

RULE OF LAW AND THE WELFARE STATE

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ABSTRACT

Classical liberalism has always insisted on rule of law under general rules. However, "true generality" of rules has been an exceedingly evasive concept. Orthodox semantic requirements of generality cannot effectively constrain the pursuit of particular interests. Starting from some more or less Hayekian ideas this paper therefore tries to explore some more unorthodox ways of implementing a regime of truly general legal rules.

1. *Every constitution is a welfare state constitution of sorts*

If we grant certain rights to every citizen irrespective of the citizen's ability and willingness to pay for the legal services and if we insist that some fundamental rights be inalienable then the legal order is already a welfare state of sorts. Even in the minimal or nightwatchman state individuals receive certain legal services without reciprocal payment and at the same time are not allowed to trade their claims in mutual agreement. Rule of law as we commonly understand it presupposes *redistribution and regulation* and thus implies the existence of the normatively most crucial elements of a welfare state (cf. on this in detail Kliemt 1993).

Moreover, most of us will accept that for efficiency reasons every constitution must contain at least some rules for central rule enactment and rule change. For, if such power conferring rules were lacking, then, whenever the gradual evolution of law would lead into a dead end or external shocks occurred, this would require revolutionary breaches of the basic rule of recognition of a legal system (in the sense of Hart 1961) — at least if a swift answer were necessary. But the rough and tumble of revolutionary change is an extremely inefficient way of social adaptation

and in any case something that most of us would want to avoid at almost any price even if consequences in the very long run might be expected to be beneficial. Thus, again, most subscribers to classical liberal principles are generally willing to accept not only some state sponsored redistribution and regulation but the further welfare state element of a central rule of collective rule change.

According to the preceding line of argument we have good reason to expect that any state which embodies the principles of the rule of law as we commonly understand them will be redistributive and regulatory under some degree of centralized law making. A Hayekian constitution of liberty (cf. 1960) will be characterized to a lesser extent by such features while they abound in welfare state constitutions. Nevertheless the constitution of liberty and the constitution of a welfare state are located on a continuum. There is no principal dividing line separating moderately centralized, moderately regulatory and moderately redistributive systems from those that are non-moderate. But to say the latter does not amount to denying the existence of relevant differences. Not all relevant distinctions are matters of principle. Shades of grey matter as well. On the basis of a somewhat unorthodox interpretation of Hayek's basic principles of a constitution of liberty I shall now try to distinguish some of those shades.

2. Some views on equal treatment

Any system that guarantees formal equality treats like cases alike. Nobody who endorses basic principles of the rule of law could have a reasonable complaint against this kind of "equal treatment". The very concept of applying a rule would hardly be intelligible without it. However, most people go beyond that. At least implicitly they endorse the Aristotelian ideal that cases that are "relevantly" different should be treated unequally. True equality, they feel, requires to eliminate schematic ways of equal treatment. They insist that rules should be fine-tuned such that some pattern of treating unequal cases according to their specific merits will emerge from the application of the rules.

Whoever enters this course of action has moved away from the basic principles of a constitution of liberty already. For, the very moment that we allow for fine tuning the rules of the game on the level of rule enact-

ment we invite rent-seeking activities of particular interest groups. Seeking special favours in the name of "social justice" they will gradually destroy the generality and universality of legal rules and establish privileges. Therefore quite rightly the fine tuning of centrally enacted rules which grant specific rights to specific groups or individuals is not among the classical liberal ideals. The adherent of a constitution of liberty will insist that centrally enacted rules better ignore differences between cases. Individuals should always be treated *as if* they were alike. We know that they are unlike each other, we know that at closer inspection almost every case is unlike any other one; still in a constitution of liberty the formulation of rules should be based on the counterfactual assumption that all are like.

Nevertheless all present western legal systems increasingly tend to fine tune rules by means of central legislation. Perhaps this development is unavoidable at the very moment that rules of centralized rule change are introduced into a legal system. If that were true then any advanced legal system would of necessity tend to move towards the extreme welfare state end of the constitutional continuum. Still, before we accept this message of despair we might want to look for ways out.

Of Hayek's own suggestions to that effect that of installing a "third chamber" presumably received most attention. However, this proposal is so technocratic in spirit and so overburdened with problems like the "strategy proof" recruitment of members that I shall dismiss it straight away. Instead of this I shall subsequently rather pursue three other broadly Hayekian proposals: 1. Strengthening the requirement of generality of rules (in part 3.). 2. Strengthening intra-jurisdictional decentralization of law making (in part 4). 3. Furthering new forms of inter-jurisdictional competition (in part 5).

3. The constraint of true generality of rules

It seems that Hayek himself felt that the requirement of generality of law can be based on something stronger than semantic criteria of generality. But he never managed to give a convincing account of this intuition. Neither will I succeed in that regard but since it is certainly worth trying, let me try.

