

Hayek the Rule of Law and the Challenge of Emergency.

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The vision of the rule of law is a central part of economic culture¹ since it defines (i) legitimacy, (ii) the scope of state regulation of private acts, (iii) the origin of authority, (iv) the possibilities and limits of change, and (v) the extent of government authority in times of crisis. To define the rule of law two justificatory theories have been devised: natural rights and the social contract, Friedrich von Hayek was an active participant in this debate. But in times of crisis the rule of law and the culture that is its environment are challenged, and two conflicts appear, the first is who should make the decisions, and second if he or she should abide to existent rules or could have the benefit of the deference of other powers and of society to look to extralegal solutions.

Friedrich von Hayek gave an answer to these questions and his vision serves as guidance for future situations.

The legal works of Friedrich von Hayek raise three different issues:

1. Natural rights as the essence of the rule of law, in contrast with the social contract as a source of constitutional legitimacy. A question emerges from Hayek general vision of the rule of law, Could we imagine an application of the social contract theory to Hayekian thought, and in this way correct some of the inconsistencies of the natural rights theory?
2. The characterization of law as a spontaneous order and its evolutionary character.
3. The solution of economic emergencies, his opposition to Carl Schmitt and John Maynard Keynes.

¹ About *economic culture* Hayek (*The Constitution of Liberty*, p. 181) once claimed that “a group of men can form a society capable of making laws because they already share common beliefs which make discussion and persuasion possible and to which the articulated rules must conform in order to be accepted as legitimate.”

The Rule of Law and a Common Culture.

Hayek accepts the existence of natural rights based on the idea that every society has a common culture.

The important point is that every man growing up in a given culture will find in himself rules, or may discover that he acts in accordance with rules-and will similarly recognize the actions of others as conforming or not conforming to various rules.²

He also recognizes that some societies are multicultural and questions the government activity in centralizing education and therefore unifying the cultural patterns of society. He gives the example of Prussia and reflects:

The role played by Prussia during the succeeding generations may make one doubt whether the much lauded Prussian schoolmaster was an unmixed blessing for the world, or even for Prussia.³

However the idea that modern societies have a common culture has been disputed. Jürgen Habermas, for example indicates that in present multicultural societies no cultural bonds exist. At least the existing cultural bonds are not sufficient to solve complex legal problems. Habermas suggests that law is the main cultural link that unites modern democratic societies and mentions other:

Modern societies are integrated not only socially through values, norms, and mutual understanding, but also systemically through markets and the administrative use of power.⁴

If so we must reconsider the exclusive use of natural rights to describe the present rule of law, because natural rights have a strict normative character and if applied to persons of divergent values and beliefs it would have the consequence of imposing moral values of a particular group and of a specific period of time to persons who do not share them.

² HAYEK Friedrich. A. von, Law, Legislation and Liberty, 19 ((The University of Chicago Press ed. 1973).

³ HAYEK, Friedrich A. von, The Constitution of Liberty, p. 301.

⁴ HABERMAS Jurgen, Between the Facts and Norms, 39 (William Rehg trans., MIT Press 2d ed.1996) (1992).

Natural Rights or Social Contract?

Both natural rights and social contract are forms to describe the legitimacy of the law. Natural rights describe the law through the values they represent, values that are rigidly defined. On the other hand the social contract is not based on values but in an agreement in a procedure. This constitutes the main difference between law and morals, since

(...) the relatively concrete character of law (in comparison to morality) concerns not only (a) the content and (b) the meaning of legal validity, but also (c) the mode of legislation.⁵

The “mode of legislation” indicates the procedures of rulemaking, that includes legislation and administrative decisions but also the legal precedents made for the solution of conflicts and in the interpretation of the Constitutional contract or the “general principles of law”. In a “proceduralist concept of democracy” democratic deliberation is organized in an established procedure for the determination of all legal rules, which includes a jurisprudence of procedures and not a jurisprudence of values.

A constitutional court guided by a proceduralist understanding of the constitution does not have to overdraw on its legitimation credit. It can stay within its authority to apply the law—an authority clearly defined in terms of the logic of argumentation—provided that the democratic process over which it is supposed to keep watch is not described as a state of exception.⁶

Regardless of Hayek’s acceptance and insistence in natural rights and a jurisprudence of values, due I believe to his legal education in central Europe, one of the points of this paper is to indicate that **his legal doctrine is not incompatible with social contract theories, particularly with his idea of law as a spontaneous and evolutionary order**. The social contract contains mainly a procedure for the creation and determination of rules and only a very general description of human rights. This allows the spontaneous development of legal institutions and its ensuing evolution. Natural rights on the contrary present a certain ideological rigidity in their content and this limits the deliberations needed in a democracy. Evolution in natural rights is only permissible in

⁵ HABERMAS supra note 3 at 153

⁶ HABERMAS, supra note 3 at 279. We shall refer to the state of exception later in the paper.

the presence of new and better information but without a change in its essence. They are perennial.⁷

The possibility offered by the social contract to open a debate on the evolution of its contents and application of the law limits the residual violence that exists in any legal system when a debate of legal change is incorporated, including the one that could exist about the original version of the contract. Critics of the social contract theory which include defenders of gender rights and race relations, sometimes consider the idea that the social contract could be the basis for racial or gender discrimination. But the contents of the contract could be changed through new debates and judicial decisions. This is what Habermas defines as the dialogical conception of the law, since the contract could only be applied through a debate, a dialogue, previous of the judicial decision that makes the legal rule obligatory, no one could suffer the application of a rule without a debate in which he or she participates. In this sense too there is certain coherence between the social contract in Rawls, the spontaneous and evolutionary order in Hayek, and the dialogical concept of law in Habermas.

Following the procedural theory of the political system Habermas considers that law is legitimate if it's self applied and not imposed from the outside.

*Within the framework of the constitutional state, the civic practice of self-legislation assumes an institutionally differentiated form. The idea of the rule of law sets in motion a spiraling self-application of law, which is supposed to bring the internally unavoidable supposition of political autonomy to bear against the facticity of legally uncontrolled social power that penetrates law from the outside.*⁸

Hayek legal formation in Austria at the beginning of the XXth. Century included the influence of Friedrich Carl von Savigny and the historical

⁷ See Heinrich Rommen. "From a purely factual standpoint the history of the natural-law idea teaches one thing with the utmost clearness: the natural law is an imperishable possession of the human mind. In no period has it wholly died out. At least since the advent of Christianity, it has always had a home in the philosophia perennis whenever it appeared to be temporarily banished from the secular wisdom of the jurists." *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. Thomas R. Hanley. (Indianapolis: Liberty Fund 1998) ch. 13.

⁸ HABERMAS, *supra* note 3 at 39.

school of law, which included the evolution of law and the recognition of natural rights and the general principles of law. Savigny thought that the legal evolution would take place through the interpretative work of jurists and not of judges or legislators. Legal Historicism evolved into positivism and the generalized codification movement at the end of the XIX century. But Hayek clearly understood that all legal situations could not be codified and that the sources of law were disperse and could not be centralized by the will of the legislator, and at the same time legal systems evolved with time. He maintained nevertheless the existence of natural rights, which is, I believe the feeble part of his argument. At the same time there is an evolution in Hayek that although formally insists on natural rights does not deny the possibility of accepting the theory of the social contract. These evolution from natural rights to contractarianism and the definition of the Constitution appear both in the recognition by Hayek of Rawls paper previous to the Theory of justice, but also in his books the *Constitution of liberty*, *Law, Legislation and Liberty*, and *The Fatal Conceit*.⁹

Hayek and the “Rule of Law”.

Hayek’s decision to write an extensive volume about the rule of law came apparently from a comment from John Maynard Keynes. Keynes who read the *“Road to serfdom”* on the ship that took him to Bretton Woods asked Hayek if he was not adverse to all forms of government intervention, how one could tell good government intervention from bad. Hayek finally answered in *“the Constitution of liberty”*.¹⁰

In this book he defined liberty as

*“that **condition of men in which coercion of some by others is reduced as much as is possible in society.** This state we shall describe throughout as a state of liberty or freedom.”*

He indicated at the same time the evils of coercion:

Coercion is evil precisely because it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the

⁹ About Hayek’s opinion of Rawls social contract, see later in this paper.

