

## EVOLUTION AND THE RULE OF LAW: HAYEK'S CONCEPT OF LIBERAL ORDER RECONSIDERED

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HAYEK'S WORKS WOULD SEEM to be divided into two distinct parts that cannot be logically combined (Wilhelm 1972, p. 179f.). On the one hand, Hayek postulates a "legal framework of general and abstract rules" (Gray 1980) on whose basis a spontaneous order arises in the form of individuals' interaction (Hayek 1960, pp. 148ff.). This framework must fulfill certain criteria in order to guarantee a maximum of individual freedoms: its rules must be universal, abstract, open, and certain in order to discern equal private spheres for each individual.

On the other hand, these criteria would appear to contradict Hayek's concept of the "twin ideas of evolution and of the spontaneous formation of order" (Hayek 1991b, p. 81): not only is the social order—the entirety of individuals' spontaneous interactions as determined by a framework of a liberal order—the unintended result of evolutionary processes, but so is the framework itself.<sup>1</sup>

According to Hayek, a decisive feature of these processes is their uncertain outcome. Therefore, a rule formed in an evolutionary process does not necessarily have the characteristics mentioned above, nor secure individual freedom (Hayek 1973, pp. 88f.). Thus, rules ensuring a liberal order are by no means necessarily identical with those evolved over time.<sup>2</sup>

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<sup>1</sup>See, e.g., Vanberg (1983, p. 72; 1994a, p. 182). An overview of the development of the idea of spontaneous order is given by Barry (1982) and Caldwell (2000).

<sup>2</sup>See Barry (1982, pp. 45f.), Radnitzky (1984, pp. 23f.), Loy (1988, pp. 130ff.), and Zintl (1983, pp. 196ff.). The problem mentioned above does not occur in Hayek's earlier writings because there he neglected the evolution of rules to a large extent—or at least he saw possibilities to improve the liberal order (Hayek, 1976a).

The aim of this article is to resolve this putative contradiction. Consequently the following questions will be addressed: (1) Which properties are associated with Hayek's concept of liberal order and what are the deficits of this concept? (2) Can these deficits be resolved by adopting additional principles or by an extensive interpretation of Hayek's works? (3) How can Hayek's theory of sociocultural evolution be integrated into his concept of liberal order?

First, we will present the basic assumptions of Hayek's concept of liberal order, his assumptions about humanity. Subsequently, we will explain the concept of a constitution of freedom and clarify its deficits. In a third step, we will propose possible methods of eliminating the concept's shortfalls. Finally, we will describe Hayek's theory of sociocultural evolution and in this context show how it can be integrated into the concept of liberal order.

#### HAYEK'S UNDERSTANDING OF HUMAN NATURE

According to Hayek, individuals differ not only with respect to their preferences and resources but also with respect to their knowledge (Hayek 1952b, pp. 77ff.; Streit 1992; Horwitz 2000, pp. 24ff.). Thus, one can assume that individuals pursue different goals,<sup>3</sup> which necessarily implies different structures of preferences.

Additionally, Hayek (1952c, p. 143) assumes that human perception of actual facts is selective and guided by subjective theories (subjectivity of knowledge). Human action aimed toward definite goals is therefore always subject to the limitations of partial information that is unequally dispersed among individuals, as well as subjective interpretation of that information. Furthermore, due to the uncertainty about the occurrence of future events, it is always based on more or less accurate expectations and guesses (Hayek 1952b, pp. 77–91; 1973, pp. 8ff.).

Finally, individuals have differing endowments of resources, not only of material goods but also of immaterial goods such as individual talents and skills.<sup>4</sup> An individual's resources are therefore characterized, among other things, by their limitations.

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<sup>3</sup>At the very least, one can find implicit evidence of this assumption: without the existence of differing individual plans, the requirement for a private sphere—understood as a sphere of action in which an individual can pursue his own goals (Hayek 1973a, pp. 106ff.)—would be meaningless.

<sup>4</sup>Regarding this concept of resources, see Albert (1978, p. 165) and Coleman (1974/75, pp. 758, 760; 1990, pp. 33 ff.).

The fact that individuals have different goals, as well as varying resources and information, implies that they recognize, evaluate, and implement possible courses of action differently.

### HAYEK'S CONCEPT OF LIBERAL ORDER

#### 1. *The Requirement for Individual Freedom*

For Hayek, the anthropological specifications described above suggest individual freedom.<sup>5</sup> This individual freedom cannot, however, be absolute; that would mean depriving others of their individual freedom.<sup>6</sup> Instead, it is conceived of as a maximum of restricted freedom, which must be equally granted to all individuals (Hayek 1978f, p. 133). This implies that all privileges or discriminations of arbitrarily chosen groups or individuals must be renounced (Hayek 1960, p. 154; 1976, pp. 141f.; 1979b, p. 103).

Individual freedom manifests itself as a scope of action—the private sphere<sup>7</sup>—within which each individual is able to act freely according to “his own decisions and plans,” unhindered by others’ intentions and limited only by his own resources (Hayek 1960, p. 12). The scope of action is characterized by the fact that others can only exercise a minimum of coercion in it (*ibid.*).

This offers a definition for *coercion*: Hayek conceives of coercion as “such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another” (1960, pp. 20f.).<sup>8</sup> Thus, according to Hayek, the phenomenon

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<sup>5</sup>See also Galeotti (1991), Radnitzky (1993, p. 16), and Dietze (1976, pp. 107ff., 126). According to Zeitler Hayek does not only give normative reasons for requiring individual freedom; instead, he also gives hints of epistemological reasons (Zeitler 1995, pp. 161ff.). Individual freedom is necessary in order to utilize decentralized individual knowledge. Additionally, one can find hints of an instrumental conception of individual freedom in Hayek’s argumentation: Freedom is a prerequisite for individuals reaching their goals.

<sup>6</sup>Popper (1994, p. 123, n. 4 and n. 6 to chap. 7) calls this the “paradox of freedom.”

