

A QUEST FOR SOCIAL JUSTICE:  
A CRITIQUE OF HAYEK'S SOCIAL PHILOSOPHY

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## DECLARATION OF ORIGINALITY

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## ABSTRACT

### A Quest for Social Justice: A Critique of Hayek's Social Philosophy

For Hayek, the rule of law and principles of social justice strictly exclude each other. According to laissez-faire philosophers the concept of the rule of law excludes all substantive equality, positive liberty, affirmative action, sanctions for discrimination; namely all the aims of social justice are excluded from the concept of 'justice'. Irreconcilability of the rule of law and social justice is one of the main arguments of Hayek's thought. Formal justice is the only kind of justice and equality before the law is the only kind of equality. The concept of the rule of law is radicalized by laissez-faire philosophers in the twentieth century. This extreme attitude is based on an assumption: formal justice and capitalism are strictly related to each other. Thus, this attitude is in contrast with social justice. According to libertarians, any positive sanction towards substantive justice (for particular people and classes) will destroy the rule of law, namely the law of liberty. However, in this thesis, I will try to undermine Hayek's irreconcilability thesis and offer an idea which makes the rule of law compatible with social justice. I will use the capability approach to reconcile these two concepts. My theory of social justice makes this reconciliation necessary. It refutes the Hayekian premises.

## ÖZET

### Sosyal Adalet Arayışı: Hayek'in Sosyal Felsefesinin Eleştirisi

Hayek'e göre hukuk egemenliği ile sosyal adalet ilkeleri birbirini dışlamaktadır. Bu 'bırakınız yapsınlar, bırakınız geçsinler' ilkesini kendisine şiar edinmiş filozoflarına göre, kapsamlı eşitliğe, pozitif özgürlüğe ve pozitif ayrımcılığa yönelik herhangi bir yaptırım, yani sosyal adaletin amaçları 'adalet' kavramından dışlanmalıdır. Hukuk egemenliği ile sosyal adaletin uyumsuzluğu ilkesi bugünün sosyal-politik felsefenin önemli konularından biridir. Bu filozoflara göre adalet sadece usuli adalet, eşitlik ise sadece kanun önünde eşitliktir. Bu anlamda hukuk egemenliği kavramı 20.yy liberteryenleri tarafından radikalleştirilmiştir. Bu uç görüşün bir varsayımı var: formel adalet ve kapitalizm birbirine sıkı sıkıya bağlıdır. Dolayısıyla bu anlayış adaletin diğer veçhelerini dışlar. Liberteryenlere göre kapsamlı adalet yolunda belli toplumsal kesimlere yönelik her pozitif yaptırım gerçek adalet olan formel adaletin temelini oyar. Bu projede sosyal adalet ilkeleri ve hukuk egemenliğinin uyuşabileceğini göstereceğim. Uyuşmazlık tezine kapasite yaklaşımını öne sürerek karşı çıkacağım. Benim öne sürdüğüm sosyal adalet teorisi hukuk egemenliği ile sosyal adalet ilkelerinin uyuşmasını zorunlu kılmaktadır.

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## CHAPTER I

### INTRODUCTION

In contemporary world, liberalism can be divided into two sects: libertarians and social liberals. The line between them sometimes seems uncertain and indeterminate; however, it can be said the main separating line is drawn by their attitude towards social justice. For instance, Hayekian kinds of libertarians claim that the ideal of justice and social justice are mutually exclusive. Social liberals think otherwise. In this thesis, I will not dwell into all the differences between libertarians and liberals; rather I will investigate an in-house debate in terms of social justice. For instance, while libertarians fiercely oppose ‘social justice’ in all manners, social liberals ask the question that to what extent we can reconcile social justice with the principles of liberalism.

In contemporary political philosophy, the main critical opposition to social justice comes from advocates of classical liberalism. Hayek is the most challenging representative of libertarianism and classical liberalism. In Hayek, we will see that the rule of law and social justice are irreconcilable. Formal justice is the only way for guaranteeing individual liberty, the rule of law and free society. Also, for him, social justice entails socialism-like command economy, namely the destruction of the rule of law. No middle way is possible for him. For instance, Nozick explains justice only as the predicate of acquisition of holdings and property. Namely, justice becomes the predicate of legitimate transaction and acquisition. If procedures by which property acquired are just, then people are entitled to use and bartering of that property. Nozick offers an *argument from procedure* in order to explain legitimacy of private

property. He recalls Locke's proviso, namely explanation for the legitimacy of private property. Nozick is one of the important examples of libertarianism which reduces justice only to procedures.

When compared to Hayek, Nozick's political philosophy includes much more hypothetical explanation. It concentrates on pre-existing nature of individual rights and entitlements. For instance, Hayek does not dwell into legitimacy of property/entitlement as Nozick does. Although Nozick takes rights as a premise, Hayek adopts an evolutionary perspective by which the rules of just individual conduct and existing institutions emerged. The role of thought experiments does not play an important part in Hayek's social and political thought. This is one of the the main differences between Hayek and Nozick.

Also, Nozick is much more ethical philosopher than Hayek. Barry (1986) thinks that Nozick's arguments "for liberty are constructed out of ethical rather than economic arguments." (p.132). Actually, the role of rights, entitlements and ethics are dominant in Nozick's thought. Hayek is different and much more original than other libertarians such as Nozick; it is because Hayek's theory is based on epistemological usefulness of spontaneous order and this epistemology is strictly related to his social ontology. Although these two philosophers defend the same ideas on justice, the way they think is remarkably different.

I can say that all the series of Hayek's *Law, Legislation and Liberty* (1973, 1976) and *Constitution of Liberty* (1960) are written to draw a separating line between the rule of law and social justice. Every volume of these books is indirectly or directly against *social justice*. It is because the term 'social justice' is not only used by socialists but used by both liberals and social democrats. *Law, Legislation*

*and Liberty* (1973, 1976) series are different from his other books; originality of *these series* comes from not economical analysis but comes from philosophy of law and justice. Hayek attacks the idea of social justice, not only in terms of economics; rather he tries to refute social justice by dealing with social ontology and social epistemology. For instance, Hayek's fear of the legal theories -which provides legislature to use unbounded power- is not only coming from expansion of the government, but Hayekian justice correlatively rejects any positive command or sanction that give way to social justice. To illustrate, Hayek (1960) sees the rise of workers as a danger in modern times. (p.118). It is dangerous because working classes constitute majority and they have the potential to come to power and realize their class aims. In that sense, Hayek advises working classes not to behave in their class interests, but he wants the working class to be aware of individual liberties that they enjoy in the market order. First of all, workers' ideological stance is not important for Hayek. The important thing is their attitude towards liberty. If workers come to power and try to realize the ideals of social justice, then it should be prevented on behalf of formal justice or abstract justice, namely the rule of law. It is because Hayek sees procedural, abstract justice and equality before the law as the core elements of the rule of law. If a legislative power defends a specific class's interests and distributes wealth under the name of social justice, then, Hayek would say, it undermines the equality before the law. I will explain this issue in the following chapter. All Hayek's debates on legislation and minimal state are directed towards this critique of social justice.

I think Hayek's world is Manichean; you can choose either a Hayekian world or a totalitarian socialist world. However, at the end of the thesis, after I sketch his inconsistencies and ambiguities, I will try to exemplify intermediate solutions which

take social justice as an important point. His theory of justice and critique of social justice are not only ambiguous but also blind to many issues concerning informal sanctions such as racism, gender, minority and other social problems. I did not see any writings about those issues from Hayek. These problems are necessarily related to social justice. According to Hayek, real justice, namely the rule of law, does not recognize any specific group of people and cannot form any politics concerning those specific groups. However, today, justice and libertarian understanding of the rule of law are unable to solve central issues mentioned above. In that sense, social justice is not related only to the economic sphere; rather it has many implications in other spheres of social problems. Self-regulating spontaneous order and Hayekian understanding of the rule of law have nothing to do with minority and gender issues in the society. Spontaneous order does not produce affirmative conclusions in those extra-economic issues such as gender and minority problems.

Hayek's social philosophy is Manichean not only in terms of justice; Hayek defends an exclusivist attitude about equality and liberty. Hayek's theory of justice is directly related to his theory of liberty and equality. When I refer to Hayek's theory of justice, I also use it in relation to equality and liberty. According to Hayek, there is only one kind of liberty and equality in an extended society. Negative liberty and formal equality (equality before the law) are superior to positive liberty and substantial equality. Isaiah Berlin's concept of negative liberty is suitable for Hayek's case. I will try to show the capability theory may also reconcile the negative and positive aspects of the concepts in the following chapters.

Now, I will ask an important question: How can we reconcile the rule of law with the ideal of social justice? How convincing is Hayek's argument on this issue? What are the alternative ways to undermine some of Hayek's exaggerations of

abstract and procedural justice and substitute them with a new way of thinking about social justice? The topics of my thesis can be summarized as seen below:

First, I will explain Hayek's social ontology and epistemology. Later, I will argue that social justice is not impossible within some kind of spontaneous order; if there were a kind of social justice, I will try to ground it by favoring a middle way between classical liberalism and social liberalism. It is true that command economy may have problems in co-coordinating economic actions of millions of individuals; however, it does not mean that promotion of some distribution patterns will undermine the rule of law. Redistribution according to distribution patterns does not need to exclude the rule of law. However for Hayek, some theories of justice – redistribution regarding distribution patterns – are doomed to undermining 'the rule of law'. I will argue about some distribution patterns that do not violate the rule of law. Also, I will expand on the outcomes of spontaneous order to show the necessity of social justice. In contrast to Hayek, I will argue that making any attempt towards social justice would not necessarily destroy the rule of law.

Second, I will argue about the consequences of so-called spontaneous orders. Hayek justifies all the consequences of the market order: inequality, poverty by appealing to ontological status of market, individual and institutions. Market is not a kind of entity that consciously allocates the resources and wealth. According to Hayek, any intervention to any market consequences under the name of social justice and distributive justice will destroy the rule of law: the law of liberty. I will challenge these ideas. I will propose that there is no essential conflict between freedom and equality provided that we expand our notions of freedom and equality regarding a coherent reconstruction of these concepts. I will offer that a pure spontaneous order and an ideal form of the rule of law will not guarantee liberty. I

will try to endorse that equality of opportunity, positive rights, substantive justice, namely the elements of social justice, will not conflict with the idea of the rule of law. It is because liberty requires more than the absence of external constraint. Also, I will try to show some of Hayek's ambiguities in his own system. We will see Hayekian understanding of the rule of law cannot solve many social problems which are related to social justice.

Third, how can we ground the rule of law, negative liberty and spontaneous order with social justice? Hayek (1967) thinks that "All endeavors to secure a 'just' distribution must thus be directed towards turning the spontaneous order of the market into an organization or, in other words, into a totalitarian order" (p. 171). I will argue that the capability approach will not harm the rule of law. Equality, liberty and the rule of law will be in accordance with the capability approach. For advocates of the capability approach such as Sen and Nussbaum, liberty is what we are capable of doing. It is related to equality of opportunity to some extent; however, the capability approach is more than this. The capability approach is a part of welfare economics, and that approach tries to promote human capabilities not only in terms of income but also other welfare indicators such as health, education and non-discrimination. Overcoming capability deprivations makes people free; being deprived of basic capabilities (i.e., health and education, income, gender equality, longevity, employment, non-discrimination, non-racism) means dis-ability to achieve certain ends for a standard of living; but this standard of living is not related to *equality of outcomes*. The capability approach does not offer such a normative claim that every individual should have similar material power, nor is it related to equality of income. Although the purchasing power is important for economic development, it means very little in terms of capabilities: ability to achieve particular ends, namely

freedom. There are many countries with a good economy and poor human rights, minority and gender rights. Capability endorsement is also an endorsement of freedom in these issues.

Hayek's social and political philosophy offers very few policies to solve the market failures or offer compensation for capability deprivations. Rather he fiercely opposes any idea of social justice and he understands social justice as a direct intervention in economy. For him, social justice shakes the ontological and epistemological basis of the so-called spontaneous order. First, we will see the contradictions and weaknesses of his social ontology and epistemology. Secondly, I will argue how his social ontology and epistemology affect his critique of social justice. Third, I will show the necessity for social justice by favoring the capability approach. In the end, I will conclude that Hayek's spontaneous order, the rule of law and liberty do not necessarily have to be interrelated. Social justice is possible with the rule of law and liberty. We will see that promoting of capabilities would not conflict with the rule of law.

## CHAPTER 2

### HAYEK'S SOCIAL ONTOLOGY: SPONTANEOUS ORDER

In this chapter, we will see that Hayek uses the concepts of grown order, cosmos, spontaneous order, endogenous order, law and nomos as being strictly interrelated to each other. On the other hand, these concepts strictly exclude made order, taxis, organization, exogenous order, command and thesis. This is the schema of Hayek's exclusion/Manichean theory. This scheme is directly related to Hayek's critique of social justice. The first items of above reflect his social ontology, epistemology and the last items such as nomos and taxis reflect his theory of law. I will analyze and criticize his theory of social justice by following this opposition represented above. I will analyze these concepts in the chapter entitled "The Case of the Rule of Law".

Before explaining spontaneous order, it is important to explain what order is. As Hayek (1973) puts it, in *Law, Legislation and Liberty*, order is "a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form a correct expectations concerning the rest, or at least expectations which have a good chance of proving correct" (p. 36). Spontaneous (grown) and made orders are the two orders coeval with human history. Spontaneous character of social formations increases as human society becomes more complex. *Spontaneous order* is an evolved-grown order, namely an order that no single human mind or a group of human minds created and conceived, but rather that emerged in a process that nobody determined. On the other hand, *made order* is made by deliberate actions of particular human beings or concerted actions of many individuals. While the rule of made orders is imposed by a deliberate subject, for instance by a government, the

rule of spontaneous orders has evolved through history and has been imposed by nobody. For example, Hayek thinks English common law emerged by a spontaneous evolution of rules and protected itself from the intervention of political bodies.

Mandeville's idea that "private vices lead to public benefits" represents a historical example of the idea of spontaneous order. Here, Mandeville assumes that "The outcome of social interaction may be something that no one actor intended" (Smith, 2014, p. 225). Actually, in Hayek's case, there is not a phrase like "private vices" or "public benefits"; rather we have individual actions and their social consequences. Assume that all the farmers in the territory A dig the ground and do agriculture for their own interests. By the work of those hundreds of independent farmers, the soil in the territory A has become much more fertile and this has never been seen before. Individual farmers do not regard general fertility when they dig the soil. The result is independent of their intentions; nobody intended to promote general welfare. They intended to increase their gain by agriculture; however, the consequence of hundreds of individual digging created a much more fertile soil, namely general welfare. This example includes a kind of the *invisible hand* of Adam Smith. C. Smith (2014) asserts, "For Smith...on the macro-level social orders arise that are the product, or unintended consequence, of the micro-level actions of individuals" (p. 225). If we associate Hayek with Adam Smith, the invisible hand argument should be understood in terms of unintended consequences which are based on the spontaneous character of social evolution.

