Gaetano Pecora

The Anomalous Liberalism of Friedrich August von Hayek

Rubbettino

Published by the European Liberal Forum asbl with the support of Foundation Critica Liberale. Co-funded by the European Parliament. Neither the European Parliament nor the European Liberal Forum asbl are responsible for the content of this publication, or for any use that may be made of it. The views expressed herein are those of the author(s) alone. These views do not necessarily reflect those of the European Parliament and/or the European Liberal Forum asbl

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To the memory of my mother and father

Foreword

Gaetano Pecora does Liberalism a great service in this treatise on Friedrich August von Hayek (1899-1992). I commend his effort, long overdue in Liberal circles, to re-evaluate the man's work.

I will not engage here in the classical and much rehearsed argument about the relative merits of Hayek and Keynes as economic theorists: let it suffice to remind the readers of this book that where Keynes believed that free markets, left to their own devices, distorted competition (and that state intervention is therefore not only justified but often necessary), Hayek believed that free markets adjust to ensure continued freedom and he detested intervention by the state to control them. Hayek is thus often seen as the antithesis to Keynes: in fact he was the antithesis to the ideas expounded by Adam Smith in his *Theory of Moral Sentiments* of which Keynes was the most noted of many disciples. Evidence can be found to support both contentions (which is why J K Galbraith's barb 'economics is extremely useful as a form of employment for economists' might well have been directed at this dispute) but most of the available evidence backs the former.

I have never forgotten the shock I experienced upon entering the Theodor Heuss Academy in Gummersbach, that former haven of expansive and optimistic social liberal thought under Rolf Schroers, sometime around 1988 and finding the place festooned with pieces of paper bearing quotations from the works of Hayek, Friedman and others of that school, hung there on the instructions on FNS boss Fritz Fliszar (later Fritz Goergen). As a Brit who was fighting a rearguard action against Mrs Thatcher's brand of neo liberalism I was horrified to find a section of Germany's FDP glorifying it.

Hayek would not have described himself as a Conservative. Indeed, in his essay *'Why I am not a Conservative'* (published in his book *The Constitution of Liberty* in 1960) he commends Liberalism for 'wanting to go elsewhere, not stand still'. But his thought developed at a tangent to Liberalism. As the extracts from his work presented here show, it most certainly went 'elsewhere'. His castigation of legal positivism suggests he was closer to the neo Liberals who hijacked Britain's Conservative Party than to British Liberals. Indeed, Mrs Thatcher and her acolytes used Hayek's *The Constitution of Liberty* and his three volume *Law, Legislation and Liberty* (published between

1973 and 1979) as the basis for many of their 1979 to 1989 reforms. If hitherto in Liberal circles Hayek has normally escaped condemnation as a neo liberal himself (after all, ideas are not responsible for the people who adopt and develop them) he was at the very least, as Gaetano Pecora points out, a protective deity of neo Liberals.

Hayek was not averse to self-doubt (or perhaps had rather learned, as Dahrendorf did, to appreciate after years of living in England the British art of self deprecation): 'We have indeed at the moment little cause for pride', he remarked of economists: 'since as a profession we have made a mess of things.'

In his private life, Hayek lacked the generosity of spirit and urbane personality which define so many Liberals. That this is reflected in his views on economics is well known. While his views on other areas of politics have often been interpreted as being liberal, what this work shows us is that Hayek was not unequivocally a fighter against authoritarian government (which, as an Austrian, he saw at close hand both at home and to the north, south and east); nor necessarily a staunch defender of freedom of thought and conscience.

Indeed, on the basis of evidence here, one might conclude - as the author does - that Hayek's ideas were antithetical to liberal thought. He disapproved of promoting social justice through government redistribution of income (a belief taken up with gusto by Margaret Thatcher, who declared 'there is no such thing as society') long after Liberalism had accepted (*pace* Mill, Grundtvig, Rawls) that voluntary action to protect the victims of destitution from the consequences of events beyond their own control was deeply insufficient. While Liberals should not be afraid of voluntary social action to remedy social ills, experience of the growing social divide suggests the wealthy are insufficiently prepared to dip into their pockets to make this a practical proposition.

Just as Erich Wolfgang von Korngold, a compatriot of Hayek's and his contemporary, drew inspiration in the field of music which ignored the developments of at least half a century, so Hayek reverted to a pre social contract analysis of society.

The Austro-Hungarian empire which fathered Hayek is not noted for a plethora of Liberal thinking. Hayek chose to live in England, later (like Korngold) in America and later still in modern Germany. That his thought made a contribution to twentieth century Liberalism can be in little doubt, as shown by the haste with which some Liberals grasped his ideas. For it to be viewed as being in the main stream impoverishes Liberalism and provides a recipe for electoral disaster.

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The Anomalous Liberalism of Friedrich August von Hayek

Introduction

Benedetto Croce said it of prefaces, but it also applies to introductions, especially the kind that are brief and do not repeat the points of an argument, instead letting them unfold gradually in the book's pages. Croce said that "he who writes a preface -which is always more or less useless- must at least see to one small purpose: to protect against disappointments". It is important, then, that the reader understand straight away what he will and will not find in this book. The reader will not find a study of the sources, the premises from which Friedrich August von Hayek's liberalism derives. Nor will he find written here outlines of this liberalism's evolution. Firstly, because others have already written very thoroughly of these arguments and, truly, we could not contribute anything further or anything better to their work. Secondly because- onwards from 1960 (which is the year in which Hayek publishes *The Constitution of Liberty*) - Hayekian liberalism resembles a house with clearly defined structures which, once erected, were never modified. Naturally this did not prevent its creator from perfecting said construction over time, embellishing its framework now and then, adorning it with terms of ancient resonance (taxis, cosmos, nomothetic, etc.) at times changing the interior to ensure greater space for what had previously been confined to narrower structures (for example the *common law* system, which over the years becomes more and more the ideal model into whose mould Hayek's political and juridical reflections are poured). However, interior changes and embellishments aside, the foundations of this construction have remained the same. Precisely the same foundations whose strength we wished to test, only to discover them pitted with fissures, at times even on the verge of collapse. Therefore, another hint is necessary for whoever is so kind to read this book: the reader must not expect an analysis that indulges in celebratory exaltation or sickly sweet acclaim that whirls around a smoke and mirrors show of approval.

Hayek, moreover, is such a scholar that he requires neither heels nor stilts to stand out among many other authors, and our praise would not add even the smallest feather to his cap. Analysis, then, but critique: meticulous, punctilious, and at times even stingy. This is the analysis that a Great scholar deserves, not in order to belittle him but to understand him better. The title of the book was cho-

sen with this critical analysis in mind: *The Anomalous Liberalism of Friedrich August von Hayek*.Anomalous is a term so direct and explicit, indeed so pointed, that it could raise the-unfounded-suspicion that this is not thoughtful book but instead a *pamphlet*; light, lively, easy-going perhaps, that at times cannot resist the temptation to grab even the most time-honoured men by the collar.An unfounded suspicion as said before. However let us be clear: these pages will not be filled with erudite haughtiness or the condescending (and unclear) solemnity of academics. On the contrary, wherever possible this book endeavors to resemble direct, immediate conversation, with examples that call to the reader's mind echoes of parallel experiences, engaging them as an equal, always with the intent to make the reasoning clear. Yet it is still reasoning; argued theories that are well pondered and never exaggerated to the point of provocation.

Having said this, I would like to reiterate that the purpose of this book is just to highlight the incongruence of Hayekian liberalism, all the more so as Hayek has become the obligatory representative, almost the protective deity, of many neo-liberals. This certainly should not astound anyone.It should not astound, but only as we consider the pronunciations of values and the declarations of belief. Beliefs and values that Hayek fulfilled through the integrity of his actions and his commitment of uncontaminated loyalty to the principles of liberalism. His character, then, is above debate.The credentials that he exhibits would satisfy even the severest critics. The problem, then, is another. Beyond idealist pronouncements, it is necessary to test the congruency between the ideals of liberty and the political and legal instruments which, according to Hayek, should foster them. It is here that his analysis reveals itself to be at once insufficient and anomalous. Insufficient where Hayek maintains that the laws- assuming that they honour formal requirements of abstractness and generality- are already sufficient to protect the rights of the individual in a fortress none can penetrate. The first part of this book demonstrates instead that even general, abstract laws can threaten individual prerogatives, becoming strongly liberticidal. Not to mention that the same generality which also shows itself so splendidly in Hayek's writings is an extraordinarily and unacceptably ambiguous notion. A notion vulnerable to a number of developments, some perfectly compatible with the most dour and closed organizations, where it could suffocate, unable to breathe the air of freedom. Anomalous, then, are Hayek's thoughts when he brings to the forefront precisely that legal content which before he had left in the margins of his reflections, keeping it almost in penance. Why anomalous? Because while analyzing the texts, dissembling and inspecting them even in their most secluded hollows (as happens in the second part of the book) one discovers that Hayek's

order had a compact, homogenous quality that on the one hand detonates all of his system's internal incoherencies and on the other hand makes a violent impact placed alongside the chief principle of liberal wisdom, where antagonism rather than harmony, and conflict (also a conflict of values) rather than understanding are the driving force of progress and the spur of perfection.

The reader is warned: this book will emphasize the shadows of the Hayekian legacy more than the brightness. Perhaps, upon reflection, it is only natural that it should be this way. The apologetic aggrandizement of a classic is always useless, anyhow. And Hayek bears all the traits of a classic. All it takes is a glance over his many works and one finds that each and every one is rife with the author's pearls of wisdom: such a treasure trove can be found his examination of collectivism (whose catastrophic effects Hayek had predicted in unsuspecting times, when many, too many threw themselves under the spell of communism with the zeal of an internal spring); how precious his distinction between spontaneous order and constructed order, between *cosmos and taxis*, demonstrating that it is not a given that the threat of anarchic dissolution looms wherever there is no superior power who, in his greater wisdom, arranges men along a ladder of social roles: society can be organized without being planned. Still more, what glimmering arguments to be found in the pages that defend individual liberty! Pages that certainly have no need for rhetorical amendments to embellish them. If anything the opposite is true: their very appeal makes us more exacting, less helpful, almost as though we fear that the power of suggestion could dull our mental faculties. It is because of this, perhaps, that the destiny of "the greats" is to provoke the critical examination of their reflection. If this is the case, Hayek is more than a very great man: he is the king of great men. Even greater when one considers that he himself was the first to warn us about the improvability of his studies."The Spirit of liberty- he loved to repeat with Learned Hand - is the spirit which is not too sure that it is right." Therefore, to end up right - and here the words Emilio Cecchi wrote on Croce are proper: 'In order to end up right, to put the finishing touch on his being right and his infinite reasons, the time has come to admit he is a bit wrong".

The author of this book has tried, in his treatment of Hayek, to "admit he is a bit wrong"; perhaps he has succeeded, perhaps not. In any case, it comforts him to think that in the case of great things to want is enough and that there is already merit in trying.

I would like to thank Sir Graham Watson for the generosity of his foreword. It is always nice to know that people as clever as Sir Watson share our ideas, especially when these ideas do not particularly reflect the mood of our time.

Special thanks are due to Giulio Ercolessi, Ermanno Martignetti, Enzo Marzo and Gianmarco Pondrano Altavilla. Without their help, without their brotherly kindness, this book would never had been published in English. It goes without saying that if any inadequacies or errors still remain, the responsibility is exclusively my own.

Gaetano Pecora

Part One
Liberty and the Structure of the Laws

A Long Polemic

The political thought of Friedrich A. Von Hayek unfurls over a period of time that is by no means brief. From *The Road To Serfdom,* written in 1944, to *The Constitution of Liberty* in 1960, onwards toward the three volumes of *Law, Legislation and Liberty* published from 1973 to 1979, right down to *The Fatal Conceit* in 1988, one finds their mind embracing a vast, capacious scope over which Hayek scattered his many pearls of wisdom for more than forty years. This entire period, furthermore, is filled with works - such as *Studies in Philosophy, Politics and Economics* (1967) and the entry *Liberalism* (1973) for the *Encyclopedia of the Twentieth Century* - that one could hardly call minor, so much is the labour required to perfect concepts, to link them with the iron rings of original ideas and encircle them with the armor of truth.

Forty years, then! Certainly not brief. Many things can change. And still, despite the many years that passed, always and with the implacable regularity of a metronome, every time that Hayek found himself anywhere near legal positivism (which, at least as he said, runs straight from Hobbes to Kelsen[1]) he used each and every time as an opportunity to rail against it with his own polemic. A polemic which, while at times growling menacingly just under the surface of his argument, at other times boils over in explosions of truly tormented fury, as can be found where Hayek writes that "legal positivism has become one of the main forces which have destroyed classical liberalism"[2], or where he declares that legal positivism is "the ideology [...] of the omnipotence of the legislative power"[3], and where at last, spurred on by all this rage,

1. Evolutionist teachings - writes Hayek - are "in direct conflict with the rationalist-constructivism of Francis Bacon or Thomas Hobbes, Jeremy Bentham or John Austin, or German positivists from Paul Laband to Hans Kelsen". (*Legge, legislazione e libertà*, Introduction by Angelo M. Petroni and Stefano Monti-Bragadin, Il Saggiatore, Milan 1986, p. 96); and slightly further along: "...the constructivist rationalism which stretches from Descartes and Hobbes, through Rousseau and Bentham all the way to contemporary legal positivism". (*ibid.*, p. 121).
2. *Ibid.,* p. 238.
3. *Ibid.*, p. 250.

Hayek levels the most serious accusation. Holding positivists responsible for totalitarian regimes, he exposes them as immoral forbearers of liberticide.

Here, almost hissing the invective, Hayek scolds ''the pure theory of law expounded by Hans Kelsen'', calling it ''the definitive eclipse of all the traditions of limited government''. And straight away after, satisfied, he proclaims once more the verdict -formed by others, but sealed with the prestige of his subscription- the verdict wherein legal positivism in general and the Pure Theory in particular have ''opened the doors to victory for the Fascist and Bolshevik will of the State''[4].

4. F.A. von Hayek, *La società libera,* Introduction by S. Ricossa, Edizioni Seam, Rome 1998, pp. 309-310. The accusation that they sustained Nazi or Communist totalitarianism is so grave, so seriously unjust, that we warn the reader now of the need to do away with it immediately, without giving it time to take root in the body of an argument which, for reasons we shall explain, should be kept thousands of miles away. Let us begin, therefore, with the reminder that the pure theory of law is one of many constellations that form the universe of legal positivism. As such, this theory recognizes the propriety of adherence to one type of regulation: those created by an authority. More precisely by an authority that enforces these regulations by employing force as a last resort. In this sense, positivists say that the law is the expression of an effective authority. Indeed, but even an outlaw has the means to bend our will and force us to follow his orders. In this manner the outlaw can also have authority. If one defines the law as the expression of authority, and authority is such so long as it produces the desired effects, it begs the question: how does one distinguish a criminal's intimidation from a legislator's decree? Illegal oppression from authorized command? The answer is not difficult if one remembers that, indeed, the key is *authorized* command. A regulation, then, that stems from the will of someone who is authorised to issue it. Furthermore, the persons who are authorised to issue the regulation are no more than the recipients of an additional regulation, to create the law under certain circumstances and certain circumstances only. It is indeed true, then, that the law connotes authority, but not ''naked'' authority. Rather, legal authority; legal because a higher authority has qualified it to produce the regulations of the law. In turn this higher authority is carried out under an overarching authority which is also legal, as it is controlled by a superior regulation.
In this way, travelling upwards from rule to authority, and authority to rule one arrives at the rule of rules, which legitimizes the authority of authorities (the constituent authority) by preceding it, authorizing it to create the law. Coming back to the main point: the legal structure cannot be confused with the highhandedness of a criminal when, through these many channels, it can be traced back to the original authorization. The criminal lacks precisely this; his vexations are not authorized by anything or anyone. Okay, one might say, but this argument only applies to the prevarication of a lone criminal. Let us suppose that the criminal, in league with other accomplices, belongs to a gang of conspiracists, for example a terrorist organization. No doubt terrorists operate within an inexorable mechanism, wherein each must act on the authorization of his boss. What then? Here too there is a prior authorization. Furthermore, the stigma of legal authority challenges terrorist action. Why? Because, according to the pure theory of law, the insurgent is authorized by an organism that is less effective and therefore weaker than the mechanisms of the State. So if by chance terrorists defeated the State's defences they and no one else

However it may be, calm or furious and exclamatory, courteous or surly, Hayek's polemic certainly does not spare any, not one, of the positivists' primary acquisitions; to the point where at times, without even knowing how, we are overcome by the temptation to reconstruct his thought "in antitheses", or a kind of musical counterpoint where one (Hayek) declares precisely that which the others (the positivists) deny, and

would be the guardians of the sovereignty. In the words of Kelsen, direct and without flowery terms: if the organization of the group of bandits "in its domain of territorial validity [. . .] is effective enough to surpass the validity of any other coercive organization, it could well be a legal system in its own right. And the community that springs from it could well be considered a State, even if it carries out criminal activity" (*La dottrina pura del diritto*, Einaudi, Turin 1975, pp. 60-61). Therefore, just or unjust as it may be, in the end it is the effective power that makes the law. It is terrible, but it is so. It is so, naturally, for those who hold to the "effective truth" of matters, matters as they are and not as one wishes they were. It does not matter much whether the truth is good, just, or moral; the important thing is that it is reality. And it is the legal scholar's job to take it as it is, without establishing if it could or must be different. Considering this it is no surprise that those who study legal sciences don't become invested, neither condemning nor absolving but stating, merely stating the law without evaluating it. Not prescribing a law because it has merit, because it is just, but describing a law that is *valid* because it exists. Merit and validity are different things. It is dangerous to confuse the two. And, above all, it is dangerous to subordinate the judgment of *validity* to the judgement of merit. In other words it would be as though we affirmed that since unlawful acts, abuse, and violations are intolerable manifestations of injustice, then unlawful acts, abuse, and violations have never cluttered the legal world. The pure theory of law, then, is just that: a theory that describes the law rather than a prescriptive conception of justice. Now, in order to contest a system of descriptive propositions one must demonstrate that they are inaccurate, not declare them unjust. From what scrutiny, distinct from that of Kelsen, does the "anti-totalitarian" movement stem? It is a question that stills awaits a response. As we wait it is important to underline this fundamental point: precisely because evaluations of merit and evaluations of validity remain distinct, nothing prevents man –as man- from further evaluating (according, indeed, to merit) the law that the jurist – as a jurist – has judged as valid; and nothing prevents him, following this evaluation, from deciding to disobey the law because his inner sense of justice commands it. This is why the pure theory of law, calling on man to mull over the ultimate questions with only his own soul for company, urges him to distinguish good from bad, right from wrong on his own. Which leads to this question: take a man who feels this sense of responsible autonomy pulsating strongly through him, a man who draws everything back to himself because by now he is the only captain of his ship, the sole creator of his own destiny; Would the man, *this man,* still cower before the fierce frown of a dictator? Let's recap. Scientific endeavor cannot disregard the methodological distinction between the theory of the law and the ethics of justice. This alone would suffice to absolve Kelsen of every accusation. But there is one more thing: that very distinction, on the moral plane (moral, not scientific) that very distinction opens itself to developments that are all completely incompatible with oblique, exhausted ethics, almost afraid of their own decorum and therefore destined for the most sheepish servitude. Here is a moral reason, or rather one reason more, to treat Kelsen with all the caution and attention that his critics (the most severe at least) often lack, Hayek certainly among them.

vice versa. Now, if ever such an arrangement of sounds were staged, it is certain that every note would jump directly to the highest octave over the subject of sovereignty, where the disagreement, normally deep, truly becomes an abyss and there can be found no fraudulent or elegant subtlety of diplomacy that merits a composition. "Indeed", writes Hayek, "the whole history of constitutionalism, at least since John Locke, which is the same as the history of liberalism, is that of a struggle against the positivist conception of sovereignty"[5]. It is an authoritative statement that requires explanation.

5. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 261.

Sovereignty: A Dangerous Concept

According to Hayek, the biggest mistake of positivists (and here he means all those who subscribe to the teachings that extend from Hobbes to Kelsen, authors which Hayek always unites under a single flag)[1] was to sustain the idea that the law derives exclusively from the conscious, considered – "deliberate", Hayek would say - desire for a human authority. Whether or not it is the desire for a monarchy or a parliament is not important, nor does it matter whether it is an individual or a collective body that gives rise to the creation of norms. What counts is that in each case the legal norms derive from (or that one believes they derive from) sanctioned, responsible, intentional humans. Here is the subtle perfidy of the argument for Hayek; an argument which, if left to its own devices without addressing its fundamental cracks, would unleash such a hurricane of censorship upon individual liberty that not one of its roots would remain in the soil. One may understand why. To place liberty within a protected sphere, where - as Hayek explains- one can "act according one's own decisions and plans, in contrast with the position of one who [is] irrevocably subject to the will of another, who with an arbitrary decision [can] force him to act or not to act in certain ways"[2], to define this as liberty, as a domain removed from outside interferences, it is wise to measure, circumscribe, and in other words limit the confines of the political world; limiting it in such a way that whoever may be the depositary of authority can employ their power by and large within this world, yes, but with unmistakable confines that he must keep within, almost as though he were in front of a sign with block letters saying: you can come as far as here, and not beyond! "Beyond" signals an area that

1. Hayek writes: "According to Hobbes 'no law can be unjust', according to Kelsen 'just is merely another term for legal or legitimate', the efforts of the positivists have become invariably oriented towards discrediting the concept of justice as a guide to determine what the law is." (*Legge, legislazione e libertà*, cit., p. 243).

2. F.A. von Hayek, *La società libera,* Edizioni Seam, Rome 1998, p. 40. This is the latest Italian edition of *The Constitution of Liberty*, Chicago Press, Chicago 1960.

is consigned to the ungovernable discretion of the citizens, all of whom "can use their own knowledge for their own ends"[3].

Limit political power then. How? With the devices of legal knowledge which are certainly the most powerful, if not the only, protection against arbitrary power. Indeed, yet if the law - as seen in the positivistic construction - counts precisely this type of power as its source, then one must inevitably give in to the unfathomability of its whims. And indeed what can limit authority? Only the law, which for positivists remains the law produced by another, second authority, can do so. This second authority can at times limit but is not limited by anything itself. Providing, at least, that a third authority does not intervene to keep it in check, where this third authority would then find itself unlimited. It will carry on this way, even if we are deferred to a fourth authority, then postponed to a fifth and even sixth authority, in a never ending sequence that always ends with a final authority which, as a final authority, is free from legal limits; without which one has free reign over the splendours - or ills - of sovereign power (the sanctioned definition of sovereignty, *potestas superiorem non recognoscens,* is correct). Once freed from these restrictions, who and what can keep this sovereign authority from giving in to the most ferocious instincts of human savagery? Who or what can suppress the instinct for extortion, the greed for possession, the overwhelming ferocity? Everything, including decorum and liberty (especially liberty), absolutely everything would be at the mercy of this authority's irascible volubility. This is why, as Hayek wrote, a liberal government "has no place for a sovereign body"[4], and why "the refusal to recognise sovereign power, abundantly clear in Locke and constantly recurring throughout liberal thought, is one of the key points that mark how this thought contrasts with the conception of legal positivism"[5].

The concept of positivism not only tumbles down onto the back of liberty, preventing its recovery, but furthermore, according to Hayek, ennobles sovereignty with the dignity of truth, when instead it is lacking in factual substance, spoiled as it is by delusions of grandeur, like a kind of devilish pride ("constructivist superstition", as Hayek calls it).

According to this idea the law, and in general systems of government, are all born from the *fiat* of an informed and clairvoyant authority; an authority that never doubts its prerogatives and is always sure of its decisions. As though governments coasted through a void, or fluctuated in nothingness. Not so. Governments, all govern-

3. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 74.
4. *Ibid.*, p. 496,
5. F.A. von Hayek, *Liberalismo*, Preface by Lorenzo Infantino, Ideazione, Rome 1997, p. 77.

ments, starting with liberal, are saddled. And they are not bucked off by the unbridled impact of hostile forces if they attain the loyalty of their subordinates, if indeed - at least according to Hayek- they do not disrupt the natural order of things, therefore, provided they work in harmony with the values, beliefs, and laws that tradition has instilled in the hearts of the citizens and which these citizens, as long as they are honorable, find within themselves without even know what or where they come from. "The government - writes Hayek - cannot begin from a State without laws[6] - and so it is - closer to the truth to invert the plausible and common idea that the law derives from authority, and to think instead that every authority derives from the law, not in the sense that the law creates it, rather that authority incites obedience because (and as long as) it sanctions a law that could exist well independently from that authority, that is founded in a common opinion of what is just"[7]. It is plain to see that in these few sentences Hayek demonstrates a complete contrast with positivists; a contender of an ancient grudge whose hypotheses (at least as Hayek relays them) bid for a takeover in a conflict of no uncertain terms, so clear, plastic in fact, that it becomes etched in the mind of the reader.

To positivists the sovereign's authority comes before the law and society. Whereas for Hayek the law which unites man into a society comes first and then, only after, the sovereign (here is the counterpoint, the "inside out" reading from before). A sovereign that is certainly not by the "interior" of the organization that he himself set up, but that is nonetheless checked by the "exterior", precisely the law him. A law that is by now an integral part of the community due to the labour of generations past, and towards which the sovereign who wishes to remain so owes the most focused concern. Conversely, the sovereign who does not accept this will set off the most dramatic event that can occur for a people, civil war. In a civil war no State, law, or sovereignty remains: *inter arma silent leges.* In this sense - as Hayek explains- "the basis for social order does not reside in the voluntary decision to adopt certain common rules, but in the existence, among the people, of certain ideas of right and wrong"[8],which, in effect, is what determines the strength of the State and, in any case, whether or not it shall survive, given that - as Hayek maintains - "there is no motive for which loyalty to the State, and therefore its authority, should survive the assumption of arbitrary governments"[9], of governments that do not attain public approval because

6. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 496.
7. *Ibid.*, p. 121.
8. *Ibid.*, p. 407.
9. *Ibid.*, p. 408.

they move against the profound, natural, instinctive aspirations of the law. Hence the conclusion: "the terms of submission to recognised authority become a permanent limit to its powers, because they are the condition for the harmony, and indeed the existence, of a State"[10]. And immediately after Hayek adds: "In the liberal era terms of submission [are] understood as limits to the coercion [that can only be] used to enforce general rules"[11].

10. *Ibidem*.
11. *Ibidem*.

General Norms and Individual Liberties

Generality of norms, then. Here we arrive at an argument that Hayek reiterated again and again with a fervent insistence. A surge of unrelenting vitality seems to sustain him as he hammers away at his point, so strong his determination to underline its importance. One understands the reason behind these outpourings of energy (one understands, which is not say that one necessarily justifies; more on this later). One understands because if it is true that the "external" law, which already lies quietly at heart of the collective spirit, articulates the rhythms and directs the movements of the sovereign, it is also true that this is the "external" law of a free society, a society that over years of silent compliance and centuries passed slowly, carefully distilled a precise criteria for right and wrong, just and unjust, which then serves as the criteria for freedom. Now, the one prophetic law of liberty - Hayek doesn't concern himself with other liberties, such as the liberty that anarchism hypothesized, and when he does he treats them with a dismissive amusement normally reserved normally reserved for fantasies of the impossible-[1] is general law, where general means an imperative aimed "literally at everyone"[2]. The norm, in short, that *independently of its content,* which for Hayek is not relevant (at least not for "this" Hayek; as we shall see there is another one), the norm that stands apart from its contents is general because "all of its bans and orders are for everyone without exception"[3]. "The conception of freedom under the law - writes Hayek - rests on the contention that when we obey laws [...] we [...] are free".

He goes on: "This, however, is true only if by "law" we mean the general rules that apply equally to everybody"[4]. Alright, one might say, but why? Because freedom takes refuge in general law? A little reflection is enough for the truth to leap out at us with immediate clarity.

1. Cfr. F.A. von Hayek, *Liberalismo*, cit. p. 64
2. F.A. von Hayek, *La società libera*, cit., p. 212.
3. *Ibidem*.
4. *Ibid,* pp. 210-211.

If "everybody" is… truly "everybody", then under this single headword (exactly "everybody") the governed should be included, yes, but also the rulers. What has value for the first must simultaneously apply to the second. The consequence is that these seconds, namely the rulers, can never do to others what they would never want done to themselves. Take the decree: "everyone must have his head cut off". Who could ever suggest it? What ruler would be so perverse as to propose this knowing that he, along with everyone else, would part with his head? In this sense, as has been rigorously explained, the sole form of general laws is already sufficient to eliminate "a significant portion of 'harmful rules'", in other words all those rules that we would like for others but not for ourselves. A rule that applies to *everybody*, without exception, is a rule that safeguards, protects"[5]. "Often - warns Hayek - one does not recognize that general and equal laws provide the most effective protection against infringement of individual liberty. This is mainly due to the habit of tacitly exempting the State and its employees from these rules". Instead - he continues - "the ideal administration of the law requires that the State apply it to others […] but that it also acts according to the same law, limited in the same way as any private citizen". Hayek concludes: "It is the fact that all rules apply equally to all, including those who govern, which makes it improbable that any oppressive rules will be adopted"[6]. Leaders that, as we know, may shape the content of their legal imperatives as they wish, but only if and when this content is formed according to the principle of general laws; it is only then that their duty to obey the law will not be challenged.

In Hayek's system, then, there is a kind of back and forth game between two powers - one positive and the other negative - allowing one to check and hinder the other, and vice versa. The positive one has the right to enact laws, while the negative one has the power to refuse to bring these laws into effect if they violate the requirement of generality. One side has the power of legislative authority, which has the prerogative to *create* the rules, albeit under certain conditions (generality). On the other side there is the citizens' power to *destroy* those same rules if such conditions were disregarded. In the words of Hayek: "The effective limitation of a legislative authority's power, therefore, does not require another organized authority to act on it; it can be produced by a view that maintains that only certain types of commands issued by that authority are to be accepted as laws. This view does not relate to the particular content of that legislative authority's decisions, but only to the general attributes of the kind of rules that one expects of the legislature and only those to which the people intend

5. G. Sartori, *Eguaglianza* now in *Elementi di teoria politica*, il Mulino, Bologna 1987, p. 93.
6. F.A. von Hayek, *La società libera*, cit. p. 276.

to give support. The power of this view is not based on its supporters' ability to take some concerted action, but is simply the negative power to remove the support that the legislator's power is ultimately based upon''[7]. With the quiet strength of one who is certain of his views, Hayek drives home his point: ''There is therefore no logical necessity for supreme power to be omnipotent. This view, as it produces loyalty to the State, is the ultimate power; a limited power that in turn limits the power of every legislator. It is a negative power, but as it is capable of denying loyalty to institutions it limits every positive power''[8].

Limited, then, the negative power; but then so is the positive power. The first limited by a general state of mind, by the state - Hayek would say- of ''prevailing ideas''[9] and that therefore retains an airy, nebulous nature that thwarts every organizational effort; the second is limited precisely by those all-encompassing, atmospheric entities (predominant views) that force him to form his commands to the model of general laws. But where then, in this state of mutual limits, can one find sovereignty? *Non cubat in ulla*, it must be said. If sovereignty means the unlimited power that is like an emblem on the banner of positivist theories, then sovereignty does not get anywhere here. Nowhere at all, knocked out as it is by three lethal jabs, levelled one after the other in rapid succession. The first hit: the law that precedes the State ''is based on a widespread opinion of what is right''[10]. Second shot: ''justice, as relates to the norms of conduct, is essential to the relationship between free men''[11]. Third and decisive lunge: freedom is ensured by general rules ''equally applicable to all''[12]. Freedom, therefore, refers to generality, and generality in turn refers to justice in a progression of dialectical rings that form the chain that ultimately imprisons sovereignty.

Ingenious, this system, it is not? Yes, of course: ingenious. Impressive too. And yet it does not add up. There is something wrong.

What now, then? We arm ourselves with patience and we start from the beginning.

7. F.A. von Hayek, *Legge, legislazione e libertà*, cit. p. 119.
8. *Ibidem*.
9. *Ibid.* p. 496.
10. *Ibid.* p. 121.
11. *Ibid.* p. 304.
12. *Ibid.*, p. 338.

The Ambiguous Positivism of Hobbes

Already in terms of the history of ideas it is not difficult to surmise in Hayek's words a certain agitation, a sort of hasty impatience that is never useful in practise, at times austere and short on distinctions. Let us begin by considering Hobbes who, as we know, Hayek credits with beginning the era of positivistic thinking, which in his opinion runs in an oblique line, inexorably bent on totalitarianism. If so, it is surprising then and verging on puzzling, that of all the "founders of liberal political thought "(the words of Hayek), along with Milton and Montesquieu, Maine and Lord Acton, Hayek celebrates the father of the Leviathan[1]. This is the very least of it, and efforts in indulgence could chalk it up to a simple whim of the pen. What's more is when Hayek places the bulk of the Hobbesian teachings in the positivistic universe, where he breaks down and dismisses the entire school of thought, as though Hobbes did not subscribe even in part to the views of natural law. Hobbes is an advocate of natural law, then? Again: in part; yes and no. Let us elaborate, and the reader must excuse this digression, necessary if one wishes (as Hayek does) remain rooted in the history of political thought without ideas floating up into the air, only to pop like bubbles of soap.