<sup>7</sup>See Hayek (1973a, pp. 106ff.). Hayek (1967f, p. 162) also uses the term “private domain.”

<sup>8</sup>In this context Hayek (1960, p. 133) discerns between compulsion (through circumstances), which does not endanger individual freedom, and coercion (through people).

of coercion constitutes two characteristics: (1) the threat of negative sanctions, and (2) the aim of achieving a certain conduct by the threatened person (1960, p. 134).<sup>9</sup>

In order to secure an equivalent scope of freedom for all individuals, a regime in the form of a codified liberal order is necessary (Hayek 1978f, p. 133). The codified laws of this liberal order must fulfill certain requirements.<sup>10</sup>

## 2. *The Model of Action*

In order to explain Hayek's concept of a liberal order we will now sketch a simple model of human action that is based on methodological individualism.<sup>11</sup>

In this model, four different categories are distinguished: *individual*, *situation*, *course of action*, and *result*. Any individual I can be described by a specific constellation of the attributes  $E_i$  (with  $i = 1, 2, \dots$ ). These attributes can be related to gender, class, birth, age, religious confession, height, hair color, health status, personal objectives, income, fortune, and so on. The anthropological characteristics described above imply that individuals differ with respect to their attributes  $E_i$ . The individual I encounters *situations*  $S_j$  (with  $j = 1, 2, \dots$ ) that are characterized by the attributes  $s_{ja}$  (with  $a = 1, 2, \dots$ ) meaning time, location, weather, other actors involved, and so on. In a situation  $S_j$ , the individual I can choose a *course of action*  $A_k$  from several alternatives ( $k = 1, 2, \dots$ ). This individually perceived course of action can lead to different *results*  $HE_k$ , which, in turn, influence the properties of the individual.

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<sup>9</sup>Examples of critical views of Hayek's definition of "coercion" can be found in Baumgarth (1978), Galeotti (1991), Rothbard (1980), and Viner (1961). In particular, Hayek's (1960, pp. 138ff.) view that a state may only act in order to prevent serious coercion by other individuals has been heavily criticized. Thus, Hayek does not put in concrete terms the different levels of coercion (Viner 1961, p. 231), making it impossible to determine when action by the state is justifiable (Hoy 1984, p. 20).

<sup>10</sup>Hayek's theories are strongly influenced by Kant, as well as Scottish moral philosophy (Hayek 1967f, p. 166; 1967c, pp. 166ff.; 1967d; 1978f, pp. 124f.; 1952a, p. 12; 1960, pp. 167ff.; Gray 1998, pp. 4ff., 56ff.; Kukathas 1989; Streit 1992, pp. 15ff.; Horwitz, 2000, p. 25). Dorn (1991) points out Hayek's borrowing from the work of Bastiat.

<sup>11</sup>It seems natural to use this model because Hayek's concept of liberal order is based on human action, as can be seen from the following quote: "In this sense 'freedom' refers solely to a relation of men to men, and the only infringement on it is coercion by man" (Hayek 1960, p. 12).

For example, the individual I, who has a personal fortune of \$1,000,000 ( $E_i$ ), can choose in a situation  $S_j$ , which is characterized by a falling interest rate ( $s_{ja}$ ), to buy three different shares ( $A_1, A_2, A_3$ ). She decides to buy the first share ( $A_1$ ) and can sell it after one year with \$200,000 profit ( $HE_1$ ). With this action she increases her fortune.

### 3. Substantiating the Laws of a Liberal Order

Hayek's concept of liberal order is based on a combination of elements of the *Rechtsstaat* and the classical notion of a "rule of law" (Galeotti 1991, p. 281). The distinction between laws (*universal rules of just conduct* or *nomos*) and commands (*thesis*) is fundamental for Hayek's work. Laws are universal, open, abstract, certain, and consistent, whereas commands are "applicable only to particular people or in the service of the ends of rulers" (Hayek 1991a, p. 362).<sup>12</sup> In order to ensure a maximum extent of individual freedom and to protect the individual's private sphere from external influence and from deliberate coercion (Raz 1977, pp. 203f.; Zintl 1983, p. 167), a liberal order based on laws alone is necessary.<sup>13</sup> The following reflections will concentrate on the property of universality.<sup>14</sup>

For analytical purposes one can discern between a law's area of application and its content.<sup>15</sup> The area of application denotes the individual, temporal, and local, as well as other properties of the situations in which a law is applicable, regardless of its content and form. Thus, in the model of action above, the area of application applies to the categories "individual" and "situation." The law's content is its material substance and can apply to the categories "individual," "situation," "course of action," and "result."

According to Hayek, a law's area of application must fulfill the criteria of (1) *indifference between individuals*, (2) *temporal concretization*, and (3) *local indifference*.<sup>16</sup>

<sup>12</sup>See also Hayek (1967c, pp. 165ff.; 1967f, p. 165; 1960, pp. 149ff.).

<sup>13</sup>In the following context we will use the term "law" for rules that fulfill Hayek's requirements to guarantee a liberal order.

<sup>14</sup>For other properties see Daumann and Hösch (1998), Daumann (2000), Dietze (1976, pp. 126ff.), Dorn (1991, pp. 308f.), and Raz (1977, pp. 198ff.).

<sup>15</sup>Similar distinctions can be found in Mackie (1977, p. 85).

<sup>16</sup>Mackie (1977, pp. 83f.) calls this the "irrelevance of numerical differences." Individuals must always be treated equally: only the existence of a qualitative difference can justify unequal treatment.

