
Hayek on Nomocracy and Teleocracy: A Critical Assessment

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Abstract: Hayek describes a state teleocratic if the same hierarchy of ends is binding on all its members. A state is nomocratic, on the other hand, if its general welfare consists solely in the preservation of an abstract and end-independent order through members' subscription to the general rules of just conduct. Although Hayek's social philosophy argues persuasively that as a centrally designed order, teleocracy is inferior to the emergent order of nomocracy since the latter provides a far more rational and effective framework in coordinating the use of the circumstantial knowledge possessed by individual members to serve their several ends, it does not follow that design plays no significant role in Hayek's idea of a liberal order. Hayek's proposed "model constitution" for a democratic state is premised on the fact that the evolution of a political system under certain conditions may lead to a cul-de-sac by political short termism and partisan considerations, undermining both the market order and individual freedom in a liberal society. A more clear-headed understanding of this Hayekian "model constitution" not only allows us to apply his theoretical insights to improve public administration and public service ethics in a democracy, but also helps to establish the case that an appropriate mix of some organizational approach with spontaneous social and institutional development would be a better way forward for his ideal of nomocracy.

Keywords: Model constitution; nomocracy; organizational order; public administration; spontaneous order; teleocracy.

INTRODUCTION

Hayek is an ardent critic of scientism and rationalism of the constructivistic kind (Hayek, [1952a] 1979; Hayek, [1978b] 1990, pp. 3-22). At the same time, he is a bold and radical theorist. Ralf Dahrendorf once accused Hayek as "a ruthless theorist who does not worry about taking his argument to absurd lengths" (Dahrendorf, 1988). While it is not my intention here to assess if Dahrendorf's comment is justified, it is indisputable that throughout his academic career, whenever he thought necessary, Hayek did not shy away from pioneering daring and unorthodox theoretical ideas or policy proposals along paths where the more faint-hearted dare not to tread. His proposal to denationalize money (Hayek, 1978a) is one example. His path-breaking theory of the sensory order (Hayek, 1952b) is not only regarded as more plausible than many of the currently fashionable naturalis-

tic approaches to the philosophy of mind, it is also argued that when it was published in 1952, it was ahead of its time by anticipating trends in contemporary philosophy of mind and cognitive science by almost half a century (Feser, 2006, p. 311; see also Feser, 2011).

In this paper, I propose to examine the bold ideas behind another of Hayek's radical proposals, which is a carefully deliberated "model constitution" (Hayek, 1979, pp. 98-127) for a democratic state where the laws constituting the social and legal order are not aiming at some hierarchy of common ends to be pursued by all, but are general rules of just conduct that are end-independent and abstract. These laws are there to—among other things—regulate the formal relationships among the citizens to avoid clashes and collisions, and to delimit the conditions for private domains within which individuals are able to act freely without requiring them to pursue any social aims. Hayek, following in

the footsteps of Oakeshott (2006, pp. 469-97)¹, calls a state where abstract and end-independent rules are ultimately supreme a *nomocracy* (Hayek, [1978b] 1990, p. 89; Hayek, 1976, p. 15). He argues that such a state not only provides the best available guarantee for individual liberty, separation of power, and social and economic growth to as many people as possible, it is also the best available approach for the maintenance of the large number of people living on earth (Hayek, 1988, pp. 120-134).

In order to examine Hayek's idea of nomocracy, we should juxtapose it with the contrasting idea of teleocracy, where a common hierarchy of ends applies to all subjects of a state. I contend that although—as Hayek rightly argues—the respective qualities of nomocracy and teleocracy are conceptually distinct, they nevertheless require each other in order to become sustainable. A juxtaposition of these terms helps us to better appreciate the strengths and problems of Hayek's bold proposal.

Hayek's theoretical justification of nomocracy over teleocracy is supported by the following insights: first, the inherent complexity of modern society and the constitutional ignorance of human minds; second, the logic of group selection in social evolution; and, third, the spontaneously emergent social order that is largely the result of human action rather than human design. All these interlocking arguments have made Hayek's defence of nomocracy one of the most profound in the 20th century. Since Gaus (2006, pp. 232-58)² shows us how these interlocking arguments by and large worked for Hayek, I will limit myself to exploring Hayek's ideas of nomocracy and teleocracy and to assess his proposed model constitution in the light of these ideas.

