

Rechtsgeschichte

www.rg.mpg.de

<http://www.rg-rechtsgeschichte.de/rg11>
Zitiervorschlag: Rechtsgeschichte Rg 11 (2007)
<http://dx.doi.org/10.12946/rg11/172-178>

Rg **11** 2007 172 – 178

Pier G. Monateri

Deep Inside the Bramble Bush: Complex Orders and Humanities

Dieser Beitrag steht unter einer
Creative Commons cc-by-nc-nd 3.0



Abstract

In this article, Hayek's theory of spontaneous complex orders – created to challenge state intervention in the market domain – is used to defend the independence of humanities against the currently dominant scientism, which is seen as an attempt to destroy the standards of the humanities and replace them with standards derived from the so-called »hard sciences«. Hayek and his successors have shown us that the social sciences in general and law in particular have to be conceived with reference to the historicity of institutions, as evolutionary orders displaying creativity, rhythm and antagonism. Their main conclusion has been that models which can be used for understanding and manipulating human orders are either more complex than or as complex as the phenomenon under study. This proves that philology and classical human studies are better suited to understanding cultural orders – including law – than modern scientific modelbuilding. It follows that the pretension of modern scientism is illegitimate and that, conversely, the claim of the humanities to maintain their own standards becomes entirely legitimate.



Deep Inside the Bramble Bush: Complex Orders and Humanities

I. *Complexity and the Theory of Spontaneous Orders*

The theory of complexity was tailored at the beginning of the 80s¹ around the concept of spontaneous orders,² a theory which nowadays has regained importance for both its merit and its political implications. The origins of the theory of complex phenomena as spontaneous orders can indeed be found in »invisible hand explanations«, that is, in explanations for the spontaneous emergence of forms of social order which arise without having any prior conscious design. The main examples of these orders are the language, the price system, and – according to Hayek's view – the law.

The theory of complex phenomena was developed in order to challenge »rational constructivism« by way of considering the limits of human reason in conceiving and designing ethical, cultural and legal norms which are necessary for both the development and the maintenance of a social order which must thus be seen as unplanned (historical) evolutionary orders.

The political use of this theory in the early 80s was to emphasize the self-corrective character of the market against political intervention. Its major foundation was Hayek's reflection on the use of knowledge within society, according to which decentralized processes, such as the market but also language evolution, are able to make use of more knowledge – dispersed among millions of individuals – than conscious centralised political processes. This offered an epistemological foundation for free market politics which can be conceived as a complex phenomenon of spontaneous order. One single person could never manage all this dispersed knowledge and so could never design society more intelligently than a spontaneous unconscious arrangement will be able to.

What is interesting to note is that even if enemies and allies have changed, this theory still exerts its appeal. Socialist interventionism is no longer an issue and the hazard of a world ruled by private corporations is much more evident, so to reactivate these discourses within a different setting and to consider these renewed concerns could be worthwhile. In particular, what is more impor-

1 BARRY NORMAN, *The Tradition of Spontaneous Order*, Indianapolis 1982; GERARD RADNITZKY, *Die ungeplante Gesellschaft. Friedrich von Hayeks Theorie der spontanen Ordnungen und selbstorganisierenden Systeme*, in: *Hamburger Jahrbuch für Wirtschafts- und Sozialpolitik* 29 (1984) 9 ff.; WALTER B. WEIMER, *Spontaneously Ordered Complex Phenomena and the Unity of the Moral*

Sciences. Paper prepared for the 12th International Conference on the Unity of Sciences. Chicago Nov. 24–27 1983, Chicago 1983.

2 FRIEDRICH A. VON HAYEK, *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy*, London 1973.

tant in Radnitzky's and Weimer's approach is that the appraisal of »spontaneously arisen complex phenomena« makes human studies different from natural sciences. We may find here a possible ground for considering humanities as legitimately different in their very essence from the »hard« sciences, that is, those disciplines which necessarily develop different methods and must be judged on their own specific ground, precisely because the appraisal of human societies has to deal with the essential complexity of historical evolutionary orders.