- (1) The criterion of *indifference between individuals* implies that a law must apply to everybody regardless of their individual attributes (Hayek 1991a, p. 326; 1978f, p. 135). It may not be exclusively applicable to certain persons or groups (Hayek 1960, p. 154; 1976, pp. 41f.; 1991a, pp. 362f.). Individual realizations of the attributes  $E_i$  may not be used to exempt individuals from a law or to restrict its application to them alone. This purely formal criterion does, however, allow different treatment of individuals according to their individual attributes in the law's content. Consequently, the commandment "You shall not covet your neighbor's wife!" fulfills the criterion of individual indifference even though its content only applies to male individuals, because, in principle, all female and male individuals are subject to its application. For instance, the criterion of *indifference between individuals* is not applied if different "laws" are imposed for different classes (an individual attribute) like it could be done in a feudal state that only gives the permission to hunt deer to the upper class and forbids the lower classes to hunt.
- (2) A further requirement of Hayek for the area of application of laws is *temporal concretization*: a law's application may not be limited in time nor may it be applied retrospectively (Hayek 1960, p. 208). This means that the commandment "You shall not steal!" would not be a law in a Hayekian sense if its application is limited to July 9, 2007.
- (3) These criteria are supplemented by *local indifference*: the area of a law's application may not be dependent on local attributes; it must be applicable regardless of region.<sup>17</sup> Therefore a ban on hunting deer that is restricted to the mountain region would not be a law in Hayek's view.

Laws that fulfill the criteria of individual and local indifference as well as temporal concretization guarantee that individuals are formally treated equally, i.e., strictly speaking, they guarantee equality before the law (isonomy). However, this still allows differentiation

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<sup>17</sup>See Hayek (1960, p. 208); Leoni (1961, pp. 72f.) takes a critical view of this.

by the individual and situational attributes; in other words, these criteria allow the creation of privileges for specific individuals and alone fail to prevent specific individuals from being disadvantaged. In short, these criteria are not sufficient to guarantee individual freedom.

Therefore, Hayek does not consider these criteria sufficient and poses further requirements to the content of the laws:

- (4) He demands that isonomy be supplemented by a partial *situational indifference*. This requires that the law's content does not contain concrete circumstances that limit its applicability; a law may only apply to "such conditions as may occur anywhere and at any time" (1960, p. 150). This ensures its applicability "to an unknown number of future instances."<sup>18</sup> Hayek uses the term "objective circumstances" (1991a, p. 362). In the context of the model of action this means that the application of a law can be restricted to a situation  $S_j$  characterized by a specific set of  $s_{j_a}$  that occurs regularly. The following law fulfills this criterion: the stealing of food is forbidden except if the thief is starving to death. Because the situation "starving to death" can occur frequently, the criterion is satisfied. "Stealing is forbidden if and only if there will be an eclipse of the sun on Bill Smith's birthday" is not a law in this specific sense since it in no way fits the criterion "may occur anywhere and at any time."
- (5) Furthermore, Hayek supplements the formal aspect of personal indifference with material aspects: laws may not be conceived so that their principal effect is intended for "particular identifiable individuals or groups" (1979b, p. 109). An *implicit differentiation* according to an individual's attributes is therefore possible, but only if the law is not made in order to affect identifiable individuals in a positive or negative manner. This means that a law that introduces intentionally specific taxes on the only saw mill in the country would not fulfill this criterion, whereas a law that imposes taxes on all businesses would.

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<sup>18</sup>See also Hayek (1979b, p. 109).

- (6) Apart from implicit differentiation, Hayek also allows for *explicit differentiation* by individual attributes: laws may contain discriminations between groups of individuals.<sup>19</sup> However, a majority in each of the different groups must ratify an explicit differentiation (Hayek 1960, p. 154). Therefore, a law that forbids stealing for persons smaller than six feet would fulfill this criterion if both groups—the persons smaller than six feet and the persons taller than six feet—agreed to it by a majority.

#### 4. Problems with Hayek's Concept

Hayek's concept of liberal order is subject to some criticism (Daumann 2000). Due to the fact that the goal of the laws is to ensure individual freedom, the following two points of criticism have been particularly emphasized:

- (1) The application of Hayek's criterion of universality offers no effective protection from *symmetrical constraint of freedom*. Laws that fulfill Hayek's criterion of universality can be used to restrain the freedom of all individuals equally.
- (2) With laws in Hayek's sense, freedom can be restrained in an unsymmetrical way: due to factually different effects of laws on individuals, the criterion of universality cannot prevent discrimination and privileging.

##### a. Lacking Protection from the Symmetrical Constraint of Freedom

A pivotal point of criticism in the literature is that Hayek's universality criterion is unable to guarantee a maximum sphere of individual freedom. Robbins (1961, p. 69) and Rees (1963, p. 355) note that extensive coercion can be exercised through laws which fulfill Hayek's criterion of universality and which are thus *universal* in Hayek's terms.<sup>20</sup> Thus, one can imagine universal laws being used to curtail individual freedom equally for all individuals.<sup>21</sup>

<sup>19</sup>"A law may be perfectly general in referring only to formal characteristics of the persons involved and yet make different provisions for different classes of people" (Hayek 1960, p. 209).

<sup>20</sup>See also Raz's critiques on that topic (1977, pp. 208f.).

<sup>21</sup>Hayek is aware of that problem: "It is not to be denied that even general, abstract rules, equally applicable to all, may possibly constitute severe restrictions on liberty" (1960, p. 154).



The rule “Thou shalt demand no interest!” is an example that fulfills the requirements perfectly: its application is consistent with the criteria of indifference between individuals and local indifference, as it is not limited either to certain individuals or by local boundaries. Similarly, the time of the law’s application is exactly specified and it fulfills the requirement of partial situational indifference. There is no distinction by class and no reason to assume that a particular effect for identifiable individuals is intended or expected.

A multitude of similar laws could be used to curtail individual freedom so strongly that the goal of maximizing it is undermined.

Even if the criticism of Hayek’s concept of coercion is rejected, the accusation that his principle of universality does not offer sufficient protection from symmetrical constraint of freedom is obviously justified.

#### b. Lacking Protection from the Asymmetrical Infringement of Freedom

The literature further criticizes the fact that the possibility of implicit differentiation between individual attributes allows discrimination and/or privileging of individuals or groups, especially since the criterion “no intent of effect on identifiable individuals” (criterion 5) cannot be effectively implemented. Even laws that intend no explicit differentiation between individual attributes can develop positive or negative effects for certain identifiable individuals or groups.<sup>22</sup> For example, a ban on sports on Sunday in a country whose main population is Protestant is applicable to the entire population, but nevertheless discriminates against certain identifiable religious and confessional groups (Barry 1979, pp. 92f.). Thus, laws that certainly fulfill Hayek’s requirements may deliberately discriminate or privilege certain groups.