NOMOCRACY AND TELEOCRACY

Hayek uses the ancient Greek term *nomos* to describe an abstract and end-independent universal rule of just conduct (Hayek, 1973, p. 94), and *nomocracy* as the kind of political order formed not by deliberate design, but by the adjustment and interaction of a body of *nomoi* that members of the same political entity are obliged to follow.

A *nomos* is end-independent, because unlike a tailored-made means for some concrete purpose, it is not there to directly help those who follow it to achieve any particular ends. It is abstract since—unlike a command or instruction—it applies not to some predetermined specific situation, but to an unknown number of future instances. It does so in a universal manner so long as the objective conditions that the *nomos* (or “nomocratic rule”) refers to are relevant.

Nomocracy is the resulting political order, deriving from the more or less consistent observance of a body of *nomoi* over time by its members.

In Hayek's view, the order of the physical environment is given to us independently of human will, while the order of our social environment is at most only partly the result of human design (Hayek, [1978b] 1990, p. 73). This is so because in any complex society, there are numerous individuals continually making different but simultaneous decisions. Each and every decision of these is made in the context of a particular circumstance, the knowledge of which is known by or useful to the individual concerned, and other people might not necessarily know or find this knowledge useful in their social interactions. Therefore there exists no authority that is able to gather all the fragmented knowledge and come up with a centralized plan that makes better use of such knowledge than decentralized markets (Hayek, 1973, p. 14; see also Cheung, 2007, pp. 55-61). More fundamentally, a Cartesian mind that can start from scratch and model a society in toto according to its own rational design is impossible, according to Hayek. This is so because mind and society or civilization can only develop concurrently (Hayek, 1973, pp. 8-34; Hayek, [1978b] 1990, pp. 3-22). The mind, being essentially a mental classificatory mechanism, cannot foresee its own advance, and its ability to manipulate the environment is far from perfect. Therefore, there is no guarantee that the individual's self-determining efforts will necessarily achieve their intended results (Hayek, 1952b; Cheung, 2011).

In other words, a nomocracy is not a designed order solely deriving from the human will. Although it is the result of human interaction, it is not deliberately made and thus serves no common and substantive purpose that is shared by its members. Its orderly relations help to define the identities, not the relative positions, of the members of the nomocracy. The same relations also help to provide stability and to maintain a peaceful environment where individuals may pursue their separate and different purposes. While there is no guarantee that all these separate purposes can be achieved in the nomocracy (since human reason cannot pre-empt unintended consequences in social interaction), the orderly relations and *nomoi*—whether articulated or not—within a nomocracy help the individuals to cope with new and unanticipated circumstances. They also help them to adjust to emergent orders, or what Hayek also calls *cosmos* (Hayek, [1978b] 1990, pp. 76-80), in the light of new experiences and conditions.

In the essay “Rules, Perception and Intelligibility” (Hayek, 1967, pp. 43-65), Hayek further suggests that hu-

man action and human perception are more often than not rule-guided. In the realm of practical skill, for example, there are social practices that are not the products of Cartesian reasoning, but are the results of human spontaneous interactions that facilitate individual human pursuits by coordinating human expectations. One of the most important practices of this kind that makes us human is our language, which does not prescribe *what* we should say but only *how* we should say it; an individual's command of the rules of a human language shapes her ability to communicate and understand texts. Hayek writes that:

[r]ules, which we cannot state ... do not govern only our actions. They also govern our perceptions. The child who speaks grammatically without knowing the rules of grammar not only understands all the shades of meaning expressed by other through following the rules of grammar, but may also be able to correct a grammatical mistake in the speech of others (Hayek, 1967, p. 43).

The price mechanism of the market and our moral rules and conventions are examples of other equally important social practices. These rules and practices, whether articulated or not (Hayek [1978b] 1990, pp. 81-2), can be followed by all. They are essential for the coordination of human interaction and for the maintenance of the social order, even though we may not be aware of them or totally understand their logic.

