

## LEONI, HAYEK AND “IL POLITICO”

by Antonio Masala

Bruno Leoni’s mentors were Gioele Solari, an important scholar of political thought, and Widar Cesarini Sforza, one of the most prominent and distinctive Italian philosophers of law. Between 1938 and 1942, Leoni published erudite works and addressed the scientific nature of law in a quite distinctive manner. In 1942, aged just twenty-nine, those works earned him a position as a full professor of Philosophy of Law. He started to work at the University of Pavia after the war, during which he had stood out for his brave deeds in support of the allied forces<sup>1</sup>.

In Pavia, Leoni resumed the research programme he had been engaged with since his years as a university student: finding a scientific method to investigate social phenomena and therefore politics, which should always be viewed and investigated in connection with economy and law, and, in his view, the three dimensions, political, economic and legal, were all parts of one and the same phenomenon. This aim was also clearly described in the opening editorial of “Il Politico”, the new journal Leoni founded in 1950, which soon became a major reference for studies in social science. Along with the Mont Pelerin Society, “Il Politico” also became the channel through which Leoni met Friedrich A. von Hayek and interacted with him over the years. In Hayek, Leoni instantly found a thinker who shared not only the same opinions on the classical liberal

Dipartimento di Civiltà e Forme del Sapere, Università di Pisa.

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<sup>1</sup> See T. PIFFER, *Bruno Leoni, la resistenza autonoma e i prigionieri alleati*, in T. PIFFER (a cura) “Le formazioni autonome nella resistenza italiana”, Venezia, Marsilio, 2020, pp. 221-240.

political outcome of his reflections but also, or above all, the same scientific journey.

The relationship between Leoni and Hayek has by now been widely known and investigated<sup>2</sup>. This essay will try to chronicle the circumstances in which Hayek and Leoni directly interacted, by analysing their letters and some speeches at the Mont Pelerin Society, as well as the articles that Hayek, urged by Leoni, sent to “*Il Politico*”.

### 1. *A not so coincidental encounter*

As far as we know, Leoni learnt about Hayek’s work in 1949, when he read *Individualism and Economic Order*<sup>3</sup>, a book that greatly impressed him. He reviewed it twice. In his first and very wide review in “*L’Industria*” in 1950<sup>4</sup>, Leoni mainly focused on the essays *Economics and Knowledge* and *The Use of Knowledge in Society*, as well as on *The Fact of Social Science* and *The Meaning of Competition*. His attention was powerfully attracted by the problem of division and the use of the knowledge of society, which is certainly one of Hayek’s greatest contributions to contemporary political philosophy. But it was also the methodological dimension and a tendency to analyse economic and political phenomena together that aroused his interest. Leoni had always pursued that goal since his very first writings. Just like Hayek (and Mises), he was also looking for an overarching framework to understand human conduct and to investigate social phenomena in their complexity and beyond any disciplinary barrier.

<sup>2</sup> See at least R. CUBEDDU, *Friedrich A. von Hayek and Bruno Leoni*, in “*Journal des Economistes ed des Études Humaines*”, vol. IX, n. 2/3, 1999, pp. 343-370; P.J. BOETTKE and R. CANDELA, *Hayek, Leoni, and Law as the Fifth Factor of Production*, in “*Atlantic Economic Journal*”, n. 42, 2014, pp. 123-131 and J. SHEARMUR, *Editor’s Introduction*, in F.A. HAYEK, *Law, Legislation, and Liberty*, edited by J. SHEARMUR, in *The Collected Works of F.A. Hayek*, vol. XIX, Chicago, The University of Chicago Press, 2021, pp. xxi-xxvii.

<sup>3</sup> F.A. HAYEK, *Individualism and Economic Order*, London, Routledge, 1949. Leoni’s copy of the book is thickly annotated all over with notes and comments. Leoni’s signature is on the first page, the date is 1949 and “a gift from Giuliani” is written on it. I would like to thank Raimondo Cubeddu, the owner of the book, for letting me consult it.

<sup>4</sup> B. LEONI, *Recensione di F.A. HAYEK, Individualism and Economic Order*, in “*L’Industria*”, n. 1, 1950, pp. 145-157. At the suggestion of the director of the journal, Ferdinando di Fenizio, Leoni then read and reviewed *Human Action* by Mises, also in 1950.

Leoni had started that journey as a jurist who also embraced economy and politics, and his contacts with Hayek (and the Austrian School) were therefore the natural encounter with a philosophical tradition and an apparatus of methodological tools, part of which he had intuitively worked out himself. In the Austrian School, he found scholars with his same research programme, and their theories opened his eyes to wider horizons.

The first essay in Hayek's book, *Individualism: True and False*, was not included in that first review because of its 'strictly political' nature, but Leoni wrote a separate review for the political weekly "Il Mondo", directed by Mario Pannunzio, which was published on March 18<sup>th</sup> 1950. In that review Leoni not only went through Hayek's thought, he also took inspiration from it to judge the soundness (and confusion) of Italian liberalism, in its different trends.