As mentioned earlier, Hayek also allows explicit differentiation of the content of laws by individual attributes. Critics fear that classes could be formed in such a manner as to completely undermine the universality of the law in question (Hamowy 1971, pp. 364f.; Leoni 1961, pp. 64ff. and 68f.; Bouillon 1997, pp. 70f.). Hayek himself recognized this (1960, pp. 154 and 208), which is why he makes the test of a majority vote within the classes a requirement.

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<sup>22</sup>See Barry (1979, p. 93), Baumgarth (1978), Crespigny (1975, p. 64), Hamowy (1971, p. 363), Robbins (1961, p. 69), Shenfield (1961, p. 57), and Watkins (1961, p. 39).

This test, however, proves insufficient for two reasons: on the one hand, the exact distinction between classes causes extensive—in some cases insoluble—problems (Hamowy 1971, pp. 361f.). On the other hand, the classes' veto right is extremely problematic (Brittan 1980, pp. 39f.; Watkins 1961, p. 40).<sup>23</sup> Brittan notes that based on this test the mafia could successfully veto a law against organized crime (1980, pp. 39f.).

Obviously, Hayek's criteria are insufficient to prevent discrimination and privileging. Hayek's requirements for laws, however, do allow discrimination by individual attributes. Thus, the accusation of discrimination of individual groups as immanent criticism can be rejected. Nevertheless, in the context of explicit differentiation, Hayek's discussion lacks concrete, individual attributes by which to conduct a differentiation of the contents of laws for different groups—or at least the presentation of a method with which such attributes might reliably be determined. There is an analogous lack with respect to implicit differentiation: Hayek presents neither actual combinations of situational attributes and actions to be prohibited, nor a method with which they might be determined.<sup>24</sup>

##### 5. *Extensive Interpretation as a Solution?*

A solution to the deficits mentioned above appears possible either through formulating additional requirements for the content of laws—in other words, by an extensive interpretation of Hayek's works (Gray 1982, pp. 51ff.; 1998, pp. 63ff.)—or through the introduction of a "method" that automatically creates concrete attributes to be used for the differentiation mentioned above.

However, as will be shown in the following paragraphs, the first alternative is not possible without the second: taking into account the requirements of *symmetric scopes of action* and *moral neutrality* only appears on the surface to eliminate the weak points in the theory.

Laws that stand the test that you can imagine "yourself in the other man's place and ask whether you can then accept it [the law] as a directive guiding the behavior of others toward you" (Mackie

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<sup>23</sup>In addition, Zeitler points out substantial organizational problems in the implementation (1995, pp. 227ff.).

<sup>24</sup>However, this is hardly to be expected, as Hayek does not assume a constructivist design of laws, but rather a process in which they are gradually developed over time and finally "found." See, e.g., Hayek (1991a, p. 363). According to Shearmur, (1996, p. 87) Hayek's later writings on legal topics especially focus on the "idea that law is there to be discovered by the judge" (Shearmur 1996, p. 87).

1977, p. 90), fulfill the condition of symmetric scopes of action. Mackie terms this a second level of universality (“putting oneself in the other person’s place”) (ibid.).<sup>25</sup> According to this principle, all individuals’ private spheres would be defined symmetrically to one another on the basis of a single individual’s moral principles. This implies that other moral principles may result in a different definition of these private spheres. The principle therefore guarantees only that all individuals’ private spheres have the same scope, regardless of how this scope is used.

According to Hayek’s criteria, a ban on mixed marriages could be considered a general law: as a law, it implies a differentiation by the individual attribute of religious confession. Therefore it would have to pass the test of majority. Assuming that a majority of members of both relevant religions accepted the ban, Hayek’s requirements would be completely satisfied. However, such a law would imply a concrete set of moral principles that would not necessarily be accepted by those who agree with mixed marriages.<sup>26</sup> A ban on mixed marriages between members of different confessional groups would be legitimate according to the requirement of symmetric scopes of action given that an arbitrary observer would accept it for herself even if she were attracted to a member of a different confessional group. However, that would presuppose that all individuals share the moral principles underlying the ban.

This is not a reasonable assumption; on the contrary, individuals’ moral principles vary, which de facto leads to an asymmetric infringement of those individuals’ freedom whose moral principles differ from those on which the laws are based. Laws must therefore not only fulfill the criterion of symmetric scopes of action but also allow action according to varying preferences and moral principles. As a result, Mackie introduces a third level of universality, moral neutrality, and requires that “different tastes and rival ideals” be taken into account when laying down laws (1977, pp. 92ff.). This is fulfilled when the content of the laws is characterized by “an acceptable compromise between the different actual points of view” (Mackie 1977, p. 93). An “acceptable compromise,” however, postulates concurrence by all individuals; it presupposes unanimity. For that, either a real acclamation or at least some kind of hypothetical

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<sup>25</sup>See also Gray (1982, p. 53), who calls this the “demand of impartiality between agents,” and see also Bouillon (1997, pp. 63f.).

<sup>26</sup>According to Mackie: “[d]ifferences [between persons] can be fairly regarded as relevant if they look relevant from whichever side you consider them” (1997, pp. 91f.).

contract is compulsory. Thus, this would lead to a contractarian-based extension of Hayek's universality criterion, which would contradict Hayek's idea of rules. Obviously, tightening the content of laws alone is not sufficient to solve the problem described earlier. Instead, it is necessary to find a "method" that facilitates the required concretization.

#### HAYEK'S CONCEPT OF SOCIOCULTURAL EVOLUTION AS A SOLUTION?

The question arises whether Hayek's concept of sociocultural evolution can fill this gap and serve as the required method.

