

Nozick versus Hayek

Why Nozick is wrong

and a libertarian state should dare to do more¹

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Abstract

Libertarianism, as a broad ethical line of reasoning, distrusts the state on its ability to provide a fair society. A fair society for libertarianism, unlike for example egalitarianism, is a society with no patterned distribution of goods and committed only to guaranteeing maximum individual freedom of action. But far from monolithic, libertarianism (and here we will only speak of the right-wing libertarianism) presents itself with several shades, going from anarcho-capitalist Rothbard to classical liberal Hayek. In this article we intend to show how Hayek, while remaining faithful to the libertarian credo of non-patterned distribution of goods, guarantees a better fulfillment of the main goal of libertarianism, ensuring individual freedom.

Keywords

Hayek, Nozick, classical liberalism, libertarianism, minimal state, minarchism

Introduction

We intend here to address the concept of legitimate state action within libertarian moral theory, answering what has been called “the libertarian paradox” (Danley, 1979): while libertarianism rejects redistributive policies, it appears that even a minimal state is indeed redistributive. So, we may ask, *what kind of state is acceptable within libertarian theory?* Or to be more accurate, *what kind of state is better?*

Libertarianism is based upon three fundamental principles: self-ownership (as the property of one over his body and the product of his work);

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fair transfer (the transfer of goods acquired by fair means is free, as long as individuals do not give up their own freedom) and original appropriation (the entitlement to a good derives from a chronological appropriation, eventually under the payment of a fee, following Locke's proviso or Paine's agrarian justice criterion)². The departure point is nevertheless self-ownership, of which all the other values of libertarianism derive; the other two principles can be reduced to a larger one, consisting in the power of each individual to pursue his own goals in the best way he can (without limiting other individuals' self-ownership)³.

We may synthesize these principles as two moments: the first and decisive moment consists in the ownership of one over oneself, the inviolability of individual freedom. It is the universal, counter-factual, properly moral moment. No practical considerations may limit in any way such principle. The second moment is the factual, or pragmatic moment: each individual has the right to pursue his concept of good, within the boundaries of the precedent universal principle and in the context in which the individual is actually inserted.

While these two moments in libertarian moral reasoning are common to all libertarians, there are naturally differences among its followers. Such differences emerge fundamentally around the concept and the role of the state, and result essentially from the divide between non-consequentialist and consequentialist approaches. As an example of a non-consequentialist, we can present Murray N. Rothbard, for whom the state results always from the expropriation of individual freedom, and so is wholly immoral. Individuals can only pursue their own goals if there is no state. As a consequentialist approach, we have Hayek. While maintaining that the state cannot use taxes to do social engineering (determine prices or promote

2. I accept here the three principles exposed by Christian Arnsperger and Philippe van Parijs (2000, chapter II).

3. It must be said nevertheless that, though indeed many authors, both from outside and inside the libertarian field classify Hayek as a Libertarian, others - perhaps more accurately - classify him as a classical liberal, that is, a liberal, and so, different from libertarians. Nicole Hassoun (2011, p.655) says it clearly: "Authors like Friedrich Hayek, Milton Friedman, and Richard Epstein do not start from a right to self-ownership. [...] these authors are perhaps better classified as classical liberals than libertarians". Indeed, the pluralism of meanings of *liberalism* opens the door to these taxonomic doubts. Recently, with the study of Rawls, the trend to transform liberalism in another word for egalitarianism (though Rawls itself is not primarily an egalitarian, but above all a liberal, focusing more in a fair institutional framework than in material equality) authors that are clearly opposed to material egalitarianism such as Hayek are in consequence "pushed" to the libertarian field, even if, at the core of his theory, he is himself eventually much closer to Rawls than to authors such as Nozick (the same way Rawls is actually closer to Hayek than to any egalitarian moral philosopher). Polemic as this may be, I will not enter such discussion, accepting here the dominant classification of Hayek as a libertarian - and accepting with it the risk of arguing on the basis of a *petitio principii* fallacy: indeed, if Hayek is essentially not a libertarian, but a liberal, then it makes no sense using his work to defend a libertarian state that goes beyond Nozickian minarchism.

social equality), Hayek affirms that the state can and must provide some basis for social interaction, for we do not live in a state of nature, but in complex societies formed by millions of individuals and of interconnected communities (or societies). Between these two extremes, we find Nozick's *utopia* (1974): a minimal state only concerned with the guarantee of physical freedom, and leaving the pursuit of goals and desires to completely unregulated social interactions.

Let us *define state* so to clarify the further discussion. We will not adopt here the classical Weberian definition of the state as an institution with the monopoly of legitimate violence. We will not adopt such definition because in most legal systems the self-defence mechanism is (even if limited) allowed. So, in some circumstances, states - even states that not only concentrate large powers over security and justice, but also that extract from society the majority of the wealth in it produced to use in social policies and in economic interventionism - may open the floor to what we may call "state of nature-kind of relations". We mean by this that a "monopoly of violence" type of definition should absolutely exclude the enforcement of individual rights (such as life or property) by direct action of the affected part.

We can nevertheless try to adopt Nozick's ultraminimal state definition⁴. There, the *monopoly of legitimate violence* is still present, but *in a doubly mitigated version*: on the one side, as it actually happens, people are, in some situations, entitled to *self-defense*. On the other side (and this is not present in the traditional definitions), people are also entitled to *self-exclusion*: they must not be forced to buy state protection services (so, pay taxes), but are not entitled for its protection either (and so must be capable of guaranteeing their life and property by themselves or accept the consequences of such choices). And, so, this is the most limited definition of state we can conceive. An organization that, while not allowing other organizations to perform the same tasks over the same territory, accepts individual exclusion from the social contract.

