

IS A SPONTANEOUS ORDER NECESSARILY LIBERTARIAN?*

SUSUMU MORIMURA

Summary

Many classical liberals or libertarians find Hayek's defense of spontaneous orders attractive, but his idea of an unintended spontaneous order is problematic with respect to individual freedom. Hayek's belief in spontaneous orders gives his liberalism a conservative tendency which is increasingly apparent in his later writings. Hayek takes market, language and law as paradigm cases of spontaneous orders. However, it appears that many liberal legal systems were intentionally created and many spontaneous orders are in fact quite authoritarian and illiberal. Hayek appears to be so impressed with the fact that the free market is a spontaneous order that he mistakenly believes only unintended orders can be libertarian. To add to this, Hayek has an idiosyncratic idea of liberty which does not regard a general restriction on everyone's liberty (e.g. the imposition of a consumption tax) as coercion. No wonder radical libertarians are often critical of Hayek's social philosophy! Classical liberals should support orders that protect individual freedom and property rather than spontaneous orders in general. Spontaneous orders may perhaps be preferable to planned ones, since planning usually entails some restriction of individual freedom. But if we cannot hope that a spontaneous order will develop in the near future, then we have to resort to planning for a liberal one.

I. *Hayek's Inconsistency?*

After elaborately advocating a free banking system in his polemical book *The Denationalization of Money* (Hayek, [1978] 1999), Hayek writes in the penultimate note of the book:

It has been said that my suggestion to "construct" wholly new monetary institutions is in conflict with my general philosophical attitude. But nothing is further from my thoughts than any wish to design new institutions. What I propose is simply to remove the existing obstacles which for ages have prevented the evolution of desirable institution of money. (Ibid., p.228 n.98)

I quote these passages because the question that Hayek tries to answer here is highly relevant not only for himself, but also for classical liberals and libertarians (I use these two expressions as synonyms) in general.

* This paper was presented at the 20th IVR World Congress of Legal and Social Philosophy held at Vrije Universiteit, Amsterdam, June 19-23, 2001.

Hayek's proposal of free banking is often said to conflict with his philosophy, for he has argued for the evolutionary superiority of spontaneous orders over intended social planning. Spontaneous orders are social institutions that are the results of human actions, but not of human design. They are not natural phenomena which are independent of human beings, but are not artificial in the sense of being made by human design either; they constitute a third category between them. While language is a typical spontaneous order, Hayek understands both market and law in a similar way. He always criticizes such attitudes that try to construct social institutions out of universally valid grounds by conscious rational reasoning, and calls them "constructivist rationalism". He contrasts it with "evolutionary rationalism", which respects spontaneously grown institutions as products of evolutionary trial and error. According to the latter kind of rationalism, it is often the case that nobody really knows why some existing social institution is beneficial. Constructivist rationalists tend to destroy such evolutionarily successful spontaneous orders by always demanding explicit justifications for social institutions.

II. *Hayek's Conservatism*

Hayek's belief in spontaneous orders gives his liberalism a conservative tendency, which is increasingly apparent in his later writings. Thus, while the appendix to *The Constitution of Liberty* (Hayek, 1960) is entitled "Why I am not a Conservative", the epilogue of *Law, Legislation and Liberty* (Hayek, 1973-79) is a lecture, "The Three Sources of Human Values", in which he argues that "the task which our age is assigning to the rational construction of new institutions is far too big" (p.176), and advocates the vital importance of customary rules and reproaches the Age of Reason and the Enlightenment for ignoring the values of tradition.

Hayek greatly contributed to the scholarship of intellectual history as well as economics and political theory, but his studies in this field are characterized by the omnipresent dualism of spontaneous orders versus constructivist rationalism. For example, the Scottish Enlightenment such as Adam Smith and David Hume, English common law thought, and Edmund Burke as Whig liberal belong to the former, while Benthamite utilitarianism, socialism, legal positivism (as understood by Hayek) and Keynesian economic interventionism correspond to the latter. Needless to say, the former is the hero and the latter is the antagonist. Thus, Hayek is less than enthusiastic about such classical liberals as John Locke, whose advocacy of individual freedom derives not from respect for the tradition of the English constitution, but from universal humanity and preinstitutional natural rights, and the rationalist French Enlightenment. No wonder many contemporary conservative thinkers appreciate Hayek, even though they are doubtful or ignorant of the Austrian school of economics in general and look askance at the free market economy.

Therefore, the above-mentioned suggestion that Hayek's proposal of denationalization of money conflicts with his philosophical position has some force. Is not the proposal of a new monetary system a typical example of constructivist rationalism? Hayek's answer to this charge is: "What I propose is simply to remove the existing obstacles which for ages have prevented the evolution of desirable institution of money". He implies that the existing national monetary and banking system is not a spontaneous order.

