

Hayek's Legal Knowledge
Trevor Wedman

Friedrich von Hayek is best known for his critique against centralized economic planning. His main contention is not ethical or social in nature, but epistemological: Assuming that the goal of an economic system is the efficient distribution of resources among consumers and producers, it is essentially impossible for a centralized mind to possess the wealth of knowledge necessary to effectively distribute goods and services across the population as well as can be accomplished through the collective whole of individuals acting upon their individual desires through the means of a pricing system. Hayek makes a parallel argument in the realm of legal theory. Namely, posited law tends to work against the essence of the “rule of law” by placing in the competence of a centralized planner the normative task which is otherwise left to the collective of individuals within a given society. In an attempt to explain this position and to add a degree of legitimacy to Hayek’s argument, it should be helpful to reconstruct this position using articles from his *Individualism and Economic Order* and to argue from the principles laid out in the first volume of *Law, Legislation and Liberty*.

“The economic problem of society is thus not merely a problem of how to allocate “given” resources – if “given” is taken to mean given to a single mind which deliberately solves the problem set by these “data.” It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in its totality.” Hayek 78. This statement is an example of Hayek’s thesis that 1) social knowledge is necessarily dispersed among many minds and 2) the problem of social science, of which economics, but also law is part, is one of systematizing the dispersed knowledge as well as possible.

The Dispersion of Knowledge

In order for this first contention to make any sense, a crucial distinction has to be made between the object of knowledge in the hard sciences and that of the soft sciences. The object of the hard sciences is facts that are in every way independent of observation and the minds that observe them. Gravity existed before any scientists were around to know of a law of gravity. The collection of properties that we refer to as trees and rivers exist even in extremely remote locations where no human beings have found access. The

hard sciences make, not particular trees and rivers, but the properties which classes of these entities share in common, the object of their endeavor. These properties or laws are defined to be eternal and always valid by the sciences. Because of the mind-independent nature of these sciences, it is possible for distinct individuals to learn all that there is to know about, for example, the properties of neurons in the brain or the details of quantum physics. When it comes to wanting to know more detail about how to build a nuclear reactor, it would be ridiculous to take a poll of people's opinion of how to do so. Rather, the accepted solution is to consult the leading nuclear physicist or engineer. This might involve a team of such experts, but the research would involve no non-experts.

The object of the social sciences is completely different. While the object is also objective in the sense that several minds have the ability to know it, it is subjective in the sense that the facts that underlie the social sciences are mind-dependant. Searle calls this kind of fact epistemically objective and ontologically subjective.¹ Because these facts are mind-dependant, they change as minds change. This means that they are constantly in flux. The most obvious example of this is price. The price of corn in Kansas City is mind dependant. The price varies depending on how many farmers decide to grow corn and not soybeans, how many farmers decide to bring their corn to market in Kansas City and not Chicago, how many cattlemen decide to buy corn to feed to their cattle, how much British Petroleum decides to invest in its alternative energy program, and what the President decides to say about ethanol in his state of the union address, among many other factors. Whereas the elements underlying the fact of nuclear fission are static, the price at which corn is currently selling is as dynamic as the market participants that act to determine it. Because of this, the uneducated farmer in western Kansas knows just as much about the supply/demand relationship of a futures contract for September corn as does the PhD economist in Chicago, i.e. the x amount dollars that is the price.

This principle holds true across the social sciences, the mere fact of which should give us pause in calling them "science". It is clear that language, though studied in grammar school as if it were a hard science ("i" before "e" except after "c"), belongs to that realm of human knowledge which is epistemically objective yet ontologically

¹ So, for example, the pain that I feel when my heart gets broken is epistemically subjective (only I can feel it) and ontologically subjective (the pain depends entirely on my feeling the pain), prices are epistemically objective (they are capable of being known by many minds) and ontologically subjective (if they are not associated with any mind, then they do not exist), and the mountain that is called Everest is both epistemically and ontologically objective.

subjective. The fact that all language is contingent on those who practice it is wholly unsurprising. Languages develop seemingly spontaneously. Once developed they evolve, multiply and sometimes converge. While it is not clear exactly how all of this occurs, it is evident that the entire process is due to individuals somehow acting together. Each individual acts particularly in each instance. Some say “you”, some say “y’all” and the linguistic process occurs with the air of spontaneity that Hayek refers to as ‘the result of human action but not of human design.’ That is, nobody ever designed the English language even if that language, which today is called English, is the dynamic result of billions of individual minds acting in some way together over the course of centuries.