In the first letter Leoni wrote to Hayek, which sadly seems to have gone lost, he sent him the review published in "L'industria" and asked the Austrian economist to be allowed to publish some of his essays in "Il Politico". The first letter we have available is dated November 7<sup>th</sup> 1950<sup>5</sup>, presumably the second one Leoni sent to Hayek, in which he rejoiced that he liked his review (Hayek had replied to him on October 20<sup>th</sup>) and told him that a second review was about to be published in "Il Mondo", and also pointed out that it had been highly rated by Luigi Einaudi<sup>6</sup>, who was back then the President of the Republic of Italy. Along with the letter, Leoni enclosed his speech for the opening ceremony of the academic year 1949-50 at the University of Pavia, *Scienza politica ed azione politica* (in which Hayek is mentioned). A speech that dealt with the same aspirations that, according to Leoni, underlaid the foundation of the journal "Il Politico", that if the study of politics wanted to "aspire to have the status of a science", it had to be investi-

<sup>5</sup> Oddly enough, Leoni's letter contains two gross mistakes. He says he is glad Hayek liked his "reprint of your books", where I suppose he should have written *review of your book*, instead; then, speaking of what Einaudi has written him, he says he liked his essay *about the French origins of your socialism*, as if Hayek were a Socialist of French descent. Assumedly, the letter must have been written by a secretary but it is strange that Leoni did not reread it. These and the following letters are in the Hayek Archive of the Hoover Institution at Stanford.

<sup>6</sup> See M. QUIRICO, *Una lettera inedita di Luigi Einaudi a Bruno Leoni*, in "Il Politico", n. 2, 1997, pp. 673-677.

gated jointly with economic and legal phenomena<sup>7</sup>. And he also asked for a formal authorisation to translate and publish the essay *The Intellectuals and Socialism*.

So, right from the start Hayek seemed to be well-disposed to publish his articles in a journal that had just been founded by an Italian young man he did not know at all<sup>8</sup>. However, the publication of the article they had talked about was postponed, and they decided to start working together at a yet unpublished article. The article *L'influsso comune di Comte e di Hegel sulle scienze sociali*<sup>9</sup>, the Inaugural Lecture for the Chicago Committee on Social Thought (September 1951) where Hayek had just started to work, eventually merged into *The Counter-Revolution of Science*, was published in English in the journal "Measure" at the same time. Then, the essay *Capitalism and the Historians* was translated and published in 1954<sup>10</sup>, while the essay they had talked about first, *The Intellectuals and Socialism*<sup>11</sup>, was not published until 1955. All such essays had remarkable scientific relevance but they also had a clear political meaning, and most likely they must have been deliberately agreed on.

## 2. *Two meetings at the Mont Pelerin society*

Hayek and Leoni first met in Autumn 1953, during one of Leoni's journeys in the United States, when he was also Visiting Scholar at the

<sup>7</sup> B. LEONI, *Il nostro compito*, in "Il Politico", n. 1, 1950, pp. 5-9.

<sup>8</sup> In a letter dated April 14<sup>th</sup> 1951, Hayek had enquired with Carlo Antoni, one of Croce's pupils and a member of the Mont Pelerin Society, about professor Leoni of Pavia who had invited him to publish a piece in his journal "Il Politico" and was interested in the Mont Pelerin Society. In a letter dated June 7<sup>th</sup> 1951, Antoni said he has never heard of him and could find no information about him. He only added that Pannunzio remembered he had received a letter from him in which he, despite embracing the general leanings of "Il Mondo", deplored the harsh attacks on Fascism and old Fascists. Quite an odd letter, considering that Pannunzio had published Leoni's review of Hayek in his journal the year before and that Leoni had been a Hero of the Resistance. The opinion of Einaudi, who had liked Leoni's review very much, must have weighted much more on Hayek's ears than Antoni's. A minor matter, of course, but one that is also quite suggestive of the 'confusion' that bedevilled the Italian liberals and that Leoni had complained about in his review in "Il Mondo".

<sup>9</sup> F.A. Hayek, *L'influsso comune di Comte e di Hegel sulle scienze sociali*, in "Il Politico", n. 2, 1951, pp. 137-156.

<sup>10</sup> F.A. Hayek, *Storia e politica*, in "Il Politico", n. 1, 1954, pp. 5-22.

<sup>11</sup> F.A. Hayek, *Gli intellettuali e il socialismo*, in "Il Politico", n. 1, 1955, pp. 5-25.

University of Chicago, where he gave a speech on *Political and intellectual trends in Italy*<sup>12</sup>. They met again at the Mont Pelerin Society congress in Venice in September 1954, the first congress ever attended by Leoni<sup>13</sup>. In the speech Leoni gave we find the very first traces of a scientific discussion between them<sup>14</sup>. Therein, he defined socialism as inescapably based on coercion and, as such, incompatible with democracy as “respect for minorities”, since some minority would always be ‘irreconcilable’ with it. A quite challenging statement, the extent of which can only be grasped if we think of his theory of politics as an exchange of individual powers. So, he used his short reflection in his discussion with Hayek, claiming that “abstract laws agreed by the majority” are not enough to rule out coercion.