In a liberal democracy majorities will always find ways to argue that,

weighing the interests of all individuals concerned, just treatment requires that semantically general rules be such that they favour the majority. As long as we stick to traditional generality requirements there is not much that we could do about that. However, assume that we focus on material or objective pay-offs rather than on personalized utilities and require that individuals be treated equally in the literal way of receiving exactly the same material pay-off — regardless of any differences of the personal benefits derived. Then, with respect to shares in material pay-offs, legislation will conceivably face a stronger constraint. In order that this constraint becomes effective the “sameness” of equal treatment in law making must be one that can be captured in purely descriptive terms. Normative considerations, evaluations accounting for personal situations and circumstances have to be excluded to the possible extent.

To put it bluntly, if there is a cake to be divided then neither the individuals’ needs to get a piece of cake nor the utility they may be expected to derive from the piece must play any role. *The cake will be divided equally in terms of cake not in terms of the “utility” consequences of the allocation of pieces of cake.* Equality is not anymore defined in relation to the individuals’ personal situation, individual welfare, utility and the like, but rather in a *schematic* way neglecting inter-individual differences. In the formulation of rules equality takes precedence over considerations of justice. If we endorse such a requirement for the generality of legal rules this — at least where applicable — seems much stronger than semantic generality. But isn’t schematically equal treatment patently absurd?

I think that it is a telling fact that the most fundamental and distinctive rules of our western legal orders are very close to the kind of schematic equal treatment discussed before. For instance, every individual has the same right to protection against violations of her person, to legal defense, to sue, to acquire property (as opposed to a claim to an equal share in material wealth) etc. In every case sameness is very schematic. The equality is like the one Anatole France rejected when lamenting that the rich as well as the poor may sleep under the same bridges. But this kind of equality is at root of classical liberalism’s conception of the rule of law. Under rule of law the individuals are treated as if they were equal even though, as a matter of fact, they are not. The point is that the *legal* system is not allowed to make differences *even though* making differences might seem appropriate from a *moral* point of view.

The most crucial advantage of the requirement of schematically equal treatment is that it can be violated only in obvious rather than in concealed ways. In an open society this puts a check on rent-seeking via norm enactment. No expert needs to blow a whistle. For it does not take any expertise to see who is going to get special favours. As long as public opinion is opposed to special favours and privileges it will tend to oppose violations of schematic equality that favour specific groups.

Schematic equality does not exclude redistribution though. Quite to the contrary even very far reaching forms of redistribution could conform with the principle of schematic equality. For instance, as long as every individual would get exactly the same amount of money in a "citizens' basic income scheme", a negative income or a voucher system state sponsored redistribution would be in line with the principle.

Therefore those who object to redistribution per se will not be satisfied by the requirement of schematic equality of rules. Still, imposing the constraint of schematically equal treatment on central law enactment should have strong appeal from the point of view of the adherent of a constitution of liberty as one minimum requirement. It closes off some of the abuses of legislative powers underlying the regulatory and redistributive politics of our days.

However, regardless of its advantages, there remains a severe problem for the proposed strong interpretation of Hayek's views on general-ity. In *financing* redistribution we evidently cannot stick to the same per capita scheme of equality. We cannot use a per head tax. If we imposed the requirement of schematic equality on financing then redistribution would be impossible altogether.

Like many libertarian subscribers to natural rights views one might want to claim here that this is all too well because a constitution of liberty is completely incompatible with redistribution anyway. Hayek himself was not of that opinion, and rightly so. For, as pointed out before in a classical liberal order all individuals receive basic legal services protecting their so called "negative rights" unconditionally. There will always be individuals who could not or would not themselves afford to pay for legal protection but nevertheless are and under rule of law must be protected.

If we want to live in a state in which rule of law in the sense we are used to prevails then we cannot but tax differently. An ultra-minimal state with a monopoly of power protecting only those who can buy into the

protective scheme while prohibiting self-defense is not compatible with the classical liberal ideal of rule of law. As Nozick (cf. 1975) has argued so well in pursuit of the ideal of rule of law we must take the normatively most dramatic step and turn the ultra-minimal into a minimal state. This requires redistributive taxation and thus a violation of schematic equality. Still, within the realm of redistributive taxation there are relevant differences. Some forms of taxation are closer to schematic equality than others. And if the preceding view is correct we should strive for the most schematic of the viable schemes.

Now, the best approximation of schematic equality in redistributive taxation presumably consists in taxing every dollar equally. (Presently Leviathan would of course prefer German marks or even better Yen.) Levying a proportional tax with the same rate on every dollar earned may be allowed for in the constitution and at the same time the constitution may restrict taxation to that form. If the latter holds good on the side of taxation while on the side of spending or goods' provision through the public sector schematic equality prevails I will say that the rules of the system are *truly general*.

