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Comments

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Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy. Vol. 3: The Political Order of a Free People. By FRIEDRICH A. HAYEK.

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But to avoid this [destroying our civilization] we must shed the illusion that we can deliberately create the future of mankind. This is the final conclusion of the forty years which I have devoted. . . .

I want to thank Kaj Areskoug, Fritz Machlup, Ingo Walter, and Lee Wohlfer for comments on an earlier draft of this review.

These dramatic words end the third and last volume of *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (hereafter cited as *LLL*) by Nobel laureate Friedrich A. Hayek. The recently published volume, *The Political Order of a Free People*, analyzes the undermining of democratic principles and liberty in parliamentary democracies and concludes with an outline of a new constitutional framework.

The message of Hayek's voluminous work since World War II¹ is, to put it briefly, that the current political system of Western democracies is bound to cause increasing coercion of individuals by governments, private groups, and firms, and that governmental decisions will increasingly be contrary to the opinions of the majority. He argues in volume 3 that the unlimited powers (sovereignty) of governments—combined with the belief and expectation that governments can direct production, consumption, and the distribution of income to maximize social welfare—are the necessary and sufficient conditions for this development. The constitutional proposal is designed to subject the government to substantial constraints in its use of coercive powers.

The previous two volumes of *LLL* (Hayek 1973, 1976b) provide the foundation for the analyses of the political process in volume 3, but the last can be read independently. *Rules and Order* analyzes the role of rules and law in a "free" society—one in which no individual can be coerced to act in accordance with the will of others. Law must represent general principles of just conduct on which there is common agreement. Coercion must be used only to enforce such general principles applicable to all individuals. *The Mirage of Social Justice* discusses the limits of reason and rationality in social design and the impossibility of defining social justice. Some arguments in these two volumes will be referred to below to clarify the discussion of volume 3.

The "Bargaining" Democracy and Logrolling

Hayek uses the concept of the bargaining democracy to describe a system of representative assemblies within which different interest groups can trade in vote support for each other's proposals. In the theory of public finance, this is called logrolling² and is generally regarded as an improvement in the democratic process because the strength of preferences can be allowed to affect the outcome. Hayek, on the other hand, argues that the trade in vote support contributes to results that do not reflect the opinions of the majority. These views are clearly contradictory, yet the abstract nature of Hayek's analysis of the democratic process makes a comparison with conventional public finance difficult. However, Hayek's criticism of trade in vote support within representative assemblies is directed at the wide range of issues on which such practices are possible rather than at the principle of logrolling itself. The argument is derived from the distinction between votes on general rules of just conduct applicable to *all* citizens (i.e., *legislation* proper, such as private and criminal law) and votes on the distribution of payments and benefits among individuals and groups in society. The latter include all votes on taxes and transfer payments, allocation decisions with income redistribution implications, and "directives" that discriminate in favor of certain groups. The representative assemblies in all democracies do in fact practice logrolling on both types of issues. It is, therefore, possible that the distribution of benefits

¹ This work includes such classics as *The Road to Serfdom* (1944) and *The Constitution of Liberty* (1960).

² See, e.g., Tullock 1969.

on which a majority decide at the same time violates general rules on which the same majority agree. For example, a principle of taxation can be accepted while special benefits (e.g., tariffs and subsidies) with implicit positive or negative tax equivalents are passed by the same assembly, violating the agreed-on principle. It appears that the theory of logrolling is valid for votes on the distribution of benefits and payments *only* when no general agreed-on principle is applicable. Only pure collective goods are likely to satisfy this condition when a principle of taxation has been laid down, because individuals can be assigned tax equivalents for other publicly provided services and benefits.

The coercive powers of governments to benefit some groups at the expense of others, in addition to enforcing generally agreed-on principles, is the source of what Hayek calls “the miscarriage of the democratic ideal” (p. 98). These powers make it possible and advantageous to trade in specific benefits as well as to trade in benefits for support of general principles. Moreover, well-organized interests are likely to gain disproportionate weights in the democratic process—“there is no limit to the blackmail to which governments will be subject” when “no superior judiciary authority can prevent the legislature from granting privileges to particular groups” (p. 11).³ The final outcome of the democratic process need not, then, correspond to anybody’s opinion on what is right or to the will of the majority.⁴ Hayek argues, in fact, that this concept *can* be stated only in terms of general rules and principles.⁵ Behavioral incentives of the rules are lost and the will of the majority cannot be given contents when representatives decide *both* on general rules and on adjustments to the outcome of individuals’ activities that are performed subject to these rules.