Obviously, there are also complex orders in nature, but the human world is characterized by an »essential complexity« as a »delicate balance of interacting constraints« and gives origin to evolutionary orders which have the following features:

1. »creativity«: the possibility to display »fundamental novelty«, that is, those changes which could not be predicted in advance and which amount to real *qualitative* differences and not simply to different arrangements of the same elements;
2. »rhythm«: the fact that human orders do not remain stable nor change according to predictable time-spans;
3. »regulation by interactive constraint«: dialectical evolution in which the outcome depends on contrasting interactions and thus never derives in a linear way from a single consistent set of variables.

The main conclusion is that models that can be used for understanding and manipulating human orders are either more complex than or equally complex as the phenomenon under study.³ Therefore, given this high complexity it is necessary to limit ourselves to an abstract understanding or to an understanding of principles only rather than being able to model its particulars (either deterministically or deductively). In this realm of academic knowledge we *cannot* build a model of how something works that is less complex than the thing itself: the simplified model does not allow us to grasp the thing intellectually.

Such a conclusion gains momentum from the splitting of sciences into the two opponent realms: humanistic and natural studies. In fact, if the »models« and the tools they imply cannot be used with reference to complex social phenomena, the whole pretension of an actual »scientism« is simply illegitimate. Conversely, the claim of humanities to maintain their own standards becomes perfectly legitimate.

³ WEIMER, Spontaneously Ordered Complex Phenomena (nt. 1) 4.

In brief, to keep human studies apart and independent from natural sciences and from their ways of handling research and evaluating results is perfectly legitimate, whereas any attempt at homologation is totally illegitimate. In addition, it becomes evident how correct the »traditional« approach of human studies to social orders (culture) in terms of history and philology is. I would also add that spontaneous orders, being unplanned, are also to a great extent tacit and unconscious, dominated by »cryptotypes«,⁴ so that hermeneutics *deserves* a key-role in human enquiries. Finally, given the agonistic nature of interacting constraints shaping evolutionary orders, we may consider as perfectly grounded the dialectical analysis proper of humanities too, including the literary analysis of the rhetoric of scientific discourses produced in order to support particular views of the present and the past which is typical of ideological criticism.⁵

In this way, historicism, hermeneutics and dialectics seem to reemerge as proper tools to handle complexity against every illegitimate »scientism«.

2. *Philology and Historicism*

From our standpoint, the way Hayek tried to combine the theory of complexity with Scottish Enlightenment and German Historicism – with a specific reference to Hume, Ferguson, Savigny and Humboldt – is particularly interesting.⁶ These references are fundamental for lawyers given the outstanding importance assumed by Savigny in the foundation of modern legal studies on the background of German Idealism in which philology played a major role.⁷ Indeed it was from linguistics, religion, and folklore that during the 19th century a paradigm of comparative studies emerged which comprised also the law and politics through the foundation of the concepts of Classic and Primitive. In this sense it is precisely through the establishment of philology as a historical *and comparative* science that a model can be derived in which a variety of sources is combined with cultural transmission. Such a model is at the basis of the »hermeneutical government« of social complexity as a framework of binding notions, ranging from philosophy to literature, from art to law, which works as the cultural »grand scheme« of historical existence.⁸

4 RODOLFO SACCO, Legal Formants. A dynamic Approach to Comparative Law, in: *American Journal of Comparative Law* 39 (1991) 1–34, 343–402.

5 HAYDEN WHITE, *Metahistory. The Historical Imagination in Nineteenth-Century Europe*, Baltimore 1975.

6 VON HAYEK, *Law, Legislation and Liberty* (nt. 2) vol. 1, ch. 1.

7 PETER SZONDI, SENTA METZ and HANS-HAGEN HILDEBRANDT, *Poetik und Geschichtsphilosophie*, Frankfurt am Main 1974.

8 PIER GIUSEPPE MONATERI, Black Gaius. A Quest for Multicultural Origins of the »Western Legal Tradition«, in: *Hastings Law Journal* 51 (2000) 479–555.