Hayek's postulation that a system of rules consists of three layers (Hayek 1978a, pp. 11ff.; 1983, p. 17) is particularly important for the understanding of his theory of sociocultural evolution:

- (1) In the course of natural selection, genetically programmed instincts ("*genetically inherited, instinctive drives*") have evolved in human beings (Hayek 1989, pp. 11f.).
- (2) Furthermore, there exist *rationally designed rules* that are a direct consequence of the rational use of human intelligence, i.e., that were made intentionally for a certain purpose.<sup>27</sup>
- (3) Hayek focuses particularly on the rules of conduct that arise as results of a process of sociocultural evolution (1989, pp. 11ff.). These rules are the unintended result of a multitude of individual interactions, remain largely beyond human cognition, and are "culturally transmitted" (Hayek 1967c, pp. 66ff.; 1979b, pp. 31f.).

Because the process of biological evolution is substantially slower than cultural evolution, the genetically inherited instinct drives "can be assumed to be essentially uniform over time and space" and are shared "by all human individuals . . . as members of the human species" (Vanberg 1991, p. 179). Therefore the developing process of the instinct drives can be neglected in this context.

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<sup>27</sup>Hayek terms "a conception which assumes that all social institutions are, and ought to be, the product of deliberate design . . ." as constructivist rationalism (1973a, p. 5). See also Hayek (1991a; 1978d) and Vanberg (1983, p. 73).

Since their design has to refer to independent values, rationally designed rules face the same problem as mentioned above concerning the substantiation of Hayek's laws of a liberal order, thus an analysis of the rational design-making process will not deliver the insights required. The rational design of rules will also play no prominent role in our further consideration. Hence we have to focus on the theory of sociocultural evolution generating culturally transmitted rules.

### *1. Evolution as a Process Generating Rules of Conduct*

Hayek points out that the idea of a process of development by which complex structures arise goes as far back as the ancient world and was rejuvenated by Scottish moral philosophers before Lamarck and Darwin introduced the idea of evolution to biology (Hayek 1991b, pp. 84ff.; 1983, pp. 17ff.). Hayek himself understands evolution as a development in time without a definite goal or aim (1967b, p. 32). Two phases can be discerned: during the process of variation, new properties emerge that can be transferred or copied. This applies to rules of conduct that guide everyday action and limit "the range of permitted action" (Hayek 1973, p. 127) or individual actions, which are then subject to the process of systematic selection (Vanberg 1991, p. 182). The extent of Hayek's interpretation is such that not only the network of individuals' spontaneous interactions is subject to continuous change, but also regular courses of action and the system of rules of conduct itself.<sup>28</sup>

At this point it is noteworthy to define the term *rule* in this context. Rules of conduct "form the basis of the spontaneous order of society at large" (Hayek 1973, p. 125). This kind of rule differs from the so-called "constitutional rules" that serve to organize the government "and the allocation of the different powers to various parts of this organization" (Hayek 1979b, p. 37). The latter are "subject to deliberate construction" and for that reason will not be considered here. Furthermore, according to Vaughn, Hayek differentiates between informal and formal rules (1999, p. 135). Whereas informal rules "are customs and habits of a social group enforced primarily through social approbation or disapproval," the latter are "the abstract rules of law that are enforced by the coercive power of the

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<sup>28</sup>Individuals' ability to pursue their own—possibly conflicting—goals on the basis of abstract rules means that competition is constituted as a social process of continuous reciprocal adaptation of action. Hayek speaks of *spontaneous order* (1979a, p. 507; 1973, pp. 36f.). It forces individuals to utilize dispersed knowledge and also to pursue new knowledge (Hayek 1967f, p. 162; 1978e). Constant competition gives the commercial order evolutionary character.

government” (Vaughn 1999, p. 135). Although Hayek’s explanation should be applied to both kinds of rules—informal as well as formal—it makes sense to restrict it to informal rules because the process of turning informal rules into formal rules is less important for this paper’s purpose. We consider the term rules to mean informal codes of conduct. The latter can be interpreted as the result of factors influencing action such as consensus and/or sanctions (Vanberg 1994b, p. 14). Thus, norms, customs, traditions, or attitudes can lead to codes of conduct if they are voluntary considerations in decision situations or are enforced through the threat of sanctions.

A central element in Hayek’s theory is overcoming constitutional uncertainty through a “process of trial and error which must involve a constant disappointment of some expectations” (Hayek 1976, p. 125). According to Hayek, the combination of trial and testing in the perception of alternative actions is essential for the evolution of social phenomena (Hayek 1967a). Therefore this process of sociocultural evolution turns out to be a continuous accumulation of knowledge (Vanberg 1983, p. 77; 1994b, p. 100), so that the rules of conduct that originate from it contain more experience than could ever be incorporated in consciously formulated rules (Hayek 1960, p. 62; 1967e, p. 92; 1976, p. 135). Thus, Hayek stresses not only the discovery role of competition in market processes, but also in the process of sociocultural evolution (Boettke 1990, p. 70).

Hayek attempts to theoretically describe this continuous process of change. Here we are interested in Hayek’s positive theory of evolution—i.e., only in the explanation of the course of events implied by the process and its determinants.<sup>29</sup> Because the evolutionary process happens without a goal and the criteria of selection remain

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<sup>29</sup>In Hayek’s explanation there are elements of a normative theory of evolution: e.g., Hayek recognizes the necessity of rational corrections of the naturally developed rules and with it the necessity of the legislation (1973, pp. 88ff., 100). He rejects only the possibility of constructing complete and functioning norms: “It is unlikely that any individual would succeed in rationally constructing rules which would be more effective for this purpose than those which have been gradually evolved” (Hayek 1960, p. 66). This would require a criterion with which to compare the results of evolution that Hayek failed to present obviously. However, Vanberg stated that Hayek “refers to the consent of people as the ultimate basis” (1983, p. 81). See also Vanberg (1994a). The normative content of Hayek’s theory of sociocultural evolution is subject to a broad debate: see Diamond (1980), Steele (1987, pp. 186f.), Gray (1989, p. 98), Yeager (1989), Boettke (1990), Sugden (1993), Hodgson (1993, pp. 153ff.), De Vlieghe (1994, p. 293), Vromen (1995, pp. 164ff.), Lange-von Kulesa (1997), Whitman (1998), Fiori (2005), and Andreozzi (2005).

largely unknown, an epistemological description of the phenomenon of change must restrict itself to pattern predictions (Hayek 1973, pp. 23f.; 1967b). Any attempt to formulate specific predictions is doomed to failure (Hayek 1973, p. 16; 1960, pp. 40f.).