¹⁰ Bruce Caldwell. Hayek’s Challenge. University of Chicago Press. 2004. P. 289.

*achievement of the ends of another. Free action, in which a person pursues his own aims by the means indicated by his own knowledge, must be based on data which cannot be shaped at will by another.*¹¹

By "coercion" we mean 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.

Hayek defines "The rule of law" as the doctrine concerning what the law ought to be, concerning the general attributes to a particular law social process". The "laws of liberty" are abstract and impersonal, universal in application, and equally enforced. Although Hayek dissents in the Constitution of Liberty, with fellow Austrian jurist Hans Kelsen because he is a positivist, in this point there is a **coincidence who indicates that the general norm is abstract and has to be transformed by the judge into a private norm which is no longer abstract but obligatory and individual and directly applied**. This transformation of the general norm into the individual norm is where the evolutionary process of the creation of law becomes evident. Hayek indicates the contrast between the general law with laws that seek specific outcomes for private persons.¹²

Following the natural rights tradition Hayek considered that the rule of law was best to find not according to its source, as if they were included in the Constitution, but according to the capacity to abide by "*general principles of law*". In this definition although he uses the English word "rule of law" he is thinking in the Germanic concept of "**Rechtstaat**" which could be translated literally as "state of law" or "state of right"¹³ which is a concept that has a deep influence of natural law. Furthermore Hayek has a whole chapter in "the Constitution of liberty" dedicated to the idea of the "*Rechtstaat*" written in the original German.

¹¹ The Constitution of Liberty. Ch. I . Liberty and liberties.

¹² See Hans Kelsen General Theory of Law and State. Harvard University press. 1949. P. 37. Hayek in the Constitution of Liberty says, "the "pure theory of law" and expounded by Professor H. Kelsen, signaled the definite eclipse of all traditions of limited government." Ch. 16 The decline of the law. This description of Kelsen by Hayek is a error, not only Kelsen was a democrat but his books were never used to promote authoritarianism.

¹³ Hayek would have preferred the word 'right' instead of 'law', since he criticizes Cicero in translating the Greek "nomos" as "lex" instead of "ius", curiously enough through a quotation of Carl Schmitt. Law, Legislation and Liberty, p. 169.

The *Rechtsstaat* as a Natural Law Concept.

The term *Rechtsstaat* originated in Germany in 1798 as a neologism combining the words “law” and “state,” thus putting more emphasis on the nature of the state than on the judicial process. Robert von Mohl, who contrasted the *Rechtsstaat* with the aristocratic police state, popularized it, he defined the main objective of a *Rechtsstaat* as “organizing the living together of the people in such a manner that each member of it will be supported and fostered, to the highest degree possible, in the free and comprehensive exercise and use of his strengths.”¹⁴

For Carl Schmitt the *Rechtsstaat* is an all-purpose notion, “magic box,” or *zauberkiste* from which an ingenious spirit could take out, by means of a magical trick, any suitable legal principle or claim. He said the *Rechtsstaat*

*“can stand for as many different things as the word Recht [law] itself and for as many different concepts as the many institutional arrangements implied by the words Staat [state].”*¹⁵

To avoid the natural law implications that gave the term *Rechtsstaat* its legal opacity, the German Basic Law of 1949 defined the *Rechtsstaat* as a fundamental principle, thus transforming it into positive law. Article 28, Paragraph 1, says

“The constitutional order in the Länder must conform to the principles of the republican, democratic and social state under the rule of law within the meaning of this Basic Law.”

The concept of *Rechtsstaat* has evolved into a constitutional principle with the constitutional practice of the Basic Law, this principle influences all the activities of the state under the law. It also includes fundamental organizational principles, e.g.: the separation of powers, the constitutional judicial review undertaken by the German Constitutional Court, the principles of legality, fair procedure, and legal certainty, and the principle of proportionality. Despite its evolution and its extreme

¹⁴ Robert von Mohl, *Die Polizeiwissenschaft nach den Grundsätzen der Rechtsstaates* 8 (Tubingen, Laupp 1844), (cf. Ricardo Gosalbo-Bono 72 U. Pitt. L. Rev. 229 University of Pittsburgh Law Review Winter, 2010 THE SIGNIFICANCE OF THE RULE OF LAW AND ITS IMPLICATIONS FOR THE EUROPEAN UNION AND THE UNITED STATES)

¹⁵ Carl Schmitt, *Legalität und Legitimität*, quoted by Ricardo Gosalbo-Bono 72 U. Pitt. L. Rev. 229 p. 245

popularity, both in the legal literature and with the Constitutional Court, the present Rechtsstaat has not managed to escape criticisms that underline its relative and elusive nature. As Hans Kelsen indicated “*the problem surrounding the study and the definition of the Rechtsstaat start with the very word.*” Kelsen considered it had a questionable dogmatic value, it covers many of the different principles already guaranteed in the Basic Law, and indeed, its very usefulness is questionable since the Rechtsstaat is little more than a pleonasm, redundant with the concept of *staat*.¹⁶

Hayek’s Rule of Law and Rechtsstaat.

In “The Road to Serfdom” Hayek identified the rule of law as the core of British liberty and established a connection between “*the growth of a measure of arbitrary administrative coercion and the progressive destruction of the cherished foundation of British liberty, the rule of law.*” In its description of the rule of law he juxtaposed three different ideas:

- (1) The English common law, which developed through time and was founded on tradition and case-law, in which political institutions are merely instrumental;
- (2) The legal orders founded on the natural law idea of the Rechtsstaat, and
- (3) As opposition the legal orders of the totalitarian states where institutions were central for the operation of legal regulations.

According to Hayek, only the English legal order genuinely ensures a notion of the rule of law based on liberty, allowing individuals to know the range of activities in which they are completely free to do as they please without being exposed to government coercion. Nevertheless in his explanation of the limits of the State Hayek describes the need of predetermined limits. But these limits *ex ante* are generally established in the constitutional contract and not in natural rights that are indetermined

¹⁶ Hans Kelsen, *Reine Rechtslehre* (1960) 2d ed. Wien 1992. P. 314. In English the book is *Pure Theory of Law*. Translated by Max Knight. University of California Press, Berkeley 1978.

*“The government in all its actions is bound by rules fixed and announced beforehand, rules which may be possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. The goals of substantive equality and distributive justice are inconsistent with the rule of law.”*¹⁷

He considers correctly that the rule of law makes the action by authorities predictable,

*“makes it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.”*¹⁸

The Constitutional Foundations of the Economic System.

For Hayek "the rule of law" means primarily the limitation of the coercive power of the state, but is more than a constitutional limitation, it requires the acceptance of certain principles:

*It is a doctrine concerning what the law ought to be, concerning the general attributes that particular laws should possess. This is important because today the conception of the rule of law is sometimes confused with the requirement of mere legality in all government action. The rule of law, of course, presupposes complete legality, but this is not enough: if a law gave the government unlimited power to act as it pleased, all its actions would be legal, but it would certainly not be under the rule of law. The rule of law, therefore, is also more than constitutionalism: it requires that all laws conform to certain principles.*¹⁹

But the determination of principles requires some form of ex ante agreement and a structure of governance that assures its application and recognizes its evolution. The Law creates the basis of the economic

¹⁷ F.A. Hayek, *The Road to Serfdom*. P 80

¹⁸ *The road to serfdom*, supra note , at 112

¹⁹ Hayek *The Constitution of Liberty*. CHAPTER FOURTEEN The Safeguards of Individual Liberty

system, Walter Eucken indicates that the formation of the institutional framework of the economy should not be left to itself, since *"the realization of the laissez-faire principle courses the tendency for its abolition."*²⁰ In this way the state has to influence of forms within which economic activities are carried out, not economic process itself. The fundamental idea behind the theoretical approach is to create and maintain institutional framework that guarantees the proper functioning of the free market economy.

