

## **A CRITICAL ASSESSMENT OF THE LEGAL PHILOSOPHY OF F.A.**

### **HAYEK**

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#### **ABSTRACT**

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*F.A. Hayek's contribution to economics has been widely acknowledged. His writings in support of classical liberalism have provided many states with direction for calibrating their economic systems. In the shadow of his Nobel Prize in Economics, there is a substantial body of his work on law that deserves attention. The initial sections of the paper are a brief recollection of the primary tenants of his legal theory. Hayek who advocated for free markets and laissez-faire economics, had kept these ideas at the center of his legal theory. He had emphasized on the importance of liberty. To safeguard it, he had proposed a limited government primarily driven by customary rule-based wherein the scope of legislation is limited. His legal work is extensive, to the point of formulating a model constitution for newer states. Nonetheless, even with flashes of excellence, his theories are not without flaws. There are several points of contention and contradictions that this paper will discuss. For instance, his apparent disdain for constructive rationalism but agreements on points of convenience. His assumption of custom as a better solution than legislation and his attempt to equate custom with common law, among others, are discussed by the author in the latter part of the paper.*

**Keywords:** *Hayek; Liberty; Constructive Rationalism; Custom; Economics; Common Law; Model Constitution*

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## A CRITICAL ASSESSMENT OF THE LEGAL PHILOSOPHY OF F.A. HAYEK

### *Background of F.A. Hayek's work*

It says a lot about F. A. Hayek's influence on the interface of law and economics that he is ninth out of 150 well-known economists in terms frequency citations of his work is in legal journals.<sup>1</sup> Friedrich August von Hayek was an Austrian polymath who contributed to economics, law, and philosophy from the mid- to late-twentieth century. He had held positions at the University of Chicago and the London School of Economics.<sup>2</sup> Despite having early success as an economist, for which he was later awarded the Nobel Prize in 1974 his literary contribution to law has been consistent throughout his career. Hayek's ability to examine law and society without being constrained by the libertarian economics he stood for was his defining quality. His work on law is extensive, spanning the entire spectrum of legal theory. From theorizing about the origins of law to developing his own version of a state's constitution. Hayek's legal philosophy is based on his liberal economic outlook<sup>3</sup>; skepticism of the expected impact of the government spending<sup>4</sup>; belief in the market's ability to spontaneously order itself<sup>5</sup>; and his aversion for constructionist rationalism<sup>6</sup>. His philosophical genius rose to the public eye through his work "*Road to serfdom*". In it he frowned upon the implications of a centralized planning of the market on individual liberty. He had also cautioned that such socialism will invariably lead to totalitarianism.<sup>7</sup> Hayek's model legal regime keeps liberty and a free society at its core which was the central argument of his later work "*Constitution of Liberty*". He further expanded it in his magnum opus "*Law, Legislation, and Liberty*."

His central idea, which resurface in all of his writings, is his argument that socialism is unworkable. He reasons that socialism necessitates more information than any central board can possibly process, making it hungry for more and more power and ultimately leading to

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<sup>1</sup> M. Todd Henderson, *The Influence of F.A. Hayek on Law: An Empirical Analysis*, 1 N.Y.U. J.L. & LIBERTY 249, 284 (2005).

<sup>2</sup> Bruce J. Caldwell, *F.A. Hayek British Economist*, BRITANNICA ENCYCLOPAEDIA, (May. 04, 2022) <https://www.britannica.com/biography/F-A-Hayek>.

<sup>3</sup> Samuel Taylor Morison, *A Hayekian Theory of Social Justice*, 1 N.Y.U. J.L. & LIBERTY 147, 227 (2005).

<sup>4</sup> DONALD J. BOUDREAUX, *THE ESSENTIAL HAYEK*, 41-49 (Fraser institute, 2014).