In order to explain the phenomenon of sociocultural evolution, Hayek utilizes two different and not necessarily compatible concepts: a purely individualist explanation and one that is founded on the mechanism of group selection (Vanberg 1991, pp. 182ff.). The latter, however, proves unhelpful for the following considerations, as will now be demonstrated.

The mechanism of group selection is a process of selection determined by the success of a group (Hayek 1978a, pp. 37f., n. 48). In the long run, the more successful groups' rules of conduct persevere (Hayek 1978d, p. 7; 1973, p. 18). One indicator of success is a group's ability to grow and sustain a growing number of people (Hayek 1983, p. 22; 1973, p. 9, pp. 18f.). The selection process is not determined by force; rather, successful groups' rules are unconsciously passed down or copied (Hayek 1978a, pp. 12f.; 1960, p. 59). The dynamic nature of the environment implies continuous change of the rules, inducing a permanent state of selection of rules. High volatility of the environment and competition between the groups result in the rapid progress of the evolution of innovative rules of conduct (Hayek 1960, pp. 27ff.; Vaughn 1999, p. 138).

Furthermore, Hayek sketches a purely individualist explanation of the process of evolution that is based on the "invisible hand" explanation of Scottish moral philosophy (Vanberg 1991, pp. 188ff.): due to the fact that certain individuals vary existing rules of conduct in their own interests, new rules arise (Hayek 1978a, pp. 12f.). If other individuals perceive these as superior, they are adopted (i.e., learned) and therefore assert themselves (Hayek 1978a, p. 20; Vanberg 1994b, pp. 88ff.). Thus, different rules of conduct are in constant competition. This favors rules that facilitate coordination of individuals. The continuous process of the innovation of rules requires an open set of rules in order to make variations possible (Hayek 1960, pp. 62f.).

Hayek's approach lacks epistemological clarity. In order to explain the process of sociocultural evolution, he combines an individualist variant of evolution with the super-individual phenomenon of group selection and does not clarify how the latter mechanism arises from individual behavior.<sup>30</sup> In particular it remains

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<sup>30</sup>See Vanberg (1991, pp. 185ff.). The fact that the two mechanisms are super-imposed becomes clear in Hayek (1960, pp. 36f.; 1967c, pp. 72f.). Obviously,

unclear why individuals should choose socially desirable rules of conduct since these may conflict with their own interests.<sup>31</sup> Similarly, the problem of the tradition of abstract rules lacks sufficient treatment (Witt 1994, pp. 183ff.).

Whereas the individualist approach proves useful, the process of group selection raises a number of unsolved problems.<sup>32</sup> Thus, group size is used as an independent reference for a group's success and, therefore, also for the success of its rules of conduct. However, the criterion of population development is generally questionable because the pressure of selection on any individual human being is very small.<sup>33</sup> Furthermore, the claim that spontaneously evolved rules of conduct are efficient, socially desirable, and superior to those which are rationally planned remains unsupported (Buchanan 1975, p. 167; 1977, pp. 28ff.; Vanberg 1983, pp. 77ff.; 1991, pp. 195f.; Kirzner 1987, pp. 46 and 48). Finally, the group based evolutionary theory is not compatible with Hayek's earlier work based on methodological individualism and his commitment to the latter.<sup>34</sup>

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the paradigm of group selection dominates Hayek's explanatory concept (Hayek 1967c, p. 68; 1973a, p. 74).

<sup>31</sup>See Vanberg (1991, pp. 186f.), Witt (1994, p. 185), and Shearmur (1996, p. 86). Schmidt and Moser (1992) take a different view and stress the importance of ignorance in Hayek's approach. Thus, the individuals never realize that they are in a prisoners' dilemma situation.

<sup>32</sup>Vanberg (1991, p. 184) demonstrates that Hayek uses a "functionalist type of argument" to explain group selection processes.

<sup>33</sup>See Miller (1989, pp. 314ff.) and Witt (1994, pp. 184f.). For further critiques of the criterion of group size, see Radnitzky (1984, pp. 22f.). Hayek himself seems to abandon this measure when he writes:

The increase [of the population in the periphery market economies] can be explained by the fact that the people there have not yet adopted the tradition, the morals, and habits of market economy but nevertheless live at its borders, partake in it and even profit from it and yet still have habits of reproduction from life outside a market economy when the problem was to sire enough children, so that in old age at least two survivors could care for one. (Hayek 1983, p. 29; my translation)

<sup>34</sup>See Hayek (1955, pp. 36ff.) See, e.g., also Steele (1987) and Gray (1998, pp. 52f.). Caldwell (2000, p. 19) states that the theory of group selection came into play in the late 60s, "when Hayek explicitly added the mechanism of group selection to his description of cultural evolution." Although not called so *expressis verbis*, Hayek (1967c) described this phenomenon first in his article "Notes on the Evolution of Systems of Rules of Conduct." Another interpretation is given by Vromen (1995, p. 172) who eliminates this discrepancy



Due to the reasons mentioned above and, especially, its explanatory problems, the group-based mechanism is not suited to be the method required. Limiting the analysis, therefore, to Hayek's individualistically based explanation, what it has to offer in this context remains the question. Hayek's individualist approach is

- (1) suited to explain the emergence and change of rules of conduct in coordination situations and
- (2) partially suited to explain this phenomenon in prisoner's dilemma situations.

