

Hayek's evolutionary theory of rules

Roger Wessman

1 INTRODUCTION

In a number of books¹ Nobel Laureate economist and liberal political philosopher Friedrich Hayek has outlined an intricate defence of the rules of the western civilisation based on a free market economy. The society in which we live, Hayek says, echoing 18th century Scottish moral philosopher Adam Ferguson, is a "result of human action but not of human design"². Society is a product of a long evolution. To attempt to change the basic rules on which society is based is bound to lead to failure because no single human being has the necessary information to deliberately design society anew.

I aim to show that while Hayek's argumentation raises several interesting questions and provides valuable insights into the nature of society, it cannot be used as a defense of a blind acceptance of all evolved rules. In fact, as I will show, Hayek hardly himself would have approved of a such usage of his theory.

Since Hayek's views are probably not very well known to the readers of this journal, I will start with a short outline of Hayek's main argumentation. Thereafter I will continue by discussing problems with an ethics based on the maxim "You ought to follow evolved rules".

I will focus in this article on the evolutionary defence of the legal rules of a free society. I will not try to evaluate other arguments for a free market in Hayek's writings, so by no means can this article be conceived as a refutation of Hayek's case for a free society.

2 THE INFORMATION PROBLEM

The central theme through all of Hayek's works is the problem of information. What limits on social policymaking is imposed by the impossible for decisionmakers to gather all necessary information about a complex socie-

ty? How can we make use of all the nuggets of information dispersed among all the persons in society?

Since the 1930s Hayek has been arguing that a centrally planned economy is impossible because no central authority cannot possibly gather all the necessary information needed to make rational plans. Only the decentralised decisionmaking in a market economy can, with the help of the price system, make use of all the information dispersed among millions of individuals.³

In a later article⁴ Hayek stressed that the market is not just an instrument for coordinating the activities of millions of people in general equilibrium. Above all it is, according to Hayek, a discovery procedure. Allowing everyone to use their knowledge to try to solve problems they perceive is the foundation of a truly progressive society, Hayek explained.

As Hayek's interests turned away from economics to general social philosophy he extended his argument to the sphere of legislation. It is impossible, Hayek claims, for a legislator to know all the effects of any piece of legislation and therefore to evaluate according to any cost-benefit calculation whether the proposed law is a good one. In the same way as a centrally planned economy would need an omniscient planner, deliberate legislation to design a better society would need an omniscient legislator.

The belief that we can design a better society by means of rational legislation (or rational economic planning) is, at least unconsciously, based on the erroneous belief that someone has deliberately planned the society we live in and designed its laws. This is not so, society is an unintended result of the actions of millions of people seeking to promote their own different — and often conflicting — goals, guided by legal and moral rules that have gradually evolved.

To think that all relevant knowledge can be collected by one decisionmaker Hayek calls the synoptic delusion.⁵ Since no one can know the impact of adopting a new set of rules on this elaborate spontaneous order, it is impossible for any man to consciously design a better set of rules. The rules that has been selected in the evolutionary process contain information not given to any single mind. Therefore we ought to follow the evolved laws even when we can't explain why any particular rule is a good rule.⁶

How have the laws evolved? The story Hayek tells goes roughly like this:⁷

Societies in which laws that promoted prosperity, such as the rule protecting private property, were adopted grew since they permitted survival of a larger number of their members and perhaps also attracted immigrants. This growth made the successful society expand its range through settlement of uninhabited areas. To some extent the laws might also have spread by imitation of the laws or an acceptance of the religion of the prosperous societies by neighbouring societies.⁸

Whatever the precise mode of the spreading of laws the crucial thing is that the selection of laws wasn't in any way dependent on any understanding of why the laws were efficient — or even which of the laws were efficient. The efficient laws might have been adopted for any freak reason. The important thing is that a society with laws that were more favourable to the prosperity of society, and therefore to the growth of population, tended to outcompete other societies.