It is from here that our argument will depart, developing in three steps. First of all we will present three different formulations of the state that share a common refusal of a right of the political system to intrude on the economic sphere (so the three types of state that are acceptable for libertarian authors): the *ultraminimal state*, the *minimal state* and a third, that we may call the *regulatory state*.

In the second section we will deal with the problem of self-ownership. We intend to show the main arguments for each one of the three types

4. For the discussion about the differences between a mere dominant protective association and a(n ultraminimal) state, read Nozick, 1974, pp. 22-26.

of state we have now presented: the *radical* and the *pragmatic* inviolability arguments, and finally the *cognitive* one. The practical limits of the self-ownership principle will be tested.

In the last section we will establish a difference between two different things: a state that creates a *framework* for free action, and a state that *frames* action. The question of *redistribution* arises here: if we redistribute something from someone to others, are we respecting the former? How much inviolable can a person be in society?

Authors like Hayek or Nozick reject social justice, but their views on the state include some redistribution. Here we will show that Nozick fails to demonstrate that Hayek defends a patterned distribution by the state. We want by this to prove that minarchist views of the state do not answer to a balanced position between a state that only protects individuals from direct harms and a state that wishes to dictate what people should do and desire. To say it in other terms, *minarchism is not superior to non-minarchist libertarianism in the decisive universal principle of self-ownership while being weaker than it regarding the factual or pragmatic principle.*⁵

I - The Three Forms of Libertarian States

The minimal and maximal criteria for a non-interventionist state

First, let us set the limits of the types of state that interest us. The minimal criterion is that it *is* a state. In that sense, the Nozickian protective associations (1974, pp. 12-15) are not included in our scope of analysis. They lack *the monopoly of violence factor* that form the core of the idea of state. Protective associations may be mutual-protection institutions, or companies providing such services, that compete in a same geographical area for providing services of protection. They do not claim to have the right for the exclusive use of violence over a given territory and they are not submitted to other associations. By definition, there can be no ultimate power, in which case that ultimate institution will be a state (even if not in the modern sense). An ultimate power federating several protective associations would correspond to a replica of the feudal political organization.

A state, even if a very limited one, will claim the right of being the *sole protective association* over a given territory.

5. With this, we also answer some attacks done on Nozick and libertarianism at large (e.g., Papaioannou, 2008) in which it is asserted that, given the gregarious nature of human beings, it is impossible to both defend individual liberty and reject strong redistributive policies. While redistribution always occurs in societies, it needs not be arbitrary, but may be restricted by neutral rules that also allow the development of societies and individuals.

The maximal criterion for a *libertarian, non-interventionist state* is that it *does not wish to direct the society and the economy in any given particular sense*. It does not intend to determine specific results, such as material equality, products that are better or worse to be consumed or the industries that the country should focus on. Excluded are not only full-fledged collectivist economies either in a Soviet style, or in its twin sister, the Nazi *Zwangswirtschaft* - “controlled economy” - in which an economy nominally in the hands of private investors is *de facto* directed by state planning. The interventionist state⁶ is also out of our scope of analysis. In it, the state has discretionary power to support given industries; sectors seen as strategic may be state monopolies or at least be under government control (e.g., through *golden shares*). Strong social policies with social segmentation (positive discrimination) may also be implemented with goals that go beyond the creation of equality of opportunities and include material equality (or, for that matter, inequality, that is, policies directed to create, maintain and reinforce social strata).

The ultraminimal state

Previously we have defined the ultraminimal state as an institution that claims the monopoly of legitimate violence, in which such monopoly was limited both by the possibility of self-defense in circumstances where the state could not provide immediate protection and by the possibility of individuals refusing to be included in the state protection scheme. Let us refine this definition. An ultraminimal state does not hold the monopoly of violence, but it is the only *organization* providing protection in a given territory, and this not exclusively because the protection-services market led to such monopolistic protection, but also because there is a claim of *legitimacy* in the enjoyment of such monopolistic condition.

Simultaneously, the legitimacy claim is limited to those individuals who expressly demonstrate their acceptance of such services by buying them (paying taxes). Other individuals may feel that the state does not provide good services, or that the services provided do not fit their needs and prefer to fend for themselves. There is not a protection market, like with

6. “The system of the hampered market economy, or interventionism, differs from socialism by the very fact that it is still market economy. The authority seeks to influence the market by the intervention of its coercive power, but it does not want to eliminate the market altogether. It desires that production and consumption should develop along lines different from those prescribed by the unhindered market, and it wants to achieve its aim by injecting into the working of the market orders, commands and prohibitions for whose enforcement the police power and its apparatus of coercion and compulsion stand ready. But these are isolated interventions; their authors assert that they do not plan to combine these measures into a completely integrated system which regulates all prices, wages and interest rates, and which thus places full control of production and consumption in the hands of the authorities.” in Ludwig von Mises, 1947, p. 5.

protective services' associations, but the ability for individuals to opt out of the protection scheme puts pressure on the state to provide good services.

This concept of ultraminimal state, presented by Nozick, is rejected by him: instead, he defends the minimal state.

The minimal state

The minarchist model is presented by Nozick as an “equivalent to the ultraminimal state conjoined with a (clearly redistributive) Friedmanesque voucher plan, financed by tax revenues.” (Nozick, 1974, pp. 26 and 27). So, contrary to what happened in the previous situation, all citizens must be under the same protection scheme, with the same rights, although not all with the same responsibilities. People who cannot pay to “buy” the security services, meaning, those who do not earn enough money, or no money at all, to pay the full price of such services, will still get them. On the other hand, those able to pay for it, will pay an extra to allow poor people (and those groups who do not earn money, such as children, elder or people with disabilities) to access such services.