According to Vanberg, coordination problems

consist of situations involving two or more persons, each one facing a choice between two or more alternative courses of action, the outcomes of which are dependent on the choice(s) made by the other actor(s) involved. Specifically, there are at least two combinations of choices which all parties prefer to all other possible combinations. (Vanberg 1991, p. 190; Ullmann-Margalit 1977, pp. 77ff.)

Vanberg (1991, p. 190) makes this clear by using a game with two actors (A, B) and two alternatives ( $a_1, a_2$ ) with the following payoffs:

A B	$a_1$	$a_2$
$b_1$	4/4	0/0
$b_2$	0/0	2/2

In this situation, an invisible-hand solution ( $a_1/b_1$  or  $a_2/b_2$ )—a new rule—will occur without any “explicit, deliberate agreement,” under the following circumstances: individuals choose between the alternatives at random, one of these alternatives is used more often

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by using a semantic trick: “If we change ‘order’ to ‘group,’ Hayek’s statements becomes [sic] less puzzling.” Indeed, this interpretation is supported by Hayek (1967c, p. 66) when he writes: “we shall occasionally use the pair of concepts ‘order and its elements’ and ‘groups and individuals’ interchangeably, although the former is of course the more general term of which the relation between group and individual is a particular instance.”

by chance, and actors that do not choose the preferred practiced alternative suffer disadvantages (Vanberg 1991, pp. 190f.).

Prisoner's dilemma situations can be also described with a two-actors(A, B)—two-alternatives( $a_1, a_2$ ) game with the following pay-out matrix:<sup>35</sup>

A	$a_1$	$a_2$
B		
$b_1$	4/4	0/7
$b_2$	0/7	2/2

A strong incentive for free riding occurs in this situation. In a single game, it is rational for the actors to choose alternatives  $a_2$  and  $b_2$  respectively. Therefore, rules of conduct in prisoner's dilemma situations can only emerge if there are sanctions that defuse the dilemma.<sup>36</sup> Mechanisms of this type can be found in small groups with low fluctuation where informal private sanctions can be used to avoid the strategy defection (in our case,  $a_2$  and  $b_2$  respectively). Beneath that, the dilemma can be mitigated in repetitive situations with the same subjects where an end to the series of situations is not in sight (Friedman 1971). The sanction in the latter case is the loss of potential profits from future situations that could have been gained through cooperative behavior. Under very narrow conditions, it could also be shown that even in situations with changing actors and a limited number of repetitions of the game, norms can emerge (Crémer 1986). At least the approach also offers a limited explanation for prisoner's dilemma situations in which the existing incentive structure can not be corrected: actors sometimes behave in a manner consistent with stable small groups even here, as adopted rules of conduct are applied independently from the structure of incentives

<sup>35</sup>See Vanberg (1991, p. 192). For detailed characteristics of a prisoner's dilemma see Ullmann-Margalit (1977, pp. 18ff.).

<sup>36</sup>A similar view is taken by Zywicki who states that the process of group selection can be explained on the base of methodological individualism if there is "a mechanism for preventing free riding by social parasites seeking to capture some of the newly-created social surplus for themselves" (2004, p. 8).

and sanctions (Vanberg 1991, p. 187). In any case, the spontaneous emergence of rules in prisoner's dilemma situations depends on the existence of broad premises and is therefore not very likely in large groups. Regularly, an external institution is needed to prevent violations of this very rule.

It should be taken into account that Hayek's approach is based on competition between rules<sup>37</sup> and that a coexistence of small and large groups can be assumed. Individuals do simultaneously act in a small and in a large group. Although they are latently present and practiced in small groups, the rules do not apply in large groups when the conditions mentioned above are not fulfilled. In other words: rules of conduct learned in the family are not necessarily used in interaction with anybody one meets in the street. Thus, if a family member gets into financial difficulties,<sup>38</sup> the existing rule could be to subsidize this member up to a certain amount. However, an individual would not act in the same way in a large group.

Which conclusion can be drawn for our purpose? Hayek's individualistically based approach performs well to explain the emergence and change of rules of conduct in small groups. His approach is less suited to elucidate this phenomenon in large groups, especially in PD situations. But, as we have seen above, he is able to explain at least their nucleus—namely moral codes and moral principles—which are partially learned in small groups, although they are not guiding action in large groups (Hayek 1960, pp. 62ff.).

## 2. *The Incorporation of Sociocultural Evolution in the Concept of Liberal Order*

As shown above Hayek's concept of rule of liberal order lacks a method that facilitates the required concretization of individual and situational attributes, on which differentiation can be founded. Can Hayek's evolutionary approach provide such a method?

Indeed Hayek's approach of sociocultural evolution may offer an answer to this question: Hayek's criteria for general laws constitute a pattern that is slowly filled in over time by sociocultural evolution.

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<sup>37</sup>"Our habits and skills, our emotional attitudes, our tools and our institutions—all are in this sense adaptations to past experience which have grown up by selective elimination of less suitable conduct" (Hayek 1960, p. 26).

<sup>38</sup>Note that the example of "a family member in financial difficulties" is the situational attribute in our context.

Let us expand on this interpretation of the interaction between the criteria determining general laws and sociocultural evolution.

As we have seen, rules and moral principles that prevail in a permanent competition process are the outcome of sociocultural evolution.<sup>39</sup> This means that these rules and moral principles have asserted themselves against other alternatives and, therefore, are present in the individuals, but the latter do not necessarily determine their conduct in large groups. What is important for this interpretation is that these rules and moral principles are generally accepted and based on a commonly shared set of situational and individual criteria. Hayek gives an indication for this interpretation when he writes:

The rules upon which different individual members of the group will at any moment act may therefore be different either because the drives or external circumstances acting upon them make different rules applicable, or because different rules apply to different individuals according to age, sex, status, or some particular state in which each individual finds itself at the moment. (1967c, p. 68)

These individual and situational criteria form the foundation for a differentiated treatment of individuals because this differentiation is accepted by all individuals and not experienced as discrimination. Thus, the approach of sociocultural evolution can be interpreted as a historical theory in the form of an explanation of the emergence and change of generally accepted differentiation attributes.