A Model Constitution

Hayek outlines a constitution designed both to make the outcome of the democratic process coincide with principles held by the majority and to minimize the degree of coercion in society.⁶ The proposal is very simple: Distinguish between legislation proper and decisions on government spending, administration, and regulation by separating the two functions into two distinct assemblies elected by entirely different procedures. Make the government body subject to the general rules of conduct decided upon by the

³ A suggestion like Friedman and Friedman’s (1980) to legally prohibit the use of tariffs for the benefit of special-interest groups can obviously not get to the root of the problem of the democracy in Hayek’s view as long as the government has the coercive power to use a multitude of alternative means of creating special benefits for the same groups.

⁴ Note that Hayek regards the state of democracy in the United States as threatened as are the parliamentary democracies in Europe because the judiciary branch of the American government does generally not subject decisions of Congress to a test against general principles—though this may have been the intention of the Founding Fathers.

⁵ This argument is developed in vol. 2 of *LLL*.

⁶ Fritz Machlup has pointed out to me that one could argue that Hayek’s proposal for constitutional reform contradicts his own views on the creation of human institutions. While Hayek argues that human institutions cannot be designed rationally and deliberately for the benefit of mankind, he also argues that they cannot develop spontaneously in accordance with people’s preferences unless the conditions for such developments exist. The proposal constitutes a deliberate design for the purpose of creating such conditions.

legislative assembly. Hayek's model constitution also contains a general declaration of rights and an important definition of what qualifies as law—a general rule of just conduct. A constitutional court would be established to test the appropriateness of the legislature's decisions against such a definition.

The *legislative assembly* would be responsible for the body of criminal and private law, the principles of taxation, general regulations for safety and health, rules to secure competitive markets, corporate law, and the like. The coercive powers of governments would be limited to the enforcement of these general rules and principles.

The *government assembly* would decide on the use of material and human resources entrusted to the public sector. The size and the general purposes of expenditures would be limited only indirectly by the general rules of conduct set down by the legislative assembly and by people's willingness to pay taxes. The general principles of taxation decided upon in the legislative assembly would make citizens aware of their share in payments for specific services. This would prevent the current practice of disguising tax burdens to "make those who will ultimately have to bear it [the burden] as little aware of it as possible" (p. 127).

Would the proposed constitution achieve its purposes? A critical issue seems to be whether the legislative assembly can be prevented from instituting laws favoring large groups or wealthy interests. Hayek presents a number of suggestions in this regard. More important, however, is the definition of "law" and the role of the constitutional court in evaluating the constitutionality of legislation against this definition. Hayek characterizes (p. 109) a law as negative in the sense that it does not "aim at achieving concrete purposes," it must be applicable to an "indefinite number of unknown future instances," and it must exclude "all provisions intended or known to affect principally particular identifiable individuals or groups." This definition would apparently rule out legislation covering such issues as minimum wages and price controls. However, the boundary between measures to improve information spreading in the market and the protection of particular firms or groups is sometimes extremely vague, as in the case of legislation on health standards, consumer protection, and occupational safety. It is therefore easy to imagine situations in which the members of the constitutional court assume a critical role. The experience with the U.S. Supreme Court indicates that the existence of a constitutional court does not necessarily provide a complete safeguard against legislation that favors large groups in society. A simple addition to Hayek's proposal could help achieving his purpose—Wicksell's old suggestion (Wicksell 1896) of qualified majorities and relative unanimity. A principle that legislation must be passed by, for example, 90 percent of the assembly hardly seems objectionable since decisions on general rules must reflect the standards of most citizens to be respected and justify coercion in enforcement.

Where does Hayek's proposal lead? Debate on it cannot be carried out without reference to more specific results. Since the author provides only general and abstract clues, I will here attempt to illustrate some potential consequences by relating it to a few economic political issues.