For the most part, the doctrine of natural law is a theory of limits; it is a construction which restricts the will of the sovereign. It limits this will because, beyond positive law, beyond the law that sovereign will establishes, the limit asserts the existence of the law of nature, a law superior to positive law because of its intrinsic justice; superior enough to influence the validity of its precepts.

In the opinion of advocates of natural law, therefore, positive law is only valid when it considers or better specifies the requirements of natural law. Now, to say that a law is valid means that it is compulsory to comply with it; therefore an unjust positive law, deviant from natural law, is a rule that is unqualified to be obeyed: it is invalid and as such its recipients can (and should) resist its command. This, the right of

1. Cfr. p.136 in *Legge, legislazione e libertà.*

the people to resist, is the main principle that followers of natural law can employ to harness sovereignty and contain it in more or less circumscribed areas.

None of this can be found in Hobbes (who, at least so far, is not essentially a follower of natural law). For Hobbes, in fact, subjects are held to "simple obedience ", where they should uphold laws regardless of their content. Meaning that even if laws are at odds with the natural norms (though Hobbes does not ever acknowledge this) this does not diminish the citizens' duty to comply with them. Why? Because Hobbes places a natural law in the bedrock of sovereignty (and so though *he is no longer* a follower of natural law, but *he is not yet* a legal positivist), and it is precisely this law that preserves social peace by imposing respect for civil authority and for *all* the rules they create. *All* the rules, it should be remembered. Now, the set of laws that derive from sovereign power constitutes the positive legal system. For this Hobbes must refer to natural law, which serves to establish the mandatory nature of the system as a whole and not merely the individual rules that make it up. These are not valid because they echo the content of natural precepts; rather, they are valid because they are part of a system which, according to the law of nature, it is necessary to obey. In short, unlike "classical" legal naturalism, their validity is not by nature substantial or content based (requiring conformity to natural law); instead it has a formal character, where - precisely positivistic - not justice but adherence to an essentially effective system determines a law's validity.

And so: Hobbes, a positivist? Well, no! No, because though he reaches the very same conclusions of the positivists, his hypotheses are too different, not to mention the concepts and tools that he employs. Hypotheses, concepts and tools that all carry the indelible imprint of natural law. Therefore, without reducing it to one of the two tendencies as Hayek does, one could more correctly say this: Hobbes begins as a follower of natural law and arrives a positivist; he begins by establishing sovereign power on the basis of a natural law (*pacta sunt servanda*) but once sovereignty is established he ends by admitting that its commands, or positive laws, are the only possible, that they alone must be obeyed. Here we find positivism, or more precisely the positivist ideology. In short, in Hobbes' work certain aspects of natural law are placed in the service of the highly positivistic ideology of obedience to sovereign power[2]. Thanks to this subtle intertwining of the devices of natural law and of positivist ideology, Hobbes' work eludes the grasp of any classification that is too rigid, such as Hayek's; by virtue of the exceptionally agile overtaking of one by the other, Hobbes work fascinates and remains for us precisely what he wanted: a vast, lofty ode to sovereignty.

2. For all this I refer to the truly essential essays that N. Bobbio collected in *Thomas Hobbes*, Einaudi, Turin 1989.

So we have to modify the concept of sovereignty a second time. Just like before, this modification shrinks Hayek's definition, which he expanded inappropriately.

Hayek develops the concept of sovereignty, which Hobbes located on the edges of positivism, in ever-wider terms, until gradually his definition ends up including the whole breadth of positivist ideas from their origins to their furthest ramifications. Hence, he judges these ideas and their ramifications by a value that is inappropriate for them because such a value belongs only to one other case, the specific details of which can't be repeated and are not subject to generalisations, which is precisely the case in Hobbes. Hobbes is alone in arguing that sovereignty is absolute because he, not Kelsen, places sovereignty within the realm of a single subject (it does not matter if the subject is an individual or a group), which in order to be unique has to abandon the limits placed on it by others: in fact it is the other who is sovereign by placing limits on the subject, not the subject itself. When Hobbes writes "whoever is granted a limited authority is no king, but a subject of the one who gives him the authority"[1], when Hobbes writes that, he actually starts that implacable process of regression we mentioned above and which, as we have seen, puts an unlimited power in charge. However, Hobbes does not repeat what lies at the very heart of Kelsen's doctrine. Kelsen also talks about sovereignty, but he is concerned with a sovereignty that is depersonalised and no longer the prerogative of this or that subject or this or that body; no, here sovereignty belongs to the legal system as a whole and - in Kelsen's words - is "the characteristic feature of a prescribed system." "Only a prescribed system can be 'sovereign' - he goes on to say - i.e. a supreme authority, the ultimate foundation of the validity of rules which an individual is authorised to issue as 'commands' and which other individuals are forced to obey."[2] But if sovereignty is depersonalised and no longer belongs to the person or the subject but to the system as a whole, then it must be recognised that not all systems are systems of dictatorship; it is not always the case that everywhere there are powers which crush others, grabbing

1. T. Hobbes, *De cive*, VII, 3, Utet, Turin 1959 p. 123.
2. H. Kelsen, *Teoria generale del diritto e dello Stato*, Etas, Milan 1978, p. 389.

their subjects by the throat; there are also liberal systems, which *in so far as they are systems* retain the mark of sovereignty but *in so far as they are liberal* organise such sovereignty, distributing it among various bodies which are perhaps jealous of each other and therefore tend to be in conflict with each other; a conflict that keeps alive the spark of freedom.

In this sense, sovereignty (as defined by Kelsen, of course, not by Hobbes) is compatible with nothing: neither with slavery nor with independence, neither with tyranny nor with freedom. It all depends on how sovereignty is organised. And in this respect, with regard to how it is set up, i.e. *de iure condendo,* the proposals worked out by Kelsen protect him from whoever wants to accuse him of having succumbed to the temptations of absolutism. Do we really have to recollect with what subtlety of views and what depth of learning he set out to equip the Constitutional Court? And what was supposed to be the Court's function according to Kelsen? Was it not meant to ensure against any violation of constitutional rules - all constitutional rules - starting with those rights and freedoms? His words should at least cast some doubt on his detractors' claims; "The political function of the Constitution is to put legal limits on the exercise of power and guaranteeing the Constitution gives assurance that these limits will not be exceeded"[3]. This means that it is surely important to enshrine rights within the constitutional document. But this is still not enough.

We must ensure rights are sufficiently robust to withstand any attempted infringement. This protects them from any abuse of power and stops them turning into a mockery of the very ideals they are supposed to represent. Real rights are those which are 'embedded' within the legal system, i.e. rights that are protected by effective legal mechanisms. To put it another way: it is important to reinforce the boundaries of legislative discretionary power, but this, *in itself*, is not sufficient to keep legislators within the space reserved for them. It is not enough just to punish them when they step outside their remit. Instead, we must also remain alert and put checks in place to frustrate their attempts at trespass; i.e. unconstitutional laws - 'acts of trespass' so to speak - must be quashed. Only in this way does the Constitution not betray the role allotted to it. Now, as Kelsen explains, "quashing a law is a function of the legal system, an act of negative legislation so to speak."[4] Why negative? Negative because it is as if the law, which was binding for everyone at first, stops being mandatory in any way from a certain point on, i.e. following the decision to quash it. It is almost as if it is suddenly silenced and no one can hear its commands any more. Therefore

3. H. Kelsen, *La giustizia costituzionale*, Giuffrè, Milan 1981, p. 232.
4. H. Kelsen, *Teoria generale del diritto e dello Stato*, cit. p. 273.

whoever has the power to silence it gives voice to the legislator. What the legislator affirms, the Court denies.

But since denying a law has a general effect - everyone is released from its imperatives[5] - and generality in principle is the prerogative of the Law, that is where the Court's verdict is a real act of legislation, in particular of negative legislation. Hence Kelsen's conclusion: "the possibility of a law issued by the Legislature being quashed by another body represents a considerable check on the former's power. Such a possibility implies the existence of a negative legislator as well as a positive legislator."[6]

How strange life is! Here, in the very construction that is meant to be sacrosanct and impregnable we find that same negative power which others place under the protection of individual prerogative; a theory which has never provoked outrage or censure.

And it is true that elsewhere negative power is entrusted to the people, to the state of their soul and 'their ideas' (remember that these are Hayek's words) and therefore it acts outside the positive system, whereas here, in Kelsen, such a power both operates and is formulated inside the same system. All this is true. But precisely because it is true we must ask: is it not better like this? Doesn't setting it up in accordance with Kelsen's views precisely ensure that it operates more appropriately and effectively? And conversely is it not too much to trust in the decency of the multitudes and to let them determine the validity of the laws? History, and even the daily news, are completely impartial witnesses showing us how unpredictably fickle the people's judgement can be! But which people? Absolutely everyone or just a majority? And what kind of majority? A qualified, absolute or simple majority? Nothing at all, no valid question nor the slightest doubt, moves Hayek (in fact, it is only later, six years after he supported the idea of negative power, in the third volume of *Law, Legislation and Liberty,* that he entertains the Constitutional Court hypothesis, but he quickly skims over it across two very short pages. Two pages! Clearly in his opinion the subject does not merit anything more). Kelsen is superior, as he sets out his arguments one-by-one on this specific point and informs us about the nature, functions, procedure and effects of negative power[7].

5. Of course this is when constitutional legitimacy is centralised, as Kelsen proposed. On this point please refer to my *La democrazia di Hans Kelsen,* Edizioni Scientifiche Italiane, Naples 1992, in particular pp. 125-135.

6. H. Kelsen, *Teoria generale del diritto e dello* Stato, cit., p. 274.

7. See in this regard *La garanzia giurisdizionale della costituzione* now in *La giustizia costituzionale*, cit., pp.145-206, which contains a wealth of lively ideas and still largely relevant information

And to think that Hayek accustomed us to a very different approach, one which is less elegant and relaxed, and which is much more analytical and meticulous, containing a level of detail that sometimes verges on contempt. An approach where even his manner, usually so bare and unrefined, with its sole charm the force of its content, is enlivened by the glint of a subtle irony or, when he can no longer hold back, biting sarcasm.

Consider, for example, what happens when he is confronted with social 'rights' in general and those rights enshrined in the *Universal Declaration of Human Rights* in particular.

Starting from the mostly legitimate assumption that "no one has the right to a particular state of affairs if it is someone else's duty to guarantee that state of affairs" and that therefore a legal claim "can only exist if there is a system"[8] capable of imposing harsh penalties which this "duty" cannot, Hayek goes on to inform against the dishonest use of words and crush all the so-called social prerogatives adorning the *Universal Declaration* one by one with almost obliterating force. He asks "What is the legal meaning of the affirmation that everyone ‹is entitled to . . . the economic, social and cultural rights indispensable for his dignity and the free development of his personality› (art. 22)?". And then pressing the point, "who is against ‹everyone› having the right to ‹just and favourable conditions of work› (art. 23) and to ‹just and favourable employment› (art. 23)?"[9]. Not satisfied, he goes on to ask what could it mean in legal language that everyone has the right to "a just and favourable remuneration which includes [. . .] periodic holidays with pay" (art. 24)? Paid to whom? And here Hayek is full of ridicule: "to the farmer, to the Eskimo, and perhaps even to the Abominable Snowman?"[10].

This is sufficient to show that Hayek is immune to the enchantment of words and does not succumb to the charms of evanescent concepts. How bewildered and amazed we are because he does this right at the point when it comes to limiting power (which is absolutely fundamental for a liberal). So how bewildered and amazed we are when we see a man who has no time for ephemeral, vague ideas embrace these and submit everything to the negative power of the "people" (an obscure, vague entity

for anyone who wants to protect freedom from the abuses of power.

8. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 308.
9. *Ibid*, p. 311.
10. *Ibidem*.

if ever there was one) and to the "external" law of the community (which is no less murky and indistinct). As a result this diminishes the sense that there is anything unique in how he settles the argument with Kelsen and congratulates himself on comprehending the secret of limited government: "Government never originates from a state without laws; it relies upon and derives its support from the expectation that it will uphold prevailing notions of justice"[11]. In fact we should note that he could not be further from Kelsen, who he can't loathe enough; and if there is something which differentiates them it just stems from a dramatic misunderstanding. But let us proceed in an orderly manner and start with the distinction that... doesn't distinguish. Then we'll come to the misunderstanding that lurks there.

11. *Ibid.* p. 496.

On the So-called "External Law": Kelsen's Position

It is well-known that Kelsen assumes individual laws are valid and therefore mandatory when they belong to a system which is effective as a whole. This means laws, taken individually, are compulsory when they belong to a system people accept at least most of the time, if not always. In fact it is clear that if a set of rules consistently lacks support, then the system as such loses its binding force. Since the parts share the fate of the whole, even this general inefficacy of the system (as well as disuse) harms the validity of each individual rule. Now, once you subordinate validity to the efficacy of the system, it so happens that even Kelsen himself was quite clear that "effectiveness is not a brute, crude fact, nor even especially mysterious: a system is more effective the fairer it is, i.e. the more it responds to the needs and aspirations of its members"[1]. In Kelsen's words: "if we examine the motives of the men who create, apply and obey the law, we find certain ideals in their minds, and the idea of justice is an essential one of these"[2].

We know that even for Kelsen power *non cubat in ulla;* even for him laws arise from the teeming hustle and bustle of life at the heart of the community. Indeed, a law is like something that is 'distilled' from the community; it is the result of those customs, those values and those beliefs which pre-exist it and which rise up from the remote, and sometimes dark and muddy, depths of the people's soul.

What should we ask following this? Where is the novelty in Hayek, then? What originality is there in his argument that the "state of prevailing ideas"[3] limits the will of the State? Is this firm belief really the unexpected wonder of an intelligence that we had not predicted before then? No, it is not. It is not because we hear it as a distant echo gradually reverberating, just as things which have a remote origin and which seem endless move extremely slowly. An echo which surely does not end with Kelsen for whom "the creation of a positive law is definitely not a creation from nothing"

1. N. Bobbio, *Studi per una teoria generale del diritto*, Giappichelli, Turin 1970, p. 92.
2. H. Kelsen, *Teoria generale del diritto e dello Stato*, cit., pp. 177-178.
3. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 408.

(here his argument that power *non cubat in ulla;* is as compelling as ever); the lawmaker - Kelsen adds - is always "guided by certain general principles"[4].

Is it necessary to add anything else? It is (and now we come to the misunderstanding we mentioned above). It may be obvious, but for Kelsen these principles must be investigated, but by sociologists, not by lawyers. Sociologists not lawyers, explain reality, describe the world of facts and are interested in the actual event, the 'why' and 'how' of actual human behaviour (including, of course, the lawmaker's behaviour). On the other hand, lawyers concern themselves with the realm of obligation, the ideals of the law, exploring not what is actually happening but what the legal requirements say must happen. And legal requirements are the crux of the matter. In fact, it is certainly true that state regulations cannot be separated from those general principles which are closely linked and intertwined with them (and here Kelsen agrees with Hayek); but it is equally true that state regulations deal with moral, political and religious principles; certainly not with legal principles (and here Kelsen is at odds with Hayek). Since they do not deal with legal principles, they "are therefore unable to impose legal obligations or confer subjective rights on men or on States"[5].

Unless… Unless - as Kelsen explains - "the legal system by forcing law-makers to respect certain moral norms or political principles or lawyers' opinions transforms these norms, principles or opinions into legal rules."[6], i.e. rules which to be legal must be supported, most of the time if not always, by ad hoc sanctions.

On the contrary, for Hayek there is no difference at all between "external" laws and internal laws; both are law; rules *created* by law-makers are law, as are rules *found* in society; they have the same nature as each other; the former has the same binding force as the latter. What's more, only in this way can one explain the assertion that a sovereign's power is limited; limited, Hayek points out, "by the source from which it derives its authority. This source is prevailing opinion[7]." Now, as I quoted above, Hayek believes "all authority comes from the law", so in his way of thinking "law" and "prevailing opinion" are in fact the same, identical thing. The proof for this is another quote (which I also cited above): Hayek writes that "authority requires obedience because (and as long as) it sanctions *a law* thought to exist independently of it"[8], and that "government never originates from a state *without laws*", and then

4. H. Kelsen, *Teoria generale del diritto e dello Stato*, cit. p. 254.
5. *Ibidem*.
6. *Ibid.* p.134
7. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 118.
8. *Ibid*. p. 121 (my italics).

immediately adds that government "derives its support from the expectation that it will uphold *prevailing concepts* of justice"[9]. Once again, just like before, Hayek blends together "justice", "prevailing concepts" and "law" in a constantly shifting pattern until finally they are *unum et idem*. After all - Hayek asks - what could ever differentiate them? Their content? Evidently not. The commandment "thou shalt not steal" resounds from both the preacher's pulpit and the judge's bench; it is carved in graven letters in both the moralist's breviary and the pages of the Penal Code. Their content does not differentiate them then. And neither does their origin, provided that in both cases that rule has its roots in customs which our fathers and their fathers before them followed, provided that it has come down to us since time immemorial, on a wave of the great tide of history.

Not their content, the substance of which is identical; nor their origins, which hark back to ancient customs[10]. So, what does illustrate the difference? Their respective punishments? Perhaps those who stubbornly resist social customs or who transgress moral rules escape the sting of punishment? Although goodness knows how the pangs of guilt can sometimes be more powerful and stronger than fines or even prison sentences themselves! Hayek asserts, "It seems difficult to withhold such a title [the title of ‹law›] from rules that are enforced via social pressure, which is very effective, albeit not very well organised"[11].

9. *Ibid*. p. 496 (my italics).

10. Recall that Hayek argues, especially in *Law, Legislation and Liberty,* that the system of *common law* is the ideal model that drops legal considerations of that kind.

11. *Ibid*., p. 222. In reality not even in the case of primitive groups (and it is to these that Hayek is referring), is the law – if it really is a law – sanctioned by simple "social pressure" that comes from society reacting in an instinctive and inorganic way. It is quite true, as Hayek argues, that these groups lack "suitable bodies [...] responsible for enforcing" (*ibid*.) the rules; therefore it is true that neither the investigation into the crime nor the execution of the punishment is entrusted to specialised bodies and therefore either one or the other function is completely devolved. Nevertheless, in so far as that primitive law is a "law", and in so far as there is a penalty, albeit a devolved one, it is in any case referred to a specific body in society and never to *quisquis de populo*, or to any old member of the group like it ought to be if the rules were really sanctioned by "social pressure". In short, the primitive "law" is real if and as long as it is supported by a rule that governs the penalty (and it does not matter whether the penalty is devolved, i.e. if the act of imposing it is carried out by the same person who has suffered the wrong, as the principle of self-defence dictates). "In a primitive society - Kelsen explains - the man who avenges his father's murder by killing the murderer, is not seen as a murderer himself, but as a member of society. In fact by this very act he performs a legal duty, one of the rules of the social system which makes up the community. It is just this rule which allows him, and only him, to kill the suspected murderer under the given circumstances, and only under the given circumstances."

Kelsen continues: "This same man would not be acting as a member or instrument of his community, but simply as a murderer, if he was not just taking revenge and if his very same action was motivated by different circumstances to those prescribed by his community's legal system. The distinction between murder as an unlawful killing and as the fulfilment of a duty of revenge is of the utmost importance to a primitive society. It shows that killing is only allowed if the one doing the killing acts as a member of the community and if this action is taken to uphold the legal system".

And Kelsen concludes: "A society that has not progressed beyond the principle of self-defence can lead to a state of affairs that leaves much to be desired. Nevertheless it is possible to consider this state as a state with laws, and this decentralised system as a legal system" (*Teoria generale del diritto e dello Stato*, cit., pp. 343-344).

Further Discussion on External Law: Hayek's Fluctuation

There is no doubt that Hayek's thinking is clear, but the flaw that undermines his thinking is equally clear. And we could dismiss him out of hand right away which, although somewhat justifiable, would be too harsh in its alacrity. It is better to let his thinking emerge from this sole flaw, and as it were pluck it fully formed from the very labyrinth which ensnares his reasoning. Because, you see, it is precisely this; a labyrinth which one moment leads us up in a tiring ascent, and the next hurls us down in a quick descent; one moment it turns to the right, the next it veers to the left; a little like a roller-coaster in an amusement park which, when it finishes, leaves us out of breath and always slightly alarmed.

Sometimes Hayek turns to the rules of positive morality to determine if they also belong to the law and if they deserve the same title of regulations enforced by organised sanctions. Sometimes he puts himself to the test in this enterprise and tries out three different stances, switching between them with a dexterity that is occasionally spectacular. We have just seen how he is not beset by any doubt over the rules of custom or other practices that can be attributed to the legal universe because they are imposed "very effectively by social pressure". And it is on this very occasion that he comes out with the following assertion: "I do not think it is a great help to characterise the law as ‹the union of primary rules of obligation with secondary rules›"[1], where, following Hart's definition, "primary" rules are understood to be rules in accordance with which "men must either do or refrain from doing certain actions" and secondary rules are "rules of organisation that are designed to enforce the rules of behaviour"[2]. That being the case, it would seem that the law has a scope that is wider than those systems of rules with organised sanctions. But then Hayek had previously concluded with a *non liquet*; suspended between a yes and a no, and he had decided not to make a decision, leaving it to pure chance to determine whether the "bare" rules, so to speak, i.e. those not strengthened by organised pressure, were to be sealed with the stamp of legality.

1. *Ibidem.*
2. H.L.A. Hart, *The Concept of Law,* Oxford 1961, pp. 78-81.

Hayek wrote: "If we must call this sort of rule 'law', which in such groups can actually be sanctioned by general opinion [...] it is a question of terminology and therefore expediency"[3]. First, the argument against (no: the law is something more than a set of rules governing strength); then the argument for 'maybe' (whether the law has a broad or narrow scope depends on the criteria we use). Then, after the 'no' and the 'maybe', right at the end of this triple somersault, we finally reach the argument in favour; yes, Hayek grants: legal rules are only those with strengthened effectiveness, and it is precisely here in the strengthening of that effectiveness (obtained by means of organised sanctions) where he draws the distinction between that which is law and that which is not law. Hayek's words are unequivocal: "The difference between moral and legal rules is [...] a distinction between rules which are applied in a way that is recognised by an established authority and rules which are not, and it is therefore a distinction which loses its meaning if all the recognised rules of behaviour, including those society considers moral rules, must be sanctioned by authority"[4].

So, all's well that ends well? Not quite, because in order to favour this narrow concept of the law, Hayek keeps all his arguments against so-called social rules in check (Who can I take it out on if I'm unemployed? And what penalty would there be? What legal course of action is open to me to claim that right to work which the constitutional documents so proudly display?) Here he refrains from attacking these overblown ideas where earlier he did not hold back. However at the same time he finds himself contradicting primarily himself, the very person who previously raised moral rules, a sense of justice and social customs to the dignified status of law (the term he used was 'external law').

If we accept, as Hayek accepts in his last argument, the idea that the law is everything in governing the response to crime, i.e. in restraining strength (and this alone means a system of organised sanctions), then we must admit that moral norms always remain purely moral norms, and that the sense of social justice and social customs always remain just that, customs which are absolutely crucial for the strength and health of the legal system but which are still separated from it by a sharp boundary. When I break a habit, e.g. the habit of greeting an acquaintance I meet in the street, I don't know whether I will be punished (my acquaintance might rise above it, shrug his shoulders and then walk away); or even when I will be punished (There and then? A little later? Or much later, since revenge is a dish best served cold?). Nor can I know who will punish me or how they will carry out the punishment. Will I be punished

3. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 122.
4. *Ibid.*, pp. 256-257.

by the individual concerned, by his relations, or by the wider community which will deem me asocial? And how will they hit back at me? By seething with resentment, muttering about me behind my back? By banishing me from the society of men? Or maybe attacking me with a knife in the belly?

Law is precisely this: the response to questions that rules and social customs regularly leave unanswered. As Norberto Bobbio explains, "Law, as a set of rules governing the use of force, has four main tasks with respect to coercive power, which is the subject of regulation: a) defining the conditions in which power can or should be exercised b) defining the individuals who can and should exercise it; c) establishing the procedure through which power must be exercised by those defined individuals and in those defined circumstances; d) the *quantum* of force which an individual, who is entrusted with exercising coercive power in certain circumstances and following certain procedures, can and should have at their disposal." Bobbio concludes, "To say that the law is the moderation of force means in other words that the law is a set of rules which governs the *when*, the *who*, the *how*, and the *how much* in relation to the use of coercive power"[5].

Naturally it follows that we must also discard Hayek's idea, which is perhaps the most agreeable to his thinking and which has served him well at various times in the anti-positivist argument; the idea according to which law is not a function of the will but a prerogative of the intellect, i.e. legal rules are not produced by the effort of a superior will but deduced precisely by the intellect when it surveys, as if from a great height, all the trends that ebb and flow within society. Hayek writes that legal rules are "things that exist independently of any particular human will"; they "are *discovered* [because] they are merely the formulation of ways of behaving that are already observed in practice"[6]. Clearly it is the same argument: law does not spring from authority, it precedes it; it is not laid down by the law-makers but imposed on them by ways of thinking and acting which define the nature of a community. So it is the recurrent theme which crops up with monotonous regularity in Hayek's writing, but it withers away when, even for just a moment, we see it through the network of conclusions which we have just reached. Let us consider it for a moment. If it is true, as even Hayek seems to think, that the law is a system of rules with organised sanctions and that it is authority which sets up these sanctions, then it is authority which determines the birth of the law; the law *comes into being in the precise*

5. N. Bobbio, *Diritto e forza*, now in *Studi per una teoria generale del diritto*, Giappichelli, Turin 1970, p. 128.

6. F.A. von Hayek, *Legge, legislazione e libertà* cit., p. 153 (my emphasis).

instant when authority consolidates it within a system of organised sanctions. This is true, but if authority brings the law into being, the law in this sense is a creation of authority and authority is the creator of the law. What kind of creation does not have a creator? So strictly speaking, and for the sake of consistency, we should talk about a law being "created", not being "found". This law has the same content as other rules (moral rules or customs). Nothing alters the fact that it deals precisely with "other" rules and how reality stands alongside the law but can never assimilate or superimpose itself on it.

The "Trickery" of Positivists

It is a line of reasoning so even and sure that one finds no reason to add another; but Hayek views it with great contempt, even provoking scandal with the language he uses to express this. Where they appear to use an honest language, the same simple clarity of honest matters, is precisely where Hayek sees slippery and sneaky tricks of words. "Evidently - writes Hayek - according to the definition used by positivists, these rules, until declared valid, are not 'rules' or laws and do not 'exist' as legal rules. This 'trickery' proves that they are 'created' from arbitrary will of the legislator"[1]. if we may ask, is the "trickery"? Before a declaration of validity, are or are they not rules of law? More precisely: before they are part of a system of reinforced effectiveness, whose effectiveness is enhanced by sanctions thus and thus governed, before they are part of this system, are the rules are legal or not? Yes? They are legal? Good. But how do we reconcile this with the Hayekian definition of the law? Does his view, where only "rules with a procedure of application that is recognized by a constituted authority"[2] are legal, not fall victim to contradiction?

No? They are not legal? Very well. Then, and again, where is the "trickery"? And why be scandalized if positivists like Kelsen refuse to christen rules which have not been validated as legal? In truth, scandalised contrariness is precisely what we see radiating through Hayek when he writes this: "The constant use of these expressions [*to validate, create, bring into being*] produces the *suggestio falsi*, which seems to trap precisely those who use it, that the content of the law is always, and should always be, determined by an act of human will"[3]. There: this is truly an exaggeration on the verge of flying into grumpy impatience. Heck! It is as if the legal positivists, victims of this alleged suggestion, were not aware of a phenomenon that instead, and unlike Hayek, frequently shapes the course of their reflections: the phenomenon of

1. *Ibid.*, p. 249.
2. *Ibid.,* p. 257.
3. *Ibid.*, p. 249. My parentheses.

"reception". Reception means that device of legal knowledge whereby, when social realities that precede authority produce a rule, that same authority ascribes the rule after the fact with the binding strength of the law. Indeed the authority ascribes the rule after, *a posteriori*, and even without having determined its content it is adopted into the system. It is understood that if legality is attributed *a posteriori*, first, *a priori*, these rules will be everything - rules of positive morality, ethics, perhaps religion - everything except rules of law. Therefore the intervention of authority is constitutive, not declarative, of law; it is not and cannot be a confirmatory act (of what is not yet there), but creative (of what will be). Where is it written, then, that anyone who creates legal rules is therefore creator of their content? One may be "creator" of the law and at the same time "receptor" of what spontaneously brews in society.

The law, the so-called external law of Hayek, is neither more nor less than the law, the so-called living law of sociological jurisprudence. Now, as was skillfully explained: "the living law is purely and simply a fact or a series of facts from which the judge derives knowledge of legal aspirations that form within society. But - he adds - in order for these aspirations to become legal rules, the judge must welcome them, and ascribe to them the legislative authority as one whose role it is to produce legal rules. The living law is not yet law, namely a standard or set of rules of that system, as long as it is merely effective. It becomes law the moment in which the judge, recognized as a creator of the law, also ascribes it validity". "In reality -he concludes - we can refer to a judge as a creator of the law, insofar as the rules he discovers within the social reality are not yet legal rules, not until he recognizes them and ascribes them a sanctioned strength"[4]. These are the words of Norberto Bobbio, and they perfectly illustrate the case of an authority which creates the law without simultaneously designing the content, which is instead received from the outside. Bobbio, as is known, is a prominent advocate of Kelsen's school of thought. Also, neither he nor others like him have flouted the laws of reason. Where is, therefore, the *suggestio falsi* which confuses their intelligence?

The truth is that Hayek's accusations towards positivism (and even more so those levelled against Kelsenism) are always a little, how to put it, off-center. One admires the hardiness of efforts required to prepare them, and is not even displeased by the pointed animosity with which they are carried out, always direct, immediate, without embellishments or sickly sweet paraphrasing. And yet, in spite of repeated attacks and

4. N. Bobbio, *Teoria della norma giuridica*, Giappichelli, Turin 1958, p. 69.

despite a whirling vortex of shots, not one hits the target. Not a single one knocks out the opponent, who is always ready to dodge and return with a deadly counter-offensive. Such was the case, as we have seen, for the concept of sovereignty, which Kelsen does not borrow from Hobbes, instead constructing it from his own, highly unique course; so special that it escapes sightings by and therefore the artillery of the enemy. It was precisely so, too, for the "negative power" that was supposed to be the secret weapon to dismantle Kelsen's stronghold, and instead was not only found already present in Kelsen's arsenal but even less rough and better perfected there than elsewhere. And again it was so for "reception", which was subject even to extreme attacks from those seeking to pierce the armour of ambiguous and elusive terms behind which, according to Hayek, Kelsenism would conceal arbitrary power. In short, it is always thus: there is an imbalance in Hayek's positions that prevents him from hitting his mark. Indeed, it must be due to some haphazard vehemence, the temerity of his endeavour. For this or yet more reasons, it is certain that the *pars destruens* of Hayekian arguments scatters and suffers under sustained trial.

This, of course, is the *pars destruens*. But what can we say about the *pars construens*? Are the arguments "centered" or is there also here a block in the flow of reasoning that keeps them from their purpose, which is freedom?

Abstractness and Generality of Laws

Freedom, it is worth repeating now as we turn to new developments in our analysis, freedom in Hayek's system is served by general laws, and more specifically by any general law, whatever the content, provided that it is general and then applied without exception to everyone. "In order for the sovereignty of the law to be effective - explains Hayek - the existence of a rule applied always and without exception, is more important than the actual content of the rule. Often the content of the rule is of secondary importance, provided that this rule is universally observed."[1] "In this sense - he adds - we cannot concern ourselves with particular content but only certain general traits that rules should have in a free society"[2].

It should be noted, in the meantime, that if the law must apply "always" and "without exception", then the requirements that it must meet will no longer be only one but two: generality (the law "without exception") and abstractness (the law "always" applied). Hayek made the mistake of grouping the two concepts together in a tangle that can tumble toward incorrect logic if it is not stopped and unravelled from time to time. Yes, unravelled. Because, no doubt, this is akin to unravelling a bundle. How else to define a mass of concepts that in the brief space of five pages (literally five?) he makes us go from abstractness, an entity distinct from generality, to generality as synonymous with abstractness, ending in a lovely pirouette with generality as a fragment of abstractness. First Hayek says that the law is characterized "by its generality *and* its abstractness"[3] (where, of course, the conjunction "and" indicates a reference to two different things); then, immediately after, talks of "generality *or* abstractness"[4] (where the disjunctive nature of "or" negates the use of the two terms as synonyms), and then, in the last act of this Fregoli-esque magic, Hayek presents generality as "the most significant aspect of the legal trail that we have defined as

1. F.A. von Hayek, *La via della schiavitù,* Introduction by A. Martino, Rusconi, Milan 1995, p. 131.
2. F.A. von Hayek, *La società libera,* cit. p. 215.
3. *Ibid.* p. 207.
4. *Ibidem.*

'abstractness'"[5] (where the relationship is no longer between two equal or distinct entities, but between two different entities where one is so much greater than the other one that it encompasses it as its own particular subset).