By contrast, if a political order is deliberately designed to achieve some common and predetermined goals or hierarchy of ends, it corresponds to an organizational order or, as Hayek calls it, *taxis* (*ibid.*, pp. 76-80). Within such an order, the constitutive individual elements obtain their positions in accordance with their relative merits or utilities in helping to achieve those goals or ends. The rules or orderly relations in a *taxis* must ultimately be instrumental and end-dependent, specifying, directly or indirectly, the concrete requirements or conditions for the realization of those goals and ends.

Hayek calls such a political order teleocratic, since *teloi* signify the particular and predetermined ends to which all the elements and rules within the order must be directed. There is a common purpose for such an order, which is the realization of its predetermined ends. The rules within such an order can be said to embody the common good in so far as they are instrumental to the realization of the predetermined ends. Likewise, the relative merits of the individual members or groups of members are dependent on how useful they are in helping to realize the order's ends. As such, a

teleocracy presupposes that there must be some given concrete and indisputable political ends in the form of a hierarchy binding a political community together, to which all those within the community have to pay allegiance. It is further assumed that there is a way to determine how well the rules within a teleocracy can help to fulfil its *teloi*, and what every individual element within that order can do to help to realize the goals of the endeavour.

With the influence of constructivistic rationalism, "whose criterion of rationality is a recognizable concrete order serving known particular purposes" (*ibid.*, p. 89), Hayek believes that teleocracy becomes equivalent to a centrally planned political order of the organizational kind. It assumes that human reason is able to create a political order for the achievement of a common hierarchy of predetermined ends through comprehensive and rational design. The nature of teleocracy is therefore not only qualitatively distinct from nomocracy; the consistent application of such organizational logic in a comprehensive manner to a nomocracy must lead to the replacement of *cosmos* by *taxis*, thereby imposing a predetermined hierarchy of political ends upon individuals who previously followed common abstract rules while pursuing different individual ends.

NOMOCRACY AND TELEOCRACY: ARE THEY MUTUALLY EXCLUSIVE?

While Hayek is right to point out the qualitative distinction between nomocracy and teleocracy, I think he at times pushes his logic too far, as when he claims that the consistent and comprehensive application of the organizational approach to a nomocracy "must" lead to the replacement of nomocracy by teleocracy. The reason for my contention is twofold.

First, if Hayek's criticisms of Cartesian rationalism or constructivism are correct and his claims of the constitutional limitation of human understanding and the fragmentation of circumstantial knowledge are plausible, it becomes impossible to apply the so-called organizational logic consistently. This is so because we do not possess the kind of synoptic rational capacity by which to plan and implement the required measures for all from the top down.

Second, if any political authority manages to consistently implement the organizational logic in a comprehensive manner to a nomocracy, the more likely result is not the replacement of nomocracy by teleocracy, but of nomocracy by chaos and confusion or even by a total collapse.

In other words, what Hayek should have said is that as ideal types, nomocracy and teleocracy are qualitatively dis-

tinct, and mixing up their different characters will create intellectual confusion. However, as a political model for the practical world, to push teleocracy to its logical extreme will only make it unsustainable. Teleocracy cannot stand on its own, if pushed to the extreme. In fact, when he is in a more cautious mood, Hayek (*ibid.*, p. 73; see also *ibid.*, p. 77) admits as much, because for him, “the fundamental truth” is such that “all deliberate efforts to bring about a social order by arrangement or organization ... take place within a more comprehensive spontaneous order which is not the result of [human] design.” Hayek the theorist sometimes has the tendency to become so radical that even his own logic cannot sustain his conclusions.

Teleocracy as a political model therefore cannot sustain itself purely on its own.³ What about nomocracy? Can a nomocratic order do without any organizational approach? The Hayekian answer to this latter question must be “no,” since Hayek is no anarchist⁴, and he is of the view that a government is needed in any nomocracy and that a government, by nature, is necessarily an organization. Moreover, Hayek contends that the spontaneous order of society is made up of individuals *and* organizations (Hayek, 1973: 46-48).⁵

Contrary to common belief, Hayek is not an advocate of *laissez faire*. Instead, he argues that so long as the government in an advanced country acts outside the free market and in compliance with the abstract and end-independent rules of just conduct, the government, through its organizational efforts and policies, can provide various services to the people while using the public resources at its disposal. For example, Hayek thinks that it is morally acceptable for the government to provide basic necessities such as food and shelter for all those who are incapable of securing such necessities by themselves (Hayek, 1960, pp. 300-301; Hayek, 1976, p. 139).