I suggest that it would be a great step towards a constitution of liberty if central legislation would be confined to truly general rules. These would close off to the possible extent preferential treatment of groups or individuals by the law.

The suggested interpretation of the Hayekian principle of generality of law would in principle leave "for grabs" almost all social wealth. In the most extreme case there could be a hundred percent "proportional" tax taxing away every dollar equally and redistributing it per head in equal shares. Nevertheless all the special privileges all the differential spending that normally are defended for reasons of social justice would be closed off under the restraint of schematic equality.

Under the strong interpretation of equality before the law Hayek's confidence that generality of law would constrain the pursuit of particular interest in welfare state politics seems quite warranted. Still the requirement of true generality law would presumably not solve all our problems of redistributory and regulatory politics. Additional more conventional measures of federalizing the legal order and of decentralization of the evolution of law should be taken into account as well.

4. *Intra-jurisdictional decentralization of law making*

Since my views on decentralization of law making are fairly conventional I can be quite brief. Every modern western legal order makes use of an extended system of courts which in one way or other develop the law by means of interpretation. However the extent to which central rule enactment interferes with such processes varies. In fact in most western legal systems the role of the courts as decentralized sources of new law is restricted by stronger and stronger central intervention.

Often intervention is defended with the argument that the parliament that is enacting rules centrally has democratic legitimacy for this while the courts do not. Within the democratic mind set all law should originate from democratic sources. Then, naturally, one must aim at subjecting as much of the law as possible to a central process of law enactment. Contrary to this view an adherent of a constitution of liberty should follow Bruno Leoni, as did Hayek (cf. instructively on that influence Liggio 1994), and insist that the realm of central law enactment or the scope of legislation should be as narrow as possible. For this would preclude rent-seeking by means of legislation.

But what of the realm of which we feel that it should remain in reach of the rule generating techniques of legislation? If majorities were unrestrained in this realm what could protect us against them?

Many adherents of a constitution of liberty will tend to draw attention to the beneficial effects of competition in that regard. Indeed whatever its defects may be intra-jurisdictional competition in form of the division of powers in society proved quite effective in securing individual rights and liberties. Modern constitutionalism was in no way a failure. Still, as far as the fundamental power of law enactment is concerned intra-jurisdictional might not be sufficient and inter-jurisdictional competition may be necessary. So let me finally speculate a bit on inter-jurisdictional competition in particular with respect to a classical liberal ideal of a future European union.

5. *Inter-jurisdictional competition*

The adherent of a democratic welfare state constitution must be quite reluctant about inter-jurisdictional competition. Inter-jurisdictional com-

petition reduces central collective, in particular democratic control over results. On the other hand, inter-jurisdictional competition seems to have formed an essential element of what we nowadays tend to regard as the "European miracle" (cf. Jones 1981 and Rosenberg and Birdzell 1986). Still in view of the fact that European history is a history of wars and of the less peaceful forms of inter-jurisdictional competition we might wonder whether this process could not be improved.

5.1. Traditional forms of inter-jurisdictional competition

In a way, pursuing such a theoretical enterprise is not very new or original. It is what the American federalist and anti-federalist papers were already all about. Still, the American constitutional fate may not make us too optimistic with respect to the stability of federal structures. A system that started with strong forms of inter-jurisdictional competition nevertheless ended up with a very high degree of legal centralization which was brought about by central judicial as well as by central political institutions. The issue is whether Europe will fall apart again, whether we will create another welfare state Leviathan or whether we can seize what James Buchanan called the "European constitutional opportunity" (cf. 1990).

Not to impose a constitution but rather to let it evolve in a competitive process must seem appealing to the Hayekian. Still, in view of the European experience of warfare we must admit that not all forms of competition are beneficial. We cannot simply throw up our hands, lean back and leave it to any competitive process whatsoever to determine which of several possible constitutions will be the winner. For instance if in the inter-jurisdictional competition some jurisdiction should restrict its citizens' rights of freedom of movement, the freedom of movement of goods, capital and services then this jurisdiction can compete in ways that almost completely leave out of account the citizens as individuals. Moreover its internal constitutional structure more likely than not might develop in ways that threaten its neighbours.

This raises the question of whether or not we can conceivably construct a framework imposing restrictions on otherwise sovereign jurisdictions and their competition such that certain risks are eliminated and the individual citizens become crucial players in the competitive process.

This question is a very tricky one. It involves great risks since in restraining sovereignty we quite necessarily create new central authorities. Moving in this direction we may end up putting all eggs into one basket, so to say. If central authority runs wild it will do so on a greater scale. On the other hand, as Europeans we are quite willing to put all eggs in one European basket anyway and quite naively sometimes. So is there any framework for constitutional competition that perhaps might minimize the risks involved?