Leoni then proposed to ‘bolster’ Hayek’s assumption by resuming the “rationalist theory of presumptions” worked out by natural-law scholars with a precedent in the Roman notion of *id quod plerumque accidit*, a concept that underlaid his theory of law as individual claim. According to Leoni, in that ‘natural-law’ theory, many rules of law are based on presumptions that are in the human mind, and therefore “respect for minorities is based on a number of presumptions about regulations that a minority, as a member of the community, would not be prepared to accept”. Since it is simply unconceivable for a socialist programme to be really accepted by everyone, especially by the minority that would be most severely damaged, it can only be imposed by coercion, regardless of any ‘presumption’ that many members of the community may certainly have. He ends with the words: “This is the reason why socialism is not compatible with democracy, and this is regardless of the fact its coercive regulations consist of ar-

<sup>12</sup> Details of Leoni’s scientific efforts can be found in the papers of the journal “Il Politico”, now in the University of Pavia. A long letter that Hayek sent to the University of Pavia to commemorate Leoni’s demise is also there. A letter of condolences describes how intense their human and scientific relationship had been and mentions their very first encounter. Finally, in the letter he asks to be informed if a commemorative ceremony is held, which he would do all he could to attend, as he actually did.

<sup>13</sup> Leoni went to that first meeting with Luigi Einaudi. Then, he was welcomed into the Society just afterwards, with a letter from Hayek dated October 1954. Then, in 1960 he was appointed Secretary and in 1967, two months before his tragic death, President of the Society.

<sup>14</sup> The speech was translated into Italian as B. LEONI, *Democrazia, socialismo e norma giuridica*, in “Il Politico”, n. 3, 1954, pp. 544-549.

bitrary decisions of the authorities or abstract rules of law approved by the majority”.

Such comments are quite interesting and point to the fact that Leoni’s reflections tried to find justifications that were not based on the general or abstract character of the rules, but in their being acceptable to the whole community, with no minority feeling damaged by them. Therefore, the rules are not arbitrary in their being produced by or applicable to everyone, a perspective Hayek was still grappling with, but in their being ‘acceptable’ to all members of society. It is also interesting to notice that, even if neither made such observation as far as we know, Leoni’s notion was perfectly compatible with Hayek’s notion of social equilibrium. He actually wrote: “For a society, then, we *can* speak of a *state* of equilibrium at a point of time – but it means only that the different plans which the individuals composing it have made for action in time are mutually compatible. And equilibrium will continue, once it exists, so long as the external data correspond to the common expectations of all the members of the society”<sup>15</sup>. This is, after all, the same line of reasoning as that of Leoni, who considered socialism always unacceptable, at least for a minority of the population, and who therefore believed social equilibrium to be impossible, to use Hayek’s language. But it is also interesting to notice that here Leoni reflected on the difference between democracy and liberalism in terms of compatibility with socialism, a topic that Hayek’s observations revolved around in *The Constitution of Liberty*.

At the following meeting, in 1957, the two had an interesting exchange again<sup>16</sup>. On that occasion, Leoni very respectfully, yet quite heatedly, criticised Hayek’s concept of law. The target was, again, Hayek’s idea that general rules, that can be applied to everyone, are enough to ensure freedom, but Leoni also clearly emphasised how basically flawed the Austrian economist’s concept of rule of law was. It is actually “a set of legal rules that are not always so well defined, which have specific contents anyway”. He also expanded his argument by mentioning Edward Coke, by claiming that, in rebelling to the Stu-

<sup>15</sup> F.A. HAYEK, *Economic and Knowledge*, in “Individualism and Economic Order”, cit. p. 41.

<sup>16</sup> Translated into Italian as: B. LEONI, *Intervento sul tema “Concetto di intervento e limiti della discrezionalità nella coercizione amministrativa”*, (X Congresso della Mont Pelerin Society, Saint Moritz, 2-8 settembre), in “Il Politico”, n. 3, 1957, pp. 707-709.

arts' tyranny, he made "a very specific (and fairly astute) reference to some details of the ancient rules of common law". So, for Leoni the problem is not the general or abstract nature of the rules, because rules that meet such requirements but do not ensure any freedom at all except their *content* can easily be imagined.

He made another relevant comment, that, rightly enough, Hayek was "deeply suspicious of executive power", but legislative power was a serious cause for concern as well, as it could change the laws overnight, thus destroying legal certainty – as opposed to common law, which is based on the principle of a binding precedent. And, in his opinion, it was precisely legislative power that had recently restricted economic and political freedom, and it had done so "precisely through general rules that applied to all those who fell within the assumption of the rule". And, finally, he encouraged Hayek to reflect on the difference between "the common law type of rule of law" and the "continental type of rule of law", like the German *Rechtsstaat*.

### 3. *Claremont or thereabouts: Freedom and the Law and The Constitution of Liberty*

The 1957 Mont Pelerin Society Congress was also attended by Arthur Kemp, who a year later organised what is now a famous Summer School at the Institute on Freedom and Competitive Enterprise in Claremont, California. There, Leoni and Hayek met again<sup>17</sup>; the Austrian economist presented some of the key theories of what would become *The Constitution of Liberty*, and Leoni widely expounded the comments he had made to his friend and colleague the year before. The lectures Leoni held on that occasion, written in shorthand by Kemp, then became *Freedom and the Law*, allegedly Leoni's masterpiece and the only book of his mature years<sup>18</sup>.