Hayek thus concludes that we should rely on spontaneously evolved laws even when we cannot show that these laws are efficient because they incorporate more information than any human consciously has.

Why would these laws be good laws? What reason do we have to believe that the laws that have evolved are good laws?

The answer is that in order to increase the sustainable population in a given area the production capabilities of that area has to increase. Thus the laws that have evolved are those that can sustain the population of the world and that maximizes production. In other words: any other set of laws are not likely to be able to sustain the present population and therefore they are obviously undesirable. Anyone who doesn't want do condemn a large portion of the population of the earth to starvation and extreme

poverty should support the laws that have evolved.⁹

4 ARGUMENTS AGAINST AN EVOLUTIONARY ETHICS

4.1 The naturalistic fallacy

A common, but nevertheless fundamentally mistaken, criticism of Hayek's "evolutionary ethics" is that it violates the "is-ought" dichotomy, since it presumably derives ethical rules from the *fact* that they have survived a process of evolution.¹⁰ The mistake is understandable since supporters often present the conclusion "You ought to follow evolved rules"(or words to that effect) as if it were a basic moral axiom¹¹ comparable with the utilitarian maxim "Greatest happiness to the greatest number" or Kant's categorical imperative.

Clearly this is not the argument Hayek is making. To accept Hayek's argument you have to start with a basic moral principle underlying the evolutionary theory of rules has to be some consequentialist rule of the type: "What's morally right is what contributes most to the long run prosperity of humanity" (Obviously there is an innumerable number of suitable maxims, including the utilitarian). If you combine this basic moral principle with an alleged statement of fact that prosperity, in the sense defined, can — as far as we can judge — best be achieved by following the rules that have evolved, you get a moral justification for an evolutionary ethics.

If Hayek is correct about the importance of adherence to the evolved rules for the prosperity of mankind it really doesn't make any difference whether your basic moral principle is Rawlsian Maximin¹² or Utilitarianism¹³, you will in any case end up supporting the evolved rules. Even act-utilitarianism collapses into an evolutionary ethics if you can show that the preservation of overall prosperity is dependent upon everyone following evolved rules and every actor should take into account the enormous possible negative unpredictable consequences of breaking general rules however beneficial the immediate effects of the rulebreaking act seems to be.

The particular maxim Hayek himself has chosen is "The Good Society is one in which the chances of anyone selected at random are likely to be as great as possible".¹⁴ Since, as far

as I can see, nothing in Hayek's evolutionary argument rests on this particular ethical maxim I mention it just to point out that Hayek himself certainly doesn't commit the naturalist fallacy.¹⁵

The reason for this confusion is obviously that philosophers who have proposed different basic moral principles have gone on to make specific recommendations based upon a different (faulty) understanding of reality and it isn't always easy to separate the pure "ought-statements" on the one hand from "is-statements" and conclusions drawn from a combination of both. Probably the confusion is less a real failure of the authors to understand this difference than simply a failure to clearly make the distinction in their writings.

4.2 The absent invisible hand of legal evolution

A more serious flaw is the lack of a detailed analysis of the selection process by which the law has evolved.¹⁶ It is not at all clear that it is the most prosperitycreating laws that have been selected. If in some ways the invisible hand of legal evolution systematically selects inefficient laws, then there's no reason to conclude that we couldn't improve on the evolved laws.¹⁷ If the information contained in the laws is not information about how to achieve our objectives, then there's no reason to think that it's impossible to better reach our goals by deliberate decisionmaking.¹⁸

In other words, while it's true that the laws have adapted through a long evolutionary process, it's not clear what they have been adapted for.¹⁹

What other laws than prosperitycreating ones could contribute to the expansion of a society and thus survive the selection process?

First of all population growth can also be promoted by laws that increase fertility. A clear example from the religious sphere is the command to be fertile and fill the earth. While it's clear why such rules would have survived in the evolutionary process, I see no reason why they would be considered beneficial — and in the long run they may even be disastrous for mankind.

