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**About the Misinterpretations of Hayek's Theory of  
Spontaneous Order and their Negative Impacts on the  
Transformation Programme in the Czech Republic**

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It is a sad fact that the transformation policy which led to what is described (more or less correctly) as "Czech downfall," "nightmare," "velvet devolution," "free-market rhetoric gone haywire," "legislative nihilism," "mix of the worst aspects of capitalism and Communism,"<sup>1)</sup> etc., has been connected with the name of F. A. von Hayek and with his theory of spontaneous order. Taking into account that Hayek incessantly stressed how liberty is inseparable from law and order, it seems to be unbelievable that an attempt to apply Hayek's theorems to the practice of economic transformation – as made by Václav Klaus and his adherents – had devastating impacts on precisely people's moral behaviour as well as their respect for law and their observance of catallactic rules.<sup>2)</sup>

Of course, it must be promptly added that the above mentioned politicians did not read Hayek carefully, nor did they understand him. Instead of true Hayekianism, they presented and asserted a confused misinterpretation of it. On the other hand, they are some inconsistencies and equivocations in Hayek's theory itself, which enable the rise of such confusions.

The alleged Hayekianism of Václav Klaus and his collaborators consisted in their belief that in the transition period (and also in general), the development of economy runs ahead before the establishing of the corresponding legal framework for it. Their position is close to the standpoint of Anthony de Jasay who says that the approach of constructivist legalism (according to which the legal infrastructure necessary for the market system must be established by the state before allowing the economy to be developed spontaneously) is like putting the cart before the horse.<sup>3)</sup>

It was argued that instead of law-making activities, initiated by government (and directed especially to the legal frame of capital markets), it was necessary to let the corresponding rules emerge spontaneously in the free interplay of economic self-interests, and only afterwards to give those rules a legal form. In defending his conception of a spontaneous emergence of law Klaus argued that with the exception of several truly "eternal" constitutional rights, law and legal institutions evolve prevalently as a consequence (or as a reflection) of the evolution of societal, political and economic reality. He asserted that law is no technological system which results from construction, but a complex system which – due to its character – results from evolution.<sup>4)</sup> Linking up with this understanding of law, he defined transformation as a "systemic change" which is "an evolutionary process and not an exercise in applied economics or political science. It is based on a very complicated mixture of planned and unplanned, of intended and unintended events, or, to put it differently, on a mixture of intentions and spontaneity." Klaus asserted that "the unconstrained activity of millions of human beings together with 'modest constructivism' in the field of foundational rules" is absolutely sufficient for the systemic change.<sup>5)</sup>

The use of the term "spontaneity" in these statements is fully incorrect because it is impossible that, at present times, there could arise any rule (or even a complex of rules) spontaneously in the strictly Hayekian sense of this term. Spontaneity, in Hayek, means production of something under the absence of the end or purpose of produced entity in our consciousness. Spontaneity thus precisely means unconscious production. This character of spontaneity applies both to the emergence of catallactic rules (which is in Hayek's *Law, Legislation and Liberty* treated as fully devoid of any conscious purpose or intention) and the functioning of the "invisible hand" of the free-market system, which results from the unintended (unconscious) consequences of market agents' conscious (intended) actions.

It is useful to present here H.-H. Hoppe's malicious criticism of the concept of unconscious production when it would be applied to the activities of people with a fully developed ability of purposeful action (i.e. contemporary people): "A person initially performs a spontaneous action without knowing why and for what purpose; and a person retains this practice for no reason – whether or not it has resulted in a success (for without purpose and goal there *can* be no success and no failure).

[...] The new practice is imitated by other group members – again without any motive or reason.”6) Really, it is beyond any doubt that – especially in our informational society, where everybody can find in popular journals, TV, etc., the most detailed analyses of the motives and consequences of all kinds of human behaviour – such an unconscious production is something entirely impossible and absurd, not mentioning the essential argument that fully unconscious production is incompatible with purposeful action as the basic structure of human activity. It is not said therewith (nor says Hoppe) that there would not exist the unintended consequences of purposeful (i. e. conscious) human actions. But precisely these unintended consequences are described in the books of thousands of authors including Hayek himself.7)