<sup>17</sup> We know they met at least one more time, a year later. The meeting took place in June 1959 at a conference of the North Carolina University, also attended by James Buchanan, another author who had frequent scientific exchanges with Leoni. See L. LIGGIO, T. PALMER, *Freedom and the Law: A Comment on Professor Aranson's Article*, in "Harvard Journal of Law and Public Policy", 11, 1988, pp. 713-25.

<sup>18</sup> Leoni was a man of great learning and distinctive thinking. But in life he never

Literature has focussed a lot on the influence of Leoni's reflections on the developments of Hayek's reflections, in particular in *Law, Legislation, and Liberty*, a matter we will get back to. However, we should not forget that his influence can be clearly felt in some passages of *The Constitution of Liberty*; an influence that stemmed from Leoni's ideas as well as from his deep knowledge of the classics of legal and political thought. In the first edition of *The Constitution of Liberty*, published in 1960, Leoni is acknowledged as someone who "had brought important sources or facts to his attention" but he is never quoted on any specific point. However, in the second edition, Leoni is mentioned in a note in which Hayek lists the sources of the passage in which Cicero speaks of Cato defining the Roman Constitution as superior, because it "was based upon the genius, not of one man, but of many" – a passage that is at the core of Leoni's argument. Here, the Austrian economist wrote: "I am indebted to Prof Bruno Leoni's lectures, now published as *Freedom and the Law*, for calling this source to my attention"<sup>19</sup>. Making such addition at a later time is even more significant considering how 'frugal' Hayek was in mentioning his sources. And Hayek may well have been made aware of the importance of Coke and Matthew Hale by the comments Leoni made at his conference; he actually mentioned them in connection with the same topic shortly after Cato's quote.

The extent of the influence of *Freedom and the Law* was acknowledged by Hayek himself in a letter dated April 4<sup>th</sup> 1962, in which he wrote:

"I have at last finished reading *Freedom and the Law* and though I remembered most of it with Claremont, I not only greatly enjoyed it but it gave me new ideas. The importance of common law seems to me that from the judicial process only laws in the true sense of general rules can observe while of course any kind of command can become a statute law. Thus 'law' kept its true meaning so long as it was mainly based on precedent, but lost it as soon

really took care of giving a systematic, final framework to his knowledge and ideas. Don't forget that *Freedom and the Law* is a 'rescued' book. Actually, had it not been for the insistence of Arthur Kemp, who prepared the drafts of the manuscript with his assistants and sent them to Leoni to be proofread, we would have never had what is ostensibly Leoni's masterpiece.

<sup>19</sup> F.A. HAYEK, *The Constitution of Liberty. The definitive edition*, edited by Ronald HAMOWY, in *The Collected Works of F.A. Hayek*, vol XVII, The University of Chicago Press, Chicago, 2011, p. 113.



as legislation became predominant. If I can find the time I hope before long to do a little pamphlet on Law, Legislation and Liberty in which I want to deal with these problems and my idea of an ‘ideal constitution’.”

And three days later Leoni replied that their works could somehow be viewed as ‘complementary’<sup>20</sup>.

As is known, there Hayek never embraced a perspective like the one Leoni called ‘natural law’, yet he increasingly went looking for a “solid argument (albeit not an immobile one) to act as a benchmark criterion in the evaluation of political choices (however limited) and stop them from being dependent on changes in majorities”<sup>21</sup>. His argument, like Leoni’s, always went in the direction of the rule of law, yet he increasingly focussed on the pursuit of a substantial content, whereby a rule could be definable as arbitrary because of its content. And there’s no denying that the attempt made by Leoni as early as 1954, however weak and incomplete it may sound, is an outstanding suggestion in this direction.

Ronald Hamowy too recalled that in his 1960 book, although in a still embryonic form, Hayek clearly took a step in the direction of “logically linking personal liberty with the rule of law”, which was missing in *The Political Ideal of the Rule of Law*<sup>22</sup>, a sort of draft of his book. And Hamowy also emphasised the importance of Leoni’s criticism<sup>23</sup>.

There can be no doubt that, for Hayek, Leoni had always been a precious inspiration for the study of the different concepts of law. Hayek was certainly impressed by Leoni’s observations on Roman law and its influence on the common law tradition. Again, Leoni’s influence ignited his interest in the legal system (and freedom) in the Greek world, which Leoni addressed in some passages of *Freedom and the Law*. It should be kept in mind that he gave Hayek, maybe just after their discussions in Claremont, a copy of his *Lezioni di filosofia del diritto. Il pensiero classico*<sup>24</sup>, which is still an outstanding tapestry of the different notions of

<sup>20</sup> The letters has been reprinted in A. MASALA, *Il liberalismo di Bruno Leoni*, Soveria Mannelli, Rubbettino, 2003, pp. 241-245.

<sup>21</sup> R. CUBEDDU, *Friedrich A. von Hayek and Bruno Leoni*, cit. p. 350.

<sup>22</sup> F.A. HAYEK, *The Political Ideal of the Rule of Law*, Cairo, National Bank of Egypt, Fiftieth Anniversary Commemorative Lectures, 1955.

<sup>23</sup> See Hamowy’s introduction to F.A. HAYEK, *The Constitution of Liberty*, cit., p. 12.

