

On Hayek's Liberal Conception of the Rule of Law: A Critical Survey

Shih-Tung Chuang*

Abstract

As a representative of twentieth century classical liberalism, Friedrich August von Hayek is not only an important economist, political thinker, social philosopher and public intellectual, but a legal philosopher not to be dismissed. In his thoughts, the concept of liberty plays a central role and the ideal of the rule of law is regarded as the foundation of liberty. For Hayek, the rule of law means that government in all its actions is bound by rules fixed and announced beforehand. Accordingly, the rule of law is a formal conception in the sense that it precludes the idea of social justice pursuing the substantive distribution of resources. The formal conception of the rule of law only consists of three attributes: the general and abstract rules, rules being known and certain, and equality before the law. Without the rule of law, he argues, individual liberties are so apt to be coerced by the arbitrary will in which human society will finally step into the road to serfdom.

Part II surveys the core ideas and main arguments in Hayek's formal conception of the rule of law. I will discuss two important distinctions in his legal theory: the distinction of spontaneous order and designed order and the distinction of the law of liberty and the law of legislation. Based on these two distinctions, Hayek develops his rule of law theory – the rule of law as the foundation of liberty – by arguing that liberty, order, and law are closely related. Part III criticizes his negative conception of liberty and his account of legal equality. This essay attempts to argue that his negative conception of 'liberty as the absence of coercion' is inclined to the neo-Roman conception proposed by Quentin Skinner arguing that liberty is better to be understood as the negative conception of no-dependence.

* Associate Professor, College of Law National Taiwan University
E-mail: stchuang@ntu.edu.tw

Furthermore, I also argue that the two formal elements implied in his account of legal equality – formality of application and formality of content – cannot be sustained. They are premised on his preference to the substantive value of the majority and his evolutionary version of western legal culture. In conclusion, I will summarize the two theses implicit in Hayek's liberal legal thoughts.

Keywords: Hayek, the rule of law, liberty, order, law, liberalism