the judges to find that the Constitution really means whatever they currently believe to be right and just. If they are good lawyers, accustomed to intricate argument, their skill in construction enables them to reach this conclusion. If they are not, they ride off on the principle that the Constitution is a flexible document which is intended to breathe the spirit of the age, and so they reach the same conclusion as their more competent brethren. It is true that there have been and are judges described as strict constructionists, but a scrutiny of their judgments will show that they too follow what they believe to be just, though their concept of justice is of an older lineage than that of their less traditionalist brethren.

This process was especially obvious in the decisions of the Warren Court. It is well known that Chief Justice Warren, knowing little law himself and having little skill in legal analysis, would react irritably to counsel who submitted a web of legal argument, saying "Never mind these legal points. The question is, is it right, is it just?". Of course a judge of such a caliber is contemptible, and it is true that when a competent judge deduces what he considers to be right and just from the Constitution, he does it in such a manner that the thread of legal construction handed on by his predecessors is as far as possible unbroken. Nevertheless Warren differed from his predecessors, colleagues and successors only in his naiveté and ignorance. They too have generally sought to find and apply what they have believed to be the rules of just conduct, free from the trammels which bind the lower courts. In countries where there is no power of judicial review (*e.g.* the United Kingdom), it is common for the highest court in the land to say "We find that the law in the

case before us is unjust, but we are bound to apply the law as we find it. It is for the legislature to rectify the injustice by amending the law." In the United States the parallel would be "We find that the provisions of the Constitution in the case before us are unjust, but we are bound to apply them as we find them. It is for Congress and three-quarters of the States to rectify the injustice by amending the Constitution." How often has the Supreme Court said this?

It follows that the Supreme Court at least in some measure attempts to perform the function of Hayek's legislative assembly; and that the fact that Congress attempts to deal with both *nomos* and *thesis* is not a fatal impediment since its acts are subject to judicial review. As for popular respect and allegiance, it is stronger for the Supreme Court than for Congress even though it is not founded on democratic election. Thus when Franklin Roosevelt was at the height of his democratic popularity, having carried 46 out of 48 states in the 1936 election, he was unable to carry the people with him in his assault on the Supreme Court.

The matter can be tested further. Suppose that Hayek's system had existed in the United States in the 1930's. Would the Legislative Assembly have resisted the popular clamor for the acts and policies of the President and Congress which have done so much damage to the American economy and polity? It is

hardly likely. After all from 1937 the Supreme Court itself succumbed to the fashionable myths and errors, although it had a greater power to stand aloof from popular emotion than a Legislative Assembly would have had. Indeed those myths and errors have become so ingrained in the thinking of most judges, that the Supreme Court has now become in some ways an even more powerful engine for the degeneration of liberal democracy than the Congress. Could a Legislative Assembly have resisted the *Zeitgeist* better?

Hence I suggest that Hayek's remedy will not work unless his assault on the intellectual errors of our time first succeeds. But is it true that if he wins the intellectual battle, his remedy becomes unnecessary? The answer, I believe, is No. First, there are important countries (e.g. notably Britain and those which have inherited her system) which will save their liberties only by fundamentally new constitutional arrangements; and Hayek's remedy is at least as good as the only other probable workable alternative, the original prescription of the American Republic (but including judicial review). Secondly, his remedy would consolidate the intellectual victory. Indeed, as intellectual battles are never complete and tend to stretch out over long periods, his new constitutional arrangements would be needed to forestall the effects of the local and occasional reverses which even victorious armies suffer.

¹See my article, "The Wiles of Satan," *Modern Age*, Spring 1978, p. 168.

²The Wincott Lecture, 1973, published by the Institute of Economic Affairs, London. 2nd impression, 1976.

³In the interest of brevity I am doing some slight violence to Hayek's distinction between *nomos* and *thesis*. The underlying distinction is between found law and made law. Hence some element of *thesis* enters into the determination of rules of just conduct. But for the purpose of this article's discussion the distinction stated here will

serve.

⁴As the degeneration of democracy may lead to disgust with its very name, Hayek suggests that we might have recourse to the other Greek word for rule and call his regenerated system "demarchy."

⁵Of course this should not be confused with the case of the American Senate and House of Representatives because, though they do indeed differ in their constituencies, periods and qualifications for election, and to some degree in their powers, they both deal with *nomos* and *thesis*.