Confusing? Of course it is! But it is useless to lose ourselves in it, and we must try instead to step back immediately without getting caught up. Here the traditional distinction comes in handy, the one that relates generality to the citizens to whom the law is addressed and abstractness to the actions that the law contemplates. So, restricting ourselves to only abstractness for now, we call abstract those rules that control an action-type, an action described as such for its typical characteristics, and that will remain defined as such provided that it always (here is the "always" of abstractness), serves toward all concrete behaviours that, from now on and for an indefinite period of time, may be part of its model, or framework-type. This is why the abstract norm is a veteran rule, so to speak, a rule with a long life. Long because it is not born and done just like that, as would be the case if I were ordered to "stop smoking that cigarette". If I obey, then the precise moment in which I stub out the cigarette is the moment in which the effectiveness of the command runs its course and will therefore not be repeated. This is different, of course, to reading the "no smoking" sign in the cinema. Here the effectiveness of the ban is continuous, no longer instantaneous because I know, *every time I want to go*, that I must refrain from smoking in the cinema, and I also know that if I don't abstain I will be punished with a fine. This is the fundamental point (fundamental, that is, for a free society): with abstract law I have the possibility to calculate beforehand the consequences of the action I wish to take. I simply need to identify the "type" of framework that it belongs to and the effects that follow.

Now, giving citizens the opportunity to know the legal consequences of their actions in advance is the principal function of legal certainty. Legal certainty means the practical possibility to know, before we act, which actions are permitted and which, on the other hand, are prohibited. But this knowledge is precluded if the regulation of individual conduct, instead of preceding the action, comes after; where the authority only intervenes after the action to declare it legal or illegal through the judgment which, each specific time, suits it best. Therefore, so that everyone may know "when they are guilty and when they are innocent" (Beccaria), the formulation of the law must not occur retrospectively and on a case-by-case basis, but in advance and in categories, not with concrete commands but, indeed, with abstract rules. It is the

5. *Ibid.*, p. 211.

abstractness of rules, the fact that they govern an action described by its typical traits, that allows the citizen, referring to frameworks already set out by the legislator, to determine if their action would be considered an offence or not. Hayek writes: "the effects of these man-made laws on their actions, are exactly the same kind as natural laws: the knowledge of both allows him to predict the consequences of his actions, and help him to confidently prepare his plans. "There is very little difference - Hayek continues - between his knowledge that if he lights a bonfire on the floor of his living room his house will burn down, and the knowledge that if he if sets fire to his neighbour's house he will find himself in prison. Like the natural laws, the laws of the State have stable characteristics in the environment they act within"[6]. Abstract laws, therefore, are the guarantee of certainty.

And certainty, in turn, is an important condition of individual freedom. Freedom - which let us remember, we intend as the liberal sense of non-impediment, the possibility to act without coercion of any kind in one's own individual sphere – the freedom poses

6. And then Hayek adds: "although they eliminate some choices open to him, the [laws of the State] as a rule do not limit the choice to one specific action that someone wants from him". (*La società libera*, cit., p. 210). That may be. But the problem is to know *which* choice they eliminate. Imagine that many in a society, the vast majority, have a burning passion for football matches. Suppose now that the legislator decides to ban to any access to the pitch indefinitely. This would be a general rule (because it is addressed to everyone), abstract (it is permanent) and negative (it instigates a ban), it would be a rule that conforms to all the formal characteristics that, according to Hayek, a law must have in order to ensure personal freedom.
For the moment let us restrict ourselves to considering the ban alone and ask: does negative prescription, for the sole reason of being negative, therefore signify freedom? Certainly, in the face of such a ban, the fans would have endless options in front of them: they could devote themselves to painting, to gardening, going to the racecourse or even just taking a stroll by the sea. Nevertheless, Sunday would remain for them a succession of lacklustre hours that slip emptily between their fingers. All this is to say what? To say, as will be argued throughout the text, that in the matter of freedom the material content is (also) a deciding factor, the content of the rules of conduct; not just the quantity but (also) the quality of the choices for individual behaviour. Valeria Ottonelli is right when she writes that "Hayek [. . .] is a victim of the illusion that any rule that requires an omissive action, as such, cannot pose a serious threat to personal freedom, since it leaves the individual the choice between an infinite number of alternative actions; obviously this is not true, from the moment that what it reveals of judgment on the coercive nature of a rule is not only the number of possible actions prohibited to the subject, but also their usefulness to the individual. Even if a rule prescribes an omissive action, in contrast to rules that prescribe commissive actions, and leaves the individual with an almost infinite number of permitted actions, it is possible that the usefulness of each of them is so much lower than that of the prohibited action that they do not represent any real choice for the subject") (V. Ottonelli, *L'ordine senza volontà. Il liberalismo di Hayek*, Giappichelli, Turin 1995, p. 131n.).

an inescapable problem of limits. And indeed, in order to avoid invading the individual sphere of others. To avoid, in short, that my freedom should become your slavery, something must exist, like a fence, which tells me: "Up to this point you are master; beyond this fence begin the rights of others". The fence represents legal certainty. "If the law must serve as a preventive delimitation of individual freedom, this does not appear conceivable without the presence of certainty. The limit, where it should serve in practice as such, necessarily implies a visible line, a clear sign; to call a limit uncertain seems a *contradictio in adiecto*: it would be like saying a limit that does not limit"[7].

The certainty of law, therefore, is a condition of freedom. A necessary condition, of course, but not yet sufficient. It becomes sufficient when the generality of the law joins with abstractness.

All this, naturally, according to Hayek, who bears down on his point with such force, so doggedly, that the strength of the whole construction depends on it. Indeed, if by chance, precisely that point were to break down, all the points surrounding it would break down together and in the end the entire frame of his theory would be compromised.

The argument that Hayek repeats every step of the way is that everything, truly everything, beginning with justice and freedom, is derived from general laws. There is hardly a page of his work that does not reiterate this. At the beginning, end or middle of *Law, Legislation and Liberty*; before, after or during its writing, the same theme always blooms. Try and pick just one, one little flower at a time, of all the bloomed bunches in Hayek's works, and you will find yourself plucking petals off the same flower. Hayek writes in *Law, Legislation and Liberty*, that "the ideal behind open society [is] that some rules should apply to all mankind"[8] which can already be found in *The Constitution of Liberty*, where we read that "what distinguishes a free society from one without freedom is that in the first [. . .] one cannot give orders to the private citizen, but expects him to obey rules that are equally applicable to all"[9]. If then, still choosing flower from flower, we look at *New Studies in Philosophy, Politics, Economics, and the History of Ideas* or the entry in *Liberalism*, we find here and again a smattering of the same idea; in *New Studies* Hayek writes that "the power of the legislative body must be limited" by "general rules of just conduct equally

7. P. Calamandrei, *Appunti sul concetto di legalità*, in *Scritti giuridici*, vol. III, Morano, Naples 1968, p. 62.
8. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 256.
9. F.A. von Hayek, *La società libera*, cit., p. 274.

applicable to all citizens"[10], and in the *Entry* that "liberalism asks only that the State, in determining the conditions within which individuals act, decree the same formal rules for everyone"[11]. And since it would be incomplete to collect Hayek's quotes without even one reference to his cruellest enemy, social justice, we close the circle by returning to *Law, Legislation and Liberty*, where we learn that "while the call for 'social justice' is merely an invitation to morally support claims that are without any moral justification and in conflict with the essential rule of a free society, the pledge to enforce only rules that apply equally to all, justice in the sense of rules of mere conduct is essential to any relationship between free citizens"[12]. Does this, Hayek's sentence, seem muddled, or if not muddled then swollen, where so many things are bundled together that the sense of purpose becomes confused? Good. Dismantle it, and the idea, the central idea, will reveal itself before you with the stubborn decisiveness of before. Therefore: (a) just rules are essential to free citizens; (b) justice is ensured by rules of conduct; (c) as long as the rules of conduct are general rules (d) generality is essential to free citizens. So indispensable that "all types of freedom, and not only economic freedom, would be guaranteed once the activities of individuals [...] were subject only to general rules applicable under the same title to everyone[13].

There is more than enough here to understand the role that general laws play in Hayek's system; laws that, in order to be general, unite rulers and ruled in the same fate and that for this reason (and, according to Hayek, this reason only), regardless of their content, are the precursors of freedom (as we saw in § *General Norms and Individual Liberties,* which should be addressed sooner rather than later). But it is precisely this centrality that makes us very demanding, less magnanimous, and urges us to probe these general laws further to see if (and to what extent) they apply to reality. The suspicion grows, in fact, that Hayek's generality was never found to be "rooted in truth" (Machiavelli). "In truth", or in reality, it is a given to speak of general laws (of course!), but of laws that are general according a different and more restricted scope than the universal one with which Hayek has charged them. A scope, and this is the terrible paradox, which Hayek could never accept, not even in the guise of reworking its structure, without undermining and detonating it from the inside at the same time. But let us not get ahead of ourselves, and instead let us endeavour to follow his reasoning.

10. F.A. von Hayek, *Libertà economica e governo rappresentativo*, now in *Nuovi studi di filosofia, politica, economia e storia delle idee*, Armando, Rome 1988, p. 122.
11. F.A. von Hayek, *Liberalismo*, cit., p. 82.
12. F.A. von Hayek, *Legge, legislazione e libertà,* cit., pp. 304-305.
13. F.A. von Hayek, *Liberalismo*, cit., p. 75.

When Hayek writes that, "a system of regulations conceived for an open society [. . .] should be applicable to everyone"[1], is that "everyone," we must ask, really and truly "everyone"?

Everyone, really everyone - men and women, adults and children, citizens and foreigners, natural persons and legal entities. . .should everyone really fall under its command, simply because these rules claim to be general? And if it is so, where are they, what are they, and especially, how many of these general laws are there?

Then and there, constitutional documents would seem to come to the rescue; one thinks of the Italian constitution, where the articles preceded by the exponent "everyone" are not few or far between: *Everyone has the right to freely profess their religious faith* (art. 19); *everyone has the right to freely express their thoughts in words, spoken or written* (art. 21); *everyone can take legal action to protect their rights* (art. 24). There are yet others of the same scope, which are announced, however, in the opposite way, by the word "no one": "*No one may be deprived, for political reasons, of their legal capacity*" (art. 22); "*No one may offer personal services or assets except in accordance with the law*" (art. 23); "*No one may be denied the right to a fair trial*" (art. 25). Then, if it is so, where is the problem? And why does it cause us to be generally suspicious of Hayek? Why is that?

This is because despite the deceptive sounds of these words ("Everyone," "No one," or, as is written in codes of law, "Whom," "Whomever," and "Every"), despite the sound of these words, there almost does not exist a rule that can be expanded enough to reach the universal capacity that Hayek exhibits as a document of generality. In short, if generality expands in universality and everyone really becomes everyone, then everyone will have to gather beneath the call of that single flag ("everyone" meaning, to be precise): citizens and foreigners alike, adults but also even minors, natural persons just as and no less than legal entities.

But if it is so, there will be some real pounding from above, even when using the purest of metals: there almost doesn't exist a law that will give off the sense of generality. Let's think about it for a moment: already, nature (physical nature I mean) in its direct and immediate materiality, mere nature, stops the vast majority of regulations from rising to the status of general laws. Could the ban on the death penalty ever have a universal reach? The heads of men and women of every age and every group will roll under the executioner's axe. But, the heads of women and men means physical persons. What about legal entities? Can they ever fall victim to this

1. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 294.

punishment? At the same time, what sense would it ever make for a child in his first cries to express "his thoughts in speech and writing"? What speech? And what written word could he possibly express? This regulation would be for adults, for foreigners, maybe even for minors that know how to speak, read and write; it will be for them, but *de facto* it cannot work for everyone-really-everyone, including newborns. "Everyone knows", Vittorio Mathieu explained, "that age, sometimes sex, and in certain systems birth, can give rise to rights and mutual, but not symmetrical, obligations. In general, the law is compelled to take account of many natural differences, and to speak to specified categories, for example, with the logical subject of "father," "minor," etc. that normally don't affect all citizens. Without a doubt", continues Mathieu, "the legal process heads in the direction of a progressive phasing out of the legal effects of natural inequalities. Rights of birth have been abolished, women's entry into the legal system and, sooner or later, in the Armed Forces, is no longer prohibited, etc. [Mathieu wrote in 1978]; but it would be very difficult to take this process all the way to the end and impose, for example, upon a two year old child to provide the same care for his mother that his mother provides for him." "Contemporary law", Mathieu concludes, "tries to abolish nature, but its outcome can never be completed."[2]

So, once again: everyone-really-everyone? "Literally everyone", as Hayek would say? No, not if generality is measured against this standard, then no the fattest notebooks around will not be enough to count the laws that put you at a disadvantage. Conversely, we can count on a one hand the regulations that honour such a requirement - the requirement of generality, to be precise (the example that immediately comes to mind is art. 1 of the Italian Civil Code, about legal capacity, which as we know is issued to children at birth, then *a fortiori* to adults, thus to foreigners and then also to legal entities). Other regulations could be added, especially when rummaging through the folds of the Penal Code, but then again this is an exercise in finding extraordinary preciousness. Sifting through the system in search of the diamonds that embellish generality, will however remain a desperate endeavour, and when not desperate, crowned with all-too-rare successes (since we can think of arranging a complete legal system on top of it). How? An entire legal system squeezed into the narrow space of two, three… ten regulations at most? What's new about that? The fact is, since it has been argued quite well, that "the need to treat all men equally, and thus not taking into account any inequalities actually in existence…brings about absurd consequences. In fact, a moral system does not exist [nor a legal one] that contains

2. V. Mathieu, *L'eguaglianza giuridica*, in AA.VV., *Eguaglianza ed egualitarismo,* Armando, Rome 1978, pp. 58-59.

a regulation according to which children are treated like adults, men like women, the mentally insane like the sane, violent people like the peaceful. It's impossible not to take all these inequalities into consideration, in every type of treatment: some of them must absolutely be taken into account."[3]

3. H. Kelsen, *Il problema della giustizia*, Einaudi, Turin 1975, p. 53. Then, simplifying, Kelsen adds: "In the regulation 'one must not kill any man,' all men are treated equally, that is no difference is taken into account: from the point of view of this regulation, all men are equal. This equality, however, only refers to the "not-be-killed," and not to all types of treatment. In regards to the application of punishment, one must absolutely consider the difference between the man that commits a crime and the man that does not commit it. From the point of view of the regulation according to which a man that has committed a crime – and only him – must be punished, men are not in fact equal" (*ibid.*, p. 52).

More on Generality: Hayek's Contradiction

It is said that it is necessary to withhold the harshness of judgement against those who have fallen. That's fine. Having raised the curtain on Hayek's mistake, it is not said that it should enter within us, or rather, succeed in overbearingly lingering on the "all" pronoun, following the analysis meticulously, perhaps a bit stingily, as we have undergone up to now. However, the fact is that even if spending freely, also in fixing up that "everyone" phrase, giving a little slap here and an adjustment there, the difficulties still are not finished and Hayek is still off to a bad start. Let's also grant that "everyone" means only adult citizens of a given State. Is this ok? Nothing out of the ordinary, or so it would seem, and nothing more natural (if equality must exist), than recognizing the same fundamental rights for all adult citizens, starting with the right to vote. Now, it so happens that in Hayek's ideal constitution, that which he imagines would restore the State to the ideal springs of generality and thus liberty, precisely here in his model constitution, there is no space for universal suffrage. How is this possible?

One must understand that for Hayek, the cardinal sin of modern legislative assemblies is that of having provided honour for "laws" of action that are lacking in any broad aim and which, instead of expanding into general regulations, contract into increasingly limited, sectarian commands. When a legislator supports this or that interest, when he gives in to the blackmail of this or that group, when that happens, Hayek warns, in reality his position is no longer one of the law. It has the appearance of a law (because it is always Parliament that enacts it), let's say, and it has the form of a law (and Hayek mentions "formal" laws), but it no longer has the material of authentic laws, and thus they are not material law. They are no longer so because their substance first fades, then disappears in their particular command. This particular command inevitably opens the doors to the arbitrary because even the smallest, most humble, citizen is used to this sneaky method of falsification; he is used to considering the law to be an instrument of bias and favour, and not quite something that guarantees equality. But once the doubt that the law isn't or shouldn't be necessarily equal for everyone has been hinted at, could anyone ever stop this

deadly conviction from rising up, light as a strand of venom, and finally arriving as high as the rulers at the top? Who will be able to prevent even them from becoming intoxicated and that they first, considering themselves unleashed from the snare of a law that is no longer general, would wish for others what they would never have wanted to wish for themselves?

With that, we are once again one step away from tyranny. Hence the necessity: first, to carefully distinguish formal laws from material laws; second, to put them in order along a hierarchical scale where some (material laws) come out superior to the others (formal laws); third, to assure that the toughest ones, since they are they are more noble metals, prevail over the softer ones in cases of conflict; and finally, fourth, to invalidate any formal law that contradicts the precepts of greater material laws. Now, in Hayek's system, this all points to an unavoidable need: that of disjointing the legislative role. To be more precise, today it is a single body, the parliament, which almost always looks after the legislation and supplies regulations that are only sometimes general, but much more often are specific (and which, coming from parliament, rise up to the dignity of law). Tomorrow, however, to avoid this tragic merging of commands and regulations, form and substance of law, tomorrow, according to Hayek, it will be necessary to divvy up legislative activity between two legislative bodies. The first is the Legislative Assembly, as Hayek baptizes it, which should be used to produce true, genuine laws, and thus appointed to general regulations. The other is the Governing Assembly, which largely corresponds to current parliaments, since current parliaments must decide on the use and the purpose of resources that are entrusted to them, but – here is the innovation – always staying within the frame of and complying with the superior measures of the Legislative Assembly. Otherwise, he would struggle with the invalidity of his commands. "The important difference between such a Governing Assembly and existing parliamentary bodies", Hayek writes, "would be that this one naturally would be chained, in all decisions, to the regulations of conduct to the rules of conduct issued by the Legislative Assembly, which, in particular, cannot issue orders to private citizens that do not directly and necessarily follow the regulations established by the latter."[1]

Then, immediately after, passing from the functions to the structure of the Governing Assembly, Hayek specifies: "as far as the right to elect representatives to the Governing Assembly is concerned, it is necessary to reconsider if there is new strength in the old argument by which government employees, or those who receive subsidies or other financial support from it, shouldn't have the right to vote. The argument",

1. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 492.

explains Hayek, "was not decisive until it concerned the vote for a representative assembly, whose main function was to be the emanation of universal rules of conduct. Certainly a state official is able, like anyone else, to have an opinion about what is right, and it would appear to be unfair that he would be excluded from a right granted to many, who may be less informed and educated. However," he continues, "it becomes an entirely different matter when it is not about opinion but about clear interests to obtain specific results. Here, neither political tools nor those which uniquely share the results without contributing to the means, seem to have the same rights as private citizens." Hayek concludes, "it doesn't seem to be an ideal situation if state officials, elderly pensioners, the unemployed, etc. must vote on how they should be paid at the expense of others."[2]

Certainly, we can concede that it would not be an ideal situation. Ideals, after all, are what they are: open ground for galloping imaginations, so it is always a bit reckless to adventure into their territory. Very well then, no right to vote for the have-nots, pensioners and government officials. At which point we must reflect: it definitely must be a regulation to establish these limits. Yes, but what regulation? Can we ever say that it is a general regulation? No, evidently not if generality must be understood as everyone-really-everyone. No, still no if generality refers to all adult citizens. So

2. *Ibid*. pp. 492-493. There should then be special consideration given to the system that must preside over the election of the other branch of parliament, and thus over the Legislative Assembly. "Every generation," Hayek explains, "should elect, once in the course of their existence, let's say when they are in their forties, representatives that should remain in charge fifteen years and who should be guaranteed continuous employment as secular judges immediately afterwards. The legislative assembly thus will be made up of women and men who are between forty and fifty-five years old. . .elected by their peers after having had the chance to prove themselves in ordinary life, and who should be expected to leave their own personal business for the rest of their lives." (*La costituzione di uno Stato liberale*, now in *Nuovi studi di filosofia, politica, economia e storia delle idee*, cit. p.116). Now, since in Hayek's construction the Legislative Assembly is elected only by people in their forties, and the unemployed, elderly pensioners, state officials, etc. will not *ever* have the right to vote for the other Assembly, for the Governing Assembly, it follows that the unemployed, pensioners, and government officials would vote one time, and only one time (upon reaching 40 years old) throughout the entire span of their existence. In this way the crisis of overcharged modern democracies would be resolved. However, it would be resolved with the typical recipe of *ultras* conservatives: that is, taking an authoritarian route and restricting the flow of questions. At that point many of the arguments made by Hayek when he wrote *Why I am not a Conservative* (which is the conclusion of *The Constitution of Liberty*) lose their importance, not to mention credibility. This is also without mentioning that the idea of the two Legislative Assemblies is an idea proposed by Hayek, a juridical order which his mind built from scratch, only with the assistance of rational reasoning. It's a nice way to honour the evolutionary paradigm and trust in the spontaneous development of law!

then what? What whim of originality is this? The very system that was to celebrate the apotheosis of generality, precisely the arabesque of inventions that was to remedy the sectarianism and particularities of modern democracies – it is precisely this arabesque and this system ending in regulations that withdraw from the requirement of generality. *Desinit in piscem, mulier formosa superne (A woman, beautiful above, ends in a fish tail)*. Let's face it: as a contradiction it is not trivial! Unless…

A Different Meaning of "General Law"

Unless, of course, one wants to extract Hayek from this mess, dressing up the "everyone" (for the second time already) in such a way that the same restricted suffrage comes across adequate. It's an operation that, in truth, isn't wrong, or far-fetched. Nor is it very difficult, really, if one thinks that through Hayek's pages traverse not one but two concepts of generality that are entirely different from each other and that Hayek makes them live together in disconcerting promiscuity as if they were the same thing. Besides the generality of the everyone-really-everyone, which we could call "universal," there exists a different generality where "everyone" is not really and truly everyone (nor is it all adult citizens of a given state), but where "everyone" means all those within a certain state finding themselves in the same situation. This is true when Hayek writes that the rules of freedom are "rules applied to *whoever finds himself in the same situation*"[1]. It is always so when in *The Constitution of Liberty*, he explains that laws do not squeeze individual freedom "at least until they concern me personally, but they are done in such a way to be applied uniformly to *all people who find themselves in analogous situations*"[2]. It is still so when he adds that "a law may be perfectly general, referring only to the formal character of the people implicated, or even *include different conditions for different classes of people*"[3].

This second part would seem to be a voice of generality that sings in unison with the other mentioned above and which performs in the same choir, so to speak. Or, so it would seem. But as soon as you hear it, it is easy to hear how, with this, the law changes rhythm and takes on a completely new tempo. It is one thing to say "the same law for everyone;" it is another thing to say "equal laws for everyone who is equal." There generality is satisfied when the law applies to everyone; here it is fulfilled when the law applies to one class, to only one category of people, and

1. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 124. My emphasis.
2. F.A. von Hayek, *La società libera*, cit. p. 197. My emphasis.
3. *Ibid.,* p. 275.

specifically to those people who are the same because they partake in the same condition. It is provided that different laws can and should apply to different people, to people that, once again, are different precisely because they are involved in different situations. We can also say it like this: given that for Hayek generality is the legal precipitate of justice, in the first case, to be just it is necessary to assign the same rights to all men. In the second case, to be just, it is necessary to assign different rights to different categories of men, and thus it is necessary to "have a different approach with regards to the members of different classes, upon the condition that those who make up the same class…are treated in the same way"[4]. In this sense, then, it may be just to confer the right to vote to a university professor and to refuse it, on the other hand, to a nobody. It may be just (as it would conform to the second type of generality), provided, however, that all the have-nots are equally deprived of the vote, and it's not some yes and some no. By the same token, the entire category of university teachers must be able to vote, without distinguishing between haughty and modest, stupid and intelligent, prepared and unprepared. Thus Perelman is in agreement with Hayek's statement that, "you cannot say that equality in front of the law necessarily requires that all adults have the right to vote"[5]. Except it's hard to understand why he adds that "if the only people to have the right to vote were those over forty, or only those who work to gain money, or only heads of households, or only those who know how to read and write, the *violation of the principle would be rather small*"[6]. "Rather small?" But why? It wouldn't be small, but clamorous – clamorously huge if referring to the first type of generality (everyone-really-everyone, or at least all adult citizens). But if in relation to the second generality, generality by class, that restriction of the vote doesn't produce a single violation, neither minute nor colossal, neither large nor small, given – as we know – that formal equality does not come out at all diminished when treating the unequal categories of legal entities in an unequal manner.

In short, it can be one of two things: either generality is universal (or basically universal), and Hayek is in patent contradiction with himself and the idea of an Assembly Government is hopelessly lost, or generality is by category and thus leaves no place for inconsistency, neither miniscule nor venial, and we can, in this way, salvage the idea of restricted suffrage. After that, we will have to operate with a concept of generality that surely is useful, doubly useful in fact,

4. Ch. Perelman, *La giustizia,* Giappichelli, Turin 1959, pp. 47-48.
5. F.A. von Hayek, *La società libera,* cit., p. 151.
6. *Ibidem.* (my emphasis)

but which – in a terrible paradox – leads us to the extreme edge or even just outside the circle of freedom.

This concept is doubly useful, first because it frees Hayek from a tangle of possible incoherence, and second because it allows us to "take" all of those regulations that we were not able to grasp before when we adopted the criteria of universal generality. Now, however, we can harpoon them precisely because we are using the second contrivance: the generality by category that is the most guiding criteria and which we can say belongs to the vast majority of civil and penal laws. Suffice a quick glance at the law codes to make sure of this. Here, in the codes of law, regulations are not simultaneously aimed at the totality of citizens, but at the totality of citizens that simultaneously find themselves united in the same class (which could be the class of "owners," "vendors," of "leaseholders," of "involuntary killers," of "failures," etc.).

It goes without saying that once all the categories are so distinguished, each one of them will be burdened by obligations and vested with rights that are rights and obligations different from the rights and obligations that will flow into other, different categories. An employer, for example, has such and such requirements listed (L. Jan. 19, 1955, n. 25), which are different from the requirements, also listed, which pertain to an apprentice. The latter "should offer his work with intelligence within the business", while the former should not "subject the apprentice to work beyond his physical ability", – obligations that are reciprocal, as you can see, but certainly not identical. Likewise, they are not identical in the simplest of shops, in the lease contract, where the landlord should follow all the necessary repairs, making exceptions for any small maintenance that, on the other hand, are the charge of the tenant, and only the tenant (art. 1576 C.C.).

Similarly, if we look to legal entities, we notice that within a limited partnership, a few members – the general partners – are jointly liable without limit for corporate bonds, while other members – the limited partners – are responsible for the same bonds only up to the amount of their shares (art. 2313 C.C.). The diverse treatment is all too clear and emerges in all of its plastic obviousness. It is different, of course, than if it comes from a close-up, an extra perspective (that is if we observe the limited partners from the general partner's point of view, and the general partners from the limited partner's point of view). But if we mute the angle of perspective and attention falls on each of the two parts, then we can easily say that the limited partners are equal among themselves, just as equal among themselves as the general partners are; equal in the precise sense that *within* each of the two categories the same rights and the same obligations are in

force. The examples could multiply, but we must stick to the point, and the point is that none of these regulations comes to be denied by the generality of the law. Provided that, of course, we come to an agreement – as it is necessary to agree when justifying law codes and, ultimately, the entire legal system – provided, as we said, we agree to keep the law that operates with categories, and thus joins men into classes, as "general". Classes, then: here if we want to follow a thread of rigorous reasoning, unravelled as such, simply, with the clear mind of someone who wishes only to understand – if we only wish to follow this reasoning, it's necessary to follow all of its developments. All of them, really all, even those that must bend the grandeur of our ideals and upset the dignity of our feelings. All developments, then, provided they are tied with the string of consequentiality to the premise from which we are moving, which is exactly that of generality referring to classes or categories of people. So then, what are the developments that so put things clearly?

To begin with: social justice. It is precisely that justice that seemed incinerated by the arrows that, without sparing any fury, Hayek had hurled against it (a "vain idea," as he had berated); it is precisely this justice that now rises from the ashes and, mockingly, lays claim to its right of existence. In fact, using the criteria of generality by classes gives an air of falsehood to Hayek's idea, according to which social justice, looking to favour the underprivileged and lift the dejected, destroys "the characteristic attribute of universal rules of conduct, the equality of all citizens in front of the same rules."[7] This idea takes on a tone of falseness because it makes the other affirmation less convincing, the one where Hayek writes that "when the aim of legislation becomes assuring higher wages for certain groups of workers, or higher income for small farmers, or better houses for the urban proletariat, this cannot be attained by implementing general rules of conduct."[8] Why not? Why can't such an aim be supported by general rules? Granted, it would be so if by general we were to hold on to the regulations that apply to everyone, to the universality of the members – if, that is, we were to entirely remake that first type of generality which, whether you like it or not, we had to set aside as insufficient to establishing legal order. Thus having to use only the second model of generality (the only one, moreover, in sync with the process of electing the Governing Assembly) and having to adopt this generality by category, evaporates the very reason for contention, and it is no longer clear what

7. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 177.
8. *Ibidem.*

sort of rejection the generality of laws could ever pose to social justice. Perhaps small farmers are not a category? Nor is the urban proletariat? But then, if it is not true that generality is affronted by the "special rules for particular classes"[9], then why close one's heart to the idea of social justice[10]?

9. *Ibidem*.

10. In truth, the idea of social justice, even so insulted, returns here and there in Hayek's own writing, thus putting himself in grave contradiction with himself. Luciano Pellicani wrote: "That a free society isn't conceivable without a market economy is something that no one today, after the bankruptcy (economic, political and moral) of 'real socialism,' can seriously challenge. But that a free society should actually free itself from the mirage of social justice is so unsustainable a premise that it is Hayek himself to contest it when he recognizes that the government has the obligation to intervene with positive actions in favour of those "who, for various reasons, are unable to earn enough to live in a market economy, such as the sick, the elderly, the physically and mentally handicapped, widows and orphans." (F.A.von Hayek, *Legge, legislazione e libertà*, cit., p. 429)". "Faced with these words," Pellicani continues, "the question spontaneously arises: what could justify the invocation of such positive actions, if not some principle of social justice? And then, what sense does it make to define the Great Society as a society held together only by the respect for laws laid down to guarantee private property and contractual freedom, and to get rid the idea of social justice as a residual of a tribal mentality. Hayek's inconsistency on this particular point is truly enormous" (*La Grande Società di Hayek: un esame critico*, now in *I nemici della modernità*, Ideazione, Rome 2000, pp. 192-193).

The Consequences of Regulations for Classes and the True Criteria for General Laws

Well then, why? Maybe a reason exists, and maybe in this way, by way of the "particular classes," we find ourselves walking along a slippery slope that drags us to consequences in front of which a civil consciousness that wants to remain civil must shrink away out of necessity. But let's see. And let's see it by moving the words, dazzling with clarity, with which Bobbio defined formal equality: "Through the known characteristics of generality and abstractness, a law, any law, assures an early form of equality, formal equality, understood as the equal treatment of those who belong to the same category. It is no coincidence," Bobbio continues, "The general principle that requires equal treatment of equals (and the unequal, unequally) is called the rule of justice." He adds: "The regulation that establishes a determined punishment for a determined crime, that imposes a determined obligation to he who signs a contract, *that confers a determined right to he who enjoys a certain status*, fixes an unequivocal criteria, good or bad as it may be, for all the subjects who find themselves in the same expected situation, and in that way allows for their equal treatment."[1]

Pay attention, because we are at a junction where vigilance cannot bear to be abandoned. Watch out then: it is general (in addition to abstract) "the law. . .that confers a determined right to those who enjoy a certain status." What status? Here, nothing intervenes to characterize it, and what counts is that nothing can intervene to do so if formal categorization has to exist. Whichever status, therefore, irrespective of the measure to define it.

Good (or rather bad), because if things are so, nothing blocks wealth rising to the dignity of status, for example, and for that reason a perfectly general rule confers, let's say, the right of association to everyone, and especially to everyone who declares a certain annual taxable income. And if instead of wealth, the measure of status was to be defined by birth? Once again nothing would change, in the sense that the generality of a law wouldn't suffer, if, let's say, it would prohibit all the children of farmers (and

1. N. Bobbio, *Eguaglianza ed egualitarismo*, now in *Teoria generale della politica*, Einaudi, Turin 1999, p. 262. (my emphasis)

only the children of farmers) from having access to a university education. Are these examples fragments of the imagination? Not at all. The Prussian law code of 1794 worked just like this: positioning legal subjects into three orders (nobles, bourgeois and peasants) and assigning to each one of them different rights and obligations, thus organizing civil society exactly according to the guiding principle that we just discussed. But then, is it necessary to look so far away? If we think of the Albertine Statute, here the criteria for status assisted religion, so they could easily create laws that, without losing generality, refused all Israelites, and only Israelites, the property of real estate or the right to testify against Christians[2]. And if there is no obstacle to wealth, if nothing conspires against birth or religion, why shouldn't we push down on the argument and sink it into the hole that has opened up before it? After wealth, birth and religion, why not skin color? Why not race? Of course, race. *Horresco referens,* but upon reflecting further, you cannot deny that from this point of view, even the Nazi organization was founded on the generality of laws, on laws that were generally precisely because they conferred full rights to Aryans, and only and all Aryans.

What terrible scenes have unfolded! And how the freedom of individuals came to a bad pass! We started on the wave of the most generous of intentions; we wanted to free Hayek from the shallows of his contradiction (Do you remember? The denial of the right to vote for the destitute) and then…then we realized, in passing, that the only argument convenient to what's needed is precisely that which, carried out consistently, ends up being just a hair away from legitimizing the most repellent types of society.