<sup>24</sup> B. LEONI, *Il pensiero classico. Lezioni di filosofia del diritto*, (a cura di A. MASALA), IBL Libri, Torino, 2021.

law in ancient Greece. Hayek expressly mentioned it in his commemoration of Leoni in Pavia:

“it is particularly to be regretted that he did not find time to prepare for publication the suggestive and original first volume of his *Lezioni di filosofia del diritto* which deals with the thought of classical antiquity and which in 1949 he had issued in mimeographed form for his students. His treatment of the relation between physis and nomos in ancient Greek thought in particular seems to me to contain much that would deserve development”<sup>25</sup>.

When Hayek wrote such words in 1968, he was already working at the first volume of *Law, Legislation, and Liberty*, in which he also dealt with the distinction between natural and ‘artificial’ phenomena and lingered on differences within human phenomena, pointing out that the Greeks used to give different names to such phenomena depending on whether they resulted from a deliberate decision or common practice. Hayek retraced the journey started by Leoni, who found the distinction between those two types of laws in the Greek world, and dwelt on the fact that the law, established by the decision of a political authority, had been enforced fairly late by the Hellenics and the fact it had only slowly and partly replaced common law. However, in *Law, Legislation, and Liberty*, Hayek hinted at Leoni’s studies, which his work was, at least partly, a brilliant and distinctive development of<sup>26</sup>.

But he certainly did not only discuss the ancient world with Hayek. Supposedly, Leoni was also involved in a discussion about David Hume, a key figure in Hayek’s reflections. Actually, in 1963, “Il Politico” hosted Hayek’s essay, *The Legal And Political Philosophy Of David Hume*<sup>27</sup>. It is an important essay in which the Austrian mentions Hume as the real father of liberalism, which is somehow different from

<sup>25</sup> F.A. HAYEK, *Bruno Leoni the Scholar*; in “Omaggio a Bruno Leoni”, a cura di P. SCARAMOZZINO, in “Quaderni della Rivista Il Politico”, 1968, pp. 24; also in F.A. HAYEK, *The Fortunes of Liberalism*, ed. P.G. KLEIN, *The Collected Works of F. A. Hayek*, vol. IV, Chicago, The University of Chicago Press, 1992, p. 257.

<sup>26</sup> About this, see R. CUBEDDU, *Leoni and Hayek on nomos and physis*, in “Il Politico”, n. 2, 2020, pp. 58-95, which also explores the influence, quite often disregarded yet very important, of epicureanism on the liberal tradition.

<sup>27</sup> F.A. HAYEK, *The Legal and Political Philosophy of David Hume*, in “Il Politico”, n. 4, 1963, pp. 691-704, followed by an Italian translation. Now in F.A. Hayek, “Studies in Philosophy, Politics and Economics”, London, Routledge, 1967, pp. 106-121.

the democratic tradition. In his philosophy, based on the awareness of the “narrow bounds of human understanding” and on an irrationalist theory of morality, Hume is the first to provide an explanation for the birth and evolution of the law and institutions as something that is not deliberately ‘invented’ but that emanates from society and is pre-existent to a government. Therefore, such philosophy on the narrow bounds of human understanding and such explanation for the unintentional birth of order, which is after all the research programme of Carl Menger (never mentioned therein) and of Hayek himself, can therefore be found in Hume.

We have no correspondence between Leoni and Hayek about such essay. However, we noticed that, when it was reprinted in *Studies in Philosophy, Politics and Economics*, in an introductory note the Austrian added some references to “a number of Continental studies of Hume’s Legal Philosophy” which he had not heard of until then, and three of them are in Italian. Obviously, it all points to the fact that such sources must have been suggested by Leoni, who still acted as a precious philological advisor. Leoni’s expertise in the notion of law, and mainly in the relationship between nature and artifice, in the history of thought, and above all in the Scottish Enlightenment, must have certainly been precious for Hayek, and they often kept conversing about such issues.

The discussions between them must have certainly been intense, even if they cannot obviously be retraced. On May 20<sup>th</sup> 1964, Hayek was invited by Leoni as a guest lecturer to Pavia, where he held a lecture called *The Theory of Complex Phenomena*, of which we unfortunately have no details<sup>28</sup>. We have, however, some correspondence from 1965, when Hayek sent Leoni a first draft of what would become *The Results of Human Action but not of Human Design*<sup>29</sup>. In that work, quoting the essay on Hume published in “Il Politico”, Hayek thanked Leoni who “has drawn my attention to the fact that Hume’s use of ‘artificial’ in this connection derives probably from Edward Coke’s conception of law as ‘artificial reason’ which is of course closer to the meaning the later scholastic had given to ‘natural’ than to the usual meaning of ‘artificial’”.

<sup>28</sup> The information is in “Il Politico”, n. 2, 1964, p. 508.

<sup>29</sup> F.A. HAYEK, *The Results of Human Action but not of Human Design*, in “Studies in Philosophy, Politics and Economics”, cit., p. 99, nota 10.