As guidelines to this end, Eucken developed a set of principles that should be included in our interpretation of the constitutional contract, and these principles include what David Hume called the "three fundamental laws of nature",

- the stability of possession, that is private ownership,
- transference by consent, in modern terms, freedom of contract, and
- the performance of promises or the respect of contracts.²¹

In addition, Eucken indicates

- The need for open markets,
- The stability of economic policy, and
- The primacy of the monetary policy.²²

Hayek links the definition of the rule of law to the problem of coordination of dispersed knowledge

*6. The rationale of securing to each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge, especially of his concrete and often unique knowledge of the particular circumstances of time and place. **The law tells him what facts he may count on and thereby extends the range within which he can predict the consequences of his actions. At the same time it tells him what possible consequences of his actions he must take into account***

²⁰ Walter Eucken -The foundations of economics: history and theory in the analysis of economic reality.- 992 (1950), also Cuestiones fundamentales de la Economía Política. Madrid. 1947.

²¹ Which are accepted by Hayek. The Constitution of Liberty. Ch. 10.

²² Walter Eucken -The foundations of economics: history and theory in the analysis of economic reality.- 992 (1950), also Cuestiones fundamentales de la Economía Política. Madrid. 1947.

or what he will be held responsible for. This means that what he is allowed or required to do must depend only on circumstances he can be presumed to know or be able to ascertain. No rule can be effective, or can leave him free to decide, that makes his range of free decisions dependent on remote consequences of his actions beyond his ability to foresee. Even of those effects which he might be presumed to foresee, the rules will single out some that he will have to take into account while allowing him to disregard others. ²³

In this sense a market system needs a set of institutions to function properly. Among them, a Democratic political system with constitutional protections of the spheres of privacy and well-defined and enforced property rights. In resemblance to the Ordo economists²⁴, Eucken among them, Hayek considers

*7. The range and variety of government action that is, at least in principle, reconcilable with a free system is thus considerable. **The old formulae of laissez faire or non-intervention do not provide us with an adequate criterion for distinguishing between what is and what is not admissible in a free system.** There is ample scope for experimentation and improvement within that permanent legal framework which makes it possible for a free society to operate most efficiently. We can probably at no point be certain that we have already found the best arrangements or institutions that will make the market economy work as beneficially as it could.* ²⁵

Law as a Spontaneous and Evolutionary Order.

Friedrich Carl von Savigny first envisioned the **evolutionary theory of law**. Probably one of the greatest jurists of all time he was the founder and inspiration of the German historical school of Law in the XIX

²³ Hayek, The Constitution of Liberty at 156.

²⁴ Alston defines “ordoliberalism” in conventional fashion as insisting on “the importance of an appropriate constitutional and regulatory framework to provide the setting within which a private law system premised on private property, contractual freedom, open markets, etc. can flourish.” Philip Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, 13 Eur. J. Int'l L. 815, 816 (2002).

²⁵ [Hayek Constitution, page 231]

century. For Savigny Law was not purely a construction of reason, as the natural lawyers had presented it, but the product of the tradition of a particular people. A people's law, like its language, should reflect the popular character and should change "organically" as societies change. **Law grows, not by the arbitrary will of the legislator, but by "internal silently operating forces"**. He gave the determination of the law not to judge's orders but to professional jurists, and legal change takes place through juristic debate. This idea evolved from the law of Citations of the year 426 during the late period of Roman law, where the works of certain jurists were given authority of law. The classical jurists participated in the work of legal development in such a way that they were able to introduce new legal institutions without discarding the old, thus producing our "judicious mixture of the permanent and progressive principles." Savigny's main work is the "System of modern Roman law."

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The rule of law and its German version the Rechtsstaat, is an important element in Hayek's economic theory. For he defines rules as conventions, habits that we acted in accordance with even before we were conscious of their existence. He associates the origins of rules with the origin of the market system the product of the human action but not of the human intent.

Life of man in society, ...is made possible by the individuals acting according to certain rules. With the growth of intelligence, these rules tend to develop from unconscious habits into explicit and articulated statements and at the same time to become more abstract and general. Our familiarity with the institutions of law prevents us from seeing how subtle and complex a device the delimitation of individual spheres by abstract rules is. If it had been deliberately designed, it would deserve to rank among the greatest of human inventions. But it has, of course, been as little invented by any one mind as language or money or most of the practices and conventions on which social life rests.²⁷

The **system of spontaneous order** in society appears when human beings interact with each other on their own initiative or subject only to the laws that uniformly apply to all of them. Hayek obviously enjoyed the

²⁶ English translation of vol. 1, Madras 1867." [See Peter Stein. The new Palgrave dictionary of economics and the law. Volume 3, page 396.]

²⁷ *The Constitution of liberty. Page 148*

use of the words "spontaneous order", strictly speaking the word "order" is perhaps inexact, for we are in reality speaking of a decentralized system for rulemaking. This said, the expression "spontaneous order" is widely used and we should continue doing so in spite that in it **there is less spontaneity than decentralization in rulemaking.**

These twin ideas of **evolution and spontaneous order** are a central part of Hayek's doctrine.

Spontaneous order is a result of competition and evolution,

"...in the relations among men, complex and orderly and, in a very definite sense, purposive institutions might grow up which owed little to design, which were not invented but arose from the separate actions of many men who did not know what they were doing. This demonstration that something greater than man's individual mind may grow from men's fumbling efforts represented in some ways an even greater challenge to all design theories than even the later theory of biological evolution.

... an evident order which was not the product of a designing human intelligence need not therefore be ascribed to the design of a higher, supernatural intelligence, but that there was a third possibility— the emergence of order as the result of adaptive evolution."²⁸

Rules abstract and general are different from commands. This permits people to respond in circumstances that differ in detail but are similar in general form. It should be noted however that a general norm that is abstract has to be transformed, or concretized, into an individual norm, similar to a command, in order to be applied in a particular case, generally through a judicial decision. It is the judicial decision that transforms the general rule into a particular rule applicable in a determined case. ²⁹.

The Activity of the Judge in the Spontaneous Order.

Hayek indicates the function of the judge in the determination of the contents of the law

²⁸ The Constitution of liberty, page 59

²⁹ See Hans Kelsen, General theory of Law and State. Harvard University press. 1949. "General and individual norms" page 37. Kelsen also indicates the impossibility of law being a command, which is particularly evident in the case of customary law. Page 35

*The distinct character of the rules which the judge will have to apply, and must endeavour to articulate and improve, is best understood if we remember that he is called in to correct disturbances of an order that has not been made by anyone and does not rest on the individuals having been told what they must do. In most instances no authority will even have known at the time the disputed action took place what the individuals did or why they did it. **The judge is in this sense an institution of a spontaneous order.** He will always find such an order in existence as an attribute of an ongoing process in which the individuals are able successfully to pursue their plans because they can form expectations about the actions of their fellows which have a good chance of being met.³⁰*

Hayek also analyzes the motivations of the judge:

*The distinctive attitude of the judge thus arises from the circumstance that he is not concerned with what any authority wants done in a particular instance, but **with what private persons have 'legitimate' reasons to expect, where 'legitimate' refers to the kind of expectations on which generally his actions in that society have been based.** The aim of the rules must be to facilitate that matching or tallying of the expectations on which the plans of the individuals depend for their success.³¹*

Judges resolve conflicts and at the same time create the rules with better information on the demands of society than legislators and regulators.

For the understanding of the process by which such a system of rules is developed by jurisdiction it will be most instructive if we consider the situations in which a judge has not merely to apply and articulate already firmly established practices, but where there exists genuine doubt about what is required by established custom, and where in consequence the litigants may differ in good faith. In such cases where there exists a real gap in the recognized law a new rule will be likely to establish itself only if somebody is charged with the task of finding a rule which after being stated is recognized as appropriate.