<sup>5</sup> Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945). [hereinafter Hayek, *Knowledge*]

<sup>6</sup> FRIEDRICH A HAYEK, *LAW, LEGISLATION, AND LIBERTY*, 3 (Routledge, 1982) [hereinafter HAYEK, *1 Law*]

<sup>7</sup> FRIEDRICH A HAYEK, *THE ROAD TO SERFDOM*, 9 (Routledge Classics, 2001).

totalitarianism.<sup>8</sup> He purports that the capacity to summon, process, and utilize such information only lies in a free market mechanism. Here individuals are connected with others by the collective consequences of their individual actions. They work independently and have sufficient liberty to choose their course of action based on their own wisdom, circumstance and local knowledge.<sup>9</sup> An unfree individual under state control will have a reduced ability to seek out and act on such local information, stifling their own growth. Resultantly, it will reduce the entire system's productivity. With spreading of the job of acquiring and responding on information among huge numbers of people, no single person or body is burdened with having to acquire and utilize more knowledge than would otherwise be humanly possible.<sup>10</sup> Hayek had asserted that such liberty and decentralization makes communication more efficient and makes it possible to make the most desirable use of resources, making it more productive than any other arrangement.<sup>11</sup> Liberty acting as the biggest facilitator in this entire arrangement, seats itself at the top of Hayek's pecking order of virtues. This understanding of self-ordering capacity of market is where Hayek's notion of liberty takes root, which he then extends to his legal philosophy to construct the base of his theory of law. Liberty is both the means and the end of Hayek's legal theory.

The purpose of this paper is to shed some light on Hayek's understanding of an ideal legal order and to attempt a contemporary critique of it, while determining the relevance of Hayek's ideas in the present context. The *mid-section* of this article explains in brief the central tenets of his legal theory. The *end section* is the authors attempt of a pointwise examination of the various aspects of Hayek's legal philosophy.

### ***Hayek's Legal Theory***

Hayek's legal philosophy carries in its core the '*rule of law*'. Hayek's conception of rule of law requires that laws should take the form of universally applicable general principles.<sup>12</sup> As per it, the powers of State is limited as it can only apply these prescribed general principles to all

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<sup>8</sup> *Id.*

<sup>9</sup> Hayek, *Knowledge*, *supra* note 6, at 519.

<sup>10</sup> *Id.* at 530.

<sup>11</sup> *Id.* at 526.

<sup>12</sup> FRIEDRICH A HAYEK, *THE CONSTITUTION OF LIBERTY, THE DEFINITIVE EDITION*, 310 (Ronald Hamowy, The University of Chicago Press, 2010).

individuals. It has no authority to issue directives separately to anyone.<sup>13</sup> Under this system individuals can pick and pursue their personal goals within the boundaries of these universal laws. Their liberty is restricted only by the corresponding freedom of other individuals. The government of such a state based on rule of law is a '*limited government*'; which Hayek argues is the only '*decent*' form of government that can be possibly realized in any political system.<sup>14</sup> Hayek's legal theory prescribes two ways of establishing rules. First one is in which rules are dictated from top down by a law-making body comprising of experts which formulates the best possible set of norms with the help of reason.<sup>15</sup> The other approach of establishing rules is by custom.<sup>16</sup> Among both, Hayek's disdain for '*constructionist rationalism*'<sup>17</sup> leads him to see customary law as a more valid source than law enacted by an expert body. Custom is preferable because it is the outcome of natural spontaneous growth. He purports that a deliberate design through legislation has a potential to undermine liberty and should thus be backed with caution.<sup>18</sup>

### **Law and Legislation**

Hayek's legal theory is notable for challenging the notion that all laws controlling human conduct are a result of legislation. He contends that "law is older than law making"<sup>19</sup> building upon the perspective of the historical school of jurisprudence. He asserts the invention of the legislation happened relatively late, unlike law itself, which was never 'invented' in a similar sense.<sup>20</sup> He differentiates between the two and puts greater faith on law. He accepts the argument put forth by common law theorists that common law was superior to legislation because it was the product of centuries of human deliberation.<sup>21</sup> Hayek observes that individual liberty has chiefly flourished in common law systems.<sup>22</sup> The common law advocacy is consistent with his notion of spontaneous order. It is also consistent with his resentment of the cartesian understanding which suggests that whatever is beautiful was created with a specific intent to achieve it. He dismissed the ability of a human mind to know clearly what it was doing

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<sup>13</sup> *Id.* At 315.

<sup>14</sup> FRIEDRICH A HAYEK, 3 LAW, LEGISLATION, AND LIBERTY, 11 (Routledge, 1982) [hereinafter HAYEK, 3 Law].

<sup>15</sup> Hayek, 1 *Law supra* note 7, at 3.

<sup>16</sup> *Id.* at 46.

<sup>17</sup> "Cartesian tradition of philosophy also known as. constructivism, as per which human institutions are the result of deliberate will put into action for the sole purpose of deliberate ends."

<sup>18</sup> Hayek, 1 *Law supra* note 7, at 46.