Secondly, language is another example of spontaneous order. Everybody uses language for his or her own purposes, to communicate with other people or to do politics. Millions of people participate in this process. For Arnhart (2007), language

“emerged from the verbal activity of millions of people over thousands of years without anyone having intended the outcome by deliberate design” (p. 129).

A spontaneous order emerged by the millions of individual interactions unconsciously and is not created by a deliberate human will. This kind of order is not designed by any particular mind or deliberation of concerted actions of many individuals. The important thing is that the consequences of spontaneous orders are anonymous. For instance, Hayek claims that the market system is a spontaneous order: There are millions of people who interact with each other and act according to their intentions; however, the consequence of that order is unforeseen and unpredictable. Although the consequences of the market order come out of millions of *intended* actions, the outcomes of that order are independent of particular intentions (as seen in farmer example). When I participate in the market order, I have an intention. All the members of the market order have intentions to get some commodities. On the other hand, the consequences of those actions can be irrelevant to their intentions.

## 2.1 Complexity, cosmos and taxis

Complexity is one of the important aspects of spontaneous order. Complexity of a social entity is a predicate of spontaneous orders. Most of social institutions constitute the parts of a complex order in the sense that they emerged as a consequence of purposive actions of millions of individuals. The opposite of a complex society is a face-to-face society. In this kind of small face-to-face group, it is easy to know someone's need and know many things regarding the group's needs. Complexity implies that social entities are beyond our control, observation and plan.

In complex societies, which are grown spontaneously, human beings are incapable of knowing others' conditions, needs, merits, deserts, ideas and health. However, in primitive small groups, everybody knows each other; economy and barter are based on very simple and immature regulations. It is easy to execute a plan for the group and impose a command to achieve certain ends. In complex societies, everything is in a spontaneous flux, which makes governments and organizations unable to know and control unintended consequences of the market order.

We will examine the relation of complexity of social entities with the concept of social justice in the following chapters. Hayek accuses constructivists of misunderstanding the nature of spontaneously grown complex entities. For Hayek (1976), constructivists do not understand how complex social entities make social justice meaningless. Hayek explains constructivists' fallacy in terms of both ontological and epistemological aspects.

## 2.2 Rationalist constructivism

For many years, it has been believed that human reason will rescue humanity from darkness and ignorance. From the Enlightenment on, scholars endorsed the role of reason in social sciences. Hayek accuses those rationalists of trying to re-shape society under the name of equality and liberty. In this part, I will dwell on Hayek's critique of rationalist constructivism because he accuses advocates of social justice of falling into the constructivist fallacy. Hayek describes the history of social thought as the opposition of two different positions: advocates of rationalist constructivism and

anti-rationalism<sup>1</sup>. Rationalist constructivists assert that people consciously design and create law, morality and institutions, so people can change these social entities by designing new ones. According to Hayek (1967), rationalist constructivists assert that “all useful human institutions were and ought to be deliberate creations of conscious reason” (p. 85). The phrase ‘human design’ is crucial because the people who seem to be proponents of ‘design’ usually manipulated this concept. He takes Hobbes, Descartes, Hegel and Marx as representatives of constructivist rationalism.

For instance, the idea of the social contract is a good reflection of rationalist constructivism, as if the social contract was invented by people who realized the benefit of it by reasoning and consciousness. The social contract theory presumes a pre-existing reason which designs the social contract and public order. According to Hayek, rationalist constructivists do not conceive of and credit the spontaneous development of social entities, namely institutions, law and morality. The mistake of constructivism results from the misunderstanding of two concepts: natural and artificial.

Generally, *natural* means dis-order, unplanned and independent of human action or construction; on the other hand, *artificial* is associated with plan, human design and creation. If you think social entities are artificial in terms of a plan and human design than most probably you think that these entities can be changed by human reason, plan and design. Yet Hayek (1967) thinks that we need a third category in order to explain the formation of social entities. In Hayekian sense, first, social entities are consequences of human action; they are constructed by human action, but they are somehow natural in the sense that they are not a consequence of

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<sup>1</sup> In Hayekian literature, anti-realism means an objection to rationalists’ insistence on reason and its powers regarding design in social institutions and distribution mechanisms.

designed and plan. For instance, language is created by human beings, but it is not a result of purposive construction. People adopt a language and speak it without knowing how it is emerged. According to Hayek, market, language, law, morality and many social phenomena emerged as a consequence of spontaneous evolution of social life. On the other hand, rationalist constructivism exaggerates the conscious design of social phenomena, as if every social entity is a product of conscious human creation.

Hayek also used this argument in order to criticize the advocates of social justice. According to Hayek, the ideal of social justice reflects the failures of constructivists' creed. He takes the concept of social justice as a 'devil in disguise'; that is to say, the concept of social justice seems very innocent at first appearance. However, rationalist constructivism (in the form of both socialism and social democracy) accuses the market order of poverty and anarchy. Proponents of this view claim the market order creates injustice for people, as it prevents material equality. According to Hayek, this is the main mistake of rationalist constructivism, as if somebody designed the market order and consciously distributed wealth among people. Hayek (1967) asserts that consequences of the market order were misinterpreted anthropomorphically as if distribution of income is consciously designed (p. 171). In this sense, Hayek relates social justice with his critique of rationalist constructivism. Constructivists do not understand that nobody designed the market order and we can judge the market order only if there is injustice in the rules of barter, trade, exchange and economic action. For Hayek, that is to say, if the rules are fairly applied, then the consequences of the market order cannot be just or unjust. I will show the weaknesses of Hayek's description of the market order in the following parts to give way to a kind of social justice in the following chapters.

Apart from Hayek, Nozick (1999) underlines the misunderstanding of distributive justice: He thinks that people used to presume that there is a conscious mechanism in distributing wealth in society (p. 149). Actually, Nozick underlines the issue that Hayek called as ‘constructivist rationalism’ without defining it as Hayek does. However, advocates of social justice think that social justice can be realized by equality of opportunity, affirmative action; also they are willing to use some re-distribution patterns such as need, merit and desert. To achieve this, governments should design state institutions and utilize social policies under the name of ‘social justice’. In that sense, for Hayek (1960, 1967, 1976), the idea of social justice, majoritarian democracy and labor unions create a danger for liberal democracy. State institutions or organizations can try empower themselves by reconstructing, designing and reshaping society under the name of social justice. The strict relation between powerful labor unions and governments creates unending regulations, which in turn leads to boosting inflation and social instability. In consequence, while pursuing their own ends, people increasingly orient themselves to the inclination of the state, rather than anonymous, spontaneous market order. With such an understanding of social justice, people would be on the *road to serfdom*. If there is a re-construction of society, by distribution patterns, national ideal of welfare state or ideology, then this inhibits spontaneous growing of society, which in turn undermines liberty. This is the reflection of rationalist constructivism regarding social justice. Now, we will see how rationalist constructivism undermines the concept of spontaneous order. Also, I will object to the main elements of spontaneous order in the following chapter.

### 2.3 The rules of spontaneous order

The rules of spontaneous order are related to Hayek's theory of law and justice; however, we need underline them in explaining spontaneous order in general. Here, first I will examine his general theory of rules, and then I will apply it to his critique of social justice. Hayek's theory of justice can be summarized in his article *Principles of a Liberal Social Order* (1967): "Under the enforcement of universal rules of just conduct, protecting a recognizable private domain of individuals, a spontaneous order of human activities of much greater complexity will form itself than could ever be produced by deliberate arrangement" (p. 162). Hayek's theory of justice is strictly related to abstract rules of just individual conduct and its relation to spontaneous order. The maintenance of this kind of order depends on the rules of just individual conduct; these rules are the "abstract rules [that] operate as ultimate values because they serve unknown particular ends" (Hayek, 1976, p. 2). Although Hayek defines abstract and general rules, he does not specify what those rules are. We only know that those rules provide protection of individual domains, namely negative liberty. The role of the rules of just individual conduct is to protect individual domains and let people to use their own knowledge in spontaneous order. Without those rules, spontaneous order would be meaningless. This is because spontaneity of the order presupposes that individuals obey certain fair rules – as in a game – and nobody exactly knows the consequences of that process. In the market order, people obey certain rules of just individual conduct. People adopt these rules by the trial and error method in social interaction: In this way, millions of people adapt themselves to each other by obeying certain rules to predict the consequences of their action. These rules evolved in the history of humanity by the trial and error method. Nobody designed these rules. This process also requires people to use their own knowledge;

we will see the epistemological issue in the second part of the project. Also, the issue concerning the rules of just individual conduct will be presented in the following two chapters.

In Hayek's thought, the aim of the rule of law is to protect those rules of just conduct and hence spontaneous order. The rule of law provides formal/procedural justice by which people know that they play their game under fair attitude of political authority. The rule of law depends on abstract and general rules. We will see that the theory of spontaneous order is the basis of Hayek's critique of social justice. In that part, I want to argue about Hayek's theory of spontaneous order and its problems related to the rule of law and social justice.

Hayek sees the market order as a spontaneous order. All the legitimacy of the market order comes from its spontaneity. This spontaneity is the basis of the market order and the rule of law is strictly related to this spontaneity. Individual liberty in the market order is secured by its spontaneous character; it is believed that people pursue their own knowledge in the most effectual way in this order. The rule of law protects that process, namely individual liberty. Now, spontaneous order, individual liberty and the rule of law are the three concepts that are strictly related in Hayekian thought. All these three concepts are the core elements of Hayek's social thought. The rule of law provides legal protection for negative liberty and spontaneous order generates a free market under the protection of the rule of law. In the following chapters, we will see that Hayek's critique of social justice is based on those premises. Now, I will make a critique of his theory of spontaneous order to give way to finding a secure basis for social justice. This entails the refutation of Hayekian premises.

We will see that there is no convergence among those three concepts in the formation of the market order. The birth of the modern market is based on a bloody process. I will exemplify Marx's concept of primitive accumulation and Wood's concept of market imperatives. We will see that there is not a necessary relationship among spontaneous order, liberty and the rule of law.

#### 2.4 Spontaneous order as a historical fiasco

Spontaneous order is always associated with liberty and formal justice in Hayek's thought. Libertarians think that market order is the best order because it provides people with much more opportunity and choice to pursue their own ends. That is to say, the market order is associated with freedom and formal justice. In this part, I will argue that *to what extent the market order is spontaneous*.

Hayek conceives some kind of a golden formula: Spontaneous order, the rule of law, negative liberty and formal justice are strictly related to each other. The existence of one concept depends on the existence of the others. Hayek's primary premise for the refutation of social justice is the concept of spontaneous order. That kind of order is taken as a natural-grown order which provides people with an ability to pursue their own ends freely. He thinks the most advanced kind of spontaneous order is the market order. He argued that any organizational attempt for fine-tuning it would destroy all the legal basis of the rule of law. The rule of law provides a legal basis to protect the rules of just individual conduct. Now, in that section, I will challenge with the idea of 'spontaneous order' for our purposes of critique of Hayek's theory of justice.

In conclusion, I will assert that:

1. The birth of the market order is not spontaneous.
2. The contemporary functioning of the market order is not spontaneous.

Therefore, the market order is not a spontaneous order.

Actually, my second assertion is problematic for Hayek because he may not see contemporary functioning of the market order as 'spontaneous'. That is why he wrote the *Road to Serfdom* (1944). In this book, he criticizes welfare and socialist states as if they are obstacles which suppress spontaneous order. In Hayekian thought, the concept of spontaneous order disregards the historical evolution of capitalism and is supposed to be expanded in history. Also, Hayek uses that concept in the normative sense; namely, he thinks spontaneous order should be expanded; our social order should be as spontaneous as it can be. It is because spontaneous order is regarded as a liberty maximizing order. It seems the concept of spontaneous order is an idealization, not a purely real phenomenon in the external world. However, I claim that the expansion of spontaneous order in history is an illusion. Primitive accumulation always exists in the socio-economic sphere. On the other hand, the more spontaneous order expands, the more the monopoly system expands. The existence of monopolies makes the market order less free and less spontaneous. Here, two aspects reflect the contradictions of spontaneous order. The expansion of spontaneous order is an illusion with the existence of monopoly and primitive accumulation.

In *Fatal Conceit* (1988), Hayek presents modern history as if it increasingly progresses towards liberty. The dynamics of this liberty lie behind the growing market order, which provides people with the opportunity to use their own

knowledge. Is this description of modern history true? Is it true that the capitalist market has been growing towards liberty? I think liberty and the capitalist market are not necessarily related to each other.

I will describe this coercion largely in the following chapters. For now, I will describe the issue only with relation to the history of economy. Coercion does not have to be related to negative liberty only. ‘Absence of external interference’ and ‘absence of external constraint’ are the only meanings of liberty for Hayek. The market mechanism can lead to coercion. I will use Marx’s concept of primitive accumulation, the concept that Hayek never deals with. Hayek’s ideas that are described in *Fatal Conceit* (1988) and Marx’s primitive accumulation are the two antagonistic concepts that exclude each other in any sense. For Hayek, capitalism is not a system that exists in the external social sphere ultimately, but it is an ideal that should expand in human history as much as it can. Yet Hayek can still defend his ideas if he accepts the coercive aspects of the market order. It is because Hayek does not describe an external fact; rather he has a normative understanding of capitalism. However, Hayek’s (1988) description of extended order as ‘expanding towards non-coercion’ is not the truth. How does this expanding occur? It is possible by “gradual replacement of innate responses by learned rules” (p. 17) or overcoming instinctual behavior gradually expanded in human society and history. As Hayek (1988) puts it, “Cultural evolution, and the civilization that it created, brought differentiation, individualization, increasing wealth and great expansion to mankind...” (p. 17). Although Hayek thinks that this evolution does not occur easily, he never regards the birth of the modern market orders as a coercive process.

In Marx, primitive accumulation refers to a historical period in which expropriation of rural people intensified. The birth of capitalism is possible with

primitive accumulation because this process accelerates the commodification of labor in the capitalist market. It is the necessary process for emergence of the capitalist class. Marx means the process in which rural people and peasants were uprooted from their homelands and became workers in the cities. For Marx, the classical picture of primitive accumulation belongs to the sixteenth century. Marx (2008) says, “In England alone, which we take as our example, has it the classic form” (p. 365). Marx (2008) calls this process primitive because “it forms the pre-historic stage of capital and of the mode of production corresponding with it” (p. 364). This process starts in the early modern era. I will use this era to challenge Hayek’s description of economic history.