³⁰ [Law legislation and liberty. Volume 1, page 95]

³¹ [Law, legislation and liberty, page 98]

Thus, although rules of just conduct, like the order of actions they make possible, will in the first instance be the product of spontaneous growth, their gradual perfection will require the deliberate efforts of judges (or others learned in the law) who will improve the existing system by laying down new rules. Indeed, law as we know it could never have fully developed without such efforts of judges, or even the occasional intervention of a legislator to extricate it from the dead ends into which the gradual evolution may lead it, or to deal with altogether new problems. Yet it remains still true that **the system of rules as a whole does not owe its structure to the design of either judges or legislators. It is the outcome of a process of evolution in the course of which spontaneous growth of customs and deliberate improvements of the particulars of an existing system have constantly interacted.** Each of these two factors has had to operate, within the conditions the other has contributed, to assist in the formation of a factual order of actions, the particular content of which will always depend also on circumstances other than the rules of law. No system of law has ever been designed as a whole, and even the various attempts at codification could do no more than systematize an existing body of law and in doing so supplement it or eliminate inconsistencies.³²

The American Constitution in a Spontaneous Order

Although Hayek had been educated in the European legal systems and that influence pervades his work, he recognizes the importance of the American Constitution. Although he thinks that "it is still an experiment in a new way of ordering government, and we must not regard it as containing all wisdom in this field."³³ which is surprising since it is one of the most successful experiments in governance in human history. He considers that the chief point is that in the United States it has been established that the Legislature is bound to general rules that must deal with particular problems in such a manner that the underlying principle can also be applied in other cases. And if it infringes a principle hitherto observed, that perhaps never was explicitly stated it must acknowledge this fact and must submit to an elaborate process in order to ascertain whether the basic beliefs of the people really have changed. *The*

³² [See Law, legislation and liberty, page 100]

³³ The Constitution of liberty, chapter 12, paragraph 9

Constitution of Liberty was written in 1960, and at that time the importance of judicial review for the consolidation of the rule of law was not completely acknowledged in Europe, although it existed in a centralized manner in Germany since 1949 and in Italy since 1946. It did not exist in Britain, France or Spain till decades later. So modern scholars in reading these words of Hayek should in no way acknowledge them as a denial of the importance of judicial review for the determination of legal rules. On the contrary since its application reinforces the general principles of Hayek's doctrine

Hayek against Carl Schmitt on the meaning of the Constitution.

Hayek follows the European continental tradition, which considered that constitutional law was not really law,

*To the rules which we are in the habit of calling 'law' but which are rules of organization and not rules of just conduct belong in the first instance all those rules of the allocation and limitation of the powers of government comprised in the law of the constitution. They are commonly regarded as the 'highest' kind of law to which a special dignity attaches, or to which more reverence is due than to other law. But, although there are historical reasons which explain this, **it would be more appropriate to regard them as a superstructure erected to secure the maintenance of the law, rather than, as they are usually represented, as the source of all other law.***³⁴

He reiterates the distinction between "**formal law**" and "**material law**" that was traditional between the last part of the 19th century and the first part of the 20th century in Germany and Italy. Hayek indicates a conflict between "**natural law**" and "**general principles of law**" on one side and the law of the Constitution on the other because he is answering the writings of the main German constitutionalist of the first half of the 20th century, which he mentions in a derisory way at the end of the first volume of "Law, Legislation and Liberty ", **Carl Schmitt**.

³⁴ [Law, legislation and liberty, volume 1, page 134].

*There is indeed no better illustration or more explicit statement of the manner in which philosophical conceptions about the nature of the social order affect the development of law than the **theories of Carl Schmitt** who... whose characteristic terminology is as readily employed by German socialists as by conservative philosophers. His central belief, as he finally formulated it, is that from the 'normative' thinking of the liberal tradition law has gradually advanced through a 'decisionist' phase in which the will of the legislative authorities decided on particular matters, to the conception of a 'concrete order formation', a development which involves 'a re-interpretation of the ideal of the nomos as a total conception of law importing a concrete order and community'.²⁰ In other words, law is not to consist of abstract rules which make possible the formation of a spontaneous order by the free action of individuals through limiting the range of their actions, but is to be the instrument of arrangement or organization by which the individual is made to serve concrete purposes. This is the inevitable outcome of an intellectual development in which the self-ordering forces of society and the role of law in an ordering mechanism are no longer understood.³⁵*

Hayek was educated into European traditions, which lacked written constitutions and judicial review. In the English tradition he accepted the constitutional conventions described originally by Albert Venn Dicey³⁶, which Hayek associated with general principles of law and natural rights. Hayek considered that this English tradition respected economic rights and liberties and therefore should be preferred to a description of civil and economic rights in a written, formal and supreme document like the Constitution. The other tradition that influenced him was the Continental constitutions and primarily the Constitution of the German Republic approved in Weimar in 1918. This Constitution was the work mainly of the socialist jurist Otto Preuss and had a wide recognition of social rights and limitations to property rights in many aspects similar to

³⁵ Hayek. *Law, Legislation and Liberty*. P 104. Hayek mentions Schmitt Nazi past and quotes Johannes Huizinga, *Homo Ludens* (1944), English translation (London, 1947), p. 209:

I know of no sadder and deeper fall from human reason than Schmitt's barbarous and pathetic delusion about the friend-foe principle. His inhuman cerebrations do not even hold water as a piece of formal logic. For it is not war that is serious but peace. P. 161

³⁶ Dicey in his book *An Introduction to the Study of the Law of the Constitution* (1885) popularized the term "rule of law" although its origin was much older.

the Constitution of the Russian Federation of 1917. The Weimar Republic had a tragic ending, but while it lasted it encouraged a wide constitutional debate, this debate included the commentators of the Austrian Constitution of 1920, mainly through the work of Hans Kelsen. Kelsen debated with Carl Schmitt about who was the main custodian of the Constitution. Kelsen considered the constitutional legal document and following the American tradition, was in favor of judicial review although in a centralized form. He therefore maintained that courts and in particular a constitutional court were the guardians of the Constitution. On the contrary **for Carl Schmitt the Constitution was a political document and considered that the protector of the Constitution was the president of the Reich.**³⁷ For Schmitt the Constitution included two types of rules, the ones that came from the “decision” of the German people and were supreme, and the rest that were mainly “constitutional laws” and were inferior. The interpretation of the “decision” of the people belonged to the President who could establish the state of emergency.

Hayek dissented with both Schmitt and Kelsen, he considered Kelsen a positivist³⁸ and therefore contrary to the evolutionary theory of law which he accepted from authors like David Hume, Edmund Burke, F. C. von Savigny, among others. Hayek felt that a purely legal reading of the Constitution interpreted by judges could mean the application of the social rights that were written in its text. He would only have knowledge of the American constitutional system of judicial review later in his life and its practice didn't influence his work, which is unfortunate because I feel that it would have given his legal theory a more general span.

However Hayek had also a stalwart opposition to Carl Schmitt, more than he acknowledges in his books. Reading them there is a feeling that he always has Schmitt in mind when he writes, and he uses against him the strongest of terms. In this particular case he opposes the three basic points of Schmitt's constitutional theory,

- (i) the dialectic between friend and foe, that defines all political debate;

³⁷ [See Hans Kelsen, *La Garantie Jurisdictionnelle de la Constitution*. 1929, and Carl Schmitt, *Der Hutter del Verfassung*. (1931) Italian translation “Il custode della costituzione” Milano 1981.]

³⁸ see *Law legislation and liberty* of volume 1 page 74

- (ii) the state of exception doctrine, indicating that the President was indeed the sovereign power since he controlled the power to establish the state of emergency or exception, and
- (iii) the "decisionist" creation of a "concrete order formation", the main parts of the Constitution were the creation of the Decision by the people, the rest were merely "constitutional rules" of lesser importance.³⁹

All these principles, that Schmitt called part of a "political theology", were the foundations of the authoritarian state and the slippery slope to the Nazi legal regime.