The letter in which Leoni suggested as much was written on July 27<sup>th</sup> 1965, and reads:

“It would probably be worthwhile to trace back to Coke the concept of ‘artificial’ employed by Hume and contrasted by him with that of ‘arbitrary’ rules. Coke used to say that common law is due to artificial reason, as contrasted with natural reason. What he obviously meant (against Hobbes and James the First) was that the use of reason in abstracto is not sufficient to work out the legal rules as Hobbes and James the First (a disciple of Hobbes on this matter) maintained. There are interesting passages on this point, if I remember well, in the correspondence of Coke with his friends. He spoiled more than one dinner of his royal host (James) by refuting the argument of the latter on natural law, as Hobbes had conceived of it!”.

Leoni’s comment must have made a deep impression on Hayek, who took it up again in *Law, Legislation, and Liberty* as well<sup>30</sup>. And it’s worth noting that some passages of *The Results of Human Action but not of Human Design* are deeply redolent of Leoni’s theories. For example, when he writes “law is not only much older than legislation” but “the whole authority of the legislator and of the state derives from pre-existent conception of justice, and no system of articulated law can be applied except within a framework of generally recognized but often unarticulated rules of justice”<sup>31</sup>.

#### 4. *The myth of representation*

Certainly during the Sixties the personal relation between the two scholars was intense, and Hayek often sent Leoni his essays to be read. We have some very interesting correspondence<sup>32</sup> about one of such essays. It is *Recht, Gesetz und Wirtschaftsfreiheit*<sup>33</sup>, in which Hayek pres-

<sup>30</sup> See F.A. HAYEK, *Law, Legislation, and Liberty*, cit. p. 113.

<sup>31</sup> F.A. Hayek, *The Results of Human Action but not of Human Design*, cit. p. 102.

<sup>32</sup> Published in M. QUIRICO, *Hayek e Bruno Leoni: due lettere inedite su diritto e libertà*, in “Il Politico”, n. 2 1996, pp. 183-196.

<sup>33</sup> F.A. HAYEK, *Recht, Gesetz und Wirtschaftsfreiheit* in “Hundert Jahre Industrie”, Dortmund, 1963. Eventually reprinted in F.A. HAYEK, *Freiburger Studien*, Tübingen, Mohr, 1969, pp. 47-55. It is peculiar, after all, that Hayek and Leoni always wrote each other in English, since Leoni was perfectly fluent in German.

ents his notion of an Upper House issuing rules that do protect personal freedom, an idea that, once refined, became one of the cornerstones of his constitutional project, developed in the third volume of *Law, Legislation, and Liberty*. After rejoicing that some of the conclusions of his *Freedom and the Law* had been favourably received<sup>34</sup>, Leoni went back to the point which they always scientifically diverged upon, i.e. the fact that an *elective* house should have produced such law, and so he wrote:

“I am very much afraid that the upper house you have in mind would not work well because it is not a judiciary court *and* because it is elective. All in all the election of its members would depend on the ‘people’, that is on the electorate, and all the evils of the so called ‘representative’ assemblies are likely to reproduce themselves in that upper house. The fact that you think of a qualified electorate is not likely to be a sufficient hindrance. [...] I don’t think it is possible to get rid of the judiciary if we really want to *find* the law of the land. The new version you sketch of a Rechtsstaat seems to be still too similar to the old one, because the task of the Rechtsfindung is still confined to some elected representatives of the ‘people’ [...]. I feel that representation should be avoided altogether in this field. As a matter of fact representation is the myth of our era.”

Hayek replied by saying something similar to what he wrote in the only note to *Law, Legislation, and Liberty*, in which he quoted Leoni<sup>35</sup>, and mentioning his intention to expand his arguments in the book he was working at, which was ten years in the making:

<sup>34</sup> There’s no denying that a large part of Hayek’s essay is redolent of Leoni; in addressing the distinction between *Recht* and *Gesetz*, he explains why it went lost and why such confusion would be detrimental to personal freedoms: “we can no longer distinguish between justice and law and what we now call state of law [*Rechtsstaat*] is but a legislative state [*Gesetzesstaat*]”. Hayek too believes the law not to be an expression of the free will of some specific person, but “the result of an impersonal process”. It “has stemmed not from the arbitrary decision of some men or of a majority but from the efforts of an independent class of jurists who believe, as judges or legal scholars, not to have created the law but to have unveiled it”, F.A. HAYEK *Recht, Gesetz und Wirtschaftsfreiheit*, cit. p. 48 (translated by the author).

<sup>35</sup> “The case for relying even in modern times for the development of law on the gradual process of judicial precedent and scholarly interpretation has been persuasively argued by the late Bruno Leoni, *Freedom and the Law* (Princeton: Van Nostrand, 1961). But although his argument is an effective antidote to the prevailing orthodoxy which believes that only legislation can or ought to alter the law, it has not convinced me that we can dispense with legislation even in the field of private law with which he is chiefly concerned”, F.A. HAYEK, *Law, Legislation, and Liberty*, cit. p. 117, note 44.

“Where I agree with you is that judge-made law necessarily possess certain desirable qualities which the products of legislation need not, though in my opinion can possess. Where I disagree with you is in that I do not believe that we could rely entirely on judge-made law, mainly because it is a process where it is practically impossible to reverse a development which may later prove to be mistaken. I intend to devote a whole chapter to showing that, however desirable it would be to rely entirely by judge-made law, there are a number of tasks of law making which cannot be solved this way.”

