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The Hayekian Model of Government in an Open Society*

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F. A. Hayek, whose most important work in the area of political and legal theory, *The Constitution of Liberty,* was published in 1960,[1] has, since that time, followed up his original analysis of the structure of a free society in a three-volume work, appearing under the general title *Law, Legislation, and Liberty.*[2] I shall here concern myself with the third of these volumes (published in 1979) and, specifically, with a brief discussion of his model of an ideal constitution. I should like to make one point clear at the outset. By concentrating on this area of Hayek's thought, as I have done in the past, I do not mean to denigrate his insights respecting the shortcomings of socialist economic and political doctrine or his contributions to an analysis of the modern democratic state. Indeed, I have deliberately chosen those areas of Hayek's work where he has attempted to suggest alternatives to the current orthodoxy. I realize that I might be doing the totality of his work an injustice by criticizing that which is most difficult to accomplish and consequently easiest to find fault with. But I think it of pressing importance to point out what I believe to be fatal errors in Hayek's argument, lest we end up accepting a system no better than the one we now have under the mistaken notion that we have thereby enlarged the area of individual autonomy and personal freedom.

The major feature, and doubtless the most novel, of Hayek's constitution is his proposal for a separation of function between the two houses of what appears to be a bicameral legislature. Hayek observes:

> When... at the end of the seventeenth century the exclusive right of the Commons over "money bills" was definitely conceded by the House of Lords, the latter, as the highest court in the country, still retained ultimate control of the development of the rules of common law. What would have been more natural than that, in conceding to the Commons sole control of the current conduct of government, the second chamber should have in return claimed the exclusive right to alter by statute the enforceable rules of just conduct?[3]

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Now, I find nothing particularly "natural" in this division. The Commons never regarded itself as solely a taxing and administrative agency of government, a kind of large executive committee with the added power of raising revenue, but as the legislature of the nation. This meant, until the nineteenth century, that for the most part it confined itself to levying taxes, raising armies and navies, and deciding questions of war and peace. To a lesser degreee, it enacted such statutes governing the lives of British subjects as were at the time thought necessary and desirable. Most such rules, however, were laid down, not by the legislature, but by the courts and, in an earlier period, by the executive, through orders-in-council. The extensive intervention in all aspects of private and public life that now describes the legislative function was unknown to the British Parliament until after the Napoleonic wars. At that point, it was natural that the Commons, having control over the government's purse and having effectively absorbed the executive power, should demand that it be the body that determined which rules were enacted.

The division that Hayek suggests is so artificial as to be unworkable. If the lower house were to confine itself to questions of revenue and expenditure, while the upper house possessed sole authority to determine the rules of conduct, ultimate control would eventually fall to that body empowered to collect and disperse funds. Every law requires expenditures for its enforcement and every money bill is passed towards some end. If the lower house were to tax and allocate huge sums towards some project, are we to suppose that such a measure would not have extensive implications respecting the behavior of citizens? Indeed, the power to tax and to spend involves the power to alter behavior, in the same way a fine punishes and a grant rewards. The effect of such a division of powers would be (and, indeed, was) to place in the hands of the lower house all substantive power to govern; for, while it could pick and choose which rules of conduct enacted by the upper house it wished to enforce, it could further enforce its own rules via the taxing power. The situation that would prevail would—in its essentials—differ very little from parliamentary government as it now exists.