Another example is that although Hayek is not in favour of universal medical services that are free at the point of delivery, he does not disagree with compulsory medical insurance coverage for all as long as the coverage is not to be provided by one single scheme of state insurance alone (Hayek, 1960, pp. 297-300). It seems that what Hayek is suggesting is that while the spontaneous order of society is made up of individuals and organizations (including the government as an organization), nomocracy will not be undermined if the organizations within that political order only apply their organizational logic either outside the free market, or in compliance with the abstract and end-independent rules of just conduct.

But a closer look at the above two examples cited by Hayek seems to reveal a more complicated relationship between nomocracy and teleocracy. While the government can certainly make provision for basic necessities for all those in need outside the free market, it will have to do so by using public funds, at least part of which must come from taxation. Taxation is a kind of mandatory legal measure for the citizens to pay; any failure to do so implies that they are liable to be coerced to comply with the requirement. Likewise, if the government makes universal medical insurance coverage compulsory, no individual citizen is allowed to opt out of this requirement, though they are free to opt for a scheme that is not provided by the government.

Even if we put aside the interesting question of how the government as possessor of legislative power could be a neutral player in the market when it is competing with other insurance providers for business⁶, the fact that Hayek is prepared to accept taxation and other compulsory measures in order to provide for some specific social necessities means that he thinks it permissible for certain non-abstract and non-end-independent logic to get into the market or the laws of a nomocracy for the purpose of some specific social good.

In this context, I think Andrew Gamble is justified in making the following comment when he compares Hayek with Kenyes:

[T]he real disagreement between Keynes and Hayek was ... the question of knowing where to draw the line between intervention and non-intervention. Keynes’s criticism of Hayek was that he accepted that the logical extreme of no intervention at all was not possible, but gave no guidance in *The Road to Serfdom* as to where the line should be drawn ... [Keynes] argued that since Hayek accepted that a line had to be drawn, it was disingenuous of him to imply that “so soon as one moves an inch in the planned direction you are necessarily launched on the slippery path which will lead you in due course over the precipice” (Gamble, 1996, pp. 159-60).

Why is the logical extreme of a nomocratic order not possible? I think a more detailed analysis of Hayek’s difficulty in maintaining the state as *simply* one organization among many others within a nomocratic society will help to illuminate this question.

STATE, GOVERNMENT AND NOMOCRACY

Strictly speaking, Hayek does not like to admit that nomocracy is a form of state, though at one point he says (Hayek, [1978b] 1990, p. 89, n. 19) that if not for fear of confusing it with monarchy (which certainly is a term describing one particular form of state), he would have coined the term “nomarchy” instead of “nomocracy” to denote the kind of political order formed by a body of end-independent *nomoi* as supreme rules and regulations. Whenever possible, he equates nomocracy as the kind of society that embodies a spontaneous order (Hayek, 1976, p. 15). Hayek argues that it is misleading to contrast the state with society within one country to indicate that the former is an organization while the latter is a spontaneous order. Instead, Hayek prefers to put this as a contrast between government and society. This is so because it is always the government as an organization that acts or pursues policy within the broader context of a spontaneous society, whereas the term “state” is not only metaphysically charged (Hayek, 1973, p. 48), but its status is also ambiguous.⁷

However, in the case of international politics, and contrary to his own explicit preference, Hayek is forced to use the term “state” to contrast it with “society” (Hayek, 1973, p. 48; Hayek, 1976, p. 61). Presumably, this is the case because in international exchanges, a state does not simply refer to a government or an organization within a political entity, but also to the nation, the territory, the sovereignty, the society and so on of the recognized independent entity. It is through the state that these latter units can acquire a political form and that their political meaning is defined. It is also through the state that these units are represented in the international arena. In other words, Hayek’s disregard of the state and his focus on the government as only one of the organizations within a nomocratic spontaneous order is plausible only if we can assume away the political preconditions that are assumed by his idea of nomocracy in the first place.

