

Hayek as a welfare liberalist

On the relation between freedom and state power in Friedrich August von Hayek's thinking

by Mogens Lilleør

Friedrich August von Hayek (1899-1992) left at his death an extensive work of social philosophy and economics (he received the Nobel Prize in Economics in 1974). The work is often read as a showdown with the somewhat mixed ideas underlying the modern Western European welfare states, i.e. market socialism, Keynesian-inspired economic philosophy, the idea of social justice and judicial positivism, and of course the Soviet planning economy. Hayek has on this background been hailed and honored as the 'grand old man' of neoliberalism, which is justified by the emphasis he places on the freedom of the individual. In the discussion of distributive justice, he is often characterized as libertarian. But he himself points to a kinship with the egalitarian John Rawls (Hayek 1976:100,183). Although there should be no doubt that Hayek's philosophy differs significantly from the ideas mentioned and that he explicitly rejects community planning that is directly utilitarian, as well as rejecting merit-based distributions, it is still misleading to make him the opponent of any kind of welfare state. It is my intention, partly to show that Hayek's criticism of the welfare state is first and foremost a criticism of the way the states have sought to promote and ensure welfare, but not a criticism of state-contribution to safeguarding citizens welfare, partly to show that the premise of Hayek's position, his conception of freedom, constitutes a crucial weakness of his political philosophy. I intend to highlight Hayek's kinship with the welfare state rather than, as is the common reading, to emphasize the contrast between Hayek and the welfare state. Hayek didn't want to abolish the welfare state as much as he wanted to reform it:

"... the services which the government can render beyond the enforcement of rules of just conduct are not only supplementary or subsidiary to the basic needs which the spontaneous order provides for. They are services which will grow in volume as wealth and the density of population increase, but they are services which must be fitted into that more comprehensive order of private efforts which government neither does nor can determine, and which ought to be rendered under the restrictions of the same rules of law to which the private efforts are subject." (Hayek 1976:7)

Hayek's 'welfare liberalism' implies just like 'rights liberalism' and 'economic liberalism' skepticism towards government intervention in the sphere of privacy and economy but accept at the same time, opposed to these, the state as a significant player in society and market. It could look like an impossible task to reconcile these views, but if state-intervention is in agreement with the market machinery, Hayek believes it's feasible. With a rewrite of an 'Adam Smith' metaphor, the legislature must never direct the various members of a community in the same way as the hand direct the pieces on a chessboard. Each one piece on the big chessboard, human society, has its own principle of motion. If the legislation and the principles of the pieces coincide and act in the same direction, the human cohabitation will slide easily and harmoniously and end happily and successfully.

Freedom - foundation and instrument?

It is well known that freedom is a key value for Hayek's liberalism. But the question is what status it has. The answer is not clear. The ambiguity concerns partly the status of freedom in Hayek's work, partly the concept of freedom as such. In the first place, Hayek seems to think that freedom is both an intrinsic value and source of many other values. Hayek sees himself as dogmatic advocating for an absolute and unconditional individual freedom. "A successful defense of freedom must (...) be dogmatic ...", he states, and further: Free and open market society requires rejection of all concrete "concessions to expediency" (Hayek 1973:61, 1976:71). If a conflict arises between freedom as intrinsic value and other values, e.g. welfare, then the latter must give way. Freedom as an unconditional value is above welfare. We should not sell out of freedom to benefit welfare. There may be a certain kinship with John Rawls as far as his idea of justice as 'fairness' implies a priority such that an equal distribution of freedoms is always more important than equal career opportunities and the concerns of the poorest. Hayek's thinking is also in a sense egalitarian: From the ideal of solidarity it is more important to be materially equal than materially unequal and better off. Hayek seems to think that it is better that everyone is equal in terms of freedom than freedom distributed differently with all better off; or put in another way: It is better that everyone's chances of success in life are limited, if just everyone has the same chances, than if an unequal distribution of chances is ensuring everyone better welfare.

That freedom has intrinsic value means that it is value independent of the individual's point of view and experience. It is therefore not a good in the sense of increasing a person's welfare or promoting his interests. Rather, it is a good in the person's life. Freedom must then be understood as the human good 'par excellence', which in some way means that it is self-sufficient probably analogous to friendship or insight that the classical perfectionists emphasize as intrinsic values. Should Hayek then be a kind of perfectionist analogous to Aristotle or Hegel, but with a focus on freedom alone, i.e. believe that freedom is the only human goal representing human perfection? This 'conclusion' is difficult to accept when considering that Hayek at the same time argues that the concept of freedom must be negatively understood. When freedom has traditionally been propounded in a perfectionist way, the term has typically been understood as a condition or an ability, e.g. Thomas Green who is talking about a power 'to create his life' or Bradley 'to realize his true self'. But Hayek explicitly rejects all so-called positive concepts of freedom.