Politicians who speak about the spontaneous emergence of rules understand rather the term ”spontaneous” in a vulgar way, in accordance with which ”spontaneous” means simply kinds of activities which are not initiated or prescribed by government or legislation, (i. e., the activities which come from below as arising in the interactions among individuals or small groups or some other voluntary associations). The term ”spontaneity,” in this understanding, is confused with the vague term ”civil society.” In speaking about spontaneous evolution, the alleged Hayekians simply combine conscious (intended and purposeful) ”initiatives from below” with such elements of evolutionary theory as trial-and-error method and competition.8) Their mistake consists, precisely speaking, in their oversimplified belief that the character of spontaneous emergence of the catallactic rules (or legal systems in general) is the same as the character of spontaneous emergence of the order which results from unintended consequences of human conscious (economic) actions which are conform to the catallactic rules (it was precisely this order which is known as the Smithian ”invisible hand”). This means that they did not discern between the spontaneous emergence of rules and the spontaneous emergence of the dynamic order of economic actions.9)

Now, as it seems to be proven that Klaus’s understanding of ”spontaneity” is far from Hayek’s conception, we can examine the theoretical as well as (some) practical consequences of Klaus’s pseudo-Hayekianism.

What is, from the theoretical point of view, the character of the period in which legal infrastructure lags behind the unrestrained development of economy? This meantime must be necessarily characterised by the absence of well-defined property and contractual rights (or catallactic rules in general), at least in some specific spheres of economy (as capital markets, for example);10) taking into account that in post-Communist countries, the moral constraints determining people’s relation to private property have been almost completely destroyed by Communist theory and practice, we may say that the above mentioned absence of law (or lawlessness) is nothing but a

version of Hobbesian natural state, or war of all against all – especially in the field of economy.

In such a situation, a kind of convention and agreement upon respecting some rules among rival agents may arise. Here, we can agree with J. Gray who says that "the emergence of conventions is a pervasive phenomenon in human interactions, occurring on battlefields, in prison and concentration camps, in relations between criminal gangs and price wars between rival enterprises."<sup>11</sup>) Surely, conventions and rules of such type actually arise everywhere, including the post-Communist societies. Nevertheless, all these rule-making activities proceed as conscious, i. e. purposeful actions and the rules which arise in this sphere are subordinated to partial (relative) goals and evaluated, therefore, from the standpoint of rule utilitarianism. The fully conscious character of establishing some "rules of the game" from below implies that these rules can be qualified as conventions or as "microsocial" contracts.

However, being based upon pure rule utilitarianism, these conventions, social contracts and rules can arise only in a situation when there exists a kind of equilibrium of power, i. e., when the rivals believe that mutual fighting would bring them losses rather than profits. (In the opposite case, namely when one of the rivals has a real hope to win over his adversaries and expropriate them, the utility of entering into social contract is for him necessarily lower than the utility of using brutal coercion.) Accordingly, the social contracts and rules are observed only until their authors consider their observance more useful than their breaching: the observance of a contract or rule is understood as a respite from fighting, a respite during which the fighters endeavour at becoming so powerful that they should have a full certainty to win over the adversaries.

This is best exemplified in the case of two mutually fighting criminal gangs: their bosses arrive at the conclusion that their long-lasting war heavily damages their illegal business (because it evokes the attention of police). Therefore, they enter into a contract concerning their spheres of interest; however, when the equilibrium of power is disturbed in favour of one of these gangs, its boss will not hesitate to breach the contract by ordering the massacre of his competitors. The same is true, *mutatis mutandis*, about the rival groups or individuals in economic life;<sup>12</sup>) we can also learn from the historical experience of international politics.

All this implies that social contracts, conventions and rules which would arise – under the absence of any kind of morality – from the *bellum omnium contra omnes* and would be established consciously and rationally in accordance with pure rule utilitarianism, cannot be long-lasting. Therefore, they cannot – as a matter of principle – guarantee the stability and development of the market system. This also means that the development of the market system cannot lead to the development of catallactic

rules (as Klaus suggested) because the development of the market system is possible only if market agents have a certainty that the prevalent majority of their partners observe, and will observe these catallactic rules in the long run.

Thus, Klaus's misinterpreted Hayekianism is nothing but a version of Hobbesian contractarianism; the fact that Hayek many times criticised Hobbes's rationalism and utilitarianism shows very clearly how far is Klaus from understanding Hayek's theory.

