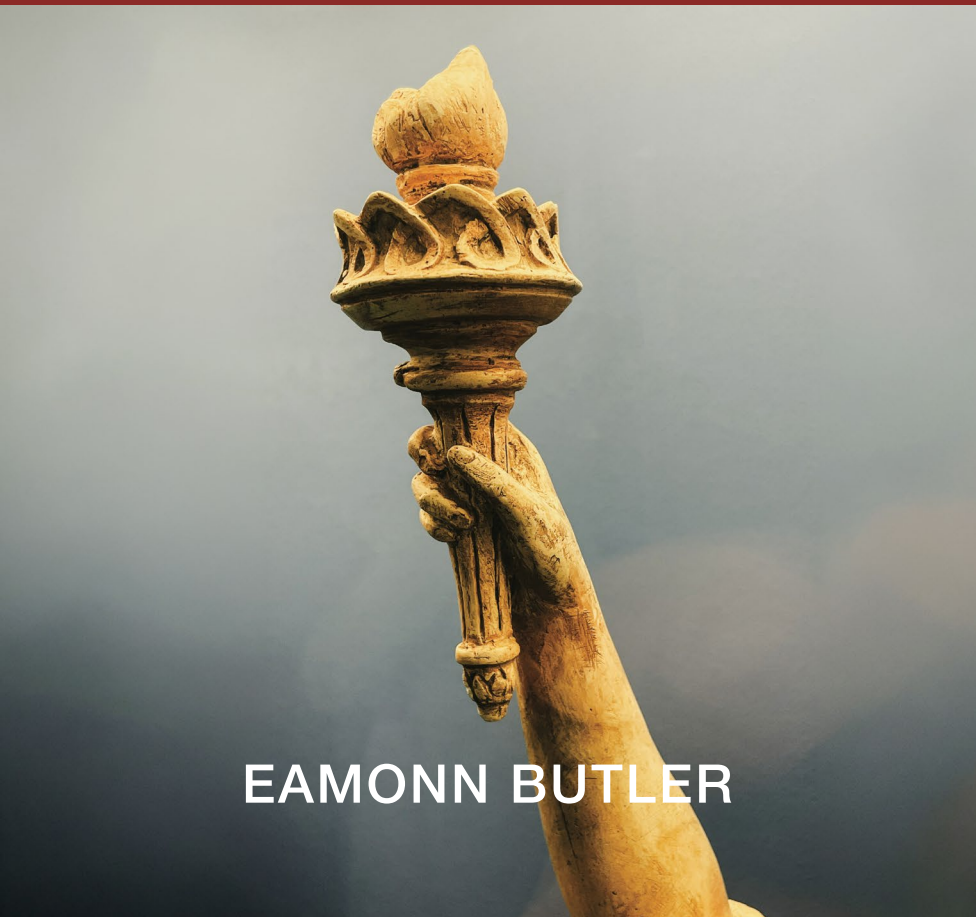
HAYEK'S *LAW, LEGISLATION AND LIBERTY*

A GUIDE



EAMONN BUTLER

Hayek's *Law, Legislation and Liberty*

Hobart Paperback 225

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A Guide

EAMONN BUTLER

iea
Institute of
Economic Affairs

First published in Great Britain in 2026 by
The Institute of Economic Affairs
2 Lord North Street
Westminster
London SW1P 3LB
in association with London Publishing Partnership Ltd
www.londonpublishingpartnership.co.uk

The mission of the Institute of Economic Affairs is to improve understanding of the fundamental institutions of a free society by analysing and expounding the role of markets in solving economic and social problems.

A CIP catalogue record for this book is available from the British Library.

ISBN 978-0-255-36855-1 (interactive PDF)

Typeset in Kepler by T&T Productions Ltd
www.tandtproductions.com

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ABOUT THE AUTHOR

Eamonn Butler is Director of the Adam Smith Institute, one of the world's leading policy think tanks. He holds degrees in economics and psychology, a PhD in philosophy and an honorary DLitt. In the 1970s he worked in Washington, DC, for the US House of Representatives, and taught philosophy at Hillsdale College, Michigan, before returning to the UK to co-found the Adam Smith Institute. He has won the Freedom Medal of Freedoms Foundation at Valley Forge, the UK National Free Enterprise Award and the Hayek Institute Lifetime Achievement Award; his film *Secrets of the Magna Carta* won an award at the Anthem Film Festival; and his book *Foundations of a Free Society* won the Fisher Prize.

Eamonn's other books include introductions to the pioneering economists Adam Smith, Milton Friedman, F. A. Hayek and Ludwig von Mises. He has also published primers on classical liberalism, public choice, capitalism, democracy, trade, economic inequality, the Austrian School of Economics and great liberal thinkers, as well as *The Condensed Wealth of Nations* and *The Best Book on the Market*. He is co-author of *Forty Centuries of Wage and Price Controls*, and of a series of books on IQ. He is a frequent contributor to print and online media.

FOREWORD

Many years ago, the IEA organised an event to mark the anniversary of the release of one of Friedrich August von Hayek's major works. Several members of the extended Hayek family were in attendance.

I sat next to one of them, who told me that they had never finished reading the publication in question, and that they generally found their famous relative's work very difficult to read. Which made me think: if even a literal Hayek faces these challenges – what are the rest of us supposed to say?

Over the years in the free-market think-tank world, I have met many economists who admire Hayek's work, sometimes to the point where it borders on idolising him. But I have yet to meet someone who admires Hayek specifically for the clarity of his writing.

To be clear: when it comes to difficult and inaccessible writing, Hayek is, of course, very far from being the worst offender. Marxist intellectuals, in particular, are famous for their impenetrable writing style, and compared to them, any Hayek publication is a walk in the park. However, the fact that Hayek is relatively readable when compared to his Marxist counterparts does not help much, for the simple reason that the latter usually get away with a lot more. Their complicated writing style works for them, in a

way it never did for Hayek. In the case of Marxist intellectuals, we too often mistake impenetrable writing for intellectual depth. Their readers may struggle to make sense of what they are reading, and give up halfway through – but they may still come away from it deeply impressed, and sympathetic to the author's views (or what they believe those views to be). Classical liberals in a Hayekian tradition, on the other hand, clearly do not have the option of winning people over on that basis.

Nor do we need to. Marxist authors often hide behind convoluted language, because once their ideas are translated into plain English, it becomes clear that they are, at best, highly contestable assertions. Turgid language gives the author wiggle room, to the point where it can make an idea unfalsifiable. Readers who are used to arguing with Marxists will be familiar with the common defence, 'But that is not what he meant!'

Hayekians do not need to do any of that. The passage of time has been a lot kinder to Hayekian ideas than to Marxist ones, so we do not need to constantly reinterpret what he may have meant by this passage or that passage in order to save him from refutation. Hayekian ideas stand their ground on their own.

Hayek was not writing in this style in order to impress his audience, or to insulate himself from criticism. He was an Austrian academic born in the late nineteenth century, and he wrote like one. This is all perfectly understandable, but it still does not help those of us who believe that Hayek's ideas remain relevant today, and that we would be better off if they were more widely understood. For

us, the challenge is to make Hayek's work accessible to a present-day audience.

The first-best solution to this would be to send Dr Eamonn Butler back in time, so that he can act as both reviewer and editor of Hayek's original writing. The second-best solution is what Dr Butler has done in this primer on *Law, Legislation and Liberty*.

Sometimes, all it takes to make an abstract idea clearer is to provide a relatable example. If that example refers to the present-day context, it has the additional advantage of showing us how Hayekian insights can be applied today.

The views expressed in this book are, as in all IEA publications, those of the author alone and not those of the Institute (which has no corporate view), its managing trustees, Academic Advisory Council members or senior staff. With some exceptions, such as with the publication of lectures, IEA publications are blind peer-reviewed by academics or researchers who are experts in the field.

Kristian Niemietz
Editorial Director, Institute of Economic Affairs
London, August 2025

INTRODUCTION

Why this book is needed

F. A. Hayek (1899–1992) was one of the most important social thinkers of the last hundred years. *Law, Legislation and Liberty* (1973–79) is one of his most important books.

A polymath with doctorates in both law and political science, and with a keen interest in psychology and evolutionary theory, Hayek received the Nobel Prize for his work on economics and social organisation. Alongside his economic contributions on trade cycles and inflation, he published influential books on political philosophy, including *The Road to Serfdom*, *The Constitution of Liberty* and *The Fatal Conceit.*

Law, Legislation and Liberty is a significant and innovative part of this output. It draws on Hayek's lifetime study of economics, political theory, philosophy, the history of ideas and information science, weaving them into a new understanding of how society, law and politics function. It presents a hugely original view of the foundation of our social institutions, criticises the very idea of 'social justice', rejects all visionary attempts to reshape society, explains our present discontents with democracy and proposes a new constitution to protect our freedom and institutions for the future.

Who this book is for

Law, Legislation and Liberty is a large and difficult book. Its arguments are involved and detailed. Its structure can be confusing: it covers an array of widely different themes and betrays the fact that it was written over a long period, with some points often repeated, some explored at length and others raced through. It can be hard for non-specialists to understand. That is why it needs a guide.

This guide is for anyone who wants to understand what *Law, Legislation and Liberty* is about, and why it is important. It presumes no prior knowledge of the subject, only an interest in society and politics. It should be of value too, to university and school students of economics and political science, and to anyone who is involved in the continuing debates about democracy and government.

How this book is structured

Part One describes the gestation of *Law, Legislation and Liberty* and how it fits with Hayek's other work. Chapter 1 briefly outlines the book's main themes. Chapter 2 outlines its continuing importance. Chapter 3 locates the work within Hayek's other thinking. Chapter 4 explains the gestation of the work and how delays, distractions, changes of mind and ill health affected its writing. Chapter 5 provides a brief guide to the book.

In Part Two, Chapter 6 identifies the best way to read *Law, Legislation and Liberty*. The next three chapters are guides to the individual volumes, *Rules and Order*, *The*

Mirage of Social Justice and *The Constitutional Order of a Free People*. These should help readers who wish to go on to read Hayek's book for themselves; or it can provide a digest for those who are unlikely to read the whole thing.

Part Three contains criticisms and thoughts on *Law, Legislation and Liberty*, and on Hayek's approach to social philosophy in general. Chapter 10 offers some reflections on *Law, Legislation and Liberty*, particularly on Hayek's views on cultural evolution and the question of whether the book reveals Hayek as a liberal (in the European sense) or a conservative. Chapter 11 explores controversies raised by the book and of Hayek's views more generally, by a variety of critics. Chapter 12 assesses the relevance of *Law, Legislation and Liberty* in modern social and political debate.

A note on examples

Parts of *Law, Legislation and Liberty* are very technical and theoretical. Hayek writes in abstract terms and provides few examples to illustrate his points, which can make them hard for a non-specialist to grasp.

The aim of this guide is to summarise Hayek's argument in a simple, straightforward way, to make Hayek's ideas accessible to lay readers. It therefore needs to rely in part on practical examples to illustrate the points he makes.

Since Hayek uses so few such examples, I have had to interpolate my own. To avoid the reader wrongly attributing to Hayek an example that is not his, I therefore use

examples without mentioning their source, except in the few instances where they are Hayek's, which are identified as such.

Hayek, the author and this book

I knew Hayek a little and organised events in which he participated. I have published two short books on his life and work (Butler 1985, 2012) and edited a volume of his essays (Hayek 1983) and a multi-author review of his ideas on cultural evolution (Butler 1987).

I was therefore present and engaged in the discussions around Hayek's ideas during the years when they were slowly emerging in the individual volumes of *Law, Legislation and Liberty*. Having some familiarity of evolutionary theory and ethology, I thought his views on cultural evolution and the 'wisdom' contained in our habits and traditions breathtakingly original and exciting.

I hope this short guide communicates some of the thrill that the innovative, challenging ideas contained in *Law, Legislation and Liberty* should rightly evoke.

PART ONE

THE THEMES, RELEVANCE, ORIGINS AND WRITING OF *LAW, LEGISLATION AND LIBERTY*

1 WHAT *LAW, LEGISLATION AND LIBERTY* IS ABOUT

Cultural evolution

Law, Legislation and Liberty covers many subjects: how social structures evolve, the vast amount of experience that those structures encapsulate, the 'fatal conceit' that we know more about how societies work than we do, the dangers of social engineering, the flaws in the idea of 'social justice', the limits of government power and the sort of constitution that might restrain it, and much else.

But underpinning all these, and the unifying theme of *Law, Legislation and Liberty*, is the idea of *cultural evolution*: the idea that our social structures are *not* the product of deliberate human creation, but have evolved and grown with us, enduring because they help us to flourish. Indeed, no human mind can grasp the complexity of this long and involved process. And that, says Hayek, is why activists' attempts to redesign human society in line with their political vision are not merely inadequate, but risk fracturing our intricate, evolved social structures in ways that will bring disaster. The fate of our freedom and civilisation rests instead upon us *preserving the conditions that allow our social structures themselves to adapt and evolve*,

and on robustly protecting them from their destruction at the hands of social engineers, however well-intentioned.

At nearly six hundred pages of often dense argument, *Law, Legislation and Liberty* is, of course, much more extensive and subtle than this. Much of it explores the tension that exists in all forms of evolutionary theory: in this case, the delicate balance between the *creative spontaneity* of free individuals and the more solid base for human interactions that is the *restrictive principles* of law, justice, morality, tradition and custom.

We depend on getting this balance right. Free, voluntary cooperation can flourish and prosper only if rooted in the mutual understanding that comes through shared and respected principles of justice and morality, and through common traditions, dispositions, manners and habits. Most importantly, we need to accept what we should *not* do and how we should *not* behave toward others. And yet, we must remain free enough to challenge these norms and so enable our social institutions to continue to adapt to the realities of our ever-changing circumstances.

Evolving orders

In *Law, Legislation and Liberty*, Hayek explains how our evolved disposition to follow certain general regularities of behaviour (what he calls *rules*) builds to create functioning social outcomes (what he calls *orders*) that flourish and prosper, and therefore endure, despite us never intending that result. In so doing, he provides a completely

new, *evolutionary* defence of individual freedom and critique of social engineering.

His argument begins by noting how very important and useful to us our behavioural principles – social, moral and economic – truly are. We have deep feelings about *justice* and injustice, enforced by *laws*, which discourage others from subjecting us to violence or intimidation. We observe *manners* that make it easier to get along with others: as Adam Smith noted long ago, we are social creatures and we like to act in ways that make others like us, respect us and speak well of us (Smith 1759). We share *cultural* understanding too. Of course, different cultures, manners and laws prevail in different times and places, but certain broad, functional principles necessarily underpin them all. No human society would last long, for instance, if its members were disposed to insult, repel or fight with each other.

In our economic lives too, the market system has brought us astonishing material benefits, making us hundreds of times richer than our forebears of just a few centuries ago. It also rests on shared principles, such as property ownership, free exchange and the respect for contractual promises that again are vital to our prosperity. After all, nobody would invest in planting crops or making useful products if their land, equipment or produce was routinely stolen by others.