Let's be clear: it is not that Hayek didn't sense all of this and didn't realize a thing. But it's not enough to be aware of it. It must also be remedied. And what Hayek offers, simply isn't an effective remedy. And when it is effective, once again it is inconsistent with its premises. In order to put it in the form of a dilemma, we can say it like this: when Hayek's solution is coherent, it is ineffective, and when it is effective, it is inefficient. Why?

Let's start from the second part of the dilemma. But before moving to meet the answer, we can allow a brief respite, a pause to catch our breath in the concatenation of reasoning. The reader will then have the leisure of stopping and catching his breath, and will also have the chance to not lose the point of attack our reflection, which then is also the fundamental point of Hayek's system, the cornerstone of his castle of ideas: everything resting as it is above a concept that has this particularity, of diminishing the importance of the content, the material of the rules, to attribute it to the form, the

2. On this point, see F. Ruffini, *Relazioni tra Stato e Chiesa*, il Mulino, Bologna 1974, in particular from pp. 59-63.

general model of the law. As if general laws could on their own ensure the freedom of individuals and prevent them from groaning oppressed under the heel of tyranny or prevent them from withering up in its rigid, hierarchical order, where superiors have rights that inferiors do not.

Instead, we have seen how from the generality of laws, the liberal set of rules is surely exalted, without, however, those illiberal ones becoming underdeveloped at the same time. We then know how generality (a certain type of generality, the only usable one when one wants to understand legal systems) does not rebel against agreements, not even, among other things, against the reconciliation with the State of the classes, with the State that, chaining men to fixed places and in determined roles, closes them in a narrow enclosure where everything is already established in advance, a sort of elastic prison that forces them to move forward along the same, identical street that lay beneath their feet yesterday. Within it is the clamorous repudiation of the liberal principle of personal autonomy: the principle by which there are multiple, unpredictable paths, and there isn't a single one that men cannot attempt under the guidance of their intelligence and the light of their convictions.

The principle of autonomy, then. Thanks to it, liberal society is exactly what it is: a wheezing succession of people that come, go and return, of individuals that today negotiate and buy, tomorrow negotiate and sell, then quarrel, then incur debt to start up a business that might make them rich, after which point, they will commend wealth and demand credit, and so on and so forth. What unrestrained agitation exists in this various and always-shimmering succession of legal figures (creditors, debtors, buyers, sellers, etc.)! And in short, this is how men, piercing through the multicolour efflorescence of law, unleash the bewildering stormy scene that is life in a free society. It's so, thanks to the principle of personal autonomy. Personal autonomy, however - and here's the point - is a substantial principle, not a formal one, it does not assume the form, but the content of the law. Because of this, Hayek is right when he writes that in a liberal state, general regulations "simply provide the framework within which the individual must proceed with autonomous decisiveness."[3] And he also is right, one hundred, a thousand times right when he points out that, different from other organizations (including that based on class), in a system of freedom, "the sphere of each individual's free actions can be determined and modified according to the laws established a priori, long ago, and such laws", he adds, "can allow each individual,

3. F.A. von Hayek, *La società libera*, cit. p. 209.

with his own actions…to change the sphere in which he directs his actions for his own purposes"[4].

Hayek has a hundred, thousand reasons for this, but they are a hundred, thousand reasons that are valid in spite of, and not in support of, his construct. And that "autonomous decision" itself is a material that spreads into the mould of general laws, just as the "permission" that Hayek refers to is material and not a mould. Just like every other deontic modality (such as prohibiting, dictating, etc.), the act of permitting goes back, not to the external frame of a law, but that within it, its substantive content. Aside from the irrelevance of the content! In this sense, Hayek's solution is effective, yes; we can even say it is very, very effective. However it is as effective as it is incoherent with the stepping-stone of his theory where, as we know, nothing else matters but the range of the laws (the generality of the subjects). Now, we learn instead, and we learn it unexpectedly from Hayek himself, that it's not a *certain range of actions* but the *range of certain actions*, and to be precise, the range of allowed actions decides the fate of a free society. This is no small correction.

4. *Ibid*. p. 208. (*My emphasis)*

Laws for Classes and Peacemaking Regulations

We now come to the other prong of the dilemma, to the solution that is consistent with Hayek's formal assumptions, but for that very reason it is put in check by the inexorable logic of the facts.

Having accepted – begrudgingly, indeed – the idea of law by class, Hayek tries to adopt this discovery because this same law does not have to encourage privilege nor pander to discrimination. And the discovery would be in this: that at the heart of any controversy between categories, the conflict's resolving regulation must be acceptable to everyone, and if not to everyone, then at least to the vast majority of the groups battling opposite one another with their opposing interests. When this happens, the peacemaking regulations, of which, once again, nothing is said of the content (and here is the formal nature of the remedy), when this happens, the peacemaking regulation does not open up to unbalanced developments and it does not become a pillar for arbitrary acts by the fact itself of being peacemaking and having spread out people's souls in the calm of general appeasement. In the words of Hayek: "The need for regulations of the true law to be general does not mean that at times special regulations cannot be applied to the various social categories if they refer to characteristics of only a few among them…These distinctions", he continues, "will not be arbitrary, they will not subjugate one group to the will of the others, if they are impartially recognized as justified both within the group and without it…If, for example, the majority is favourable to the distinction both within and without the group, there is a strong presumption that it serves the objectives of both. When, however", Hayek concludes, "it supports only he who is included in the group, evidently we are in the presence of privilege; while if it supports only he who is outside, we are in the presence of discrimination."[1] In short, "whoever finds himself within a certain group distinguished by the law must recognize the legitimacy of the distinction just as someone who is outside of it."[2] To this condition, and only to this condition, laws

1. *Ibid*., pp. 211-212.
2. *Ibid*., p. 276.

by orders or by categories will end up finished off with the same thread that was used to tack the fabric of general laws.

Thread and fabric that are rather shoddy, in truth, that don't support neither the test of time nor the assaults of history, and that from their scratches, from the scratches of time and history, they come out torn up and threadbare. The fault of Hayek's reasoning is this: trusting too much in the magnanimity of human nature when instead history, in the rare moments in which it truly is a teacher, teaches us to consider (also) the corrupt vein that runs through the fibre of men. Just squeeze this vein a little bit, just urge it on a bit, perhaps with the flattery of personal benefit, and here it begins to flow copiously, almost without interruption, sweeping everything away, everything: decorum, impartiality, intelligence. Yes, certainly, even intelligence. Because when individual profit comes into play – as human events teach us – there was no winged word, despite an icy air blowing above, there was no dialectic artifice though built on deception and bad faith, there was no about-face of philosophy as far as dancing on the edge of the absurd, there was nothing, in short, that intelligence would be spared, there where the flowerbed of his own interests felt threatened.

In a very civilized England of the nineteenth century, for example, it happened that entrepreneurs, the vast majority of entrepreneurs, judged their earnings to be undercut from the law that regulated their work and which, in particular, prohibited hiring children for more then ten hours a day. So then? Then down, to strike down with anathema this gloomy legislator's invention, down to demonstrate that if "instead of eleven hours, factories were to work ten hours, their profits would be erased: while it would double if they could work thirteen hours"[3]. And even further down, deeper and deeper, to dishonour the dignity of intelligence, forcing it to argue that "if instead of exhausting the labour of children and adolescents under eighteen years old in the suffocating, but moral, atmosphere of the factory, they are sent back one hour earlier into the outside world, cold and frivolous, idleness and vice would make them lose the salvation of their souls"[4].

Was this law on child labour one of civility? Yes, clearly: there is no one among us, with our awareness, who indulges a legal system today that is lacking it. It was a law of civility, then. Was it also a law of categories? Certainly, because it related to the class of minors. So now, we ask ourselves: was this law of civility and category also a just law (where "just," remember, here means "general," that is, indifferent to

3. Quoted from G. Ruffolo, *Cuori e denari. Dodici grandi economisti raccontati a un profano*, Einaudi, Turin 1999, p. 134.
4. *Ibidem*.

privilege and closed to discrimination)? To use Hayek's criteria, one must respond with a firm and solemn "no." No, it wasn't a just law because far from pacifying people's souls, far from uniting all of them in the goodness of its regulations, this moved the entire category, or almost the entire category, to hard and bitter resistance towards whom it was cited, which to be precise, was the category of the captains of industry. Not an expression of generality (and thus justice), but sour fruit of a discriminatory, persecutory will: so, strictly speaking, with this charge of villainy, the law on minors should have been expunged from the legal order. After which point, we today would feel diminished in our decorum of civilized people and the children would still be there, in the factories, to wait "for the salvation of their souls".

The same discourse is valid for the principle of "one man, one vote," which seems like a custom that is as natural as it is inseparable from modern society. This custom also seems, so graceful in its appearance, so obedient to the curvature of its spiritual features, that, undressing it, liberal civilization would seem to be baring its soul. It would seem as such. And instead. . . instead what confusion wasn't produced in order to count the heads one by one? How high were the barricades and how long the pikes on which this principle had to rest in order to hold itself up, until reaching the Ten Commandments? Yes, precisely: pikes and barricades. Because it just so happens that precisely the clash over this principle would inaugurate the unrest of the French Revolution, when the nobles with 188 votes against 47, and the clergy with 133 votes against 114, would decide to sink the declarations of the Third State, those that committed to voting per head and declined the vote for order. Hence the conflicts, the blood and the violence that followed and which at the end, with a sepulchral marble, would cover the vestiges of feudalism. Vestiges that we today greet like documents from the past, not because – with all due respect to Hayek – the majority of groups in conflict would come together given the opportunity to end them (and even, as we have seen, two of these – the clergy and the nobility – were stubbornly resolute in defending them like treasures of living thoughts); no, we remember them as now old and faded memories because a landmark event like the French Revolution swept them away together with that entire group of men who nothing and no one could have ever uprooted from the defence of their own interests.

We could go on. But the examples that we have mentioned here, even if briefly, are enough. More are not necessary to test the absurdity of Hayek's criteria which, if taken by its measures, would make us unavailable to a few of the most inalienable provisions of free society. And why is all of this? Because when one was exposed on the stage of history, these provisions did not solidify a consensus sufficiently large enough around themselves, and even were the cause of obstacles that self-interest and the

"particular" made increasingly ferocious and irreconcilable. If then we do not want to think how one thinks when mistaken, we should stay in the habit of taking (also) that meter into account, dead to all feeling, which is individual egotism. In this sense, how can we deny depth of concreteness to the points made by Raymond Aron? How to blame him when in one writing that is a frank testimony of consideration, he resists and it almost seems as if the pen stops dead between his fingers there where it bumps into Hayek's idea, in the idea which is for each sectarian arrangement or group, hearts should beat in unison, and in unison, whether "external" or "internal" to the group, they should recognize its goodness. It is unquestionably excessive", Aron objects, "to hope that the rich minority would accept it equally willingly like the poor majority… Thus it will be neither the minority nor the majority to find a solution that avoids discrimination and privilege, but reasonable men from both. This then means that there is no objective criteria that establishes non-discrimination or non-privilege."[5]

5. R. Aron, *La definizione liberale della libertà. A proposito del libro di F.A. von Hayek "The constitution of liberty",* now in *Il concetto di libertà*, Ideazione, Rome 1997, p. 52.

Continuation of Peacemaking Regulations: Hayek's (Impossible) Criticism of Contractual Democracy

Up until now, we have seen that Hayek's criteria – for convenience we'll call it the "external-internal group" – demands that we consider as unjust, regulations and measures that all of us today consider just (laws about minors, one vote per person, etc.). The paradox is that spinning within the same criteria and unfolding the logical thread, we find ourselves sealing, with the stamp of justice, regulations and measures that actually are unjust (or in any case are utterly, undeniably unjust for Hayek). Here we slip from right into the wrong; here Hayek falls from the unjust into the just. It seems to be a riddle and perhaps it wouldn't make sense to worry about it if it did not run through the centre of all the criticism that Hayek directs towards modern democracies. As we know, he mounted an implacable, red-hot closing argument against them whose accusations, heated on the flame of indignation, burst out in fiery words against that trafficking of privileges that had perverted democracy with market exchanges and reciprocal favours between various social groups. Diverse as they may be, all are equally corrupt and greedy.

In modern democracies (which just for that reason are baptized "contractual democracies"), Hayek declares, governments serve "the interests of a conglomerate of various groups. . .each of which agrees to the granting of benefits to other groups only if the price of its special interests are considered equally."[1] In this way, he adds, "the specific program necessary to unite the government's supporters [is] based on the joining of different interests, a joining which can be reached only with a process of negotiation"[2]. This is why democratic programs do not expand in consideration of general interests; there is no ethical height that calls them, no moral impetus that sustains them – nothing, none of this. It is as if the groups that set them up had some

1. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 473. On Hayek's critique of contractual democracy, but more generally, for a detailed reconstruction of all his thoughts on it, refer to D. Antiseri, *Friedrich A. von Hayek: dalla democrazia alla demarchia*, in N. Abbagnano, *Storia della filosofia*, Utet, Turin 1994, vol. IV, 2, pp. 151-189.

2. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 387.

vital springs loosened, hence the inability to rise above the narrowness of their own horizons and the small market of their trades. These trades will call the shots in a governmental program only if and when the occupations of interest come to an end with the mutual satisfaction of all parties' appetites. The program, writes a regretful Hayek, is founded "on the consensus of various groups in regards to providing specific services to a few of them in exchange for other services rendered to each of those same groups."[3] And that's all.

Really, is that all? We wouldn't say so. Because however you want to evaluate "contractual democracy", and what may be the causes that produced it, the fact remains that here, according to Hayek, the regulations of law are the result of arrangements, of transactions, and – why not? – of mutual bargaining between the groups. That, strictly speaking, should remove the bad reputation of privilege from the measures that are set up as such. Those measures, in fact, regard rather particular groups that, however, as an effect of negotiation, are assisted not only (as is obvious) by the approval of its members, by the approval of those on the "inside," but also by the favour of those on the "outside". That is, from the support of other groups that cater to themselves in this way, with this benevolent indulgence, with the protection of others for when, tomorrow, it will be their turn to have their demands met. Today I give permission to you because tomorrow you will give it to me: this is the logic of contractual democracy. It certainly is shortsighted, perhaps pitiful, surely not beautified by the nobility of ideals, and yet…yet it is not unjust if you measure by Hayek's criteria.

It's not too much of a punishment for the reader if we invoke a little bit of the patience that is customary to grant in good faith when it is necessary to judge an argument's coherence. He will therefore forgive us if we invite him to reflect once again on Hayek's words. Then, if it is true, as Hayek writes, that in contemporary democracies "every group will be ready to grant unjust benefits, coming from the State's coffers, to other groups if this is the condition to gain the agreement of the other groups on that which the group is used to considering as their right,"[4] if this is true, I am sorry to say it, but this measure of objectivity of the majorities inside and outside the group, this extrinsic, mechanical canon of appraisal, will no longer be valid to certify just regulations with a bronze seal, and no longer will it allow for them to be distinguished from unjust laws. It very well may happen, say, that metalworkers form a common front with winemakers, that the first supports the demands of the second when they press on the government because their wine continues to be bought at the

3. *Ibidem.*
4. *Ibidem.*

same price in Italy (even if, perhaps, due to market fluctuations it would be more convenient to buy it from the French), they support them because in exchange the winemakers will uphold the metalworker's cause in their fight against the closure of factories that are no longer productive. Is this a wicked pact? Certainly, because the damage that will befall the consumer is large. But here's the hitch: we can't judge it as so if we are to utilize Hayek's device. Do we remember his words? "Because neither privilege nor discrimination is brought by the classifications of people for whom the law serves, they should be based on distinctions recognized as relevant by those within the chosen group as by those who remain outside"[5]. Now, in our case, the metalworkers endorse the demands of the winemakers - and the discussion, naturally, could be extended to all associations that swarm about today's democracies – the metalworkers, I was saying, agree to the winemakers requests, *and thus, not only within but also outside of the group*, they support the regulations that apply to only one category of people (winemakers, to be precise). So? So we must inevitably drive for the fairness of specific measures. How capricious is destiny! Although Hayek struggles to pierce through those measures with the tip of his poison arrows, it just so happens that he himself, with his criteria, planted them in a fortress inaccessible to attack. In short, since democracy is crossed by a process of reciprocal negotiation, and then since it needs (Hayek wants) that legitimacy of sectarian measures is decided upon by the agreement of whomever is outside the sector, then there is no want for or shortage of measures that could dishonour it as is caused by privilege: the market of favours is there, always ready to invigorate those measures with the agreement of the other categories. Surely, for its selfish fermentation he will say that it isn't a genuine agreement, that it does not testify to an uncorrupted loyalty to general interests (but does the general interest really exist?), which is impoverished by the calculations of *do ut des*. He will say this and more. But what does all that matter? Still, it's always about real and substantial agreement. And that's all that is needed to make Hayek's construction dangerous.

We have arrived at our point, and the point is that within the simple lines of this argument, it bears upon, almost with harshness, the forms of an alternative which Hayek cannot escape: if the criteria of the "external majorities," is maintained, they ruin his charges against contractual democracy, and conversely, if the charge of these accusations is held high, the criteria of "external majorities" is dispersed into inconsistency. How does Hayek solve this when faced with a similar dilemma? It is difficult to respond because in general his argument proceeds loosely, almost hopping from

5. F.A. von Hayek, *La società libera,* Vallecchi, Florence 1969, p. 353.

measure to another. It's always an argument, how to put it, dented with recesses and protrusions, so that it could easily happen that you would see something that seemed submerged earlier, emerge within its pages, and vice versa.

All that said, however, it still must mean something that in the third volume of *Law, Legislation and Liberty*, where the resentment against the contractual degeneration of democracy is most turbulent, precisely there the measure of just law goes back to being generality (understood in the universal meaning of the term). It is worth mentioning that precisely there, in the third volume, not even for a moment nor in error, the criteria of "external-internal to the group" are poking out – criteria that, as we know, made such a superb show of itself in *The Constitution of Liberty*. Now, since *The Constitution of Liberty* was released nineteen years before the third volume of *Law, Legislation and Liberty*, it's credible that with the passage of time Hayek returned to his idea, separating the wilting plants from the germinating ones. And the sprout that he cultivated with loving care is still general law (general in the universal sense). With this we are back at the start, going back to the everyone-really-everyone from which we had set sail on a voyage that we now have discovered to be a voyage of circumnavigation.

The course, which at times has been damaged by muddy shallows, and at others, was calmer, this course has been long and now that we have arrived at port, we are missing the strength to take the same route up again. The reader's patience, moreover, is great but not infinite and with all probability would not be able to stand seeing us cut through the same waters. Thus, we will not say anything about the impossibility of a legal system being held together by regulations and universal generalities. We would only like to point out that even if it could be possible, even just for adventure (and we emphasize for adventure), even if such a legal system could exist, it is not for this reason we cannot guarantee the rights of freedom. It should be remembered that we are moving within an idea system within which the content of regulations is judged as irrelevant (of the "second order" as Hayek said), and where for that reason, the guarantee of individual prerogatives is confined only and exclusively to the general form (in addition to abstract) of laws. It is confined to laws which, in order to be general, simultaneously engage the rules and the ruled, with the result (it is presumed), that the one would never want for the other that which they could ever want for themselves. So it is assumed. But is this presumption well founded? Let's see.

An (Unsuccessful) Return to Universal Laws

Imagine a regulation worded as follows: "From now on, no individual will have private ownership of property." Is this an abstract regulation? Yes, certainly, because with that "from now on," the regulation repeats itself through time and does not complete, in one go, the effectiveness of the prohibition, thus it is abstract. Is it a general law? Undoubtedly so, because the right to property is blocked for everyone, ruled or ruler alike. So now we ask: this regulation that satisfies the formal requisites of abstractness and generality is it also a regulation of freedom? Certainly not, and incidentally there is no one who has explained the reason why more than Hayek or better than Hayek. No, it is not a regulation of freedom because – as we read in *The Road to Serfdom* – "whoever controls all economic activity controls the means for all of our ends and thus should decide which should be met and which should not. This", continues Hayek, "in reality is the crux of the question. Economic control is not simply control over a sector of human life that can be separated from the rest; it is control over the means used for every one of our ends. And whoever has sole control over these means must also decide which ends should be nourished, which values are esteemed to be higher and which are lower; in short, that which men must believe, is what they should concern themselves with."[1] Well said. Well said indeed, because the

1. F.A. von Hayek, *Verso la schiavitù*, Rizzoli, Milan 1948, p. 80. This is why private property is the condition necessary to freedom. Necessary, we note, but not sufficient. And there is no liberal-liberism theorist, although his indictment against collectivism may be red hot, there is no liberal-liberalism theorist, we were saying, that has promoted private property to such rank, to the rank of assumption that *eo ipso* creates freedom. This is true for all the words of Milton Friedman, whose thoughts, vibrant with crusading enthusiasm, is second to no one when he exalts the virtues of private property and the market: "History," writes Friedman, "tells us only that capitalism is a condition necessary to political freedom. But it is not adequate. Fascist Italy, Spain under Franco, Germany in different eras of the last seventy years, Japan prior to the first and second World Wars, Czarist Russia in the decades that would precede the first World War: these are all examples of societies that obviously cannot be defined as politically free. And yet," continues Friedman, "in each of these private enterprise was the prevalent form of economic organization. Thus, it is obviously possible to have economic orders that are fundamentally capitalist

profound cause of liberal-liberism is here and nowhere else, a cause which should not be reduced to squalid material assumptions (the defence of "stuff"), nor participate in an economic vision that is thus asphyxiated from life. If it supports the cause of private property, it is not to please the basest instincts of human nature or to satisfy the appetite for earthly goods; no, it defends property because it defends the freedom of the individual, the liberty that derives from the security of property and from the opportunity of choice that it offers. It is in the name of freedom of choice – which is then freedom tout court - it is in the name of this freedom and not for other reasons, then, that liberalists raise the flag of property and oppose the statism of collectivists. In fact, it is unknown what freedom of worship can flourish there, where the State is the owner of all buildings, and where the faithful must beg for its favour to obtain a building to house their rites and ceremonies. Nor is it possible to understand how freedom of the press where the State holds all the paper mills and where its approval is necessary to whoever wants to establish a new newspaper. Either the ideas that the State likes are spread and we are reduced to garrulous hacks from the regime, or it is good to give up on the hope of being able to communicate an honest, independent thought to others. At the same time, either you force your own heart to honour the divinity imposed by law or you become disheartened with the practice of dishonesty and dishonour, or renouncing the warmth of a sanctuary where you can pray in freedom is inevitable. That freedom, then, is ensured by a certain content of the law – the right to property – and not just from the formal requirement of generality (in addition to abstractness) that instead, as we know, can open itself to ferociously liberticidal developments.

Let's be clear: it's not that Hayek ignores all of this, but he runs alongside it with slight detachment, and he is particularly wrong in clinching the range of the argument in terrible, unacceptably limited environments. We'll let him say it: "You cannot refute", he grants, "that also general and abstract regulations can, sometimes, seriously restrict everyone's liberty. But if we think about it, we can see how improbable that is. The main guarantee is that regulations apply both to he who applies them and to he who follows them – that is, the rulers and the ruled – and that no one has the power to grant exemptions [...] – if the authorities don't have any special power aside from the power to apply laws, little of what one reasonably would want to do is probably prohibited". He then adds: certainly, "a group of religious fanatics could eventually impose restrictions that its own members would be happy to observe, but

and political orders that are not free." (*Efficienza economica e libertà*, Vallecchi, Florence 1967, pp. 28-29)

that for others would constitute hurdles to the pursuit of their important goals. But if it is true that religion often had been the pretext for extremely oppressive regulations [...] it is also important that religious beliefs seem to make up almost *the only terrain* in which general regulations that are seriously restrictive to liberty would ever be universally applied"[2].

Religion as the "only terrain"? It could be. But how far would it extend? Here's the problem. This terrain would be limited and would not grab hold like the grasp of distress if religious experience was truly held behind the closed doors of cathedrals, where day after day, the cult's ministers thundered from the height of the pulpit with speeches about doctrinal knowledge. If religion was consumed entirely in these contained environments, there truly wouldn't be a reason to worry. There wouldn't be if it were so. But it's not. Because, whatever may be the way of those beliefs, it is sure that when men undertake a mission of salvation, it is always the echo of the sacred religious flame that burns in their hearts. And if we don't move from here, from ascribing the nature of religion to some doctrine that is full of soteriological expectations, if we don't move from here, we will understand very little of the tragic greatness of our short century, and we will understand nothing of the ideologies that have so horrendously disfigured it. Just to stay on private property, what a miserable thing; what a wretched mistake would Marxism have been if it had been reduced to changing one economic system with another! The fact is that in the Marxist universe, private property is maintained as the source of all wickedness and the mould for all perversions (the right to property, Marx wrote with a brief and pithy word, is "the right to selfishness")[3]. Abolishing it, then, would have meant no more or less than the liberation of man from the claws of evil. Liberating man from evil, then - but isn't that the inspiration of every religion? Except now, evil is no longer embodied within the nature of man (the original sin of Catholics). No, for the Marxists, evil is not natural but historical, acquired, derived; it is derived from the precise moment in which he "who, having fenced in some land, had the idea to say, "*this is mine*, then found people naïve enough to believe him"[4]. Evil itself is private property. And since private property is an institution created by some for the benefit of a few, nothing prevents others from eliminating it to the advantage of all (and this is how Hayek's generality returns).

The others, then. But what others? Private property, in fact, is not satisfied with dividing humanity into two opposing classes: the *have* and the *have-nots*. In addition, it clouds their minds, perverting the representations of the world that surrounds them. In short, it gives

2. F.A. von Hayek, *La società libera,* Edizioni Seam, Rome 1988, p. 212. Emphasis is mine.
3. K. Marx, *La questione ebraica*, Editori Riuniti, Rome 1996, p. 30.
4. J.J. Rousseau, *Sull'origine dell'ineguaglianza*, Editori Riuniti, Rome 1968, p. 133.

rise to a distorted view of reality, equally for the exploiters and the exploited. The former, deceiving themselves, elevate the narrowness of their class' interests to the magnanimous largesse of universal values. The latter, as if by effect of a veil that covers everything, no longer see the conditions of exploitation that they go through; so that to their sick eyes, the social structure appears entirely legitimate and they cannot think of plausible reasons to overthrow it. Only the custodians of the knowledge of redemption (*idest* from the Marxist message) are immune to this sort of papillary trachoma. Only they, therefore, know what path it is necessary to travel down in order to pursue final redemption. That redemption, then, is not projected into the afterlife (as it is for Catholics), but spills out into the here and now, in the world, on the land of men. In this sense, communism is for Marxists that which paradise is for Catholics; it's a paradise, however, that now is secularized, becoming immanentistic, that in short is flesh and blood, and therefore where angels no longer play the trumpets of resurrection, nor will God come for the good ones and take them on the path to immortality. In the communist heaven, the skies would remain empty and there is no room for gods: finally honouring the snake's promise, men will be there to substitute them. "That the *deification of man* is the goal of revolution", Pellicani wrote, "may seem like a "crazy" argument. And yet, when Marx writes that communism will eliminate the conflict between essence and existence [with Marx's exact words in the *Economic and Philosophic Manuscripts of 1844*, "communism. . . is the real solution to the contrast between man and nature, and for man, is the real solution to the conflict between existence and essence"], he says that this will bring about *ideal of man-God*, if it's true, as it's true, that Thomistic theology teaches that God is the being in which essence and existence perfectly coincide"[5]. In short: communism is the "Kingdom of God without God" (E. Bloch). And yet, like the catholic "kingdom" needs an infallible authority that directs the faith through pilgrimage towards Good and picks them up wherever they are led astray by the snares of evil, so the communist "kingdom" needs a circle of enlightened people to guide men to happiness, showing them the way with lifestyles, customs and laws for which, they first, will testify to and that then, with dark fanaticism, will impose it upon the unruly, using lead and prisons as well. For their own good, of course. Because also as such, and perhaps especially as such, with tears and blood, men will have, if not their bodies, then their spirits saved.

Turning and turning, we're always here: at the stakes and the Holy Inquisition. Sure, there are various books that inspire the condemnation, various hands that write them, and even more various rites that accompany them. Yet, those condemnations

5. L. Pellicani, *La società dei giusti. Parabola storica dello gnosticismo rivoluzionario*, Etaslibri, Milan 1995. The quote in parenthesis was added and was taken from K.Marx, *Manoscritti economico-filosofici del 1844*, Einaudi, Turin 1949, p. 122.

have their own key tenets that, spanning different centuries, subjects and histories, arrive as such down to us to remind us that they, the condemnations, always move from "a mental state, a way of feeling, a mixture of intellectual, emotional and behavioural elements that can be described best as a mixture of attitudes produced by a religion"[6].

Is it possible that Hayek didn't notice it[7]? Is it possible that he's reducing all of religion down to just the foyer of historical churches? Yet even in the aftermath of *The Constitution of Liberty*, Aron remarked upon the abysses of oppression that gape open

6. J.L. Talmon, *Le origini della democrazia totalitaria*, il Mulino, Bologna 1967, p. 21.

7. In reality, years later (thirteen years later, to be precise) Hayek, responding to his critics, admits that "even general rules such as those that demand religious uniformity can be understood as the worst infringement upon personal freedom". However, almost to parry the blow, he adds: "Since for a case to come before a judge a dispute must have arisen, and since judges are not normally concerned with relations of command and obedience, only such actions of individuals as affect other persons, or, as they are traditionally described, actions towards other persons (*operationes quae sunt ad alterum*), will give rise to the formulation of legal rules [...] At least where it is not believed that the whole group may be punished by a supernatural power for the sins of individuals, there can arise no such rules from the limitation of conduct towards others, and therefore from the settlements of disputes" (*Legge, legislazione e libertà*, cit., pp. 128-129). If this is Hayek's reply, it's quite necessary to say that his response is one that...doesn't respond, and when he does respond, he responds poorly, with rather awkward babbling. First of all because, as has been pointed out, "this explanation is valid only for culturally evolved societies. In societies in which the belief that the violation of rules that exclusively regard the private behaviour of individuals can be detrimental to the entire community is established, taking the shape, for example, of divine punishments, there may be a conflict of interest even in relation to the private behaviour of single members of the community, and thus the rules that would be considered vital to the community's survival would also pertain to the private sphere. (V. Ottonelli, *L'ordine senza volontà*, cit. p. 132 n.). Second, even in culturally evolved societies, Hayek's explanation is valid, if valid at all, only for judicial activity, which is one (and only one) of the sources of law, coming from courts that are flanked by, when not preceded by, the work of Parliament. What to say, then, about law originating from legislation? Certainly it is not up to the legislator to resolve disputes brought about by "actions directed towards others". And if not up to him, if then the legislator, unlike the judge, is not pressured to resolve the dispute, who could ever stop him from establishing laws that are abstract, general and at the same time detrimental to the laws of freedom? And then, what are "actions directed towards others"? Are they, as Hayek writes, the actions that reflect their consequences into the legal sphere of others, so therefore "an individual may be limited just in those behaviours that are susceptible to violating other people's protected sphere of freedom"? (*Legge, legislazione e libertà*, cit. p. 485) Is it so? Should only these actions, therefore, be subject to legal regulation? Very well. But haven't we just learned, from Hayek, that as a matter of principle "there does not exist any type of action that does not interfere in the legally protected sphere of another", therefore, for example, "neither the press, nor speech, nor religious customs can be entirely free"? (*La società libera*, cit., p. 212). Thus, where is the limit on general laws from Parliament?

for religious beliefs. "True believers", Aron wrote, "*whatever their religion may be*, do not hesitate to impose on others everything that they feel conforms to their credo. If it is, for example, an economic credo that claims, as Proudhon does, equivalence between theft and trade, then the abolition of private ownership of the means of production will become law." Aron continues, "The above mentioned law, in that case, will present all the formal characteristics that characterize the law. Now, if Hayek can condemn it in his system, this happens because the suppression of private property entails a decrease, if not total elimination, of the individual sphere." Aron concludes with: "it seems, then, easier to disapprove of a few laws, referring to the ideal of the sphere of personal action that does not invoke the law's generality as a test of its un- oppressiveness"[8].

The sphere of personal actions, then, once gain sending us back to the content, to the tenor of the material and no longer just to the general form of the law. And then? Then we weren't mistaken on account of generality, and we shouldn't believe, therefore, that investigating it in every hidden diverticulum as we have done up until now, where turning it about as if on the wheel of a grinder doesn't produce a thing, really nothing, not even a grain of flour. It shouldn't be believed, since we have pulled out a single grain as well: that is, in spite of Hayek, general form isn't sufficient for freedom and it may very well influence consortia of humans pressured by the toughest of hierarchies.

We will not continue to insist on the argument, also because, after so much obstinate meticulousness, any further development would take on the tone of annoying ranting. But before continuing on, we would like to collect the string of our argument, and we'll do that with the quasi epigrammatic brevity of these five statements:

– General laws (going back to everyone-really-everyone) are rare and often insufficient for setting up a legal system;
– In the vast majority, laws are general because they go back to a category of people and/or status;
– In the realm of this category, if one must leave their content aside, they guarantee not liberty but equal treatment (equal things for equals);
– Such equality is compatible a) with social justice and b) with the systems that put down the liberalist principle of personal autonomy;
– If we shouldn't take their content into account, even the (few) laws with general universality may end up being offensive to individual prerogatives and thus violently liberticidal.