The ontological subjectivity, or mind-dependant nature, of social facts should not imply that all is spontaneous and nothing can be known, after all these phenomena are referred to by Hayek as spontaneous *order*. It is equally important to focus on the epistemic objectivity as it is to realize the ontological subjectivity of social phenomena. It is exactly because several individuals can know certain facts that these are social. Moreover, the epistemic objectivity of these phenomena mean that they can be studied and, to a certain extent, experts can exist who have an enhanced access to or perspective of these phenomena. Language can be learned without grammarians and yet grammarians, or economists, can be important in systematizing and making apparent the epistemically objective rules and particular facts specific to a certain language, economic system et cetera. It is only important that the “experts” do not invert the causal nexus. The object of knowledge is not to be found in a laboratory and then disseminated to individual minds as in the hard sciences. Rather, the source of the phenomena is with the minds themselves.

It is more contested whether law is a social science in the sense just described. It is well-known that all law is somehow contingent and that throughout mankind there are many different manifestations of the law. However, the subject of law is often treated in a very rationally constructive manner akin to the methods of the hard sciences. The supposition would be that the proper laws are there and ready to be discovered (ontological objectivity) and the state only needs to find the right expert to enact the right laws.² Insofar as there are no ontologically objective legal facts in the world, this supposition would have

² This was indeed the pattern of thought that led to the Napoleonic Code Civile as well as the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) in the early 19th Century and the German BGB in the early 20th. The fact that legislation in the American model purports to be democratic does not save it from being rationally constructive. Instead of enacting laws that aspire under the enlightenment ideal to being perfect for everyone as was the case with the code civile, ABGB and BGB, democratic legislators enact laws that desired by the simple majority party usually against the express desires of the minority party.

to be false. If there are ontologically objective legal facts, they would have to have always existed or they would have to have been once created but have perpetual existence. The former is commonly referred to as natural law and the latter is the kind of positive law that still exists today but which was created early on in history by the likes of Hammurabi, Dracon or Justinian. As to natural law, it is evident that, whether or not natural law exists, it is not possible to discover natural law through the scientific method. Insofar as natural law exists, it exists in the minds of individuals, is thus mind-dependant and is not ontologically objective.³ Regarding “perpetual” positive law, if we analyze the phenomenon carefully, we will realize that these facts are also not ontologically objective. It makes sense to say: ‘The law against murder has existed since the Code of Hammurabi.’ Likewise: “It is inconceivable that there could exist a state in which murder is legal.” However, the law against murder, or any number of laws that have survived throughout Western Civilization, is fundamentally different from the law of gravity. Whereas the law of gravity holds true independent of human beings, the law against murder does not. The laws of yesteryear exist today and will exist tomorrow only to the extent that individuals in the meantime have chosen and choose to accept such norms as having a normative effect upon them. From this it is hopefully clear that laws, to the extent they exist, exist only in the minds of individuals as epistemically objective but ontologically subjective.

So far there should be little controversy. Legal positivists generally do not hold that the laws are ‘written in the stars’ or that Hammurabi gave his legal code for the posterity of mankind. Rather, the issue is whether the source of the laws is in the several minds of individuals or whether it is in the single ‘mind’ of the sovereign, i.e. the king or legislature. It is implausible that the source of the law could be found in the king. Either the king makes the law because it is his divine right or because he is really smart. Because we have seen that the law cannot be found in the way that ontologically objective facts are found, it can be inferred that the laws that are in the king’s mind do not have their source in the king’s secret knowledge of God’s legislation. Therefore, the source of the law is not in the king’s divine right. The source of the law is also not in the king’s superior intelligence or virtue. Again, we know that, since there is no law to be found, the king’s intelligence could not assist him in finding the secret law, for example, hidden under the rocks of Stonehenge.

³ Note that this does not refute the existence of a divine law-giver. The assertion that natural law is necessarily not subject to the scientific method only denies the possibility of a Thomistic natural law. The sort of legal reality which Augustine might invoke, though mind-dependant and ontologically subjective, is wholly possible according to this conception. See *de Magistro*; cf. *Summa contra Gentiles*.