The inflationary bias of current democracies has been a theme in Hayek's earlier writings and is clearly linked to the subject of this volume since inflation is one way for governments to disguise the true tax burden. The independence of the central bank from the government seems guaranteed under the proposed constitution because directives covering the central bank will have to take the form of general rules unrelated to specific political and economic circumstances. This provides a check on the monetization of gov-

ernment fiscal deficits.⁷ Inflationary pressures could also be reduced under the proposed constitution because the government would be unable to bear the costs of unemployment and business failures. Most market interventions in the form of subsidies to labor or capital are likely to violate the general rules by which the government must abide. This could contribute to higher wage and price flexibility.⁸ Furthermore, governments must consider its expenditures more carefully when the corresponding tax burden for each individual has been established by the legislature.⁹

A more controversial consequence of the proposed constitution would be that developments in production, consumption, and income distribution to which a majority object have to be accepted unless a general rule has in fact been violated. However, the outcome of economic activities may shed new light on a particular principle and lead to a change therein. The extremely far-reaching implications of this can be illustrated with the examples of immigration laws and equity-oriented policies.

Immigration restrictions appear to be unconstitutional, as do tariffs or import quotas, under Hayek's proposal. Such policy measures are clearly directed at identifiable individuals to achieve concrete purposes—economic benefits for national residents and firms. Opening up the Western industrialized economies to unlimited immigration would lead to a social transformation of enormous proportions. Most people would probably find the outcome unacceptable. Nevertheless, they would have to accept immigration as the “will of the majority” unless a general principle could be found to prevent immigration without thwarting other desirable outcomes, such as imports of competitive foreign goods.

Most policies aimed at securing certain levels of incomes for individuals or groups also have to be given up by governments that must abide by general principles. Discrimination is necessary to guarantee the outcome of economic activities pertaining to an individual. This is illustrated in volume 2 of *LLL* by a revealing and sharply satirical analysis of the contents of the United Nations *Universal Declaration of Human Rights*. This declaration contains positive rights (to outcomes) as well as traditional civil rights (to equal treatment before the law as defined by general rules of conduct). The two kinds of rights are simply contradictory. Either governments treat unequal people equally, abiding by generally accepted rules, or they treat unequal people unequally to secure certain outcomes. The only available policy instrument aimed at securing a certain income distribution would be the general tax structure. Thus, a negative income tax would have to be substituted for large parts of the social security system.

The examples above suffice to show that the constitutional proposal is far from politically feasible in the foreseeable future. There is probably no significant political group in any democracy that bases its political targets on

⁷ Hayek earlier suggested the denationalization of the right to issue money (Hayek 1976a). Though a possibility, this suggestion is not part of the proposal here.

⁸ “Social responsibility” must be the major check on wage and cost increases in an economy in which the government guarantees employment independent of the wage/cost structure (cf. Wihlborg 1978).

⁹ Hayek's proposal can here be compared with the current discussion about a constitutional amendment prohibiting an unbalanced government budget. Just as tariffs cannot reduce the political pressures to discriminate in favor of a particular industry, a constitutional amendment to balance the budget does not reduce the political incentive to tax via inflation. Thus, the political process can be used, e.g., to manipulate the definition of the government budget—rendering the amendment meaningless.

general principles rather than on desired outcomes. Moreover, the proposal does not address the question of whether *any* outcome under a certain principle is acceptable. For example, is it not necessary to discriminate in order to secure survival of an individual who spends the negative income tax payments almost on receipt? Should hospital care be denied individuals who have chosen not to invest in medical insurance? Hayek has previously suggested ways of resolving these questions with a minimum of government coercion (Hayek 1960). It is not clear, however, that these solutions are commensurate with strict adherence to the constitutional principles outlined here. Despite such questions, Hayek's proposal deserves serious consideration as the starting point for further work by economists and social philosophers. A fundamental constitutional change may indeed be the only route to prevent further erosion of democratic values and individual liberty. Hayek has argued—convincingly, in my view—that the coercive powers given to governments, in the belief that progress can and should be planned and directed, are the cause of a self-generating process leading to the destruction of the decentralized market economies in which a high degree of individual liberty remains feasible.

Hayek's constitutional proposal implies quite simply that we give up the idea of steering and planning the future direction of social and economic activities. Instead, we should ask how we can set up a system of general principles under which mankind's knowledge can ensure progress for the maximum benefit of all. In Hayek's words: "To pretend to know the desirable direction of progress seems to me to be the extreme of hubris. . . . All we can do is to create favorable conditions for it [progress] and then hope for the best" (p. 169).

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