Furthermore, as compared with the original version of Hobbes's thought, Klaus's "Hobbesianism" is only a caricature of it; especially because it fails to explain how it is possible that rules and contracts which arise on the basis of purely utilitarian rationality in the situation of equilibrium of power, can become stable and fixed. This becomes explicit when we take into account that, after stressing how lawmakers conceive laws under the incessant pressure of lobbyists and interest groups, Klaus says that "the making of written law is a very complex process with many levels. Moreover, it is a never-ending process."<sup>13</sup>)

Really, when regarding single legal norms as arising only from conflicting group interests, it must be true that the process of law making will never end. Namely, when an interest group or lobby now fails in asserting a legal norm which would be advantageous for its benefits, it can wait awhile and, after becoming more powerful (e.g., due to finding some allies), it can easily assert a change of the pertinent norm or an amendment. In addition, Klaus's stressing the role of interest groups and lobbies in the law-making process shows what he really means by saying that law "reflects" the development of economic, societal and political reality: law reflects nothing but a situational (and therefore ever-changing) distribution of political power among various interest and pressure groups.<sup>14</sup>) Thus, the very essence of Klaus's "evolutionism" of law is simply, "might is right." In accordance with this perverted form of the true evolutionary approach, the democratic procedures of law-making (which enable social peace) are nothing but a continuation of the never-ending war of all against all – simply using other means.<sup>15</sup>)

From this point of view, the classical conception of stopping the *bellum omnium contra omnes*, as presented by Thomas Hobbes, is far more coherent. Unlike Klaus, Hobbes knew that social contract can become stable only if the contracting parties, when entering into contract, give up all their power and transfer it to the absolutist monarch whose main function is to maintain legal rules as coming from the social contract. This is, of course, impossible in modern democracy in which the fighting rivals preserve their political power.<sup>16</sup>) Nevertheless, the Hobbesian absolutist monarchy, which is by definition a guarantor of the stability of legal framework necessary for the market system, seems to be more effective (and perhaps more attractive) than democracy as understood by Klaus, who sees it only as a battlefield of

conflicting economic and political interests, devoid of any transcendent dimension, such as the belief in natural rights,<sup>17)</sup> as well as devoid of such a sophisticated substitute for transcendence as is represented by the (truly) Hayekian theory of spontaneous emergence of rules.<sup>18)</sup>

When taking into account the strictly legal character of the voucher method of privatisation as put into practice in the Czech Republic as well as the fact that the application of this method required a high degree of legalistic constructivism (instead of being based upon a “modest” form of it), we can see that, fortunately, the practice of Klaus’ s government was in contradiction with his confused theoretical thinking.<sup>19)</sup> Of course, this refers only to the first steps of the application of the voucher method. Later, when people became shareholders of privatised enterprises, and the process of transference and concentration of ownership started, Klaus’ s policy began to correspond with his mistaken theory, which exerted a deep demoralising impact on the behaviour of economic agents.

Namely, when people hear from politicians that the rules and norms will grow spontaneously, and hearing frequently their well-beloved phrase about the market “mechanism,” their first reaction is to think of an impersonal and automatic self-movement that does not require their personal engagement. As a result, nobody feels personally responsible for building-up the legal institutions nor for the maintenance of law. When, later, the Czech economic agents saw that the constructivist legalism of Klaus’ s government was really quite “modest” – especially face-to-face such dirty practices as “tunneling” (a form of fraudulent conveyance) – they started identifying Klaus’ s “evolutionary” rhetoric with the following parole: “It is necessary to switch off the light and wait awhile in the darkness; then we will switch on – and will see an accomplished capitalism,” where “darkness” is a symbol for complete absence of not only morality but also legality.<sup>20)</sup> Consequently, many of them started to understand Klaus’ s rhetoric as a kind of authoritative recommendation to breach all moral and legal rules.<sup>21)</sup>

Many economic agents (and also many Socialist critics of the reform) began to believe that the legislative and moral nihilism, as contained in the “switching off and on” parole was the true meaning of Hayek’ s theory of spontaneous order as well as the appropriate application of the *laissez-faire* principle. Nothing can be more mistaken and little can discredit the ideas of classical liberalism more massively.

## Notes and References

1) R. C. Longworth, Czechs' Economic "Miracle" Looking More like Nightmare, *Chicago Tribune*, 08/04/1997.

2) Catallactic rules (the term refers to Hayek's famous "catallaxy") consist of the rules guaranteeing private property, the rule of promise/contract keeping, and the finder-keeper rule (rule of homesteading). The fact that individuals, in their market interactions, observe the catallactic rules is a necessary condition for the functioning of the free market system.