Moving beyond the context of international politics, a similar criticism against Hayek’s failure to take note of the political preconditions presupposed by nomocracy can be found in Roger Scruton’s (2006) discussion of membership of a political community. Scruton thinks that Hayek fails to take proper note of the accepted identity, emotions and motives that are presupposed by the political form that embodies Hayek’s spontaneous association, because “[c]lassical liberalism of Hayek’s kind begins from the assumption that society exists, and that the distinction between the member

and the non-member is securely established in the thoughts and emotions of those who are facing the future together—so securely established that it need not be mentioned” (*ibid.*, p. 237).

The case for distinguishing between state and government becomes even more compelling in the case of war. When war is declared, it is the state that defines, on behalf of society, who its friends and enemies are. A government minister can quit the government if she disagrees with the declaration of war against another state that is made by her government. But that enemy state, like it or not, is still that ex-minister’s enemy politically speaking as long as the declaration is still valid. It is in the light of this that Adam Ferguson’s (1995, p. 28) acute observation that “without the rivalry of nations, and the practice of war, civil society itself could scarcely have found an object, or a form” can be readily understood.

In his discussion of emergency powers under a model constitution for the protection of the spontaneous order, Hayek says, “when an external enemy threatens, when rebellion or lawless violence has broken out, or a natural catastrophe requires quick action by whatever means can be secured, powers of compulsory organization...must be granted to somebody” (Hayek, 1979, p. 124). Clearly, apart from the threat of an external enemy, the other incidents which require powers of compulsory organization are internal matters. In those exceptional cases, Hayek does not hesitate to admit that somebody has to assume emergency powers and asserts that “whoever has the power to proclaim an emergency and on this ground to suspend any part of the constitution is the true sovereign” (*ibid.*, p. 125).

This is in stark contrast to the other claim stressed by Hayek, which is that sovereignty, understood in the sense of unlimited power, has no place at all in constitutional government, since the latter term denotes a limited government in which the supreme power must be negative in nature. It is negative since it restricts power in accordance with the general rules of just conduct rather than authorizing omnipotent control (*ibid.*, p. 123). This contrast, however, does not arise from the fact that the sovereign is claiming unlimited power in an emergency. Rather, it is a recognition that in the end, the authority to declare a state of emergency and to decide what powers, whether assertive or passive, are necessary to cope with that situation rests with the sovereign, whose power can never be *just* passive or negative a priori.

The same logic also applies to normal situations, though in a less apparent manner, since the same political entity (i.e. the state) “is required to provide an *effective external frame-*

work within which self-generating orders can form” (*ibid.*, p. 140, emphasis added), and the decision about the nature and parameters of this framework is again a political one that the state has to take in order to facilitate the operation of society. In other words, while nomocracy is qualitatively distinct from teleocracy, the *cosmos* within nomocracy is not a self-sufficient entity. It presupposes a political determination of a certain kind, such as a nation, a community, or an idea of citizenship. Each of these determinations defines membership and non-membership, friends and enemies, war and peace, acceptable and unacceptable mores, reasonable and unreasonable levels of various social provisions and so on. As a result, like teleocracy, the spontaneous character of nomocracy cannot be pushed to the extreme to exclude all other things, since even the negative tasks ascribed to the state under a spontaneous order regime are to be determined and sustained by the actions of the state itself. Renato Cristi (1998, p. 167) sums up the situation in the following way: “It was thus positively and actively that the state ought to restrict and limit its action to a merely negative one, so that the depoliticization of civil society could turn dialectically into the state’s active preservation of its monopoly over the political as such.”

HAYEK’S MODEL CONSTITUTION ASSESSED

Hayek’s bold design for a model constitution to save modern democracies from interest-group politics and the scramble for particularistic interests by organized coalitions of fleeting majorities is a gallant attempt to restore the nomocratic order from an ideal he thinks has gone astray. In his view, the great democratic experiment since the American revolution of 1776 has failed to secure the protection of spontaneous orders in modern democracies. The reasons for this are of course complicated and diverse. But the main ones include the mistaken idea of popular sovereignty, which equates majority rule with unlimited power (Hayek, 1979); the rationalistic belief in humanity’s ability to use synoptic planning to achieve whatever policy result it aspires to, including the hollow conception of “social justice” (Hayek, 1976); the positivist error in translating whatever the majority will prefers into legislation, including the transformation of private law into public law by so-called “social legislation” (Hayek, 1973). It also includes the need to bargain with different pressure groups in order to form temporary majorities and the deluded idea that government intervention rather than the spontaneous adjustment of the market ensures a more

rational and effective use and more equitable distribution of resources.