I find it difficult to understand how freedom could have value independently of the person who has it, or independently of those who might otherwise benefit from it, i.e. independent of subjects with experiences and welfare. And when Hayek argues the justification of freedom, he does so by referring to its consequences for welfare. Hayek, to my knowledge, does not specify what is meant by individual welfare. But one can get a clue from the fact that Hayek rejects the commonly state intervention on the grounds that the market will thus not allocate goods that stems from the preferences of individuals. Perhaps it is reasonable to assume that he, as is common among economists, adheres to some variant of 'preferential utilitarianism' or 'desire fulfillment theory' when it comes to what constitutes welfare. Thus, although Hayek claims freedom as an absolute value, it is freedom as source of other values that play the main role socio-economically. Hayek seeks to show that freedom as a generally recognized value is the source and condition of many values including moral values. He describes freedom as "...the source and condition of most

morals values." or even "...the source of all values." (Hayek 1960:6,420; 1967:230). Freedom plays a most crucial role for the efficiency of the market community.

This thinking is well known: the market community is based on a continuous growth in ideas, knowledge and development of new technology. This requires competition between the players in the market and thus a high degree of freedom. When everyone claims and practice freedom, it turns out to be a common good. Society or civilization are (perhaps) the most important reason for freedom to be defended as an absolute value (Hayek 1960:ch.2; 1976:8ff). This instrumental reasoning has a deeper layer.

The explanation of why freedom is needed rests on what one might call Hayek's Theory of Ignorance (Hayek 1960:22; 1973:12; 1976:2,8). This can be summarized as follows: Man is fallible because human knowledge and understanding is limited. This ignorance is inevitable because all insight or knowledge is conditioned by an expectation or a problem. The individual solves problems from his point of view, and thus expands his experience or knowledge, but at the same time he expands the extent of his ignorance. The logic is: Answering one question gives rise to new questions, i.e. series of unanswered questions. So, with the solution to one problem there are always a number of new unresolved issues. The paradox is therefore that the one who knows the most, also is the one who is in 'touch' with the greatest ignorance.

Progress at the level of society requires adaptation to the change that takes place in the surrounding world. Therefore, one might expect, that someone gets the idea of trying to exploit the knowledge that is present in a society more effectively by gathering it on fewer hands to create an overview. The problem, according to Hayek, associated with centralization of knowledge is the risk of economic stagnation or decline and hence declining welfare. The rationale behind this is the simple idea that while it is possible to centralize the relevant power, it is not possible to centralize the relevant knowledge. This is because the knowledge that is relevant is not only articulated knowledge such as information. Knowledge exists also as 'know how' or non-articulate skills, abilities and actions. In other words: Knowledge also includes knowing how to do something without being able to explain the why, i.e. the principles. Such 'tacit knowledge' cannot be centralized in advance because it is tied to skills in specific situations (Polanyi 1958: ch.5,6). So, if the development of a society is to be determined only by articulated knowledge, you will only use a small part of the knowledge available, i.e. knowledge that actually is present and matter in the community. And this will limit innovation and creativity with inefficiency as a result. according to Hayek.

This is at the heart of Hayek's criticism of totalitarianism social and economic planning. A criticism directed at the planning economy of the Soviet Union, but also at Oskar Lange's marginalist socialism. Whether one seeks control with both demand and supply or simply with supply will be the same if the goal is effective demand and supply coordination. Control of both demand and supply sets the market price formation completely out of function so that prices lose connection with what they should be a measurement for, namely the relative scarcity of resources and goods. The control of supply alone delays price formation, so that the flow of information necessary for optimal adaptation to scarce resources are dulled (Hayek 1960:37). Hayek's point is that adaptation is done the best by allowing different groups or individuals to adapt differently according to their specific 'know-how', - both consumer and manufacturer. And that's why it's all

the more useful that any individual is free to apply the knowledge he or she possesses in the specific situation, i.e. free to experiment, trial and error. And therefore, we should assume or adapt to the social form in which freedom is guaranteed at best possible. This, according to Hayek, is the market community (catalaxis) with free formation of prices (Hayek 1960:29; 1984:25ff).