The minimal state, thus, while still allowing a limited self-defense, does not allow self-exclusion. Everybody is, in way or another, included in the state. There is no one in a somewhat “state of nature” condition. The structure of the state is nevertheless limited to the very few elements that form the skeleton of our modern states: the political structure and the dependent administration (essentially constituted by the tax-levying services); justice services; and internal (police) and external (army) security forces.

The regulatory state

The regulatory state goes beyond such skeleton. Let us present an excerpt from Hayek to better understand this idea:

Since [...] we are mainly concerned with the limits that a free society must place upon the coercive powers of government, the reader may get the mistaken impression that we regard the enforcement of the law and the defence against external enemies as the only legitimate functions of government. Some theorists in the past have indeed advocated such a ‘minimal state’. [...] Far from advocating such a ‘minimal state’, we find it unquestionable that in an advanced society government ought to use its power of raising funds by taxation to provide a number of services which for various reasons cannot be provided, or cannot be provided adequately, by the market.

Friedrich A. von Hayek, *Law Legislation and Liberty*, vol. 3, *The Political Order*

of a Free People, p. 41.

So, first of all, we must keep in mind that in this third type the number of services guaranteed by the state goes far beyond mere security. The essential idea that we find in the end of this passage is the market failures situation. In *Capitalism and Freedom* Milton Friedman synthesizes such situations by saying that the state can intervene in “cases in which strictly voluntary exchange is either exceedingly costly or practically impossible [...]: monopoly and similar market imperfections, and neighborhood effects.” (Friedman, 1962, p.28).

Saying that the state must intervene in such situations does not mean that the state must directly provide them (it can fund it, while delegating its execution, for example) and it means even less that the state can *declare* (by interdicting private competition) its monopoly in all market failures situations. So, for example, in postal services (an example given by Friedman on page 29), some may say that there is a technical monopoly - and maybe there is, but that is not a reason for prohibiting private companies from trying to enter the market. The rationale is: either it is in fact a technical monopoly, in which case these companies will fail, or the companies will succeed, in which case the ‘technical monopoly’ argument is wrong. Similar argumentation can be used in many other sectors such as education, health, telephone services, etc..

Hayek, in *The Constitution of Liberty*, gives us a more comprehensive list of areas that deserve state attention. These include, among others, the monetary system, standards of weights and measures, statistics, land registration, education (Hayek, 1960, pp. 195 and 196). In fact, in the third part of the book a comprehensive analysis of areas such as employment, employment, taxation, housing and urban planning, agriculture, environment and education is provided. Lawrence Wai-chung Lai (2002) has done a comparison between several libertarian views on urban planning, and among them, Hayek and Nozick (pp. 297-300). In it we can see that while Nozick rejects any *ex-ante* regulation (and preferring courts as the place to solve problems such as pollution) Hayek is not completely opposed to it, though clearly preferring market mechanisms operating under a broad legal framework.

Nevertheless, I will not here elaborate a thorough description of what, in this third formulation, a libertarian state can or cannot do. The reason for that is the same for which we have named this third type as “regulatory”. *The basic characteristic of a legitimate state action is that it must conform to a “permanent legal framework which enables the individual to plan with a degree of confidence and which reduces human uncertainty as much as possible”* (Hayek, 1960, p.195). The state’s tasks are limited not so much by describing the acceptable activities, but on the methods used. The state

must protect the freedom of economic activity; this means freedom under the law; and law does not mean every legal act, but only general, abstract rules. From law are excluded specific orders, commands, prohibitions. It is not the ends that are criticized, but the methods – although, certainly, if we restrict the ways governments can intervene, we also limit the ends it may pursue. So the state is responsible for laying down the *foundations* for free action by individuals, like in a constitution, without determining how such action is going to occur. It regulates, it does not order. It is not so much worried with the substance as it is with the procedure.

Differences and similarities between the three forms of state

We have presented the three types of State that concern our discussion. We will now summarize their characteristics so that we can advance to the explanation of the main arguments founding each one of them. Contrary to what happens in an anarchy, we have here a monopoly of violence; contrary to interventionist and collectivist States, none of these three types of State define the results of economic interaction.

At the same time, the monopoly of violence can be interpreted in a mild way (ultraminimal state) or in stronger one (minimal and regulatory states). The relation between the economy and the state may be of absolute separation (ultraminimal and minimal states) or the state (in the regulatory case) may have the function of guaranteeing services that would not be delivered by normal market interactions, at the same time allowing the individuals to make the best they can within the market system.

Type of state	Several protective associations	Mild Monopoly of violence	Strong Monopoly of violence	Economic regulation, social policies	Economic intervention, social engineering
No (Anarchy)	<i>Yes</i>	No	No	No	No
<i>Ultraminimal</i>	No	<i>Yes</i>	No	No	No
<i>Minimal</i>	No	No	<i>Yes</i>	No	No
<i>Regulatory</i>	No	No	<i>Yes</i>	<i>Yes</i>	No
Interventionist or Collectivist	No	No	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>

table 1: types of state and their scope of action

II - Individual Preferences, Individual Inviolability

Negative freedom

What is common to all of the three categories of state is that all of them wish to remain neutral regarding individual preferences, and to some extent they believe there is an inviolable space within the sphere of action of each moral agent. Let us review Berlin's approach of negative and positive concepts of freedom.

