CHAPTER 12

LEONI'S AND HAYEK'S CRITIQUE OF THE RULE OF LAW IN CONTINENTAL EUROPE

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History is a great resource for anyone who deems formalistic conceptions of the rule of law insufficient. Relying on a given tradition and understanding its development seems to protect law from static and abstract theories that try to shape its content and forms as a system. Whoever thinks he has history on his side will see both natural law and legal formalism as unilateral conceptions. The former suggests values and references, which may be theoretically outdated and practically ineffective, whereas the formal structures underlying the latter theory[1] run the risk of being nothing more than powerless containers of formally uncontrollable political decisions.[2] A theorist who ignores history – or, rather, deliberately runs the risk of being overcome by history – is doomed to be a theorist without history. Yet, whether this is true or not depends on how this history is told.

There is an extensive literature on the version of neo-liberal thinking grounded on methodological individualism, whose most prominent authors are the Austrian Friedrich A. von Hayek and the Italian Bruno Leoni. As regards the rule of law, this version may be interesting for it seems to provide an understanding of law that is so deeply rooted in history that it can do without a critically aware axiologic background, a formal account, and even a relationship with formally determined institutions. When applied to law, the fundamental idea of methodological individualism is that the rule of law consists of principles that nobody has chosen consciously but which are the unintentional evolutionary outcome of individual actions. Law is formed just like paths in a wood: each walker tries to pass through leafy branches and repeated passage creates paths which others may rely on and which "work" much "better" to achieve everyone's goals than purpose-designed routes. Law and history are not in conflict since legal norms make up a "spontaneous order" of naturalistic regularities selected by evolution.

This interpretation of law – says Hayek – is inferential or reconstructive in character: we do not really know how a particular path has been formed but we can infer how this generally happens since we know how

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our fellow human beings behave when looking for a path, and, in the light of this, we are able ideally to build a genealogical model. Yet, if this account is inferential, then what Hayek sees as a spontaneous order – from the point of view of the walker looking for a path – may appear to others as irregularity and disorder. Just think of the mushroom-seeker, for whom beaten paths are barren, or of those concerned with preserving the soil from erosion. We can tell many stories and infer many different models of order, depending on our viewpoint, which will lead us to deem this or that principle to be decisive. Whoever thinks he has "the" history on his side has, in fact, only the genealogy he reconstructs by taking a viewpoint or a particular interest of his to be decisive.

The metaphor of the "spontaneous" emergence of pathways suggests an opposition between two ideas of law: either a deliberate project grounded on political institutions or a spontaneous order in which political institutions are merely instrumental and may become superfluous or even damaging. Such a bipartition rejects the continental *Rechtsstaat*, the constitutional democratic state, and totalitarian (especially socialist) systems in favour of a single "genuine" form of the rule of law, namely, the English version, founded on tradition and case law. As regards law-making, there is a proper rule of law only when decisions about what is law are essentially or exclusively made by judges and legal scholars within the context of an organic tradition, rather than by legislative bodies.[3] Only the rule of law guarantees the "government of law": all the rest is "government of men", whether they are, quite indifferently, democratic majorities, governors or officials of a state ruled by administrative law, or totalitarian dictators. On the one hand, there are men with their arbitrary decisions; on the other, there are law and tradition, whose determinations go well beyond what individuals know and want. The relationship between history and law, as political form and choice, is not a problem for the law is actually "the" history.

Assuming the rule of law to be, as Pietro Costa writes in the introduction to this volume, a set of mechanisms used to mediate, modulate, and check the relationship between power and individuals, we may wonder whether the above assimilation between law and history – or, rather, *a* history told at a given time, in a certain place, and in a certain manner[4] – really provides a model of conceptually determined legal mediation. For the theory of the rule of law as a spontaneous order arises and arose within theoretical and political contexts of conflicting philosophies of history, facing important and controversial revolutionary experiences, such as the French and Russian ones. Within such contexts, the confrontation between traditionalist philosophies of history, on the one

hand, and progressive and prophetic stances, on the other, might seem a current issue. However, now that the time of confrontations is over, it must be questioned whether the theory of rule of law as spontaneous order can offer a definite model capable of outliving its controversies.

1 THE GOVERNMENT OF LAW AS A GOVERNMENT OF MEN

Hayek's juxtaposition between a spontaneous (legal) order and an artificial human order mirrors the classic opposition between a government of law and a government of men, which is to be found in Plato's *Statesman*.[5] Among other things, Plato's opposition also deals with law's relationship with history. The anonymous protagonist of *Statesman* recounts the following myth: in order to demonstrate his support of Atreus, who is arguing with his brother Thyestes over an inheritance, Zeus changes the course of the stars and sun, making the latter rise in the east rather than in the west, as it had until then. Such a reversal of the universal order brought about a change to the past world's overall order, when the master of gods was Chronos rather than Zeus.[6]

During the rule of Chronos, politicians were shepherds and governed without laws, and indeed were divine figures. The humanity they guided had a life cycle similar to that of a vegetable: it arose from the earth, blossomed, de-structured itself, and ultimately disappeared. As Plato suggested, however, politicians can no longer be seen as divine shepherds. They are like their subjects, in terms of their education and upbringing.