Such institutions, says Hayek, are highly beneficial social and economic phenomena. But none were deliberately designed and planned by human beings. Indeed, they are so complex and non-intuitive that no human

mind could have done that. Rather, they arose, developed, grew and persisted because they *worked* and helped us flourish. They *evolved*. And importantly, we evolved along with them, our minds disposed to make us follow the behaviours that sustain these *orders*, and to avoid those that disrupt them. We have evolved, as Hayek puts it, to be guided by *rules* that – in ways we scarcely understand – somehow create the functioning, beneficial, overall *social orders* on which we depend.

And that social or *cultural evolution* continues. If we were stuck permanently in a single way of doing things, we could not adapt to the shifting challenges that the world throws at us. Nor would we discover new methods and technologies that might advance our prosperity and progress. Hence the crucial importance of individual freedom in Hayek's view. While we are indeed disposed to follow the generally predictable rules of action that create the overall order, individuals must still be able to challenge existing practices and experiment with different initiatives that they believe will bring benefits to themselves and others. If they are mistaken and their new practices prove unhelpful, their experiment will be abandoned. If they are right, their new ways will spread and the whole society will benefit.

Some examples

The point that our most beneficial social institutions are the result not of our deliberate design and purpose but of a cultural evolution with no conscious aim is a novel

one and can be hard to grasp. But in his essay 'Notes on the evolution of systems of rules of conduct' in *Studies in Politics, Philosophy and Economics* (1967), Hayek gives us some examples that help illustrate it.

The complicated societies of social insects such as bees is one: different bees perform the various tasks needed to sustain the hive, without some conscious mind having to instruct and manage their activities. They each perform their different tasks in a regular way, and that regularity of behaviour builds into a thriving community. Or as Hayek would put it, the *rules* of their actions produce an overall *order*.

There are examples from human behaviour too. When people take a shortcut across a field, they naturally take the easiest route. When the next individuals walk across, they walk on the earth that has been compacted, and the grass trampled, by the earlier walkers. As more people follow the same flattened route, they gradually wear away a path, which makes things even easier for all subsequent walkers. Yet it is nobody's *intention* to make a path. That result is simply the happy outcome of their regular behaviour.

Language is a further example, and one that demonstrates how complex human social orders can become. Plainly, it is beneficial to us as a species if we can communicate with other human beings – warning them of danger, perhaps, or telling them where they might find food or water. A series of grunts and gestures might be sufficient for some such purposes; but by following rules of grammar, we can put much more complex ideas into

sentences and share them with others who follow the same rules. The actual words that people use may vary from one part of the world to the next; and indeed the grammar may vary a little from one language to another. But by using shared grammar and vocabularies, humans can communicate very sophisticated ideas that help them to live, work and thrive. Once again, nobody *intended* to create complex languages at any stage of this process. Indeed, people follow the rules of grammar without even being able to explain them. Human language, and its great utility, simply grew out of us following those behavioural regularities.

The evolution of the economic order – of property, markets, competition and the price system – is another example of Hayek's point. It probably arose when people started to have possessions of their own and then started to barter their property (or services) in exchange for someone else's goods or services that they valued more. Gradually, as the number of people doing this grew, individuals would learn how much of one good they could commonly exchange for another. And this, says Hayek, was the origin of *prices*. But from there, the price system has developed enormously, embracing hundreds of millions of products and services and extending all over the globe. And again, nobody designed it: the reason it has spread is that it is incredibly useful and beneficial to us.

Indeed, nobody *could* have designed something so widespread, so fast and so automatic in its beneficial effects. Rising prices indicate when something is scarce, and the prospect of making a profit prompts people to produce

more of it; while falling prices indicate that their effort and resources are better employed somewhere else. Out of simple self-interest, suppliers constantly adjust their production, as rapidly as they can, to customers' changing needs and wants. So, resources are steered, ceaselessly and efficiently, towards the uses that customers value most. Yet this hugely beneficial, *spontaneous order* was never intended. It simply evolved as we switched from communal ownership to personal property and came to respect ownership rights, peaceful exchange, contractual promises and fair competition.

Nor *could* anyone invent anything as complex as the market economy. Markets routinely process vast amounts of highly important information – such as changes in supply, demand and in vast numbers of prices across the world – of far greater scale and complexity than any mind could ever grasp. And they do so far more efficiently and quickly than any human computer ever could. We did not *design* the market order, says Hayek: we simply 'stumbled across' it.

Yet many activists do not understand this. They imagine that our economic order is a human invention that, like all human inventions, we can deconstruct and redesign as we choose. But such dreams ignore our deep ignorance of how these social orders work. The idea that we can redesign them wholesale risks creating profound damage to our civilisation. Such is the central message of *Law, Legislation and Liberty.*

2 WHY *LAW, LEGISLATION AND LIBERTY* REMAINS IMPORTANT

Law, Legislation and Liberty was a book ahead of its time. It warned of many problems – the rise of centralised power, bureaucracy, inflexibility, the erosion of law by governments, nationalism, populism and the waning public faith in democracy – that have since become major issues.

Growth of government and populism

Governments, for example, have grown in both size and depth, even beyond the levels of the 1970s. In Europe and elsewhere they routinely take 40–50 per cent of their citizens' earnings, on pain of imprisonment for non-payment. Even the US government takes a third. State control over economic and social spheres, often through regulatory agencies and expansions in welfare programmes, expands without remission. During the Covid-19 pandemic, for instance, many governments voted themselves sweeping emergency powers, many of which have never been rescinded. State surveillance of our activities has expanded and become more sophisticated, putting individual privacy and freedom at risk. Even supposedly liberal

democratic governments legislate to limit their citizens' freedom of expression.

As Hayek says, such state intrusions into our personal sphere are made possible by a failure to appreciate the profound functional importance of the evolved social order. And they are also made more likely by the confusion between two different uses of the word *law*. To Hayek, *law* means the general, abstract *rules* that emerge through the evolution of social practices, institutions and customs – the predictable behaviours which facilitate human interaction. But unfortunately the word *law* is also used for what Hayek calls *legislation*, i.e. the specific, purposeful *commands* (e.g. statutes and regulations) by which governments aim to achieve particular purposes, such as directing how taxes are levied, or how government agencies are managed and run.

Law, Legislation and Liberty warns that this confused use of the word *law* threatens freedom and the rule of law. The evolved, abstract, impartial *laws* protect individual liberty by aiding predictable interactions between people, even when those people have divergent aims and objectives. *Legislation*, however, is *coercive*, being deliberately aimed at imposing particular purposes or favouring particular groups and activities. The trouble is that, by confusing the two, governments grossly underestimate the role and importance of our evolved social orders. They imagine that they can reorganise them as easily as they can reorganise some government department or agency – and indeed, to impose their political and partisan vision upon them.

This expansion of arbitrary government threatens our freedom. It also undermines the predictability that is so

crucial to our personal interactions. And it erodes trust in the political system as a whole. That is why so many people now vote for outsider parties which they see as hostile to the incumbent politicians, even if those parties are even more illiberal than those in government. But as Hayek warns in both *The Road to Serfdom* and *The Political Order of a Free People*, the rise of populist politicians can too easily turn into tyranny. Hence he argues for a liberal constitution that limits the power of politicians to erode the evolved institutions of the free society.

'Social justice' and welfare bureaucracies

Since Hayek wrote, there has also been a large expansion in welfare and redistribution policies, driven by the perception of inequality and the demands for 'social justice'. In *The Mirage of Social Justice* (Hayek 1976a), he explained how such expansion requires the creation of large and coercive bureaucracies, and why the vagueness of the 'social justice' idea leads to them becoming ever more so – further eroding individual freedom.

Contemporary policy debates reflect Hayek's concerns. High tax rates, imposed in the name of redistribution, equality and fairness, merely discourage work, entrepreneurship, saving and investment. And they induce people of talent to move themselves or their businesses elsewhere. Wealth taxes in France, Sweden and Finland were abolished for that very reason. Wealth taxes in Germany and Austria were repealed because they raised minimal revenue for the administrative burden they imposed. And

other European countries have abandoned their wealth taxes after finding they create economic distortions that make those nations less competitive internationally.

New technologies and progress

Another contemporary problem is when governments try to regulate new technologies such as artificial intelligence or internet media. As Hayek noted, such top-down regulations rarely keep up with decentralised innovation. They prove ineffective, prompting their authors to make them stricter and stricter in the effort to make them work. But that progressively stifles freedom and innovation, which sets back human progress.

The rise of technologies such as blockchain and cryptocurrencies reflects Hayek's belief in the superiority of decentralised systems. Increasingly, they provide a functioning monetary system without the need for central banks. Similarly, online sharing platforms such as Uber, Airbnb and Deliveroo, market comparison sites such as GoCompare or Booking.com and the cycle- or car-sharing apps that operate in many countries are able to match diverse and changing demand to supply far more effectively than any centralised government agency.

Hayek's message today

Law, Legislation and Liberty, therefore, is a book that remains very relevant today. It anticipated many of our current problems. It provides a powerful critique of the

overreach of centralised government power. It shows how and why our evolved ways, steeped in the wisdom of the ages, work better. It resonates in today's debates over populism, privacy and surveillance, the corruption of government power and the overreach of the regulatory state. It warns how our freedom can be lost, imperceptibly, not only to the bad intentions of those in power, but even to the good ones.

3 HAYEK AND *LAW, LEGISLATION AND LIBERTY*

Law, Legislation and Liberty in Hayek's work

Law, Legislation and Liberty, then, is a book about the importance of *cultural evolution* – the evolved ideas of justice, the development of our laws, institutions, customs, traditions, manners, even our economic activities, and how important these are to our prosperity and freedom. It highlights the dangers of imagining that we can replace these evolved and evolving social structures wholesale by ones that might be more to our liking or that we consider less 'chaotic' and more 'rational'.

In making this case, *Law, Legislation and Liberty* draws on its author's long experience and decades of engagement with many subjects, including the natural sciences, philosophy, politics, economics and the history of ideas. Born into an academic family in Vienna, Austria, he earned a law doctorate before his 21st birthday and another in political economy just two years later. This led to his collaboration with another notable Austrian economist, Ludwig von Mises. Together they founded the Austrian Institute for Business Cycle Research, on the back of which Hayek published major works on money, prices and trade cycles: *Monetary Theory and the Trade Cycle* (1929),

Prices and Production (1931) and, later, *The Pure Theory of Capital* (1941). Moving to the London School of Economics in 1931, Hayek entered into major economic debates with Cambridge's John Maynard Keynes.

During World War II, his bestselling book, *The Road to Serfdom* (1944), provided a searing critique of how totalitarianism takes root. Soon after, he created the Mont Pelerin Society, an international body of freedom-minded scholars. Its debates would inform his thinking on social organisation, leading to his blueprint for a free society, *The Constitution of Liberty* (1960).

Meanwhile, Hayek had produced *Individualism and Economic Order* (1948) on the methodology of the social sciences, *The Counter-Revolution of Science* (1952a) on scientific method and *The Sensory Order* (1952b) on the nature of the human mind and perception. These would underpin the evolutionary view of social institutions that he would develop in *Law, Legislation and Liberty*.

Unfortunately, his writing of *Law, Legislation and Liberty* was interrupted by years of ill health, though along the way he developed his thoughts on unplanned orders in *Studies in Philosophy, Politics and Economics* (1967) and in *New Studies in Philosophy, Politics, Economics and the History of Ideas* (1978). *Law, Legislation and Liberty* was also delayed by the distraction of soaring inflation, to which Hayek diverted his attention in *A Tiger by the Tail* (1971), *Choice in Currency* (1976c) and *The Denationalisation of Money* (1976b).

These distractions and health problems meant that it was the early 1970s before the appearance of the first

volume of the *Law, Legislation and Liberty* trilogy, *Rules and Order* (1973). This was followed at three-year intervals by the next two volumes, *The Mirage of Social Justice* (1976a) and *The Political Order of a Free Society* (1979). Hayek would produce only one other major work, *The Fatal Conceit: The Errors of Socialism* (1988).

The development of *Law, Legislation and Liberty*

The origins of *Law, Legislation and Liberty* can be found in Hayek's 'war book', *The Road to Serfdom* (1944), which contrasts the self-organising nature of a free society with the top-down rigidity of a totalitarian state.

Hayek developed this theme further in *The Constitution of Liberty*. Like *Law, Legislation and Liberty* itself, this book is divided into three parts. The first, 'The Value of Freedom', develops the philosophy underpinning a free society and the challenges to it. The second, 'Freedom and the Law', brings Hayek into territory that he would elaborate on in *Rules and Order*, showing how the growth of the *rule of law*, justice and the common law produced the essential foundations of a free society. The third part, 'Freedom in the Welfare State', is a precursor to *The Mirage of Social Justice*, showing how far current public policies – such as those on social security, housing, education, healthcare and redistributive taxation – are at odds with the preservation of individual freedom. And, anticipating *The Political Order of a Free People*, Hayek ventures some constitutional principles that he hopes might help protect freedom against such assaults.

Hayek conceived *Law, Legislation and Liberty* as a sequel to *The Constitution of Liberty*, filling some gaps and putting more detail on a number of its points. This new book would provide an *evolutionary* explanation of our deep notions of justice and would show how vital these are to the origin and growth of successful societies. It would explain how these ideas are undermined by contemporary political ideologies. It would take on those ideologies and would lay out in greater detail the constitutional principles and institutions that might ensure that the *rules of justice* were no longer conflated with the specific legislative *commands* by which state operations are organised.

4 THE WRITING OF *LAW, LEGISLATION AND LIBERTY*

The gestation of the book

As far back as *The Road to Serfdom*, then, Hayek had been thinking about how social, legal and economic ideas all fitted together. In *The Sensory Order*, he explained how the human mind has developed through experience. We have evolved as social creatures, in ways that facilitate our interaction, communication and cultural evolution. Hayek began to think that this might be the key principle by which to explain the development of human institutions such as law, morals and markets – things not consciously designed, but evolving and growing *spontaneously*.

It was an idea, he noted, that had a long history within classical liberal thinking. It arose even before Charles Darwin published his theory of evolution in 1859. Early versions are found in the work of the liberal political philosopher John Locke (1689). It was further developed by two eighteenth-century scholars of the Scottish Enlightenment: the polymath Adam Ferguson famously noted that 'nations stumble upon establishments, which are indeed the result of human action, not the execution of any human design' (Ferguson 1782), while the economist and

social psychologist Adam Smith wrote of the 'Invisible Hand' by which individuals, though intending only their own gain, unwittingly promote the public interest (Smith 1776).

Hayek came to believe that more work was needed to explain how these *spontaneous orders* came about and how they worked. His thoughts came together when he read *Freedom and the Law* (1961) by the Italian lawyer and philosopher Bruno Leoni. This book explained the importance of *common law* – the sort that evolves through the decisions and precedents laid down by judges of disputes in the civil courts – for the growth and adaptability of society and the freedom of the individuals who comprise it. To Hayek, *common law* seemed to be a prime example of the evolution of social institutions; and our deep notions of *justice*, which the civil courts aimed to serve and uphold, seemed to be its very foundation. Hayek therefore resolved to write a 'little pamphlet' that would suggest constitutional means to protect the adaptability of law and society and so help preserve freedom itself.