Such a free society can offer a person much more than she could achieve alone because the individual can take advantage of the creativity of his fellow citizens, whether this is cellphones, armchairs or price variations resulting from the dispositions of others. Hayek puts it this way: The more tasks a person can undertake to solve without having the necessary knowledge and insight himself that is needed, the more advanced the civilization is, i.e. the less each individual knows when at the same time the knowledge at his disposal in society increases, the greater the civilization. The point is that in a high civilization, all individuals will be unaware of most of the knowledge they actually use, but all will at the same time benefit from the knowledge they do not possess. The condition for freedom to solve this task, i.e. acting as a catalyst for growth, is that it creates space around the individual. Hayek therefore understands freedom first and foremost as negative freedom. But, as mentioned, the concept of freedom is not clear.

The concept of freedom is unambiguously

The concept of freedom occurs with different wordings in different works (Hayek 1960:11ff; 1967:229; 273:55ff; 1979:163). Freedom is: a) "The state in which a man is not subject to coercion by the arbitrary will of another or others."; b) "... independence of the arbitrary will of another." Or c); "... the possibility of a person's acting according to his own decisions and plans."; (d)"... a state in which each can use his knowledge for his own purposes." There is a difference between (a) not being forced by someone else's arbitrary will and then (b) be independent of the arbitrary will of another. Thus, there is a difference between arbitrary coercion and arbitrary influence. That freedom exists only if one is independent of the arbitrary will of others demands too much. It would make freedom incompatible with ordinary social life, where the lives of human beings are intertwined with each other through numerous intended and unintended consequences of acts of will. Moreover, it is precisely Hayek's point that individual success depends on dependence and utilization of the knowledge of others and through indirect or direct influence from this knowledge e.g. through price formation. This influence can hardly avoid being arbitrary once in a while, partly in so far as it is unintended, and partly in so far as the preferences that direct the choices of individuals can hardly always be said to be autonomous, well-considered preferences.

On Hayek's behalf, it would be possible to reject unintended consequences per se to be arbitrary, for if the influence takes place in accordance with good law, which I return to below, then it is by definition non-arbitrary, i.e. in principle arranged and predictable in a rational way regardless of its motivation or origin. Focusing on the origin of preferences, it is reasonable to distinguish between three types of preferences: preferences that are autonomous, socialized, and indoctrinated. Autonomous preferences presuppose a distinction between 1st order desires and 2nd order desires where the latter enables autonomy, viz. formation of preferences via critical reflection. Socialized preferences are preferences that I just have, i.e. have received from my surroundings. My actions are on 1st order level. I am able to relate critically to my wishes if the situation makes it necessary, but if my life goes smoothly with no disappointed expectations there won't be a reason to critically relate to preferences at all. Indoctrinated preferences are also preferences that I have received from others. The crucial thing is, that I am not able to relate critically to my

preferences at all if they are indoctrinated. There would not be any reason for me to be critical. Again, Hayek could argue that concerning the arbitrariness, the origin of the preferences is not at all decisive, i.e. whether they are autonomous, socialized or indoctrinated, but what matters is the way preferences are put into practice. If it happens in accordance with good law, it happens by definition in a non-arbitrary way.

There is also a difference between (c) acting according to your own decision and plan and (d) using own knowledge for own purposes. The latter might be compatible with coercion, in so far as one can be coerced to realize a purpose one has by means of knowledge one has, but at a time one does not want to realize it. Like my remarks on preferences, knowledge can be autonomous, socialized or indoctrinated. Hayek does not specify, when a knowledge is one's own and when not. Is it a necessary condition that it is critically adopted, or is it enough to just have it when you use it?

The concept of freedom is, as it has been stated, not clear, but if I should determine a concept of freedom in the spirit of Hayek, it reads as follows: A free person is 'a person who can act according to his own plan and purpose on the basis of his own knowledge and decision' (Hayek 1976:153). For if you can do this, you are not subject to arbitrary coercion, though you may at the same time be arbitrarily affected and subject to a non-arbitrary form of coercion. But expressed thus the concept of freedom does not presuppose that a preference or insight is autonomous as it is possible to pursue both socialized and systematically indoctrinated preferences on the basis of the knowledge, socialized or indoctrinated, one has, and the decisions one makes on the road. What is strange, then, is that a person can at the same time be both victim of systematic indoctrination and yet free.