3) Anthony de Jasay, The Cart before the Horse, in: Christoph Frei, Robert Nef (eds.), *Contending with Hayek*, Peter Lang, Bern 1994, p. 62. In this connection, de Jasay presents an anecdote in which the president of the new Minsk stock exchange faxes the consultants in London: "We have licensed the brokers, put up the quotation boards, bought the computer, now what would we do?" Here, we must agree with de Jasay that it is useless to build up a complicated legal infrastructure for such advanced forms of economic activities long before these activities are actually developed. We may agree with him that it is even impossible for economic reasons (due to lacking resources which are necessary for financing such legislative activities), but, his argument does not concern the catallactic rules, in their basic form, because their observance (and – in today's secular society - their being enforced by law) is a necessary condition for any market activity.

4) Václav Klaus, Právo a transformace české společnosti (Law and the Transformation of Czech Society – in Czech), *Pravý úhel* 6/1997, p. 1.

5) Václav Klaus, Systemic Change: The Delicate Mixture of Intentions and Spontaneity, The Mont Pèlerin Society General Meeting 1994, Cannes, France, Sept. 25-30, p. 1.

6) Hans-Hermann Hoppe, F. A. Hayek on Government and Social Evolution: a Critique, in: Christoph Frei, Robert Nef (eds.), *Contending with Hayek*, p. 139. Hoppe's critical approach is, in fact, not correct because he does not take into account the later developments of Hayek's thought as they are expressed in *The Fatal Conceit*. Nor the Czech reformers who misused Hayek's theory did know those developments and presented a simplified caricature of Hayek which is an easy object for Hoppe's simplified criticism.

7) In this connection it is necessary to notice that Klaus is fully uninformed about the differences between Mises and Hayek. This can easily be proved by presenting some of his assertions addressed to the heritage of the Austrian School: "For the transformation – for the systemic change – from 1990 to 1993 Mises's and Hayek's distinction between 'human design' and 'human action' was decisive." [Václav Klaus,

The Austrian School – Its Significance for the Transformation Process, in: Hardy Bouillon, ed., *Libertarians and Liberalism. Essays in Honour of Gerard Radnitzky*, Avebury Series in Philosophy, p. 257; also in: Václav Klaus, *Ekonomická teorie a realita transformačních procesů (Economic Theory and the Reality of Transformation Processes – in Czech)*, Management Press, Praha 1995, p. 154.] "We believe more in 'human action' rather than in 'human design,'" added Klaus elsewhere. (Václav Klaus, *A Road to Market Economy*, Top Agency, Prague 1991, p. 10.)

It is also rather instructive (in the above sense) when Klaus tells us that "Mises convincingly showed that it is not 'human design' but 'human action' that operates as the creative and inspiring force in the society and the economy." (*Libertarians and Liberalism*, p. 256; *Ekonomická teorie...*, p. 154.) This is simply an untrue statement because Mises explicitly says that "human action is purposeful behaviour. Or we may say: Action is will put into operation and transformed into an agency, is aiming at ends and goals, is the ego's meaningful response to stimuli and to the conditions of its environment, is a person's conscious adjustment to the state of the universe that determines his life. [...] Society is the outcome of conscious and purposeful behaviour." (Ludwig von Mises, *Human Action. A Treatise on Economics*, Third revised edition, Henry Regnery Company, Contemporary Books, Inc., Chicago 1966, p. 11, 143.)

This implies that in Mises, human action necessarily includes human intention – because the meaning of the word "purposeful behaviour" is literally the same as the meaning of "design. Both of these words refer to the determination of acting subject's activity by an ideal project of a future state of affairs. In this point, Mises differs from Hayek who believed that people, when behaving in harmony with the dictate of traditions, can act without intentions, i.e., without being aware of the purpose of their behaviour. I will show later that in his *Fatal Conceit*, Hayek somehow corrected this simplified view and connected traditions with religions, ascribing to the latter the role of "guardians of traditions."

As concerns Klaus, it is now clear that either he did not read Mises and yet wrote about him, (thereby making the mistaken inference that Hayek's teacher had to be of the same opinion as his pupil), or read Mises without being able to understand the hard core of his approach; both alternatives are very precarious for Klaus as a scientist. [He himself claims explicitly to have read the *Human Action* (Thus Spoke Václav Klaus, p. 133.)] What is far more precarious, is the fact that Klaus's ignorance of the meanings of fundamental concepts of economic theory is reflected in his political practice: this ignorance became really decisive in the downfall of hopes connected with the economic transformation in the Czech Republic.