Then, he went on to explain why the elective method he was thinking of should be effective, as it would provide a “sharp distinction between true rules of justice and organizational orders”. The belief that an Upper House – still elective, though through a quite intricate and untraditional process – could solve the problem of creating rules of conduct that really respected personal freedom was never shared by Leoni. There’s no denying, however, that Hayek was partly inspired by this friend’s arguments and criticism when he came up with such an innovative, far-reaching version, which he then refined and ‘radicalised’. Maybe it is precisely in questioning representation, in trying to find alternative options, that Leoni exerted his most persisting influence. Hayek was never completely convinced but was led to rethink of the role of representation and ‘mitigation’. The letters of 1963 are certainly an important milestone in the course of such influence, but they are certainly not the only one.

Hayek’s downplaying of the representative role of the law happened in the sixteenth chapter of *Law, Legislation, and Liberty*, called *A Model of Constitution* in the third volume, *The Political Order of a Free People*, which was published only in 1979. However, in a note Hayek mentions that “The suggestion for the reconstruction of the representative assemblies has by now occupied me over a long period and I have sketched it in writing on numerous earlier occasions”<sup>36</sup>. And in this regard he mentioned a few essays written between 1960 and 1973. One of those essays is *Recht, Gesetz und Wirtschaftsfreiheit*, which we have just dealt with. Two of those essays were originally published in “Il Politico”.

The first one, dated 1966, is *The Principles of a Liberal Social Order*<sup>37</sup>, the upshot of a Mont Pelerin Society meeting, which Leoni

<sup>36</sup> F.A. HAYEK, *Law, Legislation, and Liberty*, cit. p. 463, note 2.

<sup>37</sup> F.A. HAYEK, *The Principles of a Liberal Social Order*, in “Il Politico”, 1966, volume 31, n. 4, pp. 601-618; now in *Studies in Philosophy, Politics and Economics*, cit..

attended too<sup>38</sup>. In that essay, Hayek briefly lists the key points for a definition of liberal order, which he had got his friend to read beforehand. Leoni commented the essay in a long letter dated April 15<sup>th</sup> 1966. In his letter, he appreciates *inter alia* the use of the word ‘catallaxy’ but expresses doubts about the use of the word ‘spontaneous’ to describe order generated by encounters and exchanges in a free system, as it “reminds me somehow of the anthropomorphic approach which you so rightly condemn”<sup>39</sup>. Hayek did not change his terminology in that essay, and he kept using the phrase *spontaneous order* in *Law, Legislation, and Liberty*. Yet, he accepted Leoni’s reminder of the need to always explain when a specific language is used in a non-anthropomorphic sense<sup>40</sup>.

The depth of Leoni’s influence on Hayek can be felt in that essay as well. Not only did Hayek present a distinction between the British rule of law and the German “mere formale Rechtsstaat”, which was one of the topics which Leoni had encouraged him to reflect upon since their very first meetings, he also came up with some observations on the way the concept of liberal order had been developed in ancient Greece, in Rome and in modern England, where “justice was conceived as something to be discovered by the efforts of judges or scholars and not as determined by the arbitrary will of any authority”. And eventually defined liberalism as heir to the “theories of the common law and the older (pre-rationalist) theories of the law of nature”.

The third essay was published in September 1967, two months before Leoni’s death, and unfortunately we have no correspondence about it. It is *The Constitution of a Liberal State*<sup>41</sup>. Some of the key points eventually developed in *Law, Legislation, and Liberty* were expounded

<sup>38</sup> The meeting was in Tokyo, and Leoni presented the paper: B. LEONI, *Two Views of Liberty, Occidental and Oriental?* in “Il Politico”, n. 4, pp. 638-651.

<sup>39</sup> See A. MASALA, *Il liberalismo di Bruno Leoni*, cit., pp. 243-244.

<sup>40</sup> This is the case when he writes: “Since practically the whole vocabulary available for the discussion of the spontaneous orders with which we shall be concerned possesses such misleading connotations, we must in some degree be arbitrary in deciding which words we shall use in a strictly non-anthropomorphic sense and which we shall use only if we want to imply intention or design”, F.A HAYEK, *Law, Legislation, and Liberty*, cit. pp. 48-49.

<sup>41</sup> F.A. HAYEK, *The Constitution of a Liberal State*, in “Il Politico”, n. 3, 1967, pp. 455-461; now in *New Studies in Philosophy, Politics, Economics and History of Ideas*, London, Routledge, 1978, pp. 98-104.

there. Let's just mention the comment that the separation of powers did not really work and, because of that, a House would be required (but not elected with the traditional elective methods used for parliaments) to solely deal with rules of conducts and the idea to replace the word *democracy* with demarchy. The interaction with Leoni clearly comes through even from the first few pages. For instance, in the first few lines, in which Hayek admits that there's a need for a "conception of law which defines what is law by intrinsic criteria and independent for source from which it springs", which, as we saw, is the main objection raised by Leoni to Hayek at the 1954 meeting. Or that the law should not be based on the will of a majority but on the opinion of the people, a topic that was developed by Leoni in connection with socialism at the 1957 meeting. Or the idea, also so strongly redolent of Leoni, that "Historically, individual liberty has arisen only in countries in which law was not conceived to be a matter of arbitrary will of anybody but arose from the efforts of judges or jurisconsults".

