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Freiburg Discussionpapers
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Spontaneous Order, Evolution and Common Law: Some Notes on F. A. Hayek's System of Social Thought

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24/4

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Spontaneous Order, Evolution and Common Law: Some Notes on F. A. Hayek's System of Social Thought¹

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The “twin ideas”, as Hayek (1967a: 77; 1973: 23) calls them, of *spontaneous social order* and *cultural evolution* (Vanberg [1986] 1994) are at the core of his social thought, and they are closely connected with a theme that runs through his entire work: namely, the *knowledge problem* (Vanberg 2017).

A *spontaneous social order*, paradigmatically exemplified by the order of the market, is an order that results, without any central direction, from the mutual adaption of individual agents who pursue their own, separate, interests within the limits of general rules of conduct.

By *cultural evolution* Hayek means, in particular, processes in which the rules that guide human conduct gradually grow or evolve, without any overall design. Such processes he sees primarily exemplified by customary rules that arise out of human interaction, when the “existence of individuals and groups simultaneously observing partially different rules” (1960: 63)² provide “the opportunity for the selection of the more effective ones” (ibid.). Such “evolutionary” growth of rules he sees, though, also exemplified by the English common law in which rules of conduct “emerge from the efforts of *judges* to decide disputes” (1973: 123).³

Distinguishing between “two kinds of order” (1964), Hayek contrasts spontaneous orders with *organizations*, as orders deliberately arranged by a central authority.⁴ The evolutionary growth of rules he contrasts with the deliberate design and choice of rules by a legislator.

The reason for Hayek to speak of the two concepts as “twin ideas” is the fact that both are “the result of human action, but not of human design,” as Adam Ferguson famously phrased it (1967b), whom Hayek credits, along with David Hume and Adam Smith, with having pioneered “the twin conceptions of evolution and the spontaneous formation of an order” (1973: 23). The particular merit of these un-designed results of human action, in contrast to their designed counterparts,

¹ This paper has been written, upon invitation, for a special issue on Hayek's work of the Iranian journal *Critical Review of Humanities*. It has been published (in Persian) in: *Critical Review of Humanities*, Vol. 5, 2024, pp. 169-178.

² References without author name refer in this article always to Hayek's writings.

³ R. Hamowy, who had been Hayek's doctoral student, argues in his article “F. A. Hayek and the Common Law” (2003) “that the common law as it in fact arose was not the idealized system of justice that Hayek portrayed it to be” (ibid.: 246).

⁴ Hayek ([1966] 1967: 162) distinguishes „between a *spontaneous order* based on abstract rules ... and an *organization or arrangement* based on commands.”

Hayek sees in the assistance they can provide in dealing with the *knowledge problem* people face in their efforts to organize their social life in ways that work to their common benefit (Vanberg 2017: 86 ff.).

As Hayek stresses, in a spontaneous order, such as the market order, in which the individuals are free to make their own choices (within the “rules of the game” and based on their own assessment of how to best solve the problems they face), far more knowledge can be utilized than a central controlling authority will ever be able to command (1945). In such an order, he states, the “dispersed knowledge and the different skills, the varied habits and opportunities of the individual members of society, contribute toward bringing about the adjustment of its activities to ever changing circumstances” (1960: 28).

The virtue of gradual evolution of rules is, as Hayek likewise emphasizes, that it can incorporate more knowledge about the working properties of alternative rules than legislators in their attempt at rational design can possibly acquire. As he puts it: The “evolutionary view is based on the insight that the results of the experimentation of many generations may embody more experience than any one man may possess” (1960: 62).

The combined significance of evolution and spontaneous order for the knowledge problem Hayek summarized in these terms:

In fact, the collaboration of individuals under common rules rests on a sort of division of knowledge, where the individuals must take account of particular circumstances but the law ensures that their actions will be adapted to certain general or permanent characteristics of society. The experience, embodied in the law, that individuals utilize by observing rules ... is ordinarily not known to them or any one person. Most of these rules have ... grown through a gradual process of trial and error in which the experience of successive generations has helped to make them what they are (1960: 157).

The skeptical outlook at the ability of human reason to rationally construct or design a functioning social and legal order that Ferguson, Hume, Smith and other 18th century Scottish moral philosophers expressed with their “twin ideas”, Hayek contrasts with the “pretense of knowledge” ([1975] 1978) of which he accuses a conception that he calls “constructivist rationalism” (1973: 5), a conception, he charges, “which assumes that all social institutions are, and ought to be, the product of deliberate design” (ibid.), and that the “activities of all should be centrally directed according to a single plan” ([1965] 1967: 82).