<sup>19</sup> *Id.* at 73.

<sup>20</sup> *Id.* at 72

<sup>21</sup> Leonard P. Liggio, *Law and Legislation in Hayek's Legal Philosophy*, 23 Sw. U. L. REV. 507, 527 (1994).

<sup>22</sup> HAYEK, 1 *Law, supra* note 7, at 94.

and therefore questioning its capability in understanding the consequences of laws enacted by them.<sup>23</sup> He has concluded that as the human mind cannot predict its own development so the growth of the human mind is based on the development of civilization. Hayek likened legislations as a shot in the dark and that is why his legal theory advocated a very limited scope of legislative power, handled exclusively by a set of carefully elected field specialists.

### **The Model Constitution of Hayek**

Hayek's ideal constitution is basically a *superstructure* built to enforce existing concepts of justice and not to define them. It presumes the presence of a system of fair standards and provides a mechanism for their consistent enforcement.<sup>24</sup> It is reflective of his emphasis on liberal constitutionalism and a limited government. Hayek attempts to demonstrate how power separation may act as the most adequate way to minimize the influence of interest groups on rule making.<sup>25</sup> He constructs it so to shield the individual from majoritarian influence and undue state coercion. His constitution had two main characteristics:

### **Minimal Political function**

The political role of his constitution is essentially formal. It prescribes the minimum standard to which a rule must comply and does not set out substantial limitations on state power.<sup>26</sup> By not laying a fixed set of rules it provides room for the accommodation of spontaneous orders and the evolution of society's culture.

### **A Bicameral Legislature**

Hayek's bicameral legislature consists of two wings, The 'Legislative Assembly' with responsibility for governing the conduct of individuals and the governmental jurisdiction through legislation. The public policy is to be formulated by another body. Governmental Assembly'.<sup>27</sup>

Hayek's conception of the eligibility criterion for Governmental assembly is based existing parliamentary bodies<sup>28</sup>. However, for the Legislative Assembly, it's a bit peculiar. For

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<sup>23</sup> *Id.* at 38.

<sup>24</sup> HAYEK, 3 *Law*, *supra* note 15, at 38.

<sup>25</sup> *Id.* at 107.

<sup>26</sup> *Id.* at 109.

<sup>27</sup> *Id.* at 109-110.

<sup>28</sup> *Id.* at 119.

Legislative Assembly, he wishes to exclude career politicians and suggests members of fairly mature age, distinguished in their fields of work, and given a minimum tenure of 15 years upon election.<sup>29</sup> He also makes the right to vote for the Legislative Assembly limited to those of mature age.<sup>30</sup> According to Hayek, such a system would allow for less interference from interest groups in lawmaking since it would be handled by politically neutral people, putting a check on majoritarian threats and powerful vested interests.<sup>31</sup>

### *A Critical Assessment of Hayek's Legal Theory*

#### *Hayek's Conception of the Common Law*

Hayek's legal theory is founded on his regard for custom because of its spontaneous origins as a true "law of liberty"<sup>32</sup>. To demonstrate the efficiency of customs, he uses common law as an analogy throughout his works. A success story, common law was instrumental in establishing the liberal principles of justice in contemporary legal theory. Hayek tries to credit the reason of common law's liberal nature, to its spontaneous origins.<sup>33</sup> He attempts to attribute this feature to the entire customary law emphasizing on common law as a law that promoted liberty. Hayek therefore implicitly holds that since common law is customary law and common law is liberal, customary law must also be liberal. However, in order for this argument to pass an initial scrutiny, common law must first be proven to be customary law in Hayekian sense. With a proper assessment of common law, it becomes clear that common law is not a realistic representation of customary law, and that Hayek's analogy is flawed.

*Prof. Hasnas* argues that Hayek deems any law which is not a legislation as a law of liberty. He thus characterizes two forms of law, a law brought by legislation and a law of liberty.<sup>34</sup> Hasnas contends there are two forms of non-legislative law: customary law and common law, and what Hayek refers to as the law of liberty is a hybrid of the two.<sup>35</sup> Hayekian definition of a custom is that which is made without a conscious design i.e., without any constructionist rationalism. However, the same cannot be said for modern common law which has been consciously shaped through conscious directed interventions of judges. For instance, For the

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<sup>29</sup> *Id.* at 111-114.

<sup>30</sup> *Id.* at 113.