8. R. Aron, *La definizione liberale della libertà*, cit., pp. 49-50. Emphasis is mine.

Part Two
Liberty and the Content of Laws

Hayek's Double-Face

Reference has been made to Hayek's way of proceeding, sinuous, as said before, all curves and turns that one minute go right, then go left in a succession of serpentine lines that may be deadly to those who are familiar with flat, linear and coherent reasoning. Here and there we have also supplied some quick tests of these spiral-shaped developments. But now the time has arrived to prove it with more abundant detail, so buckle your safety belt and hold on: it's time to talk about the spirals of Hayek's arguments. All of this, of course, isn't just for the vain obstinacy of catching Hayek in a flagrant contradiction (what a petty thing that would be!). No, our intention is serious, and we would like to honestly provide the most exact and complete picture possible on his theory to the reader. That's right: the full picture of his theory. In fact, it so happens that the considerations up to here would be mutilated and altogether misleading if we weren't to specify that all of a sudden and without any indication, Hayek reports, in a close up view, exactly what the content of laws he had kept separated on the margins of his reflections are. It's a bit of a quick comeback, which first allows the content to regain positioning, then to flank and finally overtake the general form of the law. In the end, the vital defence of a free society becomes exactly the substantial content of regulations that elsewhere Hayek had presented as if in penitence. Be careful, "elsewhere" does not mean other pages of other books – no here "elsewhere" means other pages of the same books. In those books, therefore, as in a broken down sabbatical dance, the most varied and opposing theses chase each other, even if only for short distances. Hence that sense of weakness that one always feels after too quick of a turn. There's more than a few examples; in fact, sometimes it almost seems that they gush forth from an inexhaustible source for their projection and range. We will recall, however, only the most eloquent ones, those that best document the labyrinthine tangle in which we are about to venture.

Already in *The Constitution of Liberty,* where Hayek had glorified the general form of laws as a sufficient title (we repeat: sufficient) to guarantee individual prerogatives, already there he comes to clarity of conscience about a new concept, which is precisely the concept that has been maturing in the course of our deliberations.

Now, however, we'll let Hayek himself present it. Since a free system, he writes, "can function adequately, it's not enough that the legal regulations under which it operates are general, but their content should be such as to allow the market to function quite well"[1]. Here it is clear that the formal requirements of the law are facilitating premises, but no longer sufficient conditions, for liberty. Nor are they sufficient conditions in *Liberalism* where in a few paragraphs Hayek was happy to summarize liberal civilization in a single, fundamental principle (that is, "limiting coercion to the enforcement of general rules"[2]) of regulations, which for the sole fact of being general are able to be presenters of liberty. Hayek writes in these pages: "all the basic rights [...] would be secured if the activities of the individuals [...] could not be limited by specific prohibitions [...] but only by general rules equally applicable to all."[3] That's what he writes in these pages. Not even enough time to get comfortable and here, in a quick movement, bursting into various pages where others, many others, exist, are the characteristics that laws should honour to be able to be harbingers of freedom. In Hayek's words: "To qualify as law, in the sense in which it was used in the British liberal tradition to describe the conditions of freedom, the rules enforced by government had to possess certain attributes", which Hayek lists as: "they must be general rules of individual conduct, applicable to all alike in an unknown number of future instances, defining the protected domain of the individuals, and therefore essentially of the nature of prohibitions rather than of specific commands." He then adds, "they are therefore also inseparable from the institution of several property"[4].

Private property, then: more than just a formal characteristic of laws! Here we are (also) in the presence of their precise content, which is so rich in vital nutrients so as to not allow it to become degraded as insignificant when one must reinforce the growth of free society, or as Hayek also baptizes it: the "Great Society". The nutrients found here are so essential that in *Law, Legislation and Liberty* we bump up against the following statement: "it seems that where a sort of Great Society exists, it was made possible by a system of regulations of simple conduct that include what David Hume calls 'the three fundamental laws of nature, *the stability of possessions, transfer by consensus and the fulfilment of promises*'", or as Hayek states, "*the*

1. F.A. von Hayek, *La società libera,* p. 297.
2. F.A. von Hayek, *Liberalismo,* cit. p. 74.
3. *Ibid.*, p. 75.
4. *Ibid.*, p. 68.

essential content of all contemporary systems of private law"[5]. What a difference from the idea that troubled us so and which also stands out splendidly in the same book! How immeasurably detached it is from the opinion according to which, in free society "the legislator is authorized to mandate only that which is right, with reference, *not to specific content*, but to general qualities that every rule of mere conduct should possess"[6].

As you can see, here we go again: once again, in a rapid succession of pages, two different perspectives overlap, where one lowers precisely what the other raises. Here, as a device for liberty, the form and only the form of the law; there, on the other hand, the form of the law, yes, but it should not be separated from well-determined contents, which is – as we know – the content of private law. Other examples are pressing to be shown as documentation of this hybrid jumble. But those mentioned up to now seem to be sufficient and insisting on more would be more of an encumbrance than an advantage. An advantage, however, is to immediately attack the other question that blocked us up until now, that when seen transparently, as if by virtue of a water-mark, we guess that behind the first Hayek (the Hayek of the general form of law), is the second Hayek (the Hayek of form and substance; of the general criteria and the material content). The terms of such a question we can formulate as follows: Does this second Hayek not pose more problems than he solves? Does he not open up more questions than he closes?

5. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 233.
6. *Ibid*, p. 118.

The "Gap" Problem

The first question is the following: in order to accept the regulations on ownership and property, to accept that which we can call the hard kernel of private law, to accept all of what it's about out of fatal necessity, at least that's what Hayek believes, to set up a rigorous mechanism in which the gears are never altered, as if for the intake of grains of sand. No, there is no space for the dictates of will in Hayek's system. At least, not for this Hayek. This Hayek, distracted by his own thoughts (ah! Spiral reasoning!), in fact invalidates the certainty that is practically carved into *Law, Legislation and Liberty* and from which our analysis has gotten under way, that invalidated certainty according to which "as long as the lawmaker satisfies each expectation about the characteristics of the resolutions that are established by him [and thus the general form of laws], he will be free in regards to the specific contents of his resolutions"[1]. By invalidating and forgetting like this, he ends up clamping everything inside a grim, cruel machine, in which the joints lie idle, dislocated from the inventive inspiration of the lawmaker and the judge, so that nothing, not even a pulse, not even of breath of creative freedom can intervene to come to his aid. "The task of developing a system of law", Hayek explains, "is thus an intellectual task of great difficulty which cannot be performed without taking certain rules as given and moving within the system determined by them".

Agreed, at least up to here *nulla quaestio* – no problem. Then, however, if we start to adventure within this system, it almost seems suffocating, a lump rising in your throat like asphyxiation, so narrow and restrictive are the environs within which we are supposed to move. Listen how Hayek continues: this development of the legal system "is a job that may be carried out with or without success, but that does not normally allow whoever has received it to be free to follow his own will. It is more like the search for truth than to the construction of some new edifice"[2]. And then, because there aren't any doubts about the implacability of a logic that reduces us

1. *Ibidem*. The words in brackets are mine.
2. *Ibid.*, p. 234.

to running after legal tracks that have been left by the unachievable, because there aren't any doubts of any sort in this regard, he adds: "yet we can still maintain that the further development of the rules of just conduct is not a matter of arbitrary will, but of *inner necessity,* and that solutions to open problems of justice are discovered"[3]; discovered "as necessary complements"[4] to the initial rules from where it all started, precisely those about property and possession. It is then enough to accept them even if just for a moment, and it is here that these rules annihilate human will in order to turn it over to a process where, as if in a hint of ferocious determinism, the logic of necessity adamantly unfolds. "In this process", Hayek admits, "the individual lawyer is necessarily more an unwitting tool, a link in a chain of events that he does not see as a whole, than a conscious initiator." He then adds, "whether he acts as a judge or if he acts as a drafter of a statute, the framework of general conceptions into which we must fit his decision is given to him"[5]. That decision thus never comes up on the heaving of a will that is free and unpredictable in its infinite possibilities, and on the contrary, it needs to show itself in ways that are determined as this or that by the *ratio* of the system. Even more precisely still: It needs to show itself in the *only way* determined by the system, a place that, as Hayek writes, when the judge "has a problem to resolve [...] in the majority of cases, there will be only one just solution, and this is a job in which there is no room for his will"[6].

This is why, Hayek concludes, "Yet once the general principle of a selfmaintaining order based on several property and the rules of contract is accepted, there will, within the system of generally accepted rules, be required particular answers to specific questions made necessary by the rationale of the whole system and the appropriate answers to such questions will have to be discovered rather than arbitrarily invented"[7].

Perhaps we have reached the saturation point by insisting so much on quoting Hayek. If this is so, I beg the reader's pardon. But two points in particular merit stopping, and I wanted it to be Hayek himself to call them out: 1) legal regulations are discovered, not invented, they are found, not created; and 2) he who discovers them is the judge, or the lawmaker with the judge, or the lawmaker crashes into the system's "inner necessities". Now, both the first and the second

3. *Ibid.*, p. 238. Emphasis is mine.
4. *Ibid.*, p. 153.
5. *Ibid.*, p. 86.
6. *Ibid.*, p. 150.
7. *Liberalismo*, cit., p. 80.

points put Hayek in a violent collision with himself, so violent a collision as to crack a few of the fundamental principles of his theory. Let's take a moment and limit our thoughts to the first of the two conclusions: that regulations are "discovered". That's fine. But if they are discovered it means that they already exist. It's only about discovering them then, of revealing them, of stripping them, ripping off the cloak that covers them and bringing what already lives in the shadows, covered, to light. Except that if the judge isn't to do anything but make evident that which is hidden and make clear that which is dark, then he means to say that everything, everything is already written in the legal system, and since everything is already written, there are no leaks to stop, holes to fill, gaps to close. So, here we are, the omissions.

Hayek may very well admit their existence, as so happens more and more often[8]; however when he writes that these gaps are filled up with the help of general principles, or with regulations that are implicit[9] in those formally in effect, or that the regulations formally in effect are the "necessary addition"[10]…when Hayek writes like this, in fact, we repeat: in fact, if not in words, he negates the existence of true, proper gaps because in all these examples, the magistrate's office is there only to convert the implicit to the explicit, to change potential into reality. With that we arrive at the theory of completability within the law, which then coincidentally is the cornerstone of the much-maligned legal positivism. "Legal positivism", Bobbio explains, "admits the existence of these cases, but observes that they do not represent real, true gaps, in that regulations can be completed from within the system (self-integration of law) through the use of

8. "It is now universally admitted", writes Hayek, "that no law code exists without gaps" (*Legge, legislazione e libertà*, cit. p. 147).

9. "There may be", Hayek explains, "a set of rules whose habitual observance produces a concrete order of actions, and to a few of them, the authorities may have already granted legal validity; while others may have been observed only de facto or may only be implicit in those that are already validated, in the sense the latter reach their goals only if the former are observed. One must then believe that the validity of certain rules gives the judge the authorization to consider those that are implicit as valid as well, even though they have never been specifically confirmed by the legislator, nor have they had recognition from a court" (*ibid.*, p. 257).

10. "It is not true", says Hayek, "that the acceptance of some norms aiming at certain kinds of results may not in certain factual circumstances, oblige us to accept other norms, simply because in these circumstances the accepted norms will serve the ends which are their justification only if certain other norms are also obeyed. Thus, if we accept a given system of norms without question and discover that in a certain factual situation it does not achieve the result it aims at without some complementary rules, these complementary rules will be required by those already accepted" (*ibid.*, p. 132).

the analogy and the general principles of law, the use of which is not a creative act, but a purely interpretive one"[11]. Which as you can see, is precisely Hayek's conclusion as well. Ok, you say, but why make a scandal out of their agreement? Moreover, being (quite exceptionally) without any desire for a truce, it may very well happen that even the most unyielding enemies (such as Hayek and the positivists) find themselves reunited in some sporadic point in their thinking. So where is the scandal? The fact is that this issue of gaps (or more precisely, the absence of gaps) is a neither sporadic nor secondary point to legal positivism's structure. On the contrary, it is an element that is directly derived from the main assumption of positivism itself, which is that of the omnipotence of the law. It's a law that is omnipotent because, at the start, it can see everything and it can provide for everything without anything, really nothing, being able to escape its reach. It's true: daily reality is richer than legislative predictions, and for that reason, the clause that suits the concrete case is not always made immediately clear from the interpretation of codes. Nevertheless, positivists maintain, since the law also has a fear of a vacuum, theorists intervene here in events such as these, who by means of self-integration add the supplementary prediction to the normative whole, adhering to the concrete circumstances of the single case without leaving any margins or gaps. Similar to the biologist "who with a microscope is able to discover and distinguish the hundred fibres that makes up a bundle of muscles"[12], in this way the jurist "sees every law on an enormously enlarged scale, and he realizes [...] that: every legal regulation, even though it appears simple, is in reality the divisible sum of a multitude of rules, each one of them adapted to a specific prevision"[13]. It's due to the challenge to this particular prevision that the judge must master the concrete case. The particular case, then, will be evaluated by the judge, not in light of his human and social sensitivities, but similar to the meticulous supplementary prevision that, with detail-oriented patience, the jurists have treated the analysis of the current laws.

One may like it or not, one may judge himself passed up (as the writer is inclined to believe) or still current; surely the heart of positivism beats from this, and nothing else. To quote Bobbio again: "In the case of a law's silence (and also inadequacy), the fundamental problem is this: should the judge, who

11. N. Bobbio, *Il positivismo giuridico*, Giappichelli, Turin 1979, p. 248.

12. P. Calamandrei, *La certezza del diritto e le responsabilità della dottrina*, in "Rivista di diritto commerciale", XL, 1942, now in *Scritti giuridici*, vol. I, Morano, Naples 1965, p. 510.

13. *Ibidem*.

needs a rule to make up for (or complete) the law, search for that rule within the very same legal system (making use of implementation by analogy or of the general principles of the legal system), or beyond this, deduce it from a personal judgement of fairness (which means: making use of a normative system – the moral one or the one regarding natural law – which is different than the system of positive law)? Modern law theorists'' Bobbio continues, ''call the first solution self-integration, and the second solution external-integration of the legal system. The solution adopted by legal positivism in a strict sense is the first: *the dogma of omnipotence of the legislature* in fact implies that the judge should always find the response to all judicial problems within the same law, as contained in it are those principles that, through interpretation, allow a legal framework to be identified in every case. The dogma of omnipotence of the legislature'', Bobbio clarifies, ''implicates another dogma that is closely related to the first, that of the legal system's completeness''[14] – a completeness whose inevitable corollary is the completability of the same system. ''The dogma of completeness of the law'', again in the words of Bobbio, ''is thus closely connected to that of completability''[15].

That's why it was said that completability isn't a secondary, isolated element, that is on its own, suspended in a messy fog. No, it is the first link in a chain in which rings are closely linked. Completability refers to completeness, and completeness refers to the omnipotence of the legislature. Therefore whoever grabs on (like Hayek grabs on) to the first of these rings – completabilty, precisely – then out of logical necessity should also harpoon the last of these rings, which is that of legislative omnipotence. Yes, but if Hayek would recognize the omnipotence of the legislature it simply would cease to be…Hayek would, in a single blow, wipe out all the reasoning upon which the body of his thought is placed. Not bad for a contradiction, right[16]?

14. N. Bobbio, *Il positivismo giuridico,* cit., pp. 81-82.

15. *Ibid.*, p. 248.

16. It will be said: now that Hayek is right and there is some truth in his harsh reproach against legal positivism, which he wears out like ''the ideology…of the omnipotence of the legislative power'' (*Legge, legislazione e libertà*, cit. p. 250). Certainly, he is right. But he's right only when the positivist universe, which is much more numerous and varied than Hayek imagines, only when, as we were saying, that particular current (the current of state-legalistic deontologism) is isolated from positivism, that is, the concept by which the State is the only source of law and law is the supreme manifestation of state power. He is no longer right and, in fact, Hayek is guilty of arbitrary generalization when he ascribed ''legislative omnipotence'' to that subtle undertone of positivism that is Kelsen's normativism, which ''far from confirming the ethical absolutism of state law, it negates even legal supremacy, holding up

the superiority of international law over that of the state (on the basis of a pacifist ideology, opposed to an imperialist one)."(N.Bobbio, *Il positivismo giuridico*, cit., p. 281). And in any case, independent from the superiority of international law, it is necessary to remember that in Kelsen's system, the legislature is not omnipotent because his most typical regulatory expression (the law), always goes back to an additional criterion which is its implementation. This criterion is represented by constitutional regulations. *In apicipus*, at the height of the State, for Kelsen, there are no laws, but the regulations of the constitution which, be warned, do not necessarily need to be the product of conscious, intentional will. Kelsen, in fact, does not exclude that they may derive from a spontaneous and informal process such as that from which traditions are substantiated. After having affirmed that "the law is always created from an act that deliberately looks to create law, except in the case where the law leads to it's origin in traditions" (*Teoria generale del diritto e dello Stato*, cit. p. 115), Kelsen writes: "The constitution itself may be, entirely or in part, unwritten, customary law" (*ibid*. p.128). In this case, what legislature has the power of omnipotence? Certainly not an ordinary legislator constrained as he is in the upper edicts of the constitution; nor the constitutional "superlegislature" that simply does not exist. It does not exist, we mean, as an ad hoc authority since in this case its rules come up, spontaneous and unreflective, from the uniform, constant behaviour of everyone affiliated with it. So then where is the legislature's omnipotence? As you can see, even now, as it was for Hobbes, Hayek encloses different things, which should be kept separate from each other, in the same bag. The state-legalistic deontologism is actually different from Kelsen's normativism, and that which is valid for one is not necessarily valid for the other. We therefore frequently then recognize that, like the ancients teach us, it is "art to purify our thoughts" (St. Augustine). N.P. Barry also insisted on Hayek's *reductio ad unum* when faced with positivism in *Hayek's Social and Economic Philosophy*, Macmillan, London 1979.

Justice and Catallaxy

Another contradiction into which Hayek tumbles, no less serious and even more embarrassing than the one that was just exposed, comes from the second of his assumptions, where you want (Hayek wants) the lawmaker's or judge's resolutions to be required by the logic of the system, that they are thus the product of "inner necessities" that no one and nothing can escape, carved out as those resolutions are in the stubborn finality of the nature of things ("*the nature of the question*", writes Hayek, "will require certain regulations over others")[1]. Now, if the jurist – be he judge or lawmaker – really is the "unwitting tool" (do you remember? Hayek introduces it just as such), if he is the unwitting tool of a process in which individual will does not exist, and which asserts itself onto him from behind with ruthless insistence, if it really is so, sorry to say, but we will never manage to imprint the title of just or unjust upon the judge's sentences, nor on the legislator's laws. We can't do it, of course, if we want to abide by the measure of just and unjust that Hayek elaborated upon in his research, where he explained that "a state of affairs that no one can change may be good or bad, but not just or unjust"[2] and that the just and the unjust cannot ever be the predicate of "matters that no one has knowingly caused"[3]. The reader will note this adverb; knowingly. Note it well, because it just so happens that, as we have just seen, for Hayek the jurist is also an "unwitting tool".

Now, if awareness is the first requirement as for why one can moralize an action as just or unjust, neither the actions of the "unwitting" judge nor those of the likewise "unwitting" legislator could ever receive the stigma of the just or the unjust. They will be facts: cold, hard facts that happen simply because they must happen, just as the heat of the sun or the chill of the snow is a fact. Who would ever think to say that it is just that the sun heats and unjust that the snow chills?

1. F.A. von Hayek, *Liberalismo,* cit., p. 80.
2. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 219.
3. F.A. von Hayek, *Ordinamento giuridico e ordine sociale,* now in "Il Politico" XXXIII, 4, 1968, p. 712.

That said, where is the contradiction? And especially, if there is a contradiction, can it be unravelled without thereby squandering the most suggestive legacy of the heritage Hayek left us? Let's start from here, from the second question; the contradiction will come soon after. There is a fundamental logic by which Hayek challenges the stamp of justice on actions that are not brought to life by human awareness. It is in this way that he closes the spontaneous order of the market (the "catallaxy" as he also calls it) in an impenetrable fortress, without doors or windows, thus inaccessible to the sufferings or even to the laments of those who suffer under the weight of social injustice. According to Hayek, this injustice may surely be rectified, but under one condition: that the ties knotted with so much of the market's industry, and thus plunging the catallaxy into the dark abyss of things overtaken by time, are dissolved. Hayek seems to say: 'You want the market? Then don't let yourselves be moved by requests for social justice. Do you want social justice? Then you will be destined to abandon the market'. But, by abandoning the market, you will lose the liberty that unfolds itself here, which is the liberty of using "one's own individual consciousness to arrive at one's own goals"[4]. Either the market (and freedom) or social justice; either social justice or the market (and freedom): *tertium non datur*. These two realities, often paired together as words, contradict each other intrinsically.

Yes, but why do they contradict each other? Because the market that wants to gear up to last, that wants to face the uncertainties of time, is unable to bend with compassionate understanding over the misfortunes of individuals? Hayek's response is absolutely unambiguous: because, Hayek explains, in spontaneous order, everything is used by men to obtain the joys that make their passage on the earth less difficult – profits, remuneration and earnings that is – all which "corresponds to the value that their services offer to those who receive them". This value, Hayek immediately specifies, "will not have any relationship to their worth"[5], and often depends on the whim of the case, on the imponderability of fate, of the unforeseeable nature of luck. For example, imagine an honest craftsman who tends to the production of umbrellas and who produces these umbrellas with the dedication and conscientious industriousness of the good old days. It may very well happen that this person, due to an event that is absolutely outside of what he deserves (the greenhouse effect, let's say) sees, together with the decline in rainfall, the reduction of his profit margins. Is

4. F.A. von Hayek, *Studi di filosofia, politica ed economia,* Preface by Lorenzo Infantino, Rubbettino, Soveria Mannelli-Catanzaro, 1998, p. 302.

5. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 274.

all this fair or unfair? And is it just or unjust that one of his competitors, maybe much less honest and meticulous, earns more only because aside from umbrellas, he also makes beach umbrellas? So, again: fair or unfair? This is precisely the question that the market cannot answer; it would be like asking if the sun is fair or if rain is unfair.

It is thus a question that is out-of-place, outside of the place of the market. In this sense, for Hayek, the characteristic of justice can "be used in the case of desired results, but not in the case of circumstances that have not been deliberately brought about by men"[6]. These circumstances coincidentally are the same circumstances from which the dense weft of the catallaxy is woven. "The market's order", explains Hayek, "does not produce a close correspondence between subjective worth or individual needs and remunerations. This in fact operates based the principle of a game of skill and chance combined, in which the results attained by each individual can be determined [...] by circumstances that are totally outside of his control. [...] Everyone", Hayek continues, "is remunerated according to the value that his particular services have for the single people that he offers them to, and this value of theirs does not have any necessary relation to something that we can appropriately call his worth"[7]. Moreover, if it were not so, if remunerations really had to correspond to worth, then we would start down an extremely impassable road, at the end of which we would find ourselves enveloped in a merciless dilemma: either a civil war or a dictatorship. Civil war because (once again) it would place too much trust in the decency of human nature to leave men alone to set up the hierarchy of their mutual worth and their mutual talents. Who would ever recognize that his *sua sponte* is worth little, and then even less than his neighbour's? It's always his neighbour that is worth less than he. Self-regard, the lure of greater earnings, an irate susceptibility – all of this would conspire against a peaceful agreement, and everything, conversely, would come to stir up the deepest hatreds, the bitterest disagreements, the bitterest conflicts and whatever else corrodes the solidarity of the state's bonds.

Only in one case could the risks of social dissolution be avoided: when men relinquish their independence of judgement in order to deliver it to the unfathomable discretion of an intellectual superior. This person's intellect, from the perch of its unquestionable wisdom, would allow for the displacement of men and groups along the ladder of social roles, and each role would a correlating remuneration that was defined as such and such. "From the moment", as Hayek explains, "they are *his* goals that govern the system, [he] may give any value to every element of the

6. *Ibid.*, cit. p. 272.
7. F.A. von Hayek, *Studi di filosofia, politica ed economia,* cit. p. 314.

order and arrange it so as to make it correspond to the position of that which [he] believes he deserves"[8]. In this case, yes: the earnings and remuneration would truly be "just". It would be "just" also because it would correspond to merit, but to merit determined from above and not as freely assessed from below. With that, we would be outside the orbit of the catallaxy and we would move about, bewildered, in the order of a totalitarian system. This is why Hayek wrote that "the concrete results of the catallaxy for particular people are, however, essentially unpredictable; and since they are not the effect of anyone's design or intentions, it is meaningless to describe the manner in which the market distributed the good things of this world among particular people as just or unjust. This however", Hayek adds, "is what the so-called 'social' or 'distributive' justice aims at in the name of which the liberal order of law is progressively destroyed."[9].

A liberal legal order: here, finally we've reached the point. According to Hayek, if we want to earn the favour of the catallaxy and thus maintain the benefits of its law, then we should get to certain, well-defined measure of right and wrong. And we should stay at that certain measure, according to which "unless we believe that someone could and should have arranged things differently, it is meaningless to describe a factual situation as just or unjust"[10]. "A state of affairs", Hayek adds, "cannot be just or unjust in and of itself. Only because it was intentionally caused ['consciously caused', as he wrote elsewhere], or it could be, does it make sense to call the actions that have created it just or unjust"[11].

"Intentionally". "Consciously". Do these words tell us anything? Do we not feel that an ancient reasoning that we already know is being imitated? Is this not the very same intent and knowledge that Hayek has previously refused for the magistrate and the lawmaker, both of which he has called an "unknowing tool" of legal dynamics? So what? So, here it is, unfolding in front of us, the contradiction: since in the catallaxy, legal regulations are found and not created, and since only intentional and aware creation can moralize justice and injustice, it follows that neither the legislator's solutions nor the judge's sentences could ever receive the seal of just or unjust. Then one must ask: what allowed Hayek to pronounce legislative and judicial solutions as just? What coherence is there in his words, there where he writes that the judge "has a problem to resolve that in the majority of cases, will have *only one just solution*

8. F.A. von Hayek, *Nuovi studi di filosofia, politica, economia e storia delle idee*, cit., p. 87.
9. F.A. von Hayek, *Studi di filosofia, politica ed economia*, cit. p. 306.
10. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 219.
11. F.A. von Hayek, *Studi di filosofia, politica ed economia,* cit., p. 312.

and that it is a task in which there is no room for one's will [...]"? And what does it mean when he confirms that "often there will be his "intuition", more than his strictly logical reasoning to guide him towards the *just solution*"[12]? "Just solution": or, why? If there is only one solution, independent of will and necessitated by the logic of the system – of that system where, remember, justice is either aware or intentional or it is not justice – then, we'll have a nice auscultation of it from up close: never, really never, will we feel the heartbeat of justice (nor, it goes without saying, the rhythm of justice) vibrate in laws or sentences. Neither just nor unjust: the laws and the sentences will remain as, how to put it, neutral, aseptic events, we'd even say cold in their impassibility.

Not only that. But if the regulations are neutral, then the behaviours that they command will be equally neutral. If, strictly speaking, Hayek's system does not allow "just rules" of behaviour nor apparently can there be rules of "just behaviour". Behaviour can be just only if the criterion of its evaluation is just. In this case, yes: we truly can call the differing behaviour unjust, and just the behaviour that conforms to the just rule. But since we're moving about in an order of ideas in which we cannot testify to neither the justice nor injustice of the evaluating subject (the law), nor are we able to call the evaluated subject (and thus obedient or disobedient behaviour) just or unjust. In short, if justice cannot be the predicate of the commanding regulation, neither can it be the behavioural characteristic that is commanded. No fair rules of conduct, then, and precisely for this reason, there is no rule of just conduct. Even the rules of "just behaviour" chase each other merrily within Hayek's pages, unaware of the abyss of contradiction into which their author sinks.

12. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 150. Emphasis is mine.

Is there a way, is it possible to pull Hayek out of this bind? As a matter of principle, yes. (Although, as we'll soon see, he in fact blocks this extreme emergency exit as well.) To pinpoint it, however, the reader will need to turn around and get back into the mind-set of the first principle, to the initial seed from which his concept of right as intentional and conscious bloomed. Let's think back for a moment: in which context does the idea that justice and awareness should end up being each other's twins mature? We know Hayek's response well: it is in the setting of the market's spontaneous order; it is within, and only within, the catallaxy that the two things are completed and can explain each other. Should we recall Hayek's words? (the reader must forgive us if we repeat the same quote twice, but it is necessary for what we're about to say): "Yet *once*", he writes, "the general principle of a selfmaintaining order based on several property and the rules of contract [...] required particular answers to specific questions made necessary by the rationale of the whole system [...] will have to be discovered rather than arbitrarily invented. It is from this fact that the legitimate conception springs that particular rules rather than others"[1]; and elsewhere, more precisely: "We might therefore question whether a deliberate choice of the market order as the guiding method for economic activities [...] is a just decision, but certainly not whether, *once we have decided to avail ourselves* of the catallaxy for that purpose, the particular results that it produces for particular people are just or unjust"[2].

"Once having accepted" private property; "once we have decided to avail ourselves" of the catallaxy: here, this is the theory's point of attack, the stepping stone on which Hayek erects the construction within which, as we have seen, there is no place for exalting the justice or injustice of judicial laws. Ok, but what about the one who doesn't accept the catallaxy? About he who decides not to avail himself of it? This person, staying outside of the system's logic, certainly would maintain the ability to

1. F.A. von Hayek, *Liberalismo,* cit. p. 80.
2. F.A. von Hayek, *Studi di filosofia, politica ed economia,* cit., p. 312.

stamp the seal of infamy upon laws and sentences (as the laws and sentences of the system) that he rejects and then he, at least, can judge them as utterly unjust. And then, through the recalcitrant, by way of the dissenters, we would be able to recover that judgement of injustice that seemed lost in Hayek's horizons. Except that …

Except that, shocking wonder, in Hayek's structure (*of a specific Hayek*, at least, because – as we'll see – even here there is a *double-face* turn), as we were saying, in Hayek's structure, there are no dissenters. Precisely: there are none. Reluctance does not exist; there are no irregularities. Everyone, everyone is found chanting the same praise; everyone is singing the same chorus; there are those with a flute and those who are cavatina in tone – they're all there to unleash hymns to property and to the market's order. The existence of this order, writes Hayek, "will in the first instance simply be a fact which men count on and will become a value which they are anxious to preserve only as they discover how dependant they are on it for the successful pursuit of their aims. We prefer to call it a value rather than an end, because it will a condition *which all will want to preserve*"[3] and in which, as he states later on, "the majority of regulations are *universally recognized*"[4]. These are concepts that are so firm and secure that there is no need to comment on them. With audacity that is almost visionary, there emerges a monolith of a universe; a world that can be imagined as all of one piece and all one colour, no longer built upon those oppositions and on those multiplicities that even liberal thinking tends to hold in high esteem. We won't go on any further and we'll stop here on this barely ajar crack because we will return later on to the suitability with the ideals of liberism. For now, it's enough to know that Hayek's lesson set the standard, so much so that a few of his most illustrious followers, – one immediately thinks of Bruno Leoni – evidently taken from the admiration for this way of setting things up, have favourably welcomed "the ideal of political society as a homogenous entity"[5].

Moreover, if we think about it, it's just moving from here, from the assumption that a homogenous society, that Hayek can give back the honours of the world to the so-called "nature of the question" which, as we have seen, is the concept that has

3. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 131.

4. *Ibid.*, p. 238. The cursive is mine.

5. B. Leoni, *La libertà e la legge*, Introduction by Raimondo Cubeddu, Liberlibri, Macerata 1994, p.155. Bruno Leoni's ideas and his Hayekian ancestry have been studied in abundant detail by M. Stoppino in *Libertà e "Rule of Law"*, in "Il Politico", n. 4, 1961, pp. 770-789.

appeared over and over and is always well defined and carved out[6]. Now, the ''nature of the question'', or, as it is also called, the ''nature of things'' is a device of that knowledge of modern natural law theory from which Hayek stays as far away from as the most malignant of diseases. There are no justifications, he says sharply, ''to portray the rules of conduct as natural in the sense of being part of an order of external and internal things, or as permanently based in the unchangeable nature of man''[7]. But then, how does one explain that Hayek first rails against natural law theory and then, almost at the same time accepts one of its most suggestive derivations, which is precisely the ''nature of things''? Another contradiction? Another aporia? The umpteenth *chiaroscuro* of Hayek's intelligence? No, none of that. This time, it's just that he moves from the assumption of homogeneity; there is no inconsistency, these thoughts make a chain amongst themselves and nothing prevents Hayek from reviving a piece of the scenario of the natural law repertoire that almost seems curried in the dust of time.

6. We have already quoted the page from *Liberalism* where Hayek goes back to this idea. The reader will also find it again on pages 133-134 of *Law, Legislation and Liberty,* as well as in *Ordinamento giuridico e ordine sociale* where Hayek writes: if ''you read Dernburg's often-quoted definition of the concept of the ''nature of things'', you realize that this coincides with that concept that I have indicated here as social order. Dernburg writes ''Life's conditions contain their own more or less developed criteria of judgement of order. This inherent order of things is called the nature of things. An aware judge should refer to this when a positive rule is lacking or when it is incomplete and dark'' (*Ordinamento giuridico e ordine sociale*, cit., p. 709).

7. F.A. von Hayek, *Legge, legislazione e libertà*, cit., p. 258.

The "Nature of things" or a community of subjectivity?