Furthermore, as these attributes are the outcome of sociocultural evolution, they will not be stable over time but will change. For example, in the ancient world and in the Middle Ages, the feeding of babies required the presence of the mother. That prevented her from doing other things like hunting, which demands the mother's absence from the baby for several days. Rules occurred characterized by differentiation based on individual attributes (gender), as well as on situational attributes (having a baby). If circumstances change—due, for example, to technological progress—and the presence of the mother is no longer required to feed the babies, these rules will adapt over time, and the attributes to differentiate will change as well. A similar development happened to the individual attribute of age. In the era when there were limited ways to store and pass on information (by books, etc.), older people were treated with extra respect and enjoyed many privileges because, through their experience, they

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<sup>39</sup>According to Hayek there is a “prevalence of the more effective institutions in a process of competition” (1979b, p. 155).

possessed a comprehensive and useful knowledge. Age was a generally accepted individual attribute on which a differentiation could be based. Due to a wide spread of different data media and an enormous reduction of the half-life of knowledge, the role of older people in the storage and passing on of information has decreased, as has the acceptance of a differentiation based on age.

Given this role of sociocultural evolution, the apparent deficits of Hayek's concept of liberal order seem to vanish: the role of sociocultural evolution is to deliver generally accepted differentiation attributes which can be used to fill out the content of laws in such a manner that they fulfill Hayek's original criterion of universality. In doing so, the content of the law can be differentiated according to situational and individual criteria in the legislative process.

By using these evolutionary differentiation criteria for the possible differentiations in the content of the law, the laws fulfill the criteria of symmetric scopes of action and moral neutrality. On the one hand, moral neutrality is already implied by symmetric scopes of action when there are generally accepted moral codes and principles. This is due to the differentiation criteria that arise from an evolutionary process and therefore finds general acceptance due to the individual "perspectives" being congruent.

On the other hand, general acceptance implies that individuals would accept these laws for themselves, thereby guaranteeing symmetric scopes of action. In the example given above, laws in which the individual attribute gender is used to cause a different treatment would be generally accepted and would therefore fit the criterion. Thus, the criticism that the theory fails to prevent asymmetric infringements on liberty can be refuted. Since one can assume that there will not be a large number of rules and moral principles, but rather that a small number will simultaneously arise in the evolutionary process, the accusation of lacking protection against symmetrical infringements on freedom is also refutable.

What problems could occur with this interpretation? First, it should be taken into account that sociocultural evolution and the competition between rules, respectively, is a process. That means that at any given moment, due to changes in circumstances, there could be rules and moral principles that are not generally approved. This will especially be the case in an open society. To solve this problem Hayek offers two remedies: On the one hand, he proposes a bicameral system that he himself terms "demarchy" (Hayek 1978c, p. 104). The first chamber is responsible for codifying laws—in the Hayekian sense—which are to be applied without exception and which have the sole purpose of justifying coercion of individuals by

the state (Hayek 1978c, pp. 102f.; 1979b, pp. 111f.).<sup>40</sup> This chamber is therefore charged with finding the generally accepted differentiation criteria resulting from the process of evolution and fitting them into laws. At the same time, these laws form a framework for the second chamber, which concretizes these abstract general rules.<sup>41</sup> On the other hand, Hayek's understanding of the role of judges could be similarly interpreted: by deciding on specific cases, individual judges enhance the existing law (Hayek 1973, pp. 86f.), according generally accepted moral principles.

Second, the offered interpretation could be considered as rationalistic and constructivist, respectively, and therefore not fit the fundamental idea of Hayek's work. Indeed, Hayek (1967e) criticizes constructivist rationalism. As a matter of fact, Hayek understands the phenomenon of constructivist rationalism as "a conception which assumes that all social institutions are, and ought to be, the product of deliberate design" (Hayek 1973, p. 5), whereas the main point for his critics is "a refusal of the idea of a total construction of the entire system of rules" (Vanberg 1983, p. 74). However he stresses that occasionally naturally developed rules have to be corrected (Hayek 1960, p. 33). Therefore, the aforementioned interpretation can not be seen as constructivist rationalism, but instead fits Hayek's idea that law should be discovered (Shearmur 1996, p. 87), because Hayek's laws are just used as a shape which is filled by discovered individual and situational attributes resulting from socio-cultural evolution.

Altogether, socioevolution can be considered as a method to solve the aforementioned problem.

## CONCLUSIONS

From a view of mankind that stresses the differences in individual talents and skills, Hayek derives the absence of arbitrary coercion as the requirement for individual freedom. He wishes to see a maximum of individual freedom guaranteed by general laws. His work gives numerous possible starting points for concretizing these laws: they must fulfill the criteria of openness, abstractness, certainty, and consistency, as well as that of universality. Hayek's requirements for laws are not, however, sufficient to guarantee a maximum of equal

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<sup>40</sup>On the composition of this chamber see Hayek (1979b, pp. 112ff.; 1979c, pp. 42f.; 1978b, p. 117).

<sup>41</sup>On the second chamber's responsibilities see Hayek (1979b, pp. 119f.) and Kleinewefers (1985, p. 110).

individual freedom. This is the case because Hayek neither explicitly states concrete criteria of differentiation nor does he give a method with which they could be discovered.

Tightening the concept of universality by introducing symmetric scopes of action and moral neutrality as additional requirements is not in itself sufficient to gain concrete criteria for differentiation. That would necessitate contractarian elements.

However, Hayek's approach of explaining sociocultural evolution offers a productive solution to the dilemma: rules and moral principles that are founded on generally accepted criteria of differentiation emerge in the process of sociocultural evolution. These differentiation criteria can be used to eliminate the apparent deficit in the "construction" of codified general laws. Hayek's proposal of a bicameral system in which the first chamber is charged with finding these criteria is then a logical consequence. And so is his idea of judges "discovering law."

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