<sup>31</sup> *Id.* at 111-116.

<sup>32</sup> HAYEK, *1 Law*, *supra* note 7, at 110.

<sup>33</sup> *Id.* at 86.

<sup>34</sup> John Hasnas, *Hayek, the Common Law, and Fluid Drive*, 1 N.Y.U. J.L. & LIBERTY 79,80 (2005).

<sup>35</sup> *Id.*

entire history of the common law, the permissibility of plea bargaining was entirely dependent on the presence of remorse in the defendant. However, in the decision of *Cain*<sup>36</sup> the Court removed the essentiality of remorse openly validating the administrative basis of giving a discount in the sentence. Judges have continuously shaped common law through conscious designs through their own assessment of the needs of society, evolving moral sentiments or understanding of fairness. A conduct bordering on the nature of a legislation. Conscious human intelligence has played an important role in guiding the common law. Making it a tad different than an organically evolved custom.

Hayek's confusion seems to stem from the overt influence that classical common law theory had on him. Wherein legal fiction was designed to perpetuate the idea that judges didn't themselves make the law and merely applied the unwritten law used since time immemorial<sup>37</sup>. However, modern interpretations of common law have moved away from the dogmatic assumption that judge-made law is simply a declaration of existing law. Instead, judges have been given individual responsibility for their decisions.<sup>38</sup> Hayek, a twentieth-century economist, should had been aware of such developments.

Hayek decision to subscribe to the classical view appears to be an act of convenience. However, this weakens his argument of objective rules of just conduct spontaneously emerging around a customary law without any conscious human supervision. That when his model prototype of a customary law itself has elements of constructionist rationalism apparent in it.

### **The Wisdom of Interventionist Structures**

As per Hayek, customs are a reliable and wise source of law, and he critical of legislation created by an institution. However, it is also true that many customs develop as a result of interference from state structures. Where a custom could be traced back to a structure, It is clear that a custom originated from the wisdom of the structure. The wisdom of the structure in initiating that custom, cannot be marked down. Otherwise, it shall be comparable to claiming that the water is clean but that the source of the water is not. Hayek's confidence in the wisdom of a custom upon that of an institution is not plausible.

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<sup>36</sup> R vs Cain, Crim. Law Rev. 464 C.A. (1976).

<sup>37</sup> MARGARET DAVIES, ASKING THE LAW QUESTION, 45 (Thomson Reuters, 2017).

<sup>38</sup> Id. at 70.

### **Commitment to General Rules**

The possibility of treating people differently who are not in similar circumstances is eliminated by Hayek's theory of general rules. It may in his opinion remove the possibility of arbitrariness but it also removes the possibility of existence of a welfare state. As a state cannot differentiate, it cannot make schemes and law targeted at a specific sect of people which are in need of states assistance. It serves equality, but defeats equity. Reservations and welfare schemes won't stand test of constitutionality under the Hayekian scheme of Law.

A further consequence is that laws cannot be created to deter something, until it violates a general rule. For instance, dumping of foreign goods cannot be restrained by a law until a general rule is found to prevent it without effecting the desirable outcome of import of needed goods.

### **Fragility of Rule of Law**

Hayek's rule of law ideology has a 'doctrinal cast'<sup>39</sup> which deviates from his position as an anti-constructionist. In Hayek's view, the rule of law primarily concerns the form and not the contents of the law.<sup>40</sup> He leaves the contents open to cultural evolution and spontaneous ordering. However, the distinction he makes between spontaneously evolved change and constructivist intervention is not clear. In a society, a single change may be understood differently by different people. Where a constructionist intervention to one may appear as a spontaneous change to another. Prof. Timothy Sandefur comments, the "Spontaneous order is therefore in the eye of the beholder"<sup>41</sup> The distinction between the two cannot withstand objective scrutiny hence rendering Hayek's conception of rule of law fragile.

### **Problem with Custom as a Reliable Normative Source**

Hayek is criticized of not being enough critical of custom as a norm.<sup>42</sup> Prof. Richard Posner gives out two main problems with customs. First are many practices that are damaging to

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<sup>39</sup> Richard A. Posner, Hayek, Law, And Cognition; 1 N.Y.U. J.L. & LIBERTY 147, 151 (2005).

<sup>40</sup> HAYEK, *1 Law*, *supra* note 7, at 48-51.

<sup>41</sup> Sandefur, Timothy, *Some Problems with Spontaneous Order*, 14 Independent Review 5, 23 (2009).