The concept of freedom is relevant

The concept of freedom is thus quite problematic, as will be further elaborated below,- and yet plausible. And at the same time, it is a necessary condition for that Hayek's negative libertarian freedom can be united with a comprehensive welfare state. When I find the concept of freedom relevant, it is because it implies that freedom exists only as protected by law that excludes arbitrary assaults. This means that freedom must be perceived as concrete freedom, i.e. freedom from something specific which must be specified in more detail by the law. I think that this is significant. Negative freedom has often been defined as the absence of external coercion, but in so doing also absence of law. Obviously, external coercion is a possible cause of impunity, e.g. in the form of physical coercion, but the negative concept of freedom in this sense excludes too much, e.g. the necessity inherent in laws of nature, and it is hardly unfreedom in this sense that threatens the welfare of the welfare state. The main threat to welfare is more likely absence of predictability, e.g. unpredictability makes it impossible to plan and dispose of one's life, so one is unable to handle it. It could very well be an intuition like that, that is the motivation for Hayek to focus on 'absence of arbitrariness'. Although a law can force and thus assault freedom, Hayek believes that if the law does not rule out predictability, then it reduces freedom less than if it resulted in arbitrariness. Freedom is thus conditioned by regularity. Regularity is not only seen to be a necessary condition for freedom, but also a sufficient condition. That's what Hayek points to when he argues that freedom is constituted by law that meets certain specific legal conditions. These conditions of 'good law' belongs to classical liberalism: Good law (nomos) is characterized

by the fact that it applies to everyone, which it does when it does not refer to specific groups of people, individuals or geographical areas, i.e. law must refer to anonymous individuals, living as well as not-yet-born. Good law is purpose-independent in the sense that it fails any reference to specific consequences that can only be known by a finite and limited number of individuals. But it is imperative for Hayek that these claims are not perceived as merely formal claims. Hayek's constitutional proposal (Hayek 1979:105ff) aims to establish institutional bodies capable of articulating legal substance in relation to the content of concrete political decisions.

Let me illustrate this point about 'good law' with a Danish case, i.e. The Tvind Special Act of 1996. The purpose of this law was to stop state financed aid for a group of schools, the schools of the so-called 'Tvind Empire', 32 schools, without violating the Constitution and the principle of equality before the law. The Tvind schools allegedly abused the state aid for other purposes within the 'Tvind Empire' than intended by the aid. With few exceptions there was agreement among the lawmakers that the support should be withdrawn, but some critics were worried about the way the law was to be carried out, i.e. by adopting a law made especially for Tvind. The critics agreed with the intention of the law, i.e. to stop the abuse of Tvind, but demanded that it should be done in a manner consistent with the Constitution, which meant to them that the law should be formulated as 'good law'. Special laws are an evil that should be avoided, as it was argued in the classical liberalist spirit. However, could the law be worded without mentioning the Tvind schools by name, it would not be considered a special law but rather be in accordance with the ideal of equality for the law. According to the critics then, the law would be justified.

Thus, apparently emphasis was placed on that good law should apply, but hardly law understood in the substantive sense that Hayek has in mind. The intention was to stop 32 schools and the law was designed to get the job done. But Hayek could rightly object that if the intent of the law clearly is to exclude the Tvind schools, and this is fully accepted by the critics, and the task given to the lawyers of the Ministry of Justice is directly to formulate a law, so that this happens, then it will be hypocrisy to attribute any meaning to the letter of the law, e.g. naming. By the wording of the task the judicial question is already reduced to be a matter of legal dexterity, i.e. legalisms or technique. According to Hayek, the extent to which a law meets good law is not a matter of form, but about substance, i.e. the intention of the law. In other words, the focus is on the spirit of the law, not its letter. Hayek's criticism of legal positivism follows this line.

Thus, freedom exists only as protected freedom, i.e. as a protected space. In this sense freedom is relative. Freedom arises as it is articulated by law, i.e. is defined and delimited by law. The tradition Hayek thus enters into is the 'Rule of the Law' tradition. It is reminiscent of the tradition based on natural law though Hayek's concept of justice is not natural law, but evolutionist. The corresponding state ideal is the 'Rechtstaat'. In contrast to that one must see the state law principle of legal positivism ('Staatsrecht'), where law is regarded as empowered laws, i.e. statutes which a powerful assembly decides to achieve a specific goal, e.g. a concrete distribution of the goods of society or a certain behavior. The logical difference between good and bad law is that good law is in principle universal and that statute laws are singular or numerically universal. Strictly speaking, Hayek should believe that the only permissible laws are laws that apply to the whole world in the present and the future, i.e. laws that are strictly universal.