III. *Is Law Always a Spontaneous Order?*

But if we accept this answer of Hayek, many unintentionally grown social institutions would appear not to be spontaneous ones since they are obstacles to evolution. Indeed the majority of public (i.e. governmental) institutions have grown out of political compromise, piecemeal patchwork and inertia without any overall planners, though some other public institutions were intentionally constructed by rationalist theorists.

Cannot the same be said of the common law, which Hayek always reverentially refers to as the model of law? It has been officially claimed, and Hayek seemed to believe, that the common law was not invented, but rather discovered by judges in unwritten customs pre-existing in English society. But the common people in England did not seem to be familiar with the common law, and the lawyers formed a close-knit privileged class. Though the common law sometimes rescued English people's freedom from tyranny, it cannot be said that it is a typical spontaneous order. Libertarian legal scholar Bruce Benson writes:

The common law system we have inherited was largely shaped, not by some desire to organize society in the "public interest", but by the self-interested goals of the kings, their bureaucrats, and powerful groups in England. (Benson, 1990; p.76)

The common law was authoritarian law imposed by the kings, superseding earlier Anglo-Saxon customary law.

Even if we accept Hayek's characterization of the common law as a spontaneous order, it is farfetched to call, as Hayek does, law in general a spontaneous order. It is true some legal systems grew out of spontaneous orders. They include the law in ancient republican Rome, customary law in some parts of medieval Europe, the law merchant (especially international law) and, perhaps, the common law. But far more legal systems in the civilized world were intentionally constructed. Modern liberal legal systems are no exception. Hayek insists that legislation originally only made existing customs written law. But such legislation is the exception rather than the rule.

Moreover, planned legislation may work as well as customary law. Civil law in modern Japan was codified over a century ago through the reception of European law and was quite different from the customs then prevalent in Japan, but has still worked reasonably well for the market economy. To take an example that may strike a sympathetic chord in classical liberals, the Constitution of the United States is a product of deliberate design, too. It is grounded upon such highly abstract ideas as popular sovereignty, natural rights, and the separation of powers.

The notion of spontaneous orders applies well to language, positive morality, etiquette, and rules which have grown up in a market, but it is questionable whether it applies as well to law. That does not mean the view strongly and justly attacked by Hayek that a law can be designed to serve any purpose. Designed or not, what a law alone can achieve in the real world is quite limited.

Hayek tends to regard customary law and case law, which allegedly is nothing but discovered and written customary law, as protecting individual freedom and statute law as restricting it. This presupposition has some plausibility. As Benson wrote in the above-mentioned book, customary law has validity only when it receives people's voluntary acceptance by benefiting them all, while statute law is imposed by force from above.

But some statute laws help protect individual freedom and rights, and customary law does not always protect freedom. Some customary law can restrict freedom or make class distinctions. Slavery can become the customary law of some societies. That is because people are not equal in physical and economic power and social influence.

Adjudication by customary law and case law is difficult to control by critical discussion since it appeals to an implicit sense of justice which is claimed to be shared in a society. Hayek writes: “The explicit statement of the established practice or custom as a verbal rule would [...] rarely achieve more than an inadequate and partial expression of what was well known in practice” (Hayek, 1973: vol.1, p.77). But Hayek seems to overestimate how much a particular sense of justice is commonly and implicitly shared in a society. He may be right in this point concerning traditional, relatively homogeneous societies. But we cannot expect every member to share such an implicit custom in a modern society where the people do not know one another personally. Here we need explicit written, objectively identifiable rules for our guidance.

IV. *A Spontaneous Order Can Be Illiberal*

Hayek seems to presuppose that spontaneous orders always become impersonal abstract orders such as the market economy, but I suspect the opposite is sometimes the case. Etiquette that has grown spontaneously in some kinds of communities can be closely connected with that community’s hierarchical or oppressive order. The same can be said of customary laws developed in a closed small locality — especially those practices which conservatives hail as “traditions” derive from histories of nations and are authoritarian. Conservatives rarely think of the traditions of a free market, liberal individualism, or tolerance.

What is important for libertarians or classical liberals about existing customs and institutions should be: “Which are harmful obstacles to human action and which are not?” It is a matter of secondary importance whether those institutions come into being spontaneously or by design. For example, corruption by public servants and rent-seeking in many countries were not designed by some planner. They are spontaneous orders that have developed by innumerable individuals’ self-interested, often shortsighted, actions, and they are beneficial to some of those who are parasitic upon them, but are certainly harmful to others. Some conservatives may claim that even those apparently unjustifiable customs should not be abolished, since there must be some hidden wisdom of tradition in such long-standing customs. Would Hayek join those conservatives or say such customs are different from his “spontaneous orders”?