One feature of the laws that might have survived for a long time in the evolution exactly because of its tendency to raise fertility is the lower legal status of women which effectively made marriage the most feasible alternative for

practically all women.

One might of course defend a strictly evolutionary ethics by saying that we have no alternative other than taking the bad laws with the good ones because trying to destroy the bad laws will lead to disaster since we don't know what essential functions the laws may perform. And furthermore changing one evolved law is an invitation to make changes in other evolved laws and thus destroys the whole system of evolved laws.

Is there, as Dobuzinskis suggests, a middleground "between rationalistic design based on an illusory objective knowledge of socioeconomic mechanisms . . . and passive submission to a glorified process of competition and evolutionary adaption"?²⁰

In fact, as Dobuzinskis notes, Hayek himself doesn't seem to adhere consistently to any evolutionary ethics.²¹ However there isn't much left of the evolutionary ethics as soon as you admit the possibility of rational evaluation of the laws. There is no way to determine which laws contain information we don't know — since we don't know it. Which laws shall we passively accept and which rationally evaluate?

The only thing that remains is that knowledge of the evolutionary process should make us more humble and cautious in our attempts to change society and give more consideration to the possibility that the evolved laws might still be the best laws. "We can always only tinker with parts of a given whole but never entirely redesign it."²²

Awareness of the dangers of the synoptic delusion should also restrain any impulses to radically reconstruct society. Nevertheless since we are able to make pattern predictions of the effects of different laws that have evolved it is possible to slowly and cautiously improve the evolved laws²³ — as has been done by e.g. abolishing legal discrimination of women or as Hayek himself suggests redefining property rights.²⁴

4.3 Selection through promotion of military strength

The survival and spreading of a legal system of rules is not only dependent upon its effectiveness in promoting population growth. The survival of a society is also dependent on its military strength. Military strength is of course correlated to population size and prosperity but

still the problem of how much survival value for a society do laws that promote an aggressive military hierarchic order have, remains.

Was Islam such a successful entrepreneurial innovation because it was a merchant religion with a strong protection of private property or because of the concept of Jihad? Or maybe a combination of both? Will societies that have prosperity-creating laws be outcompeted in the long run by neighbouring societies with laws that are less prosperity-creating but which provides them with a militaristic spirit that enables them to conquer the former?

Certainly it is true that western civilisation has spread throughout the world by means of war. We cannot therefore deduce the superiority of the laws of the western civilisation from the mere fact that they have been able to spread all over the world. We can only conclude that by understanding that the laws have done so through promoting prosperity and technological development. This again requires of us an ability to make pattern predictions. Noting the obvious achievements of western civilisation is not a strict evolutionary argument but an argument from experience.

4.4 The world has changed

Another objection to a strictly evolutionary argument is that the society has changed so dramatically during the last two centuries that the laws that were beneficial sometime in the past might very well be destructive in today's world.

Of course Hayek has attempted to show that to preserve the complex extended order of modern civilisation we need the general laws constituting the market economy more than ever. The more complicated a society becomes, the more difficult it will be for any central authority to gather all necessary information. But that is an argument based on understanding how society works. Merely from the fact that the laws have worked well in the past we can't deduce that they work well — or even at all — in a different situation. To the extent we understand how the society works there's no need to appeal to the inherent wisdom in the selected laws.

To take a concrete example — one of the great changes brought about by the industrial revolution is the increasing importance of external effects, especially pollution. Now, the

question is can the general laws of private property and tort effectively handle this increase — or is it essential that new laws are designed, to solve these problems.

It's clearly wrong to argue that because the evolved laws has proved to work on balance better than any other laws in the past, therefore it cannot be within our capacity to design any better laws to cope with this new situation. For there can be no presumption that the laws that have evolved contain some information given to no man about this problem, because they haven't evolved in a situation where this problem was important!