The first of these political senses of freedom or liberty (I shall use both words to mean the same), which (following much precedent) I shall call the 'negative' sense, is involved in the answer to the question 'What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?' The second, which I shall call the positive sense, is involved in the answer to the question 'What, or who, is the source of control or interference, that can determine someone to do, or be, one thing rather than another?'

Isaiah Berlin, *Two Concepts of Liberty*, p.169.

Berlin does not intend to attack the idea of positive liberty, but to stress that positive liberty must be limited also to defending the autonomy of individuals. It could not be mixed with any idea of what the individuals should, *if they are rational, or good*, desire or choose. Negative freedom (the freedom of *the individual as an individual*) appears thus as a clearer concept, referring to that space that positive liberty (so, the liberty of *the individual as a citizen*, meaning thus, the political order) cannot infringe.

The notion of negative freedom serves as a conceptual instrument to avoid the extension *ad infinitum* of "rights" that must be guaranteed by the political sphere, and thus the areas in which the state must intervene. Let us see for example how Nozick sees the relation between his minimal state and the individuals.

The minimal state treats us as inviolate individuals, who may not be used in certain ways by others as means or tools or instruments or resources; it treats us as persons having individual rights with the dignity this constitutes.

Robert Nozick, *Anarchy, state and Utopia*, pp. 333 and 334.

Again we see the issue of non-violation of a private sphere. But that same non-violation may be seen in different ways. In fact, a crucial issue concerns the Welfare state. Davis (1987) has argued that Nozick's principles can be used to defend it, but also that he is a "philosophical" libertarian, unlike Hayek, who is a "pragmatic" one (p. 594) and that of course this produces different outcomes. From a different perspective, Su (2008)

affirmed that John Stuart Mill's utilitarian liberalism justifies social justice, whereas Hayek's "rule of law" principle rejects the unequal treatment that social justice, as "concrete" (p. 410) justice, entails. In an attack on Milton Friedman, Nock (1988) has argued that in a truly libertarian state some kind of social *minima* (presumably, a basic income) should be provided so that individuals could be truly free and not be forced to engage in market interactions. It would be a way of avoiding unequal treatment (since everybody received the same amount) while expanding individual choices⁷.

We need, for all this, to understand which are the underlying specific arguments for an ultraminimal, a minimal and a regulatory state.

The argument of radical inviolability of self-ownership

We will start by defining a radical version of this inviolability argument. Sell-ownership is based upon the Lockean property concept, given by the English philosopher in his *Second Treatise*.

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body had any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the state that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.

John Locke, *Two Treatises of Government, The Second Treatise*, §27

So, we have two premises: each person owns her own body; each person owns the product of her work. What the radical interpreters of this perspective extract from the principle of self-ownership is that no person and no institution has the right to demand any payment that the person herself has not agreed upon in the absence of coercion. So, in conclusion, *the state has no right in imposing its protection services and receive taxes* from people. That is, as we have seen, the case in the ultraminimal state.

In contemporary philosophy, one of the most radical perspectives is given by Murray Rothbard. In his analysis of the nature of the state (Roth-

7. It is not the goal of the present article to discuss such position, but it should be noticed that to pay for such income, money is to be raised from taxes, implying that some people - that accepted to live under market economy - would be forced to pay for other people - who chose not to. So, we would find the paradox of people rejecting market economy while living off its fruits, which puts at stake the inviolability principle, according to which each individual is free to live as he sees fit, provided he does not transgresses on other people's choices. The correct libertarian answer to Nock is simply that those individuals not wishing to live in a market-based society, must be free to do so, but cannot demand that others subsidize it. Fourteen years before Nock's article, Nozick had already solved that question by defending his utopia of a minimal state in which a multiplicity of communities with different economic systems were free to exist.

bard, 1982, pp. 161-182) he says that “the crucial monopoly is the state’s control of the use of violence [...]. Only the state obtains its revenue by coercion, by threatening dire penalties should the income not be forthcoming. That coercion is known as ‘taxation’” (Rothbard, 1982, p.162). The author actually claims that the state has no moral right to exist (Rothbard, 1982, p.187).

But how, if the inviolable nature of the product of each person’s work grounds the claim for denying compulsory taxation, can any type of state exist? Nozick uses the *market failure* kind of approach (Nozick, 1974, p.17): “maximal competing protective services cannot coexist” because they would lead to a state of permanent conflict. Saying that they cannot co-exist does not mean necessarily that everybody has to accept these services, and hence the opt-out limitation on the principle of state’s monopoly of violence in the ultraminimal state.

The pragmatic inviolability argument

But Nozick does not defend the ultraminimal state either. He ends his 1974 book by saying the following about the state:

Treating us with respect by respecting our rights, it allows us, individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves, insofar as we can, aided by the voluntary cooperation of other individuals possessing the same dignity. How *dare* any state or group of individuals do more. Or less.

Robert Nozick, *Anarchy, state and Utopia*, p. 334.

Nozick’s claim is thus that anything less or anything more than the minimal state is immoral. Anything more, following the inviolability of individual property. Anything less, because if there is an invisible hand process leading towards the creation of an ultraminimal state, “[i]t would be morally impermissible for persons to maintain the monopoly [...] without providing protective services for all, even if this requires specific ‘redistribution’.” (Nozick, 1974, p.52) The constraints created on the individuals who did not join this dominant association would not be compatible with the idea of self-ownership because, in the end, some kind of last resort to solve conflicts among individuals must exist.