A just constitution – as argued by Plato – is characterized by magistrates who are experts in their art, so that the government is in the hands of intelligent individuals. A law cannot comprise what is best and fair for all individuals or decide what is best and fair for each single individual. In the light of the differences among men and among their actions, given that nothing human is unchangeable, the legal art cannot enunciate a simple rule that is valid at all times and in all cases. Law can be compared to an authoritarian and ignorant man who demands unswerving and unquestioning obedience to his orders, even when new situations arise. A law for many people must be generic and loose with respect to individual situations. However, if law proves to be inadequate in response to social change, society's intelligent leaders are justified in breaking it, though public opinion may require them first to persuade citizens that changes are warranted. The relationship between the government of law and that of men is akin to that between the medicine manual and the doctor: the

former's instructions are generic but if we cannot consult a doctor we must refer to them even though we are aware that they are inadequate.

Does Plato prefer the government of law or the government of men? At first sight, the myth seems to suggest that law is a mere makeshift solution conceived to remedy governors' unreliability: we would gladly do without law if politicians were wise and capable of dealing with the particularities of men and their situations without resorting to rough general rules. Yet, the political and divine shepherds' government was very different from ours: the cycle of human life and human flourishing – as American neo-Aristotelians say – followed the simple model that we have compared to the natural botanical cycle of growth, bloom, and decay and for this, without controversies or the need for deliberation over problems.

Things are now different: humanity develops, culturally and historically, through open relations, even in its reproduction. Hence, a model grounded on a naturalistic understanding of human development and flourishing is of no use. Neither is a god's wisdom useful, since the world develops on its own. While the universe in the past was ordered and could be reduced to rules, now it is complex and chaotic. A god no longer governs, men do. This brings about the problem as to the government of law: human reality is cultural and historical; hence, a naturalistic perspective is counterproductive, since men cannot be treated as plants and cannot be endowed with a god's wisdom. Hence, the government of law is preferable, precisely *because men govern*. Laws are of no use to govern harmony, since this already has its regularities; they are useful to regulate chaos. Laws would be meaningless if there were only divine creatures, plants and animals similar to plants, rather than men, histories, and cultures.

As revealed in Plato's myth, there are at least three main features of the historical condition:

1. There is no longer an immutable order that is established once and for all; therefore, there is no longer a botany of humanity grounded on unquestionable and fixed flourishing models: human realization itself, once it enters the historical ambit, becomes problematic.
2. Correspondingly, there is no divine wisdom in the historical world: the paternalistic pastoral government of the age of Chronos was not oppressive, because men were vegetable-type creatures, without a history, to be grown according to a botany, which had been for ever established.
3. The government of law is suitable to history; the former, faced with the unstable world it is supposed to rule, is human and not divine, textual and thus semantically closed, authoritarian and rough with respect to a changeable, rather than fixed, reality.

Even though the historical condition – the lack of order and of the corresponding wisdom grounded on 'botanic' formulas valid for ever – requires law as a closed system ordering chaos, it also reveals its inadequacy, since the environment of law goes beyond what law itself claims to fix and formalize. A theory of the rule of law, which is fully aware of historical conditions, should question the manners and instruments, which might allow it to come to terms with its own limits: the limits which make law necessary though not exhaustive.

Not only does the myth told in *Statesman* provide a not-particularly-edifying account of the historical condition, but it also represents, in an apparently edifying way, the non-historical and vegetative condition of the age of Chronos. Even the latter is a history, which someone is interested in recounting. It is a kind of history where changes can be mirrored by a foreseeable formula established by a governor in whom power and knowledge are concentrated. To reduce history to a naturalistic formula is itself a way to deal with and exorcize it that, according to the foreign narrator of the myth, is an alternative to the way that justifies the government of law.[7] The government of law is a historical and human order; the government of men may be conceived only as a non-historical and divine model. When opting for the government of law, we ought to be aware that it is historically and humanly conditioned and circumscribed, and that its internal forms and reasons are insufficient; when choosing the government of men, we need to view the universe as non-historical and accept that governors are endowed with divine wisdom.

In *Statesman*, such options are the two elements of a dilemma, in that to choose one option means to exclude the other. However, it might be argued that it is sufficient to find the formula of law's historical development in order to unite what Plato thought was incompatible, thus obtaining a government of law, or rather a rule of law, endowed with superhuman wisdom. In order to be successful, such a theory would have to provide a formula of the rule of law capable both of accounting for history's development and, above all, of being rigorously determined in its contents. For an appeal to history with an episodic and vague content would be tantamount to surreptitiously appealing to the government of men.

Against such a background, the justification of the rule of law grounded on the historical and philosophical formula of the spontaneous order is worth examining. Its analysis will help us in understanding whether it can offer a definite contribution to the discussion on the rule of law, or whether it may be endowed with a given content only by secretly (maybe consciously) relying on the government of men or, more precisely, of far-from-divine notables and judges.[8]

2 RULE OF LAW AND LEGAL HISTORICISM

According to the Italian philosopher of law Guido Fassò, the rule of law may be defined in two ways, depending on whether the perspective of *lawfulness* or *legitimacy* is taken into account.[9] Under the technical and formal perspective of lawfulness, the rule of law characterizes a state limited by law, which checks and circumscribes the state's sovereignty. Under the legitimacy perspective, the rule of law characterizes a state grounded on substantive justice, which ought to be thought of as superior to the technical and formal requirements of mere lawfulness.