In order to rescue the democratic and nomocratic ideal, Hayek dismisses the idea of sovereignty as unlimited power; instead supreme political power must be based on the majority opinion (not majority will, see Hayek, [1978b] 1990, pp. 82-8) of what is right and what is wrong in the form of abstract and end-independent rules of just conduct—many of which are the results of social evolution over time—to restrict arbitrary powers. It is in this context that Hayek proposes a constitution that spells out the general attributes, not the substantive contents, of the enforceable universal rules of just conduct with which government policy must be in compliance.

To avoid enabling the government-controlled legislature to transform spontaneous private law into rationalistic social legislation, Hayek thinks it imperative to create a separate, elected, legislative assembly. This assembly is to be tasked with the responsibility of maintaining and articulating the general and end-independent rules of conduct for all to follow so as to ensure that the spontaneous *nomoi* and the rule of law (not social legislation) prevail. Such an arrangement is essential to halt the contemporary trend of making whatever the majority wants into law and to ensure the real separation of powers in a liberal state. Members of this legislative assembly must be independent from the government and the political parties to free them from interest-group-driven partisan politics. To further protect the independence and quality of the members of the legislative assembly, Hayek proposes a 15-year tenure period for each and every one of them, and they should be elected once in a life time at the age of 45 to sit in the assembly by their peers who, generally speaking, are the best judges of the candidates’ quality and ability for this important public duty.

Within this nomocratic model, Hayek believes that an elected governmental assembly is still required to form a government supported by the majority of the people. Party allegiance is allowed in this assembly. It is to be entrusted with determining government policy and public service, so long as the enforceable decisions of the governmental assembly do not contradict the *nomoi* as upheld by the legislative assembly. The government or the executive arm of the governmental assembly is to be supported by an administrative bureaucracy to implement its policies and decisions in the actual governance of society. Hayek further suggests that a constitutional court is required to settle any disputes between the respective jurisdictions of the legislative assembly

and the governmental assembly in accordance with the constitution (Hayek, 1979, pp. 105-27).

It requires a discussion that is at least the length of another paper to adequately assess how persuasive Hayek's above claims are. For the limited purpose of this paper, the important point is that in spelling out the principles and the main outline of his constitutional blueprint for nomocracy, Hayek is trying to organize a viable political framework in an attempt to create the right kinds of conditions that can nurture all kinds of self-generating orders to flourish from within. The basis of his five-tier model constitution (i.e., the constitution itself, the constitutional court, the legislative assembly, the governmental assembly, and the administrative bureaucracy) is twofold: his clear understanding of the qualitative difference between a nomocratic order and a teleocratic order, and the deliberate design of a constitution, which "ought to consist wholly of organizational rules" (*ibid.*, p. 122) to allocate and restrict powers. In other words, *a nomocracy requires the right kind of organizational rules or public laws to create the political pre-conditions for it to flourish.*

One cannot but feel that every now and then, Hayek the bold theorist makes too sharp a contrast between nomocracy and teleocracy, creating the impression that they are always and necessarily mutually exclusive. For example, when Hayek ([1978b] 1990, p. 89) asserts that in a nomocracy "the 'public good' or 'general welfare' consists solely in the preservation of that abstract and end-independent order which is secured by obedience to abstract rules of just conduct," it appears that he has left little room for his own organizational rules of the model constitution that exist to preserve spontaneous orders. Once again, Hayek's deliberate formulation of the model constitution should further strengthen the claim that while nomocracy and teleocracy are qualitatively different, a nomocratic order nevertheless requires certain organizational logic and political determination as its infrastructure.

I think Hayek's model constitution can be further strengthened by the right kind of organizational arrangements at the level of the administrative bureaucracy in its protection of the spontaneous order. Hayek himself pays little attention to public administration, and the question of how Hayek's theoretical insights can shed light on the study and practice of public administration is a very interesting but very much neglected one in the field of social and political studies (Spicer, 1993).⁸ But in the light of the principles and logic presupposed by Hayek's deliberation on his proposed model constitution, there are at least two areas at the

level of the administrative bureaucracy that are worthy of considering further. These areas are concerned with how organizational arrangements and administrative accountability can be developed to help the state to better follow the spirit of the rule of law and constrain arbitrary power.