It is necessary to know that the "nature of things" refers to a concept about nature that is entirely different from that which usually refers to natural law. For followers of natural law theory, in fact, natural law takes the form of rules, values and principles that are valid in all climates and all latitudes. And why is this? This is because unlike positive law, it isn't created by humans, but it is man who has *found* it in nature. Natural law – as far as followers of natural law consider it – isn't established by man, but it is imposed onto man by nature. Now, precisely as laws whose truth imposes itself onto the entire community of physicists, independent of their geographical location or politics, preside over physical nature, so is human nature studded with precepts whose evidence is imposed on the entire community of humans, independent of the colour of their skin or the tone of their political views.

Not at all similar for the scholars of the "nature of things", who do not refer "to the general nature of the human world, but to the characteristics or elements that make up a relationship or a legal law in a given, historically conditioned society"[1]. Where the first expand, the others contract; that which natural law theory expands in generality, the "nature of things" restricts to specificity (to the particularity of a specific historical contingency). We can also say it like this: while followers of natural law chase after a universal right, the theorists of the "nature of things" stay behind an interpersonal right, a right that is interpersonal because it is not valid for all, truly all of mankind, but for all of those men that make up part of a well-defined society. Whatever it is, expanded or restricted, universal or interpersonal, it is certain that in both cases there is a claim to infer the awareness of what is right from the analysis of reality. There, however, we know that there is no inherent value for reality; that it doesn't contain anything, no right of any type. The world of reality and the world of values are different, non-communicative worlds, so we are not permitted to infer a value from a fact; we cannot claim a 'should-be' from what is. The reason for this *no-bridge*, the reason that it has not been, nor will it ever be, the arc of a bridge that joins the two shores of facts and values, is explained by

1. N. Bobbio, *Giusnaturalismo e positivismo giuridico*, Comunità, Milan 1972, p. 202.

Bobbio in pages of glazed clarity that should be taken up again in full: "We believe", Bobbio writes, "the idea of the nature of things is nullified by that which in moral philosophy is called the naturalistic fallacy, that is, from the misleading certainty of being able to deduce from the observation of a certain reality (that which is the judgement of a fact) . . . Let's give a concrete example", continues Bobbio, "to illustrate what is meant by naturalistic fallacy. From the regulation that establishes that in the centre of the city you can park a car for just an hour, you could say that it is a rule extracted from the nature of things: available space, the number of cars that park there are facts that are objectively ascertainable and measurable, and it is from these that the rule in question is extracted from. In reality", Bobbio continues, "it isn't the fact itself that imposes the rule, but the end that it wishes to reach; it is the end that makes all the facts be considered in a certain way. In our case, the goal is to guarantee the safety of traffic and to give all drivers the possibility to find parking. But in the identification of the end, value judgements necessarily intervene: in our case, these judgements involve the common benefits of citizenship, and that of drivers in particular. The apparent objectivity of the hypothesized regulation", Bobbio concludes, "does not depend on the fact that it is derived from the nature of things, but on the fact of being established to pursue an end that is shared by all: the regulation is not based on the objectivity of the circumstance and the situation, but on a commonality of subjectivity. But when agreement upon the end is lacking, that is, when multiple conflicting goals appear, then the apparent objectivity drops off"[2].

And it drops off, we should add, in another circumstance as well: even when everyone shares the same goal, the means in favour of promoting it are multiple, various and opposing. We can all agree to the need for cars to park in the city centre? Wonderful. But someone might say: the tidiest way to carry out this common goal isn't to limit the time you can park, but rather to build parking garages. To which someone else, just as convinced of the good of their goal, might plead the need for underground parking that on one hand avoids painful restrictions on motorists and on the other saves the city the mangle of cement catafalques. We could go on, but the point should be clear. The point is touched upon once again by Bobbio: "the difficulty that the theory of the nature of things presents is such: for as much as it may suggest a certain relationship between means and end, it's not always true that when there is agreement on the end, the relationship between means and end will be unique and necessary, and that there would a possible agreement on the means as well. On the other hand, when the relationship between means and end is unique and necessary (and thus agreement on the means is possible), it's not always true that there is

2. N. Bobbio, *Il positivismo giuridico*, cit., pp. 209-210.

an agreement on the end to arrive at"[3]. In this way, regardless of his gnosiological inconsistencies, the "nature of the question" may be invoked only for particular circumstances, and precisely for those circumstances where everyone shares the same goals and where, in addition, everyone supports those ends, preparing for the same means. This is why Hayek can appeal to the "nature of the question" without falling victim to inconsistencies: he can do so because the society that he proposes is, as we know, an order "that everyone wants to maintain" – where there is agreement on the end, that then turns on the same enthusiasm (for private property, for contracts, for the generality of regulations, etc.), finding themselves united as such in the same means.

Communality of ends and means, then: this is precisely what demands the "nature of the question". In its consideration, there is nothing more significant than that which Hayek confirms in one of his minor writings. Let's read it verbatim: "if we explicitly pose the question: what limitations in the scope of individual action posed by just regulations of behaviour are able to create the highest degree of similarity to a general order equipped with the characteristics of the abstract nature of generality, we find ourselves in a curious situation. Every rule", Hayek continues, "whose opportunity we can always question, is in fact an improvement from the actual order that more or less perfectly holds water already, and in turn is the result of compliance with many other regulations that we cannot nor do we want to contemporaneously put into question"[4]. Where, if we peel away the compactness of this period, a little like the grains of sand that come off of a wall as it crumbles, we feel three fundamental hypotheses slipping through our fingers: a) everyone longs for the abstractness and the generality of spontaneous order; b) everyone, contemporaneously, wishes to improves this order; c) everyone, in order to improve it, decides in unison to address their anxiety about transforming those very regulations.

What compactness of purpose! And what simultaneity of intent! Perhaps only the most polished clockwork mechanisms are governed by such a relentless synchronism. Is this then the "Great Society"? Nothing more than a large clock? We don't know. It is certain that such conclusions, which to tell the truth give a sense of bewildered vertigo, these conclusions and not others are brought about by the "nature of things". Free, therefore, to participate together with Hayek in the joy of rediscovering this notion; since later, without sneaking off, they respect all consequences. All consequences, then. Well then, limiting ourselves to gleaning from them, there is one upon which we should stop immediately.

3. *Ibid*., p. 211.
4. F.A. von Hayek, *Ordinamento giuridico e ordine sociale*, cit., p. 708.

More on the "nature of things": the uselessness of the Legislative Assembly

If it is true that in Hayek's system, everyone accepts spontaneous order as a value, and if it is true that to put the final touches on this order, everyone must resolve to use certain means instead of others – first among them, as we know, is the general form of laws – if this is true, one must ask: so then, in this coincidence of judgements, with so many feelings in common, in this and in so much congruity of suggestions, what on earth is the Legislative Assembly needed for? If really there is such a uniformity of views, why is the legislative capacity specialized and why distribute it across two bodies, of which one (the Legislative Assembly, to be precise) must restrain and control the excesses of the other (the Governing Assembly) tying it down and blocking it from straying from the frame of general laws? Straying from general laws? And why is that? If we experience the market's order as intensely as a value and, equally intensely, we make sure to refine it with general regulations, for what mysterious sorcery should we then succumb to at the whim of changing it with specific commands and special directives? And if there is no one who tests the risk of these sectorial measures, what is the pro of setting up a body ad hoc that watches over the correct functioning of the system? Watching over that which works well on its own and that nothing will ever hinder? Come on, it would be a useless complication and a useless waste of energy!

This is why, the Legislative Assembly, which is a very amusing invention in Hayek's imagination, and for which he has squeezed the most buried veins of his imagination, this is why this assembly, even if presented with blaring horns and drum rolls, does not get any applause in the end. If doubt, or rather amazement, is ever encouraged, which is always the precursor to a smile, the malicious smile that inevitably surprises when faced with racking one's brain, this search may be pretty to admire, lit up as if made of infinite reflections, perfect as they may be, but. . . alas, perfectly useless!.

Useless, of course, society is informed with a homogeneous, cohesive and we'd like to say rock solid, idea of justice. Which is then, at least up to this point, Hayek's society, which he has equipped with the "nature of things". But then with an unexpected twist in his thinking (clearly reflected in his always jagged and jumpy plodding ahead), Hayek muddles this calm view of peace and harmony, and as if by magic the system

where everyone draws from the same just source disappears from his horizon; it disappears and suddenly, without knowing how, without knowing why, we find ourselves plummeting from above in a monotonous or monochromatic order to a situation of wild disorder, where individuals are slammed here or there from the dispute between two opposing, irreconcilable conceptions of justice. "In our era", Hayek writes, "we are governed by two different and irreconcilable conceptions of what is right"[1].

On one hand, there's the right that comes from the heaving of a gregarious instinct that is never truly and definitively restrained; on the other, the right that presents itself as a testimony to reason and the turmoil of individual emancipation. On one hand there's the right that solves the ego in us, that dissolves the single into the community and that, submerging it in this gurgling, communal impetus, obliterates every one of its details in the community to which it belongs; on the other hand, there's the right that breaks any discipline that the group had, that pokes through the shell of ways to act and to think collectively, and that throws individuals, all individuals, into the pursuit of their own personality. There, you'll find the man that first subordinates himself to his inner circle and people he knows, and then afterwards to those distant from him and strangers. Here, you'll find the man that claims for himself and others, near and far, friends and strangers, the equal right to confirm their own unique originality. While one has a soul shrunken from caring for the precise interests of his group, the other has an enlarged heart from the universal expansion of his own demands. Therefore, the first moves under the dominion of specific considerations and special rules; the second comports himself under the rule of thoughts and general laws.

As you can see, Hayek makes many various chords vibrate here, without ever forgetting the main principle: and the principle reason is once again the conflict between special regulations and general laws. Behind the contrast between the two justices or, what's the same, behind the contrast between instincts and reason, the contrast is drawn between the same, identical realities that have always faced each other as enemies in Hayek's pages. On one hand there are special rules that allow the individual to damage strangers when it serves the interests of his own group; on the other, general laws that, treating everyone equally, do not bend to the hateful particularities of any sort of discrimination. It is thus a variant of the same theme that Hayek presents with the two justices that battle furiously. There is a new element, however: that the theatre of the battle is liberal society, that is, within liberal society, first so calm and pacifistic, two irresolvable conflicts stir, which are perhaps irresolvable and that in any case cause upset into the deepest depths. Nor can it be otherwise because, as Hayek writes, "we mustn't forget that

1. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 343.

before the last 10,000 years, over the course of which humans have developed agriculture, urban living and finally the "Great Society", man has lived in small groups for a period at least a hundred times longer [. . .] It is more likely", Hayek continues, "that many of the moral principles acquired then have not only been culturally transmitted through teaching or imitation, but they have become innate"[2]. In this sense, as he explains elsewhere, "the rise of the great society is too recent to have given man the time to discard the results of development that lasted hundreds of thousands of years, and to not consider artificial or inhuman these abstract behavioural regulations that often are in conflict with one's deeply rooted instincts"[3] and from which the "social justice" about which the socialist line of thought leads to bragging is the last, extreme, most virulent offshoot.

As it is, sinking its roots in the night of time or not, it is certain that today, according to Hayek, the justice of special rules closely undermines the rule of universal right; it no longer leaves it as the master of the field: it crushes it, it digs its heels in, it opposes it in haughty contrast so that the "Great Society", which is the arena for this showdown, comes out mangled by disagreements that pull it from opposite ends. What is the consequence? The consequence is that this society, split as it is internally, takes on broken, syncopated movements, that are absolutely unpredictable in their development and there is no "nature of the question" that can direct those developments, no "intrinsic necessity" that matters enough to govern them. Everything, everything, starting from the production of laws - everything is handed over to the balance of power between the opposing protagonists that, evidently, will no longer have to "find" the regulations that are already there, ready to amicably reveal their secrets to whomever cares to look for them; no, henceforth the rules will be created – created with grievous yet conscious effort. This effort will be so much more conscious so as to need to navigate through laborious mediations, insecure agreements and uncertain balance. The awareness about these efforts, then: but haven't we seen more about exactly this being the prerequisite for preaching about the justice of laws? And is this not precisely the condition that Hayek (the first Hayek), had failed to satisfy with his homogeneous society, where the lawmaker was more similar to a mechanical tool than to an informed and responsible actor? How strange are the sequences of intellect! In homogeneous society, which Hayek caresses with his support, the rules close themselves to the judgement of justice (or injustice) – a judgement that opens, instead, onto an irregular society, onto which, however, Hayek pins a great scandal. In short, in order to put it in the form of a dilemma: when a society is homogeneous it cannot be just, and when it can be just, it is not homogeneous.

2. F.A. von Hayek, *Nuovi studi di filosofia, politica, economia e storia delle idee,* cit., p. 70.
3. F.A. von Hayek, *Legge, legislazione e libertà,* cit. p. 357.

The Legislative Assembly: from uselessness to impossibility

The tightening of an entire reasoning into a lightning-quick, dilemmatic sequence is a tempting invitation that the mind very rarely declines. In fact, once started down this road, before setting off, the desire to look around to see if there is anything else that can be reduced to the rigor of alternative choices is strong. From this point of view, it is necessary to say that Hayek does not let us down, because if we pay close attention, we realize that at least in two other circumstances we can draw up his thoughts on the precise force of dilemmatic arguments.

The first of these circumstances is produced in the same way in which Hayek presents the "Great Society" to us, and describes the disjointed contrast that afflicts it (the contrast between the two justices). His is not a rough outline sketched with quick strokes, nor is it a sketch where there are side shadows that just here and there are pierced by some sudden flash of light. It's not an outline or a sketch, but a real, true painting complete in every little part, defined in the most minute of details. Nothing evaporates into vagueness and nothing is left to the imagination; everything, conversely, is definite, precise, measured. Yes, exactly: measured. It just so happens, in fact, that Hayek is no longer content to confirm that "many people"[1] run after the "mirage" (as he defines it) of social justice. From a certain moment earlier, he begins to weigh, to quantify, and the humans victim to this cruel suggestion of "many" who were, become first the vast majority and then…then, listen here: "if we count as 'socialists' all the people that believe in what is called 'social justice'

(as we should do, from the moment that which they want can be obtained only through the use of the State's powers) we would be forced to admit that probably around 90% of the population in western democracies is currently socialist"[2].

Will it be true or false? Does Hayek coldly stand behind the effective truth of things? Or does the upsetting imagination of it make him see what isn't there? We don't know, and all said, it really doesn't interest us to find out. However, we do know

1. *Ibid.*, p. 184.
2. *Ibid.* p. 510.

that if he had caught hold of the truth, he once again would be badly off. Since it would mean that the fire of a universal right is extinguished in the hearts of nine out of ten people, and that nine out of then would be hopelessly lost to the cause of general laws. These general laws – precisely because for Hayek law is the mirror of the people, the reflection of public, and *non cubat in ulla* – precisely for this reason, these regulations would remain without an echo of effectiveness in so populated a universe, and it would be necessary to substitute them with special laws, the only ones that are convenient to instinctive individuals, folded onto themselves, deaf to the calls of altruism and sensitive only to the fascination with the power of their group. After which, with dramatic obviousness, you find yourself before the following question: and the Legislative Assembly? What ever will be of the Legislative Assembly? Its parts – the "nomothetes" (as Hayek baptizes them) – will they not be obstructed in their purpose, which is precisely that of providing the general rules? What generality of rules if the orientation of people's spirits is so severely resistant to them? In a society of that kind, the nomothetes would remain extraneous to the dominant ideas and thus would be lacking the titles of legitimacy needed to wield power; legitimacy, deep down, is all here, in the idea that "constitutions and laws should be thought of and created in relation to the historic and racial character"[3]. Power does not suit you, it is like a "borrowed dress, a temporary disguise"[4] that the community casts off just as soon as, on the political scene, there appears another that better adheres to the style of its natural forms. This is why the nomothetes – strangers as they are to the deepest passions of their citizens — would not possess the minimum requirements to govern it. To the eyes of those same citizens in fact, their authority would be converted into tyranny, their power would be changed into abuse, and the sovereign rules (general laws) would be valued as just as many insolent offences that only the issuance of special commands could fix it. Thus, right when the Legislative Assembly should roll out its functions as best it can to block men from tumbling down, attracted by the pimping of "social justice", just then, the Legislative Assembly becomes impractical. What a tragic paradox! First, when Hayek was conversing confidently on the "nature of things", society was too perfect since the Assembly wasn't useless. Now that the unsettling variety of our time collapses Hayek into a rumbling of internal turmoil, society is too imperfect because the Assembly fails, is impossible. Either impossible or useless, either unfeasible or superfluous: what evil fates hang over Hayek's most genius of inventions!

3. G. Prezzolini, *Manifesto dei conservatori*, Rusconi, Milan 1972, p. 83.
4. G. Le Bon, *Psicologia delle folle*, Mondatori, Milan 1980, pp. 85-86.

And that's not all: this very same turmoil that makes him ache for the more difficult life of universal justice, just that same turmoil moves Hayek to passionate apostrophes, to stinging insults that, like a bitter prank of destiny, turn against him, chasing him into difficulty that is no more nor less paradoxical than the one before. What is the new difficulty? To respond to this question, it's useful to start from a distance and remember that when Hayek comes to talk about social justice, the words come out pointed, sharp, and he spares no adjective to denounce the dangers that nuzzle in the promise of significant equality among men. This is illuminating with regard to this work of his: "the nearly universal acceptance of a belief does not prove that it is valid or that it has meaning, no more than how the community belief in ghosts and witches proved the validity of those ideas. That which relates to the case of 'social justice'", Hayek continues, "is simply a quasi-religious superstition that should be left alone until it only serves to make the person who holds it happy, but which should be fought against in the moment in which it becomes a pretext for coercing others. The faith diffused in 'social justice'", continues Hayek, "is probably today the biggest threat against a large part of the other values of a free society"[5]. And so, after having discredited social justice first as a "mirage", then as a "superstition" and then, a little later on, as a "will-o'-the-wisp"[6], Hayek concludes: "we can protect against this danger only by subjecting our dreams of a better world to a ruthless rational analysis"[7]. Behold: *ruthless* analysis. Here's the rub.

In fact, it is necessary to know that one of the most precious teachings of Hayek's mastery is his condemnation of the "intellectualistic fallacy", that is, the condemnation of that belief according to which the mind, individual reason, is an external reality that is outside of the community, for that reason, the community would be the product of an intentional design that is imposed from the outside, for the *ab extra* stimulus on some individual's or some group of individuals' intellect. Nothing could be more wrong for Hayek, according to whom reason has endogenous consistency: it is part, then, of a larger reality that encompasses it, and at that point it is covered by ways of thinking and acting into which it is inserted that its development is always part of the society to which it belongs. "The idea of a man that deliberately builds his civilization", writes Hayek, "derives from a false intellectualism that considers human reasoning to be something outside of nature and equipped with an intellectual and rational capacity independent from experience. But," Hayek continues, "the devel-

5. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 268.
6. *Ibid,* p. 269.
7. *Ibid,* p.268

opment of the human mind is part of the development of civilization: and the state of society determines the capacity and the possibility of ends and human values"[8]. It follows that reason makes progress "only by moving within an existing conceptual system, and trying, through a gradual process of adaptation, or really of 'immanent critique', to make the entire system more consistent [...] This immanent critique", Hayek adds, "is the main tool for the evolution of thought"[9]. In other words, as he explains elsewhere, "the specific characteristics of a culture may be critically examined only in the context of that culture and [...] you can always examine one part of the whole in terms of that whole"[10].

Now, if this is so, the question is: how can Hayek, whose reasoning evidently is inserted in our same society and thus participates in its dominant thoughts and values, how can Hayek subject the concept of social justice, which he says himself is an "almost universally shared" belief, to "ruthless" criticism? Critique, yes, if the critique has to exist, but soft, within the system, imminent in fact, and never fierce or external like that that which roars inside and that gushes from his soul with such a fierceness of adjectives. In short, one of two things: either the critique is "ruthless", and then social justice is not "widespread" faith (not so widespread at least as Hayek suggests), or faith in social justice is truly this widespread but now Hayek's critique cannot be "ruthless". Hence the second dilemma that we announced: either it is radical (Hayek's disapproval) but not widespread (social justice), or it is widespread (social justice), but it cannot be radical (Hayek's disapproval).

8. F.A. von Hayek, *La società libera*, cit., p. 55.
9. F.A. von Hayek, *Legge, legislazione e libertà,* p. 148.
10. *Ibid,* p. 212.

Liberal Society: uniformity or antagonism?

At this point, it is better to pause in our reasoning, and before going any further it is a good time to stop upon the results we have reached so far. We have seen that within Hayek's studies, different, and thus opposing, conceptions of modern society alternate; and we also know that Hayek passes through from one to the other in a rapid succession of perspectives, just like the spool of a loom.

Sometimes it seems that our civilization becomes completely subjected to the charm of social justice, and for that reason the game of liberty is definitively compromised (in that case the Legislative Assembly is impossible and Hayek's critique cannot be ruthless). Other times, however, it seems that the antagonistic values of universal justice and special justice deploy their line-ups, whose consistency is not altogether unequal. In this case, setting the scale precariously in balance, everything, everything, is still possible: the worst, certainly, but also the best. This better and worse remain in the hands of the knowing responsibility of humans (and thus, but only now but not before, it is impossible to stamp the stigma of justice or injustice upon laws). At other times, it seems as though the strengths of universal justice are absolutely overwhelming so that men leave it entirely made from the same mould, which is the mould of private property and the catallaxy. Thus, there is no more conflict and friction, but agreement and homogeneity (where the uselessness of the Legislative Assembly and the impossibility of preaching the injustice of laws). As you can see, whatever the perspective, there isn't a single one that subtracts Hayek from difficulty and aporias; in each of the three descriptions of society, there is always something, how to put it…that disengages, that clashes, that screeches, and basically blocks the various elements from joining together to become a system.

One may object: but liberal society (that last one that we just now have mentioned) is a mandated condition, not a described one; it belongs to the ideals of the mind and not the reality of things. Both are true. We admit that Hayek had only mandated as an ideal the society informed by the logic of the "nature of things" (we admit this, to be clear, out of the love of reason, since Hayek's ways of phrasing things are those typical to description: "it occurs that…"; "it so happens that…"; "in fact

it happens that…"' etc.). Whatever it is, we can admit that Hayek has only held as an ideal the society where "the large part of regulations are universally recognized"[1], and that only as a projection of one of his desires did he sing the praises of the virtues of a system "that is founded on a diffused opinion upon what is right"[2] and "which everyone wishes to preserve"[3]. So what changes? Nothing, absolutely nothing. This objection doesn't change anything because the Assembly remains useless and the moralizing about justice remains impossible both if homogeneous society exists in fact, just as if it exists in Hayek's flights of fantasy. And not just that, but precisely that objection makes things worse: it's not that it rectifies the internal inconsistencies. In fact, this makes the "external" contradiction explode between Hayek's system and all the baggage of the values that are eulogized in liberal thinking. This liberal thinking may very well have lost itself among the fog and the fumes of the rhetorical amplifications of our time; it could very well be swollen out of proportion and dilated to the point of joining the least compatible ideas and the most contradictory people under its mantle. All this may be, especially now that, in the show that is always a little bit shameless for cultural trends, the classics of liberalism have become a sort of bible where each person reads what he wants to. Sure, in these classics there is a page, maybe only one but it's there, a page where you can find, for clarity of character and vigour of expression, the distinctness of liberal thought. And it is there where there is conflict between values, antagonism between truths and, in a word, only the liberty of dissent is not already loathed as fodder for anarchic disintegration but, on the contrary, greeted like the most powerful impetus to advance men along the road of moral, material and intellecutal progress.

In the messy universe of politics, there is an infallible way to immediately recognize a liberal (or at least someone who is on the way to becoming one): ask him what he thinks of dissent. By dissent we mean, not the technical specifics that don't count for anything, but the main values in life, those that involve us with the deepest fibres of our beings. Let's ask him then. If dissent provokes him like a pang of anxiety, if it scares him, conjuring up who knows what catastrophic world destruction that surrounds him and the tranquillity that protects him, then we can be sure: he is not and will never be a liberal[4].

1. *Ibid.,* p. 238.
2. *Ibid.,* p. 121.
3. *Ibid.,* p. 131.
4. Bobbio wrote: a "characteristic and innovative theme in liberal thought [is] the fecundity of antagonism. The traditional organic conception of society values harmony and agreement even if it is

For a liberal, it is simply impossible to live in a society of replicants, where each one repeats the lifestyle of others. If each thing were made in the image of another, the world would be unbearably bleak and gloomy. Let's think about it. Everyone acting in the same way, thinking identically, cultivating equal ideals and values, so desolately equal to each other, always comrades of each other, always in harmony, never any dissent: no, that would no longer be a society. It would have an I-don't-know-what of sweetness that is precisely that of sacristies or convents, and up close it would recall the many Cities of the Sun that dot the universe of utopias. About utopias, we mean it in a negative sense, of "dystopias" that is, because in the Cities of the sun or in paradises that are sorted out once and for all, where everything goes smoothly and nothing is ever contested, it is precisely there that you die the worst of deaths: dying of boredom. Really, for a liberal there is only one thing worse than the hell of suffering and that is a paradise where you get bored. In support of his repugnance for a world where everyone says yes and there is no one that rises up with dignity to say: "no, I don't agree with the dominant beliefs and opinions!", as witness to his aversion to a time where the years are depleted calmly, monotonously, slipping away without ever seeing the rise of discontent or the fermentation of criticism. In support of all this, we could invoke one or another of the fathers of liberalism – Kant, von Humboldt, Constant or Tocqueville, Stuart Mill and Lord Acton – which is to say that they crowd one's mind; indeed, there is no hindrance of choice. In fact, living in a country afflicted with this annoying illness that is "provincialism in reverse", which is why everything coming out of the genius of foreigners is the best of the best and the resulting material, however, is how you ignite the nation's inspiration, living in such a country and having hinted earlier at Paradise and the Cities of the Sun, we believe it is useful to bring back a work that is worth it all, nice as it is for its external beauty, rhythm, images and richness. That is a part of *Verso la città divina* where Luigi Einaudi asks: "why must it be an ideal to think and act in the same way? [...] Why only one religion and not many, why only one political or social or spiritual opinion and not infinite opinions? What's beautiful, what's perfect isn't uniformity, but

forced, subordination of the various parts regulated and controlled by the whole, and condemns conflict as an element of disorder and of social breakdown. On the contrary, in all currents of thought that are opposed to organicism is the idea that the contrast between individuals and groups in competition with each other [...] is beneficial and is a necessary condition for mankind's technical and moral progress, which springs only from the opposition of differing opinions and interests. This opposition is carried out in the debate of ideas in search of truth, in economic competition for the pursuit of better social wellbeing and in the political fight for the selection of the best government leaders." (*Liberalismo e democrazia*, Angeli, Milan 1985, p. 20).

variety and contrast''. Einaudi continues: ''those who complain about the prevailing disorder of the spirits to yearn for a new order, are unable to understand themselves, they complain about that which they love, they suffer from what makes them live. Aspiring for unity, for the empire of just one is a vain chimera; it is the aim of he who has an idea, of he who follows an ideal of life and would like if everyone else, that everyone has the same idea and yearns for the same ideal. There is one thing that he does not see: that the beauty of his ideal derives from the contrast in which this finds itself with other ideals, which to him seem uglier, from the pertinacity with which the others defend their ideal and from the nonchalance with which many look at all other ideals. If everyone were to accept it, his ideal would be dead. An idea, a way of life that everyone welcomes is no longer worth anything. [...] The idea is born from contrast. If no one tells you that you are wrong, you know no more to possess the truth. [...] No. – Einaudi concludes – Shout it on high. A disordered, laborious, anti-unitary, anti-disciplined life that we carry out seems unbearable to we who suffer through the hard personal, economic and moral repercussions. It may seem beautiful to future generations, who will enjoy the fruits of the political, economic and moral truths that today's contrasts will have allowed to triumph''[5].

Here it is: the truth as the fruit of contrast. Among the few that still are, this is the last, the extreme trench that cannot be abandoned without losing the war, which is the war to confirm itself amid the confused, muddled interpretations which today its identity is subjected to. In this sense, as was said before, the adversarial conception of the world and antagonistic ethics are conditions (necessary though not sufficient conditions) to respect because it can be said of an author that he is a liberal author. It is derived from here, in fact, that the juridical law of dissent is not *one* of the rules of the ''Great Society'', one among the many: no, it is the first rule, the rule of all rules, the rule without which we cannot explain the why and the how of the political, civil and personal freedoms that characterize a free society.

The rights that originate from free dissent, in fact, are not divisible; one pulls the other. Let's think about it for a moment: what dissent could ever occur where the freedom to vote and the freedom of association are not guaranteed above all? Dissent, then, posits political liberties. But to political freedoms the right of representation of the opposition is necessarily associated. And indeed, whatever will be of political freedoms if not accompanied by the ability to substitute he who is criticized? The exercise of the right to vote, of association, etc., makes discontent rise, but a discontent that does not have the possibility to organize in opposition inevitably ends by fuelling the explosion

5. L. Einaudi, *Verso la città divina*, now in *Il buongoverno*, Laterza, Bari 1955, pp. 32-34.

of a revolutionary violence. And is the formation of an opposition movement not suffocated perhaps with a watchful, all-pervasive jurisdiction that puts the private life of whoever is suspected of conspiring with the opposition under widespread control? How to nip the opponent in the bud? How to establish if he who reeks of "heresy" is truly a "heretic"? How? Is it not necessary to rummage through his papers, peek into his correspondence? Do you not need to creep into his house at night? In doing so, trampling upon the principle of the sanctity of one's home, destroying the guarantee of confidentiality of correspondence; in doing so, violating all the rules that circumscribe individual *privacy*. In doing so, and only in this way, is it possible to establish if the suspect is really an opponent (after which he is sent to prison or to another world). Dissent, as you can see, presupposes political freedoms. Political freedoms imply the right of representation for the opposition, and the right of the opposition makes individual freedoms secure. This is why it is said that freedoms are integral to one another: *simul stabunt aut simul cadent*.

Hayek's "halved" conflictualism

So, representative institutes, political freedoms and personal rights all begin from liberal dissent; that dissent comes straight away from the first foundation of liberal knowledge, in which the competition and not the harmony, the dynamism of individuals in battle and not their static harmony, is the driving force of human progress.

The reader need not fear: we have not lost our thread of reasoning. Before going further with Hayek, we would like to stop upon the following point: freedoms follow the fate of rules on dissent. And dissent, in turn, is held behind a conception of the world that you can rightfully call "conflictual" because it does not wear out the antitheses and it does not dishearten the contrasts; not the antitheses, we repeat, and not the contrasts on minute questions of the second or third order that are always easy to resolve and to assemble into a unit. No, it does not wear out the antitheses and it does not dishearten the contrasts even when in these antitheses and in such contrasts there are colliding beliefs, the first truths and in short the pillars themselves of individual existence.

If it is in this manner that liberalism is measured (which, therefore, it is either conflictual or not), then it is necessary to say that Hayek's thinking doesn't pass the test. But how, one might argue? Isn't Hayek the defender of the catallaxy, the champion of competition? And what is competition? Is it not just a play of contrasts, a tangle of rivalry? And does the catallaxy not ask individuals to just "exist according to the means, not the ends; means that are able to serve a wide variety of purposes"[1]? So then, where is the doubt? Why suspect that Hayek may have drawn upon a less lipid source – one that is different from that native source of liberal thought that is conflictualism? Why be suspicious? Because, despite the misleading sound of the word, the word "means" – the Great Society, Hayek insists, is "connected only by means"[2] – the word "means", we were saying, does not evoke anything that is neutral in its associations, it does not call the idea of a tool to mind, of a mechanism without a soul, thus

1. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 188.
2. *Ibid.*, p. 318.

cold and lifeless like only tools and mechanisms can be. No, the means that Hayek is talking about suck their lifeblood from a mixture of values and principles without which they simply could not function. Remember these means, and we'll quickly see that from the armouring technique in which they seem protected, the True and the Just shine with lots of brilliance (a certain idea of Truth, you see, and a specific conception of Just). As we know, and after all, Hayek does not forget to underline it each time he gets the chance, the catallaxy game is presided over by abstractness and the generality of judicial laws. That's fine. But abstractness, we ask, is it not the legal precipitate of the value attributed to the certainty of the law (as we saw in the section on *Abstractness and the Generality of Laws*)? And does the certainty of the law not need one, *not even one*, of the possible meanings of freedom, which is freedom as a non-impediment – liberal freedom in short? At the same time, generality is not a well-known differential that stays there, frozen in its impassivity, to distinguish law from morality or religion or any other regulatory system. No, generality is a requirement; and it is a requirement for nothing impartial. It is the requirement that legal rules (which, then, is legal even before being general, independently then from the character of generality) – it is the requirement, as we were saying, that legal rules must comply with when one wishes for the law to promote a well-defined value, which is the value of equality before the law. This equality, once again, is one *and only one* of the many ways to sway the word of justice.

If this is the case, you can certainly say that the Great Society is "connected only by means". You can say it, but with one condition: as long as you remember that the "connection" or that which serves this purpose, the communality of the means, goes back to the need for a communality of values. And of values – remember Hayek's words – that, "everyone wants to keep", which are also the values of freedom and justice according to the liberal meaning. According to the liberal meaning, mind you. After which one must ask: what fate will fall upon other-freedoms, upon socialist freedom, for example[3]? And what will be of the other justices, of substantive justice, for example? What will be of it? Nothing. That's right: nothing will be of it because in Hayek's ideal society, other freedoms and justices *are nothing*, in the exact sense that they do not ever receive the honours of the world because they never capture the emotions and the hearts of individuals, so therefore...it doesn't make sense to question yourself about the life of something that is never born. What a nice way to celebrate the splendours of diversity and conflict!