In 1962, Hayek relocated from the University of Chicago to the University of Freiburg. Here, fortunately, he had access to an excellent library and could discuss his ideas in a vibrant academic body. Soon, he agreed to write a 'small book', to be called *Law, Legislation and Liberty*, for a popular American political philosophy series, but the project grew too big, and too theoretical, for this purpose.

Hayek now began to envisage the book as much larger than he originally had in mind. He mapped out ideas for it in articles, essays and lectures. By 1968 he had the first

part of *Law, Legislation and Liberty* in semi-finished form and rough drafts of the rest. But the work slowed after another move, to Salzburg, where the academic facilities and debate disappointed him. And, more unfortunately, he also suffered debilitating illness and depression. It would be several years before he could return to the book.

Now in his 70s, his priority became to get each of the three parts of the book out as they were completed, rather than as a single three-part work. Thus, the first volume, *Rules and Order*, appeared in 1973. A year later, Hayek was awarded the Nobel Prize in Economics, which boosted his morale but led to a time-consuming round of visits and lectures which further interrupted his writing. He had also concluded that more work was needed to challenge the increasingly popular idea of 'social justice' (a phrase he always put in inverted commas). This wrenched the book in a new direction and required major expansion and revision of the second volume, *The Mirage of Social Justice*, which appeared only in 1976. But by then there were more distractions. Hayek's mounting concern with inflation made him prioritise his ideas and output on that, and he was also working on his long-cherished (but ultimately unsuccessful) idea of staging a major international debate in Paris, on the question of whether socialism was a mistake.

So, it was 1979 before the last volume, *The Political Order of a Free People*, appeared. And much like the final part of Adam Smith's *The Wealth of Nations* (1776), this reads like a book that the author is rushing to finish. But, by this point, the ageing Hayek was thinking that this

might be his last chance to create a systematic defence of individual freedom and explanation of the *cultural* evolution on which it depends.

Despite these many problems, *Law, Legislation and Liberty* remains a great book. But, as Hayek admitted, it cannot claim to be a *good* book. When, in 1982, it was finally published in a single volume as he originally intended, Hayek apologised in his 'Consolidated Preface' for the many weaknesses that had resulted from its long and difficult gestation.

The nature of *Law, Legislation and Liberty*

Law, Legislation and Liberty is a great book in the sense that it is monumental in scope and presents ideas that are original and of huge importance to our understanding of society. It demonstrates with great thoroughness how our laws, morals and institutions evolve. But this cultural evolution, Hayek explains, works at the level of the *individual*, which makes it vital that we respect individuals' freedom to act – since only that provides the diversity that this evolutionary process needs to work on.

Yet, almost paradoxically, the preservation and prosperity of human society, says Hayek, depends on individuals having evolved to behave in *broadly predictable ways* and to respect broadly established practices, values and principles – what Hayek calls *rules*. We might not be able to explain *why* we behave in these predictable ways, nor understand how the overall result depends on us doing so. But – just as the rules of popular games endure through

the generations because they produce good games that we want to play again – these regular patterns in our actions and interactions endure because they produce a society that survives and thrives.

The idea that we can abandon these evolving processes and create an outcome that is more to our liking – like deciding in advance who should win a game – is a mirage. It almost always produces unintended and disastrous results. We need constitutional safeguards to save us from this error, to protect the freedom on which our cultural evolution depends and to deny politicians and planners the power to usurp it.

This is profound thinking, though its expression in *Law, Legislation and Liberty* is far from perfect. Hayek's long period of ill health, his changing priorities (especially his concern over the rising clamour for 'social justice' and the growing public disillusionment with democracy) led to hasty rewriting. So, the argument lurches in different directions and the book contains the gaps, repetitions, digressions and changes in pace that betray something written over a long period.

Moreover, much of *Law, Legislation and Liberty* is written in a very theoretical style, often 'dense and Germanic' as the editor of the 2021 consolidated volume put it (Shearmur 2021). Hayek provides almost no examples to illustrate his reasonings. Though the book is meant as a warning about the direction of politics, its theoretical language makes it largely unintelligible to political activists. The thread is easily lost in its maze of detail. And so on.

Hence the need for a guide such as this.

5 A QUICK TOUR OF *LAW, LEGISLATION AND LIBERTY*

At the risk of repeating points already made, it is helpful at this point to provide a very brief overview of the book's theme and structure.

The knowledge problem

A large part of *Law, Legislation and Liberty* is devoted to pointing out the stark differences between *organisations* (such as government agencies) that are deliberately created with specific ends in mind and what Hayek calls *spontaneous orders* (such as law, justice and markets), which have evolved without conscious human intention.

The scope and functioning of *organisations*, being deliberate human creations, are limited by the powers of the human mind. Though economic planning is often advocated as being 'more rational' than the market system, Hayek insists that it cannot be. The central authorities simply cannot access, collect, process and act upon all the dispersed, tacit, personal, context-specific, time-sensitive, practical, changing, unarticulated knowledge held by the millions of individuals across society,

and upon which those individuals make their various economic choices. Central authorities could discover and act upon only a tiny fraction of this dispersed information, so their decisions can never be as fully informed, rational or beneficial.

> Complete rationality of action ... demands complete knowledge of all the relevant facts ... But the success of action in society depends on more particular facts than anyone can possibly know. (Ch. 1, p. 12.)

Furthermore, central planning – or perhaps more relevant today, detailed regulation – of economic and social life is a *threat to liberty*, says Hayek, because it requires everyone to conform to the *authorities'* purposes rather than their own. It replaces the many different aims of diverse individuals with the single political vision of those in power. In so doing, it stifles people's power to determine their own lives and decisions.

Spontaneous orders

By contrast, says Hayek, our *spontaneous* or evolved social orders can be highly complex. They are not limited by the power of individual minds. Their operation has been tried, tested, added to and refined over the years, centuries and millennia. They come about by us following certain regularities of action (Hayek's *rules*) that encapsulate knowledge (*wisdom*) from the past that guides us in whatever future situation we face.

This wisdom of the ages, concludes Hayek, is beyond human intelligence, and we interfere with the rules of action at our peril. Imagine it is like a game. By following the rules of chess, we can enjoy an interesting game. Draughts, Chinese Chequers and Backgammon have different rules and produce entirely different games. But if we change the rules, we cannot predict exactly how the game will be affected. It may not work as a game at all. And again, if we decided in advance that the outcome of the game should always be a draw – that there would be no winners and no losers – how would we know how to amend the rules so that they always produced that result? We simply cannot.

Indeed, says Hayek, conscious attempts to impose some preconceived outcome on a *spontaneous* social economic order (like trying to ensure that the outcome of economic activity is always to produce complete equality) are doomed to failure. They attempt to replace something evolved and highly complex with something simple enough to be grasped by the human mind. They ignore the automatic coordination of countless individual actions and instead attempt to impose particular results. They cut across the *rules*, the shared notions of morality and justice, that have created our functioning, thriving society.

> Civilisation rests on the fact that we all benefit from knowledge which we do *not* possess. (Ch. 1, p. 15.)

We must abandon the idea, says Hayek, that 'the law' is whatever those in authorities *command* it to be. There is

a much more fundamental sort of *law* – the evolved *rules* of behaviour that produce our overall social order. These rules are embodied in *common law* – the precedents and rulings laid down by countless judgements in civil court disputes.

Though government *commands* and the *rules of justice* are quite different in character, the two are often confused. Parliaments assume authority over both functions, and their decisions on both are called 'laws'. But then they imagine that they can change the *rules of justice* as easily and legitimately as they can change the rules on government agencies; and the rules of justice become corrupted by the fluctuating dynamics of political power.

That, Hayek concludes, is why we need a *constitution* that clearly protects the fundamental, evolved *law* – the *law* that guarantees our freedom and promotes our prosperity – from the *commands* needed to run the apparatus of state.

Rules and order

In the first volume of *Law, Legislation and Liberty*, titled *Rules and Order*, Hayek starts outlining this case by drawing attention to the difference between evolved *orders* and deliberate *organisations*. Human life is a mixture of both: but the evolved institutions and the *rules* that underpin them are more vital than we commonly realise.

Here, Hayek explains how functioning orders, like today's vast and complex societies and market economies, emerge spontaneously through individuals following

rules – i.e. by acting in certain ways and not others. Human society depends on us following these rules, even if we do not understand their overall effect, nor appreciate what any particular rule contributes to the operation and sustainability of the overall order. But such behaviours evolve over time, through adaptation and testing that favours successful outcomes. Not so much a process or *trial and error*, but trial and the survival of *success*.

The *rules* we follow are mostly *negative* proscriptions that tell us what *not* to do. In particular, they guide us away from *injustice*. All societies, for instance, have deeply held convictions that murder, violence, fraud and theft are wrong, and that wrongdoing should be deterred by punishing it. And there are customs and manners that are strongly felt but are maintained by *social* pressure rather than *criminal* penalties.

But these limitations still leave individuals with plenty of freedom to pursue their own aims. And they still leave open the possibility of some individuals challenging the prevailing norms and customs in ways that they think will bring benefit. If such amendments do indeed prove beneficial, they will be adopted by others and will spread. If not, they will be abandoned, or the groups that adopt them will fare less well. By such adaptations, we respond to changing circumstances and make progress.

From here, Hayek goes on to explain how a free, evolving society will be a more efficient, prosperous and just society than the conscious *commands* of authority could consciously create. That is because social rules and institutions, having evolved through trial-and-success

improvement, encapsulate millennia of such experience. They contain a *wisdom* that cannot safely be overridden by conscious plans to impose some grand design for society. Certainly, we can amend them to adapt to changing circumstances. But to try to redesign society wholesale would put us at risk of the whole complex and delicate process going haywire, with results that are unintended and potentially damaging.

> Complete rationality of action ... demands complete knowledge of all the relevant facts ... But the success of action in society depends on more particular facts than anyone can possibly know. (Ch. 1, p. 12.)

Yet, concludes Hayek in this volume, we still continue to confuse the evolved principles of *law* with the acts of *legislation* by which consciously designed *organisations* like governments are managed. No wonder, then, that the political system has become so corrupted and why people are losing faith with it.

The Mirage of Social Justice

Hayek begins *The Mirage of Social Justice*, his second volume of *Law, Legislation and Liberty*, by exploring some of the implications of this process of *cultural evolution*. Our complex, worldwide *Great Society* (as he calls it) of today cannot possibly be run by issuing specific organisational *commands* to tell each of its members what to do. That is simply infeasible in a world of billions of people, all

interacting with one another, in place to place and from moment to moment; and all interdependent, through commerce and trade, on distant others whom they could never know.

(To see why it is infeasible to manage our social and economic lives like an *organisation*, take the example – not Hayek's – of a game of chess. To open a game of chess, a player has a choice of 20 different moves; their opponent can make any of 20 different moves in response. Already, that is 400 possibilities. And the options expand from there. So, following the game through, how many different games of chess are possible? Nobody is sure, but one estimate is 2,015,099,950,053,364,471,960 – more than the number of atoms in the universe. But that is the possible moves in a limited game with just 32 pieces: how many possible actions are there in an unlimited series of interactions between a world of eight billion individuals? No mind nor agency could deal with all those possibilities. The only principle on which a *Great Society* can operate is that its members follow certain general and predictable *rules* of behaviour.)

The *rules* through which *spontaneous orders* arise, Hayek continues, are necessarily *abstract*. Unlike *commands*, which apply to specific individuals in specific situations, they apply generally, to everyone, everywhere. They are just as relevant to unknown individuals in unknown circumstances in the future as they are to us today. Unlike commands, we do not adopt them with the deliberate intention of producing some specific outcome. We adopt them because evolution has shaped us to do so. And they persist because they help us to survive and thrive.

This is where Hayek explains that the rules we follow are essentially *negative*. They do not tell us what we *should* do but dispose us against doing what we *should not* do (e.g. stealing property or breaking promises). Their effect is not to make people take specific *just* actions, but to urge them to avoid *injustice*.

This brings Hayek to his extended critique of 'social justice'. It is much longer than he originally intended for *Law, Legislation and Liberty*, reflecting his rising concern over the spread of the idea during the years he was working on the book. And in 'what inevitably must be my last systematic work' as he put it, he felt impelled to give the idea a thorough analysis.

He concludes that 'social justice' is a term empty of meaning. The idea cannot be pinned down because different people have different ideas about what it means. It may sound broadly attractive, but on what principles would it be based? Does it mean that people should be rewarded according to merit? If so, who is to rule what 'merit' is, and who is to judge people on the basis of this opinion? Or should people be rewarded according to their 'value to society'? But then who could possibly judge the relative value, to society as a whole, of different people and occupations? As Hayek puts it: 'When we ask what ought to be the relative remunerations of a nurse or a butcher, or a coal miner and a judge at a high court, of the deep sea diver or the cleaner of sewers, or the organiser of a new industry and a jockey, of the inspector of taxes and the inventor of a life-saving drug, of the jet-pilot or the professor of mathematics, the appeal to "social justice"

does not give us the slightest help of deciding …' There is no objective answer, and any answer proposed by the authorities would simply provoke bitter dispute.

> I have now become convinced … that the people who habitually employ the phrase ['social justice'] simply do not know themselves what they mean by it and just use it as an assertion that a claim is justified without giving a reason for it. (Consolidated Introduction to the One-Volume Edition, p. xv.)

There is also the problem, he notes, that trying to create any such predetermined *outcome* would destroy the delicate *processes* that create the complex *spontaneous order* of markets by disrupting the information-signalling and value-directing function of prices and incentives. (Who would exert themselves in productive work, for example, if 'social justice' were taken to mean that everyone should receive equal reward however long or hard they labour?) Moreover, to treat people as mere components in a deliberately *organised* economic strategy would require *compulsion* to prevent individuals from pursuing their own aims on the basis of their own information and instead force them to pursue the limited vision of the authorities. Such action would smother our efficiency and prosperity.

Concluding this volume, Hayek explains how politicians and lawyers persistently confuse the conscious *organisation* of social and economic life with its *evolution*. Even the 'rights' that are detailed in the United Nations Charter are a mixture of genuine principles of justice

along with demands that reveal *organisation*-led thinking: not merely identifying the sorts of *injustice* we should avoid but consciously directing individual actions in the pursuit of outcomes that are favoured by the Charter's authors.

The problem is that such confused ideas about 'rights' and 'social justice' have a deep resonance in the human mind because, Hayek suggests, most of our existence has been in small, easily organised groups, which has shaped our psychology. But the extended *Great Society* of today cannot operate like that. However much we yearn for the old ways, we prosper today only because we follow *rules*.

> In the small group the individual can know the effects of his actions on his several fellows, and the rules may effectively forbid him to harm them in any manner and even require him to assist them in specific ways. In the Great Society many of the effects of a person's actions on various fellows must be unknown to him. It can, therefore, not be the specific effects in the particular case, but only rules which define kinds of actions as prohibited or required, which must serve as guides to the individual. (Ch. 9, p. 90.)

The Political Order of a Free People

Another of Hayek's rising concerns, he explains, is the dereliction (and public distrust) into which our democratic systems have fallen. His analysis of this, and his solutions to it, form the third volume of *Law, Legislation and Liberty*, titled *The Political Order of a Free People*.