On the other hand, Hayek never uses primitive accumulation, but my aim here is to challenge his idea that capitalism and liberty entail each other. Hayek, contrary to Marx, describes the birth of capitalism as a liberating process. As society becomes complex by capitalist growing, the liberty grows. Hayek thinks that humanity evolves towards to an ideal extended order in which people enjoy negative freedom. As Hayek (1988) puts it, “The extension and refinement of the concept of property were, as such examples suggest, necessarily gradual processes that are hardly completed even today” (p. 30). In this article, Hayek starts from ancient Greeks to prove the harmony of private property, liberty and trade. Thus, he thinks humanity evolves towards an ideal spontaneous order since the ancient Greek period. It is the precise point that Marx challenges. For Marx, capitalism does not evolve into an ideal position in which people are much freer, compared to our time.

There are various kinds of markets in the history of economy. For Marx, the capitalist market exhibits its difference from other markets in terms of wage-labor; villagers come to the cities and they sell their labor for a price, namely sell their

labor-power to an employer. The history of capitalism is the history of wage-labor. Marx sees the capitalist market as a new phenomenon, whereas Hayek takes capitalism as a high stage and development of other types of markets in the history of economy. History of economy is a gradual development of liberty and spontaneous order (extended order in *Fatal Conceit*). Hayek (1988) says, “If several property is the heart of the morals of any advanced civilization, the ancient Greeks seem to have been the first to see that it is also inseparable from individual freedom” (p. 30)<sup>2</sup>. Hayek calls the capitalist market as extended order; this is because he believes that capitalism is a stage in which liberty and spontaneous order are much more extended when compared to the times of ancient markets. This extension of social order is always related to liberty (absence of external coercion), trade, private property and spontaneity of social process. Marx will fiercely oppose such a description of economic history. He would say that the birth of capitalism is not a gradual development of ancient markets. Also, liberty and spontaneous order are not necessarily related for Marx. Capitalism neither emerged spontaneously nor promoted liberty.

I believe that the market order is important for negative liberty; however, there is not an ‘ideal’ capitalism in which coercion is absent, and the market order has somehow coercive consequences. Marx’s concept of primitive accumulation and Wood’s concept of market imperatives are the two important themes for Hayek’s description of the market order.

In this part, I will show that Hayek’s social ontology lacks important historical knowledge. I will not give a summary of the formation of the English

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<sup>2</sup> Several property means private property in Hayek’s *Fatal Conceit* (1988).

working classes; rather I will assert that the birth of the market order is not spontaneous and it never functions as spontaneously as Hayek describes.

Marx (2008) sees primitive accumulation as the ancestor of capitalism's existing malignity (p. 363). Processes by which we gain our own money are primary for libertarians such as Nozick. He thinks our wealth is just if we acquire it justly. If we inherit some money or real estate property, then we have a complete entitlement over that inheritance or wealth. For Marx, the source of all our wealth goes to that original sin of primitive accumulation. Primitive accumulation is expelling the agricultural population from their own soil. Original (primitive) accumulation, as described by Harvey (2003), "entailed taking land, say, enclosing it, and expelling a resident population to create a landless proletariat, and then releasing the land into privatized mainstream of capital accumulation" (p.145). Just before the enclosures, there were free villagers who had their own land. That subsistence agriculture was destroyed by the enclosures. That expropriation was based on coercion, namely landlords occupied common lands and they did not care whether it was legitimate or not. Villagers were forced to leave their lands. They immigrated to the cities and modern free workers emerged in those cities in which the expelled villagers constituted the bulk of the population. History of the modern market order has very little relation to the concept of spontaneity. Harvey (2005) describes original accumulation as "the forceful expulsion of peasant populations; the conversion of various forms of property rights...into exclusive private property rights; the suppression of rights to the commons; the commodification of labor" (p. 159). As we see, Nozick's search for just acquisition of wealth is very weak regarding the history of primitive accumulation.

Peasants were not only expelled from their homelands but also legally exterminated in the big cities. Marx (2008) calls it “bloody legislation against the expropriated, from the end of the fifteenth century; forcing down of wages by acts of parliament” (p. 372). Wage laborers did not emerge spontaneously but they are a product of legal sanctions. It is because they could not adopt the new worker life easily. Early workers tried to protect their peasant instincts; they worked one day and left their occupations another day. Marx (2008) underlines that “They were turned en masse into beggars, robbers, vagabonds” (p. 372). Those fathers of working classes were subjected to arbitrary laws of the parliament. By this laws, workers were expected to work in discipline. The labor market itself emerged not spontaneously. Historically, the market order is not spontaneous as Hayek thinks. Apart from the historical analysis, market always has imperatives; people obey certain imperatives in order to survive in the market order. Those imperatives are the invisible coercive apparatus of the market order. Also, primitive accumulation never ends; it always exists in our socio-economic sphere. Cities are still full of people who were expelled or emigrated from rural areas.

## 2.5 Wood and market imperatives

Wood (1994) thinks that market imperatives somehow lead to coercive consequences. However, I use the term *market imperative* or *market dependence* in relation with coercion for disadvantaged people in a free market. In Wood, market imperatives shape the limits of human behavior. It should be noted that Ellen Meiksins Wood uses *market imperative* and *market dependence* not for a specific social class; that is to say, for Wood, every producer, buyer and seller is dependent

on the market process. In other words, all people are dependent on the capitalist market, but I want to underline that the disadvantaged part of the market is much more dependent on a free market to survive. It creates coercion upon those people who are at the bottom of the society. For instance, one can ask that who is able to enter or withdraw from a 'free' market as they see fit, in view of their own economic advantages. This reflects two important things: Most people in the 'free' market are not able to withdraw from it. The other part of the market, namely, bourgeoisie, is able to do this if they feel fit and safe. Therefore, the word 'unable' shows us the limits of freedom of human behavior in a 'free' market for a specific class. A free market is free for a small percentage of the population. Although most of wage-laborers are *legally* free to withdraw from a free market, they are not actually free to do that. In that sense, market dependence and imperatives become coercive for a specific class. (Although Wood does not directly say this.) Market imperatives do not lead to coercion for all the agents of a free market. Yet market imperatives or market dependence become coercive for the disadvantaged or impoverished people as they are not free to withdraw from the free market. In that sense, legal freedom and actual freedom are different from each other. The capability approach tries to increase actual freedom by proposing capability sets.

Wood uses *market imperatives* in order to describe the coercive nature of the market order. In Hayek, the market order is an ideal in which there is fair competition. However, in the actual market order, we face so many coercive consequences of that order. There are some imperatives which constitute the market order; without those imperatives, the market order would not maintain itself. Wood (1994) says, "...its imperatives of competition, accumulation, profit maximization and increasing labor productivity-regulate not only all economic transactions but

social relations in general” (p. 15). Without describing those imperatives, it is impossible to differentiate the capitalist market from ancient or medieval types of market. Capitalist market is not a quantitative expansion of the ancient types of markets; rather it is a qualitative rupture from other historical kinds of markets. Those people who do not recognize capitalistic market imperatives assume that the capitalist way of thinking “exists, at least in embryo, from the dawn of the history” (Wood, 1994, p. 16). Hayek is a person who takes spontaneous orders and made orders are co-existent throughout history, as if there is always a struggle between those orders in the history. However, Hayek assumes that spontaneous forces of society are grown (maturated) in our time. Although Hayek does not have an essentialist theory of human nature, this kind of thinking presumes that human beings are endowed with a capitalist rationale, as if human beings have always tried to eliminate “the barriers that have stood in the way of its development, and of the process by which those barriers were lifted” (Wood, 1994, p. 20). In Hayek, we departed from primitive kinds of spontaneous orders to an advanced one. Actually, this is what Hayek criticizes: teleocratic understanding of history. Capitalism, here, as a kind of ideal; we come to it very close. Hayek’s position – especially in *Fatal Conceit* (1988) – contradicts his critique of teleocratic understanding of history and society. It is because his idea of cultural evolution deterministically goes to a foreknown ideal.

## CHAPTER 3

### THE MARKET ORDER AND HAYEK'S SOCIAL EPISTEMOLOGY

Epistemological pessimism is one of the important aspects of Hayek's critique of social justice. Also, his theory of knowledge is at the core of his liberalism. As seen above, Hayek's critique of social justice is strictly related to spontaneous order, and an important part of his social ontology leads to a kind of social epistemology. This epistemology is very important in his critique of social justice. It is because he thinks if we challenge the spontaneous order, then we prevent people from using their unique knowledge for their ends. It means the rules of just individual conduct would not be protected by the rule of law. We will see the details of the argument later.

One of the essential elements of Hayek's *great society* is that the welfare of individuals cannot be provided by government policies that help people to satisfy specific ends. It is because the government cannot know individual circumstances of individuals and cannot gather all the knowledge of specific ends. Hayek has two kinds of epistemology; the first one is interpretivist epistemology as represented in *The Sensory Order* (Hayek, 1952). In this book, we see classical epistemological arguments as we see in Kant. That is to say, human beings shape the raw material of the external world. However, I will not argue about the interpretivist epistemology; rather I will concentrate on *The Use of Knowledge in Society* (Hayek, 1948) and *The Facts of the Social Sciences* (Hayek, 1948) where Hayek explicitly analyzes dispersed and tacit knowledge. As mentioned in the first section, his theory of knowledge is a consequence of his social ontology. It is because he takes a society as a pseudo-entity; that is to say, the basic element of spontaneous order, namely

individuals are the most real and they are particular carriers of their unique knowledge. This unique knowledge is the knowledge particular to time and space of individuals. That knowledge is inaccessible and is a barrier for socialist central planning. Uniqueness of that kind of knowledge comes from epistemic atomism; individual is the carrier of inaccessible knowledge of space and time. We will see that epistemological pessimism is in every part of Hayek's social and political philosophy.

### 3.1 Epistemology in general

According to Westphal (2003), Hayek's social epistemology is a reflection of epistemological individualism, or ego-centric predicament (p. 118). Individuals are carriers of knowledge packages which cannot be conveyed unless the price mechanism functions. They carry a kind of tacit knowledge which cannot be articulated objectively. In this chapter, I will explain the nature of tacit knowledge and its relation to his social ontology and theory of justice.

For Hayek, the problem is co-ordination of dispersed knowledge in a complex society. The market system coordinates unique knowledge of millions of individuals anonymously and instantaneously. Actually, Hayek's contribution to political economy and political philosophy is his problematizing social issues in terms of a *theory of knowledge*.

In his description of a self-regulating system Hayek's major achievement has been to show that the advantages of decentralized decision-making in a market stem from the fact that this is the only device that man has discovered for coping with the universal facts of ignorance and uncertainty. (Barry, 1982, para. 78)

### 3.2 Knowledge in the market order

The market coordinates knowledge anonymously via price signals. People orient themselves to the market via price changes and they use their own knowledge to get advantage of this change.

Also, Hayek's critique of central planning, social justice and central state is different from other classical liberal theorists concerning that theory of knowledge. In Hayek, the central planning and social justice have *epistemological* obstacles; I think this claim is the core of his social and economic thought. In that sense, some scholars such as Burczak (2006) see Hayek as a part of epistemological pessimism of post-modernism and "unattainability of objective truth and knowledge" is the core part of that epistemological pessimism of post-modernism (p. 5). Here, after explicating his theory of knowledge generally, I will try to create counter-arguments against his critique of social justice. Here, it should be underlined that this idea is a reflection of his social ontology. To what extent is our knowledge tacit?

First of all, what kind of knowledge are we talking about? Is it scientific knowledge? If the data of knowledge were given in the external world, then it would be very easy to classify and model this data for redistribution of wealth. A group of people or a central planning board would use data and solve the problems resulting from the market order. Perhaps, they would design a new economy depending on these data. We would arrange all the set of data and decide how to allocate wealth among people. The problem of central planning would be the problem of formal logic or mathematics. However, what kind of knowledge are we talking about in a Hayekian sense? What are the main predicates of such kind of knowledge that Hayek

is interested in? In the following paragraphs, I will explain the kinds of knowledge that Hayek deals with.

It is the knowledge of time and space of individuals. Every individual in society occupies a unique place for his/her specific knowledge of time and space. This uniqueness makes every individual superior to others. Suppose that a blacksmith in a village learned how to make nails and knives and was morally educated by his master. He can predict the need for metal of surrounding villages; he can predict which products are sufficient. He has the knowledge of the raw materials etc. He knows his village, his occupation and perceives simultaneous change in the economic sphere of the village. This makes him superior than others in terms of knowing those particulars. Every person in society has this kind of epistemological advantage. In some sense, everybody is ignorant regarding others' ideas or position, namely their choices, motives, needs in the market order. Nobody can get the exact knowledge of others' situation. However, every person in the village would have different epistemological advantages to that blacksmith. There are millions of people who are endowed with a unique knowledge of particulars. Instantaneous change in the village – need, price, etc. – will create different reflexes among particular individuals. For instance, if there were a change in the price of iron, every producer who deals with iron-related industry would orient him- or herself to this change. Maybe, they would choose another sort of raw material such as steel and copper or they would try to find a new market for their production. All these people who deal with iron business would use price signals to adjust themselves to the new situation. In this process, the source of iron's shortage is unknown. Suppliers and consumers constantly orient themselves to this new situation without knowing the source of iron's shortage. Everybody uses his or her own limited knowledge by following price

indicators. Dispersed knowledge of millions of individuals is coordinated by price signals anonymously. The important thing is that no single mind can collect that instantaneous ever-changing knowledge of particular individuals. Butler (2012) indicates, “Nor do we know how the millions of people involved in the modern market order will respond to changes.” (p. 44). This kind of private and subjective knowledge is unable to be centralized into one pool. Society consists of millions of people that have this kind of unique knowledge and every person is epistemologically advantageous to others. This kind of knowledge cannot be conveyed to a central mind because:

1. The total knowledge of society is the knowledge of millions of private and subjective knowledge of time and space; namely the knowledge of craftsmanship, agriculture, fishing, mining, etc.