The antinomy in the inviolability discussion

Other part of this pragmatic approach of the individual inviolability argument is the symmetric response to the accusation that Rothbard laun-

ches against Nozick in chapter 29 (pp.231-253) of his *The Ethics of Liberty*: he reproaches an allegedly “immaculate conception of the state”. By other words, if the state is the ultimate power within a society, who or what is going to guarantee that it is fair and keeps itself within the strict boundaries of its minimalistic functions?

Nozick, on the other hand, is worried with guaranteeing that individuals and communities will respect the rights of other individuals. Rothbard tells us that “[t]he great *non sequitur* committed by defenders of the state [...] is to leap from the necessity of *society* to the necessity of the state.” (Rothbard, 1982, p.187). Accepting, as we may, that the state will eventually exercise power beyond the limits of the minarchist project, who will guarantee individuals that their rights will be guaranteed if they are not under the protection of the state (such as in an anarchy or an ultraminimal state)? Nozick assigns to his state precisely the duty of regulating conflicts between the existing *voluntary* communities within the state, and the duty of guaranteeing that such communities are *in fact voluntary* (meaning, that individuals are not forced to join or stay in such communities).

So, we may conclude, if Nozick has an immaculate conception of the state, we may rightfully ask if Rothbard has or not an immaculate conception of society. Market relations solve many of our problems - but they are, as Rothbard notices, the peaceful way of solving them. What if violence comes up (and it *does* come up in all human societies)? That is why we have chosen to call the second formulation, the Nozickian, “pragmatic”: it recognizes that states do exist, and they naturally exist, but they should serve to guarantee individual self-ownership. The “inviolability of individuals” argument is taken on realistic grounds.

The cognitive or informational argument

Hayek does not deny the bulk of the inviolability argument, and in fact we should start by the remark that, while the author does include a wide range of activities in which the state has to, in one way or another, intervene; and while in these activities there are some that we can call “social policies”; it does not follow that Hayek’s concept of state may engage in the slippery slope that Rothbard sees.

We have called Hayek’s state the *regulatory* state to avoid confusion with the terms *Rechtsstaat* or *Rule of Law*. These are the terms that Hayek generally uses, but their common use as any Western-type democratic regime would create some misunderstandings in this discussion. For our argument, it suffices to explain that this regulatory state establishes the general rules that allow individuals to act freely. Providing social minima and regulate market failures are the tasks that, as we have seen in the previous table,

the state has to fulfill.

How can Hayek accept the institution of social policies, how can he for example be “in favour of the government providing on an equal basis the means for the schooling of minors” (1976, p.84) while rejecting the notion of “social justice”? He goes even further and rejects the concept of “equality of opportunity”. In his view, providing full equality of opportunities “would have to go on until government literally controlled every circumstance which could affect any person’s well being. [...] any attempt concretely to realize it [will] produce a nightmare” (1976, p.85)⁸.

The author’s line of reasoning goes deeper than the previously stated mere “market failure approach”. While the state is not entitled (following the inviolability argument) to extract resources from the individuals to redistribute them in order to produce specific patterns of material wealth, it is entitled to use resources that give the individuals instruments to pursue their own ends⁹. As we have just seen, his rejection of egalitarianism goes as far as even denying (at least to some point) equality of opportunities. Hayek is not worried with *producing* a *just* society, for the state should not *try to produce* specific results. Society, as a result of free interactions, cannot be unjust; it is only unjust if the state is itself unjust, namely by trying to substitute individuals in their choices.

What grounds state action is not a pre-given concept of what is right, but creating a framework for human action. It does not limit itself to avoiding physical threats to life and property (as it is the case of the minimal state) and it does not go as far as saying what should the individuals desire for themselves (as in interventionist and collectivist states). Instead, the state must create rules that, by being known by all, may allow action with some degree of confidence. For example, it is not *per se* relevant to know if, in weights and measures, the state adopts the metric system or an alternative system - but it is relevant that *individuals know the valid system* so that they can work and trade. Guaranteeing the reliability of information is a fundamental task that allows peaceful market interaction.

8. This is a modulation of Berlin’s negative/positive freedoms dichotomy. A *radical* notion of equality of opportunities, interpreted in the light of positive freedom, leads inevitably to a comprehensive intervention of the state in society.

9. For example, Hayek does not oppose that minimum living conditions be guaranteed for everybody, but directly denies the right of some professions to block the access by prospective workers or to guarantee fixed levels of income and benefits. So, for example, in *The Road to Serfdom*, p. 215: “Let a uniform minimum be secured to everybody by all means; but let us admit at the same time that with this assurance of a basic minimum all claims for a privileged security of particular classes must lapse, that all excuses disappear for allowing groups to exclude newcomers from sharing their relative prosperity in order to maintain a special standard of their own.”

Self-ownership and egoism

As Gerald Allan Cohen correctly puts it, “the right not to supply service or product forms part of any plausible reading of the self-ownership principle” (1995, p. 215). Self-ownership allows us to deny the duty of providing for others, not only in the mere economical transactions but also, for example, in social policies. The political imposition of social solidarity is in contradiction with the idea that there is an inviolable personal sphere. Under such principles, individuals have the *right* to be blatantly egoistic.

However, it is different to ask if that is their *interest*, and even more different if that is what they are *actually* going to act like. There is no straightforward connection between rights, interests and actions, and authors such as Rothbard, Nozick and Hayek use that fact to say that the absence of all-pervasive social policies does not mean that solidarity is absent from society. Individuals do not actually act on the sole basis of their strategic interests, and *sympathy* or *compassion* are sentiments that naturally exist among humans. But what makes the difference between Hayek and Nozick (not to speak of Rothbard) is that while the latter is a rights-based libertarian, Hayek is a classical liberal utilitarian, in which interests do play a significant difference (and grounds Hayek’s defense of broader state than the Minimal one).¹⁰ We intend to show this here.