What is the intelligent king, with no secret access to the law, to do? The intelligent king would look to the law followed by his subjects and, in the interest of uniformity and efficiency, attempt to codify this law. However, the source of this law is not in the king's mind but in the minds of the several subjects. Of course, the king could simply decide to follow the law that is only in his mind, i.e. what he alone thinks is best, without regard for the legal knowledge dispersed among his subjects. To the extent that his law had no correspondence to that of his subjects, there would not be law in the kingdom, but rather that state of affairs that we generally refer to as tyranny. The source of the law can also not be in the "mind" of the legislature for the same reasons given vis-à-vis the king. (From now on, in order to maintain the conceptual distinction between the tyrannical "law" in the mind of the sovereign and the actual law in the minds of several individuals, the former shall be referred to as Gesetz.)

It is no defense of the Gesetz, that law, as its defenders would call it, is specifically a creature of the state determined by and conceivable only in light of the state's power to sanction those who refuse to follow the state's norms. Any such claim is ultimately based on a theory of social contract which is indefensible given the nature of society and the social facts which derive therefrom. Prior to social contract is necessarily a community of individuals capable of contractual obligation. Prior to the community of individuals capable of contractual obligation is a community of individuals who can interact with one another. Prior to the existence of interpersonal interaction is the existence of deontic commitments among individuals. And prior to this existence of deonticity is the existence within the minds of individuals of desire independent reasons for action. However, if there are already desire independent reasons for action, deonticity, and a community of interacting individuals, then the postulate of the social contract becomes superfluous. The origin and the persistence of society are already placed in the first social facts and the deonticity which holds them together. Whether or not this deonticity is given the name of law is definitional or semantic in nature. It is only essential to the argument that law has no basis in anything if not in norms that are in individual minds.

The Problem of Law

If the argument stands as written, then we are left with the somewhat novel conclusion that the norms of society are contained in the minds of the several individuals and not in the mind of the sovereign. What does this imply for jurisprudence? In itself

nothing is implied since jurisprudence is essentially a normative endeavor and Hume shows us that no conclusions can be drawn about what the law or our approach to law should entail based on the descriptions of the kinds of facts involved in social science. However, instead of arguing in absolute terms, let us instead proceed by way of hypothetical imperative and lay forth the founding assumption on which the argument must rest: the rule of law is to be preferred over the rule of tyranny.

On the Rule of Tyranny

The assumption is meant to be self-evident and thus not in need of defense. However, it is useful for our theory to consider momentarily the rule of tyranny. It seems likely that no pure form of tyranny has ever persisted over any significant time, space or population in the modern era. Regardless how undesirable the Nazi, Soviet or Maoist regimes of the 20th century were to many people, it seems that these regimes also organized their societies into collectives that were at least tolerable to most members even if this included disastrous consequences to significant minorities within the populations. Let this historical question be left open to historians. There are other reasons why pure tyrannies cannot persist or why there cannot be no law in the way defined above. A pure tyranny, the case where the Gesetz is only in the mind of the sovereign, is surely doomed to immediate failure. In such a case, not even one lynchman or general would follow the Gesetz out of any reason other than direct coercion. As soon as the coercion ceased, the Gesetzgeber would be brought down from power by others interested in not being coerced in the future.⁴ Naturally, there are realized instances of lesser degrees of tyranny which are mixed cases of law and Gesetz. Indeed, it is likely that all forms of society entail in some way a combination of Gesetz and law. For other reasons than with the rule of tyranny, the rule of law is seldom if ever manifest in a pure form. Some social forms resemble a band of robbers where, relative to the masses, the order is that of Gesetz, but relative to the band itself, the order is in the form of law.⁵ Without constitutional restraints, party politics would be only slightly better than a band of robbers along the spectrum of the rule of tyranny and law. Was the USSR not a case in which the Communist Party made law for all of its members and coerced all of the non-Communists under its rule to follow the Gesetz? The

⁴ Of course, it conceivable that pure tyranny could exist if the dictator/Gesetzgeber was both insane and perpetually awake and held his thumb on the atomic bomb that would automatically destroy all of sovereign territory.