While acknowledging the profound benefits of democracy, Hayek sees both problems and dangers in *unrestrained* majority power. A powerful majority can exploit minorities, trample over their rights and become a tyranny. Its political representatives are also easy prey to the demands of special interest groups. And those interest groups know that the more the government expands, the larger the potential favours they might be able to extract, so the more effort they are willing to expend in extracting them.

Today's political systems have strayed far from the purposes for which representative bodies were originally established, says Hayek. The first parliaments were created precisely to protect us from exploitation by those with executive power. But now, the representative and executive functions have been conflated. Those who are supposed to defend us against the arbitrary decisions of rulers now confuse *justice* and *organisation* and imagine that they can amend the rules of *justice* as legitimately as they can change the workings of a government agency. But that, he says, is like leaving the cat in charge of the cream.

Hayek then turns to the politics of how we might restore and preserve a free, evolving social order, with all its benefits. We need a *constitution*, he says, that protects it from political ambitions to impose some predetermined outcome. Previous constitutions have failed because their authors have not understood the overriding importance of separating *justice* from *organisation*. Hayek's solution is bicameral government, with one house focused on

maintaining *justice* (and the *rule of* law, in which everyone, including the government, is subject to general rules) and the other determining government *organisation* – but remaining subject to the rules of justice.

Another protection, he suggests, would be to limit the government's scope to its core functions such as defence, the justice system and the provision of essential services that are not adequately provided by markets. But this is no 'minimal state'. Hayek points out that defence and justice are major tasks, with significant costs that must be raised out of taxation (which takes us into debates about taxation and its wider effects). Moreover, the list of other essential services that Hayek believes government must provide is considerable, including emergency services and public goods such as roads and public parks, and possibly more.

> Far from advocating such a 'minimal state', we find it unquestionable that in an advanced society government ought to use its power of raising funds by taxation to provide a number of services which for various reasons cannot be provided, or cannot be provided adequately, by the market. (Ch. 14, p. 41.)

Even so, he insists, the scope of government must be clearly defined in order to avoid 'mission creep'. And governments can be further restrained through the decentralisation of decision-making, such as in federal systems, to reduce the concentration of central power and promote quicker and better decisions, based on more local knowledge.

It is worth mentioning that Hayek's language in these last sections is less philosophical, less nuanced and more urgent. As his editor Jeremy Shearmur commented (Shearmur 2021), it is unwise to take Hayek's broad statements in this volume out of context and present them as his definitive view – however tempting Hayek's normally difficult language might make it.

Epilogue

Law, Legislation and Liberty closes with an Epilogue (originally written as a standalone lecture) which summarises his case. There are, he observes, 'three sources of our human values'. Some behaviours are genetic, born into us. Some of our institutions are the results of our conscious design. But, larger and more important than we realise, he says, is *cultural evolution* – something neither innate nor designed.

There is a tension to this, as there is in all evolutionary processes. *Cultural* evolution allows us to adapt much faster than *biological* evolution. But at the same time, the *rules* of behaviour that it works through have to remain strong. Much more than in *The Constitution of Liberty*, Hayek stresses that our evolved notions of justice, our traditions and customs, and our morals and markets, deserve respect. Even so, we progress by allowing these *rules* to adapt to circumstance. But let us not imagine that we have the intellectual ability to reshape them wholesale, without risk to our lives and freedom, simply as we choose.

> Freedom was made possible by the gradual evolution of *the discipline of civilisation which is at the same time the discipline of freedom.* It protects him by impersonal abstract rules against arbitrary violence of others and enables each individual to try to build for himself a protected domain with which nobody else is allowed to interfere and within which he can use his own knowledge for his own purposes. We owe our freedom to restraints of freedom. (Epilogue, p. 163.)

Hayek's choices of words

Hayek's thesis requires him to introduce new (or, at least, little understood) concepts and find ways to describe them. Partly because his native language was not English, and partly because this task is inevitably a difficult one, he does not always succeed well at this. And English words invariably accumulate many ancillary meanings beyond their strictly literal meaning.

'Grown' law versus 'made' law

Take, for example, the general regularities in human behaviour like laws, moral norms, manners, even our shared understandings, dispositions, fears and prejudices. These he refers to as *rules*. This might suggest that they are consciously constructed, like the rules of golf or tennis. But what he has in mind is the opposite, i.e. *rules* that simply grow and evolve, without us directing or perhaps even noticing the process.

This Hayek calls *grown law*, in contrast to the consciously created *made law* or *commands* by which *organisations* such as government projects and agencies are managed.

Grown law evolves but is much more permanent than *made law*. It is also more *general*, applying to everyone in any situation, rather than being directed at specific people in specific circumstances. Of course, different circumstances might challenge the norms of *grown law*. Should we abandon the rule against homicide, for example, to end the suffering of someone in great pain? Can I cut back a neighbour's tree that overhangs my property? In such questions and disputes, it is for judges in the courts to *discover* (as Hayek puts it) which *rules of justice* take precedence. And this is how our moral and legal thinking evolves to deal with different situations.

Spontaneous order

As for the overall result of us following these *rules*, Hayek calls it *spontaneous order*. But again, these words may be misinterpreted. Hayek means 'spontaneous' to imply something that happens without deliberate human intention or obvious external cause. But 'spontaneous' might suggest something that is done on a sudden impulse but is still a conscious action – as in 'spontaneous applause'.

Likewise, 'order' in German means little more than the disposition of people or things in relation to others – as in the arrangement of atoms in a crystal, the lines made by iron filings on a piece of paper above a magnet, or the pattern of seeds on a strawberry. And in social

terms, Hayek means the overall outcome that stems from rule-guided behaviour. But in English, the word 'order' carries a stronger hint of something *deliberately* ordered or arranged – such as the neat regimentation of a marching band.

Mindful of such problems, Hayek searches for less ambiguous words. In Chapter 2 of *Law, Legislation and Liberty* he explores Greek terms such as *nomos,* meaning 'law' or 'custom' (instead of *rules*); *telos* (meaning an end, purpose or goal) and *cosmos* (meaning both 'world' and 'order'), since the Greeks considered the world as something perfectly arranged and harmonious. But some scholars question his use of these terms (see, for example, Minogue 1987), and they are likely only to confuse the lay reader.

It is indeed not easy to find alternative terms for Hayek's *spontaneous order* that are free from ambiguity. For *spontaneous*, perhaps *evolving* would be better, implying a process that is outside human agency and still continuing. Replacing *order* is more difficult; terms such as 'structure' or 'arrangement' can also imply something consciously organised, while 'pattern' sounds too simplistic for the complex social and economic order that Hayek has in mind. Perhaps *evolving order* is reasonably clear – provided we remember that *order* does not imply human design.

PART TWO

A READING GUIDE TO *LAW, LEGISLATION AND LIBERTY*

6 WHERE TO START

Epilogue: The three sources of human values

The best place to start reading *Law, Legislation and Liberty* is the Epilogue. Hayek had intended to write a Postscript that would link the book to his next planned work, *The Fatal Conceit*. But in 1978 he was asked to give a special lecture at the London School of Economics and decided to end his third volume with this rather than delay publication any further.

The Epilogue is a good starting place because it is a statement and explanation of the main theme of *Law, Legislation and Liberty*: that is, the *cultural evolution* of social institutions that are neither innate nor designed. He begins it with a critique of the emerging field of *sociobiology*, which had gained prominence through an influential book by the biologist Edward O. Wilson, which explored the innate foundations of human behaviour (Wilson 1975). Soon after, another book, by G. E. Pugh, attempted to trace the innate basis of human morality (Pugh 1977), and it is with this that Hayek takes the most serious issue. The sociobiologists, he complains, regard the evolution of human values as a purely genetic process. They forget the process of *cultural evolution*, which allows our values to

adapt much faster to changing circumstances than *genetic evolution* and makes possible the *Great Society* we live in today. And it is not a product of genetics or invention but has grown up with us.

We did not develop our culture and institutions because we have rational minds, Hayek further explains. Our minds and our culture evolved together: we evolved to learn and follow the rules of conduct precisely because those of us who adopted them prospered. Scientists may focus on the rational or the innate sources of our values, but cultural evolution is the third and most important explanation of our civilisation.

> *Man did not adopt new rules of conduct because he was intelligent. He became intelligent by submitting to new rules of conduct* ... The basic tools of civilisation – language, morals, law and money – are all the result of spontaneous growth and not of design ... (Hayek's emphasis; Epilogue, p. 163.)

As we evolved from life in small bands to life in the *Great Society*, Hayek suggests, new rules and customs gradually replaced the old beliefs. Progress came through the gradual relaxation of old prohibitions and customs. New ideas such as private property, bartering, specialist production and competitive exchange gradually revolutionised our way of life.

So there is a tension between rule-following and making progress. The *rules* need to be generally followed if they are to give rise to a functioning *social order*. Though it

must remain possible to challenge them and try new ways. But the scope of such initiatives is limited. They must still be compatible with the society's overall functioning.

There is therefore a tension in freedom too. Paradoxically, we owe our freedom to the *restraints* on our behaviour (such as our prohibitions against theft and violence) that shape and facilitate our civilisation. Freedom and its restraints – civilisation – evolved together. We did not intend that, it simply worked.

We still have a yearning for the old values that sustained the small bands in which we have lived for most of our history, Hayek continues. Hence our attraction to socialism, centralised authority and an 'organised' society. But in fact our lives depend on the *new* values and customs that enable the *Great Society* to flourish. With our scant understanding of how that process works, we cannot hope to safely redesign it. Our best way of improving things is to create the conditions that enable *cultural evolution* to operate smoothly. That means giving people the freedom to innovate and experiment in economic and social life, and not let adaptation be stifled by rigid state directives. And this argument is the basis of Hayek's new, evolutionary defence of individual liberty.

Those who would redesign society, he warns, underrate the functionality of our evolved institutions, such as markets, and how much information they process. By assigning everyone specific roles in their proposed social *organisation*, they deny individuals the ability to use and act on that torrent of information. They prevent people

experimenting with new things and thereby promoting human progress. And they underrate the importance of the price system in signalling the most valued uses of resources and steering them in that direction.

Hayek concludes that our yearning for the old values is an *atavism* – adherence to outdated rules that could never sustain the vast and complex needs of a *Great Society*. We may not know precisely where our developing rules will take us. But if we cherish freedom and tolerance, *cultural evolution* will help us adapt and progress.

Editor's introduction

After reading the Epilogue, the next place to turn to is the Introduction. Specifically, the Editor's Introduction that Jeremy Shearmur wrote when *Law, Legislation and Liberty* was reissued as part of *The Collected Works of F. A. Hayek* (Shearmur 2021). It explains how Hayek became increasingly concerned, during his book's long gestation, about how the law, culture and institutions of the free society were being eroded by the rise of social engineering and about the threat to democracy and even civilisation that it posed.

To Shearmur, the first main theme in *Law, Legislation and Liberty* is that our constitutions no longer serve their purpose, because they do not fully separate the *rule of justice* from the *commands* of authorities. The second is that our inherited social institutions are evolved and *spontaneous*. The third is that *law* is based on established customs, not on the whim of those in authority.

These thoughts, observes Shearmur, have clear roots in *The Constitution of Liberty*, in *Studies in Philosophy, Politics and Economics* and in *New Studies in Philosophy, Politics, Economic and the History of Ideas*. And there is a close connection between Hayek's evolutionary theory of mind in *The Sensory Order* and his ideas here on the evolution of social institutions. But these thoughts can even be traced back to *The Road to Serfdom*; Hayek simply gives them more prominence in *Law, Legislation and Liberty*. And, says Shearmur, this line of reasoning gives us a completely new defence of individual liberty. Rather than resort to justifications such as 'natural law' (the idea that human beings naturally possess intrinsic values and rights), Hayek provides a completely new explanation based on the *cultural evolution* of human values and institutions.

The fourth theme that Shearmur notes is Hayek's solution to the erosion of justice, namely a constitution that separates the maintenance of *law* from the administration of government between two different representative chambers. And a last theme worthy of note, he says, is the tension between the traditions that underpin our evolved social institutions and our freedom to improve them in the light of reflection.

There are, however, some issues with much of this, says Shearmur. For example, Hayek's parliamentary separation leaves it unclear how the law-focused representatives relate to civil-court judges, who are also charged with upholding and developing the common law. Nor does Hayek critique John Rawls's highly influential book on 'social

justice', *A Theory of Justice* (Rawls 1971). Third, Hayek's stress on the need for a common-law view of law seems out of step with *The Constitution of Liberty*, in which he is much more confident about the ability of freedom to flourish even with a large government, if that government respects *justice* and the *rule of law*.

But despite all these shortcomings, Shearmur concludes that *Law, Legislation and Liberty* remains a rich and impressive work.

Hayek's consolidated preface and introduction

Hayek's own 'Consolidated Preface' to the one-volume edition of *Law, Legislation and Liberty* is the next stop on a reading plan. In it, he says his aim for the book was to fill the gaps in *The Constitution of Liberty* rather than provide an exhaustive explanation of the workings of a free society. He stresses how constitutions have not saved us from the erosion of law by governments, which has led to a devaluation of liberal ideals, the erosion of impersonal justice, and the rise of coercion as authorities attempt to impose their preconceived orders on society. Our current, unrestrained, majoritarian democracies have a sad tendency to self-destruct, he observes; but given the rise in academic specialisation, there are few people with the general understanding to explain the roots of the problem.

Our evolved institutions, Hayek concludes, are much more information-rich, and so more functional, than anything designed by conscious minds. We can preserve our

freedom only by limiting political authority and focusing that authority on the task of maintaining the fertile self-organising processes that are most likely to promote freedom, and along with it, our adaptability and long-term prosperity.

7 CHAPTERS 1–6: *RULES AND ORDER*

Chapter 1: Reason and evolution

The first chapter of *Law, Legislation and Liberty* can be daunting to anyone new to political philosophy and unfamiliar with Hayek's earlier writings. But it sets out the book's key theme: the need to distinguish *spontaneous* or evolved social *orders* (such as the rules of justice, morality and markets) and *organisations* (such as government agencies).

Hayek begins by noting that people commonly imagine that we have deliberately *designed* our social institutions to serve our purposes, when in reality they *evolve*. This mistake has three origins, he says. First is the desire to make all our action 'rational', an approach with a long history in political thought. To be fully rational, Hayek argues, our actions would need to be based on *all* the relevant facts; but these facts are so dispersed and so numerous that no 'rational' mind or agency could ever comprehend them. The 'rationality' of our action is necessarily constricted by our profound ignorance.

Moreover, the human mind has evolved along with our civilisation; it has evolved to dispose us to behave in ways

that promote the functioning of society. As the *product* of that social inheritance, we are limited by it. We cannot somehow *stand outside* our civilisation and rationally, objectively critique and redesign it.

The second origin of the mistake is that we are over-confident about science, thinking it can deliver us all the facts we need to rationally plan our society. But, Hayek explains, science is about ruling out *false* theories, not knowing every *truth*.

The third origin is that our language still reflects the ancient Greek division of the world into two categories: things that arise *naturally* and things that we intentionally *create*. But, he insists, there is a third category: things that *result from human action but are not intended*. And our most important social values belong to this category.