The Evolution from Natural Rights to the Social Contract.

Hayek and the Idea of Constitution in Aristotle.

Hayek's idea of the Constitution as a description of natural rights reminds of Aristotle's description of the Constitution. For Aristotle the formal call of the state is in its Constitution, it is "a certain ordering of the inhabitants of the city state".⁴⁰ According to Aristotle the Constitution is not a written document but an organizing principle, analogous to the soul to an organism; the way of life of its citizens. The person who established the city-state is the lawgiver, someone like Solon in Athens or the Lycurgus in Sparta, who founded the Constitution. Aristotle compares the lawgiver to a craftsman [*demiurgus*], hence giving this mythical character, demiurgic, to the founder of the Constitution of the state.

This description "the Constitution is a certain way of organizing those who inhabit the city state" gives rise to the idea that the Constitution is more than the written document and includes traditions, conventions and customs. This definition gave origin to the idea of the material Constitution in opposition to the formal or written one. Aristotle described the Constitution of every city-state in ancient Greece although only the description of the Constitution of Athens survives. Aristotle's

³⁹ see Law, legislation and liberty. Volume 1, page 71

⁴⁰ [Aristotle Politics. III.1. 1274]

Constitution looks for the universal justice for the "common advantage" of its citizens, which includes a just claim by every citizen to private property and to an education.⁴¹ In the Politics III. 11, Aristotle indicates that the many are better than the individual when they come together, although they could be inferior when considered individually. For if each individual has a part of virtue in a group or multitude they could put these assets together and be better rulers than the wise individual. Which could be a distant origin of Hayek's idea of the "**spontaneous order**" **applied to the Constitution.**

The Austrian School and Social Contract.

Carl Menger writes that States may develop from the corporations between heads of families without any agreement, determined only by their members' progressive realization of individual interests.⁴² The modern open state could be described as a voluntarily concluded contract, in the sense of an implicit long-term contract between its constituents, the principals and their agents, the government officials. This constitutional contract creates both the political institutions and the structures of governance for its interpretation in the future.

The central topic of the contract literature on the State since John Locke is the need to safeguard individual freedom, and to prevent the dangers of totalitarianism of which Hayek warned against in his writings on the rule of law⁴³.

The "constitutional economics" school created by James Buchanan is also based in the social contract although its origins are nearer to Hobbes than to John Locke; and naturally to John Rawls who gave impetus to the contractarian model of government.

⁴¹ [Aristotle. Politics.VII.9. 1329].

⁴² Carl Menger, Problems of Economics and Sociology. 1883. University of Illinois press 1963, book 3 chapter 2.

⁴³ This worry to understand the dangers of totalitarianism, including its genesis by the slippery slope, were established in Hayek's book "the Road to serfdom" [1944] and it's a central topic of the contract literature of the state since John Locke. Hayek's "the Constitution of liberty" [1960] should be included in this process, as also should be the German authors of the "economic order". Eucken, "The Foundations of Economics" German edition 1947.

In thinking about constitutions European scholars begin by describing the ends of government and then deducing the constitutional rules that will bring about those ends. This follows the tradition of the natural right principles and in general the "general principles of law" tradition. Buchanan and Tullock first consider the means that individuals would agree to use in setting up the Constitution for self-governance and then relied upon such means to deduce agreeable ends. In this they followed the contract area and tradition off setting a procedure more than values to reach an ex ante agreement to form a government. ⁴⁴ This economic theory of constitutions is based in the idea that

“the individual will find advantageous to agree in advance to certain rules (which he knows may work occasionally it on his own disadvantage). When the benefits are expected to exceed the costs. The "economic" theory that may be constructed out of the analysis of individual choice provides an explanation for the emergence of the political Constitution from the discussion process conducted by free individuals attempting to formulate generally acceptable rules in your own long-term interest.” ⁴⁵

One of the reasons of the abandonment of the model of social contract in the 19th century and part of the 20th is that it was merely a metaphor and not a historical event. ⁴⁶ Although this is formally true, it has to be taken into account that the model of social contract is contemporary to the constitutional movement of the late XVIII century and beginning of the XIX, and it's main achievements: (i) the recognition of the division of powers, (ii) checks and balances and (iii) judicial review, have a formal date of origin, that could be interpreted as the conclusion of a contract. The importance of the social contract model and the vision of the Constitution as a long-term contract is that it departs from the idea that a legitimate modern government is a purely historical event, based on political or legal principles. As we reject the historical school in scientific analysis we should also do it in the social sciences. The social contract is not exclusively the product of design but primarily establishes a procedure that will organize the evolution of government. The guarantee

⁴⁴ James Buchanan and Gordon Tullock, *The calculus of consent: logical foundations of Constitutional democracy*. 1962 The University of Michigan Press.

⁴⁵ James Buchanan and Gordon Tullock. *The calculus of consent. Logical foundations of Constitutional Democracy*, University of Michigan Press.1965 page 7.

⁴⁶ See John Kay, *Obliquity. Why goals are Best Achieved Indirectly*. New York, 2011, page 168.

of good governance is not in the principles described but in the development of the established procedure. The result varies with time and is probably different of what the framers of the constitutional contract originally envisaged. It also avoids the risk that the founders of the political system could impose on future generations values that are no longer theirs. David Hume cautioned against the principles established by groups of persons to protect their interests "*each of the sections into which this nation is divided has reared up a fabric of the former kind [of philosophical or speculative system of principles], in order to protect and cover the scheme of actions which it pursues.*"⁴⁷

Hayek and Rawls.

Although Hayek seems to be completely opposed to Rawls differences among them are more verbal than substantial. Their arguments are not strictly opposed but allow some complementarities, it is the case of evolution or contractualism, their description of norms, including anti-utilitarianism, impartiality and experimentation; they also agree in the conception of justice in society through the content and the hierarchy of norms which include the priority of liberty, fair increase of opportunity for everyone and better condition for the poorest

In *Law, Legislation, and Liberty*, Hayek says,

Before leaving the subject I want to point out once more that the recognition that in such combinations as 'social', 'economic', 'distributive' or 'retributive' justice the term 'justice' is wholly empty should not lead us to throw the baby out with the bath water. Not only as the basis of the legal rules of just conduct is the justice which the courts of justice administer exceedingly important; there unquestionably also exists a genuine problem of justice in connection with the deliberate design of political institutions, the problem to which Professor John Rawls has recently devoted an important book. The fact that I regret and regard as confusing is merely that in this connection he employs the term 'social justice'. But I have no basic quarrel with an author who, before he proceeds to that problem, acknowledges that the task of selecting specific systems or distributions of desired things as just must be 'abandoned as

⁴⁷ David Hume, *Essays: Moral, Political, Literary*. Liberty Classics, 1985, book 2, chapter 12, quoted by John Kay, in *Obliquity*, supra note at ___, p. 168.

*mistaken in principle, and it is, in any case, not capable of a definite answer. Rather the principles of justice define the crucial constraints which institutions and joint activities must satisfy if persons engaging in them are to have no complaints about them. If these constraints are satisfied, the resulting distribution, whatever it is, may be accepted as just (or at least not unjust).’ **This is more or less what I have been trying to argue in this chapter.***⁴⁸

Hayek follows up the citation in a footnote:

*(. . .) where the passage quoted is preceded by the statement that ‘It is the system of institutions which has to be judged and judged from a general point of view.’ I am not aware that Professor Rawls’ later more widely read work *A Theory of Justice* (Harvard, 1971) contains a comparatively clear statement of the main point, which may explain why this work seems often, but as it appears to me wrongly, top have been interpret support to socialist demands, e.g., by Daniel Bell, ‘On Meritocracy and Equality’, *Public Interest*, Autumn 1972, p. 72, who describes Rawls’ theory as ‘the most comprehensive effort in modern philosophy to justify a socialistic ethic.’*

Hayek quotes another passage from the same *Nomos* essay that casts Rawls in a similar light. Here’s Rawls:

*If one assumes that law and government effectively act to keep markets competitive, resources fully employed, property and wealth widely distributed over time, and maintains a reasonable social minimum, then, if there is equality of opportunity, the resulting distribution will be just or at least not unjust. It will have resulted from the workings of a just system . . . a social minimum is simply a form of rational insurance and prudence.*⁴⁹

The Social Contract as a Rule of the Spontaneous Order.