Perhaps the latter answer is correct, but I am not certain because I have read only a small part of Hayek’s voluminous writings. Anyway, classical liberals should repudiate such customs, whether they are spontaneous orders or not. Corruption makes the public enforcement of the law unfair, and rent-seeking privileges some groups at the expense of taxpayers in general. These customs are not only inefficient, but also in conflict with the classical liberal principle of equality under the law, even if they are spontaneous orders. Hayek paid little attention to such harmful spontaneous orders. As contemporary Austrian economist Kirzner writes of him, “The same scientific fascination which surrounds the spontaneous emergence of benign social outcomes, should apply also to the spontaneous emergence of social outcomes

which the individuals (out of whose activities the outcomes emerge) would abhor.” (Kirzner, 2000: p.189)

V. *Hayek’s Idiosyncratic Idea of Liberty*

Hayek mistakenly identified spontaneous orders with liberal orders, for he is so impressed with the certainly important insight that the spontaneous and liberal order of a market works much better for human prosperity than a planned economy does. It is true that a spontaneous free market is a typical liberal order, but many liberal orders are deliberately planned and created.

Here Hayek’s idiosyncratic idea of freedom plays an important role. As Japanese scholar Tsutomu Hashimoto perceptively writes,

Hayek’s negative liberty regards only governmental arbitrary use of force as coercion; it does not regard general principles (e.g. a consumption tax) as coercion.... On Hayek’s account of liberty, even when the consumption tax becomes 90 per cent, it cannot be coercive *by definition*. Hence there is some scope for positive government policies in his doctrine. Perhaps it is because of it that laissez-faire theorists often reproach him for being a socialist. (Hashimoto, 1994: p.234. Originally in Japanese. Emphasis original)

It is an exaggeration to call Hayek socialist, but he is certainly so preoccupied with the distinction between generality and arbitrariness of use of force that he is far from the commonsense conception of negative liberty which regards the use of force as restricting liberty. In other words, he is more interested in the general principle of the “rule of law” than in individual liberty. For this reason, Hayek’s argument for liberty looks strangely tepid in the eyes of ordinary libertarians committed to individual liberty for its own sake. His argument depends on the view that liberty *as a social institution* makes the progress of societies possible. But this reasoning appears too indirect, and the very concept of social progress is ambiguous. When it becomes clear that Hayek’s conception of liberty is compatible even with conscription and a 90 per cent consumption tax, then his argument for liberty loses much of its appeal for libertarians (e.g. Rothbard, [1982] 1998: ch.28). This idiosyncratic conception of liberty, belief in spontaneous orders based on evolutionary theory, and antipathy to the Enlightenment rationalism make Hayek a borderline — not central — figure in libertarianism.

VI. *Conclusion*

What should libertarians think of the formation of orders? If spontaneously grown orders are liberal ones, such as language untouched by government and money before it was monopolized by the state, they pose no serious problems. But as is often the case with coercive groups, some spontaneous orders unjustifiably constrain individual liberty. They are not to be respected simply because they are spontaneous. On the contrary, sometimes concentrated planning is necessary for the establishment of a liberal social order. Thus, feudal usage should be abrogated for the implementation of equality before the law, and communal restriction on private property should be abolished in order to make the free exchange of goods and service

possible. Orders created by such planning may not be spontaneous, but they are liberal. Indeed, many of precious modern liberal institutions were born in such a way. Classical liberals or libertarians should not optimistically believe in the possibility of planning and establishment of such free orders, but they should not deny that possibility altogether either. It is a problem which needs to be examined on a case-by-case basis.

HITOTSUBASHI UNIVERSITY

BIBLIOGRAPHY

- Benson, B.L. (1990), *The Enterprise of Law: Justice Without the State*, San Francisco: Pacific Research Institute.
- Hashimoto, Tsutomu (1994), *Jiyu no Rompo (Arguments for Freedom)* (in Japanese), Tokyo: Sobun-sha.
- Hayek, F.A. (1960), *The Constitution of Liberty*, Chicago: University of Chicago Press.
- Idem. (1973-1979), *Law, Legislation and Liberty*, 3 Vols., London: Routledge.
- Idem. [1978] (1999), "The Denationalization of Money", in S. Kresge (ed.), *The Collected Works of F.A. Hayek, Volume VI*, London: Routledge.
- Kirzner, Israel (2000), *The Driving Force of the Market*, London: Routledge.
- Rothbard, M.N. [1982] (1998), *The Ethics of Liberty*, New York: New York U.P.