Hayek on the Rule of Law and Unions
by
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In Hayek's mind the rule of law had two equally important parts. Like most writers on the subject he argued that the rule of law requires that everyone, including those who wield governmental powers, be bound by the same set of rules. He called this principle "*isonomia*" (Greek for equal law); most others call it equality before the law or equal treatment under the law. *Isonomia*, by itself, says nothing about the scope of government activities. So long as all the rules are applied equally to everyone, *isonomia* exists whether a government is limited to enforcing individual rights or is permitted to intervene extensively into private affairs.

The second part of the Hayekian rule of law is the principle of limited government. Hayek often wrote about the proper scope of government action, and he thoroughly examined the issue in *The Constitution of Liberty* (1960). There he argued that the principle function of a government under the rule of law is to provide the protective services of the classical night watchman state. The legitimate protective role of the state is to enforce the "rules of just conduct" among people. These rules create an environment within which people remain free to pursue their own purposes while dealing with all others solely on the basis of voluntary exchange. To enforce such rules government must have some coercive power. According to Hayek, coercion is evil, but some coercion, exercised exclusively by government for the sole purpose of preventing people from trespassing against each other, is necessary. The private use of coercive force, except in self defense, is always contrary to the rule of law. Later, in *Law,*

Legislation and Liberty I (1973), he made clear that "law" in "the rule of law" is "*nomos*: the law of liberty."

Hayek's two most detailed discussions of labor unions are found in *The Constitution of Liberty* and in *1980s Unemployment and the Unions* (2nd edition, 1984). He argued that unions, because of the legislation that empowers them, violate both principles of the rule of law. *Isonomia* precludes privilege; yet,

> Public policy concerning labor unions has, in little more than a century, moved from one extreme to the other. From a state in which little the unions could do was legal if they were not prohibited altogether, we now have reached a state where they have become uniquely privileged institutions to which the general rules of law do not apply. They have become the only important instance in which governments signally fail in their prime function – the prevention of coercion and violence (1960: 267).

Muddled thinking leads public opinion to tolerate legislation, such as the National Labor Relations Act (NLRA), which exempts unions from the rule of law.

> [T]he fact that it is legitimate for unions to try to secure higher wages has been interpreted to mean that they must be allowed to do whatever seems necessary to succeed in their effort. In particular, because striking has been accepted as a legitimate weapon of unions, it has come to be believed that they must be allowed to do whatever seems necessary to make a strike successful. In general, the legalization of unions has come to mean that whatever methods they regard as indispensable for their purposes are also to be considered legal (1960: 274).

A government limited to enforcing the rules of just conduct is a government that, among other things, does not abridge any person's freedom of association; yet,

> Most people … still support the aspirations of the unions in the belief that they are struggling for 'freedom of association,' when this term has in fact lost its meaning and the real issue has become the freedom of the individual to join or not join a union. The existing confusion is due in part to the rapidity with which the character of the problem has changed; in many countries voluntary associations of workers had only just become legal when they began to use coercion to force unwilling workers into membership and to keep non-members out of employment. Most people probably still believe that a 'labor dispute' normally means a disagreement about remuneration and the conditions of employment,

> while as often as not its sole cause is an attempt on the part of the unions to force unwilling workers to join (1960: 268).

Hayek also thought that statutory unionism leads to the crippling of the market economy which in turn leads to a vastly expanded scope of government's role in the economy.

> [Unions] are using their power in a manner which tends to make the market system ineffective and which, at the same time, gives them a control of the direction of economic activity which would be dangerous in the hands of government but is intolerable if exercised by a particular group….
> Unionism as it is now tends to produce that very system of overall socialist planning which few unions want and which, indeed, it is in their best interest to avoid (1960: 272-3).

Notwithstanding all of the above, Hayek was not opposed to unionism *per se*. Rather he was concerned with the unions' statutory exemptions from the rule of law. As he made clear in 1960 and again in 1984 Hayek supported the right of workers, exercising their freedom of association, to form voluntary labor unions and even to strike so long as the rules of behavior in strikes are consistent with the rule of law.

> I do not, of course, deny the trade unions their historical merits or question their right to exist as voluntary organizations. Indeed, I believe that everybody, unless he has voluntarily renounced it, ought to have the right to join a trade union. But neither ought anyone to have the right to force others to do so. I am even prepared to agree that *everybody* ought to have the *right* to strike …. But I am convinced that nobody ought to have the right to *force* others to strike (emphasis in original, 1984: 51).

The principles of exclusive representation and union security embodied in the NLRA, which I have explained in earlier columns, make American unions *in*voluntary organizations and therefore outside the rule of law. Individual workers are not free to choose whether to associate with unions.

The statutory right to strike embodied in the NLRA also violates the rule of law. If "strike" is defined as a collective withholding of labor services by workers who find

the terms and conditions of employment offered by an employer to be unacceptable, a strike is consistent with the rule of law. In the absence of an unexpired fixed-term employment contract, any individual worker has a right to withhold his labor from an employer who doesn't offer satisfactory terms. If every worker has such a right they all can individually choose to exercise the right simultaneously. Even if a worker has an unexpired fixed-term contract with an employer, he cannot be forced to continue on the job. If he walks off the job the employer's only recourse is to sue him for breach of contract and let other employers know that he is an unreliable employee. But the NLRA's statutory right to strike allows strikers, with impunity, to use violence and threats of violence to try to prevent customers, suppliers and, most of all, replacement workers from exercising their rights under the rule of law to do business with any strike target.

Although Hayek never discussed the principle of mandatory good faith bargaining incorporated in the NLRA, it is clear that that principle, too, is inconsistent with the Hayekian rule of law. In ordinary contract law all parties to a contract must have freely chosen to bargain with the others over the terms of the contract and have consented to the terms that emerged from the bargaining. Absent that mutual consent, a contract is null and void. The NLRA forces employers to bargain with unions over anything the union chooses except things that it is illegal for either party to do. Individuals are not free to choose to bargain for themselves. Simply put, every union-negotiated contract under the rules of the NLRA violates the rule of law.

American politicians frequently proclaim their fealty to what they call the rule of law. To most of them this is the idea that all people must be equally subject to whatever statutory rules politicians enact. Even if those statutes, such as the NLRA, invade what

Hayek and other classical liberals regard as the protected private domain of all individuals, they must be obeyed. This is the rule of might-makes-right, not the rule of law. Just as collectivists stole the word “liberal,” they have stolen the phrase “rule of law.” We must try to reclaim them both.