The concepts of Classic and Primitive, and then of Exotic and Modernity, for instance, shape those of time and space, while defining, both historically and geographically, an »us« and a »them«. These concepts are fundamentally political even if ambiguous: they can be and have been used both for cultural imperialism and for revolutions against »the modern« *bourgeoisie*. However, they unambiguously display the tremendous capacity of German Historicism to insert itself in the most different areas of the human spirit: from Indo-European linguistics to the foundation of Roman Law as the German legal system, from folklore studies to the dramatic impact of historical critique of religion, showing in the most clear way how much the management, if not the government, of complexity is based on the shaping of a *morphè* of the cultural field as a form of Lordship over the formless.

All this proves the force of this attempt to capture »systematically« the history of the *Geist* as the paradigm of evolutionary complexity and it cannot be simply discarded as worn out in favour of modern »scientism«, »model-building«, and »clear and measurable definition of terms«. On the contrary, on the basis of Hayek's theory, we must rebuild our capacity to come to terms with it: there are good scientific reasons to reappraise such a theory against scientism.

3. *Philology and Complexity*

In the previous sections we have observed the way in which the question of complexity is combined with the theory of evolutionary orders, the features of which require a historical approach to »culture«. From this viewpoint the philological approach becomes, once again, of particular relevance for the appraisal of the »cultural order« as the *overall order of meanings* from language to religion to aesthetics to the law, precisely in the sense Cover gave to the term *nomos*: »... we inhabit a *nomos* ... a normative universe, a world of right and wrong, of lawful and unlawful, of valid and void ... law becomes not merely a system of rules, but a world in which we live.«⁹

In this context we must appreciate the *normative universe* we live in, highlighting the continuity between law and other cultural fields, and focusing on the relevance of philology.

⁹ ROBERT M. COVER, *Nomos and Narrative*, in: *Harvard Law Review* 97 (1983) 4–68 (5).

The relevance of philology in relation to this normative universe lies indeed in the fact that philology has directly something to do with *scarcity* and *dispersion*. Similarly, the law deals with the passage from individual norms to a legal order as a whole, as the *nomos* of political existence.

There are thus four main features of the evolutionary order which require the adoption of a classic humanistic appraisal and these features can be summarised as follows:

- | | |
|----------------------|---------------------|
| 1. <i>Synekdoche</i> | 3. <i>Ouroboros</i> |
| 2. <i>Eidolon</i> | 4. <i>Agon</i> |

First of all the feature we have labelled as »essential *synekdoche*« has to do with the fact that we always possess or have access to only a small part of a complex evolutionary order. However, although we only have access to a limited, and often very limited portion of it, we must nonetheless try to elaborate from this small selection theories that can prove to be consistent with the entirety of those elements we do not have access to.

As an example, we could recall the question of the archives in Roman history. Since most of them have been lost, we can reconstruct ancient culture only on the basis of a very small part of it. This limited selection was reversed in Codex in the 5th and 6th centuries and later transmitted from Carolingian manuscripts into Renaissance editions. Even if they are limited sources, we must depend on these selections: without archives we cannot rebuild history independently from redactors.

The same feature of »essential *synekdoche*« (a part for the whole) is shared by the law. The law is always »lacking« in its sources (precedents, statutes, regulations) with respect to reality. It is necessary to proceed from presence to absence, from what is there towards *what is not there*, thus reconstructing an order of meaning to recapture what is already missing and posing a patent questioning of the truth on the fragment and of the power over the absent.

The typical philological questions on the »essence« of Ancient Greece or »the real words of Jesus« are clear examples of this interplay between truth and fragments and thus between truth and power. Moreover, philology has to deal with another main feature of those complex phenomena which arose spontaneously: historicity intended as the vanishing of presence and the emergence of

unpredicted novelty. If we look at the institutions in historical terms like Hayek, this implies that their past – which would give an explanation to their present – is no more at hand and is no longer present. Philology has precisely to do with the study of what has ceased to be present even if its effects persist, that is, with the actual being of having been, with the study of an *eidolon*.

Such a vanishing and such a persistence entail »essential novelty« in the same sense in which we can speak of an »Eliot effect« in literature: in a cultural order, the newest part gives meaning to older ones and not the other way round, even if the most recent block has obviously been built with the »older bricks«. ¹⁰ We may label this »Eliot effect« as *Ouroboros*, from the name of the mythical snake encircling the cosmic egg which has become the symbol of the eternal return. This is precisely what happens with the latest decision of the House of Lords: it is the latest precedent which gives a sense to the older chain of cases, and *not* the opposite.