8) This vulgar understanding of the term "spontaneous" is expressed in the following statements by Klaus: "New political parties are spontaneously created...", "New private firms spontaneously emerge..." (Václav Klaus, Systemic Change: The Delicate Mixture of Intentions and Spontaneity, The Mont Pèlerin Society General Meeting 1994, Cannes, France, Sept. 25-30, pp. 4, 6.); "Not to mention the spontaneously emerging institutions like stock exchange and similar institutions competing with it, commercial banks, and insurance companies [...] because they cannot be created from above by anybody, they simply emerge." (Václav Klaus, *Ekonomická teorie a realita transformačních procesů*, in: *Ekonomická teorie a realita transformačních procesů*, p. 32.) Klaus here neglected the fact that according to Hayek, firms, enterprises, political parties etc. are – as concerns their inner structure – nothing but various modifications of constructed order (TAXIS), and that their being established is, from the standpoint of their founders, derived from conscious intentions with the use of the principles of utilitarian (calculatory) rationality. Klaus does not understand that the term "spontaneous" in its correct Hayekian meaning can be related only to the unintended results of such conscious (intended) actions about which he speaks.

Klaus even suggests, that the system of prices in (really existing) Communist economies did not arise intentionally (i. e. from above as ordered by the Central Planning Committee) but rather via Hayekian "spontaneous order," i. e. – in Klaus's understanding – as a result of an interplay of group interests and pressures. (Václav Klaus, Walter Eucken and Transformation Processes in the Contemporary World, in: *Ekonomická teorie a realita transformačních procesů*, p. 159.) Klaus forgets that the actions of pressure groups and economic agents under Communism do not constitute any order but mere arbitrariness. These actions are nothing but various forms of seeking for privileges with the aid of degenerated political methods as used within the Communist party and based upon personal relations; the goal of such an action, as performed by a monopolistic state-owned enterprise, was to influence the central planning organs to rise the prices of goods produced by the enterprise as much as possible. Of course, this sort of a semi-legal political fight over privileges is a typical zero-sum transaction because in Communist economy, the profit of a privileged industrial group is compensated by the loss of the other groups or consumers. This implies that – in spite of the fact that there existed a kind of competition among privilege-seekers – Klaus's application of the term "spontaneous order" to Communist economy is fully nonsensical.

9) In order to be honest to Klaus, it must be added that his confusions about the meaning of the "spontaneity" cannot be treated as if they came merely from his ignorance. Klaus's mistaken interpretation of Hayek's ideas was developed within a dramatic situation when he was in opposition to the representatives of gradualist approaches towards economic transformation who believed that a functioning free

market system could be built up "from above," i. e. with the use of a sequence of well-premeditated and "scientifically prepared" legal measures which – instead being oriented to the establishing of a general institutional basis for the free market system – were conceived to restructuralise and construct individual economic, political and societal entities. (E. g., by supporting, subsidising or even founding some enterprises which would be predicted – with the aid of "scientific prognoses" – to have good prospects in the future.) In this connection, Klaus was correct when saying that "we didn't want to mastermind the transition from Communism to a free society because such a complex system can and must evolve. It can't be dictated from above" (Václav Klaus, *Czeching into Capitalism*, *Cato Policy Report*, March/April 1996, p. 7.), and that "the politicians should resist the temptation to rule by means of laws instead of making laws for defining the rules of the game only" (Václav Klaus, *Systemic Change: The Delicate Mixture of Intentions and Spontaneity*, p. 6.). It is possible that while looking for some strong arguments against the gradualists, Klaus hit upon the idea that their legal constructivism would become entirely untenable face-to-face such an understanding of law according to which law "reflects" the evolution of economic, societal and political reality. He could even find a support of this view in some passages of Hayek's *Law, Legislation and Liberty*, where it states that judges and lawgivers only "discover" law – without creating it. From this point of view, Klaus's way of interpreting Hayek can be understood – but not justified.