2. This knowledge constantly changes.

3. This knowledge is unable to be collected because of its private and subjective nature.

4. This dispersed knowledge makes central redistributive policy impossible.

Hayek thinks that particular individuals have very little part of knowledge in a complex society. The knowledge is dispersed among individuals. It is dispersed because “...the utilization of knowledge which is not given to anyone in its totality” (Hayek, 1948, 78). How can this dispersed knowledge of many individuals be coordinated? For many socialists, the issue is “a problem of how to allocate *given* resources” (Hayek, 1948, p. 79). In his book *imperialism*, Lenin assert that the dynamics of capitalism leads to anarchism and chaos in the market system and blindness of capitalism creates many failures ; therefore, this system should be

replaced by a central planning system. In a post-bolshevist socialist command economy, the production, distribution and consumption would be determined by a central planning organization. Hayek asks a question to socialists: Is any single mind capable of coordinating dispersed knowledge of millions of individuals? If so, then a central planning board owns all the relevant information of individuals, needs, desires, merits, choices – namely, everything that concerns the economic sphere. If a central planning board knows that relevant knowledge, then redistribution of wealth will be easy. In this case, one can calculate all the relevant information and create a social policy regarding those data. Yet, Hayek proposes that it is impossible to know all the relevant information of individuals in a complex society.

### 3.3 Active knowledge of entrepreneurs and the case of unemployed

Also, Hayek thinks centralization of dispersed knowledge is impossible in a complex society. In complex societies, human beings are constitutionally ignorant about other people's intentions, aims and decisions. All the people in society including economic theorists and government officers are ignorant about other people's knowledge, aims and decisions. Yet, how do people overcome that ignorance? How can that dispersed knowledge of many individuals be coordinated? In a market system the co-ordination problem can be solved; it is because people follow some grown rules regardless of whether those rules are articulated or not. *Grown rules* means the rules that are emerged by an evolution of the trial-error method in social life. Supposedly, those rules are not imposed by any rational will. When one follows certain rules, he puts his knowledge to the market for the use of other people. Those millions of inputs to the market create a system which utilizes knowledge properly and benefits from

knowledge of many individuals. This anonymous functioning of knowledge reminds us of the invisible hand of Adam Smith. Supposedly, dispersed knowledge of many individuals is used in the most effectual way in the free market order.

Also, when Hayek articulates the knowledge problem in his articles *The Use of Knowledge in Society* (1945) and *The Facts of Social Sciences* (1943), he usually exemplifies independent entrepreneurs in the market order. Craftsmen and real estate agents are the notable instances of Hayek's subjects in the market order. People from these independent occupations are really important to understand the anonymous orientation resulting from price signals in a free market. Yet, Hayek concentrates too much on classical liberalism's craftsmanship and entrepreneurship; however, a worker in contemporary world does not have skills as blacksmith, shoemaker or tailors have. "This necessarily excludes the tacit knowledge of non-entrepreneurs from the social process of discovery and mobilization" (Adaman&Devine, 1996, 531) I further claim that not only does Hayek underrate tacit knowledge of non-entrepreneurs but also unemployed people and even workers are very hard to be classified as people who have Hayek's tacit knowledge. It is because the position of workers or the unemployed regarding price signals is not same as that of Hayek's entrepreneurs. Workers make very simple moves during working hours. This kind of knowledge is very easy to be articulated and transferred. Apart from their conditions in a work place, what is the role of workers' knowledge in a market order? If prices increase and salaries stay same, then the purchasing power of workers will decrease. Workers will adjust themselves to the market order by restraining themselves. They send information to the suppliers only by eating and consuming less. They seem as passive bearers of price signals when compared to Hayek's independent entrepreneurs. If prices change, independent entrepreneurs have many options to

make moves in the market order. On the other hand, Hayek does not regard unemployment here. How can an unemployed insert his/her unique knowledge to the market? Suppose that a person has been unemployed for six months, how can he read price signals if has nothing with which to participate in the market order? She would be unable to insert her knowledge to the market order as an entrepreneur does. I mean the main subject of Hayek's epistemology is an entrepreneur who is somehow independent from a corporate organization. Actually, it is useful for Hayek; if one assumes that the market order consists of millions of entrepreneurs who want to sell and buy things, then price signals create a very dynamic process among these independent entrepreneurs.

#### 3.4 Big corporations and domination of knowledge

Actually, Hayek's picture reflects an idealization of market's golden age as we see in his antique craftsmanship. In the contemporary world, individual entrepreneurship is superseded by big corporations, monopolies and finance giants. The roles of these corporations are important because the process of competition is indispensable for a good functioning market order. It is because Hayek sees competition as a discovery process. People and companies discover data and knowledge by participating in the market order. Competition is a necessary procedure resulting from our ignorance in the market order. Agents discover facts, choices, needs, price inclinations while they participate and interact with other agents. Competition also increases the number of choices. "Our lucky discovery of the price mechanism allowed our economic system to expand hugely, because it made use of widely dispersed, personal knowledge and enabled the diverse purposes and actions of millions of different people to

coordinated peacefully” (Butler, 2013, 43). However, as I say, Hayek idealizes the capitalist market as if it really expands via competition. I want to underline what exists in Hayek and what exists in reality. The existence of big corporations makes the market order less competitive. Therefore, although these corporations are still unable to collect all the data in the market order, they are highly advantageous to the direct market order and orient people’s choices to pre-determined directions subtly. In this sense, the discovery process in the market order malfunctions. The role of Hayek’s individual entrepreneurship has decreased in the market order.

Contemporary individuals have mostly lost their active role in the market order and become more passive by being a part of big corporations. They have become more subordinated in big companies. They mainly participate in the market order by adjusting their salaries to their consumption. Although they insert their knowledge by adjusting themselves to the price signals, they have become passive bearers of exchange in the market order. I think, Hayek’s premises on the knowledge problem are valid when a majority of society plays an important role like an independent entrepreneur. It is because the discovery procedure depends on such a condition in which independent agencies interact with each other via competition process.

### 3.5 Hayek’s description of command economy and the knowledge problem

While Hayek objects to social justice, he targets centralized command economy’s epistemological weaknesses: In a central planning-command economy people would not use their unique knowledge freely, they would not be able to insert their knowledge to the market freely and one’s use of knowledge would depend on the central board’s attitude. People would orient themselves to the government’s attitude

towards economy, rather than to price signals. They would be able to use their knowledge to the extent that the central board allows. In this case, for Hayek, people would orient themselves to the moves of the central government; they would be deprived of using their own tacit knowledge. A blacksmith would not adjust himself to price signals, but he would try to produce in accordance with the government's pre-determined policies. In this sense, the coordinative role of price signals would collapse and a central board would try to co-ordinate the market order. First, Hayek thinks that a central government is unable to achieve co-ordination of dispersed knowledge of millions of individuals. Second, a central government should not try to achieve distributive justice because it hinders individual freedom. While Hayek targets distributive justice, he mainly takes only a dystopian kind of socialism into consideration as seen above. By this reasoning, he accuses distributive justice as if it hinders individual freedom by controlling and subordinating all the data into one pool. However, redistribution mechanisms and distributive justice do not have to be in a strict relation with command economy. Also, not all socialists undermine the coordinative aspects of the market order as advocates of central planning do. There are some scholars who address the importance of the Austrian school's critique of the command economy for participatory planning and alternative kind of socialism (Adaman & Davine, 1996). Apart from socialism, a welfare state's social policy is not immune from Hayek's criticism. In *Road to Serfdom*, Hayek (1944) underlines the dangers of social welfare states' attitude towards social justice by accusing them of trying to imitate socialist states' policies. Hayek's reason to object to welfare states comes from his argument for liberty regarding the knowledge problem. This point includes weak points of Hayek's social thought. It is because not all states

which promote social justice make concessions from individual liberty; I mean both negative and – somehow – positive liberty.<sup>3</sup>

### 3.6 Liberty and theory of knowledge

For Hayek (1976), his social epistemology is also related to liberty. “The idea that government can determine the opportunities for all, and especially that it can ensure that they are the same for all, is therefore in conflict with the whole *rationale* of a free society” (p. 9). Supposedly, abstract and general rules also provide people with a sphere of liberty in which individuals use their unique knowledge in the most productive way. In that case, these rules of just individual conduct are related to negative liberty; these rules supposedly teach people to avoid dealing with other people’s sphere. People – under the rules of just individual conduct – use their unique knowledge in the market order by feeling safe about their individual sphere. If a person is unable to use his knowledge for his own sake, then we cannot talk about liberty. Moreover, Hayek’s social epistemology is also related to the so-called spontaneous order. The market order is the most effectual way to coordinate dispersed knowledge of millions of people. Any legal attempt to interfere with that process would disrupt it and people would be unable to use their unique knowledge in that order. If so, then the codes of the market mechanism would be disturbed by an organizational power for a specific central policy. Now, the abstract and general rules of just individual conduct, which make people feel safe in the market order, would be undermined by a political power under the name of social justice.

Spontaneous distributive function of the market order would be replaced by

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<sup>3</sup> I will explain the negative/positive freedom debate in the following chapter. Here, I am only concentrating on dealing with liberty in relation to Hayek’s epistemology.

distribution of a political power; now, instead of using their unique knowledge for their own ends, people would be subjected to government regulations. Those rules of legal regulations are different from general and abstract rules of just individual conduct. While the former is designed by a deliberate legal will and has specific known ends, the latter is not designed and does not serve any specific end. The latter is the legal basis of spontaneous order in which people use their unique knowledge in the most effectual way. If government expansion prevailed under the name of social justice, then the sphere of general and abstract rules of just individual conduct would decrease. It means people would be unable to orient themselves to use their unique knowledge; rather they would try to orient themselves to the rules of government regulations. Hayek (1944) says, “The important question...is whether the individual can foresee the action of the state and make use of his knowledge as a datum in forming his own plans” (p. 46). At this time, society becomes a huge organization in which the abstract and general rules are surpassed by government’s commands; namely the destruction of the rule of law. This is a very brief summary of Hayek’s social thought. Here, Hayek pictures a disaster scenario. However, monopoly and corporations change social life into a huge organization in which workers are still unable to use their own knowledge for their ends. They are not craftsmen and they are disadvantaged in using their own knowledge as independent entrepreneurs do. In this huge capitalist organization, people orient themselves to the needs of the market order, not their own ends. Participating in capitalist accumulation is a kind of imperative for all members of society. It is true that nobody legally or physically forces people to participate in the market order; however, people do not chose to participate in the market order. They must be a part of that order in order to survive. We will see that Hayek’s epistemological pessimism means very little to object to

social justice. On the other hand, can Hayek's epistemological pessimism be a genuine objection to social justice? Do we have to gather all the relevant information to impose regulations for social justice? Is tacit nature of knowledge related to his critique of social justice? I say that his 'argument from epistemology' concerns social justice in a very small way. I favor his 'argument from epistemology' in terms of functioning of the market order; however, I think it has very little to do with the issue of social justice. Social justice and liberty do not exclude each other. Yet I think, his epistemological theory is related to the issue of liberty. If a state undermined the price mechanism, then we would say that individual liberty was manipulated by central government. Price signals enable people to use their own knowledge regardless of anyone's interference with their interaction in the market order. People freely adjust themselves to the market order and respond by creating new opportunities. The more government interferes in the market order, the more price signals are influenced by the state. In this sense, people orient themselves to the attitude of the state, rather than the anonymous free market. These make individuals much more dependent on the state, the biggest organization in modern world. In this case, we can say that individual freedom is undermined.

## CHAPTER 4

### JUSTICE AND THE MARKET ORDER

In this chapter, I will dwell on the main argument of my thesis. I will challenge Hayek's exclusivist idea: the market order and social justice strictly exclude each other. Above, we see that the market order is not as spontaneous as Hayek presumes and the market order has not spontaneously evolved. The need for social justice comes from the adverse consequences of the market order. Hayek agrees that there can be very harsh consequences of that order but also agrees that consequences are irrelevant to justice. Hayek's ideas on social justice can be summarized as below:

- If there is a market order, social justice is meaningless.
- Social justice cannot be achieved in a market order: Epistemological argument.
- From those two premises, Hayek concludes that social justice destroys the *rule of law*.

#### 4.1 Meaninglessness argument

Hayek thinks justice cannot be applied to unintended consequences of many people's actions. If spontaneous order comes out of millions of individual actions, and no particular individual determines the consequences of it, then nobody is responsible for the consequences of the spontaneous order. Many individuals interact with each other and nobody deliberately designs the outcomes. In that sense, spontaneous order seems as an anonymous process. Therefore, nobody is responsible for the outcomes of this order. Above, I tried to challenge Hayek's concept of spontaneous order and

its epistemological implications. When he says nobody is responsible for the outcomes of that order, he disregards not only the case of monopoly, but also state interventions. In such a condition in which power is centralized in the hands of very few states and corporations, the consequences of the market order can be predictable. Although consequences of the so-called spontaneous order can be unintended, they can be foreseen. For instance, if there is an economic depression in a country, it is easy for economists and policy makers to predict the moves of international corporations. Also, if there is a military emergency in the Middle East, we can predict NATO's moves. We can predict the moves of power centers regarding unintended consequences of the spontaneous order. Because I said much about Hayek's social ontology and epistemology, I will not dwell on them.

According to Hayek, the predicate 'just' and 'unjust' belongs to deliberate human conduct only. One cannot label natural disasters as just or unjust. It is because nature as a totality of spontaneous forces that cannot be responsible for justice or injustice. However, according to Hayek, some scholars personify *the society* and label it as just or unjust. According to him, the 'social' of the 'social justice' is meaningless. It is because society is unable to act and think. Moreover, society is not a kind of deliberate entity that distributes goods and wealth. For ontological individualism, an individual is prior to any supra-individual being. A constructivist rationalist sees society as super-entity over its individual members. According to Hayek, they fall into the error of constructivist rationalism; that is to say, those scholars do not recognize any results without a deliberate designer. This part of Hayek's thought reflects his contemplations in social ontology. This ontology has been explained to some extent above; however, we will be looking for its implications in social justice. Later, we will see how that ontology is strictly related

to his critique of *social justice*. His social ontology and epistemology give way to the concept of spontaneous order, which is used against social justice. Undermining this ontology will give way to some kind of social justice within the scope of liberalism.