The ideal of law whose purpose is to protect freedom, can be described as an ideal of equality. As Aristotle has noted, so everyone can agree that 'equal should be treated equally' though the dispute arises how to decide who is equal (Aristoteles, 1900: book V.1131a ff. and Aristoteles, 1946: 3.book, X,3-6,148-150). The legal positivist Alf Ross shows in this line that what is crucial is not the ideal of equality as such, but the criteria used when deciding (Ross, 1953: ch.12). One can be assured that Hayek confirms both Aristotle's remark and Alf Ross's point. In continuation of 'The Rule of Law' ideal, Hayek endorses the principle of equality (equality for the law) but is critical of the number of criteria (which is not strictly consistent, as I will show), and especially their creation. There are too many criteria and they are the fruits of a problematic political practice. One can tentatively describe the modern welfare state as a complex state-controlled system of services available to individuals and groups that meet the relevant criteria. Roughly speaking, the system looks like an attempt to rationalize the personal discretion, i.e. replace it with mechanical rules. As the utmost consequence one could imagine a system with a criterion for every conceivable situation, so that the lives of the citizens are governed to perfection, i.e. meets the set of relevant criteria that is necessary for the state to secure a good life for him or her. This would be an example of a totalitarian state of democratic means. This issue is not new, already Plato and Aristotle discussed and rejected the possibility that a rule or a set of rules exhaustively could 'cover' a person (Platon 1995:293a-295b, 158-164 and Aristoteles 1946: V, 8-10,123-125), they both recommended a combination of insight and discretion to make up for the shortcomings of rules. Hayek is fundamentally skeptical to the idea of regulating in detail for the purpose of a just state. But if regulation must be, then it must be done in accordance with good law. Even if in theory it was possible to comprehensively describe a person using a comprehensive set of rules it would be wrong to transform the rules into law unless the law met the aforementioned conditions. Everything else would reduce freedom and thus welfare.

The problem with the modern welfare state is that the legislators operate on 'ad hoc' criteria, i.e. criteria whose validity depends solely on the acceptance of the specific case with its specific objectives for which the criteria are designed. The validity of the criteria is case dependent. Their justification is arbitrary outside the case, e.g. seen from a citizen's point of view, for the citizen has usually neither knowledge of the case nor share any part of the creation of the criteria and therefore will perceive them as volatile. The fact that there are many criteria is primarily due to the origin of criteria: They depend on the political power that constitutes itself in the situation, i.e. they depend on what's politically possible at a certain time. What is politically possible, manifests itself mostly through what one might call a political 'horse trading' (bargaining), i.e. some groups get each other's support at the expense of some other groups, i.e. political practice is reduced to ensure a sufficient majority behind a case nothing more and nothing less. This practice flourishes in a democratic system where the principle of majority is the crucial principle, because all other things being equal one just need to take into account what is required to get a majority. And since political possibility is not static, i.e. it moves with the need for adaptation to the changeable environment, the trading parties also change over time, and new criteria are decided and added or replacing criteria of the past according to the new nature of the cases. The consequence is a high degree of randomness (unpredictability).

Following his view that freedom and thus welfare depend on statutory regularity, Hayek wants the principle of precedent set in legislation. If legislators are required to decide only criteria that may

apply for a long period to come, thus making the validity of the criteria independent of the specific case or occasion that poses the problem, then it is possible to restrict 'ad hoc' or 'case by case' practice. He even suggests a new constitution to impede this practice. The point is not to reject politics as such, but to counteract that it stands alone. Hayek himself believes that the principle of precedent will actually limit the number of criteria. But assume that the actors got used to this way of thinking and developed many precedent-based interventions, then Hayek had to believe that many criteria and the related interventions were reasonable. It is this consequence that binds Hayek to a perhaps comprehensive welfare state.

The concept of freedom is inadequate

Hayek's concept of freedom is despite some plausibility quite problematic. If a concept of freedom means that one can at the same time be free and systematically indoctrinated, then there is reason for skepticism. Let me try to elaborate on this. There are two forms of coercion, arbitrary and regular. Regular coercion is necessary to prevent arbitrary coercion (Hayek, 1960:144). Following Hayek, harmful coercion is clearly linked to arbitrariness, whereas coercion linked to regularity and predictability is fruitful and not really compulsive at all. This 'narrowness' in the concept of coercion and consequently the concept of freedom is as suggested several times, central to Hayek's welfare liberalism. The decisive factor is thus the way interventions take place, not whether they take place and what their purpose is. This notion of freedom has rightly given rise to criticism (Calvin M. Hoy, 1984). Good law is claimed to constitute liberty and therefore cannot violate freedom, but the question is whether this concept of freedom is adequate? One could think of a market-based society where the state does not own the means of production, and tax collection take place in accordance with good law. In this community the state wants to accommodate all citizens and will therefore intervene in the economic process of turning production away from luxury goods to basic goods, so no one is starving. The state chooses income equalization to indirectly control the use of the means of production. This is done by setting a very high, general and uniform tax rate, so that the market is narrowed to a strip. Outside the market the state distributes tickets on specific product groups that are exchanged for the items.