Natural law doctrines, as seen by Fassò, deal with the rule of law both as a feature of a lawful state and of a just state. Yet, given their rationalist and non-historicist outlook, natural law doctrines remain abstract, non-historical, and arbitrary – although they do express the need to combine lawfulness with legitimacy. Both, lawfulness without legitimacy and legitimacy without lawfulness, lead to arbitrariness, i.e. to denying the restraint on sovereignty and the quest for certainty, which the rule of law is grounded on. If a law is defined only on a formalistic level, it is open to any content formally compatible therewith; on the contrary, mere substantive legitimacy replaces the government of law with of the government of men, or rather of one man or some men who are supposedly able to infer or know justice. On the other hand, if we purported – like natural law doctrines – to bind law according to content-based and rationalistic criteria, we would make it rigid and historically arbitrary.

In the light of the above, we might conclude that the rule of law, no matter what is meant by it, conceals arbitrary power – since the very limitation of sovereignty, which the rule of law arises from, ends up by ultimately being an arbitrary limitation. Fassò, nonetheless, believes that history might provide the requirements of limitation, certainty and guarantee of individual rights – which are abstractly expressed by natural law doctrines – with a non-arbitrary content. However, in order to do so, the conception of law needs to be enlarged, i.e. law ought not to be identified with rules, will, arbitrariness; rather, it ought to include the specific and particular aspects of case law and custom.

In this respect, Fassò refers to Bruno Leoni, who believes that the rule of law inspired by natural law doctrines and the French Revolution, by reducing all law to acts of parliament excludes citizens' participation in the law-making process and jeopardizes legal certainty because of legislative pollution. Law can be certain only if it is a spontaneous social creation, administered by notables or *honoratiores* not bound by written laws.[10] Rather than the rule of legislative or formal law, there ought to be a rule of social spontaneous or free law. Such a system can assume and

mirror society's widespread values, since it is "spontaneous" both in the selection of judges and jurists – which is based on the parties' approval –and in the declaration of law, founded not on legislators' express will, but rather on precedents and customs. Law is not wanted by any given individual but is found within society's historical structure. For if law were wanted by a given individual it would be arbitrary. Being instead found within an order, it guarantees individuals against the state's power; as it is the case in the British tradition of common law – if we overlook, as Leoni himself significantly does, the political role of parliament in creating this tradition.[11]

We might wonder whether it is correct to view this neo-liberal legal historicism as an attempt to come to terms with history by integrating or surrogating the government of law with the government of men. Here men are not Plato's divine shepherds but judges, officials, and notables. There is no guarantee that such figures are less authoritarian than the law they are supposed to complement historically: being themselves men within a historical setting, it is subjectively and objectively impossible for them to deviate from the botany of humanity, which is typical of a kind of knowledge transcending history. If this kind of legal historicism reduced the government of law to the government of men, a historicist rule of law would be, quite simply, a paternalistic and not very justified regime of notables.

Yet, the theory of the spontaneous order claims it can explain how good laws (i.e. able to cope with historical mutations) "grow" and how men can complement their development. The historicist rule of law would risk making citizens' rights empty rhetoric only if it were proven that the theory is programmatically vague. Indeed, a theory whose aim – to detect the law of the historical development of human societies – is out of proportion with respect to its chosen theoretical means[12] may be a form of authoritarian paternalism.

3 THE RULE OF LAW AS A SPONTANEOUS ORDER: THE ISSUE OF INDIVIDUAL FREEDOM

Theorists of the spontaneous order are usually deemed to be interested in the "uncompromising protection of individual freedom".[13] In *The Constitution of Liberty*, Hayek clearly depicts his ideal state of liberty, namely a state where coercion is reduced to a minimum, so that all individuals may act in line with their own projects rather than being subject to other individuals' will. This concept of freedom is negative, for it denotes the lack of hindrances, and exclusively concerns – as specified by Hayek – the relationship among men. Coercion is when an individual's

environment and circumstances are so controlled by others that he cannot pursue a coherent project of his own – at best, he can choose the lesser damage – but must serve other people's aims. Coercion is wrong since it destroys an individual's capacity for thinking and evaluating and makes him an instrument of others' purposes. An action is free when it is based on data that cannot be arbitrarily moulded by others; in order to guarantee free individual action, a private domain, which nobody can interfere with, must be secured.[14]

If taken seriously, Hayek's conception of freedom is hardly attainable within a historical context. Freedom is viewed as a free area whose data are not under others' control or influence but are completely open to individuals' choices. Yet, such a free area does not exist within society: even life is the result of other people's choices. Similarly, Hayek's theory whereby employees are free in so far as they can choose a given employer among many competing employers, if unemployment does not go beyond a certain level,[15] is not consistent with his negative idea of freedom. The environment of the worker's choices is determined by others: it matters very little whether the latter are effectively or only nominally competing among them in trying to attract him. What really matters is that the situation in which the worker has to make his choice is decided by others and not by himself.

It follows that Hayek's idea of freedom is not negative because it defines an individual domain of non-interference; rather, it is negative because it defines something that does not exist within society. On the other hand, the manipulation of individuals is something that Hayek's liberalism can hardly do without. A free society grounded on a legal system requires people to be responsible for their actions: i.e. that they are legally imputable in that they are permeable to law's normal coercive instruments.[16] In other words, their manipulation is essential under the rule of law: liberal beings are not stoical wise beings, capable of abstracting their passions and organizing their own area of non-interference within the stronghold of their reason; rather, they *must* be so weak that the scope of the celebrated concept of negative freedom is practically null.