Namely, Klaus did not observe that according to Hayek, the catallactic rules – existing before their being converted into written law in the form of traditional (moral) rules sanctioned by religion – emerged fully unconsciously, and that it was fully nonsensical to assume that at our present times, the evolution of economic reality could lead to such a truly spontaneous (unconscious and purposeless) emergence of pre-legal rules which would be later "discovered" by modern law-makers and converted into written law. It looks like Klaus, being fascinated with a passage by Hayek (which helped him in his argumentation), neglected some other passages in which Hayek repeatedly states that law is not a means for an end but only a condition for successful following of most of those ends. This, of course, refutes entirely Klaus's "reflectional" conception of law. Klaus's neglecting of Hayek's fundamental theses is explicit in his statement that "we have to prepare and enact *new rules* which define certain abstract features of the new order" (Ibid., p. 2), such that he speaks about "features" instead of "conditions." As a matter of fact, Klaus was not compelled to apply his peculiar "reflectional" conception of law because the gradualists' programme could be easily refuted by referring to the principle of the "rule of law." In doing so, Klaus could find a support coming from Hayek's authority without misinterpreting his ideas.

As concerns Klaus's mentioning "the rules of the game" as presented above, it should be mentioned that Klaus seems to confuse those rules which regulate transformation policy with the (catallactic) rules whose enactment and validation is one of the basic

targets of transformation policies. Klaus compared, many times, the economic transformation with chess. In both cases the player is able to know the rules of the game but it is impossible to predict the situation after fifteen or twenty-five moves. Taking into account that the rules which regulate transformation policy must actually "reflect" the non-predictable evolution of economic reality, we can arrive at the conclusion that in considering this fact, Klaus made an incorrect generalisation and naively started to believe that the catallactic rules also have to be of the same character.

10) If we take Klaus literally and accept his assertion that only several "eternal" constitutional rights do not result from the evolution of economy, etc., and look at, e. g. the American Bill of Rights, we can see that this fundamental norm includes only a very general formulation of citizens' right to private property, without defining them even in such a short (but concise) form as David Hume did by regarding them as guaranteeing "the stability of possession, of its transference by consent, and of performance of promises." It would imply that in accordance with Klaus, these elementary rules, too, should arise in post-Communist society as a result of "evolution."

11) John Gray, Hayek, Spontaneous Order and the Post-Communist Societies in Transition, in: Christoph Frei, Robert Nef (eds.), *Contending with Hayek*, p. 35. Later, when Gray conventions to be in contrast with "human design, plan, or will," he shows a complete misunderstanding of the Hayekian idea of spontaneous emergence. The very fact that Hayek criticised the contractarian theories as being based upon constructivist rationality confirms that the rise of conventions as described by Gray has nothing to do with unconscious production.

12) It is evident that when Anthony de Jasay says, "real stock exchanges begin at the curb or in the coffee house, when owners have stock to trade. It does not have to be organised first; it is unstoppable," he tacitly presupposes that the corresponding economic agents respect the principle of voluntary exchange and, therefore, they are, for example, willing to pay for their debts and to abandon any violent coercion.. But this precisely is not the case of economic agents in the post-Communist countries.

13) P. Jüngling, T. Koudela, P. Žantovský, *Tak pravil Václav Klaus (Thus spoke Václav Klaus - in Czech)*, Votobia Praha 1998, p. 65. Elsewhere Klaus complains that in the Czech Republic there exist too many too complicated laws, overburdened by details, and sees this situation to be caused by an exaggerated legal activism or – to use his own words – by "false legislationism;" the overflow of legal norms, in turn, makes the maintenance of law very difficult. (Ibid., p. 151.) Thus, Klaus presents two contradictory conceptions of the "spontaneous emergence" of law: 1. The emergence of law is a never-ending process. 2. The evolution of law (progressing, of course, via

trial-and-error method) can (and should) stop by reaching an optimum state when the quantity and quality of legal norms fit the corresponding degree of the development of economic, societal and political reality.

14) It is no accident that Klaus uses here the term "reflection." Namely, his factual understanding of the relation between "economic, societal and political reality" on the one hand, and law on the other is very close to Marxism, according to which law is only a "superstructural" phenomenon which "reflects" the development of the "basis" (i. e., the development of economic relations). It would be sufficient to add, explicitly, that political activities of social groups are determined by their economic interests (this idea is present implicitly in Klaus's statements), and Klaus's "evolutionism" could become a version of "historical materialism" – at least as concerns his understanding of the role of law.

15) This kind of degenerated democracy as resulting from the "reflectional" understanding of law (which is nothing but a consequential utilitarianism of rules) is modelled excellently in Hegel: "The law, as a specific law, has a contingent content; this means here that it is the law of a single consciousness and has an arbitrary content. To legislate immediately in that way is thus the tyrannical insolence which makes caprice into a law and ethical behaviour into obedience to such caprice – obedience to laws which are *merely* laws and not at the same time *commandments*." G. W. F. Hegel, *Phenomenology of Spirit*, translated by A. V. Miller, Oxford University Press, 1977, p. 260.