Far more significant in terms of a theory of freedom is not the creation of an upper chamber itself but the basic principles which are to govern the specific rules of conduct it may enact. These rules, Hayek writes,

> should be intended to apply to an indefinite number of unknown future instances, to serve the formation and preservation of an abstract order whose concrete contents were unforeseeable, but not the achievement of particular concrete purposes, and finally to exclude all provisions intended or known to affect principally particular identifiable individuals and groups.[4]

The first criterion, "intended to apply to an indefinite number of unknown future instances," appears to be a restatement of Hayek's rule of generality. The second, that rules should only "serve the formation and

preservation of an abstract order whose concrete contents were unforeseeable, but not the achievement of particular concrete purposes," strikes me as almost impossible to fulfill. *All* statute law is enacted to achieve certain concrete purposes, whether it be as broad as prohibiting theft or as narrow as proscribing entry into a specific defense installation without authorization. What would it mean to enact a law that did not aim at achieving a concrete purpose? If Hayek here means that all rules of conduct should also aim at achieving some abstract purpose, such as "justice," or "fairness," or such like, then all laws, no matter how invasive, can be regarded as falling into such categories as well. "Social equality," "order," "public peace," "national well-being," "social harmony," are all rubrics under which specific rules might fall. Frankly, I am unsure of what Hayek here means and I cannot imagine the courts of any nation struggling with the notion of whether or not a resolution of the legislature possessed this property.

The third criterion is stunning in its implications. That all legitimate rules "exclude all provisions intended or known to affect principally particular identifiable individuals or groups" is—without question—the strongest protection against government intrusion. Indeed, it is so strong that it appears to defeat the purpose of Hayek's upper house altogether; for, if no laws may avail before the courts should they violate this criterion, then the legislature is logically prevented from ever enacting a prohibition in reaction to certain conduct previously allowed. Since the provisions of all such laws would at least be *intended* to affect identifiable individuals or groups, namely, those engaged in the specific activity constituting the subject of the prohibition, then the courts, under Hayek's criteria of judicial review, would be bound to nullify all such acts. But, then, why have an upper chamber (a "Legislative Assembly," as Hayek calls it) at all? If its compass is limited to setting down the basic rules of conduct and never to enlarge this body of rules in response to specific events, then the legislature need never meet.

When Hayek observes that this criterion "would by itself achieve all and more than the traditional Bills of Rights were meant to secure,"[5] he appears to be aware of the far-reaching nature of this restriction on legislation. However, these limitations on the form law may take also seem to contravene Hayek's intentions regarding an ongoing legislative body. He writes of the freedoms guaranteed in the American Bill of Rights that, for example, "freedom of speech does not of course mean that we are free to slander, libel, deceive, incite to crime or cause a panic by false alarm, etc."[6] Now these limitations, as Hayek is aware, are the product of judicial decisions and not of a legislative assembly. But Hayek views one of the functions of the upper chamber as passing into law the "not yet articulated decisions" implicit in the courts' decisions. If so, he has gutted the very restriction on legislative authority that might have proven most effective, by reducing his

criterion (that no law may be enacted that, either by intent or knowledge, principally affects identifiable individuals) to some vague generality, and, in the process, he has made the upper chamber a creature of the courts. In any case, what would be the point of such laws? Legislatures are already bound by judicial decisions; they would hardly pass into law statutes that the courts would void. Why have a legislature that confines itself to nothing more than enacting general rules which have been previously set down by the courts and, by that very fact, are already binding?

But no sooner has Hayek set down these restrictions on the nature of the rules that his upper chamber may enact than he removes them by observing:

> The Constitution should. . . guard against the eventuality of the Legislative Assembly becoming wholly inactive by providing that, while it should have exclusive powers to lay down general rules of just conduct, this power might devolve temporarily to the Governmental Assembly [the lower house] if the former did not respond within a reasonable period to a notice given by government that some rules should be laid down on a particular question.[7]

Thus, having first specified criteria that would have provided workable limits on what can be legislated, we have returned full circle to a legislature empowered to enact laws on virtually any particular issue.