Nonetheless, there is an aspect of Hayek's negative freedom that might endow his idea with a non-ironical meaning. Hayek is keen on specifying that his conception of freedom is applicable only to relationships among men. Therefore, for negative freedom to exist, it suffices to prove that the conditions in which an individual makes his choices are not the immediate product of someone else's deliberation, but the output of an impersonal and, in this respect, naturalistic process. Therefore, the more an individual's range of choices is defined by forces and processes deemed as impersonal

and over-personal, the more the individual is "free", i.e. no human being voluntarily interferes with this range. Quite paradoxically, we are free as long as the world we live in does not depend on our choices – i.e. as long as we view our culture and society as a natural output, beyond individual control.[17] Furthermore, since individuals make choices and decisions, the less such choices and decisions affect the context of our choice directly and intentionally, the freer we are.

Such an idea must hold true also for negative freedom whose boundaries and guarantees, if they are not to be oppressive and arbitrary, must be seen as the output of an impersonal process and not as the immediate result of someone's thoughts and choices. According to Hayek, the most reliable theory on freedom is the British one, formulated by the eighteenth-century Scottish school (David Hume, Adam Smith, and Adam Ferguson) and by some English contemporary thinkers (Josiah Tucker, Edmund Burke, William Paley) in that it purports to understand the common law tradition and spirit: the law and freedom it guarantees are a conscious production but the output of selection and evolution processes hardly controlled by individual reason: society is conceptualized as a living organism, which normally grows and develops "on its own".[18] Quite coherently, Leoni argues that the only acceptable definition of freedom is the lexical one, whereby "freedom is a word employed in ordinary language to indicate particular kinds of psychological experiences".[19] Such a definition, which essentially appeals to a widespread and shared *idem sentire*, is justified precisely because such an *idem sentire* results from an evolution and a tradition legitimating it, and not from someone's theoretical and practical choice.

The *theoretical* delimitation and justification of freedom on the grounds of tradition suggests that, for Hayek and Leoni, there is no autonomous domain of practical reason within which, interest in, and reflection on, freedom are to be found. As Hayek argues in *The Constitution of Liberty*, the justification of individual freedom is mainly grounded on the acknowledgement of our ignorance of a large number of factors on which the achievement of our aims and well-being depends. If we were omniscient, if we were able to know what might affect the attainment of our future, as well as current wishes, freedom would have no collective usefulness since experimentation would not be required. On the other hand, Hayek adds, where knowledge is limited, freedom is necessary to leave room for unpredictability: the development of civilization depends on maximizing the likelihood of incidents, which leads to working out, through evolutionary selection, better rules overall.[20]

When Hayek speaks about omniscience, he does not mean individual omniscience but a supposed collective omniscience: not surprisingly, he uses the first person plural and justifies individual freedom as a means to experiment and select rules needed for "civilization" itself. The meaning of freedom is exclusively associated with a common knowledge deficit that makes individual experimentations and inventions highly recommended for the development of a collective entity, i.e. "civilization". A hypothetical "civilization" with an already perfect, complete, and finished body of notions would have no reasons for allowing individual freedom.

Hayek's reasoning seems to suggest that his understanding of freedom has neither practical value nor a genuinely individual meaning. If practical reason were independent of theoretical reason, if the value and meaning of what we do were at least partially independent of what "civilization" collectively knows, omniscience would not eliminate freedom as a condition for the possibility of choices, moral laws, and the associated technical decisions. These should be a problem even in a "civilization" *theoretically* able to know all the elements of its environment. If individual autonomy were something we were to come to terms with beyond its evolutionary meaning, someone's omniscience should not impinge upon the value of someone else's free experiments and choices.

The holistic and functionalistic ease with which the passage of *The Constitution of Liberty*[21] stating this position ignores the practical meaning of freedom leads us to assume that, strictly speaking, Hayek's interest in freedom is morally and politically null. If we were to take Hayek's considerations seriously, we should conclude that individuals knowing the development laws of the spontaneous order do not value liberty as such but only as a means, as long as they are aware of their ignorance.

4 THE RULE OF LAW AS A SPONTANEOUS ORDER: LAW'S NATURAL CHARACTER

Law, being a system of regularities distinct from legislation, i.e. from the explicit and voluntary production of norms by a somehow legitimated authority, is a spontaneous order. It is spontaneous in that the regularities it is made of are not the result of a deliberate project – individuals "following" such regularities need not even be aware of them – but are formed and selected through an evolutionary process: a given behaviour becomes a regularity when the group adopting it outlives and prevails over other groups. The world of law, language, market, and of many other cultural institutions is to be thought of as the result of human

action rather than human planning. No human mind is able to plan a spontaneous order, since no human mind is capable of calculating the infinite complexity of interactions and correlations that may take place between one single element of the system and all other elements.[22] It follows that the approach of the common law judge, who draws the law for each individual case from a number of principles already existing within tradition and does not claim to create it, is the most respectful of the social order.

Hayek draws a line between two kinds of social order: *taxis* is an "artificial" order resulting from an organization planned for a specific purpose; *kosmos* is an order made of spontaneously created regularities, which is typical of self-organizing and self-governing systems. "An order not deliberately made by man *does exist*" – yet, such a circumstance, says Hayek, is not widely acknowledged because it has "*to be traced by our intellect*".[23] The reconstruction process of an order – be it an order of rules or woodland paths – is an inferential process. So why cannot it be argued that the *kosmos* is a mere *taxis* of ours, i.e. a construction *of ours* whereby we, as theorists, seek to ascribe a given meaning to reality's multiplicity?