5.2. An outline of a constitution for constitutional competition

In addressing this question let me begin with the following working hypothesis: If there can at all be legal orders in which the rule of law prevails, and if we can trust to a certain extent in their factual constitutional stability then we should have good reason to assume that federal systems of such legal orders can be *relatively* more stable legal orders than the legal orders of which they are composed. To put it slightly otherwise: All social rules can be broken or bent, but *if* we assume that under certain favourable circumstances one can trust that certain rules will be observed and will be in place for a while then one should conclude that adding another layer of rule enforcement may make stable enforcement even more likely.

More specifically assume that there are n legal orders $n > 2$ — presumably at least 5 — which all are conforming with the basic principles of rule of law including the division of powers in society. Assume that a treatise of federation among them is formed in the following way (for a more thoroughgoing analysis of the following argument cf. Brennan and Kliemt 1994):

0. None of the legal orders can on itself entertain the slightest hope to win an all out war against a majority of the other orders. And, on the other hand, a coalition of more than two thirds of the states will have overwhelming force in any unfriendly encounter with any of the other states.

1. In the international treaty of federation it is specified for every state that it is under an obligation to take part in an intervention in any of the states that are part of the treaty if a two thirds (or perhaps three quarter) majority of states comes to the conclusion that certain basic rights — which are explicitly laid down in the treaty — have been or are violated

in one of the nations that are part of the compact. All these rights must be of the form of so-called negative rights, in particular securing freedom of movement goods, capital, services and people as well as freedom of expression, press or information in general.

2. The rules of intervention, its conditions and limits are included as "national" law in each of the several federal states' constitutional codes. In each it is specified that intervention is legitimate for the sole purpose of enforcing the explicitly enumerated basic citizens' rights (in particular freedom of movement) that are part of each of the constitutions of the members of the federation.

3. For membership in the federation it is required that basic rights, basic institutional structures and the appropriate intervention clauses are part of each prospective member's constitution — including judicial review by the constitutional courts of each member state.

4. Pending on a referendum system to be worked out in detail new jurisdictions may form by seceding from larger ones and secession from the federation itself is also allowed if approved in a referendum under some super-majority.

5. An obligation for mutual aid in defense against outside aggression may be specified in analogous ways.

Now, what has been said so far is not even an outline of an idea. It is merely a kind of hint. Still as long as we can have any hope that nations with an appropriate basic legal framework will by and large stick to their internal rules it should at least be regarded as conceivable that basic citizens' rights might be safer in a framework like the one outlined before. If according to the specifications in the internal constitutions and the other legal set up in each state we have some good reason to expect that state authorities will basically play by the rules we should expect that they will act that way with respect to interventions into other states' internal affairs too.

Since it is very unlikely that the legal orders in a majority of states "go wild" *simultaneously* it seems plausible that the powers to intervene will not be abused because the majority qualification among *states* cannot be met. Moreover, the well specified threat of intervention will in itself have deterrent effects in the "right" direction. Since all states should have at least some kind of own army, intervention will not be tried lightly. There might be some forces of the central authority but only of a strength the weakest single member state would have. In any case the central

authority must not be in a position to go ahead and to enforce certain standards all on its own. Finally, the exit option or secession clause will keep governments on track.

All these arguments presuppose three things: 1. There is no monopoly to having armies and armed forces within the federation (even though the legitimate use of force is restricted to certain purposes.) 2. All the member states must have an appropriate size such that equilibria can be assumed to be stable because none of them is too large to be controlled by the other states. 3. We must assume that some degree of stability of the rule of law and the minimum content of a liberal constitution is possible in each of the several sovereign jurisdictions. (However, if we would not assume the latter why care for sovereignty of a jurisdiction at all?)

If all these conditions are met we may hope that within a somewhat more realistic framework of inter-jurisdictional competition (as opposed to the utopian Nozickean one in 1975 chap. 9) a constitution of liberty might emerge spontaneously. If it even then would not emerge and more extreme welfare state constitutions would be the winners throughout this would be a telling fact too.

6. *Concluding remark*

Since most subscribers to more encompassing social and cultural rights are subscribers to the fundamental negative rights as well they hardly could complain against an enforcement of these rights in all jurisdictions. Then being the winner in a inter-jurisdictional competition respecting the most fundamental negative rights would be about the strongest argument in favour of any constitution — and from an evolutionary point of view perhaps the only one. I trust that in a process of peaceful inter-jurisdictional competition “history” would come down strongly on the side of constitutions of liberty or very minimal welfare states based on truly general laws and a high degree of decentralization of rule and decision making in society. People with different preferences may expect different results. But whatever may emerge from non-violent competition between states that respect the most fundamental negative rights that we associate with the rule of law should be acceptable.

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