The lower house, what Hayek calls the Governmental Assembly, would, we are told, resemble existing parliamentary bodies, in that the executive and the day-to-day legislative power would be combined in the same hands. With respect to its orders, it would be bound by the general rules of conduct set down by the upper house. In other words, it would be bound by the Constitution, by establishing rules of just conduct, and by the courts' various interpretative rulings. How exactly this differs in principle from the situation now prevailing in the legislatures of parliamentary democracies is unclear. Hayek states that the lower house would be "complete master in organizing the apparatus of government and deciding about the use of material and personal resources entrusted to the government."[8] But, if it is to have any legislative function at all, it is the lower house itself that is empowered to determine which and how many resources are to be entrusted to government. Indeed, this is Hayek's whole point in classifying the lower house as a legislature and not simply a huge executive committee. But if it is a legislature, then how can it be bound by the *same* rules of conduct that apply to all citizens? Individuals cannot extort wealth from others under authority of government. In what sense, then, is the lower chamber obligated to conform to the rules of conduct enacted by the upper house? Hayek does not say that there are special rules it must obey, but that it must obey the *same* rules as apply to all citizens. He is here left in a quandary. Either the lower house is nothing more than an executive authority, and Hayek's model provides no body authorized to tax and to determine how the wealth it controls is to be spent, or it is in fact a legislature, with the

power to raise and expend funds and to pass laws respecting the conduct of government. But, by the nature of the fact that legislatures pass laws, they cannot be bound by the rules that limit other members of society. Private citizens cannot employ force to execute their dictates, while governments are defined by their power to do exactly that.

There is yet a further problem. Many laws fall within the jurisdictions of both Hayek's chambers. How are we to determine when a law constitutes a "general rule of just conduct" and when it pertains to "the conduct of government"? What of a law regulating access to the streets? Or a statute providing that all actions of the executive be kept secret? What chamber determines who is to be enfranchised? And, finally, why have two chambers at all, if, between one or the other, there are no limits on what laws may be enacted?

The constitution itself neither solves these jurisdictional problems nor, more importantly, does it contain any substantive limitations on the powers of the legislature, regardless of which of its two houses might have jurisdiction. The constitution, we are told,

> ought to consist wholly of organizational rules, and need touch on substantive law in the sense of universal rules of just conduct only by stating the general attributes such laws must possess in order to entitle government to use coercion for their enforcement.[9]

Thus, despite his elaborate and complex schema of government, in the end Hayek returns to his original restrictions on the formal qualities of rules of conduct that he first laid down in his *Constitution of Liberty* as the only protection against arbitrary government.

I would suggest that this approach has been discredited and that it has been shown that no purely formal criteria of the sort Hayek has offered, that is, that all laws be general, predictable, and certain, can effectively curtail the extent of governmental intrusion, all the structural changes notwithstanding.[10] You cannot make a silk purse out of a sow's ear and you cannot limit the power of government by tinkering with its structure. Only by placing unequivocal, substantive limitations on what laws may be enacted would it be possible to control the areas in which the legislature may intervene, and, even then, one would still require a vigilant and suspicious judiciary to ride herd on the legislature. The decisions concerning which areas must be off limits to the legislature can be made only on the basis of a theory of rights, which logically precedes a theory of government. This is a conception that Hayek, for some reason, fails to come to grips with and it is nowhere more evident than in his discussion of the emergency powers for which his model constitution provides. Hayek is so wedded to the notion that rights are a product of good government—and not anterior to it—that when good government is endangered, he is quite prepared to sacrifice the lesser value, the citizen's rights. Hayek observes:

> When an external enemy threatens, when rebellion or lawless violence has broken out, or a natural catastrophe requires quick action by whatever means can be secured, powers of compulsory organization, which normally nobody possesses, must be granted to somebody. Like an animal in flight from mortal danger society may in such situations have to suspend temporarily even vital functions on which in the long run its existence depends if it is to escape destruction.[11]