It's undeniable that these two essays, which are at the core of what Hayek developed in his seminal third volume *Law, Legislation, and Liberty*, were imbued with Leoni's influence, and it's certainly no coincidence that Hayek decided to publish them for the first time on "Il Politico"<sup>42</sup>.

### *Conclusions*

Here, we tried to look into Leoni's influence on Hayek by going through what can be argued from their correspondence and from the other public meetings at which they had discussions. The sources we reviewed confirm how important the interaction with Leoni had been for Hayek since they had first met at the Mont Pelerin Society in 1954, a friendly relationship that went on till the premature death of the Italian scholar.

<sup>42</sup> After Leoni's death, another three essays by HAYEK were translated into Italian and published in "Il Politico": *Ordinamento giuridico e ordine sociale*, in "Il Politico", n. 4, 1968, pp. 693-724; *Gli errori del costruttivismo e i fondamenti di una legittima critica delle strutture sociali*, "Il Politico", n. 3, 1970, pp. 421-444, and *Note sull'evoluzione dei sistemi di regole di condotta*, in "Il Politico", n. 1, 1978, pp. 5-21.



The differences between them were never reconciled, but Hayek was appreciably and gradually embracing his friend's concerns. The real difference lay in the fact that Hayek could not do without representation and the elective process (though extremely far-ranging and negotiated) to produce law, what he called rules of conduct, and there are two main reasons that can be very clearly argued from the article of 1963, which was commented on by Leoni and eventually resurfaced in the third volume of *Law, Legislation, and Liberty*. Firstly, he thinks that the legislator's role is essential to produce or change the rules as and when needed; a change that might otherwise (i.e. if one relied on a judicial law-making process) not happen or happen too late. Secondly, he "believes in democracy" much more than Leoni, in that he thinks that the democratic principle – labelled by Leoni as "the myth of representation" – no matter how widely reworked and powerfully negotiated (don't forget the important role played by the Constitutional Court in his model) and maybe even downsized, could not be forgone anyway.

Hayek was well aware, under Leoni's influence, that historically freedom had gained ground by means of a law that had not been produced legislatively, by men's will. In this awareness lies his big change and even the questioning of the theoretical system of *The Constitution of Liberty*. But, despite all this, he never went so far as to think that legislation and representation could be forgone, he only conceded that sophisticated tools could be worked out to mitigate their potential dangers and make them work in accordance with the principle of personal freedom. His was probably the greatest attempt at rethinking representation and its bounds, as part of the liberal-democratic theory. Leoni took a different route, one that was more theoretical and unconcerned with historical needs, if you will, which does not make it any less interesting. In his theory of "Law as individual claim"<sup>43</sup>, he tried to trace the birth of the law and the state back to an exchange of individual claims, by outlining a model of political order in which coercion can

<sup>43</sup> This theory is explained in some essays written in the Sixties and collected in English in B. LEONI, *Law, Liberty and the Competitive Market*, ed. by C. LOTTIERI, with a foreword by R.A. EPSTEIN, New Brunswick-London, Transaction, 2009, a wider account of which can be found in his last course of Philosophy of Law at the University of Pavia and now published in B. LEONI, *Il diritto come pretesa*, ed. by A. MASALA, with a foreword by M. BARBERIS, Macerata, Liberilibri, 2004.

be ideally got rid of. A model that might be far from reality but that is doubtlessly theoretically fascinating and that should perhaps be known and investigated more deeply.

**Riassunto** - Il saggio ricostruisce la relazione scientifica tra Bruno Leoni e Friedrich A. von Hayek, prendendo in esame le lettere, gli scambi intercorsi alle riunioni della Mont Pelerin Society ed esaminando i saggi che Hayek pubblicò su “Il Politico” quando Leoni era ancora in vita. Ne emerge un dialogo molto intenso, nel quale Leoni rappresenta non solo un prezioso riferimento filologico per gli studi sul diritto e sul pensiero politico, ma anche una costante sfida alla riflessione hayekiana e uno stimolo ad andare oltre le proprie posizioni. Le differenze tra i due permarranno, e Hayek non metterà mai in discussione la necessità della rappresentanza politica e dunque di un processo elettivo (per quanto estremamente articolato e mediato) per la produzione del diritto, e di quelle che egli

chiamava le “regole di condotta”. Tuttavia è possibile vedere un suo progressivo avvicinamento alle posizioni di Leoni. L’austriaco diventa infatti ben consapevole, grazie all’influenza di Leoni, che la libertà si era storicamente affermata grazie a un diritto che non era stato prodotto per via legislativa, per volontà degli uomini. In questa consapevolezza sta il suo grande cambiamento, e in fondo anche la messa in discussione dell’impianto teorico di *The Constitution of Liberty*. È dunque anche possibile sostenere che la “costituzione ideale” hayekiana, presentata nel terzo volume di *Law, Legislation, and Liberty*, risenta di una forte influenza di Leoni. Ipotesi confermata anche dal fatto che Hayek scelse “Il Politico” per presentare le prime versioni di quella sua elaborazione.