<sup>42</sup> John Gray: *The Friedrich Hayek I knew, and what he got right - and wrong*, THE STATESMAN (July 30, 2015), <https://www.newstatesman.com/politics/2015/07/john-gray-friedrich-hayek-i-knew-and-what-he-got-right-and-wrong>.



society are often supported by customs.<sup>43</sup> For instance: customs evolved by corporates of forming cartels or indulging in other unfair cooperative practices without infringing any general rule.

Second problem that Posner raises is that customs are ‘*acephalous*’ and hence changes very slowly due to lack of an institution to guide it towards change.<sup>44</sup> Customs fails to keep up when the social or economic changes occur rapidly, and as a result acts as a hindrance to progress.

### **Judicial Activism**

Hayek’s credence of common law and his acceptance of the argument of classical common law advocates that Judge job is only limited to ensuring that whether the questioned conduct conformed to the rule in place.<sup>45</sup> Hayek’s idea of common law doesn’t fit with its ‘judge made law’ connotation attached with the common law. For Hayek, a judge’s responsibility is to enforce the expectations created by the custom.<sup>46</sup> So any judge acting outside this expectation in pursuit of “socialism”<sup>47</sup> is not a judge Hayek would prefer in his regime. However, Modern democracies that have benefited greatly from judicial activism and has an essential feature of the modern democracies. Discounting the role of the judges is problematic.

### **The Very Concept of a Model Constitution**

Although Hayek puts it clearly that his constitution is meant to be seen as an ‘*intellectual emergency equipment*’<sup>48</sup> which can be used by states with a total breakdown of law or in international organizations or new democracies<sup>49</sup>. However, by designing a constitution Hayek has tried to engage with constructive rationalism, a principle which he has despised, making his model constitution incompatible with his own philosophy. Hayek establishes standards and benchmarks by using constructionism, for instance, the age at which a person should be considered mature enough to vote, which is 45 years as per him.<sup>50</sup> Also his drastic redesigning

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<sup>43</sup> Posner, *supra* note 41, at 151.

<sup>44</sup> *Id.* at 152.

<sup>45</sup> HAYEK, *1 Law, supra* note 7, at 86.

<sup>46</sup> Posner, *supra* note 41, at 150.

<sup>47</sup> *Id.* at 121.

<sup>48</sup> Hayek, *3 law, supra* note 15, at 151.

<sup>49</sup> *Id.* at 108.

<sup>50</sup> *Id.* at 113.

of the parliamentary structure,<sup>51</sup> is different from any prior customary form of representation. *Prof. Gray* succinctly puts “his scheme for an ultra-liberal constitution was a prototypical version of the philosophy [constructive rationalism] he had attacked”<sup>52</sup>

### **Hayek’s Concept of a Legislative Assembly**

Hayek’s concept of legislative assembly has uncanny similarity to the Plutonic concept of ‘Philosopher Kings’.<sup>53</sup> A group of special people, elected by special people for an especially long tenure. Hayek’s noble intention behind this body is to break the influence of special interest groups in law making and preventing it from benefiting only a special set of people. However, apart from the practical difficulties of realizing such a setup, the success of this setup is based on many implicit and refutable *assumptions* of Hayek. *First* assumption, that maturity depends upon the age of individual. *Second*, that without any political affiliations, elected officials will be neutral, with no inclination towards any interest group. *Thirdly*, such non-political elected individual will be able to recognize the truth, and act on principles and not on intention; *fourth* a long tenure prevents affiliations. Such assumptions are *prima facie* fallacious and constructionist.

### **Rise of Socialism and Planned Structures**

The success of Welfare states dent Hayek’s rhetoric that socialism will invariably lead to totalitarianism. The Scandinavian states along with other states represent a shining example of success of socialist policies in establishing equity without turning totalitarian. Even in Economics there is enough imperial study to suggest that socialism is one of the quickest ways to get results; For instance, the Nobel prize winning study of Dr. Abhijeet Bhattacharya wherein the immunization rates of a selected class went up upon distribution of incentives.<sup>54</sup> The emerging legal trends even in traditionally capitalist economies represent a socialistic touch. For instance: Free vaccination programs around the world.<sup>55</sup>

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<sup>51</sup> *Id* at 109.

<sup>52</sup> Gray, *supra* note 44.