This conception of ‘social’ justice is thus a direct consequence of that anthropomorphism or personification by which naïve thinking tries to account for all self-ordering process. It is a sign of the immaturity of our minds that we have not yet outgrown these primitive concepts and still demand from an impersonal process which brings about a greater satisfaction of human desire than any deliberate human organization could achieve, that it conform to the moral precepts men have evolved for the guidance of their individual actions. (Hayek, 1976, p. 63)

The constructivist fallacy leads to anthropomorphic fallacy: Constructivist rationalists not only take social entities as being created by somebody, but also they posit some human characteristics to those social entities; they see social entities as if they have a human mind and behave as a human being. According to Hayek (1973), for instance, when we use the word *social justice*, we assume that society is a kind of conscious being which is responsible for the distribution of the wealth (p. 69). Hayek (1967) thinks that the word ‘social’ implies personification of society as if conscious concerted actions of individuals create an order which deprives people of basic capabilities (p. 162). Therefore, the people who see society as a conscious deliberate being fall into error of constructivist rationalism. Why does Hayek claim that social justice is meaningless in a market order? Actually if there is a spontaneous order as Hayek describes, I would accept both Hayek’s critique of rationalist constructivism and its relation to social justice. Hayek idealizes spontaneous order and its epistemological usefulness; that is, if there were a real spontaneous order, then nobody would be responsible for the consequences of this order. The main concept for our argument is *deliberation*. For instance, if there is a socialist-like command economy, then central planning is a deliberate central organization that legislates and

acts for the purposes of social justice. The state owns the means of production and it decides how to allocate wealth among its members. Particular ends of different individuals are transformed into collective ends. For instance, five-years plans for the development of the national economy of the U.S.S.R. were seen as ultimate economic plans which try to unify all people's ends into a unique great end. In that sense, people are directed to follow one great end – for the sake of national economy – and they are unable to *pursue* their own ends. Socialist states established a hierarchy of ends; in this way people behave not according to their own ends, but they behave according to externally imposed collective ends. A central planning board decides how to use resources and how to coordinate knowledge. A society was transformed into a kind of huge organization by decision makers. In this picture of command economy, the key concept is *deliberation*. A group of people deliberately try to distribute wealth among specific groups and they use some distribution patterns like merit, desert and need. If there is a responsible decision maker, then they are responsible for injustices in economy or distribution. It is because Hayek thinks that justice is a predicate of deliberate-conscious actions of individuals. In this sense, actions of organizations can easily be seen as just or unjust. Hayek opposes this kind of economy to a spontaneous market order. However, if the market order is dominated by big corporations and states, how can we justify so-called anonymous-coordinative role of the market order? The existence of private ownership does not directly entail the existence of spontaneous order. It is because the power of big corporations, monopolies and states is highly effective in international and national economy. Therefore, we can say that powerful actors in the market order can deliberately dominate the market order, which results in much more inequality. Also, Wood's market imperatives and Marx's primitive accumulation are the two examples

that indicate that the market order is not as spontaneous as Hayek thinks. Indeed, the consequences of the market order can be judged as just or unjust because of the existence of powerful deliberate actors in the market order.

Hayek's pivotal claim is the 'deliberation' thesis. Justice can only be the predicate of deliberate will of particular actions. For instance, if I manipulate and violate the fair rules of individual conduct, then it is immoral to do that. It is because I deliberately interfere with and disturb other individuals' ends. However, in the absence of deliberate will, there cannot be justice or injustice. For instance, the market order is an anonymous process; therefore, nobody is responsible for the consequences of that order. Is it simple enough? Before getting into some concrete problems, I need to deal with Hayek's deliberation thesis.

Suppose that there is a pure Hayekian spontaneous order. Can we ask whether the consequences of the market order *are* immune from criticism for social justice? I think, we can still ask this question. It is because the absence of deliberation does not end the quest for justice. There are examples that are not deliberate but are still the object of justice. Responsibility does not come only from conscious and deliberate actions.

*Negligence* and *liability* have top priority in philosophy of tort law. However, I will not concentrate too much on the philosophy of tort law in this part; rather I will try to use some tort cases in order to undermine Hayek's philosophy of justice. In most of tort cases, if actions of individuals or organizations result in an injury or harm, then this person or organization has to pay a price for the consequences of his action regardless of deliberation. In most of tort cases, contrary to Hayek, deliberation is not necessary for justice. Suppose you drank a Pepsi without noticing

anything wrong with it, but when you got a second glass of Pepsi, you realized that there is a spider in your Pepsi bottle. After going home, you felt sick and later you underwent medical care for a couple of days. The restaurant which serves Pepsi was found guilty and paid money to the plaintiff. There is no deliberation. The consequences are spontaneously grown; in the first case nobody intended to put spider into the Pepsi bottle. Nobody intended those consequences; the waiter wanted to serve and the client wanted to enjoy his Pepsi. The result is very different from agents' intentions involved in the events. As a result of accidents, defendant companies were found guilty.

The relationship between deliberation and justice is issued here: In this case, we see different situation that Hayekian understanding of justice cannot explain. Hayek's *conscious deliberation* thesis is incapable to answer some problems in some fields of private law, which he sees as a successor of his favorite common law.

If those cases concern justice related to spontaneously grown consequences, then spontaneously grown consequences can be the issue of law and justice. Hayek's thesis that justice or injustice is possible only with a deliberate will that is a conscious conduct is not credible. If there is a spontaneous consequence, and then we cannot say 'it is not my fault', there is also a payoff for those consequences; the welfare state – in that case – seems to be a reply to this liability.

#### 4.2 Equality and liberty: A quest for social justice

In this part, I will not dwell on the conflict between negative and positive liberty too much. It is because although Berlin (2002) describes that they are rival positions, some thinkers such as Skinner (2002) underline the weaknesses of the distinction.

The weaknesses come from the definition of the concepts such as *constraint* and *interference*. Many philosophers (Taylor 1973; Cohen 1983) argued on the vague nature of constraint and interference. This is a huge literature to deal with here. Yet, I will only concentrate on Hayekian kind of strict negative liberty. I will criticize Hayek's concept of liberty to the extent that the issue of social justice deals with it. Although Berlin (1958) indicates that positive and negative liberty exclude each other, Hayek thinks negative liberty is the only kind of real liberty. For Hayek, constraint entails external conscious interference by others, government, etc. I will criticize Hayek's exclusivist understanding to give way to a different kind of constraint. I will concentrate on the kinds of constraints which do not come from a conscious deliberate being. It is because Hayekian kind of liberty or strict negative liberty only deals with conscious external interference of individuals or concerted actions of human beings.

Berlin's definition of liberty exactly suits Hayek's case. It is because Berlin (2002) not only says that liberty is the absence of external constraint, but he defines negative liberty as the absence of "deliberate interference of other human beings within the area in which I could otherwise act" (p. 393). It is very similar to Hayek's definition of liberty. Hayek exactly is a part of this negative liberty tradition. Here, the important term in Berlin's usage is *deliberation*. If no one coerces a person to behave in a specific manner, then there is not coercion. Hayek is still on the side of Berlin on the role of deliberation. Yet, different from Berlin, Hayek relates his idea of deliberation with justice; being just or unjust can only be the predicate of conscious human action. If a person interfered in one's individual sphere, then Hayek would call it unjust or a violation of the rules of just individual conduct. In this sense, Hayek puts the concepts of injustice and coercion into one basket. Coercion, as

external interference, creates constraints and it is against the rules of just individual conduct. The concept of constraint is debatable here. For Hayek, poverty, starvation and Sen's capability deprivations cannot be called coercion; it is because there is no intentional action by any human being.

For many liberals, positive freedom is associated with collectivity. Advocates of strict collective liberty presume that individual liberty can be achieved by social emancipation. As a communitarian, Charles Taylor is one of the scholars who criticized this stereotype. Taylor (1979) indicates, "When people attack positive theories of freedom, they generally have some left totalitarian theory in mind, according to which freedom resides exclusively exercising collective control over one's destiny in a classless society"(p. 418). I also object to this caricature of positive liberty as Taylor does. It is certain that Marx proposes to destroy bourgeois freedom and replace it with a state of positive liberty which is based on collective decision making. However, it is only one kind of positive freedom. Positive liberty does not entail purely collectivist state as advocates of negative liberty think. Yet, self-realization is still an issue for liberty. If a person is deprived of the necessary means to realize herself, then I say she is unable to be free.

I need to underline that I do not adopt an exclusivist understanding of these concepts. By this way, I reject not only the exclusivist position of Hayek's theory of liberty, but also its strict positive meaning. I will call Hayek's understanding of liberty as strict negative liberty. According to Hayek, negative liberty is the only real understanding of freedom. You will see that my view rejects the exclusivist theory and give way to a moderate view of positive liberty. Sen's argument for the capability theory will offer a different genuine form of liberty.

Also, my suggestion does not violate the main theme of negative liberty. It is because I am still in the scope of ‘freedom from something’. For instance, constraint can be in the form of capability deprivations. One can say that people should be ‘free from capability deprivations’. I will explain it by making a distinction between two terms: *absence of external constraint* and *absence of external interference*. We should be careful about the distinction between absence of external constraint and absence of external interference. I think these two are different. Advocates of strict negative liberty do not differentiate between these two terms strictly. What is the absence of external constraint? If we take coercion only as the absence of external interference, then how do we relate external constraint with coercion? For instance, monopoly over vital resources is not an external interference, but a constraint. External constraint does not have to be understood only as external deliberate interference. This is my departure point; I will defend the idea that adverse consequences of the market order or market failures create external constraint for those who are deprived of capabilities. ‘Being free from’ these constraints make people much freer.

I broaden the concept of constraint beyond external conscious interference. I understand some of external constraints as capability deprivations which are prevalent in lower classes and minority groups. However, I will not take the arguments as related to only working classes. Notable representative of analytical Marxism, Cohen (1983) reformulates the issue of liberty regarding workers and lower classes. Cohen (1983) asks the question, “Is it true that workers are forced to sell their labor power?” (p. 429). However, this is not my question; I am seeking a constraint which is not external conscious interference in general. I will use some of Cohen’s way of thinking to show that consequences of the market order make some

people less free. Indeed, my main focus is not workers' unfreedoms, but I try to show that constraints do not have to result of external conscious interference. If Hayek accepts that coercion exists without external conscious interference, then his critique of social justice collapses. It is because Hayek sees consequences of the market order as if they are neutral and immune from being coercive.

In the first chapter of *The Constitution of Liberty*, Hayek (1960) calls Dewey's attempt to reconcile liberty and equality as jugglery (p. 16). Dewey proposes an early version of the capability approach on the issue of liberty. In his article *Force and Coercion*, Dewey (1916) says, "Whether the use of force is justified or not...is, in substance, a question of efficiency (including economy) of means in the accomplishing ends" (p. 362). In another article, *Liberty and Social Control* (1935), Dewey says, "Liberty is not just an idea, and abstract principle. It is power, effective power to do specific things...If one wants to know what the condition of liberty is at a given time, one has to examine what persons can do and what they cannot do...it becomes evident that the demand for liberty is a demand for power" (p. 41). In these passages, Dewey defines liberty as being able to do something or having power to achieve success in certain ends. Dewey uses *power* instead of *being capable of*; however I did not see any important difference between those different uses. In that sense, Hayek (1960) sees Deweyan kind of liberty as the most dangerous theory of liberty (p. 16). It is because Hayek thinks that freedom is understood as having material power in this 'dangerous' Deweyan case.

This confusion of liberty as power with liberty in its original meaning inevitably leads to the identification of liberty with wealth, and this makes it possible to exploit all the appeal which the word liberty carries in the support for a demand for the redistribution of wealth. (Hayek, 1960, p. 16)

I will try to show that *being able to do something* does not entail redistribution of wealth as Hayek understands. He relates positive meaning of liberty to the concept of distributive justice. Therefore, Hayek's objection to this kind of liberty is related to substantive equality. Actually, the issue in Hayek is obvious: equality and liberty are in contrast. If government tries to promote substantive equality under the name of social justice, then liberty is lost at the expense of substantive equality. When I say *substantive justice*, I mean facilitating capabilities which provide people with minimum power to achieve their ends in the market order. This entails concrete measures taken by institutions and governmental organizations which include equality of opportunity, material subvention for lesser inequality and legal attempts to prevent discrimination. Hayek opposes all these attempts by some ontological and epistemological premises which are represented and criticized above. Here, I will assert that social justice is possible according to reconciliation of equality and liberty, which is possible with a good theory of capability approach. When I say *equality*, I do not mean equality of income or only equality before the law, rather equality of capabilities.

#### 4.3 The case of capabilities: assimilation of freedom and ability

Suppose that you are living in a village in which people are engaged in agriculture. If you asked some people, "Are you free to do drive a tractor?", then some people would answer 'yes'. It is because 'to be free to drive a tractor' and 'to be able to drive a tractor' are compatible. On the other hand, suppose that you are living in a village in which people are engaged in cattle breeding. If you asked some people, "Are you free to do drive a tractor", then some people would not answer this

question. It is because it may be meaningless for them to drive a tractor if they are unable to do so. Now, suppose that the people who live in the second village decided to give up cattle breeding because of poor market conditions. Now, they have two options: Either they will migrate to the city or they will engage in agriculture. If they migrate to the city, they will not be able to overcome harsh market conditions, but they can start to deal with agriculture, which they are familiar with. Unfortunately, they do not have any financial power to get the necessary means for agriculture. They can reach the means of production by using either private or state credit. Suppose they are living in a Hayekian world; the banking system will not give them money because of their poor financial conditions and the state will not deal with their financial conditions because state cannot serve for particular conditions. Now, we call that situation poverty. If you ask those people, “Are you free to drive a tractor?”, it would be irrelevant and meaningless for them because they do not have the ability to do that. The point is that ‘poverty’ is an obstacle to enjoying liberty. As Plant (2001) puts it, “If there is a general set of abilities and opportunities in society which poverty prevents an individual from realizing, then this can be regarded at least as a potential restriction on liberty” (p. 172). In this sense, I think poverty is an obstacle to realizing the liberties.

The capability approach proposes that development should not be understood only with macroeconomic indicators. One of the notable representatives of capability approach, Amartya Sen proposes that development should be understood as what people are able to do. It is because most of macroeconomic indicators do not show anything concerning equality, social justice, liberty, etc. Macroeconomics deals with national income, inflation, international trade and GDP. If there are good and stable rates of them, then we would say that the economy is good. However, capability

approaches concern very concrete market failures. Market failures such as poverty, famine, discrimination are the unintended consequences of the so-called spontaneous functioning of the market order.

I think the capability approach reconciles freedom and equality. In this way, we can have a sound ground for social justice. I think, the weakness of abstract justice can be compensated for by a sound ground of the capability approach to give way to social justice. Hayek does not make a difference between oppressive intervention and intervention for social justice. The latter does not have to be oppressive as libertarians think. In this chapter, I try to demonstrate that equality and liberty are compatible in terms of social justice. If a social policy tries to promote equality of opportunity for a deprived minority, then it can be said that equality and liberty are in accordance with each other. Increasing human capabilities makes people more equal in terms of realizing themselves. Capability theories regard not only distribution patterns but also extra-economic relations which Hayekian theory of justice disregards. The object of social justice is also extra-economic relations such as gender and ethnic discrimination, minority rights, equality of opportunity, retrospective justice. We cannot define social justice only in terms of market allocation. There is a huge number of people who are deprived of basic capabilities (education, health, self-sustenance) for extra-economic relations. Hayek's view of strict negative liberty does not concentrate on these extra-economic issues.