> There are two ways of looking at the pattern of human activities which lead to very different conclusions concerning both its explanation and the possibilities of deliberately altering it. Of these, one is based on conceptions which are demonstrably false, yet are so pleasing to human vanity that they have gained great influence and are constantly employed even by people who know that they rest on a fiction, but believe that fiction to be innocuous. The other, although few people will question its basic contentions if they are stated abstractly, leads in some respects to conclusions so unwelcome that few are willing to follow through to the end. (Ch. 1, p. 8.)

Chapter 2: Cosmos and taxis

Hayek now goes into more detail on what he calls *spontaneous orders* such as our social institutions, and how they depend on us following certain regularities or *rules*. He acknowledges that these are novel ideas and that it is difficult to find clear words for them. For instance, *order* to Hayek implies only a set of elements that are somehow related to each other. In physics, that might be the way iron filings line up when subjected to magnetic force; in human terms, it is how we unintentionally create institutions by each behaving in roughly predictable ways. He therefore attempts a more precise use of words, though this soon becomes very complex. He even resorts to the ancient Greek notions of *taxis*, *telos* and *kosmos*, but even that does not satisfy him. All words, after all, are rooted in past concepts and still carry past baggage when we try to apply them to new ideas.

Since no names are perfect, Hayek proceeds by highlighting the different *qualities* in the ideas that he is trying to define. *Deliberately made* orders, he explains at this point, must be simple, because they depend on the limited information available to their maker at the time. But *evolved* orders, such as human society, can be hugely complex, because they draw on the dispersed information that is (and has been) available to the millions of individuals that comprise them.

Interestingly, the regularities in human behaviour – Hayek's *rules* – that produce the overall social order might not be understood, or even noticed, by those

individuals. Like the rules of grammar, he says, people follow them without necessarily being able to explain them in words. Only when people have different or conflicting ideas about them do we need to express the rules in words, as in the decisions of judges in civil court cases.

Not all regular behaviour, he notes, will produce a social order. Individuals who always run away from others would not create a society. Yet individuals striving to maximise their own material gain do, unwittingly, create sophisticated and hugely productive markets. So what sorts of behaviour do and do not produce order?

That is no easy question, he answers, because our society arises out of rules of different sorts, with different levels of commitment. Some rules are universally obeyed because our minds have evolved to do so. Others are followed, less strictly, as part of good manners, or through tradition. Yet others (such as the laws against theft or violence) need to be enforced, otherwise the social order could not function.

These rules of the evolved social order, Hayek reminds us, are quite different from the rules by which we manage *organisations*. Organisational rules require the performance of specific tasks by specific individuals or groups, in pursuit of a deliberate overall outcome. Today's large societies cannot be run like that. Their complexity requires that individuals are free to apply their own local knowledge in deciding how best to act, not to be bound by the limited information available to some authority.

Chapter 3: Principles versus expediency

Hayek therefore advises that those in authority should not seek to *manage* society like an organisation but try to *maintain the conditions* under which our institutions can evolve and adapt to changing needs and conditions. That means preserving people's freedom, since only this produces the diversity of aims and actions that the evolutionary process tests and selects.

Indeed, it requires a strong *culture* of freedom, since the real value of freedom is not the visible benefits it gives us here and now, but its usefulness in our navigating unforeseen and unpredictable situations. That benefit is harder to understand, so when we lose our freedom, we may not realise the extent of what we are losing. We undervalue it, leaving us too willing to accept restrictions on our actions, and dangerously so.

> Individual freedom, wherever it has existed, has been largely the product of a prevailing respect for ... principles which, however, have never been fully articulated in constitutional documents. Freedom has been preserved for prolonged periods because such principles, vaguely and dimly perceived, have governed public opinion. (Ch. 3, p. 55.)

While free people will want to try new things, we cannot maintain a social order by purely random experimentation. To preserve freedom, we must therefore reject measures that destabilise the order's operation.

Certainly, the law continues to change and evolve, through the decisions of judges in civil courts, for example. But judges cannot be *revolutionaries*. Their decisions must be compatible with the prevailing norms, opinions and values. Activists may not like this, but their attempts to re-make the law to serve some preconceived social outcome is potentially highly destructive.

One of the main sources of such activism, says Hayek, is a misunderstanding of economics. The idea that we need to replace the 'chaos' of capitalism with 'rational' planning is a bad mistake, because we do not fully appreciate the complex and functioning order that is the market process. Yet the lure of the idea remains strong.

> It is necessary to realise that the sources of many of the most harmful agents in this world are often not evil men but highminded idealists, and that in particular the foundations of totalitarian barbarism have been laid by honourable and well-meaning scholars who never recognized the offspring they produced. (Ch. 3, p. 70.)

Chapter 4: The changing concept of law

Hayek next explores the ancient roots of how our ideas of law and justice might have emerged. The law, he says, has evolved with us: our observance of certain rules of conduct made possible our peaceful coexistence, and thus our flourishing and expansion. These rules – such as the rules of property ownership and peaceful transfer – evolved because they helped the groups that followed them to prevail.

They were followed long before we could articulate them. We learnt (and still learn) them by imitating others and extending them by analogy into new situations.

In the ancient world, Hayek suggests, the law was taken as 'given' and the role of rulers was to preserve it. They too would be bound by it. But gradually, the 'law' came to be seen as merely the will of the ruler. Only England, with its deep roots in *common law*, protected the law against executive power. It was up to judges to interpret how the law applied in new situations. Judges, and the common-law courts, are therefore important institutions that serve the evolving *spontaneous order* of society and make it work, grow and adapt. Their role is to *discover* what the principles of law – the *law of liberty* as Hayek calls it – really are. In doing so they help to make everyone's future expectations about their relationships with other people more certain, making social interaction and beneficial collaboration easier.

Some critics (see Chapter 10, Part Three, below) think that Hayek's faith in judges and courts as the guardians of liberty is overblown. Yet the common law remains quite different from a ruler's power to change the 'law' completely. Certainly, the evolved, judge-given law sometimes needs conscious amendment by some constitutional authority. When circumstances change, the 'given' rules may produce undesirable effects; or strings of court judgements, all based on precedent, may end in some undesirable cul-de-sac. And this need for occasional conscious revision may add to people's confusion between evolved *law* and imposed 'law'. But legislators, and the amendments

they make, must always remain limited by the rules of *just conduct*: if they do not, justice and liberty will soon cease to exist.

> Legislation, the deliberate making of law, has justly been described as among all inventions of man the one fraught with the gravest consequences, more far-reaching in its effects even than fire and gun-powder. (Ch. 4, p. 72.)

Chapter 5: Nomos: the law of liberty

The role of judges, Hayek explains, is not to *make* law, but to establish exactly what the law is: to confirm which *expectations* about others' behaviour we can count on. Judges cannot prevent *all* damage and disappointment – such as when a business is outrun by a new competitor – only that caused when people *unjustly interfere* with others. They can only protect the expectations that are vital to the maintenance of the evolving order.

Private actions that affect nobody else, and so do not disturb the overall order, can therefore never be the concern of judges, Hayek insists. Judges exist to establish the rules of just conduct towards *others* and identify the limits to each individual's *private domain* – the range of actions with which others may not interfere.

Such limits may not be obvious, particularly when technology changes. Hayek cites the example of electricity: when introduced, judges had to decide whether it was a form of property that should come under the laws concerning property ownership and theft. Today we might

ask if someone's ownership of a piece of land should prevent others from flying drones over it, or whether certain digital assets deserve protection as 'property'. The role of court decisions is to *clarify* how the rules apply in new situations and so ensure that our understanding of the law remains consistent with the overall functioning of the social order.

Chapter 6: Thesis: the law of legislation

Our confusion between evolved and deliberate orders has another powerful source, says Hayek. The measures passed by modern parliaments mostly concern the management of government institutions, setting out their aims, structure and operational rules. But on occasions they do have to make necessary amendments to the rules of interpersonal conduct too. Unfortunately, the same word, 'law', is used for both, which makes many people imagine that the authorities can manipulate the rules of just conduct as easily as they issue the *commands* that determine how government agencies operate.

Even when we do recognize the difference, our constitutional attempts to restrain our authorities have been unsuccessful because they have not properly separated these very different functions. The American constitution, for example, sought to restrain the authorities through a *separation of powers,* but that still leaves the determination of the general rules of behaviour muddled with decisions about government *organisation,* since the same bodies are responsible for both. Instead, Hayek insists, we

must clearly separate the *law* that applies to us all from the *legislation* designed to organise government and government bodies. And if we hope to maintain our freedom, the *rules of just conduct* must apply to the government and political authorities as well.

8 CHAPTERS 7–11: *THE MIRAGE OF SOCIAL JUSTICE*

Chapter 7: General welfare and particular purposes

Here, Hayek summarises his thinking thus far. We follow the essential rules of our evolving order voluntarily because our minds have evolved as part of that order. We have inherited a disposition to act in ways which maintain our functioning society; only a few transgressions need to be restrained by force. But if social engineers want to cut across our inherited dispositions to achieve a different overall outcome, they must be prepared to use force to make us change our ways.

They may try to justify such coercion as necessary for the 'public interest'. But, says Hayek, the idea of 'public interest' is so vague that almost any use of force might be excused by it, and governments are unlikely to confine their coercive power to that end alone. Indeed, our constitutions struggle to stop them expanding and misusing such power.

> The idea that government can determine the opportunities for all, and especially that it can ensure that they are the same for all, is therefore in conflict with the whole *rationale* of a free society. (Ch. 7, p. 9.)

No, he insists, the best way to promote public benefits is to *nurture the conditions* by which our evolving, adaptive social order thrives. That will maximise the opportunities for improvement and progress that are open to everyone. True, we cannot forecast precisely who will prosper most or whose hopes will be disappointed as circumstances change. But the rules that give rise to the *Great Society* of today are not intended to bring benefit to particular individuals or groups. They benefit the community as a whole.

Those rules, Hayek continues, are necessarily *abstract*. They apply equally to everyone, including our rulers and including unknown individuals in unknown future circumstances. They are, he says, like a tool that helps us adapt to and deal with all kinds of unforeseen situations in a changing world – like a walker taking a pocketknife on a hike, unable to predict exactly what if any need might arise, but well equipped if and when it does.

The inherited rules, he continues, encapsulate vast *knowledge* – not a knowledge of *facts*, but knowledge of *how to act* – or more precisely, how *not* to act. Despite our having different ambitions, we can collaborate peacefully because the rules constrain how we treat each other and make our actions more predictable. We do not have to agree on common aims. We trade goods, for example, even without knowing what use the other has for what we provide them with. Nor must some authority determine the merit or demerit of our purposes before such cooperative trading takes place.

Sadly, it is easy to stray from these *abstract* principles. Hayek cites the example of utilitarianism, the popular

idea that we should judge actions on how likely they are to generate the greatest happiness of the greatest number of people. The trouble with that, he objects, is that we can never grasp all the potential *results* of our actions. We cannot access nor understand the relevance of every fact involved. We might be able to anticipate the broad effect of an action on those near to us, but we cannot know how it might ultimately affect everyone in what is a worldwide society. Utilitarians are asking the impossible.

Our inability to predict the full results of our actions is because our rules have *evolved*. They have endured because they give us the general purpose tools, such as the walker's pocketknife, to get us through future events. They have been cumulatively shaped and improved by generations of experience. And they give rise to overall orders so complex that we can barely understand them, much less successfully redesign them.

Even so, there remains plenty of room for debate on how the rules apply. Where rules come into conflict, for example, we need to establish which one trumps the other. Is it immoral to tell a lie, for example, if the truth would injure someone's feelings? Should it be illegal to give a fatal overdose to a relative who is dying in great pain? There might be no objectively correct solutions in such cases, and different societies may develop different solutions (e.g. different laws on euthanasia). But the ultimate test says Hayek, is whether a rule can be *generalised*. Are we content to see it applied to all similar cases from now on? Only then do we have a firm and predictable foundation upon which we can collaborate without conflict.

Chapter 8: The quest for justice

What, then, *are* the rules – specifically, the rules of interpersonal *justice*, the rules that are so important to our social order that we feel the need to *enforce* them?

Hayek starts by noting that only *human conduct* can be just or unjust. *Facts* are neither just nor unjust: they are simply facts. Likewise, the outcome that emerges from our following rules is neither just nor unjust. It again is simply a fact, like the result of a game or like prices in the marketplace.

Second, he says, the rules of just conduct are essentially *negative*: they do not tell us every possible way in which we *must* treat others, only the few ways in which we *must not* treat them. That discipline restrains us from causing conflict by interfering in others' *private domains*. It tells us what we can reasonably expect others *not* to do. That in turn makes it easier for us all to plan confidently for the future – a key part of our ability to prosper.

Likewise, the role of judges is not to create some particular social outcome based on any particular notion of, say, economic equality or 'social justice'. Those are elusive ideas anyway, since everyone has a different understanding of what they mean. Rather, the role of judges is to reduce *injustice* by discovering how the abstract *rules of justice* should apply today and in the future.

This explanation rejects both the classical liberal idea of *natural law* (that our rights and values are 'given' and immutable) as it does the socialist idea of *legal positivism* (that justice and law are what we legislate them to be). The

first idea, says Hayek, would never allow us to adapt to new circumstances, as *cultural evolution* does. And the second would leave us defenceless against the whim of those in authority at the time. Neither provides the secure but adaptive foundations on which a society can survive and prosper.

Chapter 9: Social or distributive justice

Hayek next turns to his main concern in this volume – the rising allure of the 'social justice' idea. He concludes, first, that 'social justice' is an impossibly elusive concept, and quite unsuitable as a policy objective, since it means something different to everyone. Second, the idea cannot be reconciled with any generalisable abstract rule, so cannot qualify as genuine justice. Third, and more specifically, any attempt to make economic rewards reflect some 'just' criterion (such as 'merit' or 'need') would dislocate the signalling function of prices, on which our material prosperity depends.

The idea of 'social justice', Hayek explains, is supposedly about how particular individuals and groups are (or should be) 'treated' by 'society'. But this is anthropomorphism – treating society as a thinking, purposive being. Only *individuals* think, have purposes and act: what we call 'society' is merely the *outcome* of those individuals' thoughts, purposes and actions. Remember too, he warns, that the redistribution of people's resources (such as their wealth or income) in the name of 'social justice' will require the use of force – particularly when there is disagreement about what 'social justice' means. So the first

problem is not *how* such redistribution should be done, but what justifies *coercing* people to accept it.

Nevertheless, he continues, many politicians believe that 'social justice' trumps all else, encouraged as they are by the support of moralists, charities and clergy. But the fact that large numbers believe in something does not make it any more real than the witchcraft so feared by medieval populations. Indeed, the 'social justice' *superstition* (as Hayek refers to it) is even more disruptive, since it seeks to destroy the rules that give rise to our evolving, functioning social order.

It is easy, though, to see how the 'social justice' idea arises. We commonly regard accidents and misfortunes as 'unjust', notes Hayek, even though they occur despite nobody acting unjustly. And many people regard the economic outcome of market processes too as 'unjust', even though, like the result of a game that is a mixture of skill and chance, it is merely the order that emerges from everyone following rules, rather than some deliberate reflection of their 'merit' or 'need' or 'value to society'.