So the choice of laws have to be made based upon an evaluation of which law is the most efficient.²⁵ Of course there should be a strong presumption in favour of the evolved laws because a) any change of laws undermines the stability of all laws b) all individuals have made up their plans upon the assumption that the laws won't change.

5 AN EXAMPLE — THE GLOBAL POLLUTION PROBLEM

A short digression from our main theme — could we make a plausible argument why the evolved laws of a market economy function would relatively well also for solving the pollution problems?

The standard answer to this from defenders of a completely free market solution to this problem is that there is nothing special with today's environmental problems. The polluter simply violates the rights of people whose health or property are damaged by the pollution. Therefore the polluters should be forced to stop their activity until they've acquired permission from all those victimized by their polluting activities.²⁶

The problem is that in this case it's very hard to define when a crime has occurred. Some persons have suggested a no threshold principle i.e. a crime has occurred when a person or his property has been exposed to any amount of pollution. This is clearly a absurd principle since any human activity emits some polluting molecules. Even merely breathing means emitting carbon dioxide. Therefore any person so inclined could prohibit any activity under the pretext that it violates his rights according to this principle.²⁷

A more reasonable principle would be that the victim has to prove that he's been damaged by the pollution. But the problems with this rule are also huge.

Firstly the causality is nowhere near as clear as in normal cases of assault and battery or vandalism. A polluting chemical may — or may not — cause cancer to the victims in thirty years time, and even then it's in most cases impossible to tell whether the pollutant has caused any cases of cancer. Certainly it is — at least today — completely impossible to tell whether a particular case of cancer was caused by a specific pollutant. What increase in the risk of getting cancer should be considered a damage? 10%? 1%? Or any increase in the risk at all? The last alternative leads us back to the no threshold principle.

Secondly we have the problem of joint causality. Most of the damages of polluting activities cannot be attributed to a single criminal but are caused by a large number of polluters. Should a person have to sue all cardrivers in the world to protect his piece of property from being damaged by the greenhouse effect? If the forests in Finland could stand 1 million cars and there are 2 million drivers now — which million should be banned? Or should they all be banned — which logically again leads us back to the no threshold principle.

The third and most persuasive proposed solution would be that the courts doesn't forbid polluting but only require that the polluters pay the victims according to the damage done. Then you would avoid falling into the no threshold principle since an infinitesimal damage would only require the polluter to pay an infinitesimal sum of money.

However there still are major flaws in this solution. The courts can't value the damage done since that would require that they have subjective information known only by the victim of the pollution. This is of course always a problem when a court does assess damages. However in most cases awarded damages functions simply as a way to enforce property rights and to discourage the violation in question. When we concern ourselves with pollution the courts would in practice become price fixers in the market for a right to pollute where the original rightholders are required to sell to anyone who wants to buy.

Furthermore, the problem of joint causation and the large, sometimes global, spread of the

damage leads to a situation where however large the damage a polluter causes, no single victim is significantly hurt by that polluter, and however large the damage of pollution for a single victim may be, no single polluter significantly hurts him. Therefore any kind of legal solution would have to be some kind of massive class action suit. (Imaging every living being on earth suing practically everybody else for destroying the ozone layer by using CFC-driven spraycans). The judges would have to assume the role of the omniscient planner of all polluting activities.

Of course any government body would face the same problems as the courts. Nevertheless since the decisions would have to be arbitrary policy decisions a court of law is hardly a suitable forum in which to make these decisions. The court procedures have not evolved to cope with these questions. Furthermore the fact that prices would be fixed after the polluting activity has occurred would increase the uncertainty for all parties.

Finally the design of a new rule to cope with environmental problem would hardly to any large extent undermine other rules since the problem is clearly new and therefore new rules in this case doesn't directly lead to claims for new rules in situations where the rules can be seen to have evolved to cope with the problems. To the contrary one could plausibly argue that the failure to cope with such a possibly vital problem, which could if the alarmists are right destroy all life on earth, could seriously undermine the faith in the general beneficiality of spontaneous order as such!