One might then ask which type of state is most free: the market state as described with high tax rates and a high degree of redistribution based on universal, non-arbitrary interventions (good law), or an actual interventionist state with low tax rates, which rarely interferes in the market, but where the interventions that take place are nonetheless arbitrary? It follows from Hayek's concept of freedom, that the market state is most free, because all interventions are consistent with good law. But intuitively this seems wrong. Clearly, the market state seems more restrictive than the interventionist state taking into account the permanent nature of the generally valid interventions while interventionist state intervention is rare, and this indicates that coercion and thus freedom must be understood more broadly than Hayek does. Although he has grasped a significant feature of freedom, I think he probably focuses too much on the type of coercion (that it is regular) and too little on the amount of coercion which can be measured both by intensity and duration.

The point is that freedom is not simply a matter of absence of a particular type of coercion. Regular interventions can also violate freedom. They are easier to customize than arbitrary abuses

because they are predictable, but even if predictability makes them manageable in a substantial sense, they are not thereby harmless (it is not enough only to emphasize that the shoe presses in a certain way when it also matters how hard and how long it presses). A significant threat to welfare is reduced, namely arbitrary coercion, but the question is whether Hayek at the same time engages in another significant threat, regular coercion, when rule constitute freedom. Oppression camouflaged as freedom. A threat it would be difficult to criticize because criticizing it would be equivalent to criticizing being free.

To sharpen the point one can, by analogy with the player in various computer games, try to imagine a person whose actions are limited to three choices by general rules: He can either stand, step back or move forward. Those are the opportunities he has. If these conditions apply to all people, then they are all free. This, not being able to act exactly how one may wish is not the same as being subject to injurious coercion if all are covered by the restriction, is Hayek's position. Even though the rules are created by lawmakers. Each actor can use his own knowledge to move in the direction of the goal he has, e.g. there are good reasons pointing in one direction, less good in the opposite direction, and bad ones recommending him to stand. Although all are subjected to the general frameworks and would choose the same good reasons and act the same way, they are not unfree. Hayek must, as far as I can see, accept that even if there were only one possible (type of) way out of a specific situation so that the choice or decision had to be whether to maintain status quo or move on, there would be no coercion if only that option applied to everyone, i.e. that there was only one permissible type of action beside the status quo, and this counts also if it was not even an option to maintain the status quo, for this would really just be as though everyone obeyed the same law of nature. So even if anyone could easily predict their choices, they are free by virtue of the validity of the framework in force. The consequence of this view is that one must attribute full freedom of action to a student in a highly controlled learning environment of the type B.F.Skinner recommends with only one opportunity to move further into the system. The student is free when she decides the only possible way. The consequence of Hayek's concept of freedom is thus that a very comprehensive welfare state based on 'good law' is fully compliant with freedom and therefore acceptable, and that even if all preferences and applied knowledge were the product of systematic indoctrination if only that took place under 'good law'.

The state is allowed to do everything - except discriminate

It is clear that in order to reasonably conceive a man-made law by analogy as a natural law, its form, substance, and creation must meet certain requirements similar to those that are expressed in the criteria of classical liberalism on good law. Hayek's constitutional proposal implies a people-elected assembly with the task of ensuring that any legislation regardless of its motivation is compliant with such demands. In the example above, the state makes its intervention consistent with good law by setting a very high, general and uniform tax rate. This type of intervention is permissible state intervention because the state actions do not discriminate between individuals. Normally one would say that discrimination is when for instance two people who have claims for the same treatment because they fall under the same rule or criterion, do not receive the same treatment. But Hayek seems to think that discrimination does not happen so much despite an applied criterion, but rather by using a certain criterion. Criteria are means to discrimination. What is in the real sense unfair discrimination seems to be fair differentiating treatment: The random majority in the political practice uses criteria to promote specific interests,

i.e. the criteria work as a formally cover up of special interests. Hayek believes that this kind of legislative practice threatens freedom and welfare, and he believes that all legislation should instead have a general purpose. If everything the state does is compliant with general, predictable and impartial rules, its actions are legitimate; and then there is really no intervention (Hayek, 1960:221-222; see also 1973:92-93).

"We would not call it interference if we oiled a clockwork, or in any other way secured the conditions that a going mechanism required for its proper functioning. Only if we changed the position of any particular part in a manner which is not in accord with the general principle of its operation, (...), can it properly be said that we have interfered. The aim of interference thus, is always to bring about a particular result which is different from that which would have been produced if the mechanism had been allowed unaided to follow its inherent principles" (Hayek, 1976:128-129)

The state can legitimately intervene in economic activity, provided it is compliant to the legal ideal. But this is required because the success of the market community depends on each individual in society adapting to all the different factors affecting it, local, regional as well as national and international; an adaptation that takes place by the individual aligning his expectations, intentions and actions with them. This can only be done by having the opportunity to use one's own private knowledge (i.e. the concept of freedom).