First, since the executive arm of the governmental assembly is there to formulate and implement government policy and public service, it is natural to have governmental departments work under the executive arm to implement decisions and to deliver public service in accordance with the policies passed by the governmental assembly. However, since the decisions and policies adopted by the governmental assembly must also be in compliance with the abstract and end-independent rules of just conduct determined or promulgated by the legislative assembly, it seems that within the administrative bureaucracy, the proper organizational position of several types of administrative departments that are tasked with responsibilities *not* directly or mainly related to policy implementation may need to be reconsidered.

For example, some law enforcement agencies such as the police or anti-corruption agency are either responsible for general law and order or have the supervisory function of ensuring a clean government overall. It would seem to make sense to ask if these departments should not be placed outside the executive arm of the governmental assembly and subject them to some kind of supervision by the legislative assembly instead. Likewise, for the important functions of public prosecution and the administration of justice for the general observance of the rule of law, it appears that these functions within a department of justice would also benefit from being placed outside the supervision of the governmental assembly so as to avoid possible party-political intervention on related matters. The logical thing to do under Hayek's proposed model constitution would be to move such supervision to the legislative assembly, since this assembly is there to improve and determine the universal and general rules of just conduct in a nomocracy.

Equally obvious in this connection is the kind of departments that are tasked with the responsibility to hold the government to account in its management of public finance. For example, the National Audit Office in the United Kingdom, which was established to help to scrutinize the government's public accounts and to ensure that the expenditures of the government meet value-for-money requirements, reports to the House of Commons rather than to the government. With a separation of the legislative assembly from the governmental assembly as in Hayek's proposal, it would be natural to put offices of this kind under the supervision of the legislative

assembly. Of course the governmental assembly can still pass the government budget and impose taxes on the people for the delivery of public service. But the government's taxation policy and public finance management must comply with the requirements determined by the legislative assembly's general rules on taxation, which after all are coercive measures that should be provided for strictly in accordance with the general attributes of the abstract and end-independent rules of just conduct. If administrative offices responsible for government audit and the propriety of the government's public finance practice are placed under the governmental assembly, such arrangements will not help to achieve a genuine separation of powers within a nomocracy.

Second, it goes without saying that the elected governmental assembly has the constitutional mandate to make policy and provide public service in accordance with the political platform of the majority party which controls the assembly. As such, the elected politicians of the government are in charge of the final policy decisions and shoulder the political responsibility of the government, while the public administrators working under the government are there to execute policy decisions faithfully and professionally. But since the government also has the duty to formulate its policies and deliver its public services within the broader framework of the rule of law required by the constitution and the legislative assembly, public administrators working under the government, while administratively accountable to their political bosses in government in terms of the implementation of government policy, must also discharge their administrative duties or exercise their delegated discretionary powers in a manner that is consistent with the requirements laid down by the constitution or the general rules of just conduct. If there is a conflict between the government's policy and the requirements of the nomocratic rules laid down by the legislative assembly or the constitution, public administrators under the government have the duty to defend the rules against governmental decisions.

In the parlance of public administration, this is called the public service ethics of the public administrators (Kernaghan and Langford, 1990; see also Cheung, 2009, S18-19). In other words, at a more fundamental level the loyalty of the public service is to the state *per se*, not just to the government of the day. Hayek's model constitution and his critique of the arbitrary powers exercised by fleeting majority coalitions for the benefit of certain particularistic interests in unreformed democracies in effect caution us "against excessive preoccupation with the accountability of public admin-

istrators to the [arbitrary] will of the majority" (Spicer, 1993, p. 58).

CONCLUSION

Hayek says that given the entrenchment of vested interests and the political reality of contemporary democracies, his proposed model constitution is not meant for "present application" (Hayek, 1979, p. 107). He certainly does not think that a state without an established tradition and a prevalent belief in the rule of law or spontaneous order can just transplant his proposed blueprint into its constitutional framework for immediate use. However, Hayek believes that his theoretical insights on the important qualitative difference between nomocracy and teleocracy and on why the original ideal of democracy under the rule of law has gone astray will "obtain more definite shape" (*ibid.*) and become more persuasive if he can spell out the principles and the reformed structure of the model constitution in this manner. He even thinks that the principles embodied in his model constitution may help to guide contemporary efforts of creating new supranational institutions along the line of a nomocratic order. All these insights are important and exemplary. However, Hayek the theorist at the same time also tends to be radical and uncompromising, and the way he formulates his theoretical insights sometimes goes beyond what is warranted by his own logic, leading to unsustainable conclusions and creating misunderstandings of his profound social and political philosophy.