6 LEGAL EVOLUTION IN MODERN TIMES

The arguments so far presented have considered the historical evolution of laws and whether the evolutionary process can be used as a justification for continuing to adhering to the evolved laws.

The evolutionary process outlined above is certainly not applicable to modern times. This takes care of some of the given objections. First of all within a community of nations such as Western Europe which is not any more engaging in wars of conquest the usefulness of a martial spirit to spread its laws are minimal. Secondly an increase in fertility is not of much use any more since increasingly migration, not fertility, has become the main determinant of

population size. Anyway population growth doesn't any more significantly help to increase the geographical area over which the laws of the society in question is in force.

Instead one could suggest that the evolution is going to continue as people vote with their feet by moving to societies with better legal systems. This solution would still preserve the flavour of the evolutionary argument since all individuals only consider their own prospects and so the combined effect is based on information not given to any single man — and no one has to understand why the laws which attract people are good.²⁸

From the competition for migrants it is very easy to draw parallels to the normal competitive process in a free market economy. People choose among the offered alternatives according to their subjective evaluations. The result while not ideal in any absolute sense would at least reflect the subjective choices of the individuals involved.²⁹

However, it is not clear if the threat of loss of populations through emigration is a strong enough motive to make a government change its laws to conform with the ones in an neighbouring country that have proved better by attracting immigration from the former country. This is especially so since those who stay are generally those who are least attracted by the policies in the neighbouring country. It also remains to be seen if enough people are prepared to move in the face of linguistic and cultural barriers to make a significant impact. (In economic terms: the transaction costs for exercising choice is very high). Migration will have some impact but hardly enough to dominate all other influencing factors. The developments in East Germany in the fall of 1989 certainly suggests that migration can be a powerful force in the absence of linguistic barriers when the difference in standard of living is sufficiently high.

Still we could draw the conclusion that one way to promote better laws might be to encourage competition, by lowering barriers to migration and decreasing the size of legislative units. The second step would increase competition by reducing the costs of migration (since the average persons wouldn't have to move as far) and by increasing the number of competitors. Interestingly enough the European integration process while lowering barriers to migration is simultaneously centralising legislation and thus counteracting the effect of lower bar-

riers to migration. From an evolutionary standpoint it would seem beneficial to encourage competition also between different national parliaments by retaining their independent legislative power.

The second way the evolutionary process can work, even in the absence of migrations, in modern times is that different countries experiment with different laws. Laws that leads to good results are thereafter copied and implemented in other countries. The problem is of course that this process rests entirely on conscious selection. The legislators have to determine which laws are good laws by trying to understand how they function and/or study the results of implementing different laws. The evolutionary process is driven by experience and understanding, so we can no longer attribute to the results of this evolution any superhuman wisdom.³⁰

The fact that we cannot appeal to superhuman wisdom doesn't mean that the discovery procedure outlined would be unimportant. The fact that different countries can try out new solutions is bound to be a more progressive system than one in which only the solutions that can get a majority of the decisionmakers in the whole community behind it will be tried out.

It's easy to show the benefits of harmonising legislation between e.g. the E.C. countries under conditions of perfect information. However when we consider the limited information that any single decisionmaker can possibly contemplate, it's very possible that an evolutionary process where different laws are tried out might lead to better results. This is true even in a situation when migration has no significant impact on legislation.

It should also be pointed out that while we by experimentation can increase our knowledge, this doesn't by itself guarantee that the laws will evolve in the right direction. The behaviour of rent-seeking interest groups might still lead to a continuous deterioration of legislative policy³¹.

7 CONCLUSIONS

The main conclusion of this article is that even if it's true that the laws are a product of a lengthy process of evolution this is no reason for accepting them uncritically. There is no reason to believe that the selection process systematically has picked out the ideal rules for our present society.