Let us take two examples, one hypothetical and another real. We show that even if we have a right to avoid a given transaction, if the marginal gain of performing such interaction is superior to the one of not performing it, there are *interest-based* reasons to proceed with the transaction, while it is argued, from a libertarian one, that such transactions must not be *imposed*.

From clay you may get vases and from dust you only get hunger

We will start with the hypothetical example. John is a person of no talents, but he holds a big amount of clay. The fact of owning such clay is of no good to him, because he cannot transform it into something useful. But Mary does know how to transform clay and make fine pottery. The sole problem is that Mary has no clay of her own. Let us assume that John holds all the clay on a completely fair basis and that Mary holds all the talent in an also completely fair basis.

In a situation *A* they do not trade. They do not trade either because

10. So, for example, while libertarianism in general may be seen as a “*fetishization* of ‘natural rights’” (Arnsperger and Van Parijs, 2000, p. 42), Hayek is “a thinker combining, on the one hand, an ultimately utilitarian justification of the rules of social organisation emerging from spontaneous evolutionary processes and, on the other hand, a libertarian vision of society and of its economical organization” (Arnsperger and Van Parijs, 2000, p. 30).

John thinks that the terms of the trade are not fair, or because John does not like Mary, or for any other reason - it is John's clay and he does not have to give any justifications. In situation *B* they do trade. Mary can produce four vases out of the clay John gives her, and Mary promises to give John one vase as a payment.

Situation *A* is perfectly consistent with John's right of not trading clay for vases. According to the principle of inviolability that derives from self-ownership, he may refuse to sell the clay. John would be better off if he let Mary get three vases, but he may think that her work is not worth three vases, or that his clay is worth more than one vase.

A is fair. *B* is also fair, but materially better. What should people prefer?

Let us take a real life example. Until the year 2000, Zimbabwe was a net exporter of several agricultural goods. Since then, an agrarian reform has been put in place by Robert Mugabe's government. Thousands of white farm-owners have been evicted from "their" lands which have been subsequently redistributed to dispossessed black families.

From a rights-based, libertarian, perspective (even right-wing perspectives such as a Rothbardian) it is not obvious that what Mugabe's government is doing is wrong. All libertarians will agree that it is crucial that the original appropriation has been done with no violation of other people's rights. The appropriation was so recent (essentially between late 19th century and the first half of the 20th century) and so wide (one percent of the population held seventy percent of the farming land) and based in such a blatant violation of human rights (war, conquest, imperialism, colonialism) that I will actually say that any libertarian-based view will be at pains to say that the original appropriation of Zimbabwean farm lands was anything other than unfair. Enter, then, the need for a compensation principle or, even better, a redistribution of land¹¹.

11. Being at pains, but not at all impossible. In fact, both Locke and Paine link property with the adding of individual work to unowned goods, say uncultivated lands. Some may argue that the lands of present day Zimbabwe were, for the most part, uncultivated - and consequently their appropriation was done with no harm to the inhabitants. Since, following Paine, "It is a position not to be controverted that the earth, in its natural, cultivated state was, and ever would have continued to be, *the common property of the human race*." (*Agrarian Justice*, 1797, paragraph 10) and that the lands were unappropriated, it is irrelevant to know if the farmer that takes it was born there, and his family was born there, or if he is an immigrant, say, a British settler. But here we find several arguments to counter this one: we cannot guarantee that all the land that was appropriated was in fact virgin; and even those parts who were virgin, belonged to political entities of sedentary peoples that, while seen as uncivilized by 19th century Europeans, would by our present standards have to be respected as sovereign states. It follows from this that, the same way that a British settler cannot take possession of a swamp in France under the argument that nobody has joined his or her labour to transform it into productive soils, there is no reason for a British settler to claim as valid its possession of a piece of land that was part of the Shona or Ndebele kingdoms that existed in the area of present-day Zimbabwe.

In any case, with or without legitimate appropriation of Zimbabwean lands, a compensation is

So Zimbabwe apparently does have the right to take white farmers' land. But since the start of the agrarian reform production dropped immensely, and a formerly food exporter has now a high hunger risk.

For most people, a strictly rights-based approach seems highly counter-intuitive. If in theoretical situations (clay and talent) opinions may be more divided (egalitarians may argue that A is, from a theoretical point of view, preferable to B, should there not be a situation C in which both John and Mary had two vases) few people would have the courage to assert that it is preferable to starve to death than to keep a land distribution that was, in its origin, unfair, but that presently provides more welfare than the fairest solution.

III - Frameworking and Framing

The role of information in cooperation and market transactions

So far we have showed that, while minarchist perspectives are fully grounded in the self-ownership principle, the Hayekian perspective includes, but goes beyond, that principle. It includes concerns over welfare that justify both funding through taxation (so, through state coercion) services considered vital for society and that the market could not provide, and regulatory frameworks for markets to properly function. These concerns are to better answer the second libertarian principle: that each individual is free to pursue his own ends. We now intend to develop this idea by showing the crucial relevance of the cognitive dimension.