Hayek in “Law, legislation and liberty”⁵⁰ indicates that for the determination of spontaneous orders and organization, we have to rely

⁴⁸ Volume 2: *The Mirage of Social Justice*, p. 100,

⁴⁹ John Rawls “Constitutional Liberty and the Concept of Justice” in *Nomos IV, Justice*, 1963, p. 102.

⁵⁰ [volume 1, page 48. “The rules of spontaneous orders and the rules of organization.”]

on rules, and that the important difference between the kinds of rules that the two different kinds of order require are not obvious. Every organization, he says, must rely on rules and not only in specific commands: and the rules of organization are subsidiary to commence, filling in the gaps left by the commands. Such rules will be different for the different members of the organization according to the written roles that have been assigned to them. By contrast,

"the rules governing a spontaneous order must be independent of purpose and be the same, if not necessarily for all members, at least for all classes members not individually designated by name."

And,

"the application will be independent of any common purpose, which the individual need not to know."

Modern society is extremely complex and its spontaneous order cannot be replaced by an organization that allows its members the access to dispersed knowledge. We can preserve an order of such complexity indirectly by improving the rules that allow the formation of the spontaneous order. We can therefore improve the spontaneous order by adjusting the rules where it rests.

Hayek's version of the spontaneous order was very much influence by natural law, that is the reason that he mentions Cicero and medieval thinkers and excludes ancient contractarians as Thomas Hobbes. Nevertheless, social contracts are a procedural rule that allows the development of understanding its order without falling into the structure of an organization, basically, because it permits the evolution of the system. **It establishes a procedure to follow in the creation of rules and not an ex-ante determination of its contents, that is the main difference between the social contract conception of John Rawls and Buchanan with the more traditional version of Rousseau. Rousseau's conception of social contract was also procedural but relied on the metaphysical idea of the "general will" that gave an authoritarian character to its application.** This was the reason of the abandon of the social contract by political thinkers in the 19th century and the resurgence of natural rights theorists and the historical school. In this respect, one cannot avoid mentioning Alexis de Tocqueville⁵¹. **But**

⁵¹ Hugh Brogan. Alexis de Tocqueville. A Life. Yale University Press. 2006. At 340.

modern versions of social contract permit both the creation of procedural rules that permit the development system's basic order and at the same time create a structure of governance that permit its evolution.

The Constitution as a long-term contract.

Social contractarian theory has a history of application to the Constitution. The initial elements of it are present in Federalist 78 written by Alexander Hamilton and referring to “*the right of the courts to pronounce legislative acts void, because contrary to the constitution*” and in the first case of judicial review *Marbury v. Madison* in 1803, which were written relatively close in time to the original ratification. Arguing for the supremacy of the document over ordinary statutes, John Marshall referred to the "original right" of "the people" to establish principles for their future government, *Marbury v. Madison* 1 Cranch 137, 1803 .

Judicial review as the structure of governance of the social contract.

The idea that judges could be the structure of governance of the social contract was first envisaged by John Marshall in the case *McCulloch versus Maryland* of 1819.

Chief Justice John Marshall's famous words from *McCulloch v. Maryland* that “*A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.*”... “*the Constitution [was] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.*” 17 U.S. (4 Wheat.) 316, 415 (1819).

Both *Marbury* and *McCulloch* describe the Constitution as a long-term implicit contract with clauses that are brief and therefore laconic in its description of rights, similar to the **general principles of law** mentioned by Hayek. This brevity in the description of the norms permits both

creation of new rules by spontaneous order and its evolution. But this long-term contract needs a structure of governance to determine the extent of the rules and the solution of legal controversies. In this sense judges and finally the Supreme Court are the structure of governance of the long-term contract called Constitution.

The Natural Rights Reading of the Constitution: the *Luth* Case.

The characteristics of Constitutional interpretation require a wide judicial review procedure. Therefore not all constitutional interpretations follow the contractarian view, particularly if those legal systems have a centralized Constitutional court. In the *Lüth* case the German Constitutional Court after restating the doctrine that fundamental rights are primarily intended to guarantee the individual's sphere of freedom against interference by public power, determined that the Basic Law has a **value system of basic rights**

It is equally true, however, that the Basic Law . . . has set up an objective value system . . . This value system centred round the human personality developing freely in the social community, and its dignity must be regarded as the basic constitutional decision for all spheres of law. Legislation, administration, and the judiciary are given guidelines and inspiration [Richtlinien und Impulse] by it. Accordingly, it also manifestly influences the civil law: no provision of civil law may be in contradiction with it; each one must be interpreted in its spirit.

The legal content of basic rights as objective norms informs private law by means of the rules which directly control this area of law. Just as new rules must conform to the value-system of the basic rights, so existing and older rules receive from it a definite constitutional content which thereafter determines their construction. From the point of view of substantive and procedural law a dispute between private citizens on the rights and duties that arise from rules of conduct thus influenced by the basic rights remains a dispute of private law. It is private law which is interpreted and

*applied even if its interpreters must follow the public law of the constitution.*⁵²

Judicial decisions and spontaneous order.

Hayek recognizes the important judicial decisions in the evolution of the spontaneous order: *“the contention that the judges by the decision of particular cases gradually approach a system of rules of conduct which is most conducive to producing an efficient order of actions becomes more plausible when it is realized that it is in fact merely the same kind of grosses us that by which all intellectual evolution proceeds.”*⁵³ He continues saying that the judge tries to maintain and improve an order that nobody has assigned and that transforms itself without the knowledge and often against the will of authority. But Hayek does not determine where the authority of the judge to indicate the evolution of law lies. There is a need of a foundation for the judicial review of the legislation because if not it could be considered illegitimate against the principles of majority rule and democratic legitimacy. The main question to answer is why a group of men and women with similar origins and intellectual formation could establish the rule of law even against the will of the majority of the citizens. It would be the victory of platonic legitimacy, the modern philosopher kings, against democratic principles in which our system of government is based. Natural rights could not be the foundation of judicial review because a society would not agree in its contents, and are extremely rigid not allowing evolution in its scope, making them extremely difficult to apply them in particular cases. Jurgen Habermas indicates modern societies do not agree in values, they could agree in the methods of decision making. The main argument in favor of judicial review is that it allows a debate by the interested parties following a procedure established ex-ante each time a constitutional decision is taken. This form of decision-making permits **evolution of rules in the spontaneous order along the knowledge of its contents,**

⁵² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (205) (F.R.G.) (English translation in 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT 1, 5 (1998)).

⁵³ Law legislation and liberty. Volume 1 page 118. The Function of the Judges is Confined to a Spontaneous order

by a procedure determined by the social contract that reminds us of the phrase by Ronald Dworkin “the Constitution is a chain novel.”⁵⁴

Public and Private Law in Economic Regulation.

Hayek makes the distinction between a **goal-free civil law**, within which the state does not pursue aims of its own, and the **goal-orientated public law**, which does pursue aims, and thus is particularly in need of legitimacy. Opposing Hayek’s conception of natural rights, there was the theory of “subjective public rights” described by the German public law jurist Georg Jellinek, which represented a statist conception of rights, that is individual rights established by the sovereign authority of the state, which thereby imposed limits on its own freedom of action. These individual rights were the result of popular sovereignty as theorized by the French revolutionaries and did not include the “right of resistance” to the state. ⁵⁵

But the distinction between public and private law can produce unexpected consequences.

In a recent article, professors Phelps and Bhidé mention that one of the causes of the financial crisis in Greece and other countries is that the rules applied to private persons dealing with finance are different and more stringent than the ones that apply to governments. ⁵⁶ They comment on the lack of control on government, which leads to irresponsible borrowing.