There is a lot to say in favour of his bold suggestion of a model constitution to revive the ideal of a liberal democratic state and to free it from many constructivistic delusions. Whether such a proposal can eventually deliver Hayek's intended results in practice I am not sure. But a more clear-headed understanding of this important and interesting proposal leads me to conclude that an appropriate mix of some organizational approach with spontaneous social and institutional development must be a better way forward for realizing the Hayekian ideal of nomocracy.

NOTES

- 1 Richard Boyd and James Ashley Morrison mention that Hayek and Oakeshott discussed nomocracy and teleocracy in their correspondence in the 1960s in “F. A. Hayek, Michael Oakeshott, and the Concept of Spontaneous Order” (Boyd and Morrison, 2007, p. 104, note 76 & note 77).
- 2 Gaus (2006, p. 254) states that his “aim has not been to correct all the misunderstandings of Hayek’s account of social evolution ... Rather, I have tried to show in this chapter how Hayek offers a system of sophisticated and complex analyses. Because the theories of complexity, spontaneous order, evolution, mind and rule following form their own complex pattern, commentators are apt to focus on just one or two elements which, not too surprisingly, they find inadequate. It is only when we appreciate the genius of Hayek’s linking of complexity theory, spontaneous ordering, social evolution, and neutral networks into an overall account of mind and human society that we will be, finally, in a position to see the true difficulties of his system of ideas, and move beyond, by building on his great work.”
- 3 Hayek ([1987b] 1990, p. 77) states that “[t]he reason why an organization must to some extent rely on rules and not be directed by particular commands only also explains why a spontaneous order can achieve results which organizations cannot. By restricting actions of individuals only by general rules they can use information which the authority does not possess. The agencies to which the head of an organization delegates functions can adapt to changing circumstances known only to them, and therefore the commands of authority will generally take the form of general instructions rather than specific orders.”
- 4 For example, Hayek (1960, p. 62) clearly sees the need to use governmental coercion to enforce some general rules of just conduct under certain circumstances: “In some instances it would be necessary, for the smooth running of society, to secure a similar uniformity by coercion, if such conventions or rules were not observed often enough.”
- 5 I am indebted to one of the anonymous reviewers of this paper in drawing my attention to an emerging literature that, similar to what I am doing here, seeks to critically examine the roles of individuals and organizations played in the study of Hayek’s notion of spontaneous order. For some interesting discussions in this emerging literature on the interplay between individuals and organizations within Hayek’s theoretical framework, such as the role that philanthropy plays in the extended order and the need for individuals’ commitment to abstract, non-instrumental rules in the pursuit of their purposeful actions, see Steven Grosby’s “Philanthropy and Human Action” and Paul Lewis’ “Commitment, Identity and Collective Intentionality: the Basis of Philanthropy”. Both papers can be found in *Conversations on Philanthropy VI*, 2009, pp. 1-14 and pp. 47-64, respectively.
- 6 Ernest Gellner (1994, p. 92) believes that “the most effective modern economies are those which practice a loose state-economy co-operation, working on the basis of informal networks and pressures, without depriving productive units of their autonomy and liberty of movement, but frankly recognizing the significance of the state as weather-maker, and the inevitably political nature of major economic decisions.” As a result, Gellner thinks that we are not dealing with a genuinely neutral market situation under modern capitalism.
- 7 Some of the major arguments used in this section of the paper coincide with the arguments in Cheung (2007, pp. 83-86).
- 8 I am indebted to one of the anonymous reviewers of this paper for alerting me to the relevance of the public choice theorist in public administration Vincent Ostrom’s work in this regard. I believe that Ostrom’s idea of democratic administration in a polycentric decision-making context would align well with Hayek’s insights for public administration. See in particular Ostrom (1973).

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