Let us get back to the clay/vases example. John and Mary may decide to trade, because even if John only gets one vase and Mary gets three vases, it is in John's interest to prefer one to none. He would be better off than in the initial situation. But that decision is not done in abstract (just "clay"). There are *quantities* and eventually even *qualities* of clay that are exchanged against given numbers of vases. In primitive economies (or in the simple example given) the attributes may be defined on a case-to-case basis, or with not rigorous measurement mechanisms. Nevertheless, certainly when John gives Mary clay, he will give a given quantity that they have agreed upon. In complex economies, deciding on a case-to-case system does not work, and people need measurement instruments. The same

mandatory, at least in Paine's case: "Every proprietor, therefore, of cultivated lands, owes to the community a ground-rent (for I know of no better term to express the idea) for the land which he holds; and it is from this ground-rent that the fund proposed in this plan is to issue." (1797, paragraph 12). In Locke's case, the proviso is not very different, but it is simultaneously not as clear that a compensation is needed in case of legitimate appropriation. That is why Locke's proviso is preferred by right-wing libertarians over Paine's agrarian justice, which will tend to inspire left-wing libertarians.

way that mankind developed official calendars and clocks to master time, something that became crucial when it passed to sedentary, agricultural societies, so it needed measurement instruments when complex trade came into existence.

As we have seen, in Hayek, keeping up a system of measurements is one of the tasks that the state “in an advanced society” (Hayek, 1979, p.41) must perform, as is guaranteeing education for example. The reason is that without clear uniform information and rules in some aspects, and without some level of information provided to individuals, economic relations are transformed into prisoner dilemmas. The state’s task is then transforming *prisoner dilemmas* into *assurance games* through a normative framework that provides the cognitive tools for individuals to trust others and so to make their choices in confidence. To say it in another way, the fact that the state gives people maps does not mean that it is telling them where to go. And that is what Hayek is trying to tell us.

Redistribution, Patterned and Non-patterned

Right-wing anarchists and (hypothetical) ultraminarchists see *all* redistribution as a violation of the self-ownership principle, something that authors such as Nozick or Hayek would not agree with. The latter maintain that their position is nevertheless not the same of interventionists or collectivists, who wish to give the state the task of moulding society (either only on some sectors, such as the interventionists do, or globally, like the collectivists). We have simultaneously seen that Nozick and Hayek have rather different perspectives on the tasks of the state. Let us summarize the general picture in a different way than the used in the previous table.

	No Redistribution	Non-Patterned Results	Patterned Results
No violence monopoly	Anarchy	-	-
Monopoly on violence	Ultraminimal state	Minimal state	-
Regulation, Social Policies	-	Regulatory state	Interventionist state; Collectivist state

table 2: types of state and redistribution policies.

What we can see is that the similarities that we had found between the Ultraminimal and the Minimal state, on the one hand; and between the Regulatory and at least and Interventionist state, on the other; are much less relevant than we could think, because the logic guiding them are different. The Minimal and the Regulatory states accept redistribution of resources, but only as a means of guaranteeing a *framework* for human action. This is very much different from *framing* the results of social interaction,

which is what is intended in Interventionist and Collectivist states. So, we may conclude, redistribution in Nozick and Hayek does not violate self-ownership in the sense it creates the framework for it to exist, without nevertheless impose results that were not naturally produced in society. Contrary to anarchism and the ultraminimal state, they both accept redistribution. But contrary to interventionism and and collectivism, they both reject patterns of redistribution: yes, those who can pay more will pay more, and those who cannot pay may even receive help (in the Hayekian formulation). But the state does not intend to benefit some social groups, nor economic sectors, nor even produce some levels of social cohesion and certainly not economic equality.

We will now develop the Nozickian and Hayekian concepts of non-patterned (so, non-framed) distribution.

Non-patterned distribution in Nozick

We have previously seen that Nozick admits that the Minimal state includes a redistributive policy regarding security. Nevertheless, and contrary to the Rawlsian Difference principle, there is no distributive intention. The “subsidy” (or the “Friedmanesque voucher”, in Nozick’s words) is not a predicament of one’s social position. It is not because people are poor that they receive this support. It’s because they have a natural right to (self-)defense that is taken from them when the state is instituted. So, to guarantee that their lives or the product of their labour is not usurped by others, an alternative defense system must be in practice. Nozick’s Minimal state works within a purely non-redistributive *logic* (even if not practice), or to be more precise, a *non-patterned* distribution.

According to Nozick, his entitlement theory is not patterned: “From each as they choose, to each as they are chosen” (1974, p.160). It’s based upon no overarching aims, but only on individual choices. According to him, Hayek on the other hand does look for a patterned distribution: “Despite his rejection of a patterned conception of distributive justice, Hayek himself suggests a pattern he thinks justifiable” (1974, p.158). For the Austrian author, in a free society there will be no distribution according to moral merit, but only value, meaning, benefits perceived by others. The entitlement system does not need overarching aims, patterned distributions; it needs individual aims and transactions only (Hayek, 1960, p.87).

Non-patterned distribution in Hayek

It seems however that there is a misinterpretation of Hayek’s concept of *value*. That is why (1960, p.82 and 83) he distinguishes between merit

(or, as he a few pages later he develops, “moral merit”) and value. What matters is what others value of the objective outcome of our actions - not our subjective efforts. There is no such thing as a “moral merit” in economics; the payment that each will receive is the direct result of other individuals’ decisions, and not state regulations.

We have to conclude that also in Hayek *there is no patterned distribution*. The Hayekian argument for *value* is that it is the only compatible system with individual freedom because *merit* limits or - in extreme cases - stamps out any possibility of, each individual choosing his own goals. The main thing in a non-redistributive system is that there is no central authority dictating who should get what and why; it is the individuals who decide if a profession is worthy or not, or a product is good or not, through market interaction. This judgement is not necessarily a moral one and often will contradict the common moral perspectives (probably more people will think that a teacher is morally more noble than a manager; however, people prefer to pay more to a manager than to a teacher).