Such a reasoning, albeit not extraneous to Hayek's work, would be deleterious in this context, since legislation and law, *taxis* and *kosmos* or, more generally, scientific theories open to discussion and natural truths that individuals must abide by (because too complex for our limited minds) would become virtually undistinguishable. The vegetable order of law would lose its epistemological legitimization. Therefore, in this case, the rhetoric of ignorance is relinquished in order to firmly claim that the system is not a cognitive construction of ours; rather, it has an objective existence of its own. The system's viewpoint is treated as an absolute viewpoint.[24] There is no way out of the system.

That even an order grounded on deliberately created rules can be spontaneous is proven by the fact that its particular manifestations will always depend on factors that were not known or could not have been possibly known to whoever planned such rules.[25]

Hence, according to Hayek, human culture and society are spontaneous orders; our minds are too limited to understand their complexity and foresee their development; also, the establishment of artificial rules, by interacting with a complex world, falls within a spontaneous order. Ergo, in the perspective of the spontaneous order, what is the difference between a common law judgment, a statute enacted by a democratically legitimated parliament, and a tyrant's edict?

If we take the effects of the above acts into account, we can see that neither judges nor lawmakers nor tyrants have a privileged viewpoint

with respect to the complexity of the potential consequences of their actions. Within a spontaneous order, nobody can exhaustively justify his choices at the time he makes them. Justification is something on which evolution, with hindsight, has the last word; it follows that he who makes legal choices has no precise criterion that might legitimate them and must thus grope his way as if in the dark. The only legitimating criterion is retrospective. According to Hayek's outlook, judges will say that in making decisions they are not acting creatively but merely discovering what already existed, whereas democratic legislators and tyrants will variously appeal to one or more wills or procedures. This does not rule out that evolution (through its inscrutable processes) may end up by "vindicating" the output of a conscious will rather than of an act of interpretation or recognition.

None of the suggested legitimating criteria is able, in itself, to circumscribe the content of legal choices: legitimacy concerns the future effects and the link of a given choice with that of an antecedent, which may be either cognitive or voluntary. This means that the same legal act may be seen as the output of liberal wisdom, if the author appeals to the spontaneous order, or of an intolerable tyranny, if the author acknowledges that it is the result of will or imposition.[26] Hence, in order not to breach others' negative freedom we only need to convince them that our choices fall within a naturalistic order.

5 THE RULE OF LAW AS A SPONTANEOUS ORDER: THE INDETERMINACY OF NORMS

The spontaneous order acts in an inscrutable manner, and may be (only generally) recognized and explained with hindsight: it follows that there can be no criterion defining normative behaviours or acts producing or falling within a spontaneous order. This, however, exclusively regards the law-making process. Hence, we need to examine whether Hayek's system allows for determined criteria to identify the typical norms of a spontaneous order[27] according to their contents; this must be done by bearing in mind that, given Hayek's mistrust in a planning reason, the genesis of rules remains in any event crucial. Hence, we should ask whether there is a close relationship between the characters of the typical rules of a spontaneous order, their spontaneous genesis and their justification based on that genesis.

As explained by Hayek, the typical rules of a spontaneous order arise as simple natural regularities, i.e. rules, which individuals unconsciously and practically abide by. They become norms, i.e. linguistically articulated

prescriptive rules, only when intellect develops and the need is felt to correct deviating behaviour and settle disputes about them. These rules induce individuals to behave in such a way as to make society feasible; with the proviso that society's feasibility is not logical but naturalistic-evolutionary, and may take place only *ex post*, i.e. through the survival of societies following the norms in question.[28]

The rules of a spontaneous order are independent of any purpose and are universal, i.e. applicable to an undetermined number of possible cases; they enable individuals to pursue their aims both because they ensure a (partly) foreseeable environment and also because they guarantee a reserved domain for everyone. These rules provide no criterion to delineate individuals' reserved domain, since the latter is *produced* by them and is not their premise; even though, generally speaking, actions concerning the sole individual should not be punished. Such a reserved domain ought not to be treated as the domain of morality: the only difference between legal and moral norms is the presence or absence of enforcing procedures recognized by an established authority: a naturalistic understanding of law, as a set of regularities, does not certainly allow us to distinguish between legal and moral regularities. Therefore, says Hayek, if there is a set of norms whose habitual respect leads to an actual order of actions, and some norms are given legal value by authorities, whereas others are merely respected in practice or implied by other validated norms (in that the latter attain their purpose only if the former are observed), the judge may, at his own discretion, deem implied norms to be legally valid, even if no judicial or legislative authority has passed them yet.[29]

A spontaneous order exists independently of individual choices and knowledge and, as such, cannot be explicitly organized in a systematic and exhaustive body of norms: at most, its underpinning principles can be determined, similarly to what common law judges do. Hayek believes that judges decide by examining the logic of each individual situation that is based on the needs of the existing order of actions. This logic is, in turn, the unintentional result and the rationale of all norms judges are expected to view as settled. The common law tradition makes law foreseeable, since judges are bound by widespread beliefs about what is fair, independently of their being legally acknowledged or not. Judges' trained insight – says Hayek quoting Roscoe Pound – constantly directs them towards fair outcomes: the idea that judicial decisions are the result of logical inferences is ascribable to "constructivist" rationalism that treats all rules as being deliberately created. Law is thus made up of all the rules whose binding nature would be recognized if they were explicitly expressed in words.[30]

Hayek's appeal to judges' insight, the idea that the law cannot and should not be viewed as a systematic set of norms intelligible to the human mind, and the uncertain demarcation between law and morality, suggest that such a conception of the rule of law may work, i.e. be given substantive content, only through the surreptitious *and thus critically uncontrollable* involvement of the government of men. Nonetheless, there are at least two elements, which might provide the rule of law with a precise identity: firstly, its rules have no precise purpose; secondly, they are universal.