All this implies that complex evolutionary orders cannot be afforded without considering all the mediations occurred from a »then« to a »now«, which acts as a chain of both transmission and change as we do in hermeneutical contexts. ¹¹ In this perspective complex relations cannot be appraised without a totally legitimate traditional and humanistic approach in order to deal with historical and literary analysis. In this way »objectivity« manifests itself as the explicit assumption of a specific viewpoint which starts from the fragment and provides the grounds for a normative reconstruction.

In brief, in cultural studies truth is scarce, most of it is out of hand, and we are dealing with chains of transmissions and adulterations in a context of *synekdoche*, *eidolon* and the Eliot effect, as well as, of intrinsic antagonism ¹² which manifests itself precisely in the everlasting struggle for the attribution of meaning. It is, however, precisely the awareness of these processes which makes cultural studies scientific, an awareness that goes lost in »scientism« in which knowledge is reduced to the paradigms and standards of natural science. Therefore, it becomes necessary to stand against it also from a broader ethical and from a political point of view.

Finally, with particular reference to the law, we must underline the normative side of the »struggle for meaning« as the mastering

¹⁰ THOMAS STERNS ELIOT, *The Sacred Wood. Essays on Poetry and Criticism*, London 1920.

¹¹ HANS GEORG GADAMER, *Truth and Method*, New York 1997.

¹² RADNITZKY, *Die ungeplante Gesellschaft* (nt. 1).

of something which otherwise would appear as formless dispersion, wherever »reason« itself is part of the same evolutionary process and thus is *not* the same at all times and in all places.¹³ Reason does not lie somewhere outside of history and outside the evolution of human societies, but it is rather part of the same evolution leading from past to present forms of culture. In the field of the law this entails an approach¹⁴ focused on the political as the main feature of a legality¹⁵ which can be conceived as the *form (morphè)* of a *peculiar historical existence*.¹⁶

In this perspective, the relationship between the lawlessness of emergency and the legitimacy of sovereignty is structured as the iconic depiction of an inner connection between the amorphous state of politics and the opposite *but* connatural form of the law in its concrete historicity. Emergency is the *time and place* of the exercise of mere sovereignty, imposing a complex juri-political form on mere life where the foundation of legitimacy of such an imposition could be, in its proper essence, either divine or enigmatic. The complexity of the law arises from a direct politicisation of life itself in a moment of clash. Just to mention one example: the formalism of conceiving a constitution as a *Grundnorm* concerning the validity of all other norms becomes the actuality of a constitution arisen from a real political sovereignty exercised over a state of emergency as an effective *nomos*, that is an actual partition of the land, resources and of power which determine a course of history, something we can call law by virtue of the force of *arcanum*.

This metamorphosis of a fact into a law is made evident precisely when forms fall apart in a state of emergency, that is to say, when emergency unveils formlessness. It is undeniable that to capture this hidden nature of the law, the Romantic aesthetics of night and chaos as a kind of superior knowledge becomes much more useful than logic, or economic analysis or, to quote Hayek once more,¹⁷ more useful than »reason« and all its abuses.

Pier G. Monateri

13 FRIEDRICH A. VON HAYEK, *The Sensory Order. An Inquiry into the Foundations of Theoretical Psychology*, London, Chicago, Ill. 1952.

14 CARL SCHMITT, *Der Nomos der Erde im Völkerrecht des Ius Publicum Europaeum*, Berlin(-West) 1974.

15 ERNST-WOLFGANG BÖCKENFÖRDE, *The Concept of the Political. A Key to Understanding Carl*

Schmitt's Constitutional Theory, in: *Canadian Journal of Law and Jurisprudence* 10 (1997) 5–19.

16 CHRISTINA CONSTANTINI, *The Literature of Temple Bar*, in: *Polemus* 1.1 (2007) 169–178.

17 FRIEDRICH A. VON HAYEK, *The Counter-Revolution of Science. Studies on the Abuse of Reason*, Glencoe, Ill. 1952.