The apparent goal to which Hayek devoted most of his academic life is to revive and defend the tradition of classical liberal thought, and it is this goal that explains why much of his work relates to the “twin ideas” which he sees at the foundation of this tradition. This particular focus, combined with his biting critique of constructivist rationalism can easily lead readers to overlook those less

prominent parts of his writing in which he qualifies his assessment of the merits of spontaneous orders and evolved rules.

His arguments on the beneficial properties of spontaneously generated order Hayek qualifies in two regards. Firstly, he points out that this method of social coordination is not adequate for all purposes and that deliberate arrangements or organization is “for many limited tasks ... the most powerful method of effective co-ordination because it enables us to adapt the resulting order much more fully to our wishes” (1973: 46), and that, in this sense “the two kinds of order will regularly coexist in every society of any degree of complexity” (ibid.). In particular, he notes, for the enforcement of the rules upon which the spontaneous order of society is based, “an order of the other kind, an organization, is also required” (1964: 8), i.e. the state.

Secondly, and more importantly, he emphasizes that their ability to utilize the dispersed knowledge existing only in human minds does not necessarily mean that spontaneously generated orders display desirable properties, but that the nature of the resulting order critically depends on the nature of the general rules that guide the behavior of the participating individuals. As he notes:

Some rules governing individual behavior might clearly make altogether impossible the formation of an overall order. Our problem is what kind of rules of conduct will produce an order of society and what kind of order particular rules will produce (1973: 44).

The 18th century founders of classical liberalism, Hayek states, clearly recognized that a prerequisite for the beneficial working of the spontaneous order of the market was “the observance of appropriate rules of conduct”.

The superior potential to discover what kinds of rules are *appropriate* to allow for beneficial spontaneous orders to emerge is the virtue Hayek ascribes to processes in which rules or laws gradually grow or evolve. But this judgement on the virtue of grown or evolved rules he does not leave unqualified. On the one hand rules for the internal operation of *organizations* are typically deliberately chosen, such as the rules comprised in the constitution of a state, which, as he notes, are “chiefly concerned with the organization of government and the allocation of the different powers to the various parts of this organization” (1979: 37). Accordingly, he argues, “there always existed of necessity an authority which had power to make ... the rules of the organization of government. Constitutional rules in this sense or, more generally, rules of organizations are inherently subject to deliberate design”.

More importantly, again, Hayek expressly points out the limitations of evolved and grown rules, of customary law as well as of common law. Referring to spontaneously grown customary rules he states:

Of course in advanced society only some rules will be of this kind; what we want to emphasize is merely that even such advanced societies will in part owe their order to some such rules (1973: 19).

And in a section entitled “Why grown law requires correction by legislation” he notes about common law:

The fact that ... [it] will of necessity possess some desirable properties not necessarily possessed by the commands of a legislator does not mean that in other respects such law may not develop in very undesirable directions, and when this happens correction by legislation may not be the only practicable way out (1973: 88).⁵

Even though Hayek made it a particular concern of his writings to draw attention to the merits of the “twin ideas,” and to warn against an overzealous ambition to deliberately construct the order of society, he by no means wanted to deny the necessary role of deliberate legislation in our efforts “to improve human institutions” (1960: 30). Because, as noted above, he puts so much emphasis on the fact that the beneficial nature of spontaneous orders, and the order of the market in particular, depends on the presence of *appropriate* rules, it is quite natural for him to conclude that “those rules which ... we can deliberately alter ... become the chief instrument whereby we can affect the resulting order, namely the rules of law” (1973: 45).

It is Hayek’s explicit acknowledgment of the legislation as the “chief instrument of deliberate change in modern society” (ibid.: 65) that provides the link connecting his evolutionary liberalism with the ordo-liberalism of the Freiburg School (Vanberg 2003; 2013), and with J. M. Buchanan’s *constitutional liberalism* (Vanberg [1983] 1994), both of which draw attention to the role a policy of institutional framing has to play in creating a desirable social and political order.

⁵ About Bruno Leoni’s book *Liberty and the Law* (Princeton 1961), in which the author makes the case for common law, Hayek (1973: 168, fn. 35) remarks: “But although his argument is an effective antidote to the prevailing orthodoxy which believes that only legislation can or ought to alter the law, it has not convinced me that we can dispense with legislation even in the field of private law with which he is chiefly concerned.”

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