3. On liberty that is not singular but plural, and on the various relationships that exist between different liberties, I refer to my *La libertà dei moderni*, Dunod, Milan 1997.

In this sense the "Great Society" grabs hold like a sense of dissatisfaction, or, better, yet, discomfort: because, certainly, the conflicts noisily whirl around you, but it's noise whose echo has a short resonance and that stifles everything in the tight enclosure of the economic sector, there, where individuals essentially are rioting, they intersect each other and compete for the pursuit of their ends. But this is about the opposition for material ends, and not the contrast between ethical principles, which are always, conversely, so homogeneous, so widespread, sculpted so rock-solid and granite like in everyone's souls. Conflict, yes, then – but conflict of an exquisitely economic nature, that pits entrepreneur against entrepreneur, shopkeepers against shopkeepers, merchants against merchants and never whole men against whole men, each one with his own ideals and beliefs (in addition to, naturally, with his own material objectives). It is a collision of profits, only profits and not ideals; it is tension over calculations, all within the game of costs and revenue. It is tension over calculations then, not over values – values that, say, violently move ones soul, dragging out hints of noble and contrasting passion, of that, in short, which is precisely blood in turmoil. From here, from drying up the everlasting sources of conflict (beliefs and ideals), from here a sort of economic lumpiness, like the musty air you breathe in the "Great Society", where under the prudish covering of material competition you can guess at the homogeneity of values that goes beyond there, much further beyond than what is necessary for a liberal state to last and weather the storms of time[4].

4. Yes, even the liberal state needs a common prescriptive core, without which the antagonisms would explode with the violence of a revolutionary explosion, and the conflicts would plunge society into the abysses of anarchy. Not that, mind you, conflict as such is laden with catastrophic effects. However, "ritualized" conflict is one thing, "radical" conflict is another. "Ritualized" conflict happens when the contenders "call certain things into question but do not challenge everything" (J. Ortega Y Gasset, *Sull'impero romano*, now in *Scritti Politici*, Utet, Turin 1979, p. 990), and they don't challenge everything because they continue to recognize the validity of regulations that more or less make them participants in the same vision of the world. Conversely, conflicts are radical when they no longer graft themselves onto the common principles of the disputers. Consensus on the values that cement society together here is entirely evaporated, so that, cutting the ties that united them, individuals fight like it's war. Like *hostes*, then. "To he who listens to you - Goethe suggested – do not ask if he absolutely agrees with you; ask him if he's heading in the same direction". Among those who "do not head in the same direction", there can be confusion and, almost certainly, a brawl; never a dialogue, however. But if there cannot be dialogue, how can collaboration work? In this sense, whatever you think of K.R. Popper, truly "a rational and fertile discussion is impossible if the participants do not share a common framework of fundamental assumptions" (K.R. Popper, *Il mito della cornice*, now in *I modi del progresso*, Il Saggiatore, Milan 1985, p. 20). Only in Hayek's case, the "framework" is so doubled so as almost not to leave space for the canvas; it so often takes up the entire picture itself. There where "everyone wants to

Not only that, but such homogeneity, which is unacceptable as a matter of principle, also sounds fake in point of fact. It is unacceptable as a matter of principle because we are unable to convince ourselves that the liberalism that expunges disagreements of moral consciences from its horizons is a well-formed liberalism. But it is also not true in terms of fact, since it is difficult to imagine that in a society where men are so free as to organize the plans for their material life, so brazen in pursuing them and so proud of their originality to almost get high from the newness of their experiences (especially when these experiences enrich their pockets and embellish their reputation) – it is difficult to imagine that in such a society, of thousands of depths, of thousands of economic strengths, it is difficult to imagine that precisely in this society, individual choices do not inspire different, contrasting criteria, and that they are all attributable conversely to a single, cohesive, value system. It would be as if the imagination, which flies so high in the field of practical work, were to take on a timid, wary and clumsy gait just upon entering into the realm of the spirit. When on the other hand we know that the logic of innovative experimentation – and the sometimes explosive glow of conflicts that they derive from it – when instead we know, we were saying, that the logic of innovative experimentation either is shared or not: this is true for doing as it is for imagining, for spirit and for matter, for thought no less so than for actions. And actually, we'd go beyond and say that: it is true for thought precisely because it is true for actions. This point is absolutely fundamental; fundamental, mind you, in Hayek's same teachings where he writes that "actions are the main source of individual knowledge" and that "the varied experiences which lead to the differences of opinion from which intellectual growth originates are in turn the result of the different actions taken by different people in different circumstances"[5]. And elsewhere: "Although once having had in part one's own life, the conscious elaboration of abstract thought wouldn't last long, nor would it develop without the constant stimuli that spring from the capacity of people to act in a new way, to try new systems for doing things [...] *the flow of new ideas,* largely springs from the sphere in which the action, often that which isn't rational, and the corporeal events clash into each other"[6].

preserve" the value of liberal freedom, the good of commutative justice, the principle of private property and the mechanism of the catallaxy, there where everyone shares everything, what type of picture can there be and what rainbow of colours could ever enrich its design?

5. F.A. von Hayek, *Liberalismo,* cit., pp. 99-100
6. F.A. von Hayek, *La società libera,* cit., p.66. The cursive is mine.

At the time, then: if it is true that to multiple and diverse actions there usually correspond convictions and values that are just as plural and diverse, how is it possible, we ask, to defend the catallaxy and at the same time invoke the "nature of the question" (which is a concept, as we know, that befits a harmonious order of opinions and beliefs)? What ever, in the catallaxy, could deliver men to the joining of the spirit and the mind, and squeeze them together in that "widespread opinion about what's right"[7] that many, really many times Hayek recalls in his pages?

What source could possibly revive a collective feeling that is even more fleeting and evanescent? Like it or not, but the objective characteristics of the market's spontaneous order are those of removing the power of, and increasingly weakening the cogency of shared principles. More than the "widespread opinion on what's right"!

So, is there a contradiction? Yes, and it's quite serious. Such a contradiction is much more serious if we remember that we are moving in a whirl of ideas that is defined as the spontaneous order of the market, there where individuals – like Hayek taught us and how we have documented with the example of the umbrella seller – there where the individuals, even the most deserving, and the most competent and hard working, can tumble down for the screeds of life and sink into the slums of society for entirely unpredictable reasons, that has nothing to do with their moral and intellectual qualities. It may also happen that other individuals, that are perhaps much less worthy, rise to the opulence of wealth and spend their lives between the glitter of gold and the embroidery of silk only because the benign unpredictability of chance wanted to help them during their existence. Is it necessary to be a clever psychologist to guess what snarl of jealousy, resentment and envy that this show can sink the human soul into, especially the soul of disheartened, humiliated men, suffering from the anguish of the fall? Is it not exactly from here, from the impulse for revenge, that the bitterest condemnations move against the table of dominant values? Is it not from here, exactly from this sense of frustration, macerated until it becomes venom – is it not from here that objectors and enemies of the system come from? Who are the objectors if not "men of resentment"[8]? And what are their insults if not

7. By way of example, I refer to pages 77, 121 and 408 of *Law, Legislation and Liberty* as well as the essay on *Liberalism* where it is said that "the ideal of distributive justice … should be rejected by logical liberals [because] universally accepted general principles of distributive justice do not exist" (cit. p. 80); that "universal recognition" – it's given that you understand –instead smiles upon the principles of commutative justice which inspires the action of the "logical liberal".

8. Cfr. M. Scheler, *L'homme du ressentiment*, Paris, Gallimard 1970.

frightening, stabbing "screams of pain"[9]? That being the case, how can one think that liberal justice materializes from "universally recognized" principles? Recognized by who? By objectors and enemies of the system? What kinds of enemies would they even be if they recognized these principles? Come on, let's not mess around; and let's allow that together with the "nature of the question", every aspiration for "universality" is dropped from the mind. Unless…

9. Cfr. E. Durkheim, *Il socialismo*, Angeli, Milan 1982.

Hayek's anomalous liberalism

…Unless one wants to gag the objectors and obstruct, *legally obstruct*, their ability to raise up, high and strong, the reasons for their dissent. Then, yes, we would have restored society to shared ideas and values; truly, in that case, the freedoms and other-justices would be nothing (as Hayek requires) and truly we could unearth the "nature of the question" from the ruins of history to sculpt it right on the pediment of society that it is set up for. But at what price? At the price of making this society lose all the other rules that derive from it, together with the right to dissent, that are the crown of liberty. From here, now we have arrived at the end, the last, the most extreme among the many dilemmas that have articulated the flow of our reflections: either conflict, with the allure of dissent and of the other rules of liberty, or forced homogeneity, harmony forced at gunpoint without dissent and therefore without freedom.

You may say: but what does this have to do with Hayek? It does, alas! Because we would expect to read everything in his books except the statement that around the end, almost to the seal of *Law, Legislation and Liberty*, comes over us with a ferocious finality. It is an affirmation that casts a sombre light and envelopes Hayek's liberalism as if it was in a funeral shroud. You would prefer not to have met it or not have understood it, but there it is, unambiguous, cut as it is with characteristics of the fire: one cannot –Hayek writes – "for the purpose of maintaining our society, accept all the moral beliefs which are with equal conviction as equally legitimate, and recognize a right to blood feud or infanticide or even theft, or any other moral belief contrary to those on which the working of our society rests". He continues: "What makes an individual a member of society, *and gives him claims*, is that he obeys its rules. Wholly contradictory *views* may give him *rights* in other societies but not in ours"[1].

1. F.A. von Hayek, *Legge, legislazione e libertà*, cit. p. 554. My emphasis. To clarify: it isn't that the conflict between values is absent in Hayek's thinking; however, it's a theme that, let's put it this way, isn't absent but evanescent, that with the passage of years continues to fade. Comparing the passage in the text with how Hayek had confirmed it nineteen years earlier in *The constitution of liberty*, there where, securing the difference between the conservative and the liberal, he wrote that the conservative

No, no, one hundred times over, no! It is not so, curbing rights to only "friendly" opinions - this isn't how you put a liberal system into place. This is how tyranny is organized, and we have seen it above when we were discussing the rules about dissent. So we won't repeat it. We only want to note that if liberalism isn't a passing shadow but a reality that remains to this day, and a reality that, all considered, is neither slow nor faded, if this then still talks to our sensibilities, and deep down we feel happy to have a soul in which its teachings resonate, if this happens it is precisely because "liberalism is the supreme generosity; it is the right that the majority concedes to the minority and it is, therefore, the noblest call that has rang out in the world. It proclaims the decision to live with the enemy, and what's more, with the weak enemy"[2]. Living with the enemy then. Sure. But why? Because, as has magnificently been written, "men are not simply what they do, but moreover what their adversaries do to them, decreasing or stimulating their strengths"[3].

Let's follow Hayek's suggestions (even only in our imaginations), and let's try to refuse any right to the enemies of the system.

What would we have? We would have it so that the anarchists, the Marxists the Catholics, and whoever else doesn't get along well with the market's logic would have no say in the matter. Hence a uniform society, homogenous (ah! Homogeneity), without stimuli, which threatens to become harder and dryer than a rock and where the same liberals, exhausted of their creative inspiration by the absence of hostile forces, would slow down their movements until stopping and languishing in a sort of rusty immobility. From here, from the knowledge that the other, even the most radically and inflexibly different from us, it is from here, we were saying, from the knowledge that the other is essential to us only if we really want to save ourselves moral atony and mental ankylosis, from here the decision to "live with the enemy"…It is from

"does not have political principles that allow him to work with he who has different moral values than his own, in favour of a political order in which both can adhere to their convictions. The recognition of such principles is the condition of the coexistence between various value systems that make it possible to build a peaceful society with the least amount of coercive force possible. The acceptance of such principles means that we accept tolerating a lot of what we don't like […] Living and working successfully with others requires more than the simple fidelity to one's concrete ends. It requires a moral commitment to a type of order in which, even for problems that are fundamental to him, others are allowed to pursue different ends." (*La società libera*, cit. p. 492). Well put; in fact, extremely well put. Too bad that nineteen years later all this would be lost. Nineteen years only: it seems like a lifetime for *quantum mutatus ab illo!*

2. J. Ortega y Gasset, *La ribellione delle masse*, il Mulino, Bologna 1974, pp. 69-70.
3. B. Croce, *Pagine sparse*, vol.I, Ricciardi, Naples 1943, p. 411.

here, mind you, and not from elsewhere, and surely not from the belief that the State, in order to be neutral, "agnostic", and thus indifferent to friends and enemies. This of the agnosticism of the Liberal state, pardon the brutality, is solemn stupidity to take into account to get rid of once and for all. It is not correct to say that the Liberal state is neutral because it encompasses its duties of maintaining order. Even if it were entirely as such (and it never has been), it would be necessary to remember that "order" (abstract order) does not exist. Rather, there is a *certain type of order*; and the State is liberal when it assures the maintenance of that particular type of order, which is order shaped by the rights of freedom, with the consequence that the attack on such freedom provokes the violent reaction of public power. As such, it defends itself, or equally, it defends its order from the liberticidal attacks of subversives. More than indifference! It has always been so and presumably it will always be so: in any era, the tolerance for what's "different" is limited, and it will never be indiscriminately extended to everyone and everything. For this reason, it is useless to stay there and waste time: the Liberal state has struck and will continue to strike the destabilizing minuses with the rigidity of its sanctions. Sure, the subjects from which it must protects itself can change – yesterday they were Catholics (*rectius*: the papists), today however, they are terrorists; and they may also change the mode of protection (ferocious and ruthless in the past, the death penalty, but more humane and forgiving today, for the rehabilitative purpose that is assigned to the punishment); the subjects to protect from and the mode of protection can thus change, but the principle – the principle of self-protection as such – is, and remains, unchanged. With one clarification, however: that it would be redundant if it was not briefly visited by Hayek, making him stumble on the loudest of misinterpretations. The clarification is the following: that the threat (today, at least) is made up of subversive *actions*, not *opinions*.

The potential danger of the subversive theory isn't enough, the real and effective danger of the revolutionary act it is necessary to spring the State's defences into action. Therefore Hayek is right when he writes that "it is not by conceding 'a right to equal attention and respect' to those who break the code that civilization is maintained"[4]. But, precisely, this is about violation of the code, and thus about a concrete, material behaviour, physically tangible in its disruptive effects. Clearly, opinion is another thing, which – as long as it remains opinion – is like the fluidity that frees it from the jurisdiction of the magistrate and places it within the incoercible sphere of the individual. Careful: as along as it stays an opinion. It may very well happen, in fact, that the link between thought and action is so direct,

4. F.A. von Hayek, *Legge, legislazione e libertà,* cit., p. 554.

ready and instantaneous that it is no longer possible to distinguish one thing from the other, with the consequence that the effects of the "doing" bounce backwards and reverberate on "opining" that then and there, produced it immediately. For this reason, if that "doing" is judged to be a violation of the code, then even the idea that is attached behind it will also be a violation. Hence in this case, and only in this case, opinion is also punishable. As you can see, we are at the start of the "immediate and present danger" formulated by Justice Holmes who Hayek shows he holds in high esteem for his teachings. Too bad that in this case Hayek didn't learn much from it. If he had ever turned a profit, never and never again would Hayek have had to write that, "completely contrary opinions may [grant] rights in other societies but not in ours". It would be as Hayek wants it only, say, if addressing an already excited crowd, fully armed with lots of iron clubs and maces, I would point them at a concrete target against which to attack to make the reasons for the so-called "class war" heard. Yes, this would be an "immediate and present danger". But if in Hyde Park I get up on a dilapidated chair and in front of the now curious, now simply amused passer-by, I start thundering against the crown, the parliament and private property, why and who would have the right to suppress me?

Not only that; there's more. If by chance, my opinion at first glance seems so extravagant, so resistant to what exists, roaring inside like a destructive fury, if by chance precisely this opinion were to conquer the acceptance of peoples souls bit by bit, with respect therefore to a civil confrontation and without ever bringing violence upon someone, precisely that opinion would be entitled to have free reign without censorship or the gag of the police. Would that be the end of the liberal system? Yes, it certainly would be the end of the liberal system. Which, however, in a sublime paradox, in the very moment of death would celebrate the highest of its principles: the one for which "with the goal of survival, free men must not disavow their very reason for living, the freedom itself for which they claim to be advocates [...] Men who love civil tolerance have the duty to fight to the end; but in fighting, they cannot give up on being themselves. Therefore, they must conclude: 'if, in spite of our words and our opposition, citizens prefer the liberticidal to us, it is a sign that they do not appreciate the greater good and, *fruges consumere nati*, they give out on their reasons for living, which is continual liberation from evil, which is battle, which is suffering, aspiration looking upwards, towards moral perfection. Such being their will, their fate is sealed"[5]. So says Luigi Einaudi, with words that have the sound of

5. L. Einaudi, *Maior et sanior pars*, now in *Il buongoverno*, cit., p. 106.

a warning to those of us today who have the enemy not in front of us but already penetrated within our defences.

In the end, the greatness, and we can also say the tragic greatness, of liberalism is all here in the conviction that the last word is never pronounced and that the game of freedom is still yet to be played. It may end well, it may end badly, but in any case, in the end the choice is made by men - by men and not, as Hayek would like, by the scowl of an intolerant law.

Appendix

I present this essay once again on "Ancient and Modern Organicism" which I previously published in L. Pellicani (Ed.), The history between past and present, Rubbettino 2001. *I'm presenting it again here because, as we have seen after the long gallop into Hayek's territory, Hayek brings conflict down more than befits it to an authentic, complete liberal theory. This is so precisely because he greets the battle, starting from the battle between values and principles, as the most powerful impetus that pushes men onto the street of moral and material progress. In that is the exact opposite of organicism that, on the contrary, berates competition as a simply diabolic element, where diabolic is to be understood in that very sense of the word. "Diabolic" is a term that derives from the Greek "*diaballein*" and means "to divide". Therefore, everything that divides men, that puts them in conflict and generates friction between them; all this on its own gives off a sulphurous, demonic smell, because it is harmful to a world harmony and pushes society into the "inferno" of anarchical disintegration.*

As you can see, that which the one (liberalism) celebrates, the other (organicism) condemns; that which the first raises, the second lowers. It is a bounce back of contrasts then, with organicism, which can reinstate the principles of liberal knowledge even more cleanly and pronounced than before. Moreover, perhaps it is not true that umbra demonstrat lucem? *Hence this essay, the opportunity to republish it here provokes the unavoidable repetitions that always run after cases of this sort.*

Ancient and modern Organicism

"The new thinking, if it is seriously such, is always the new joke in a dialogue that goes on through the centuries"[1]. This statement by Benedetto Croce comes to mind now that the theories of neo-communitarianism are taking the stage, draping themselves in gaudy cloth, at times showy from novelty, almost as if they were unexpected miracles of the sort of intelligence that left nothing, until then, to guess or foresee. However, it's not so. It's completely not so. Beyond the undoubted originality, in these constructions you can hear the insistent slowness, like a distant echo whose resonances spread slowly into a circle, of the things that have a remote origin and that seem to never finish. Perhaps adapted to new listeners, perhaps changed into new variations, but that which the neo-communitarians imitate is an ancient motive: it is the motive that has always inspired the organicists, old and new. And it is precisely on the organicism of the ancients and the moderns that we would like to linger on in the following pages.

Organistic theory boasts illustrious thinkers among its supporters, who belong to the most diverse schools of thought. But there is a conviction that joins them and places them in a single world, the organistic one, to be exact. The conviction is the following: everything comes before the parts – the people and/or the State precedes individuals, and precedes them both chronologically and in terms of values. It precedes them both historically and axiologically. Historically, because the population and/or the State already exists when individuals are born. When individuals come to light they don't float off into a vacuum, they don't vacillate into emptiness. The legal community is there, ready to receive them. But if it is already ready to receive them – the organicists argue – it is a sign that the community comes *first* to the honours of the world, and then *individuals*. From here it's historical precedence of the whole over its parts.

As for axiological precedence, the whole comes first over the parts because, the organicists claim, without the whole the parts would have no value. Man – these are the words of Croce, but a Croce who was writing in 1911, when he still derided

1. B. Croce, *Pagine sparse*, vol. III, Ricciardi, Naples 1943, p. 119.

the "witty inventions" of the followers of natural law – "man is nothing in terms of abstract individuality, but everything when he agrees with the whole"[2]. And Giovanni Gentile, then his companion, moving along right from here, concluded that it was "no longer a case of counting and weighing individuals". It wasn't a case of counting them because, inherently, individuals don't count for anything. Their value is secondary, derived, and never original. Their value is derived precisely because *it derives* from the organism into which they are inserted. Moreover, the organicists ask, does a foot or a hand have value detached from the body? Evidently not: a foot and a hand have value if and when they contribute to the preservation of that organic whole which is the human body. From here, the famous statement by Aristotle, which then, on closer inspection, is the original source, like an always-open vein to which all organicistic theories draw from: "the whole – Aristotle wrote – must necessarily be prior to the part; since when the whole body is destroyed, foot or hand will not exist"[3].

Now, the comparison with the human body is a constant and we'd almost say the distinctive mark of organicism. We see it preside over the political thought of Plato, from here it pierces into Aristotle, then inspires the parable of Menenius Agrippa, peeks out in Cicero, even becomes cliché in the Middle Ages and then receives the seal of ecclesiastical teaching. And we've only just touched on a few, only a few, of the moments that run along the trajectory made by organicism! Very well then: this comparison is important. But why dwell on it so much? For philological scruples, sure. But not just that. The truth is that the political consequences of organicism derive from here, and only here.

For now there's an established conception of justice, and then a certain system of sovereign power. Let's look at them separately, starting with justice. If the political body is comparable to the human body, if thus the State is the human body, "on a large scale" so to speak, then the conflict must be expunged from its horizons. Competition between the parts is unjust because it damages the preservation of the whole. It would be as if the hands got in a fight with the feet, and the feet were in conflict with the ears: what a teratological monstrosity! And especially: what a message of disintegration for the organism of the state! But if the organism crumbles, the community plunges into the abyss of the state of nature, where the mind whirls in doubt and the soul is lost in the terror of the unknown, no one able to count on the other and each one becoming a potential attacker to his neighbour.

2. B. Croce, *Fede e programma*, in *Cultura e vita morale*, Laterza, Bari 1926, p.166.
3. Aristotle, *Politica*, Laterza, Bari 1972, p.27

For the preservation of the human race, however, terror is not helpful: no, to live, humans need cooperation and peace, and peace requires reciprocal trust. That trust can mature only in a condition of order, never in a state of anarchy. Either peace and thus order, or conflict and thus disorder: these are the organicist's choices, which has been expressed in many ways, but none as absolutely clear is Leo XIII's *Rerum Novarum*. Let's read from it: "like in the human body, the limbs, despite their diversity, agree together and form a harmonious whole that is called symmetry, as in society, the two classes are destined by nature to harmoniously join and to maintain a perfect equilibrium. Each one has an absolute need for the other: there cannot be wealth without labour, nor labour without wealth. The agreement creates beauty and the order of things, while perpetual conflict cannot give anything but confusion and barbarism"[4].

And just like in the human body, the organs perform once and for all the function assigned to them by the whole; in the political body each individual must keep himself sated with the condition that fate has reserved for him. Woe if he yearns to change it or improve it! That would be offensive to the precepts of justice, given that in the organistic universe, it is right "to do one's own duty" (Plato). Duty is defined by profession; it is the professional *status* that fixes the condition of a citizen in the hierarchical arrangement of the community. Doctors, for example, would stay doctors for life and they would always occupy a position suitable to the role that they play in society (just as for magistrates, entrepreneurs, etc.).

So, social position. Here's the problem: who establishes it? Who establishes if the doctor does work that is more important, let's say, than the labourer, and thus also has more of a right than the labourer to sit in the orchestra seating at a theatre, not in the balcony where you'll find the common scene? Just like in the human body there are organs, and there are organs, and not all of their functions have equal importance (you can live without your hands, but not without your brain, without the tactile sense but not without the cerebral one), in the social system not all the professions contribute equally to the development of the whole. So, once again: in virtue of what criteria is greater or lesser importance determined for an individual or professional group? And then: who determines it? For example: how useful are labourers to society? But more importantly: who decides if they are more useful or less useful than entrepreneurs? So, who decides?

4. Leo XIII, *Rerum novarum*, in *Centesimus annus*, *L'insegnamento sociale della Chiesa dalla Rerum novarum ad oggi*, Piemme, Casale Monferrato 1991, p. 43.

Certainly not the labourers or entrepreneurs themselves. If that were the case, all the reasons for the conflict would be rekindled! In fact, one never recognizes *sua sponte* to contribute little, or at least less than the others in the large size of the City. It is always the contribution of others that is inferior (and vice versa). Hence conflict, slight disagreements, friction and whatever else corrodes the state's bonds. Only the autocrat, from the height of his knowledge, can ward off the risk of dissolution. Why? Because – and here once again the call to the physical organism assists – like the parts of the human body kept together by a unifying principle (the heart, the mind, the soul) that organizes its functions, in order to keep the organs of the collective body united, the autocrat is needed, and it is the autocrat that arranges them along the hierarchy of social roles. Without *uniqueness* of leadership, then, there cannot be *unity* of the whole. The analogy with of the political body with the human body thus reveals the preference for the governing of one alone, of the "unifying prince", the ultimate autocrat. In this sense, whoever is anchored in organistic premises, who agrees with the preference for the whole, cannot coherently enter into liberal and democratic solutions (unless of course you mean democracy in the modern sense of the term). Here, the point that is necessary to keep in mind is: if not the only, certainly one of the most important historical-philosophical matrices of autocracies and organicism – more precisely, it is the organicism *of the ancients*. Yes, the ancients. This specification is necessary because there are different versions of organicism, and the ancients' way of rolling it out is different from the modern way it has been passed on (by modern people we mean scholars of the new right and Marxist theorists).

The new right's version of Organicism

Just like a God who reveals himself to mankind, Organistic substance is also both one and three at the same time: it's a trinity when each variation presents original motives and sets up new combinations, but it's also one because motives and combinations develop the same topics for the most part. They're always those that, correlating among them, make Organicism distinctive. What topics, then, are original and what topics are recurring?

To answer this question it is useful to return to ancient Organicism, whose basic characteristics we can summarize as such: a) the community comes before individuals, and the value of its parts is measured according to their advantages for the whole; b) all this knows no conflict, friction or disagreements of the sort (there are

no dissenting voices: it is a harmonious whole where everyone, with respect to his arrangement, always sings in the same chorus); and c) like in every respectable chorus, here there is also a director that sets the pace and directs the music. So, when the theorists of the new right (we'll consider Marxists in the next paragraph) think of the collectivity in Rousseau-ian morals and thus "like a moral and collective body" with "its unity, its common identity, its life and its will"[5], when they – under the pen of Alain De Benoist, who is their greatest interpreter – maintain that Rousseau's way of "thinking of community" is "infinitely more realistic than that of Montesquieu"[6], when it is then (also) Rousseau as their inspirational source, it is clear that two of those three characteristics are found reproduced in the new organicism: the first and the second. The first characteristic because it is Rousseau's auspice of "transforming each individual, who is by himself a complete and solitary whole, into part of a greater whole from which he in a manner receives his life and being"[7]; the second, because it is always Rousseau to berate "partial societies" (parties, groups, associations) that are fermenting disruptors to the collective unity.

The first and the second characteristic, then. But not the third, because it is still Rousseau to cultivate a "horizontal" vision, let's say, of political relationships, where all citizens participate, equally, in the decision making process, without others intervening from above to organize them, and, also from above, to contribute to directing their movements. No podium and no conductor therefore. And here's the innovation: although the neo-organistic construction is presented like a closed, foreboding fortress in which you no longer breathe the air of individual creativity, even its walls seem to be well polished and do not offer excuses for the yearnings of the autocrats. No, it is not in the name of autocracy that the new right moves to attack the liberal-democratic citadel. As Rousseau foretells, the new right has ancient democracy as a representative ideal. Therefore, it is "new": because it gives up the autocratic implications of traditional organicism and because it substitutes them with democratic developments. Democratic, yes, but this democracy is different from the modern one. These democratic developments are loaded with all the attributes of political liberalism; they are liberal democracies. The other one, ancient democracy, is "pure" democracy, that knows neither the inventions nor the values of liberalism. So in the end, the "attack" is not on democracy, but on liberalism since liberalism, not democracy, signals the dividing line between the old and the new, between ancient and modern.

5. J.J. Rousseau, *Il contratto sociale*, Einaudi, Turin 1975, p. 25.
6. A. De Benoist, *Democrazia: il problema*, Arnaud, Florence 1985, p. 50.
7. J.J. Rousseau, *Il contratto sociale,* cit., p. 57.

That being so, it would not be wasteful to spend a few words to distinguish liberalism from democracy. For that goal, we'll move from a precise perspective, which is not philosophical nor that of political science, but legal. And legally the distinction is made as follows: liberalism is not the same thing as democracy because democracy is, precisely, a "-cracy", a power. Liberalism, on the other hand, is a technique to limit power. Power is limited not only when he who exerts it is bound by certain procedures (so-called *formal* limitations), but especially when a number of behaviours that cannot be neither prohibited nor controlled are subtracted from the imperatives of he who commands, and since they cannot be prohibited nor controlled they are handed over to the indisputable discretion of individuals (so-called *material* limitations). The rights of freedom are inalienable precisely because they fall in this sphere of behaviours and thus signal the material limits of sovereign power.

However, these formal and material limitations are the two pillars of the liberal-constitutional State, and thus – as we know – modern democracy is grafted to the structures of such a State, and it follows that this cannot be left out of the legal system of liberal constitutionalism. Thus the democracy that we practice is not the "democratic-democracy" of the ancients; it is the liberal democracy of the moderns. Its distinguishing characteristic – we're allowed to reiterate once again – is in the legal dams that come with it and that no one, not even popular sovereignty, can overpass. These dams are represented by the rights of freedom that are canonized in the superior rules of the Constitution. Hence why those who pose as champions of the "democratic-democracy" should be a detractor of constitutional rules and, more generally, should renounce the legal mechanisms that curb popular power. And indeed, the strange note of "pure" democracy ("pure" because it is not "contaminated" by liberalism), in short the characteristic mark of ancient democracy, is that nothing intervenes to limit the sovereignty of the people. As De Benoist explains, "it is not the idea of absolute power that democracy rejects, but the idea that such power would be the privilege of one person"[8]. Entirely consistently, then, De Benoist reduces the Constitution to a "vague and little durable document"[9], and equally consistently – consistent with his premises, that is – he reproaches a fetishistic conception of the law to those who break democracy down into a combination of procedures and legal limits. Democracy, for De Benoist and for all those who think of it as he does, it is not founded on the impersonal supremacy of law, but on the personal, highly personal (and absolute), government of citizens.

8. A. De Benoist, *Democrazia: il problema*, cit., p. 41.
9. *Ibid.,* p. 62.

The citizens: here is the crucial point. Mindful of the Greek experience (though the thought runs towards Sparta more than to Athens), De Benoist defines it as such: citizens are those who descend from the same stock and that participate in the same culture. Because they have origins and values in common, they and only they are vested with equal political rights; these rights are epitomized in the option to participate in the creation of collective decisions, and by participating, regain their freedom.

Freedom as participation, political equality and citizenship thus become inextricably linked: they are the phases of a sequence that has its origins in an organic, spiritually compact and culturally homogeneous community. The main principle of Greek democracy is not, thus, direct participation in the creation of laws; this, if anything, is a consequence. It is the consequence of cultural cohesion; it is the effect of this spiritual communion to dissolve individuals in a rock-like, undifferentiated social block. It is clear, in fact, De Benoist argues, that the more that citizens share the same beliefs, the "easier it is for them to collectively make decisions that move in the direction of the common good without having to pass through the channel of mediation". In this sense, he adds, "returning to a "Greek" conception of democracy does not mean entertaining the hope, constantly disappointed, of a "face to face" social transparency. It means the re-appropriation, in order to adapt it to the modern world, of a conception of the *people* and of the *community* that has been darkened for two thousand years [...] of exaltation of the individual-without-belonging"[10].

And here the first difficulties arise. How does De Benoist support the organic conception of community without then nourishing the hope for "face to face" based social relationships? How can he support the holistic vision of community without trusting in the reactivation of "transparent" social relationships"? However you want to judge it, it is a fact, with all the stubborn persistence of facts...it is a fact that the communal spirit lingers there where individuals live in symbiosis with each other, in close contact with each other. Emile Durkheim wrote: "the more unanimous the group, the more its individuals find themselves frequently and closely in contact with each other; now, the more frequent and intimate these contacts are, the more exchange of ideas and opinions there is, and the more the communal opinion is extended to a greater number of things, precisely because there is a greater number of things they have in common"[11]. In short, the closer the members of a community are – physically close – each one to the other, the more they share the same feelings, the same values and the same understanding of the world. Conversely, the further the physical distance between men, the looser their

10. *Ibid*., p. 21.
11. E. Durkheim, *Lezioni di sociologia*, Etas Kompass, Milan 1973, p. 30.

interpersonal ties are; the group crumbles with the weakening of these restraints, and as much as the group's unanimity is shattered, so evaporates the communal spirit.