The result is ideally a dynamic, situational and in principle volatile equilibrium in the sense that each individual's expectations through a continuous process are consistent with the actual consequences. But this expectation, this one dynamic 'condition', is extremely vulnerable. It might be understood as an Aristotelian middle between too much and too little, i.e. it is a situational 'just fit'. Considered over time, the equilibrium is dynamic because what is 'just fit' changes from situation to situation. Situation and social life consist of many situations that are interchangeable, so that the middle must be created again and again.

When Hayek rejects the neoclassical general equilibrium theory, it's because it is unable to handle the real-world market, when simply showing that a general equilibrium is logically possible given certain actor assumptions but not telling anything about how equilibria are created in the real world. It is static and therefore practical inapplicable. The appeal it does have, is due to the fact that it gives nurture to the illusion that a social optimum exists, e.g. a pareto optimal distribution of resources, which might be realized by a mix of political craftsmanship and social engineering. This is a fatal misconception of the market, however, and according to Hayek it has created some of the most oppressive communities of the 20th century. Alternatively, Hayek tries to capture the dynamic nature of the market, i.e. the many changing situations that require adaption.

The problem is that unilateral or singular goal-rational intervention by a 'blind' and mighty player like the state displaces the balance and thus the possibility of equilibrium. Prices lose connection with what they are representing, resource scarcity, they convey false information: They reflect the intervention and intent of the state, but not the actual state of resources. This is, after all, the point of a unilateral government intervention, e.g. based on an idea of a social optimum to be

realized. Like any other market player, the state can only act with a limited perspective, but its intervention usually has far greater potential and scope than any other actor, both financially and by virtue of the legal nature of the intervention, which often involves coercion and the possibility of sanction. And at the same time, if you include the ordinary political practices, which entail that intervention is based on the relatively random nature of the 'horse trading' balance of interest, the arbitrariness is enhanced. Therefore, government intervention is often harmful interventions. The interventions

"...refer to a part of a system of interdependent actions determined by information and guided by purposes known only to the several acting persons but not to the directing authority." (Hayek, 1973:51)

Interventions in accordance with good law, similar to letting precedent prevail, Hayek believes is equivalent to 'lubricating the clockwork', i.e. an intervention that is not against the mechanism. If the state goes beyond what good law dictates, it is a threat to the market community and its citizens. Hayek defines intervention in this context as an

"...isolated act of coercion, undertaken for the purpose of achieving a particular result, and without committing oneself to do the same in all instances where some circumstances defined by a rule are the same" (Hayek, 1976:129)

Intervention in this sense inhibits individuals' ability to adjust their expectations to each other and to the actual consequences, i.e. prevents the market community as a whole in maximizing the chances of any chosen individual, which is the criterion that matters in the best society (Hayek, 1976:132).

The best society

The best society must be measured by the amount of chances that it bestows to all its members. Note that the criterion has two elements: One indirect principle of social welfare based on freedom of action, what I would call 'chance maximization', and a distribution principle which states that the chances must be distributed equally in the sense that anyone should have the same opportunity based on legislation and market. The two principles are likely to conflict, but Hayek will probably believe that the market is able to coordinate the two considerations, i.e. hit a situational center or equilibrium. The condition for this evenly distributed chance maximization must be that the state ensures that freedom is extended to a point, a social optimum, where everyone has the same amount of one and the same type of freedom: Freedom constituted by law.

When it comes to assessing the laws, Hayek embraces a variant of utilitarianism, which could be described as an indirect utilitarianism (Gray, 1989: ch.8; Hayek, 1976:18,22), i.e. a variant that neither is action- nor rule utilitarianism, but rather a so called 'system utilitarianism' (Hayek, 1976:5,23,24ff). The point is that the only utility that can be assessed is the utility of a regulatory system as a whole, neither the individual action, the effect of which interacts with the effects of many other actions, nor the individual rule whose effect when someone follows it depends on the effect of other functioning rules, e.g. the usefulness of a judicial system should not be assessed on

individual cases or individual legal rules, but on the system as a whole. However, it may be difficult to understand how to approach this, especially because it might be difficult to keep systems or cultures in a society apart. The boundaries are hardly sharp. But imagine that this problem was solved, how should the individual culture establish the necessary reflexive distance? How does a culture determine the usefulness of its institutions, its own norms and rules, when it is the same institutions, norms and rules that constitutes its members thought content?