Firstly it is possible that laws have survived in the selection process for some other reason than that they are conducive to general welfare. For examples laws might have been selected because they promote fertility or a martial spirit in society, neither of which is obviously desirable and both of which might be disastrous.

Furthermore it might be argued that the rules have evolved under circumstances very different from a modern industrial society. Therefore we have no reason to believe that their adapted to solve the problems of modern society.

While I've shown that Hayek's argumentation isn't sufficient to defend a strict adherence to evolved laws, this does not imply that stressing the evolved character of laws would be unimportant. The problem of deciding on the optimal laws in the absence of perfect information is real enough.

Neither does this mean that we should forget the evolutionary approach to legislation. If we have free migration between peaceful neighbouring countries we can conceive of the situation as an analog to the discovery process of free competition familiar from economics. Instead of an argument for the historically evolved rules, the main lesson of Hayek's writings might well be the importance of building up a structure within which the laws might evolve in the future.

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NOTES

- 1 Hayek (1973,1976,1979 and 1988).
- 2 Hayek (1973) p.20.
- 3 For the main exposition of this point see Hayek (1945).
- 4 Hayek (1968).
- 5 Hayek(1973) p.14.
- 6 "our whole civilisation in consequence rests, and must rest, on our *believing* much that we cannot *know* to be true" Hayek (1973) p.12. (Emphasis in the original).
- 7 A somewhat different explanation of the evolution of the laws is given by Bruno Leoni whose writings have clearly influenced Hayek. According to Leoni the common law-system in which the judges try to interpret the established rules rather than legislate is a process similar to the market. Aranson (1988) p. 669. For a general exposition of Leoni's views see Leoni (1961).
- 8 Hayek (1973) p.169 (Footnote 7).
- 9 Hayek (1988) p.120.
- 10 Hayek (1988) p. 27.
- 11 e.g. Vihanto (1987) p.1.
- 12 While Hayek (1976) p.100 writes approvingly of Rawls' Theory of Justice in general his own view which emphasizes the chances of anyone selected at random (p.132) clearly shows that he doesn't endorse the specific maximin-criteria.
- 13 For an interpretation of Hayek as a utilitarian see Yeager (1989) p. 331.
- 14 Hayek (1976) p. 132.
- 15 Hayek (1988) p. 27.
- 16 Gray (1989) p.98.
- 17 Buchanan (1975) p. 194.
- 18 Hayek himself is well aware of this . e.g. Hayek (1973) p. 88: "The fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad. It there-

- fore does not mean that we can altogether dispense with legislation.”
- 19 Dobuzinskis (1989) p. 252.
 - 20 Dobuzinskis (1989) p. 258.
 - 21 Dobuzinskis (1989) p. 258.
 - 22 Hayek (1976) p. 25. However this shall not be taken as a permission to tinker with the system in any way we like. On the same page he clearly points out that we're not allowed to change the basic character of the body of rules since "the test by which we can judge the appropriateness of a particular rule will always be some other rule which for the purpose in hand we regard as unquestioned".
 - 23 Vihanto (1987) p. 23.
 - 24 Hayek (1988) p. 36, 69.
 - 25 Hayek's approving comments on the analysis of the so called property rights school seems to imply that Hayek would approve of this at least in certain circumstances. (1988) p. 36.
 - 26 Shand (1984) p. 105, Vihanto (1987) p. 32.
 - 27 Friedman (1989) p. 168.
 - 28 Vihanto (1987) p.28.
 - 29 The classic presentation of competition between geographical government units as analogous to market competition is Tiebout (1956).
 - 30 See e.g. DiZerega's (1989 p. 218—220) description of democracy as a coordination system. The main point is that through a free debate everyone can express his information and make it into general knowledge. While it's undoubtedly true that a free debate is an effective way to gather information, the problem remains that the amount of information any single mind can digest is very limited. Besides, it doesn't take account of the fact that a lot of information is only tacitly held and can therefore not be expressed in any debate.
 - 31 Olson (1982).