⁵ Think of the internal consistency of scenarios such as found in *The Godfather* or *The Sopranos*. Why is it that Fredi's execution is accompanied by sympathy for Michael whereas normally fratricide is thought of as despicable?

idea is that the characterization of state action always depends on what is going on in the mind of the one who characterizes such action. In most cases, one man's law is another man's tyranny. If the assertion above is correct that pure tyranny can hardly ever exist, then perhaps the colloquial form of tyranny would be equivalent to that state of affairs where laws are made for the benefit of either a substantial minority or a majority of citizens without any regard for the impact or normative force of those laws on the others. This is a more accurate description of what occurred during the 5 year plans in Soviet Russia and it can serve as one guideline for that which the rule of law is to avoid.

On the Rule of Law

In the preceding paragraphs it has been maintained that law is only to be found in individual minds and that the term "rule of law" refers to the state of order in a society in which the source of the codified law is in the minds of the several individuals and not in the mind of a singular sovereign. This reasoning brings us closer to formulating a prescriptive theory of law, though we are just now embarking on the most difficult issue of modern Anglo-American legal theory: in a democracy the people elect representatives who enact laws on behalf of the people. This cornerstone of democratic theory is also the bedrock of the modern version of legal positivism advocated by H.L.A. Hart which serves as the main challenge to an Hayekian account of law. According to Hart, the validity of all law has its source in a "rule of recognition" by which citizens and other actors in a state make a rule of recognizing as valid governmental laws and actions that fulfill certain procedural and potentially substantive requirements. So, for example, in the United States federal laws are valid so long as they are enacted by an elected majority of Congress, executed lawfully by the executive branch and adjudicated by qualified federal judges. The rule of recognition focuses mostly on procedural requirements based on democratic processes. Because the ultimate authority and legitimacy of the government lies in its democratic nature, the focus of political concern is concentrated on political processes with the objective of ensuring that citizens and interest groups are not "disenfranchised" and that they are adequately represented in the process. As long as this is the case, the government and the laws are supposed to be legitimate because they are democratic.

H.L.A. Hart's rule of recognition is thought to provide legal validity to a system of norms. Similar to Hans Kelsen's basic norm, the rule of recognition is a dynamic principle

or, in Hart's terms, a secondary rule, capable of granting validity to most any and all substantive laws. This is to say that a society's rule of recognition functions to identify by which authority the primary or substantive rules of obligation may come into existence. It is through the 'secondary' rule of recognition that the laws are determined to be legally binding and it is through the secondary rule of recognition that a procedure is identified whereby the societal rule against murder is distinguished from the societal rule that men should bare their heads upon entering church.⁶

The rule of recognition is not a purely formal, epistemological postulate, but is an actually functioning and acknowledged part of a legal system. That is, the rule of recognition is based in the fact of the popular will. "For the most part, the rule of recognition is not stated, but its existence is shown in the way in which particular rules are actually identified, either by courts or other officials or private persons or their advisors."⁷ The identification of the rule of recognition occurs concretely in "the real world" and serves the common man as an actual reason for following the rules he shall follow. The rule of recognition is practical, has a socio/political function, and it can be said to originate in the minds of individuals thus satisfying the criterium of the dispersion of knowledge.

However, while Hart's rule of recognition coheres with the first part of Hayek's thesis, it is in the second part that the two thinkers diverge. In other words, it is implicit in Hart's theory that legal knowledge is dispersed among the citizens of a legal system for they are the ones who are ultimately responsible for the rule of recognition which is the source of legal validity. But Hart does not take this idea any further. For him the several minds play only a passive role vis-à-vis the laws and the legal system. They recognize it and give it legitimacy as such, but have no active role in determining any of the primary or substantive rules.

It seems that Hart does a more adequate job of finding a legitimate source of normativity for the legal system than does Kelsen or Austin, whose accounts are much more formalistic. Yet, Hart's account may still fail to provide the real foundation for law because it is doubtful that a *rule* of recognition in Hart's sense can truly be the source of normativity. In other words, it is doubtful that the rule of recognition is able to fully account for the normative effect of laws and legal actions such as judicial action. To

⁶ Hart, H.L.A. *The Concept of Law*. The description of Hart's notion of the rule of recognition will be taken primarily from the *Concept of Law*.

⁷ *Id.* at 98.

rephrase Hart's position in the framework of this paper: Hart acknowledges that law has its source in the minds of the several individuals and yet refuses to derive the content of that law from the several individuals instead deriving its content from the singular mind of the legislature subject to approbation/recognition by the several individuals.