A possible answer could be a strategy that try to take an external point of view by assessing the culture to the extent that it meets the standards of another perhaps superior culture; or alternatively simply record the extent to which the culture is an example to follow, i.e. the extent to which other cultures mimic and thus gradually assimilate into its practice. One example could be the market whose 'logic' gradually gains its way into other cultures or systems, e.g. education or health. Criteria in such an assessment could be growth and expansion. But this would imply that a culture of growth is a useful and valuable culture regardless of its consequences for itself in the long run, and for others less useful or viable cultures that function in peaceful coexistence, which is hard to accept.

Another option is a so-called system-internal evaluation, e.g. an assessment of the amount and the nature of conflicts and the way in which they are resolved. This is Hayek's view: If the rule system results in a conflict-free order of action, it is a fruitful system regardless of whether it contains rules that are logically incompatible. Hayek argues that all other things being equal, such a culture will result in growth and expansion. But at the same time, of course, this implies that it is possible that such a useful and valuable culture shrinks as a result of competition with other less useful cultures. Thus, it is not given that it is the most useful culture that dominates; and it follows that a dominant culture may be in the paradoxical situation that it in a number of areas has a duty to liquidate itself in favor of a more useful but weaker culture. Hayek would argue that the market community represents the most useful culture as it is based on freedom for the benefit of welfare. The main function of the rule system is coordination of action, i.e. to promote empowerment and fulfillment of preferences of individuals. It is the primary function of rules to facilitate the mutual adjustment of expectations to each other and thus maximizing the chances of in principle anonymous individuals, which means maximizing anyone's chances of fulfilling their preferences.

Concluding remarks

If I should briefly summarize the role of the state in Hayek's political philosophy, it is limited to two main functions (Hayek, 1973:48). The first is to substantiate and support good law and thus, freedom and welfare. The second function is an actual service function where the state contributes to non-profit services that do not follow from the market's own allocation e.g. when the market fails. It can consist of internalizing external effects or it can be about the provision of collective goods. For example, external effects must as far as possible, be internalized through voluntary agreement (Hayek, 1979:43-46), i.e. within a by the state guaranteed judicial-political framework corresponding to good law. This could be an example of an agile conflict management. In this function, the state must be regarded as one (service) organization among others. In both functions, all intervention must be limited to a general purpose. But there do not appear to be any limitations in principle on the number of service functions, that the state could initiate (cf. the quote from page 1, Hayek, 1996:7). As far as I can see, Hayek's political philosophy therefore gives

way to a wide range of liberal positions: From the care-oriented social liberal to the cynical, self-centered individualist. What is decisive is, as described, the manner in which intervention occurs. The logical consequence is that Hayek should fully advocate for a comprehensive welfare state if it is based on good law. The question is whether it at all is practicable to make a welfare state on Hayek's terms, i.e. whether the 'regular' thinking is adequate. Although man is a rule following animal when he strives to achieve his goals, it is a question whether he is politically capable of restraining himself only to make decisions that it is rational to set a precedent for. We can join Jeremy Bentham in his doubts:

"... in principle and in practice, in a right track and in a wrong one, the rarest of all human qualities is consistency" (Jeremy Bentham, 1970:14).

Furthermore, one may have doubts about how effective a policy can be implemented on the basis of general legislation which must neither explicitly nor implicitly refer to proper names or geographical locations. Even an environmental regulation working on market's premises using salable pollution rights, must be based on locally founded acceptable emission standards. What the environment can withstand from extraneous substances is not evenly distributed but depends on local conditions. On top of that, the concept of freedom is inadequate; Hayek's welfare state can violate freedom.

But in spite of this skepticism, in my opinion there is an essential thing in 'precedent thinking' that should be highlighted. If the basic values are freedom and welfare, if security is a necessary condition of welfare, and if a basic rule of law is necessary condition (but not sufficient condition) for freedom of action, so both welfare and freedom presuppose basic predictability. This speaks for placing greater emphasis on precedent thinking in a constitutional context.

In this connection, it might be interesting that the Supreme Court has since rejected the aforementioned Tvind special law with the justification that because it cuts off the Tvind schools for a judicial review of their entitlement to subsidy, it is really a decision on a legal dispute and thus an intervention in the citizens legal right. The Supreme Court has thus rejected a special law. And if this court ruling on the political territory sets a precedent so that the court will continue to assess such problematic political lawmaking in the future, it might correspond to the Hayek spirit, i.e. the court as protecting against arbitrary political interference.

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