Bank lending to sovereign borrowers has been a double disaster, fostering over-indebtedness, especially in countries with

⁵⁴ Ronald Dworkin *Law’s Empire* Belknap Press of Harvard University Press 1986, at 228. Although I disagree entirely with his idea of a “moral reading of the Constitution” which proposes an ideological construction of the Constitution in the exactly opposite vision of Hayek’s.

⁵⁵ Georg Jellinek *System der subjektiven öffentlichen Rechte*. - (1905) Tübingen 2011. Pp. 41-53

⁵⁶ Amar Bhidé and Edmund S. Phelps, **The Root of All Sovereign-Debt Crises** Project Syndicate 2011-08-04

irresponsible or corrupt governments...The solution to breaking the nexus between sovereign-debt crises and banking crises is straightforward: limit banks to lending where evaluation of borrowers' willingness and ability to repay isn't a great leap in the dark.

The reasons for this dualism between the rigid control and sanctions to private borrowers and the generous and irresponsible lending to governments are extremely old and comes from the remote distinction originated in Roman law between public law and private law. This distinction, which has very little foundations in modern legal doctrine, determines that states and private persons are ruled differently, and gives privileges to governments that are denied to private persons. Hayek however indicates the distinction should be maintained.⁵⁷

Nevertheless, although the description of the problem is correct it is the distinction between public and private law that gives these privileges to the state. If public law is part of general law and subject to the constitutional contract and with the review of the courts, the authoritarian characteristics of the traditional concept of public law diminish considerably.

In reality, the distinction between public and private law is a purely historic category that has no meaning in modern law; it was originally a distinction between the legislation created by the state and the legal relations between private parties. Its content was given later and especially since the XIX century. Although the regulatory activity of the state cannot be denied, this distinction between the law of the state that represents the public good and should therefore have a higher status, and the law between private parties, which represent their own private interests and therefore should give way to the general interest represented by the state, is in itself false.

The **limits to public law are better defined if included inside a social contract and not left to undefined general principles of law.** In the contents of the social contract insured during its natural evolution mainly through judicial decisions, some rules could be introduced in order to avoid this legal distinction that has dire consequences to all societies. The distinction between public and private law should be forgotten and one body of law based on the constitutional contracts that

⁵⁷ Hayek, Law, Legislation and Liberty. Volume 1 page 132.

treats both the government and individuals as equal legal persons should be recognized.

Hayek indicates that there can't a be precise distinction between public and private law, although he accepts their existence

*“What we have said so far, then, might be summed up by the statement that the law of legislation consists predominantly of public law. There does not exist, however, general agreement on exactly **where the line of distinction between private and public law is to be drawn.** The tendency of modern developments has been increasingly to blur this distinction by, on the one hand, exempting governmental agencies from the general rules of just conduct and, on the other, subjecting the conduct of private individuals and organizations to special purpose-directed rules, or even to special commands or permissions by administrative agencies. During the last hundred years it has been chiefly in the service of so called 'social' aims that the distinction between rules of just conduct and rules for the organization of the services of government has been progressively obliterated...”⁵⁸*

He indicates that **the terms private and public law could be misleading and that the similarity to private and public welfare could wrongly suggest that private law serves only the welfare of particular individuals and only the public law the general welfare.** Hayek indicates that this confusion is already existent in the original definition in Roman law given by Ulpian in the III century, and widely made public in the Institutes of Justinian⁵⁹. The problem with this distinction between public and private law is that it allows the existence of privileges in favor of the state in regulation that could not be made in favor of individuals. This privilege is based on the idea of public utility associated with the state since the Middle Ages and in the scholastic theory of the "common good." Even if this privilege is given formally to the state it is in reality applied by public officials that act without the control imposed on individual persons, as the article by professors Phelps and Bhidé clearly indicates. We should take a step further than the one taken by Hayek and deny the distinction between the public and

⁵⁸ Hayek, Law, legislation and liberty. Volume 1 page 132.

⁵⁹ Justinian an East Roman Emperor of the VI Century codified the existent Roman law in the “Corpus Iuris Civile”. In that codification was a book for the students of law called the “Institutions”.

private law or limit its existence and historical category existing in Roman law. It should be mentioned that although the Roman legal texts mention the distinction they do not elaborate on the contents of public law but refer exclusively to private. ⁶⁰

The Challenge of Emergency.

The Definition of Emergency.

Political or legal emergency brings a conflict to the full application of the rule of law. The traditional legal solution is to give to political authorities leave to act with less constitutional restraints. These traditional solutions include (i) the suspension of the *habeas corpus*, (ii) the state of siege, (iii) the principle of deference to executive authorities.

Hayek acknowledges that emergencies could exist and indicates that measures taken to limit their effects could put freedom at risk.

*Not only is liberty a system under which all government action is guided by principles, but it is an ideal that will not be preserved unless it is itself accepted as an overriding principle governing all particular acts of legislation. Where no such fundamental rule is stubbornly adhered to as an ultimate ideal about which there must be no compromise for the sake of material advantages—as an ideal which, **even though it may have to be temporarily infringed during a passing emergency**, must form the basis of all permanent arrangements—freedom is almost certain to be destroyed by piecemeal encroachments. ⁶¹*

*Even the most fundamental principles of a free society, however, may have to be **temporarily sacrificed when, but only when, it is a question of preserving liberty in the long run**, as in the case of war. Concerning the need of such emergency powers of government in such instances (and of safeguards against their abuse) there exists widespread agreement.*

⁶⁰ See for example, the Institutions by Justinian, book first, title I of Justice and Law, paragraph 4.

⁶¹ Hayek, The Constitution of Liberty. Freedom, Reason, and Tradition. #9.

*It is not the occasional necessity of withdrawing some of the civil liberties by a suspension of habeas corpus or the proclamation of a state of siege that we need to consider further, but the conditions under which the particular rights of individual or groups may occasionally be infringed in the public interest. That even such fundamental rights as freedom of speech may have to be curtailed in situations of "clear and present danger," or that the government may have to exercise the right of eminent domain for the compulsory purchase of land, can hardly be disputed. **But if the rule of law is to be preserved, it is necessary that such actions be confined to exceptional cases defined by rule,** so that their justification does not rest on the arbitrary decision of any authority but can be **reviewed by an independent court;** and, second, it is necessary that the individuals affected be **not harmed by the disappointment of their legitimate expectations but be fully indemnified for any damage** they suffer as a result of such action.⁶²*

However he only gives to emergencies a passing attention. For example, he mentions that in emergencies you could raise taxes and indicates that the dangers of rent control that were established in emergencies had negative effects only inferior to inflation. But remains relatively silent in comparison with two contemporary figures the economist **John Maynard Keynes** and the jurist **Carl Schmitt**, who wrote extensively on the subject.

Hayek considered *"that the social sciences... unlike most fields of the physical sciences, have to deal with structures of essential complexity."*⁶³ It was therefore very difficult in economics and other social sciences to *"deal with essentially complex phenomena, the aspects of the events to be accounted for about which we can get quantitative data are necessarily limited and may not include the important ones."*⁶⁴ Therefore since we cannot fully predict situations of uncertainty we have to deal with them with care.

Keynes and Carl Schmitt: the Answers to Emergency.

⁶² The Constitution of Liberty. CHAPTER FOURTEEN The Safeguards of Individual Liberty. #9.

⁶³ Hayek. The Pretence of Knowledge. Nobel Prize Lecture. 1974.

⁶⁴ Hayek. The Pretence of Knowledge. Nobel Prize Lecture. 1974.