For capability theories, Crocker (1992) indicates that a high GDP rate is not an indicator of development; what is important is to look at well-being and quality of life (p. 586). Most scholars indicate that United States' GDP rates illustrate the superiority of a liberal economic system. However, it does not show us anything about the quality of life and standard of living. The capability theory does not deal

with only macro-economy to show the advantages of capitalism; rather it tries to criticize government policies which disregard people's well-being and quality of life. There can be a state with a great level of GDP and also millions of homeless people. On the other hand, it is not true that capability theorists try to redistribute wealth centrally via a central planning agency; rather they pursue genuine social policies which try to facilitate an endorsed set of basic capabilities.

For Sen (1992), a basic capability is "the ability to satisfy certain elementary and crucially important functionings up to certain levels" (p.45). I think social justice should be understood by those basic capabilities; they are the main issues in the market. For Sen (1985), those basic capabilities can be summarized as longevity, nourishment, basic health, avoiding epidemics, being literate (p.5). Also, Crocker and Robeyns (2010) indicate, "Basic capabilities refer to the freedom to do some basic things considered necessary for survival and to avoid or escape poverty or other serious deprivations" (p. 69).

I want to examine the capability theory as an element of social justice; in this way, I criticize Hayek's theory of justice, which is based on the irreconcilability of social justice and liberty. However, the capability theory gives way to reconciling them; indeed, it means the reconciliation of liberty and equality. However, capability theorists such as Nussbaum and Sen formulate the capability approach as closely related to the concept of opportunity. Sure, social justice is strictly related to equal opportunities. However, I think that is not enough; we can make the capability theory a part of social justice. Equal opportunity constitutes only a small part of social justice. Also, we will see that this approach does not violate any principles of the rule of law. By substantive justice, I mean facilitating capabilities that enable people to have minimum power to achieve their ends in the market order. Yet this power does

not have to be defined with only material aspects. My view concerning social justice is not only related to material equality, but there are so many issues that social justice concerns, e.g. gender and minority issues. Hayek's understanding of equality, justice and law do not have any implication for the solution of these issues.

Sen (1999) indicates, "The usefulness of wealth lies in the things that it allows us to do-the substantive freedoms it helps us to achieve" (p.14). In the language of the capability approach, achievement of specific ends is called functioning. Substantive freedoms are related to individual's functioning, namely her/his achievement. According to Sen (1999), development should be understood as enhancing those substantive freedoms. Actually, that position is the opposite of Hayekian assumptions. Sen shows that there can be some countries with full macro-economic success and free market order and yet with poor life quality and low standard of living. Moreover, this spontaneous order does not bring freedom because of its market failures: poverty, unemployment, etc. However, development is not only economic; there can be some countries in which most individuals are wealthy, but suppose that they live under poor human rights conditions. If a rich person belongs to an oppressed minority, then he is not free. As we see, there may be a constitutional state that enables formal freedoms but the market order and governance can still be discriminatory. Capabilities are not only related to economic issues; rather they cover most spheres of social life. Sen (1999) says, "The role of income and wealth – important as it is along with other influences – has to be integrated into a broader and fuller picture of success and deprivation" (p. 20). In that sense, capabilities become a central part of the issues of social justice.

Poverty is regarded as an income problem; however, although income is important, a high income is not an indicator of capabilities. Poverty is a condition in

which people are deprived of basic capabilities. High income rates can provide people with basic capabilities; however, it does not mean that high income guarantees capabilities. You can have too much money; however, you can still be incapable of doing too many things or enjoying your freedom because of gender and minority oppression. In this sense, poverty should be regarded as capability deprivation. Consequently, income is a useful means for capabilities; however, it does not guarantee basic capabilities. The capability approach looks for various kinds of capabilities for people to achieve their ends.

#### 4.4 Minimum income: concession or consistency?

I think the capability problem is at the core of the issue in order to make a critique of Hayek. He underlines that if a government recognizes some people's incapability and compensates for their conditions in *the market order*, then it will impair the functioning of the market order. Intervention to *in-market* relations would expand the government and people would orient themselves to the attempts of the state. We should differentiate two important concepts; *inside the market* and *outside the market* intervention are different. If a government proposes some distribution patterns for *in-market* people, then it would impair the market process. If the government treats people differently in the market order via merit, desert or need as in the example of the *tractor* above, then those people, he assumes, will orient themselves to the government, rather than anonymous market process. However, Hayek proposes a kind of safety net for *out-market people* who are deprived of minimum living conditions: food, shelter, etc. At this point, a huge debate starts; if Hayek proposes such a minimum income, then does he contradict himself? I think the answer is no.

Hayek's minimum income is not for social justice, not for capability deprivations, not for equality of opportunity and not for minority rights. Therefore, his theory of minimum income does not make him an advocate of the welfare state and does not make him an enemy of laissez-faire economics. It is because when he underlines minimum income, he does not mean accessible education, health services, equality of opportunity, anti-discrimination policy. He only tries to involve out-market people in the market order again to some extent: to the extent that prevents people from dying. It is true that he favors government financing for education; however, this attitude does not come from the idea of equality of opportunity. Rather it is a kind of donation to the people who cannot afford education.

This part of my thesis concerns Hayek's minimum income debate: Is minimum income a concession in Hayek's social-economic thought? Or is it a complementary aspect of his critique of social justice?

Hayek puts the issue as we see in the following passage:

There is no reason, why in a free society government should not assure all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody need to descend...So long as such a uniform minimum income is provided outside the market to all those who, for any reason, are unable to earn in the market an adequate maintenance, this need not lead to a restriction of freedom, or conflict with the rule of law. (Hayek, 1976, p. 87)

Do these two propositions conflict each other? The last passage from Hayek does not imply that he defends social justice or he contradicts himself. These two passages are different from each other. Hayek does not propose a distribution pattern, but rather offers a minimum for people to survive in the market system. Here, there are two Hayekian propositions which seem to be contradictory. First, *distribution of*

*wealth should not be done according to desert, merit and need. Second, there should be minimum income for out-market people.*

Why are distribution patterns irrelevant to Hayekian justice, if Hayek maintains that governments are entitled to guarantee a minimum sufficient income to any and all citizens? This question is important. Actually, these two Hayekian propositions are not related to each other in Hayekian sense. Hayek's defense of minimum income does not entail distribution according to certain patterns such as desert, merit, need, skill. Hayek does not say that there should be a minimum income for desert, merit and need. Yet, Hayek underlines that there should be a safety net for people who are out of the market. The former proposition is *directly* related to *equality before the law* and the latter is *directly* related to *liberty*. These two premises should be clearly distinguished from each other. Why does Hayek oppose distribution according to desert, merit and need? If the government treats people differently in a spontaneous order, it will undermine the main premises of the market order. The rules of spontaneous order, namely the rules of just individual conduct, are enforced if the state or law treats people equally. Law treats people equally regardless of people's merit, desert, need, skill; namely, law treats people indifferently. It is true that people were born with different skills, talents, characters, needs. If the law treats people regarding those patterns, then we would not say equality before the law is secured. If the law treats people *differently* according to distribution patterns, then they would not be equal before the law. It is because law would treat people *differently*. This is Hayek's main argument about distribution patterns. This argument is mainly related to equality before the law, namely the rule of law. It is the main reason why Hayek thinks social justice (distribution according to predetermined patterns) undermines the rule of law.

Also, both Hayek and advocates of the capability approach are content with the second proposition, namely minimum income. Amartya Sen would agree on the latter; they will exactly disagree on the former. It is Hayek's difference from the advocates of the capability approach. Sen would say we can distribute wealth according to specific patterns which is important for capability deprivation and also defend the idea that it would not undermine equality before the law, namely the rule of law. Distribution of wealth is possible regarding distribution patterns. Hayek thinks there is not any pattern for distribution in the market order; if there is, then it is artificially created by taking care of distribution patterns.

Yet, if Hayek does not defend distribution according to some patterns (need, merit, desert), why does he defend minimum income? As I said above, *distribution patterns* and *minimum income* are different issues in Hayek's thought. If Hayek said that merit, desert and need are distribution patterns, then we would easily say that Hayek contradicts himself for his critique of social justice. Yet it is very important that when Hayek thought of safety net or minimum income he did not underline *the need of people*. It is because not only does Hayek fiercely defend the idea that needs cannot be objectively determined, but also a central government's policy is unable to know people's need, desert and merit. One cannot objectively define these patterns. In his article, Tebble (2009) indicates that Hayek's theory of minimum income contradicts his premises on social epistemology (p. 598). How can we decide on this *minimum*? What is this minimum? Hayek (1944) explains it as "some minimum of food, shelter and clothing" (p. 120). The word *some* makes the issue complex here. It is because there is no objective criterion for *some*. However, when we take Hayek's other works into consideration, then we realize that this minimum protects people from dying. According to Hayek, coercion in the market order is possible only if

individuals are deprived of vital resources. By this, people have a space in which they maintain their life. Also, we can say that *minimum* means *some* food, shelter and clothing that prevent people from dying because of poverty. This is not a contradiction of his theory, but it reinforces his theory. Distinctly, this is not a contradiction of his theory of social epistemology. Hayek does not say that a central planning agency should collect relevant information of individuals to allocate resources according to their capability deprivations. He only proposes a minimum for out-market people (disabled, extremely deprived, etc.); this is not hard for a state to implement a policy towards people who are extremely deprived of vital living resources.

Hayek defends the idea of minimum income for people who do not have the advantage to participate in the market order. From a Hayekian point of view, the state does not have to build a huge social security institution, regulate the market by establishing state industry or enable people to access free education or health services. However, the state should make legal sanctions by creating a fair, open and participatory condition for disadvantaged people regardless of distribution patterns.

Hayek's defense of minimum income is actually related to his theory of liberty. According to Hayek, the market consequences can be coercive only when individuals are deprived of vital resources. Hayek (1960) thinks that if a person is deprived of vital resources, then she is coerced to death by a kind of monopoly (p. 136). That is to say, Hayek thinks he does not contradict himself when he defends the idea of minimum income. It is one of the consistent consequences of his general thought. Yet if Hayek thought of minimum income regarding capabilities, then he would contradict himself. It is because he explicitly maintains that Dewey and other philosophers who take liberty as having power to do something defend the most

dangerous type of liberty. He defends the idea that state should support the most disadvantaged people to keep them alive. Hayek says:

Neither of these confusions of individual liberty with different concepts denoted by the same word is as dangerous as its confusion with a third use of the word to which we have already briefly referred: the use of 'liberty' to describe the physical 'ability to do what I want', the power to satisfy our wishes, or the extent of the choice of alternatives open to us. (Hayek, 1960, p. 65)

That is to say, Hayek does not defend minimum income for some distribution patterns or capability approach. Hayek sees forerunners of the capability approach as very dangerous for undermining the role of the rule of law. Why should one believe the capability approach rather than Hayek? It is because the market system and Hayek's minimum income will hardly overcome coercion resulting from the market system itself. As I said, Hayek does not care about any distribution pattern. Hayek thinks coercion will occur in a market system if and only if there is a monopoly on a resource that is important for human survival; otherwise, there is not any coercion in market system. However, coercion exists in the market system today and in history. Today, coercion occurs in the form of monopoly, unemployment, discrimination and minority problems. Also, it occurred in the form of primitive accumulation.

However, Amartya Sen and Martha Nussbaum would surely insist on the concept of need, capability, having power to achieve alternative ends. Yet, when one starts to take 'need' as a primary concept for social justice, then there should be a definition and kinds of *need*: basic needs, primary needs, basic capabilities, etc. In the literature of Amartya Sen, *capability* is more than *needs*; capabilities are the necessary condition to develop one's life. It helps people to achieve some ends or to have power to do something. Actually, we do not have distribution patterns in Sen's thought; that is to say, there is not any distribution pattern but providing a good

standard of living and quality of life. Therefore, state regulations should take care of providing people for them to have core capabilities regardless of distribution patterns. In Sen and Nussbaum, there is no distinction of in-market/out-market person regarding social policy. This is the main difference between the capability approach and Hayek. Also, it is the main reason that I defend the capability approach. The capability approach is advantageous in solving the main problems of Hayekian liberalism.

#### 4.5 The issue of morality and minimum income

However Hayek is much vague in the case of morality. According to Hayek, there should be a minimum guarantee for people in need who harshly suffer from the market order. For some philosophers, this is a concession from his former thoughts concerning social justice (Tebble, 2009). After the harsh results of the spontaneous order emerged, Hayek thinks that there can be remedy for those results in which some people are deprived of basic tools to maintain their lives. A minimum income can be provided by government, but this is not because of there is an injustice; rather it is a kind of moral behavior to alleviate others' harsh conditions. I ask the question if we morally compensate the adverse results of the market order, why can we not call these results 'just' or 'unjust'? Why do we feel responsible morally to alleviate needy people's harsh conditions? What is the motive for that alleviation? Is it not an ambiguity? Hayek does not claim all people are morally responsible for this. On the other hand, suppose that the result of a spontaneous process will lead to harsh conditions for all the people in a society. What will we say about it? In capitalist crises or a local recession, a great number of people are affected by the harsh

consequences of spontaneous orders. In that sense, will all people be morally responsible for harsh deprivations?

Hayek's moral attitude towards harsh consequences of a spontaneous order is ambiguous. What is the object of judgment? According to Hayek, the consequences of a spontaneous order cannot be just or unjust; however, individual attitudes towards harsh consequences can be moral or immoral. Hayek (1976) calls it "insurance against extreme misfortune". If human beings alleviate the *extreme misfortune*, then it is good for all society (p. 87). I have two questions in my mind:

1. If the *extreme misfortune* is a consequence of the market order, why should people have a moral duty to alleviate their experience? This question reflects one of the important aspects of Hayek's ambiguity.

2. If it is a moral duty to alleviate the harsh consequences of a spontaneous order, why should not public policy prevent these *extreme misfortunes* before they take place? What is the motivation for moral duty?

Those two questions reflect the ambiguities of Hayek. Yet, it may not be appropriate to call these questions *ambiguity*. It is because Hayek may share a kind of philanthropy, which is important for conservatives. Now, Hayek would say that there is still no coercion because nobody forces blacks, the Kurdish and women to work in a certain place. Also, Hayek would suggest that we cannot do anything to employers who do not employ 'others'. How can minorities be free if they cannot work because of their nationality, race and gender? There is a deliberate action: The employer deliberately does not employ 'others'. Formal equality which the rule of law favors the most does not solve that social problem. If I cannot enjoy my freedom, what is the meaning of liberty? That issue makes the *capability* issue very important.