That last concept, 'value to society', is interesting, because it is again anthropomorphic: 'society' does not 'value' things, Hayek reminds us; only *individuals* have values. And the problem for the social engineer is that individuals each value *different* things; not everyone loves Beethoven or Shakespeare. So who is to decide the 'value to society' of, say, a judge, a deep sea diver, a jockey, a tax inspector or a professor of mathematics? Any attempt to determine the distribution of resources on these grounds would produce only endless arguments and conflicts.

The problem might be avoided if 'social justice' is taken to mean that everyone's material benefits should be *equalised*. But to make a redistribution on this scale would require giving enormous power to the authorities – a dangerous move.

> While an equality of rights under a limited government is possible and an essential condition of individual freedom, a claim for equality of material position can be met only by a government with totalitarian powers. (Ch. 9, p. 83.)

Furthermore, redistribution would mean treating different people differently, which is contrary to the principles of genuine justice. And it would still leave people unequal in important but non-material ways. Some jobs are difficult, or dirty, or dangerous, or undertaken in unpleasant settings, for example, while others are easy, clean, safe and agreeable. If all employments carried the same reward, who would willingly do the more difficult, dirty or dangerous jobs? Government would need to take on even greater powers to force individuals into these undesirable occupations. Though intended to promote equality, the pursuit of 'social justice' would create a world of superiors and subordinates.

> 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'. (Ch. 9, p. 97.)

Appendix: Justice and rights

Hayek cites the United Nations (UN) Charter as a prime example of our confusion about *rules* and *commands*.

The idea of *justice* imposes no positive obligations on anyone, beyond the requirement *not* to interfere within other people's *private sphere* – i.e. not to violate their *rights*. But the Charter confuses our *right* to be left alone with positive 'rights' such as free education and paid holidays. These are not genuine *rights*, but proposed claims on others, in particular the positive obligation to pay taxes to fund them. Certainly, we may all aspire to live in a world in which everyone enjoys holiday pay and good healthcare and education. But merely asserting that people have a 'right' to these things does not produce them. On the contrary, the best way to ensure that these things are accessible to everyone is not to force others to pay for them but to maintain the conditions by which the *market order* creates general prosperity. (On Hayek's conception of rights, see Chapter 10, Part Three, below.)

Chapter 10: The market order or catallaxy

On the subject of the market order, Hayek expresses his discomfort with the term 'the economy', which sounds like a mechanistic *organisation* operating under a particular set of goals. In reality our economic life is a *catallaxy* – the unintended emergent outcome of millions of individual market exchanges. This term derives from the Greek word

for exchanging or reconciling, and Hayek took it up from his friend Ludwig von Mises (1949).

In this *catallaxy* of exchanges, Hayek explains, participants take advantage of vast amounts of disparate information that are encapsulated in prices. They may not know exactly who wants their product, or for what purpose: but if customers appear willing to pay more, producers will be prompted to supply more. And to capture even higher returns, they will try to innovate and make their products better and cheaper. They do these things out of self-interest, though everyone benefits as a result.

This innovation and improved value offered by alert producers may induce customers to migrate to their products and away from old ones. That may disappoint the producers who are left behind, which is the cause of many of the complaints made about capitalism. But markets do not reward *past* success; they promote the supply of what people value *currently*. So when particular goods and services become obsolete, new and better ones arise to replace them. We need to let such change happen, since that is how we make progress.

Like other rules, the *rules of property*, on which the exchange system rests, do not prescribe how property *should* be used; they exist to prevent interference in people's ownership and transfer of property, and so to reduce the potential conflicts caused by fraud and theft. With their ownership secure, owners can then aspire to make their assets work as productively as they can and so generate the highest possible value from them.

Such value-creation benefits the whole community. We could never achieve the same benefit by trying to assign resources centrally. We would simply disrupt the automatic value-creating process. But while following the rules of property and exchange improves the chances of us all prospering, it does not determine how much *any one person* prospers. Those outcomes will depend on the particular mixture of circumstance, opportunity, luck and skill.

Chapter 11: The discipline of abstract rules vs tribal emotions

The idea of 'social justice', says Hayek, might have begun as an appeal to abolish destitution. But the market order has largely achieved this ambition: the interventions made in the name of 'social justice' have only slowed the process. Today, 'social justice' has become more a slogan used by groups who feel themselves undervalued (e.g. academics and intellectuals).

People do of course overestimate their value to others, and the appeal to 'social justice' allows them to argue that they should be made better off. But that produces only a competition for government favours between different groups. And in this contest, it is the larger, better-organised interest groups that can exert most pressure on governments to 'correct' the market by steering resources towards them or by creating regulatory privileges to protect them from more innovative competitors.

'Social justice', Hayek concludes, is an *atavism*, a throwback to the values of small tribal communities. The conscious assignment of particular benefits and favours to particular groups is totally inadequate and inappropriate to the preservation of today's *Great Society*. It would undermine markets and stifle their ability to benefit countless unknown people all over the world. And it would discourage diversity, not just in commerce, but in the arts, sport, science and everything else that it supports – diversity that we need to fuel the *cultural evolution* through which humanity progresses.

9 CHAPTERS 12–18: *THE POLITICAL ORDER OF A FREE PEOPLE*

Chapter 12: Majority opinion and contemporary democracy

The third volume of *Law, Legislation and Liberty* reveals Hayek's distress at how liberal democracy has eroded into majority dictatorship, and how politics has become a process of deceiving the public into paying for benefits that politicians give to favoured groups in exchange for their electoral support. Such injustice happens, says Hayek, because legislators now decide not only how government is organised but what 'justice' should mean.

Part of the problem, he explains, is our belief that democracy, the participation of all the people in choosing our leaders, leaves no need for any further restraint on those leaders. But when things are decided by majorities, it is easy for them to exploit the minority, and to use their power to benefit themselves and their supporters rather than the whole public. Which, of course, they do.

Hence the declining public faith in the political process. Democracy was originally a way to restrain rulers' abuse of power. Now it has eroded into what Hayek calls *demarchy* – unrestrained majority power (or, more accurately,

coalitions of special interests who argue that majority support justifies their actions, however illegitimate they are). But the mere fact that a majority wants something and has the power to get it, he warns, does not make it just.

> It seems to be the regular course of the development of democracy that after a glorious first period in which it is understood as and actually operates as a safeguard of personal freedom … sooner or later it comes to claim the right to settle any particular question in whatever manner a majority agrees upon. (Ch. 12, p. 2.)

Over time, however, those empowered by this *demarchy* come to regard their ability to grant favours as their right. They protect their cronies against competition from abroad, or use public funds to prop up outdated jobs, and give benefits to their supporters at the expense of others. This is obviously corrupt, but also weak: as Hayek notes, a government with unlimited power can hardly resist using that power to grant favours to interest groups who claim to be suffering or disadvantaged. And the more it does so, the more normal such behaviour becomes – and the more the general public becomes disenchanted with the entire political process. But the choice for ordinary electors is only a choice of evils: which set of self-serving politicians and their cronies can they best tolerate?

Chapter 13: The division of democratic powers

Hayek insists that majority government works only if the winners are bound by the *rule of law* – i.e. are subject to

the same rules of justice as everyone else. Majority voting might be the best way to reach agreement on how governments are chosen and organised, but it is certainly not the best way to determine justice and the *law*. Elected politicians are mostly focused on concrete decisions, such as whether new roads or schools should be built, and how to pay for them. They have little time for the philosophy or maintenance of *law*. Their priority is to *use* (and perhaps *extend*) their power, not to *limit* it.

The first question we should ask of this system, therefore, is not who should have power, but whether power is justified at all. The next question is then how we *restrain* such power, once granted. In this task, says Hayek, our constitutions have failed. Power needs to be subjected to the *rule of law*. It needs to be restrained by *justice*.

Chapter 14: The public sector and the private sector

Hayek then explores what the legitimate role of government might be. He is no supporter of a minimal state; a government, he says, must ensure the provision of *public goods* such as defence, policing, a justice system, emergency services, roads or public parks.

The problem with these goods is that people could 'free ride' on them, enjoying their benefits without paying towards them. Hence the need for compulsory taxation. But that in turn raises problems, because some people may derive little or no benefit from services that they are obliged to pay for. A state-run local school, for example, is of little benefit to a childless family; so why should they be

forced to pay for it? The answer, says Hayek, is that taxes pay for a 'pool' of benefits: people will benefit in different ways, but everyone benefits overall; so it is reasonable to ask everyone to contribute towards the package.

None of this implies that governments should have a monopoly on the *delivery* of these services. They can be delivered by commercial, independent or voluntary bodies. Indeed, Hayek notes, schools, hospitals, libraries, museums, theatres and parks were originally provided by independent bodies, and many still are.

Unfortunately, though, there are almost no limits to what vote-hungry politicians will promise in return for votes. So they have to deceive taxpayers into funding a larger pool of benefits than they might agree to consciously. The full scale of the tax burden is concealed (today we talk of 'stealth' taxes) and voters are assured that 'other people' will bear it. But if taxpayers are unaware of what they truly pay, there is no brake on government spending.

In addition to the public goods mentioned above, Hayek sees care of the sick, old or handicapped as necessary in today's mobile society where family ties are weakened by distance. He suggests a minimum income guarantee as insurance against the risk of unemployment. He includes the provision of local transport, communications and utilities, especially in remote communities. Governments should also ensure that there is easy access to education and information, and the certification of goods and services (e.g. building regulations, food standards, professional qualifications and the control of dangerous goods) because such measures enable markets to work more smoothly.

Chapter 15: Government policy and the market

Hayek favours *competition* as the best way to provide goods and services. Competition encourages innovation and rapid adjustment to changing circumstances, and so promotes economic progress.

But genuine competition is very different from the textbook 'perfect competition' model. For instance, that model assumes that market participants all have 'perfect knowledge' when in fact knowledge is inevitably patchy, partial and dispersed between millions of individuals. We can never know the exact circumstances, assessments and motivations on which real market participants make their choices.

The 'perfect competition' model also assumes very large numbers of providers. But the number of businesses that will provide effective competition and still remain viable varies from market to market. In capital-intensive industries such as steelmaking, it may be few; in others such as hairdressing it may be many. We have to *discover* the answer; we cannot simply *assume* that it has to be very many.

Hayek is even relaxed about *monopoly* provision. While a new product might give a firm a temporary monopoly, he points out, others can challenge that. In dynamic markets, even the largest corporation can be challenged by others, unless government policies prevent them. What *is* harmful is *preventing competition*.

Often, the worse culprits for that are governments, giving special protections to large firms, such as bailouts

to prevent them failing, or actively encouraging monopoly in sectors such as utilities and transport. But private firms also use strategies such as *predatory pricing* to prevent competitors challenging them – cutting their prices below market levels until the challenger has given up, then recouping their losses with higher prices later. Hayek argues that the best way to stop that would be to allow the affected challengers to lodge claims for damages, rather than to use the (much clumsier) criminal law. However, some economists think this naive, given the complexities of modern markets (see Chapter 10, Part Three, below).

Chapter 16: The miscarriage of the democratic ideal

Hayek now briefly summarises his argument. There is a disillusionment with democracy because we are not doing it properly. We have allowed politicians to usurp *justice* and accumulate power, which they use to benefit particular groups.

> Apparently a free constitution no longer means the freedom of the individual but a *licence to the majority in Parliament to act as arbitrarily as it pleases.* We can either have a free Parliament or a free people. (Ch. 16, p. 102.)

Since democracy is the only peaceful system of political change, we have to get it right. Constitutionalists have tried to limit government by separating powers. But that has not separated *law* and *legislation,* so it allows

governments to set their own rules. This is not governance under the *rule of law*. 'To leave the law in the hands of the elective governors is like leaving the cat in charge of the cream jug,' says Hayek. 'There soon won't be any …' Instead, we need a constitution that separates *law* from government *organisation*.

Chapter 17: A model constitution

Hayek's model constitution is not a blueprint, he explains, but an illustration of how governments might be kept subject to the rule of law.

He proposes bicameral government: one body for government administration, the other to maintain justice, including justice in government actions. The administration body would be elected much as today and would focus on electors' specific concerns. The other must be chosen to consider matters of justice. That needs a longer-term view, so Hayek proposes that this chamber should comprise mature people (those reaching 45, he suggests), serving a single term (15 years) to prevent them being corrupted by office.

A third body, the constitutional court, would resolve issues such as conflicts of competence between the assemblies. Its guiding principle would be the just limitation of coercive power. Emergencies may require coercion, but they must be sharply defined and not used as an excuse for lasting force. Centralisation is another enemy of freedom, says Hayek: the constitution should encourage federal structures and local decision-making where feasible.

Chapter 18: The containment of power and dethronement of politics

We need government to protect us against violence by others, concludes Hayek. But the main problem is government's own coercive power, which makes it the chief threat to liberty. Peace, freedom and justice can come only from the adoption of *negative* rules that protect each individual's *private sphere*.

Government's role should be to create a framework within which individuals can justly pursue their different aims and use their various talents and abilities. That is the best way to improve *everyone's* prospects. Only the principle of individual liberty, with a protected domain in which people can use their own knowledge and abilities for their own purposes, has so far delivered prosperity and made the growth of civilisation possible. We must give up the idea that we can consciously shape the future of humankind.

> … we must shed the illusion that we can deliberately 'create the future of mankind', as the characteristic hubris of a socialist sociologist has recently expressed it. This is the final conclusion of the forty years which I have now devoted to the study of these problems … (Ch. 18, p. 152.)

PART THREE

REFLECTIONS AND CRITICISMS

10 REFLECTIONS ON *LAW, LEGISLATION AND LIBERTY*

Problems with general rules

To Hayek, the social order, and social institutions and processes such as the market economy, arise from our following of general rules – inherited norms, habits, dispositions, even prejudices. General agreement on these things promotes regular behaviour that helps us to know what to expect from others, avoid conflict, navigate through our interpersonal dealings, plan ahead and so create value and prosperity.

Some critics, though, have complained that 'general agreement' is a rarity, particularly in the light of today's political polarisation on issues such as climate policy, healthcare provision, free speech or culture – with social media amplifying the discord.

Nor is it clear what 'general agreement' means. Does it mean that a simple majority have to agree, or abide by, the rules, or does it require a much bigger margin for the benefits of the rule-guided system to be realised? Presumably, Hayek, with his critical stance towards majority power, would think the latter: but then, *what* margin suffices? Is a majority decision by one of Hayek's two parliamentary

chambers sufficient? And are we sure that such decision-makers would be representative of the 'general public' at all? This, say the critics, all sounds rather fuzzy (Brittan 1983).

Remember also that public opinion is often irrational and potentially oppressive. If large majorities support capital or corporal punishment, or believe immigration should be halted, or want alcohol prohibited and all enterprises closed on the Sabbath, or support uncompromising lockdowns during epidemics – all of them *general rules* – does that make those rules just? Again, Hayek would say no; but then who is the arbiter of justice? Lastly, even socialists could support general rules that apply to us all – though the kinds of rules they would support would be far from what Hayek would wish. Is *justice* not summed up better and more simply as: 'Don't hurt people, and don't take their stuff' (Kibbe 2014)?