16) Let us play awhile the role of the *advocatus diaboli* by trying to look for some positive aspects of Klaus' s understanding of "spontaneity." This means that we should imagine a kind of legislative practice (in the field of legal framework for economic life) which would be – in harmony with Klaus's (and de Jasay' s) conception – based on the above mentioned conventions, rules and contracts as rising from below, i. e. from a free interplay of rival economic agents.

There is no doubt that in forming their conventions and rules from the standpoint of rule utilitarianism, these rival economic agents would be able to use more "dispersed" information concerning the optimum conditions for their activities than any government or parliament applying the method of constructivist legalism. In this point (only), Klaus' s and de Jasay' s conception is in harmony with Hayek; it is just this Hayekian motive which prevents their conception from being promptly disclosed as a flagrant nonsense.

In scrutinising the other consequences of that conception we cannot find any point which could be justified. Namely, our previous analyses imply that the Klausian lawmakers – as wanting to be inspired by the conventions rising from below – should

let the economic agents act freely until a kind of equilibrium of power would come and the agents would be willing to enter into contract. Then, the lawmakers would learn from the economic practitioners and take up their contractarian invention in order to give it a legal form. Nevertheless, such a kind of "experimental" law-making practice – be it intended to be applied to the utmost specific fields (as, e. g., to the complicated rules regulating the interactions on capital markets) – would necessarily lead to the fact that in the time before the arising of the equilibrium of power, the government should explicitly admit the existence of a legal vacuum filled with the law of "might is right" – and this is hardly acceptable in any human society. Moreover, this practice would require an impartial absolutist monarch who would not be influenced nor determined by interest groups and lobbies (i. e., by anyone of rival economic agents) and who would serve only to the pure "public benefit." It is precisely the existence of such an impartial sovereign or judge, which is radically denied in Klaus' s treatment of law as a mere "reflection" of economic interests. It seems needless to stress that no utilitarian attitude to the catallactic rules, even if it were most deeply rooted in the practice, could lead to their being interiorised and respected therewith in unconditional manner.

In addition, as concerns the catallactic rules in their general version, they have universal character and therefore no need to let them be invented in the above-described peculiar form. (As a matter of form, they were quickly enacted in all post-Communist countries including Russia.) Klaus, on the contrary, stresses the specific character of local conditions, and, consequently, of the rules corresponding to them: when speaking about an institutional vacuum in the post-Communist countries, he says that "...there was no need (not to speak about possibility) to fill a vacuum with a ready made, imported from outside, delivered system." (Václav Klaus, *Transforming Toward a Free Society*, The Mont Pèlerin Society General Meeting 1996, Vienna, Sept. 12, 1996, p. 2.) In his emphasis upon local conditions (which, as we have shown, means nothing but a local situation in distribution of power) he is opposed to both Hayek' s conception of cultural imitation (also the main theses of the *Counter-Revolution of Science*, where Hayek argues in favour of the universal structural principles of economic order as investigated with the use of the "compositive" method) and Mises' s aprioristic (i. e. absolutely universalistic) treatment of the formal structure of human action and the universalism of Mises' s followers, such as M. Rothbard and H.-H. Hoppe, who connected the apriorism of their teacher with the conception of natural rights.

17) When speaking about the "eternal" constitutional rights, Klaus characterises them as rights upon which "probably no dominant social group casts doubt." (*Thus spoke Václav Klaus*, p. 143.)

18) In this connection it is useful to recall Hegel's famous interpretation of the French Revolution, where he showed that the revolutionary legislative practices, consisting in an incessant change of legal norms (then, any law coming from the lawmaking process was promptly abolished and replaced with another law, etc.) necessarily resulted in the *Terreur*. (See G. W. F. Hegel, *Phenomenology of Spirit*, the chapter entitled "Absolute Freedom and Terror," pp. 355-363.)