Now, what is being preserved here? Surely not the rights of citizens, but the government, as it is constituted, and from whom one's rights flow. Else, why go through the trouble of preserving it at such cost? But even allowing this, why is it necessary to provide for powers which no society calling itself free would tolerate? It is particularly surprising that Hayek, whose contributions to social theory are predicated on the notion that ordered social arrangements do not require an orderer, should fall victim to the idea that in times of domestic crisis it becomes necessary to bestow authoritarian powers on a leader. If what appear to be the simplest social patterns are beyond the capacity of government to manipulate without seriously damaging the spontaneously generated order created by the free interactions of individuals, then why would this not hold true as these patterns become increasingly complex? Why is a government endowed with extraordinary powers of compulsion better able to cope with a natural catastrophe than the unfettered forces of the market and the charity of free men? And why should the political mechanism be granted a warrant to exercise coercion unrestrained by its usual checks in cases of lawless violence? Any government already possesses ample authority to deal with those who commit violent acts. Extra powers would serve no purpose unless they were used to also coerce the innocent, such as occurred when all Americans of Japanese origin were interned during World War II.

Hayek's whole model of government, emergency powers and all, is conceived in the mistaken notion that the political mechanism in society can itself be made subject to its own orders. However, the fact is that one cannot bind a legislature by a higher legislature and thus compel the lower house to obey rules applicable to everyone else. Legislatures, to the extent they legislate, are not like private citizens, since their instruments of compliance are not suasion and exchange but main force. And even if Hayek is right and the circle can be squared, what difference would it really make? After all, what binds the higher legislature? Certainly not the constitution, which places no substantive limitations on which law may be enacted.

In his *Counter-Revolution of Science,* Hayek quotes Saint-Simon as having said: "I cannot conceive of association without government by someone."[12] Yet Hayek's penetrating insights into the anti-libertarian foundations of positivist social theory seem difficult to reconcile with his own suggestions on the constitutional structure of a free society. For at least two hundred years, social philosophers have known that association does not need government, that, indeed, government is destructive of association.

And no modern thinker has written more incisively on this issue than has Hayek.

The central problem that confronts modern libertarian political theory is not the development of formal criteria respecting the rules government may enact and the political structure that ensures that these criteria will be met. It is, rather, the problem of how to place limits on the *number* and *kinds* of intrusions in which government may engage and how to ensure that it will confine itself to these limits. That laws meeting Hayek's criteria might make government less arbitrary does not really matter in the end if the government will be no less invasive and if men will be no freer.

NOTES

1. F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).
2. Hayek, *Law, Legislation, and Liberty,* vol. 1, *Rules and Order* (Chicago: University of Chicago Press, 1973); vol. 2, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976); vol. 3, *The Political Order of a Free People* (Chicago: University of Chicago Press, 1979).
3. Hayek, *The Political Order of a Free People,* p. 106.
4. *Ibid.*, p. 109.
5. *Ibid.*, p. 110.
6. *Ibid.*
7. *Ibid.*, p. 116.
8. *Ibid.*, p. 119.
9. *Ibid.*, p. 122.
10. Among the many criticisms respecting Hayek's contention that the rule of law is a sufficient condition for a free society, see especially: Ronald Hamowy, "Freedom and the Rule of Law in F. A. Hayek," *Il Politico* 36 (1971):349–77, and a revised version of this article, "Law and the Liberal Society: F. A. Hayek's Constitution of Liberty," *Journal of Libertarian Studies* 2 (Winter 1978):287–97; Joseph Raz, "The Rule of Law and Its Virtue," *Law Quarterly Review* 93 (April 1977):185–211, reprinted in R. L. Cunningham, ed., *Liberty and the Rule of Law* (College Station, Tex.: Texas A & M University Press, 1979), pp. 3–21; John N. Gray, "F. A. Hayek on Liberty and Tradition," *Journal of Libertarian Studies* 4 (Spring 1980):119–37; and Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982), pp. 219–28.
11. Hayek, *The Political Order of a Free People,* p. 124.
12. Hayek, *The Counter-Revolution of Science: Studies in the Abuse of Reason* (New York: The Free Press of Glencoe, 1955), p. 127.