The scope of government

Hayek is no minimal statist. He sees an important role for the state, particularly in having a monopoly over the use of force for defence (countering violence from external enemies) and justice (combating fraud, theft, bodily harm and other infringements of our personal domain). And these are large and important functions. But he goes further, with the provision of public goods, and even of a minimum income guarantee to those with low or no income. He endorses peacetime conscription in some circumstances, and (provided it is covered by general

rules) compulsory government purchase of private property (known in the US as 'eminent domain'). All this, say critics, seems far from the classical liberal ideal. It also provides wide scope for government intervention. As we have seen in our own time, giving government sweeping powers to deal with national security, domestic insurrection and crime, disasters and epidemics can be a hostage to fortune.

Also, how are policies like a minimum income guarantee, which benefits only some, compatible with 'general' rules? Hayek might characterise it as a sort of insurance policy provided to us all, but that would open up the prospect of government insurance for healthcare, accidents, old age, loss of earnings, disability, education, and much else. Is this not a slippery slope towards the very 'social justice' mentality that Hayek so condemns?

Moreover, Hayek admits that it might not be feasible to extend rules like these across the whole world. A universal minimum income guarantee, for example, might seem a fortune in the poorest countries but an insignificant amount in the richest. So in what sense is such a rule 'general'? And if it is not general, then we need to control 'benefits tourism', which means restricting foreigners' access to this benefit – in other words, treating some people (foreigners) differently. The 'general' in Hayek's 'general rules' seems an elusive idea.

Moreover, how can we justify forcing people to pay tax to finance things they might not need? Hayek sees it as a matter of governments providing a pool of services, from which everyone benefits, albeit in different ways. But this

seems to lead us into a politics of horse-trading by which different interest groups try to get governments to skew the package in their favour – just what he wants to avoid.

Hayek also allows major exceptions for emergencies, which, he says, may require the central government to issue commands that override the general rules. This is another hostage to fortune (Lemieux 2022, 2023), and Hayek himself admits that emergencies often provide governments with an excuse to deepen and expand their powers. As he says in *Law, Legislation and Liberty*, '"Emergencies" have always been the pretext on which the safeguards of individual liberty have been eroded' (Ch. 17, p. 124). Contemporary examples might be the powers that governments assumed after the 2008 financial crisis or during the Covid-19 pandemic, many of which have never been repealed. But then powers may even be popular. So where in reality is the brake on this? Are powerful governments likely to respect Hayek's demand that their emergency powers are only temporary? Indeed, given the threat to liberty, is a central government really the best body to deal with emergencies at all, or should decisions be made locally, as Hayek recommends for many other government functions?

Hayek's proposed constitution

Some critics complain that Hayek's plan to impose a new constitutional framework on society is inconsistent with the evolved order and institutions that he defends. The political philosopher Michael Oakeshott, for instance,

argues that, though Hayek rejects political ideologies, his prescriptions make him an ideologist himself (Oakeshott 1947). The journalist and author Sir Samuel Brittan, goes further, calling Hayek's constitution 'blatant social engineering' (Brittan 1983).

Another problem is that some parts of Hayek's constitution seem quite bizarre, especially the proposal that one of the chambers of government should be elected only from those reaching the age of 45. Though he insists that his constitution is meant, not as a model, but as an illustration of how we might encapsulate the broad principles of just government, it is a misfortune that so much of the criticism against *Law, Legislation and Liberty* has come down to dismissing or mocking this single idea and this single chapter.

Another concern about Hayek's law-making chamber is that he characterises its members as acting like 'lay judges'. This leads some critics to question how the competence of this chamber fits in with the competence of court judges, whom Hayek applauds as upholding the common law and assisting in its adaptation in the light of changing circumstances. But this seems to be much the same task as he assigns to the judicial arm of government.

And as for that judicial arm, can judges really be trusted to uphold justice and the *rule of law* impartially? The modern 'judicial activism' in the US and elsewhere (e.g. on abortion control, 'gender' rights or immigration) and the perceived politicisation of judicial appointments leave this in doubt.

Hayek on the rule of law

It is interesting, on this subject, how Hayek's account of the *rule of law* changed after his reading of Bruno Leoni (Leoni 1961). In *The Road to Serfdom* and *The Constitution of Liberty*, Hayek supports a strong and positive role for government, but he believed, and reportedly told Keynes, that this would be acceptable, and not a threat to freedom, if the government were constrained by the firm, codified principles of the *rule of law* (Shearmur 2021). He had back then less faith in common law, which he thought might conflict with these principles. But Leoni convinced him that the law has to evolve, and that codified law would always become outdated by events and that codification would consequently restrict adaptability and progress.

Despite Hayek's commitment to the *rule of law*, in *Law, Legislation and Liberty* he argues that this, while essential, is not sufficient on its own to restrain government power effectively. Elements of the *rule of law*, such as equality before the law, generality and predictability, certainly help safeguard individual liberty, but cannot guarantee it. For example, governments might enact laws that are general and predictable yet still unjust because they oppress or benefit some groups more than others. They might enact laws that prioritise short-term benefit – today's Ponzi-scheme pay-as-you-go retirement pension systems, for example, or quantitative easing – over the long-term principles that generate a just, sustainable society and the fiscal discipline that underpins it. Or again, government agencies may simply interpret just laws in *unjust* ways.

The *rule of law*, therefore, can become a hollow formality unless it is bolstered by other restraints that align government action with the broader goals of liberty and justice. Hayek cites two: *expediency*, i.e. practical considerations of what is feasible or sustainable, including a self-awareness in governments of their own limitations; and *community interest*, i.e. a commitment to the moral force of shared values such as freedom, fairness and mutual respect, and of other norms that help preserve a free society. Together, he argues, these restraints will ensure that government action remains functional, compatible with liberty, and aligned with our shared values. It is another case of Hayek tempering principles with practical reality.

Hayek's conception of rights

Unlike many liberal philosophers, Hayek does not try to derive *rights* from some 'given', such as 'natural law' or 'the will of God' or 'self-evident' axioms. Indeed, he is sceptical of such 'rationalist' attempts to deduce rights from abstract principles. Instead, he sees them as emerging out of the spontaneous evolution of human society – as functional guides that facilitate peaceful collaboration and individual freedom, and therefore progress. They are not somehow sacred or undeniable but are justified by their utility in maintaining a free and prosperous social order. Certainly, he regards *liberty* as critically important, but not as some sort of 'super-right' or entitlement, from which all others derive, as (for example) the libertarian philosopher Robert Nozick (1977) suggests. To Hayek,

freedom is a practical condition for success, as are the rights to liberty, property and freedom of thought, expression and association, because these principles allow people to pursue their own purposes and expand their knowledge through individual experimentation.

While this view avoids the dogmatism of many rights theorists such as Ayn Rand (Butler 2018) and allows our conception of rights to flex with the prevailing circumstances, critics such as Kenneth Minogue (1963) would argue that it leaves liberal thinking devoid of any firm ground from which to defend itself – for example, from collectivist views that prioritise *social outcomes* over *individual liberty*. But Hayek's supporters argue that his approach is realistic, grounding rights and liberty in practical realities rather than some conjectural claim.

Law, Legislation and Liberty and liberals

The publication of *Law, Legislation and Liberty* caused some disquiet among classical liberals, who since the 1930s and 1940s had seen Hayek as a champion of their cause. They felt that his emphasis on the wisdom of traditions, and his call for piecemeal change (and even then, only change that was consistent with the prevailing order) signalled his lurch towards conservatism. Had he abandoned the 'critical rationalism' by which we could analyse and then improve our social institutions – making them better guardians of individual freedom? And was Hayek's new approach not completely at odds with the 'natural rights' approach of Locke and many other classical liberals?

The answer to that last question is yes, but that does not mean to say that Hayek had given up on liberalism, only on this justification of it. As explained above, his justification for human freedom is a completely new argument, based on the evolution of human culture and values.

Regarding critical rationalism, Hayek's concern is that we have generally failed to understand the limits of our reason. As he explains in his Epilogue, we simply do not know enough to re-engineer our values and society 'rationally', and our attempts to do so are usually damaging and disruptive. Meanwhile, the innate values that are born into us are far less important than those that come to us through the evolution of our thinking and culture; innate values cannot adapt to the needs of changing circumstances with the speed that *cultural evolution* can.

Hayek's conclusion is that, since we do not fully understand the impact of our rules and moral norms (such as those concerning kinship, marriage and property) we must base our hope of progress on *piecemeal improvement* of particular rules. But this implies a large reliance on custom and tradition which seems quite distant from the classical liberal tradition in which free individuals are bound by few limits on their action. So is Hayek saying we cannot choose our morality and the principles by which we live, when most liberals would say that, as a matter of fact, we do? Hayek's answer would probably be that it is indeed the *limits* on our actions that is the critical feature. The rules do not tell us what to do, only *what not* to do. And as already mentioned, that still leaves free individuals with plenty of scope for action.

Amending the rules

How far, then, can we amend the established rules? Hayek's position here is nuanced because evolution itself contains a tension between two different forces: preserving the 'wisdom' in the established structures and practices but also being able to adapt to changing circumstances. Hence his view that, while we should generally follow the rules, rule-breaking pioneers should be tolerated, because their practices might prove to promote our adaptability and boost our progress. If not, they will not last.

Hayek talks of the proliferation of new moralities and religions which provide the fuel for this selective process. He even cites communism as one of these religions. Though he suggests that such experiments will not survive unless they promote a functioning order, critics would respond that, like communism, they can last a very long time and do a great deal of damage along the way. And it is no good saying that the pioneers break the old rules at their own risk only: the damage they do by disrupting the social order harms everyone. Worse, we may not understand the harm that is being done until it is too late. That might explain why we are disposed to oppose (often fiercely) new ideologies, revolutions in sexual practices and much else. Hayek seems to have no real answer to this objection.

Furthermore, Hayek argues that the evolution of social phenomena works through *individual* actions and choices. But he also suggests that the *groups* that adopt beneficial rules outcompete others, which implies a *collective-level* selection process. How can both be right?

Alexander Schaefer (2001) answers, on the basis of modern evolutionary theory, that selection is *multi-level*. Individual behaviours shape social orders such as markets – market prices, for example, are driven by the individual choices of buyers and sellers. But group-level rules and institutions also influence individual behaviours – social norms, for instance, make us reluctant to act in certain ways. In sum, then, *individual actions create orders*, while *group competition refines the rules* that influence individual actions. Seen this way, Hayek's approach happily avoids the pitfalls of purely individualistic or collectivist explanations of human society. And it is consistent with his view that cultural evolution does not require conscious or centralised direction.

Other critics have questioned what Hayek thinks the criterion of a group's success might be. He says that it is not just a matter of numbers – though elsewhere he says that well-functioning rules allow groups to prosper, which certainly suggests that their numbers would increase. Instead, he argues that the mark of success is 'adaptability'.

But there is no obvious way of measuring 'adaptability', nor of knowing how far our actions advance it or retard it. How can we even see the damage that a new practice might do when it could be a lifetime before its effects lead to the group ossifying (e.g. Japan before 1853), or collapsing into civil war (e.g. England in 1640), revolution (America in 1776) or economic disaster (Stalin and Mao's collective farms)?

Customary or common law?

Hayek argues that the common law, administered by judges in the courts, supports the spontaneous order of society, allowing it to change naturally and organically as circumstances demand. He argues that this allows individual liberty to prosper; indeed, that 'the ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated' (Ch. 5, p. 94). But as well as this *law*, the *law of liberty* as he calls it, Hayek nevertheless accepts that we still need government-made *legislation* to allow the machinery of government to work and to provide public goods and services that markets produce inadequately.

The Hayek scholar Cento Veljanovski (2023), however, argues that Hayek exaggerates and over-idealises the common law as the 'law of liberty' and judges as the 'custodians of liberty', each maintaining the rules that protect individual freedom against arbitrary state power. That, says Veljanovski, is because he mistakenly confuses the evolved, *customary* law with the *common* law, the law established by precedent from court decisions, as it emerged in England. In early medieval England, in fact, there were *many* customary law systems, dealing with local, mercantile and ecclesiastical matters, each with their own special courts and procedures. They were only consolidated into one *common law* by Henry II (1132–89).

Furthermore, as time went on, Veljanovski continues, control by monarchs shifted to control by Parliament, which Hayek admits must occasionally amend the law

as interpreted by the courts. Judges, after all, have imperfect knowledge, particularly in complex cases (such as present-day intellectual property or competition disputes), and the *common law* reliance on precedent can fail to deal with dynamic changes in market and social realities. Judges, for example, can perpetuate the inefficiencies in markets, particularly in highly dynamic markets like digital technology, 'big data' and social media, where (it is argued) large social media companies can act perfectly legally according to the courts, and yet still have a power over public debate that stifles freedom of speech. And the practical realities of markets may require legislative or regulatory intervention (such as patents, data protection rules or transparency requirements on sellers) to protect under-informed customers, promote innovation or support genuine competition.

Accordingly, control over the *common law* remains with the state, and Hayek's portrayal of the common law as the ultimate protector of liberty is overstated. This, says Veljanovski, is why he needs to bring in the *rule of law*, with its procedural safeguards such as *habeas corpus*, as a protector of freedom even above governments.

Is Hayek a conservative?

Hayek added an Epilogue to *The Constitution of Liberty*, under the title 'Why I am not a conservative'. His argument was that we need to keep adapting and trying new things, but conservatives resist change. Even if we are in a bad situation – a world where laws and traditions are

hostile to personal freedom, say – conservatives (he believes) are still reluctant to change it. On the positive side, this attitude may slow down any movement that makes things even worse, but it hardly gets us heading in the right direction. Conservatives share with classical liberals their opposition to socialist thinking and identity politics, but, fearful of change, are more focused on the *process* of change, desiring it to happen more cautiously. Hayek is conservative in rejecting grand visions and resisting revolutionary change, and liberal in welcoming spontaneous change; he combines caution arising from the problem of knowledge with confidence in the 'wisdom' of the evolved rules.

> I can already hear our modern intellectuals hurling against such an emphasis on tradition their deadly thunderbolt of 'conservative thinking'. But to me there can be no doubt that it [was] favourable moral traditions which made particular groups strong rather than intellectual design that made the progress of the past possible and will do so also in the future. To confine evolution to what we can foresee would be to stop progress; and it is due to the favourable framework which is provided by a free market … that the new which is better has a chance to emerge. (Epilogue, p. 170.)

In a 1987 essay 'Why F. A. Hayek is a conservative', the activist and thinker Madsen Pirie counters that Hayek's epilogue confuses the conservative *temperament* with the conservative *political tradition*. By the standard of temperament,

even many leftists (say, ruling socialist parties and protectionist trade unions) are conservative, since they also oppose change. At the same time, there were huge differences in temperament among prominent British conservatives such as Edmund Burke, Sir Robert Peel, Benjamin Disraeli, Winston Churchill and Margaret Thatcher.