It is in light of this mainstream Hartian theory of lawmaking that we turn to Hayek's second major insight: the problem of social science, of which economics, but also law is part, is one of systematizing the dispersed knowledge as well as possible. In the area of law, this can happen either through a system of legislation or through a system of spontaneous order. If the integration of the dispersed knowledge occurs through a system of legislation, then the legislation would have to work through democratic representation. Namely, each individual person would vote for another person who would pledge to enact the law that exists for that voter. That such a system could never function must be evident. First, the law that exists in an individual mind is hardly knowable to the individual himself let alone to any representative who would enact these concrete norms on behalf of the individual. Second, each legislator represents thousands if not millions of constituents such that his mandate could never be diverse enough to truly represent the law existing in each mind. Indeed, legislation as it exists in our system hardly resembles a lawmaking by the people. Rather, it is a sort of centralized legal planning, the organizers of which are subject to recall by a majority of the people if the majority disapproves. While this may be acceptable under democratic theory as an appropriate, if not perfect, check against tyrannical laws, or Gesetze, it is not conducive to the development of law as we have defined it above.

The alternative to lawmaking through democratically elected legislatures is the lawmaking that comes about through spontaneous order. It should hardly be surprising that the spontaneous order that comes about in the field of law is essentially the same order that in economics is called the "free-market." After all, the facts underlying both orders are social facts, the result of human action but not of human design. As seen above, the distinguishing characteristic of these facts is their mind-dependant nature. In economics, the desires that affect supply, demand and ultimately the price curve are mind-dependant. In law, the reasons for individual action that affect human interaction and on which adjudication and the common law are ultimately based, are mind-dependant. The criticisms that are valid against the centralized planning of prices, i.e. that no one mind or committee

of minds can ever know as much about the plans of economic actors as the actors themselves, are also valid against the centralized planning of adjudication, a.k.a. legislation.⁸

While Hayek's concrete vision of the legal order is not entirely clear, the following can be constructed to illustrate how a system of spontaneous legal order can function. The lion's share of "legal activity" occurs not in a legislature or in a courtroom, but in the banal and quotidian activities of ordinary individuals. This is the sphere of deontic formation and expression where the countless number of oughts and shoulds are negotiated. Only quite rarely do conflicts arise and only extremely rarely do irresolvable conflicts arise to the extent that judicial involvement becomes necessary. When a common law judge becomes involved, his method of decision-making is key to the persistence and development of the spontaneous order. In making his decision, he doesn't necessarily look for the economically efficient result *a la* Posner nor does he look for the "just" result *a la* Rawls, nor does he look for the popular result as would a legislature or a Hartian judge. Rather, the common law judge will apply that rule of conduct (norm) to the facts of the case which has the greatest degree of presence in the minds of individuals. How does the judge have access to this? The rule of precedence is the closest thing that exists. The precedential rule is a rule based on hundreds of years of judicial interaction with the actions and interactions of individuals. That the norms that existed in the minds of individuals from centuries past are identical or even comparable to the norms in the minds of individuals of centuries present is hardly self-evident. However, there are strong reasons for making such an assumption.⁹ The new rule which comes into effect with the present case is essentially the old rule that has been given a new character through new facts and a new cultural setting. This rule then becomes precedent for other rules and will be relied upon both as an implicit rule of the

⁸ Let it be noted that this argument is not to be associated with, and indeed stands in stark contrast to, the movement of law and economics. Law as spontaneous order, i.e. the common law, makes no presumption as to the desires or plans of individual persons and lets these actors develop their norms naturally only intervening on the amazingly few occasions when irresolvable conflicts arise. Moreover, the use of precedent allows the law to reflect the norms that exist in the community and more than likely determine the background normative assumptions (acquired through socialization) on which the litigants relied. In contrast, law and economics presumes the litigants to be homini oeconomici acting to maximize their wealth or a definite number of interests which the judge calculates in arriving at the economically efficient result. Though often engaged in at the judicial level, law and economics entails the sort of constructive rationalism that Hayek staunchly opposes and which is destructive of spontaneous order.

⁹ This argument, though much too extensive to be made now, depends on notions of background knowledge and common cultural heritage which are, if not entirely, mostly determinative of an individual's thoughts and actions.

society when individuals choose how to act in the future and as an explicit rule of the law when other individuals come into conflict and must rely on the judicial system. Though this is a very crude portrayal, it does give a glimpse into what, I believe, Hayek meant by law as a system of spontaneous order.