#### 4.6 Coercive consequences of spontaneous order

We see many people who deserve much more material power than they have. We see many people who have intellectual rigor and a great mind and we witness that he/she has nothing. She cannot even maintain her life. After seeing those people, we say it is not just. We sigh for them; they should have much more than a parasite stock trader who gains millions of dollars within five minutes. Hayek would say that there is no coercion imposed on them, so they are free. They have equality before the law. Desert, merit and need are irrelevant to Hayekian justice. As Hayek (1976) describes, in a great society (free society which the rule of law governs) nobody is responsible of the just or unjust consequences of the results of spontaneous order. If there emerged a bad situation for some people, we cannot call it just or unjust, but we can call this result as a negative feedback.

In that part, I ask a very basic and general question: Do we need social justice, namely substantive justice? There are very harsh consequences of the spontaneous order in contemporary world. Abstract and general rules and equality before the law alone cannot provide a good solution to alleviate those harsh conditions. If we look at the coercive consequences of the market order, we will see that social justice is meaningful as much as formal justice of the rule of law. Hayek surely does not mind coercive consequences of the market order. The market order cannot have any coercive consequences for Hayek. I think the consequences of the spontaneous order are the first stimuli for the justification of social justice. I will analyze the consequences of the market order; then I will problematize and instantiate some problems such as equality of opportunity, individual liberty and capability. In the last part, I will evaluate and try to reconcile the rule of law and social justice. In spite of the fact that I agree with Hayek that classical socialist states

have an epistemological barrier for central planning and realization of absolute social justice, there are two things: First, the consequences of spontaneous order are not as beneficial as Hayek imagines. Second, people do not have to create a socialist-like command economy in order to pursue social justice. State does not have to know all the dispersed knowledge in society. Finally, the attempt for social justice can be compatible with the rule of law.

#### 4.7 Labor, coercion and justice

Laborers may not seem to enjoy their liberties in their working life. According to Hayek, if one person chose to be employed, then he/she should be aware of the disadvantages of being employed. Hayek defends the idea that if a worker sells her labor, then she gives her time for others' service. Also, the gain of being employed may be better than being independent. When I say independent, I mean independent from hierarchy of an organization such as a company or state. She is not coerced into the job formally. "Coercion occurs when one man's actions are made to serve another man's will, not for his own but for the other's purpose" (Hayek, 1960, p. 133). The job she deals with may be disgusting; however, she cannot give up because of great risks. Yet, it does not mean coercion. Hayek thinks independent jobs may include such risks also. Nobody can coerce a laborer to work for a permanent employer. There are many employers in a market order and the employee is free to choose any of those employers. Differently, the employee is free if and only if there are many employers in the market order. Hayek defends that idea to attack socialism where there is a unique boss, namely the state. If there was only a unique employer, then there would not be an alternative for employees; everyone would serve for the sake of the state. This again means the destruction of individual liberty and the rule of law.

#### 4.8 Unemployment as capability deprivation

Strict advocates of the market order praise it because of its liberty-maximizing role. Capitalism destroyed feudalism and brought a new order in which laborers and employers make a free contract. Unemployment is one of the consequences of the so-called spontaneous market order. It constitutes a part of capability deprivation; namely unemployed people are unable to participate in market relations and satisfy their needs. That incapability may be related to other capability deprivations such as gender and race discrimination. However, I will analyze unemployment in economic terms. Remember that capability deprivation is related to unfreedoms, famines, health, longevity, unemployment, which make people incapable to be really free. Not all of them are consequences of the market order; however, unemployment is *directly* a consequence of the market order. I assert that unemployment – as a capability deprivation – makes people less free. That is why we need a well-grounded social policy that would reconcile equality and liberty, and we reach a minimum conceptual framework for social justice.

If there is no coercion, then there is liberty. According to Hayek, the concept of coercion should be articulated because the confusion leads to manipulation of the concept. If a person/institution that has power to force people deliberately to act in a certain way, then there is coercion. The power exercised upon people makes people unable to serve for his/her own ends. Coercion is also possible when individuals have alternatives; if a power determines the alternative preferences of individuals, then there is coercion. The key point is that there should be a *deliberate* power that decides on the alternatives. In the state of coercion, there can still be chances to have alternative preferences. For Hayek (1960), what is the crucial point is that the coerced “is not altogether deprived of the use of his capacities; but he is deprived of

possibility of using his knowledge for his own aims” (p. 134). It is crucial because we assume that there is coercion only when somebody forces people to behave in a certain way. When we have alternatives, we do not assume we are not free generally. If a power uses other people’s will for its aims and those people are deprived of using their knowledge for their ends, then there is coercion. This coercion/justice issue is most apparent in the issue of monopoly.

#### 4.9 Hayek’s justification of monopoly and its critique

There are not only individuals but organized groups in a spontaneous order. Actually, this part of Hayek’s thought is highly problematic: How does the rule of law protect us from arbitrary power of monopoly? For Hayek (1988), formation of self-maintaining systems is the product of spontaneous evolution of rules of conduct; however, it does not mean that deliberate order is not important in spontaneous orders (p. 87). I ask the question if there are still deliberate organizations in the market system, how can we protect individual liberty from those organizations? Hayek implies the more the spontaneous order is extended, the more the individual liberty is protected. When he says *extended*, he means an order in which specialization and free trade prevail, and no central authority and nobody is capable of interfere in that order. In extended orders, there can be deliberate organizations; they will exist as long as they do not violate the rule of law.

Hayek thinks in socio-economic sphere, the rise of prices cannot be regarded as a part of coercion. A company can raise or decrease prices according to the market mechanism; nobody can be coerced to buy the products of that company. For Hayek (1960), if a monopoly raises the market price, then I am still not coerced. A

monopoly can be coercive if and only if it is the sole agent that supplies vital goods (p. 133). “A monopolist could exercise true coercion, however, if he were, say, the owner of a spring in an oasis” (Hayek, 1960, p. 136). Water is a vital good, so if monopoly raises its price too much, it is sure coercion. In conclusion, Hayek thinks monopoly cannot exert coercion unless it has a complete control over indispensable sources for human maintenance. In other cases, the existence of monopoly is irrelevant regarding coercion. Although monopolies are the most organized elements of a market order, Hayek disregards the importance of monopolies. Are there not injustice or a subtle coercion? Hayek claims that there is coercion only in the *periods of acute unemployment*. In those periods, employers used to manipulate worker’s work force. However, Hayek’s idea on coercion is not convincing.

In that sense, companies, monopolies and the state that employ people and supply specific services cannot be labeled as *coercive power*. For Hayek, I cannot buy a certain good if a company raises its price; however, it is nonsense to say, “I am coerced.” His reason is that no company or monopoly coerced people to work for them. However, Hayek underlines that employers can be coercive if there is a great deal of unemployment. Hayek (1960) thinks that the fear of dismissal can give way to employer’s arbitrary behaviors over their employee. (p. 137) Hayek contradicts himself because the employer still does not coerce people to work for him. There is still no legal sanction for the worker to work for a specific employer. The fear of dismissal and permanent unemployment are common today. Hayek talks about an *ideal* great society in which the rule of law is provided and liberties are protected. However, there is not such a society. Actually, unemployment and the unsecured nature of work life are a permanent problem in contemporary capitalism. Hayek uses the term *permanent coercion of individuals*. I think the situation of workers in the

market is a permanent coercion and oppression of individuals. The meaning of coercion is very precise in Hayek's thought. If we adopt his concept of coercion for specific circumstances, then it loses its conceptual consistency. The same problem is the theory of justice.

#### 4.10 Hayek's reply to my rejection

The underlying idea of Hayek's objection to social justice is the naturalness of social order. Spontaneous functioning of the order is as natural as natural events. There are some harmful aspects of the labor market: I can hate my job, I can reluctantly bear my employer's caprices; however, all the misfortunes and harmful aspects of that process do not create necessary conditions to allege that there is coercion or injustice. The employer does not compel us to work for him. We are free to choose alternatives. Yet there is huge question here: How about if the laborer could not find a job? While a worker cannot maintain his life without a permanent job, an employer can maintain his life because of his capital accumulation. Reserve army of the unemployed or *lumpen proletat* enable the employer to hire necessary laborers to run his business. However, the laborers most of time cannot choose their employers. The reserve army of the unemployed strengthens the employer's hand, making employers feel comfortable because employers are advantageous in determining the price of the labor. In the existence of the reserve army of the unemployed, workers would not choose, they *have to* choose: otherwise they will die. This is the one of the coercive outcomes of spontaneous order; that is why we need the concept of social justice.

#### 4.11 Discrimination as capability deprivation: Minorities

A country with the rule of law and a spontaneously grown market order can still produce diverse social problems in the form of racism and discrimination. Suppose that in a country with the rule of law and market order the rate of racist persons is very high; also, in this country, people are reluctant to employ women. Here, although there are general and abstract rules which enforce the rules of just individual conduct, those legal rules do not guarantee factual equality. People are equal under the law; however in the actual life racism and discrimination are very high. What will we do here? Do we need a positive sanction codified by legislature? Do we need affirmative action? Here, we see that social justice is not directly and only related to distribution of wealth justly, but also it is related to wider social problems as exemplified above. Discrimination is a capability deprivation; some groups of people are deprived of goods in social life.

Suppose that there are huge corporations and monopolies in the market place and they control a great deal of economy. All those companies do not employ blacks. It is not articulated or written anywhere. However, informally monopolies do not employ other races. Now, no trial can judge them according to the rule of law. However, deliberate organizations such as firms and monopolies are safe in that order. In that sense, the rule of law is not only the safeguard of individual liberty, but also the safeguard of informal sanctions. Those racist monopolies' competition is not in danger because it is protected by the rule of law, which also guarantees the liberty of individuals. Therefore, Hayek would not object to such kind of deliberate organizations in a market place; however, their existence can be possible only in an order which is protected by Hayekian rule of law.

In Turkey, in the early 1990s, my family witnessed that some firms in İstanbul did not employ Kurdish citizens. Moreover, the state did nothing to overcome this social problem. Kurdish people were irremediably influenced by those experiences; they wanted the state to do much more, such as put sanctions to those who practice discrimination. Also, one may think that millions of people who are discriminated in *open societies* or in *the societies in which the rule of law prevails* face the same situation. Without positive sanctions made by the government, those problems will go on in a spontaneous functioning market order.

#### 4.12 Equality of opportunity

All the issues above entail equality of opportunity. Legal sanctions should be imposed to get rid of informal *racist* sanctions. However, it would make no sense for Hayek. Hayek tries to justify individual positions in the market order by appealing to inborn differences. In the *Constitution of Liberty* (1960), Hayek argues that equality of opportunity is a violation of the rule of law. As we know, equality of opportunity treats every person equally formally. Now, people were born with different characters, skills, etc. All people are different from each other. Hayek (1960) thinks that if the rule of law treats all those different individuals equally, then the result must be inequality (p. 87). Suppose, I have an inclination to be a mathematician, swimmer, financial analyst; it is very natural for me to choose such occupations. Suppose there is another person who has not got any inborn skills. If the law treats both of us equally, then the result will be inequality in our positions in the society. People are different naturally. “If we treat them equally, the result must be inequality in their actual positions, and that the only way to place them in an equal position

would be treated differently” (Hayek, 1960, p. 87). If the law views certain individuals differently under the name of *equality of opportunity*, then the law does not treat disadvantaged persons equally. Rather the law would serve for his particular end. Then the equality before the law is disturbed and the rule of law is violated. Therefore, for Hayek, there should not be equality of opportunity. However, I think, Hayek understands equality of opportunity only in the form of affirmative action. Yet, equality of opportunity does not have to be related to affirmative action. Also, Hayek does not make a distinction between *formal* and *substantive* equality of opportunity. Formal equality of opportunity is related to fairness and equal treatment in terms of gaining positions in society. In this sense, it seems a matter of *legal procedure*. Actually, this view is in accordance with Hayek’s social philosophy. Procedural fairness is one of Hayek’s central topics in his social philosophy. It is because Hayek thinks spontaneous order functions properly only if procedural fairness and the rules of just individual conduct are protected. Indifferent treatment in the market order is substantial for the anonymous character of this order. However, as I mentioned above, the market order and legal procedural fairness is not even a guarantee of formal equality of opportunity because the market order is not immune from informal sanctions. In the market, there may be social exclusion of blacks or other ethnic minorities; women may be excluded from top positions in some companies. These are possible and existing problems in the market order and also they exist in countries in which legal procedural fairness is protected. That is why we need some kind of *substantive equality* to define equality of opportunity. This is the certain kind of equality of opportunity which Hayek fiercely opposes. In order to enjoy formal equality of opportunity, people need to have an equal access to the extra-market or in-market positions. It entails social policies which decrease

discrimination in society. These social policies towards disadvantaged groups do not undermine equality before the law and the rule of law because extra-market and in-market discriminatory practices make formal equality of opportunity meaningless.

## CHAPTER 5

### CONCLUSION: THE CASE OF THE RULE OF LAW

Hayek's philosophy of law shows his exclusivist interpretation of social phenomena. According to Hayek (1960, 1973), law is more original and older than command. When he uses *command*, he mainly means the laws which are made by modern legislation. For Hayek, law is a consequence and enforcement of evolution of the rules of just individual conduct which expands particular domains of individuals. Nomos is the root of the law; Hayek (1973) used it as a synonym for *the rules of just individual conduct*. On the other hand, command is the main predicate of *taxis*, which Hayek relates to modern legislatures.

For Hayek, the main element of nomos or the rule of law is to secure the rules of just individual conduct, which provides people with a private domain in society. In the legal system, justice can be the predicate of procedural rules; that is to say, it means fairness to treat people equally. If a specific rule targets only me, instead of others, then I can call that rule *unjust*. Procedural justice or equality before the law never recognizes any particular social class or group of people; that is to say, they *cannot serve for the specific ends of those groups*. Rather those rules provide a fair process in which all individuals pursue their own ends. According to Hayek, general and abstract rules can be called *just* because those rules treat every individual as *equal*. Those rules of just procedures are called as *Nomos* (Hayek, 1973). Gray (1998) underlines that general and abstract rules govern all the spheres of law and justice in the Hayekian libertarian thought (p. 69). Those rules are for the protection of individual liberty, namely for the limitation of external coercion. In Hayek's thought, liberty actually can be called *epistemic* liberty; coercion prevents people

from using their unique knowledge for their own ends. In a spontaneous order, people pursue their own ends freely by using their unique knowledge. The rule of law protects people in using their own knowledge and achieving their own ends. In this sense, Hayek's conception of the rule of law is strictly related to his social ontology and epistemology.