Sure, De Benoist does well not to cultivate illusions: the volume of the population and the dimensions of the territory make a *vis à vis* with the ancient Greeks impractical today. But precisely for this reason we must ask: so then, what source can revive that increasingly fleeting and evanescent sense of community? What ever will restore men to the communion of spirit and mind? The objective characteristics of contemporary society weaken the group spirit and blunt the effectiveness of common principles. It is then inevitable that individual choices draw inspiration from diverse, contrasting criteria, no longer attributable to the single system of communal values. But if it is inevitable that individuals adhere to different, contradictory values, then it is likewise inevitable that they, when they don't want to abandon democratic horizons, hand over their consent to that particular form of democracy, which is liberal democracy. In fact, it is liberal democracy that lays down the equal dignity of normative paradigms; it is that, and only that, which, guaranteeing the rights of freedom, protects dissent; and it is precisely dissent that legitimizes the plurality of values and material interests. The cornerstone of liberal-democracy is all here: in dissent, and not in consensus. Or said a better way, it is in consensus that does not exclude dissent; it doesn't exclude it because it is not unanimous, because it is provided by the reasons of the many, because, in short, it is the consensus of the majority. And the majority, by definition, postulates the minority, the dissent of the few. Those few, for as little of them as there are, benefit from the same privileges of the many in regards to the rights of freedom (starting with the freedom of consciousness and religious freedom).

If, say, in a community there are only practicing, faithful Catholics and only one person is not Catholic but atheist, that one atheist – in a liberal democratic regime – possesses the same rights of his Catholic countrymen, and those Catholics do not benefit from any legal privilege in comparison: here is dissent and here is the individualistic root that makes it sprout. Things being as such, Marco Tarchi is mistaken when he credits the theorists of the new right as those that "fully accept the rules of the democratic game – mainly those of political legitimization based on consensus and the popular control over the government's actions – but do not at all accept the liberal ideology"[12]. All that is not only wrong, but it is also dubious. It is wrong because democratic rules move from the premise of liberal individualism and thus are not axiologically neutral, like the gears of a soulless machine. No, precisely because they derive from some, and not from other, values, he who adopts them can

12. M. Tarchi, *Quando Saint-Just fa il portaborse*, in *Diorama letterario,* n. 115, maggio 1988, p. 9.

pursue some, and not other, goals, and certainly not the goal that puts individuals behind the community and that which is ready to sacrifice individuals' independence to the community. And, it is dubious because democracy (*this* democracy, at least) does not only live on consensus. As we know, there is also dissent; and it is a dissent that does not affect the exercising of fundamental rights. Not mentioning it as the first requirement of democracy, hesitating with a slightly suspicious emphasis on consent alone, Tarchi's words allow us to ask: but the atheist, to stay on our example, will that one atheist have the same, identical rights of all the others who are not atheists? Yes or no? If yes, Tarchi also abandons even Organistic society: in fact, he puts the individual before the community and honours the ideal of individualism. If not, he could profess himself to be democratic ten, one hundred, one thousand times, and we'd have ten, one hundred, one thousand reasons not to believe him. Either individualism with the allure of dissent and the other rules of democracy, or organicism without dissent and without democracy (without *this* democracy, of course) - there is no other choice.

Let's now resume the thread of our argument. We had stopped on dissent that, we were saying, legitimizes the plurality of values and material interests. Caution: of material interests. And we arrive as such to another weak point in De Benoist's reasoning. His writings, which ooze disdain for individualism and social atomism, do not retain one single critical remark for the market economy. As if there had (also) not been the market, that is to say the entrepreneurial spirit, private initiative, to break the draconian discipline of the group, to pierce in the shell of ancient traditions and to allow individuals, on their own, to launch into the pursuit of the unknown. As if it would be possible to reconcile a homogeneous, harmonious social order with an economy enlivened by the spirit of conquest and man's desire for supremacy. Either abolish the market and return to economic communism, or it's a good idea to lay down holistic hopes and the yearning for "organic democracy". Either dismantle the polycentric structure of society, or make it necessary to resign oneself to the plurality of values and interests. In this sense, the Marxist critics of liberal democracy are quite more logical and consistent than the theorists from the radical right. Both of them – Marxists and radicals on the right – oppose liberal "selfishness", and both strive for a peaceful society, for a calm universe, no longer criss-crossed by idealistic tensions and material conflicts. But while the Marxists, quite consistently, demonize the market and advocate for the nationalization of the economy, the theorists of the new right abhor a similar solution: when they are not scorning contact – as they'd say, vulgar and repellent with economic issues – what's more, they theorize about a corporate reorganizing of society and assign the role that today individual entrepreneurs carry out to professional groups. They thus forget that corporations are founded

equally on selfishness and material interests and that between these "there exists, by nature, not a communion but a conflict of interests"[13].

Thus it isn't only the extent of the territory and the size of the population that makes De Benoist's proposal impractical: it also conflicts with the market economy's characteristics. It is precisely because of the market that the idea of "organic democracy" sails towards utopian skies – a *negative* utopia, we should add. It's true: disputing values is always of little use. And just for this reason, so far, we have not yet critiqued the ideals of the radical right; we have limited ourselves to underlining the inconsistencies with the structure of modern society. However, it should be clear that, also when only by chance it was not lacking in concreteness, we would reject the neo-Organistic perspective anyway. We would reject it because the idea of sovereignty that informs it does not charm us; that is, that the community, or better yet, its citizens can possess absolute power, irresistible like all absolute power, but in addition (and worse) iridescent, moody, and capricious like only the tastes and opinions of citizens can be. In such a perspective, it is anonymous collectivity that reigns supreme, that crushes individual personalities, breaking them down and dissolving them in its chest. And he who is left at the mercy of the community is no more fortunate; in fact, he is surely unhappier than those who live as subjects to the moods of a single tyrant. "If I had to choose - Voltaire wrote – I should detest the tyranny of one man less than that of many. A despot always has his good moments; an assembly of despots never". And then, with the grace of his ironic ripples he adds: "If I have only one despot, I am quit of him by drawing myself up against a wall when I see him pass, or by bowing low, or by striking the ground with my forehead, according to the custom of the country; but if there is a company of a hundred despots, I am exposed to repeating this ceremony one hundred times a day, which in the long run is very annoying if one's hocks are not supple"[14]. No, submission of the individual to a fickle citizenry, which could become blindly bestial in its repressive fury, is the idea that smiles at Iranian ayatollahs, not on the secular consciousness of the third millennium.

And then, what if one reflects on the consequences that arise from the concept of citizenship? To what revolting wickedness is this a prelude? "What does a commitment", Stephen Holmes asks "to "solidarity" or "consensus" imply about the authority of majorities over the dissident minorities? Should children of Jehovah's Witnesses be

13. H. Kelsen, *La democrazia*, il Mulino, Bologna 1981, p. 89.
14. Voltaire, *Dizionario filosofico*, Mondatori, Milan 1962, pp. 618-619.

compelled to submit to the community-binding powers of the Pledge of Allegiance? Should non-conformists be legally ostracised or "weeded out"?"[15].

These are embarrassing questions that the theorists of the new right never respond to. We'll try to do it though, and let's try to think about a string of logic, coherently, deducing certain consequences from the established premises.

So if it is true, as De Benoist claims, that political rights are recognized only for citizens, and if it is true that citizens are those that have origins and values in common, if all this is true, it follows that - strictly speaking – that no political right should be granted to he who does not boast of the same lineage and doesn't take part in the same ideals. No political rights, then, for racial and linguistic minorities, and no political rights for prostitutes, homosexuals, the homeless and whomever else may lead a life contrary to the dominant ideals. Not only that. The fact is that political rights, among other things, strengthen civil liberties. Is the right to vote also needed to safeguard the security of private earnings? Is it not the vote that punishes those who govern, that substitutes them when they make an attack on personal dignity, on domestic hearths and on other personal property? We might as well abolish those very civil rights! It doesn't make sense to bestow them upon those who cannot defend them with a vote[16]. Civil rights, then, share the fate of political rights, and he who is not worthy of these, does not deserve the others either. Having one without the other, an individual is condemned to a civil death, and it's a small step from civil death to *tout court* death. Especially since we move in an order of ideals for which an individual counts if and so long as he is useful to the community. And what does the community make of a man that is without political and civil rights? His presence is uncomfortable, useless, and is to be gotten rid of as soon as possible. It's not strange then, that his deletion from earthly life follows from his deletion from the General Registrar's Office, that physical suppression follows legal suppression. Of course, it's likely that none of the neo-Organicists endorse a similar waterfall of events. It is even easy to suppose that they withdraw from it, horrified. This must be a great thing for the good faith of men, but what a humiliation for the coherency of their thoughts!

15. S. Holmes, *Anatomia dell'antiliberalismo*, Edizioni di Comunità, Milan 1955, p. 257.

16. Remember that the neo-Organicist construction rejects the contrivances of liberal constitutionalism; in this context, then, *but only in this context*, the vote truly is *the one* possible guarantee for civil rights, and here the fate of individuals truly depends on the destiny of the others.

Marxist Organicism

Things aren't too different for the Marxist version of Organicism. Like in every Organicism, even here conflict and antagonism fall under the lightening bolts of anathema; and even here the curse of the individual that does not blend into the whole, that does not bend his particularities under the yoke of compactness and harmony, even here this condemnation is not less severe nor less final. It is only more explicit. The opposition that the new right sets forth to modern freedom is in the logic of things, and for this reason it imposes itself always and in spite of everything. Also, as we have seen, in its cautious silences and its calculated omissions. The Marxist rejection, on the other hand, is declared, demonstrated and without deception. "None of the so-called rights of man", we read in *The Jewish Question,* "goes beyond the selfish man, a man, in as a member of civil society, that is an individual falling back on himself, on his private interests and his private discretion, is isolated from the community"[17]. And then again: "man's right to liberty is based not on the connections of men with other men, but rather on the isolation of men from other men. This is the right to isolation, the right of the limited individual, limited to himself"[18]. And everything, everything is overwhelmed by this gurgling collective surge. Starting from the most precious asset of human heritage, that which offers everyone the comfort of a sanctuary where he can pray freely, according to the light of his own morality and under the guidance of his own consciousness. However, the Marxist indictment does not spare even this privilege; even this one, especially this one, is wiped out, almost like the poisonous froth of a bad habit that in religious freedom celebrates the splendour "of specific perversity, *private whimsy*, and arbitrariness"[19]. No religious freedom then. And no freedom of worship; least of all, then, the freedom of property (as we'll see shortly): none of any of this. There is no right that is safe in modern civilization, and as has been admirably noted, in effect in Marx's writings, "every position on the principle of liberalism is exactly overturned, and the result is not a criticism from within the liberal idea, to reconcile it and integrate it with certain democratic applications, instead, it is a total, inflexible rejection of that idea"[20].

That is why, despite the misleading sound of their words, not all socialist movements are the same by nature. In regards to liberalism, a few "criticize from within",

17. K. Marx, *La questione ebraica*, Editori Riuniti, Rome 1996, p. 31.
18. *Ibid.*, p. 29.
19. *Ibid.*, p. 17.
20. G. Bedeschi, *Introduzione a Marx*, Laterza, Rome-Bari 1994, p. 21.

others from without. There is the socialism that challenges liberal society, scolding it for having taken on obligations that it did not honour, or in any case that it did not honour in relation to everyone, including the weakest ones: it is a protest against good preaching and bad practice. While instead there is the socialism that always condemns the liberal structure, and that always will condemn it even if by chance the practice lives up to what is preached. On one side, there's the condemnation of ugliness and iniquity *in spite of* liberal ideals, and on the other there's the condemnation of ugliness and iniquity that are *consequences* of liberal ideals[21]. There, the work of truing-up liberalism with coherent practices; here, the imperative of substituting it with different principles. First, just the practice; now the criticism going back all the way to the principles - principles that History is confused by. History, not men. It is History, this presence of always slightly mysterious and elusive outlines, it is History that stamps them with its mark of infamy and that plunges them into the dark chasm of things overtaken by occurrences.

Strictly speaking, then, it's not that we should make up for the deficiencies of liberal ideals with different ideals, that are perhaps more noble and generous, but that always – as ideals – come up from the gagging of a free will that is gratuitous and unpredictable in its infinite possibilities and that then does not need to manifest itself in this or that specific way. No, the *should be* and man's subjective choices don't count for anything, including those that ache for the injustices of the liberal system. "It is not a question of what this or that proletarian, or even the whole proletariat, at the moment *regards* as its aim. It is a question of *what the proletariat is*, and what, in accordance with this *being*, it will historically be compelled to do"[22].

Not individuals, then, but history shoots down liberal selfishness, and history always, in its inescapable necessity, takes it upon itself to restore them to their primordial brotherhood. Yes, just so: primordial, because the course of events was not started by

21. Domenico Settembrini wrote: "The aim of criticism is not, so to speak, the way that an ideal is lowered down to reality, but the ideal itself. A human race of individuals living in wellbeing and freedom, but all different by "birth", "profession", level of wealth ("property"), "religion", ideology, mentality and culture [...] a human race of individuals in permanent contrast with each other, even in the framework of rigorously equal laws for all; such a humanity would not constitute an emancipated human race in Marx's eyes, but on the contrary, atomized and lost for good in a selfishness that is as incurable as it is comfortable." (*Due ipotesi per il socialismo in Marx ed Engels*, Laterza, Rome-Bari, 1974, pp. 4-5). Here, Settembrini likes to point out the important essay, *La società liberaldemocratica e i suoi nemici* in "Mondoperaio", August-September 1989, where the criticism of both the theories of the new right and of Marxist Organicism is devastating.

22. K. Marx & F. Engels, *La sacra famiglia*, Editori Riuniti, Rome 1967, p. 44.

individuals or their competition. In principle, it was the organism, the community, the fusion of the "I" into the collective "us". Only then the fall is produced, and man rolls down, down along the slope of "base greed", of "sordid avarice", and the "selfish robbery of the common wealth"[23]. But the same fate that has "corrupted him, gotten him lost", will make him find himself and celebrate his "communal nature"[24] in "a higher, socially archaic form"[25]: the tribe. That tribe, Kautsky specifies, is not founded "on the principles of *freedom*, equality and brotherhood, but only on equality and brotherhood"[26].

Quite different than the freedom of the moderns! From original unity, then, to division, to separation; and from separation once again back to unity, even if it is a more dynamic and opulent unity: this is the ternary rhythm, from the unmistakable Hegelian movements that Marx impresses onto history[27]. It's a history that (as has been justly noted) replicates all the characteristics of the Gnostic mentality, and that precisely in the Gnostic manner is thought of "as a soteriological drama of fall and redemption: this has as the original perfection a *terminus a quo*, and as a *terminus ad quem* it has the perfection of the future, while the present is nothing but the spastic waiting for liberation from evil"[28].

Yes: the problem of evil. Which is then the problem of all problems, that by which one measures philosophies on history and *all* conceptions of the world. Compared to these, then, the Gnostic idea is one, but only one, of the possible solutions. To challenge it (at least on the western scene), two doctrines intervene – one pessimistic, one less so – on which we should spend a bit of time if not only because from their comparison, the unique originality of Marxist Gnosticism becomes even more pronounced. They are the Christian (the Catholic version) and the liberal doctrines. The Christian-Catholic one does not exclude that man

23. F. Engels, *L'origine della famiglia, della proprietà privata e dello Stato*, Editori Rinascita, Rome 1950, p. 100.

24. K. Marx, *La questione ebraica*, cit., p. 17.

25. K. Marx, *Lettera a Vera Zasulic*, cit. by L.Pellicani, *La società dei giusti*, Etaslibri, Milan 1955, p. 193.

26. Cit., da A. Panaccione, *Kautsky e l'ideologia socialista*, Angeli, Milan 1987, p. 56.

27. "The communism of the future is the synthesis, the return to the thesis, or primitive communism, enriched by the antithesis, that is, by all the marvellous things, summed up then in the domain of nature, by which the acquisitory spirit, the desire for power, the rough virtues of an animal in the grips of a hostile environment, have given to humanity" (D. Settembrini, *Il labirinto marxista*, Rizzoli, Milan 1975, p. 23).

28. L. Pellicani, *La società dei giusti*, cit., p. 181.

can redeem himself from evil and be saved. But salvation is not of this world. The worldly experience is marked by the fall of the original sin, and original sin sculpts the human adventure into permanence. If man can save himself, he won't save himself in the world, or through the world, that Adam threw into an inferno of pain (or of evil pleasures). It's true: for Catholics, the trajectory of salvation begins from down here on earth because it is with prayer and actions that man can be worthy of heaven. It's true, then, that despite all the pessimism, the catholic universe does not wall men into sin; they are not petrified into error. Descent can be the start of a climb, and pain the promise of eternity. Also here, for that reason, humanity walks and moves on. Except that this journey is not free. It cannot be free. What freedom could ever be acknowledged by men whose nature is spoiled by original sin? If their nature is corrupt, what perception could they ever have of what is good and right? What freedom, then? The freedom to sin? To get lost among the twists and turns of mistakes? To allow themselves the lures of vice? But it certainly is not precisely so that one earns eternal salvation. If the journey has to be, then, it is necessary that someone controls these men, upholds them and instructs them on which path to follow. It is not a path for free men, then, but the pilgrimage of the faithful, of the faithful prone to infallible and paternal power (the Pope) that, alone, can return him to God. This then puts Catholics in radical conflict with the liberal concept; a conflict that is radical for at least three reasons.

The first is that the prospective of otherworldly salvation falls outside of liberalism's horizons, or in any case, it is a problem about which liberals prefer to stay silent. What they are interested in knowing is if man can be saved in *this* world. Here, not elsewhere. For liberal thought, there is no human history and divine meta-history. There is only history, *this history*, made by men, with other men, for men. The second reason is that now the very concept of salvation changes. Catholic salvation is different than liberal salvation. The former refers to heaven, that is a perfect state, final and decisive perfection, therefore unyielding to changes and as if it is stopped in an eternal present. The latter, on the other hand, is just a normative ideal, an idea-limit, let's call it a movable line on the horizon that gets farther away the closer we get to it. Here there is no longer final redemption, understood as a state of fullness that is refractory to every correction and an enemy to any change. There is no final redemption simply because this history has no final destination, no outstanding goals – final milestones, in fact. For liberalism, history is a perpetual movement forward and a continuous evolution. So, there is no final redemption, but there also is no original sin. Therefore – here's the third reason – its not necessarily so that men must always make mistakes in this possibly

infinite journey; thus it is not necessary for someone to intervene from above, take them and set them on the right path. Yes, humans make mistakes, but no one and nothing condemns them to permanent error. And in fact, precisely because they err today, they may get it right tomorrow. Missed shots are useful precisely for this: to circumscribe the target. Human experience, then, is a mishmash of errors and truth, and these errors sometimes set up the truth. In short: liberalism is enlivened by the cautious conviction that man learns from trying and making mistakes, and if he does not begin to try and err, he will never learn. The important thing however, is that these attempts are *his* attempts, and the errors are *his* errors.

It is necessary, for those who think this way, to carve out a space of freedom, the space in which to experiment with the quality of ones own efforts without anyone – least of all the powers that be – coming to take over or preventing something. The need to limit power originates here, not from the belief that evil is consubstantial to human destiny and that the history of the people must hang wearily on the tracks of the same errors, the same folly, the same blunders. No, pessimism is not the tempered metal in which the rediscoveries of modern freedoms are reheated. So, it's not pessimism. Then what to say about Marxist optimism? Because, this is about optimism – imperious, proud optimism sheathed in certainty like a blockaded fortress. What is there to say about a thought that, as we have seen, understands history as an event that, in any case, is destined for a triumphal outcome? How to evaluate this ride towards the sublime? And from the fanatic conviction of the more or less close triumph, what advantage might derive from a system of freedoms? None, really none: just as no advantage can come from the Catholic thought from which Marxism reproduces the same *aggravated* distortions. Yes, exactly that: aggravated. It's not otherwise because Catholics depend on an authority that has long been disarmed and that no longer obtains obedience through a rod and pitchfork. Communism is (or it had been up until yesterday) armed. It governs (or had governed up until yesterday) this world, not the other one. So that which for the Church is a sin, for the Party is a crime. And crimes are paid for with handcuffs and lead. But let's see.

Like liberals, Marxists also know only one history, the history of this world. But unlike liberals, and like Catholics, they consider it led astray by the presence of evil. Only that evil is no longer embodied in the nature of man (original sin). For Marxists, evil is not natural but historic, acquired, derived: derived from the precise moment in which he "who, having closed in on a plot of land, dared to say: *this is mine*, and found men naïve enough to believe him" (Rousseau). The evil is private property.

Excursus on private property

Private property, wrote Marx, is the "right to enjoy ones property and to dispose of it at one's discretion (à son gré), without regard for other men, independently of society, the right of self-interest"[29]. "The liberty of egoistic man and the recognition of this liberty, however, is rather the recognition of the *unrestrained* movement of spiritual and material elements which form the contents of his life"[30].

The term "unrestrained" is underlined by Marx and about says it all. You can guess at all the internal turmoil and how the gasp for the troubles, the uncertainties, the unsettling variety of modern society, for this universe of a thousand forces, of a thousand voices, of a thousands depths and a thousand conflicts. It's logical that Marx would auscultate for the gurgling of the vein that fosters such marvellous diversity; he would listen to it to return to the origins, to the first source that makes it gush forth. It is equally logical that, having identified in private property –for him, private property makes up "the basis of civil society"[31] of which political organization and thus the system of freedom is "the official compendium"[32] -, entirely logical, we were saying, that having identified this source in private property, he dries it out with the tools of collectivization. If in modern freedoms there ferment the malicious humours of "private whim" and diversity, and diversity bursts forth from the ownership structure of the market economy, it is simply logical that property and the market are first demonized and then subverted. It is logical, of course, for those who, like Marx, intend to deliver mankind to the tranquillity of organized things. It is by no means logical, and is perhaps even foolish, for he who knows that "beauty, perfection is not uniformity, is not singularity, but variety and contrast"[33].

Among the few, very few, lessons from history, there is one that has the inescapable persistence of eternal truths: there does not exist a collectivist society that opens itself up to the rights of liberty through which differences and antagonisms between individuals mature. And yes humanity has experienced this regime countless times: in the Inca Empire, in China, in India, in Islamic countries, in Paraguay, in the Soviet Union, and never, absolutely never, did individual talent remain free from the control of a miserly and parasitic bureaucracy that has flattened it beneath the weight of its

29. K. Marx, *La questione ebraica*, cit., p. 30.
30. *Ibid*., p. 35.
31. *Ibid*., p. 30.
32. K. Marx, *Miseria della filosofia*, Rinascita, Rome 1949, p. 140.
33. L. Einaudi, *Verso la città divina*, now in *Il buongoverno*, Laterza, Bari 1955, p. 33.

oppression[34]. So, where the "unrestricted movement" of men does not plunge the imagination into a rumbling of fear, where, conversely, conflict and not agreement is promoted to the vehicle of perfection, there – out of necessity – it is imperative to humour the reasoning of the market.

From this chain of references, then, one cannot escape: the dynamism of individuals in struggle goes back to individual freedoms, and individual freedoms refer back to the market. This, only this, is the profound motive for liberal-liberalism. Which therefore should not be reduced to sordid material requirements (the "defence of stuff"), nor does it participate in an economic, and thus narrow, view of life. If liberal-liberalism defends the cause of private property, it is not to appease the vilest of human instincts nor satisfy only the appetite of earthly pleasures. It defends property because it defends the creative freedom of the individual, that freedom that he derives from the safety of his property and from the opportunities of choice that this offers him. Property, thus, is a means and not an end. Especially since the ultimate ends are not economic in character: the economy is only the instrument to pursue them.

Except for the miserly for whom money is truly the ultimate goal of their life, no one gets rich just for the sake of getting rich: there is he who does so to attest to his entrepreneurial calling to himself and others, he who wishes to rise in respect to the next one, he who wishes to honour his family's traditions, and he who wishes simply to obtain all the delights that make his time on earth less uncomfortable. Whatever it may be, the economic "ends" are always means to ulterior ends. So he who dominates material resources, is he who monopolizes the wealth necessary for the individual to reach the objectives he has chosen. In short, whoever controls the means, by default also controls the ends[35]. And with the ends individual preferences and options are bridled. It is in the name of the freedom of choice – which is then freedom *tout court* – it is in the name of this freedom and not for other reasons then that liberals are opposed to the national mono-centrism of collectivists. It's not possible to see, in fact, if freedom of worship can flourish there where the State owns all buildings, and where the faithful must beg for its favour to obtain a place to host their rites and ceremonies. Nor is it possible to understand how freedom of the press can arise where the State owns all the paper factories and where its consent is necessary for whoever wishes to start a new journal. Either the ideas that the state wants disseminated are

34. In this regard, the considerations that L. Pellicani developed in *Saggio sulla genesi del capitalismo* (SugarCo, Milan 1988) are truly illuminating, especially what is written in cap. IV, that on the terrifying effects of a "caged economy".

35. Cfr. A.F. von Hayek, *Verso la schiavitù*, Rizzoli, Milan 1948.

spread and they are reduced to garrulous hack reporters of the state, or they do away with the hopes of communicating an honest and independent thought to others. By the same token, either one forces his own heart to honour the deity imposed by law and he becomes disheartened with the practice of perjury and dishonour, or one must inevitably renounce the warmth of a sanctuary where one can pray freely.

More on Marxist Organicism

The reader need not fear: we haven't lost our line of thought. Before continuing on, we should stop on the following point: individual freedoms follow the fate of private property. This is a necessary condition for them and where one is absent, inevitably so will the other[36]. With this established, it is understood that the evaluation of this "absence" is a judgement that is the responsibility of the consciousness of individuals. There are those who will bemoan it as an irreversible loss, and those who instead greet it like an exceptional event. The former are free to cry; likewise, the latter are free to laugh. But there are also those who neither cry nor laugh, who entrench themselves behind the solidity of history, and within the abolition of property they are delighted to glimpse the unfolding of its (history's) rational design, of the design that so announces the dawn of a singing tomorrows.

Thus, it is no longer a fact of evaluating according to ones own subjective preferences or ones own subjective assumptions of value, not a fact (the suppression of property) and a value (of dejection or joy, according to the situation). Not a fact and a value, then, but a value based on facts, and precisely on the "fact" of the course of history. The Marxist construction is also this: it is a monument to ethical cognitivism because it infers the disappearance of evil – that is of private property and the rights relating to it – from the (alleged) laws required by history[37].

36. A necessary condition, mind you, but still not enough. There is no liberal-liberalist theorist, as red-hot as his indictments against collectivism may be, there is not liberal-liberalist theorist, we were saying, who has promoted the ownership structure of the market economy to such a rank, to the rank of a prerequisite that *eo ipso* creates freedom. On this point, see M. Friedman, *Efficienza economica e libertà*, Vallecchi, Florence 1967, in particular pp. 28-29.

37. On this point the words of H. Kelsen are still masterful, among the first to denounce the tangle of facts and values that invalidate the Marxist construction and that ascribe it fully to the world of natural law (Marxism, Kelsen warned, is a "camouflaged natural law"). Then, continuing on, "it is a tragic methodological syncretism, it is the most radical confusion of the limits between reality and value if the politician, at the problem around what he *should* do, around the span of his reach, is content with

History: let's pick up the discussion we had interrupted. We had argued that Marxist Gnosticism produces consequences that are even more damaging than Christian-Catholic understanding, and we had put it aside to demonstrate it later on. This is the moment to do so. For Marx, as we know, history falls headlong for the better, but not right away, not from the very beginning. If the negative, that is, if the competition's forces, didn't have the time or way to let themselves loose, men would spend their lives in a type of rusty paralysis where the perfect brotherhood among them would damage everyone's wealth. In solidarity, yes, but poor. Too poor. These men would be too poor to go beyond a still animalistic condition. "Without setting free the desire for acquisition, which in its most mature form becomes the capitalist drive for profit [...] humanity", Domenico Settembrini writes, "would be condemned to vegetate in the squalor of primitive communism, men would be without comforts and without culture, more similar to beasts than to the angels which they should become"[38]. Then they do well to arrive at private property and the acquisitive spirit; evil is welcomed if this evil is a harbinger of good, if only passing through its unfairness are men able, just as after a long running approach, to leap towards the Kingdom of Freedom, which certainly is the kingdom of brotherhood, harmony and effective collaboration. But before all that it is the domain of abundance, the triumph of opulence. Evil, then, inasmuch as it prepares for good, it does not have eternal breath, but rather a short sigh.

Being embodied in private property and no longer in human nature (like the original sin of the Catholics), it is a historical institution: temporary, then, transient. Moreover, if it comes to life at a certain time in history, why shouldn't it disappear in another? If it was created by a few at the disadvantage for many, why shouldn't others eliminate it to everyone's benefit?

So, the others – but what others? Private property, in fact, does not favour the splitting of what was once united; it doesn't pay to divide humanity in two opposing classes – the haves and the have-nots. It clouds their minds, perverts the representa-

a response that is simply given by explanatory science, at his problem around being and becoming. One can never, ever, give an answer to the problem of what's right until acting through the awareness of what is happening and maybe, arguably, most likely will take place [...] Since something will remain charged with value and worthy of being pursued, even if its *fulfilment* were to reveal itself to be impossible, thus it makes no difference – for the value and the righteousness of an end – if its fulfilment appears inevitable" (H. Kelsen, *Socialismo e Stato*, De Donato, Bari 1978, pp. 10-11). On Kelsen's criticism of Marxism, but more in general on Kelsen's political thinking, I refer to my *I pensatori politici. Kelsen*, Laterza, Rome-Bari, 1995.

38. D. Settembrini, *Il labirinto marxista*, cit., p. 19.

tions of the world around them. In short, it engineers a distorted vision of reality for the exploiters just as much as for the exploited.

The former, deceiving themselves, elevate the tribulations of their class' interests to the great magnanimity of universal values. The latter, as if they had a veil covering their eyes, are no longer able to perceive the condition of exploitation that they are going through, so to their eyes the social structure is entirely legitimate and there are no plausible reasons to overturn it. Only the Gnostics, as repositories of the knowledge of salvation (*idest* of the Marxist message), only the Gnostics are immune to this sort of papillary trachoma. Only they know the causes of the (temporary) degradation of man and what road leads to salvation, which, therefore, is not excluded from (as for liberals) nor projected into the hereafter (as for Catholics). Here, the kingdom is overturned into the world – that is, the world of men. Communism is for Marxist Gnostics what heaven is for Catholics: a paradise, however, that has been secularized, rendered immanent, that in short became flesh and blood and where however the angels will no longer play the trumpets of the resurrection, nor will God come for the good ones to take them on the trip to immortality. In the communist heaven, the skies will be empty and there will be no room for gods; finally honouring the serpent's promise, men will replace them. "That *man's divinization* may be the goal of the revolution – Pellicani comments – may seem like a "crazy" argument. Yet, when Marx writes that communism will eliminate the conflict between essence and existence [in the precise words of Marx in the *Economic and Philosophical Manuscripts*: "communism [...] is the *true* solution to the contrast between nature and man, the true solution to the conflict between existence and essence"] he says that this will be materialized in the *ideal of a Man-God*, which if it is true (and it is) that the Thomistic theology, teaches that God is the being in which essence and existence perfectly coincide"[39]. In short: communism is "God's kingdom without God" (Bloch). And yet, like the catholic "kingdom" needs an infallible authority that directs the faithful on the path towards good and picks them up where they are led astray by the snares of evil, the communist "kingdom" also needs a circle of enlightened ones who, having figured out the secret to happiness, lead men to its conquest. And as always when it comes to the spiritual health of the people, the power of the "infallible" communists (equal to that of the government of the "infallible" Catholics) is, and can be nothing other, than absolute, full, total. Or better yet: totalitarian. Woe indeed if the most secret thoughts, the deepest needs, most hidden choices were not to fall under their watchful

39. L. Pellicani, *La società dei giusti*, cit., p.118. The quotation in parenthesis was added and comes from K. Marx, *Manoscritti economico-filosofici del 1844*, Einaudi, Turin 1949, p. 122.

jurisdiction. Evil is always there, always awake, never dozing off, ready to distract the souls from the imperatives of good and truth.

Therefore, the same reason that pushed Pope Pius XI to seal the totalitarian nature of the Catholic church with the stamp of authenticity ("if there is, as is said, a totalitarian regime, totalitarian in fact and law, it is the regime of the Church, *given that man belongs entirely to the Church*")[40] - this very same reason allows us to exclude that the totalitarian consequences of communism are attributable to heterogeneous ends or to who knows what wicked irony of history. No, the worm has already spoilt the fruit. "Having the historic mission of creating the kingdom of God on earth, [Gnostic Marxism] cannot tolerate the existence of traditions, institutions, resources, interests places outside of its normative jurisdiction. Everything must be subject to its cathartic power to be reshaped and brought back to life. Its policy, therefore, is totalitarian in the strongest, most complete sense"[41]. Like the Church, in fact.

40. As said on September 18, 1930 by Pope Pius XI, in a speech directed at members of the French Confederation of Christian Trade Unions (cit. by E. Rossi, *Il manganello e l'aspersorio*, Parenti, Florence 1958, p. 278).

41. L. Pellicani, *La società dei giusti,* cit., p. 240.

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PRINTED IN ITALY
in November 2014
by Rubbettino print on behalf of Rubbettino Editore srl
88049 Soveria Mannelli (Catanzaro)
www.rubbettinoprint.it