The first characteristic would make sense if purpose were intrinsic to all rules and could be detected just as rules are first detected, says Hayek, as regularities. Yet, at least since Kant's Copernican revolution, this has been far from obvious: the aim of a rule – or rather the many aims a rule might be used for – is not a sort of intrinsic quality of the rule but stems from the relationship between a deliberating agent and the rule itself. Any given rule might be examined with a merely theoretical interest, for a descriptive or explicative purpose, or may be connected with different practical aims: for instance, the rule fixing the lethal dose of a drug may be connected both with the aim of poisoning and that of medical treatment. A more *à propos* example is provided by Hayek, who claims that the principles of a spontaneous order must be respected if the survival of the group as an entity endowed with a certain order is desirable:[31] if a given aim may be connected also with the normative system of a spontaneous order, it follows that no rule – either descriptive, technical, moral, or legal – entails in itself a connection or a lack of connection with given purposes as part of its irrevocable character.

As regards the universality of rules,[32] this could be a criterion independent of the arbitrary decisions of judges or legislators interested in promoting and preserving the spontaneous order if it were something more than a mere ethnographic-sociological concept. When speaking of the criterion of universality of a given norm Hayek does not certainly mean that it can be formally universalized, only that it is coherent or consistent with the rest of the system of accepted values. This does not depend on a given reasoning but on inevitably arbitrary sociological generalizations[33] – especially because the perception itself of a line of conduct as a problem proves that the sociological generalities which choices should be grounded on do not (or no longer) work.[34]

If the above account is correct, the concepts of evolution, spontaneous order and rule of law lack a definite content unless they are filled by men's choices. What is more, men's choices run the risk of being arbitrary since the emphasis on men's ignorance and thus on the impersonal

and inscrutable nature of order and of its development entail, as a sort of side effect, the absolute vagueness of the criteria for legal decision and interpretation.

Although Hayek and Leoni employ arguments that may be largely referred to the same historical and theoretical environment, they institutionally[35] disagree on both the need for legislators' intervention to correct case law and on the possible replacement of the state with an anarchical-capitalistic hypermarket. Leoni, who is essentially more keen on the latter approach, believes that the rule of legislative law turns law itself from a boundary and limitation of power into an instrument of power, subject to majorities' particularistic and episodic interests.[36] Law's guaranteeing role may be restored, thus freeing it from political haggles and legislative inflation, only if it is taken away from the state and back to the social spontaneity of judicial rulings and of the selection of legal scholars and notables, in line with the model of Roman law and, more generally, of the market. Yet, why should we believe that the power of legal scholars and executive officials is less arbitrary than that of political legislators?

Leoni defines law as the normality of social behaviours, i.e. as the set of claims, which might be predictably satisfied.[37] Yet, while law is a social phenomenon, many decisions affecting individuals' lives and choices are not taken exclusively by parliaments or, in general, by the state. Therefore, to remove law from the state may eliminate only problems arising from the state, not the general problem of power and how to check it; hence, unless it is naturalistically assumed that society is harmonious and that individuals' interests are homogeneous, the less such a problem is public and formal, the more dramatic it is.

According to Hayek's metaphor, the world of law is a dense wood through which walkers going towards their individual destinations create paths that are equally useful for all. Theorists of the spontaneous order, albeit disagreeing on the need for intervention by a forester and of what kind, agree that the creation of paths is a spontaneous process in all individuals' interests: the power that we need to check, justify, and possibly eliminate is exclusively the forester's power. However, these theorists ignore the problem that, when walkers who have treated the wood as a pass-through area realize that their paths have created an order that is good and useful for "all", they themselves exercise a power that needs to be legitimated at least as much as the forester's. Those who view the wood differently, for example, as a means for preventing soil erosion, or as a botanic oasis, or even as a living creature deserving respect, might regard the beaten paths as the product of arbitrary and questionable

decisions. To believe the contrary is to assume dogmatically that all individuals visit the wood only to walk through it.

6 THE RULE OF LAW AND DEMOCRACY

A speculatively conscious form of legal historicism might offer food for thought on the rule of law, since it might urge legal philosophy to analyse the relationship between law as a formal structure and its political, social, and cultural environment, and political philosophy to examine the interplay between formal and informal powers hiding within the state and society.[38] Which elements of law should be treated as unalterable, and why? And how and where can we guarantee that they are not altered?