The complexity of reasons behind the actions of each individual, multiplied by the complexity of vast societies like ours, which unite millions of individuals, makes any attempt to create a central distribution system a failure.

We will conclude by trying to understand: why something more than an ultraminimal state is needed; and if the minimal state is not also too limited.

The ultimate enforcer

The ultimate enforcement of justice is a serious problem raised in a situation where the state cannot impose its decision on everybody. That leads Nozick to write that, “[p]resumably what drives people to use the state’s system of justice is the issue of ultimate enforcement. Only the state can enforce a judgment against the will of one of the parties.” (1974, p.14) The nonexistence of an ultimate enforcer would lead to standstills or direct violence (with not necessarily the fairest result) in judicial disputes between individuals. Such is the generally accepted assumption that grounds the argument for a strong monopoly of violence.

The same moral status: the non-violation of the first libertarian principle

But why should we go from the Nozickian pragmatic inviolability argument to a Hayekian state that redistributes even more wealth and inter-

venes in areas such as education, while building normative frameworks to which businesses must conform?

As we have seen, the reasoning that grounds one and the other author is the same. The state must allow each individual to follow his or her own path, giving them the instruments for such and without imposing on them predetermined choices. Both defend a non-patterned distribution of goods in society, where though there is redistribution, the richer individuals are not used as a means to achieve a political goal (like material equality). Both Nozick and Hayek avoid violating the first libertarian principle, that of self-ownership and individual inviolability.

Higher benefits: maximizing the second libertarian principle

The difference is that while Nozick has a limited notion of the instruments needed by individuals to succeed in their projects, Hayek has a broader one. We can easily presuppose that external defence and internal justice are, in general, too narrow tasks, and that they certainly do not fill all the needs in complex societies. Even if we assume that the state must be a last resort¹² certainly we can imagine that many services of universal interest can only be provided, or provided efficiently, and even so, provided with no monopoly (and thus with no coercion) by the state. In that sense it does not necessarily violate the principle of self-ownership, while allowing individuals to better live their lives.

If the moral status of, say, financing education is the same, if it is done without the state directing what individuals should want for their lives; and if simultaneously state funding produces better results; what is, in the end, the argument that can be used against it? Nozick falls short of explaining why we should be limited to his non-patterned distribution and not accept why, on top of defence and justice, the state should not integrate tasks in sectors that society (the market) is not able to guarantee by itself (provided, of course, the state does not try to dictate the specific results of, say, the distribution of wealth, and does not forbid private enterprise and social cooperation).

12. Which is, generally speaking, the classical liberal approach. Hayek's perspective is far from innovative, as we can read in Adam Smith: "When the institutions or public works which are beneficial to the whole society, either cannot be maintained altogether, or are not maintained altogether by the contribution of such particular members of the society as are most immediately benefited by them, the deficiency must in most cases be made up by the general contribution of the whole society." (Smith, 1776, p. 878).

Conclusion

We intended to discuss in this article what the state is allowed to do from a non-interventionist perspective. This means that our discussion was limited to libertarian normative theories. We wanted, also, to show that the minarchist perspectives hold no moral advantage against more moderate ones, while being pragmatically less good.

Accordingly, in the first section we defined the limits for the type of states in analysis, and presented three alternative models. We concluded that the ultraminimal and the minimal states are both grounded on the limitation of the state to the monopoly of violence, although with different interpretations of such monopoly. The regulatory state adds to a strong concept of monopoly of violence the idea of economic regulation and some social policies, features that are shared with interventionist states - which certainly required a further discussion.

Such discussion was done on section two, where we saw that all the three described types of state are based in an idea of self-ownership. But such self-ownership is differently interpreted: a radical view rejects any kind of redistribution, while a pragmatic one accepts redistribution, provided it is not patterned, meaning, provided that the state does not seek to determine results but only provide the means. That is Nozick's, but also Hayek's position. The latter focuses not only in the protection of physical integrity, but also recognizes that individuals in complex societies need more input than mere security to be able to succeed. We showed, afterwards, how a discourse grounded solely on self-ownership (such as the minarchist one) is limited and ineffective, not only in theory, but also and above all, in practice.

In the third section we stressed the importance of going beyond such theory, and the importance of having cooperation based in something else than mere coercion. To have cooperation in complex markets, cognitive tools must be provided to individuals for them to guide themselves. Getting back to the image used before, one thing is having a map and another is having someone telling us where to go. So, yes, we can say that Nozick and Hayek defend some kind of redistribution of resources in society, but they defend that it must not be patterned. Both resist to the self-ownership test, but Nozick fails to show that his minimal state respects it any more than Hayek does. Simultaneously, what we called the regulatory state provides to individuals much more resources for them to be, in Nozick's terms, "inviolable individuals", meaning, for them to pursue their lives as they see fit without being used as "means or tools or instruments or resources".

In conclusion, and answering the sentence with which Nozick finishes his *Anarchy, State and Utopia*, a state should dare to do more than the mere monopoly of violence, because if, as it results from our discussion, a mi-

nimal and a regulatory state equally respect the first libertarian principle; and if, as it also results from our discussion, the regulatory state maximizes the accomplishment of the second principle without violation of the former; we are forced to conclude that the minimal state is a less advantageous option than a regulatory state, even from a libertarian moral point of view.

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