Hayek considered that “Keynes was, in spite of himself, to contribute greatly to the weakening of freedom...”⁶⁵. He considered that Keynes’ philosophical mistake was

*“that, by taking account of foreseeable effects, he could build a better world than by submitting to traditional abstract rules.... This extraordinary man also characteristically justified some of his economic views, and his general belief in a management of the market order, on the ground that ‘in the long run we are all dead’ (i.e., it does not matter what long-range damage we do; it is the present moment alone, the short run – consisting of public opinion, demands, votes, and all the stuff and bribes of demagoguery- which counts). The slogan that ‘in the long run we are all dead’ is also a characteristic manifestation of an unwillingness to recognize that morals are concerned with effects in the long run – effects beyond our possible perception – and of a tendency to spurn the learnt discipline of the long view.”*⁶⁶

Keynes influence in the rule of law is less mentioned but as important as his economic theories. His opposition to obey the general rules particularly in times of economic crisis had a lasting influence in the decay of the rule of law till present times.⁶⁷ His popular articles like "National Self-Sufficiency," had negative influence in the rule of law since it attacked the constitutional right to commerce with scarce arguments.⁶⁸ Normative Keynesian economic theory has an important authority in the constitutional development of some societies thorough the precedents created by the resolutions of the Supreme Court and lesser judges. Constitutional rights and institutions were decisively determined by Keynesian economic theory not only through the decisions of legislators and government officials, but also and decisively by judicial rulings. This situation created a ‘Keynesian Constitution’ that is still applicable, not completely in the United States but particularly in other countries since the American judicial review is copied in many countries throughout the

⁶⁵ F.A. Hayek. *The Fatal Conceit. The errors of socialism.* The University of Chicago Press. 1991 at 58.

⁶⁶ F.A. Hayek. *The Fatal Conceit.* At. 57.

⁶⁷ In his autobiographical account Keynes mentions that the Cambridge group to which he belonged “*entirely repudiated personal liability on us to obey general rules.*” Quoted by Hayek in *The Fatal Conceit* at 57.

⁶⁸ John Maynard Keynes, "National Self-Sufficiency," *The Yale Review*, Vol. 22, no. 4 (June 1933), pp. 755-769. In this article he writes the oft-quoted phrase: “But let goods be homespun whenever it is reasonably and conveniently possible, and, above all, let finance be primarily national.”

continent.⁶⁹ As an example could particularly mention the association of the Gold Clause cases of the American Supreme Court and the doctrine of the “euthanasia of the rentier” described by John Maynard Keynes in chapter 24 of the General Theory.⁷⁰

Therefore when we analyze the rule of law in case of emergency we must concentrate in the contemporary author that most contradicts Hayek: Carl Schmitt. Hayek criticizes Schmitt particularly in his book *Law, Legislation and Liberty*, but in all his references to the rule of law his attack to Schmitt’s ideas is present even if the censored author remains generally unmentioned. This is understandable since the ominous influence of Schmitt in European public law was extremely important in the first half of the XXth. Century and remains to the present day.

Carl Schmitt: “Sovereign is he who Decides on the Exception.”

Carl Schmitt’s work in Constitutional law pays particular attention to the state of exception. It includes any kind of severe economic or political disturbance that requires the application of extraordinary measures. Whereas an exception presupposes a constitutional order that provides guidelines on how to confront crises in order to reestablish order and stability, a state of emergency need not have an existing order as a reference point because ***necessitas non habet legem.***

He starts his book *Political Theology* with the following definition, “Sovereign is he who decides on the exception.” And associates the idea of sovereignty with the solution of an economic and political crisis. The sovereign is he who can solve the crisis and has no legal limits to do so

*“It is precisely the **exception** that makes relevant the subject of sovereignty, that is, the whole question of sovereignty. The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a*

⁶⁹ Juan Vicente Sola. The influence of Keynesian economics in judicial decisions. CENTER ON CAPITALISM AND SOCIETY. COLUMBIA UNIVERSITY <http://www.capitalism.columbia.edu/> Working Paper No. 57, May 2010.

⁷⁰ Chapter 24. Concluding Notes on the Social Philosophy towards which the General Theory might lead.

*matter of an extreme emergency and of how it is to be eliminated.*⁷¹

In state of exception where the entire legal order is at stake, a sovereign decision is not constrained by any normative principles. There can be states of exception, in which the rule of law is simply inoperative. For example, crisis can be conceivably a result in a state of exception, that is, a situation requiring unusual political decisions which themselves do not fit into any given set of legal and constitutional norms. In short, states of exception to law are “states in which politics rather than law properly governs outcomes.”⁷²

Schmitt had emphasized, for the Republic of Weimar, the need for the executive to act unilaterally because parliamentary democracy could not sustain the decisiveness necessary to cope with a mortal threat to the state.

The Metaphysical View of Crisis.

For Carl Schmitt “*there exists no norm that is applicable to chaos,*” The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case.

“Empty Proceduralism.”

Constitutional democracy is, for Schmitt, a mere amalgam of two components that contradict with each other: the liberal component of

⁷¹ CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY at 8 (George Schwab trans., 1985).

⁷² CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY at 13 (George Schwab trans., 1985).

constitutionalism and the political component of democracy. In contrast with democracy, constitutionalism does not concretize any political substance in an Schmittian sense. The problem with this purported neutrality is, for Schmitt, that constitutionalism is used as an instrument to defend private and economic interests by setting up a bill of individual rights and a separation of powers. By insisting neutrality, constitutionalism in effect safeguards a given list of individual rights, and prevents a particular people from exercising political sovereignty. By separation of powers liberal constitutionalism seeks to tame political power.

Schmitt disdainfully argues, *“He who invokes humankind is about to cheat.”* For Schmitt, the political is drawing a clear line between friend and enemy.

In times of crisis, however, the claim of neutrality does not stand. In any serious political crisis, liberal neutrality is doomed to break down. It is because there cannot be neutrality in “the political.”

Hayek’s answer to Schmitt: rules vs. discretion.

What was Hayek answer to Carl Schmitt’s challenge of the need exceptional powers in case of an economic and political crisis?

Hayek reaffirms the importance of the rule of law and opposes the discretionary power of the legislator and even more of the political authorities.

“Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge. Though this ideal can never be achieved, since legislators as well as those to whom the administration of the law is entrusted are fallible men, the essential point, that the discretion left to the executive organs

wielding coercive power should be reduced as much as possible, is clear enough."⁷³

But Hayek does not give a direct answer to the dilemma of regulation in times of crisis: between the compliance of existing rules or the greater deference to political authorities to find a solution to the new problems. Carl Schmitt raises the issue of deference to political authorities to the extreme; even to the point to saying that sovereign is who decides on the measures of exception. Meaning that economic crisis hinder the existence of the rule of law. Although Hayek's institutional answer to economic and political crisis is not completely developed in his work he was nevertheless conscious of their importance to the rule of law. We can therefore envision a Hayekian answer to the challenge that economic crisis raise to the rule of law.

The solution was given very recently in a paper by Prof. John Taylor, which mentions a similar quotation of Hayek.

John Taylor indicates:

*At their most basic level these policy rules are statements about how government policy actions will react in a predictable way to different circumstances. ...a rule does not have to be viewed as mechanical formula to be used rigidly. This brief review demonstrates that, from my perspective, **the rationale for using rules over discretion in formulating macroeconomic policy is an economic one.***

*The word "balance" emphasizes that the ideal of a pure rule, without any discretion, is a theoretical abstraction. Evidence of the **swing away from discretion** is seen in actual fiscal policy and in the wide consensus among economists against the use of discretionary countercyclical fiscal policy in the 1980s and 1990s; it is also seen in the efforts to make monetary policy predictable and transparent, including through the use of inflation targets and actual policy rules for the instruments. The swing back toward discretion is found in the recent large discretionary fiscal stimulus packages and in deviations of monetary policy from the simple rules that described policy well in the 1980s and 1990s.* ⁷⁴

⁷³ Hayek *The Road to Serfdom* (1944) Chapter 6. Rule of Law. The University of Chicago Press, 2007. P.112.

⁷⁴ John B. Taylor. Swings in the Rules-Discretion Balance. Prepared for the session "The Individual, the Market and the State: Rules vs. Discretion in Economic Policy"

Using rules over discretion in an emergency is a logical conclusion to Hayek's ideas on the rule of law.