Starting from Edmund Burke, Hegel stresses that revolutionaries, being fascinated by the enlightenment idea that no transcendent commandment precludes them to create freely and autonomously the normative structure and institutions of their society, are unable to stop their law-making activities, and, in order to be able to continue, they must negate all fixed products of previous acts of law-making. In Hegel, this situation in which everything is allowed to be destroyed in order that something new could be (consciously) created, culminated in political terrorism whereby the revolutionaries not only violated natural rights as they had been declared before but started to physically destroy each other. Only this bitter experience of the *Terreur*, when people felt themselves face-to-face death, gave rise to a moral revival marked by people's becoming aware that everything was not allowed. Consequently, the era of Restoration came, the essential character of that is described by Hegel as a synthesis of the positive achievements of the Revolution (i. e., the emancipation of the *tiers état*, the *Code Napoléon*, etc.) and some traditional institutions and rules coming from the historical periods preceding the era of Enlightenment and Revolution. In Hegel's view, people's re-acceptance of those traditions and institutions, which emerged spontaneously (i. e. unconsciously) and were originally treated as being rooted in the transcendent sphere, means that people became aware of the fact that their conscious (autonomous) production of law (i. e., their "absolute freedom") had limits and that some (traditional) rules are not allowed to be changed, transformed or abolished by any conscious activity of law-making. Only this awareness enables people to abandon the conceited legal activism and constructivism; this abandonment then results in the fact that their social interactions become subordinated to a fixed and stable legal framework.

Hegel's conception of the "absolute freedom and terror" can be interpreted also in terms of Hayekian evolutionary theory, which enables us to avoid the metaphysical and teleological assumptions which form the basis of the original Hegelian approach. Accordingly, the "absolute freedom" is a trial of the conceited constructivist rationality on abolishing all constraints (traditions, etc.) which have not been designed consciously with the aid of utilitarian rationality. This trial results in the *bellum omnium contra omnes*, having at the beginning a "civilised" form of competing legislative activities that cannot result in any stable legal framework because they "reflect" only the momentary situation in the distribution of power among various interest groups. (Being inspired by Kant, who treated the Hobbesian concept of the

natural state only as a regulative idea which had no correlate in reality, Hegel knew that the *bellum omnium contra omnes* could not proceed at the beginning of human history; on the contrary, he saw it as a result of the historical development in which human reason arrived at a false conclusion that it was the only creator of social reality. Hegel's analysis of the French Revolution also shows that the constructivist rationality need not have the form of socialist or Communist commanded economy.) Later, the "civilised" form of the war of all against all is replaced with its direct and brutal form, i. e. with the terror. From an evolutionary point of view, the shocking experience of the terror was nothing but an experience of the fact that the belief in the "absolute freedom" of reason was an error. Accordingly, Hegel expressed the idea that mankind was able to learn from this error and recognise the necessary limits of constructivist rationality, which led to the re-acceptance of the unconsciously emerged traditions and institutions.

19) Referring to this positive contribution of his policy, Klaus now stresses that the connecting of his programme with the conception according to which "economy runs ahead before law" is nothing but one of the "false myths of our times" and that he does not know from where such a non-defendable view could come. (Václav Klaus, *Zemì, kde se již dva roky nevládne*, Centrum pro ekonomiku a politiku, Praha 1999, p. 29.) Thus, we have two alternatives (similarly as it is in the case of Klaus's reading Mises as mentioned above): either Mr. Klaus is not able to grasp that the meaning of his statement that "law 'reflects' the evolution of economic reality" is identical with the meaning of the statement, "economy runs ahead before law," or he is able to grasp it – however he then disseminates apparent lies.

20) The unhappy "switching the light off and on" programme was originally uttered by one of the leading economic reformers at the very beginning of the transition process as a kind of sad joke which should have expressed the reformer's hopelessness resulting from the attitudes of lawyers who saw no possibility to find any legal way of the privatisation of state-owned property. In spite of the fact that the reformer himself did not take his slogan seriously, journalists started to disseminate it among the public. Now, people usually add that "after switching on the light we will still be in the darkness because somebody stole the bulb."

21) The fact that the real contents of Klaus's confused evolutionism are nothing but a kind of legislative nihilism has been recognised also by some Western observers. "Shunning lawyers and the law, Klaus never bothered with the regulations that control commerce in most market nations," wrote R. C. Longworth. (Czechs' Economic "Miracle" Looking More like Nightmare, *Chicago Tribune* 08/04/1997.) Even Thomas W. Hazlett, who originally appreciated Klaus's programme, arrived at the conclusion that "Klaus had assumed that rules would develop spontaneously to create a vibrant capital market... But Klaus did not recognise that the new economy needed a new

legal structure to spark spontaneous order.” (Thomas W. Hazlett, Velvet Devolution, *Reason*, March 1998, p. 44.)