Therefore we cannot define conservatives by a shared temperament, says Pirie. They are better defined by their shared understanding of the basis of society and social change. The factor that unifies them, he says, is one Hayek would wholly approve of, namely their aversion to the imposition of *preconceived outcomes*. They seek, not to preserve the *status quo*, but to preserve spontaneity and adaptability. Even Burke, the eighteenth-century arch conservative, talked of tradition as the 'bank and capital of nations' (echoed in Hayek's 'wisdom' of the rules) and yet regarded change as an inevitable 'law of nature' (Burke 1790). To Disraeli, the 'noblest of inheritances' was, paradoxically, freedom (Disraeli 1835). In a free society, traditions change when their value has declined, or when changing events render them no longer appropriate.

To Pirie, then, the conservative *temperament* fears the unknown and prefers predictable outcomes. But the conservative *tradition* rejects all plans to create predetermined outcomes – for example, the socialists' dream of a 'rational' arrangement to dispel the 'chaos' of the market economy.

This is a strong theme, even in Hayek's earlier writings. As far back as 'The use of knowledge in society' (1945) he had written:

> We make constant use of formulas, symbols, and rules whose meaning we do not understand and through the use of which we avail ourselves of the assistance of knowledge which individually we do not possess. We have developed these practices and institutions by building upon habits and institutions which have proved successful in their own sphere, and which have in turn become the foundation of the civilisation we have built up.

In *Law, Legislation and Liberty*, argues Pirie, Hayek simply puts much clearer focus on what it is that enables societies to adapt and prosper. The most important factor is neither innate nor consciously chosen values, but those that emerge through *cultural evolution*. Groups must be able to ditch outdated values. But given that our inherited laws, moral norms, culture and traditions do encapsulate a 'wisdom' of the ages, we should approach that task with due caution. Success is a matter of evolution, not revolution.

11 CRITICISMS OF *LAW, LEGISLATION AND LIBERTY*

The assumed superiority of the liberal order

Hayek's supporters have praised *Law, Legislation and Liberty* for many reasons: the important role of decentralised information in society and markets, and the limits to our knowledge and therefore our ability to intervene successfully (Boettke 2018); the role of prices in economic coordination (Henderson 2007); the complexity of social phenomena such as markets and why governments should stay out of them (Coyne et al. 2005); and much more.

However, a common criticism is that Hayek *assumes* the superiority of the evolved liberal order without giving any evidence for it: heavily state-directed Asian economies, for example, seem to be doing well. The philosopher John Gray, to take one critic, thinks that Hayek's assumption of liberalism's superiority makes him over-optimistic about human nature and the operation of *spontaneous orders* (Gray 1984). Real-world social orders, such as market economies, are not self-regulating: they have inbuilt biases and inefficiencies that lead to problems such as poverty, the abuse of power and environmental degradation, which require active economic and institutional reform.

In response, Hayek might say that the liberal order is superior because it relies far less on coercion than any *organised* society that is directed to some preconceived outcome. As for poverty, Hayek argues in *Law, Legislation and Liberty* that markets, trade and globalisation have largely eliminated the worst of it and will continue to do so. He might add that the environment would benefit greatly from the wider application of markets, rather than of bureaucratic regulation.

Conservatives, such as the philosopher Roger Scruton, argue that real-world law and morality must have a much stronger foundation than evolutionary adaptability alone, a foundation such as religious faith or 'natural law' (Scruton 2014). Hayek's focus on 'negative' liberty overlooks the importance to human affairs of a shared sense of community, shared narratives and shared institutions.

Hayek, though, sees no reason to resort to faith or 'natural law' to explain the evolution of human society. Different societies with different beliefs, and none, flourish perfectly well. And the individual freedom on which the evolved social order rests does in fact produce a flourishing civil society, where people with shared values collaborate productively.

History and context in human institutions

Other critics argue that our social institutions, including law and our idea of justice, are not the result of a blind, success-selecting evolution, as Hayek suggests. Rather, they have been skewed by historical imbalances,

including inequalities in power and wealth (such as the oppressive influence of 'big tech' companies on public debate or the impact of wealth on families' health and education outcomes), as well as discrimination over race and sex. Thus, the Nobel economist Amartya Sen suggests that Hayek's faith in social institutions might well perpetuate the systemic injustice, unfairness and disadvantage that is consequently inherent in our institutions (Sen 2009).

In Hayek's defence, however, he did acknowledge that past circumstances, including inequalities in wealth and power, would shape the evolution of the social order. But he saw the current and future benefits that the evolved order brings as being more important. And in any case, cultural evolution is a constantly adaptive process, in which such concerns can be corrected in the future. Open markets, for example, allow the greatest scope for social mobility. Furthermore, Hayek's constitutional proposals, by ensuring that those in power are subject to the same *rules of justice* as everyone else, would serve to eliminate such past inequalities.

Today's issues

Some critics regard Hayek, and particularly his focus on central planning, as being shaped by the collectivist and statist age in which he lived. Contemporary issues such as market failure (e.g. unpriced carbon emissions, subprime lending), regulation (e.g. of digital markets) and inequalities of all kinds, they say, have a higher priority than central planning in today's debate.

Sen, for example, sees *market failure* as endemic, and calls for government action, particularly on poverty, healthcare and education. Even Scruton, though a supporter of economic freedom, argues that markets are no panacea to all our problems, and that we still need a measure of regulation and social protection.

In response, Hayek might argue that interventionism is a slippery slope: however justified some interventions might be, there is no obvious limit to them. Nor do we know what the full effects and potential damage of our interventions might be. For example, if governments override the price system by subsidising goods and services, they fatally undermine the vital coordinating power of prices to pull resources to their most valued uses, leading to costly misallocations that undermine progress and prosperity.

On market failure, Hayek recognised that individuals have limited information, which could certainly lead to that. But he insisted that decentralised markets, with their greater ability to use dispersed information than any centralised government, are much more resilient and adaptive than their critics believe. A much bigger problem, in his mind, is *government* failure – particularly its capture by majorities and interest groups and its steering of favours and of public resources to its supporters.

Hayek on competition

Commentators have criticised various other parts of *Law, Legislation and Liberty*. An example, again from Veljanovski, is Hayek's view of competition.

Hayek sees competition as a dynamic, evolving and self-correcting process, and is therefore sceptical of government interventions. However, he accepts that monopoly power exists (even in the absence of state-given privileges) and that practices designed to restrict competition (such as predatory pricing, cartels or collusion) might justify some intervention.

To Veljanovski, this jars with Hayek's view of markets as self-adjusting, and also with his general scepticism of intervention. Moreover, Hayek seems unable to provide a clear criterion for deciding whether a firm's action is anti-competitive or not. Indeed, in modern markets, anti-competitive behaviour can be subtle and hard to identify. In digital markets, for example, with their low marginal costs and 'winner takes all' network effects, firms such as Google or Amazon are accused of using strategies such as 'killer acquisitions' to buy off potential competitors. Or are such acquisitions merely well-judged, expert investments?

Hayek's faith in the courts to resolve such matters seems over-optimistic. In complex digital markets, for example, with big data and algorithmic pricing, the courts may be unable to 'discover' whether or where competition and freedom are being threatened. A thwarted competitor may not have the funds to take on and sue a monopolist, and the courts may struggle to identify exclusionary practices or identify intent or harm, or to decide and impose penalties before the harm to competition is already done.

Politics and solidarity

Another criticism against Hayek's focus on evolved rules is that he ignores the real historical development of the social order. In reality it has been shaped by bitter political struggles, including civil wars and revolutions, often sparked by long-resented concentrations of power. Today's internal conflicts in many countries and the international defence and trade tensions such as those between the US, Europe, Russia or China testify to the point.

In other words, our social structures do not evolve independently but are largely the result of deliberate human ambition and design. And sometimes, laws do not simply follow social norms, but lead them. Over the centuries, for example, conscious lawmaking has accelerated the existing moral trends towards abolishing child labour, improving workplace conditions and allowing same-sex marriage.

A number of critics, including Scruton and Gray, say that our natural social cohesion, our strong community bonds, our wish to maintain a healthy society, and our pursuit of a good (not just efficient) life, are more powerful explanations of how we live and should go forward. Some argue that Hayek needs to strike a better balance between individual liberty and collective needs, while others think that his obsession with individual liberty and failure to focus on social justice, community spirit and the pursuit of the good society is actually damaging.

But Hayek's case for individual liberty is strong. Genuine social bonds, he might argue, evolve out of free

interaction between individuals, rather than any forced conformity to some preconception of 'solidarity'. The civil society that emerges between free individuals – churches, clubs, charities, advocacy groups and educational bodies, for example – reflects the bonds between them much more than any government initiative.

Negative and positive liberty

Many critics take issue with the idea of negative liberty, arguing that people cannot be considered free if they do not have the means to realise their lives and potential. Sen, for example, believes that while liberty is vital for human flourishing, Hayek overlooks how hunger, ill health, illiteracy, inequality and other disadvantages restrict people's freedom of action (Sen 2009). Action to correct this would be perfectly compatible with our social evolution, since it does not seek to impose a particular outcome, only to help disadvantaged people fulfil their capacities.

The US legal philosopher Ronald Dworkin, meanwhile, argues that individual rights are not based merely on the 'historical pedigree' of what we have inherited, and are not only about individual liberty, property rights and the rule of law: *substantive* justice is also important. A just legal system, he says, must strive actively for fairness and equality in outcomes, but Hayek's focus on negative liberty allows inequality to persist. Hayek underestimates the importance of collective action and democratic decision-making in tackling inequalities and ensuring that people's rights are made practical (Dworkin 1977).

In response, Hayek might argue that there is no objective way to define terms such as 'positive liberty' or 'fairness', so conflicts will arise when we actively pursue them. Moreover, the limitation of our knowledge means that it is unclear how we might advance these outcomes anyway. Our supposed remedies are more likely to undermine personal moral responsibility and discourage innovation, adaptation and progress.

The adaptability test

For Hayek, the moral test of our actions is how far they promote the adaptability and functioning of an evolved social order. But, say critics, this is a very vague idea. How do we know which of our actions might do that? After all, Hayek has already said that we do not fully understand the impact of our actions on social outcomes.

Hayek might respond that we are best to do what is underpinned by general approval and consent. But then many of the things that have come out of the evolutionary process, and have become the norm, are things that he deeply disapproves of – wage, price and rent controls, for example, or the nationalisation of industries, protectionism in commerce and trade, lifestyle prohibitions and powerful, dominant governments. Is this not the 'wisdom' that really emerges from Hayek's cultural evolution?

Hayek would regard this argument as confused. While he supports an order that arises from the free but predictable actions of the individuals that comprise it, these examples are all attempts to override that order with a

preconceived one. In addition, they stifle innovation and distort price signals, thereby disrupting the dissemination of information that tells us how resources are best employed.

A last question might be to ask whether evolutionary progress is beneficial anyway? What, for example, would the dinosaurs think of it (Butler 1987)? Our present happiness might be more important to us than any concern about our future adaptability. And as Hayek says, we lived too long in small groups to find the new evolved morality comfortable. So why should we suffer it?

Hayek's answer might be that it is a mistake to sacrifice long-term fulfilment to short-term, fleeting happiness. The billions of people who live in the *Great Society* of today are crucially dependent on it remaining efficient and adaptive. That might not be easy for us to accept – as we see in the campaigns and complaints when firms lose business to more innovative providers – but all of our lives and those of our children, as well as our progress, depend on it.

12 THE RELEVANCE OF *LAW, LEGISLATION AND LIBERTY*

The key argument in *Law, Legislation and Liberty*, then, is that the cultural evolution of our values and institutions is far more important than we realise. Indeed, everyone who lives in the worldwide *Great Society* of today is dependent on its ability to maintain a functioning society that can adapt to future challenges. It rests on deep and shared notions of justice, moral norms, culture and tradition. But the temptation of social engineering – the attempt to deliberately reshape society into something we (or the political ideologues) prefer – remains great. The only hope for this adaptive system, and for our freedom within it, is to ensure we protect our profoundly held and shared principles of justice from the political authorities. If justice depends on the whims of the politicians of the moment, justice will soon cease to exist.

The corruption of politics

These thoughts seem even more relevant today than when Hayek was writing. He anticipated the trends that we see today; or at least, he saw their early stages in the politics of the 1970s.

With governments making their own rules and acquiring more and more power, few have resisted the temptation to use that power to steer public resources towards their own supporters (and in many cases, themselves). Lobbying scandals (such as the influence of US pharmaceutical companies on opioid regulations) and cronyism (e.g. in the awarding of Covid-19 contracts) testify to the fact. Such breaches of trust have led to public disillusionment, not just with the politicians who are currently in power, but with the political system in general, with polls today showing negative public ratings of both political leaders and political institutions. Citizens feel, increasingly, that their interests are not being represented. The echo chambers of social media and partisan news services have created a deepening polarisation between different political ideologies. There is increasing partisanship, with politicians unwilling to compromise with their opponents. In response, electors have been giving increased support to extremist parties and populist politicians whom they believe are more likely to share their mistrust of the political system than those who have risen to power within it.

Hayek's argument today

What Hayek perhaps could not have anticipated is how technological, legislative and other developments would serve to increase this mistrust in governments and at the same time pose a threat to our individual liberty. The expansion of powers in the police and security forces and their increased exploitation of technology to monitor and track citizens – for example, through US PRISM-style

surveillance of their phone and credit card usage, their email and internet browsing history or their medical and tax records – have given state authorities a set of powerful tools that, in unscrupulous hands, could be used as a weapon against opponents. Meanwhile, the complexity of modern legislation has obscured the principles on which laws should rest and has left wide powers in the hands of civil servants, government agencies and regulators whose decisions have the force of law but who are not subject to any appeal or public recall.

This is indeed a dire situation, even more so than when Hayek was writing. It is a good reason why we should engage with and understand the arguments in *Law, Legislation and Liberty*. However difficult and flawed the book may be, it remains of huge importance and relevance to anyone who is concerned about the present and future state of politics and of individual freedom.

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Hayek's *Law, Legislation and Liberty – A Guide*

'While an equality of rights under a limited government is possible and an essential condition of individual freedom, a claim for equality of material position can be met only by a government with totalitarian powers.'

– Friedrich Hayek in *Law, Legislation and Liberty*

F A Hayek's *Law, Legislation and Liberty* is one of the key texts of classical liberalism. It provides a subtle argument that the social structures on which civilisation is built are not the product of state plans or activist dreams, but instead emerge from a Darwinian process of 'cultural evolution'.

Yet despite its influence on politicians from Ronald Reagan to Javier Milei, to a non-specialist *Law, Legislation and Liberty*, published in three volumes from 1973 to 1978, can seem a daunting read. Hayek made little attempt to make his long and detailed arguments, often confusingly laid out and with little explanation, comprehensible to the general reader.

Dr **Eamonn Butler**, author of *Classical Liberalism – A Primer* and *An Introduction to Capitalism*, has written this guide to assist non-specialists approach this monumental text.

Butler offers a straightforward and accessible guide to this key work of twentieth-century liberal thought, without downplaying the complex nature of Hayek's philosophy. He approaches the topic sympathetically but not uncritically while bringing in real-world examples to illuminate Hayek's ideas.

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