<sup>53</sup> Melissa Lane, *Philosopher king*, BRITANNICA ENCYCLOPAEDIA, (Jun. 07, 2016) <https://www.britannica.com/topic/philosopher-king>.

<sup>54</sup> Editorial team, *Economics of poverty: On Economic Sciences' Nobel*, THE HINDU (Oct. 15, 2019) <https://www.thehindu.com/opinion/editorial/economics-of-poverty/article29683404.ece>.

<sup>55</sup> Sangeeta Ojha , *Free Covid-19 vaccination for all citizens in these countries*. LIVEMINT (Dec. 4, 2020) <https://www.livemint.com/science/health/free-covid-19-vaccination-for-all-citizens-in-these-countries-check-here-11607063140836.html>.

Centralized planning has also become more productive than it was in 20<sup>th</sup> century due to better channels of networking, resources for processing information and increasing uniformity in the society. With advent of globalization the problems states face has also homogenized which need more interference from central structures for resolution. For instance: the Covid 19 pandemic. Also, with rise of Big Multinational Capitalist structures, the need for a strong center has become much more important so as to maintain a balance of power. India's vaccination program is a good illustration wherein a strong center managed to bargain better deals with the big pharma, but the states given their inferior bargaining capacity were subjected to exorbitant amounts for agreements on for securing vaccines.<sup>56</sup>

### **Limitations of Spontaneous Order**

Hayek confidence on spontaneous order is implicit in his legal philosophy. He concludes that formalism will be lesser productive, than individuals who rely on local knowledge and intuition.<sup>57</sup> However, Hayek's putting of it as a rule of thumb is problematic. With the advent of information technology, the issue with his contention becomes even more apparent. For example, a formal knowledge with from the Global positioning system (GPS) of terrain and traffic of a place will enable a greenhorn to compete efficiently with a local resident in tracking down a remote location in a city. Local knowledge is effective but can be inadequate in some areas before logarithmic, more methodical solutions to certain problems. With artificial intelligence and big data, the 'human mind' whose capabilities Hayek was critical about, can bypass its limitations and delegate the processing of such information to more able systems. They can create solutions and policies which might outperform decisions made by local knowledge holders. Modern technology is a direct challenge to Hayek's thesis.

### **Hayek's Over-Optimism About the Direction of Evolution Towards Order**

Hayek's believe that through spontaneous order, the society will naturally evolve towards stable and liberal legal order, is not an empirical claim.<sup>58</sup> Primitive tribal societies stand as an exception. They instead of ordering themselves, splinter even further with every periodic

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<sup>56</sup> PTI, SC directs Centre to revisit current vaccine policy, says it creates disparity, THE HINDU (May 3, 2021) <https://www.thehindu.com/news/national/sc-directs-centre-to-revisit-current-vaccine-policy-says-it-creates-disparity/article34470207.ece>.

<sup>57</sup> Hayek, *Knowledge*, *supra* note 6, at 519.

<sup>58</sup> HAYEK, 3 *Law*, *supra* note 15, at 74.

increase of their population.<sup>59</sup> They are far from achieving a social order with a shared commitment. He emphasizes on evolution but neglects that evolution without a teleology cannot be anticipated to produce typically appealing consequences.<sup>60</sup> An unplanned order may emerge in a society, but there's no surety that it would propagate stability or respect liberal values. *Prof. John Grey* deems this contention of Hayek as his “evolutionary speculation”<sup>61</sup>

### ***Conclusion***

Hayek's legal theory is his honest attempt on reaching on a legal setup which can sustain individual liberty and nullify majoritarianism. He attempts so by minimizing human intervention in law making to the maximum extent possible. Hayek's concerns against legislation are not based on fragile grounds as the destructive potential of a legislation surpasses that of any other political instrument. His apprehensions act as a good warning, and his approach gives a good direction. However, as an alternative, he nominates custom as the normative order. Custom is the truth for Hayek, which he places his faith in and wants the society to do so as well. However, as *Nietzsche* puts, truths “are illusions which we have forgotten are illusions”. For that segment of the society which has experienced the harsh side of customs, it would be challenging to understand or even fully process Hayek's claim.

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<sup>59</sup>Elman R. Service, *Primitive culture*, BRITANNICA ENCYCLOPAEDIA, (Feb. 01, 2018) <https://www.britannica.com/topic/primitive-culture>

<sup>60</sup> Posner, *supra* note 41, at 154.

<sup>61</sup> Gray, *supra* note 44.