The theories of the spontaneous do not help answering these questions. Their understanding of negative freedom – freedom as lack of environmental interference by other individuals' deliberate actions – leads them to identify the domain of freedom with the domain in which only naturalistic regularities are in force, i.e. regularities *thought of* as unalterable and not open to control. Under Hayek and Leoni's perspective, when power has an impersonal naturalistic justification, it is not coercive. Once actually existing socialism has lost its appeal, constitutional democracy, precisely because it explicitly legitimates itself as a construction and a pact,[39] is *the* enemy of freedom,[40] against which there stands the spontaneous order exemplified by the market and by a law formulated accordingly. The spontaneous order, which may be thought of as impersonal and non-deliberate, is the absolute guarantee of individual freedom; in order to attain it, it suffices to eliminate the explicitly deliberative manifestations of political power.

Such an idea stems directly from the theoretical need to give social content to negative freedom, this being descriptively[41] meant as the absence of manipulation of the conditions for individuals' choices. These axioms of negative freedom bear a paradoxical political consequence: if the *only* enemy of individual freedom is the deliberative aspect of law, which is typical of democracies, then the democratic project of the rule of (legislative) law, whereby citizens should only be bound by laws they have consented to, has been so completely realized that no other power within society can manipulate it through a coercive relationship. In other words, according to this account the democratic rule of (legislative) law has eliminated all informal powers, and in society there are no more patriarchal families, mafias, masonries, oligopolistic multinationals, and media concentrations, which are able to manipulate individuals' choices

for their own purposes. Only this blindness, which results from a naturalistic understanding of the social world, may lead us to think that, once the legislative production of law is eliminated or reduced to a minimum, absolute individual freedom is favoured – rather than freedom only from state interference but not from other less visible and less controlled authorities. The more the government of law is conceived of as uncontrollable and spontaneous, the more the government of men is justified, in courts and elsewhere.

NOTES

1. Legal positivism is often underpinned by a moral and political choice to limit morality and, therefore, in a certain way, also to limit law; in this respect, it is worth mentioning U. Scarpelli, *Cos'è il positivismo giuridico*, Milano: Comunità, 1965, pp. 127–34.
2. On this issue, see Hayek's criticism of legal positivism in general and of Kelsen's philosophy of law in particular, in *Law, Legislation and Liberty*, London: Routledge & Kegan Paul, 1976, vol. II, pp. 44–8.
3. B. Leoni, *Freedom and the Law*, Indianapolis: Liberty Fund, 1991, p. 22.
4. We might view the neo-liberal theory on spontaneous order as an extreme twentieth-century version of the great legitimating ideologies discussed by J.-F. Lyotard, in *La condition postmoderne*, Paris: Editions de Minuit, 1979.
5. As maintained by M. Dogliani (*Introduzione al diritto costituzionale*, Bologna: il Mulino, 1994, pp. 33–72), modern constitutionalism arises with the crisis of the principle of tradition, which renders an artificial organization of the political world both necessary and feasible.
6. Plato, *Statesman*, 268d ff.; for a historical and philosophical *excursus* on technocracy, see P.P. Portinaro, "Tecnocrazia", *Filosofia politica*, 3 (1995).
7. Plato, *Statesman*, 269c ff.; the cosmos may rotate in one way or in the opposite way, though not in both ways.
8. P.P. Portinaro (op. cit.) and D. Zolo, in his essay "A proposito di *Legge, legislazione e libertà* di Friedrich A. von Hayek", *Diritto privato*, 1 (1996), 2, note that Hayek, through his constitutional engineering suggestions – in the third volume of *Law, Legislation and Liberty* – ends up by endorsing the government of Guardians, which he previously declares that he thoroughly despises. Also Bruno Leoni (*Freedom and the Law*, p. 22), an Italian follower of the Austrian school with an anarchical-capitalistic penchant, enthusiastically endorses a law made by gentlemen, on the basis of the Roman law model.
9. G. Fassò, *Società, legge e ragione*, Milano: Comunità, 1974, pp. 13–52.
10. Ibid., p. 41.
11. It is worth underlining that it is possible to neglect the English parliament's role precisely because its power is deemed not to be the output of an agreed and wanted constitution, but rather an element of a given and immemorial tradition. See in this respect M. Fioravanti, *Costituzione*, Bologna: il Mulino, 1999, pp. 142–3.
12. R. Bellamy (*Liberalism and Modern Society*, Oxford: Polity Press, 1992, pp. 222–3) notes that Hayek, on the one hand, anti-rationalistically exalts spontaneous and non-planned evolution and, on the other, tries to assume a particular form of "spontaneous" evolution as a rigid evolutionary model.

13. R. Cubeddu, *Introduzione* to B. Leoni, *La libertà e la legge*, Macerata: Liberilibri, 1994, p. xii (It. tr. of B. Leoni, *Freedom and the Law*).
14. F.A. Hayek, *The Constitution of Liberty*, London: Routledge & Kegan Paul, 1960, pp. 11–21.
15. Ibid., pp. 118–30.
16. Ibid., pp. 71–84.
17. When Hayek claims that in a society of free men, where individuals can use their competences to achieve their aims, social justice is meaningless because the distribution of material benefits is not determined by human will, he applies exactly such a strategy (*Law, Legislation and Liberty*, vol. II, p. 96).
18. F.A. Hayek, *The Constitution of Liberty*, pp. 39–54.
19. B. Leoni, *Freedom and the Law*, p. 47.
20. F.A. Hayek, *The Constitution of Liberty*, pp. 29–30. It is worth quoting its original text: "the case for individual freedom rests chiefly on the recognition of the inevitable ignorance of all of us concerning a great many of the factors on which the achievement of our ends and welfare depends. If there were omniscient men, if we could know not only all that affects the attainment of our present wishes but also our future wants and desires, there would be little case for liberty. And, in turn, liberty of the individual would, of course, make complete foresight impossible. [...] Humiliating to human pride as it may be, we must recognize that the advance and even the preservation of civilization are dependent upon a maximum of opportunity for accidents to happen [...] All institutions of freedom are an adaptation to this fundamental fact of ignorance."
21. L. Infantino, editor of F.A. Hayek, *Conoscenza, competizione e società* (Soveria Mannelli: Rubbettino, 1998), includes this passage (see n. 21) in his anthology on Hayek, believing it to be important and illustrative.
22. F.A. Hayek, *Law, Legislation and Liberty*, vol. I, pp. 11–12.
23. Ibid., vol I, p. 38 (italics mine).
24. It is nearly superfluous to underline the assonance of such a claim with the theoretical and much more sophisticated work by N. Luhmann (*Soziale Systeme*, Frankfurt a. M.: Suhrkamp, 1988, p. 30).
25. F.A. Hayek, *Law, Legislation and Liberty*, vol I, p. 46.
26. Such reasoning conceals law's voluntary and political implications, and might prove to be useful to hide extra-legal power. It is by no chance that Hayek and Leoni's are severely critics of democrats, reformers, and revolutionaries who are ingenious enough to acknowledge the reality of those implications. As a result of their naturalistic outlook on society, Hayek and, even more, Leoni view formal political powers as the only cause of oppression. Freedom stands for no governmental coercion, thus leaving social relationships of power unaltered (cf. M. Stoppino, "L'individualismo integrale di Bruno Leoni", in B. Leoni, *Scritti di scienza politica e teoria del diritto*, Milano: Giuffrè, 1980, pp. xlvi ff).
27. F.A. Hayek, in *Law, Legislation and Liberty*, vol. I, pp. 1–7, explicitly states that spontaneous orders internally contain a typical law of their own.
28. Ibid., vol. I, pp. 70 ff.
29. Ibid., vol. II, pp. 56–7.
30. Ibid., vol. I, pp. 115–22.
31. Ibid., vol. I, pp. 80–1.

32. Hayek, however, adds a further element: all merely behavioural norms are negative, in that they always impose bans and quasi-obligations, which are not the result of voluntary activities, with the exception of family law (ibid., vol. II, p. 36) and a few other cases. Whereas norms establishing how to purchase or transfer property, make contracts or wills etc. only define the conditions under which the law grants the protection of the behavioural norms, rendering them open to sanctions and ensuring that relevant situations are legally recognized (ibid., pp. 34–5). Yet, this is irrelevant for our purposes, both because it is an empirical generalization and because many private law norms, especially when connected with family and marriage, directly impose (sometimes burdensome) obligations, even where there would be room for individual choice. See for instance the feminist critique – applicable to common law systems – in L.J. Weitzmann, *The Marriage Contract*, New York: The Free Press, 1981.
33. F.A. Hayek, *Law, Legislation and Liberty*, vol. II, p. 27.
34. See J. Waldron, "Particular values and critical morality", *California Law Review*, 77 (1989), 3, pp. 562–89.
35. On these issues, see above all Hayek's criticism of Leoni (*Law, Legislation and Liberty*, vol. I, p. 88n) as to the need for legislation (and thus for the State) to support the judicial function. On this matter Hayek follows C. Menger, *Untersuchungen über die Methode des Sozialwissenschaften und der politischen Ökonomie insbesondere*, It. tr. *Sul metodo delle scienze sociali*, Macerata: Liberilibri, 1996, p. 266); for a historical account see R. Cubeddu, "Sul concetto di Stato nella Scuola austriaca", *Diritto e cultura*, 1 (1998), pp. 3–35.
36. See in particular Hayek's foreword to B. Leoni *Freedom and the Law*.
37. B. Leoni, *Il diritto come pretesa individuale*, now in B. Leoni, *Le pretese ed i poteri: le radici individuali del potere e della politica*, ed. by M. Stoppino, Milano: Società aperta, 1997 pp. 119–33.
38. See G. Palombella, *Costituzione e sovranità. Il senso della democrazia costituzionale*, Bari: Dedalo, 1997.
39. M. Fioravanti, *Appunti di storia delle costituzioni moderne*, vol. I. *Le libertà: presupposti culturali e modelli storici*, Torino: Giappichelli, 1991, pp. 138–9.
40. See, e.g. B. Leoni, *Freedom and the Law*, p. 130: "the more we reduce the large room occupied by collective decisions in politics and law, with all the paraphernalia of elections, legislation and so on, the more we establish a situation similar to what prevails within the language ambit, within the ambit of the common law, of the free market, fashion, customs, etc. where *all* individual choices suit each other and no single choice is less important than others."
41. According to theories of spontaneous order, freedom can be hardly seen as something different from a descriptive and theoretical element, since the only admissible yardstick is the descriptive and theoretical one of evolutionary success. G. Marini, reviewing the Italian version of B. Leoni, *Freedom and the Law* in *Il pensiero politico*, 29 (1996), pp. 332–3, notes that "ethical matters cannot be assimilated to the genetic processes illustrated for law and even less for language (in line with a hidden trend in these pages), without introducing serious philosophical problems certainly affecting the most sensitive ethical domains, such as criminal law, politics, economy".