The concept of *nomocracy* is useful here. Plant (2010) argues that this concept implies an order or legal system which does not recognize any specific groups' and individual's ends (p. 6). Hayek uses it as *nomos*. In nomocracy, law only provides people general rules by which people pursue their own ends and use their own knowledge. On the contrary, in teleocracy, there is a power that tries to interfere with individual ends. While Hayek mentions the rule of law, he actually means *nomocracy*. For Hayekian kind of liberalism, nomocracy is the only way to realize real justice, namely procedural justice. Gray (1998) underlines that the political sphere is governed by *nomos*: "the true law which defines justice and prescribes the limits of individual liberty and of governmental authority" (p. 69).

Hayek's idea of justice is meaningful only with general and abstract law, namely *nomos*, the law of liberty. The unique basis of that conception of justice is *nomos*, which excludes all the positive aspects of deliberate will of state power regarding other sorts of justice.<sup>4</sup> In that sense social justice – which entails at least a minimum sanction by the government – is the opposite of the rule of law. According to this idea, the procedural justice and the outcomes of the market order are not related to each other. Formal justice only cares about a fair play between individuals

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<sup>4</sup> This distinction of *nomos* and *nomocracy* and teleocracy creates many distinctions related to social justice, equality, etc. For instance, while 'equality before the law' is directly related to *nomocracy*, 'factual equality' (material equality, substantive equality) is related to teleocracy.

in the market order. If legislation made laws for social justice, then it would be a big threat to the rule law. It is because legislation-made laws target a specific group of people/classes under the name of social justice; therefore, it undermines the general/abstract rules, which do not recognize any specific group of people. Those are Hayek's ideas which I want to challenge.

When I use *social justice*, I mean substantive justice to alleviate market failures, anti-discriminatory social policy which focuses on gender, minority problems and diversity and equality of opportunity. Actually, this policy-oriented politics is not compatible with Hayek's normative political philosophy. It is because policy makers offer legislation to enact laws which are focused on a specific group of people under the name of social justice. Hayek's *rule of law* is similar with *equality before the law*. Hayek would take this policy making as an initiative for pursuing collective ends in a command economy. Hayek would declare this policy making as being incompatible with the nomos. It is because social justice is always teleological, namely it directs itself to specific ends. While Hayek asserts that we cannot have social justice by looking at individual's merit, desert, need and equality, as Plant (2010) puts it, Hayek regards a "mechanism to determine which principle of distribution will prevail over others" (p. 86). It is because while the state distributes wealth according to distribution patterns, some of those criteria can clash. For instance, when you distribute wealth by merit or desert, it can contradict with the needy people's conditions. Distribution patterns can conflict within themselves. Also, suppose that policy makers know everything about citizens; they know who is the poorest and they know who deserves the best. How can we ground distribution criteria? Therefore, although I object to Hayek's exclusivist theory (exclusion of social justice from the concept of justice), I accept that it is very hard to define these

distribution patterns. First, a central agency or planning board would never get the data of distribution patterns of individuals for the distribution of wealth. Second, there is not an objective definition of distribution patterns. However, I regard substantial capabilities as a core issue for social justice, which enables people to enjoy their freedom. Sen (1980) defines basic capabilities as a core element for quality of life, namely nutrition, health, education and mainly participation in social life (p. 484). This view does not propose *distribution patterns*; also, it does not direct policy makers to enact laws for specific groups of people or individuals. Yet, this idea tries to promote substantial freedom, namely capabilities for all people. Although positive policy making is not designed for a specific class or group of people, mainly deprived people will benefit from this positive policy making. However, it does not mean that the objects of social policy are only the deprived people. I mean positive policy making does not have to be target specific groups of people. Hayek objected to any substantive regulation or social policy because he thinks it imposes some distribution patterns for specific groups of people or classes. In that sense, formal justice seems to be the opposite of any social policy making. It is because Hayek (1976) thinks that government's job is to secure the rules of bartering game which provide people with fairness in the market order (p. 2).

Now, it is good to endorse some themes in Hayek's concept of justice. As mentioned above, for Hayek, his understanding of the rule of law is the only way to enjoy liberties. I try to make a sound critique of the distinction of *formal* and *substantive justice*. I mention my own critique in the conclusion, by accepting Hayek's importance and intellectual value; I criticize his idea of the rule of law because of its incapability of embracing real problems within the sphere of social justice, substantive equality.

Why do we need abstract and general rules in order to protect the rule of law?

The rule of law has one vital point for Hayek: the principle of *equality before the law*. First of all, this is the only kind of equality recognized by the rule of law. The rules posited by government and laws made by legislature cannot violate this principle. That is to say, a government obeys a principle which is independent of any speculation. Secondly, related to the first point, the rule of law makes the state to protect abstract and general rules, which protects equality before the law. While we say *equality before the law*, it means the state/government can never treat people differently. Equality before the law recognizes no skill, race, gender and social condition; and abstract and general rules provide people with an ability to understand that formal equality. No government is allowed to manipulate and undermine those abstract and general rules.

I think Hayek's theory of *the rule of law* is very different from its existing meaning today. We generally assume that if there a constitutional state, then there is a rule of law. This is not Hayek's definition of the rule of law. The attributes of the rule of law mentioned above are insufficient to understand Hayek's core idea of the rule of law. I ask the first question again: Why do we need abstract and general rules? The answer I gave in the first paragraph of this part is true for both general legal theory and Hayek; however, there should be a different answer that distinguishes Hayek from general legal philosophy. Here, I will try to give my answer.

Some of crucial chapters of *Law, Legislation and Liberty* and *The Constitution of Liberty* are based on distinguishing the concept of law from contemporary social theory. In these chapters, we see Hayek's originality. First, the source of general and abstract rules is not the modern state. In Hayek's legal theory,

the law is understood *beyond the state apparatus*. I mean that people had law-like rules before the formation of the modern state and those rules have evolved in the history of humanity until today. People did not articulate those rules for many centuries; they obeyed these rules but they hardly wrote these rules for centuries. Abstract rule following is older than articulation of the rules. For instance, in the primitive times of human beings, the rules are concrete and specific. Hayek calls those kinds of societies *face-to-face* communities. Hayek does not assume any hypothetical state of nature as early modern political philosophers do. He asks the question of ‘how did human beings live together for many years while they do not have the law *in modern sense*?’ According to Hayek, it is because we followed some rules without articulating or writing them. Human beings lived under these unwritten rules for a long time. From face-to-face societies to complex societies, people have chosen the most appropriate rules to live in a society. It is the key point that explains the maintenance of *society*. That is why those rules have been articulated and become more general and abstract throughout history. The rule of law is a consequence of those rules evolved in history.

In history, people obeyed some rules of just individual conduct which is not imposed and designed by any sovereign. Hayek (1967) indicates that there has not been any human mind that imposed the universal/abstract rules; it is because people have adopted the rules of just individual conduct in a very long trial and error period (p. 88) Most of those rules were not codified, namely they were unarticulated until the formation of complex societies. Hayek (1973) thinks that most people unconsciously have followed those rules (p. 74). People discovered those rules by a trial and error method and obeyed them if they were useful; otherwise, those rules were not necessary. The usefulness of those rules comes from their success in

particular ends. A certain rule is a useful one if it provides success for the follower. They are like the rules of a game. The rules of just individual conduct are abstract and general because they have not emerged for a specific group's or individual's particular purposes; that is, they are not designed by any sovereign. That is why those rules are general and abstract in character. Millions of people have different ends; in order to achieve those ends, they use the abstract and general rules.

Rules have a different meaning in complex societies: while we act in society, we do not know other people's ends, skills, characters, wealth. We are ignorant concerning those factors in society. We know only a small part of our own environment. For Hayek (1976), the rules of just conduct are a tool to challenge our *constitutional ignorance* (p. 8) and they are only instructions by which people predict their ends and measure the risks of their actions (p. 3). People feel safe with those rules. The rule of law protects those rules of just individual conduct by which people enjoy their liberties.

For Hayek (1976), the law protects those rules of individual conduct by which people use their own unique knowledge and pursue their own ends. No king or democratic government, namely no sovereign, created those rules of just individual conduct and no sovereign can challenge the spontaneous rule following of individuals. If there is any attempt to interfere with this process in which people freely pursue their own ends, then it is the destruction of the rule of law.

Now, I think it is much easier to understand why formal justice is a genuine kind of justice in Hayek's thought. It is because formal justice both recognizes equality before the law and secures people's pursuing their own ends freely. Formal

justice guarantees the protection of individual sphere in which people pursue their own ends in a spontaneous order.

I want to ask another question: Why do formal justice and social justice oppose each other? For instance, Miller (1999) indicates that while formal justice is related to procedures in which people are treated equally, social justice is related to outcomes of social order: their distribution, need, desert equality (p. 94). Social justice is related to distribution of wealth and opportunities and substantive equality. In a market society, spontaneous functioning of the market order does not regard any distribution patterns. On the other hand, social justice is related to outcomes of that market order: poverty, inequality, discrimination. Procedural justice is related to fairness in treating people equal. This distinction seems significant; however, Hayek's final claim is that any attempt for social justice will undermine the rule of just individual conduct, procedural justice and the rule of law. The problem is not the distinction between formal and social justice; rather the problem is Hayek's strict exclusivist attitude towards that distinction. The rules of just individual conduct/formal justice – in Hayekian sense – have nothing to do with outcomes of the market order. Yet, in this work, I try to criticize that approach. The opposition of procedural and social justice does not have to be strict as a libertarian thinks. But why does Hayek oppose social justice by using the concept of *the rule of law*? One of the most important sources of that opposition (the rule of law vs. social justice) comes from his theory of spontaneous order. Related to the rule of law, his theory of spontaneous order opposes social justice in both epistemological and political sense.

Spontaneous order and the rule of law do not necessarily rule out the principles of social justice. When I say *the rule of law*, I understand “depersonalization of state authority” as Scheuerman (1994) proposes. For Hayek,

there should not be a positive particular enactment or law for particular persons and groups. As Jones (1958) states, Hayek's important claim is that economic planning entails "a deliberate discrimination by government between particular needs of different people and that this violates the rule of law principle of formal equality before the law" (p. 150). This definition of the rule of law is what classical liberals and contemporary libertarian have adopted. If I say, "I need a laptop, state should give it to me", this is trivial because I know that state cannot discriminate me among other citizens. However, we should note that subjective desires do not have to be the issue of social justice, but the capability approach can be the object of the social justice. Contrary to Hayek's claim, in a welfare state in which social justice has top priority, people are not treated differently. The rule of law and social justice can be compatible. Social justice tries to facilitate capabilities and welfare of the citizens in order for them to enjoy freedom. Social justice is a precondition to realize 'to be free' and 'to be able to free to do something'. It is true that a state under the rule of law cannot discriminate any particular individual; however, this claim is irrelevant for social justice and the welfare state.

The issue of welfare constitutes the vaguest part of Hayek. Hayek does not directly target the *welfare state*, but indirectly targets the welfare state by rejecting social justice. While he says that social justice is – in the long run – the road to the elimination of the rule of law, he indirectly indicates welfare states. Some philosophers (Feser, 1997) assert that his critique of *social justice* is against only socialist regimes, not welfare states. However, many advocates (Jones, 1958) of classical laissez faire politics think otherwise. That is to say, Hayek's critique of social justice is not against only socialism with central planning but also indirectly

against the welfare state. I think the existence of the welfare state is a refutation the proposition of social justice is the end of the rule of law.

Jones (1958) defined the rule of law as the “protection of the individual against state power-holders” (p. 145). Jones is one of the people who think the welfare state (social justice in Hayekian thought) is not compatible with the rule of law:

As government becomes regulator, dispenser of benefits, and mass employer, it draws to itself functions and responsibilities formerly dispersed among such other private companies, trade and labor associations, and charitable institutions. And there is a danger that the man in the street will come to look at the state – source of so many of his most valued expectations – with a new affection that undermines the healthy suspicion with which sturdy citizen of a free society should regard officialdom and all its works. (Jones, 1958, p. 146)

Above, the writer gives us a picture of an individual’s attitude towards the state in the extended governance, but it still does not give us the reason for why those government services rule out the rule of law. Indeed, Hayek is very clear: social justice needs positive regulations for specific groups or classes. However, in welfare states, the state does not treat classes differently. Welfare states protect equality before the law by the principles of social justice: anti-discriminatory politics, equality of opportunity and capability-oriented attitude. If one takes social justice only as a compensation for the consequences of the market order, then social justice is reduced to taxes, entitlements and the scope of distribution. It is true that compensation of market failures is important for social justice. Hayek also defends a minimum income for this compensation. However, the point here is different. The aim of social justice is to secure certain capabilities for the freedom of citizens. It is because social justice is related not only to distribution or compensation. We do not deal with only unlucky people who are the prey of modern capitalism, but we also need social justice for people who are socially deprived of the means of maintenance

in a constitutional state. Suppose that there is constitutional state in which procedural justice is guaranteed; in this state there may be vital gender and minority problems. In this sense, the state should make positive regulations in order to include every individual in the society; therefore, the state should facilitate services to disadvantaged people. In this way, people can pursue their own ends and use their own knowledge in the society. If the idea of social justice were related only to distribution, it would be easy to agree on some distribution patterns; yet, the problem is not only economic but social.

Some thinkers (Scheuerman, 1994) assert that we should find a way to reconcile the idea of *the rule of law* and *welfare state*: “I hope to suggest that we may not need to choose either formal law or the welfare state, either the rule of law or greater social and economic equality” (p. 203). It is true that if I know formal and legal rules, then I can predict the consequences of my commercial activities in the market order. I should know how the state would react regarding my action. At least, I should know that I will not be subjected to discretionary interferences of the government. As an entrepreneur I need formal and general rules in order to predict the potential consequences of my entrepreneurship. As Scheuerman (1994) underlines, free market advocates think that any challenge to capitalism is the challenge to formal and general rules (p. 204). On the other hand, Marxists use the same logic: the state or the law is the protector of capitalism; if we want to challenge capitalism, then we should target state and its law. Both opposite sides strictly relate formal law with capitalism. However, there does not have to be a strict relationship between capitalism and abstract/general rules.

Hayek uses the phrase ‘democratic dogma’, which is supported by people who give too much importance to legislatures. He thinks that the majority of

population consists of laborers; therefore, supposedly, Hayek presumes that a democratic dogma will give a discretionary power to the representatives of the legislature. Then, legislature-made laws will dominate the social-political sphere under the name of 'social justice'. We will step by step be closer to totalitarianism and the destruction of the rule of law, namely destruction of formal justice and equality before the law. This is the characterization of his ideas on the relationship between philosophy of law, democracy and social justice. However, in reality, in contemporary welfare states, there never emerged a totalitarian state; however, we should be very careful that some totalitarian states (Hitler's Third Reich or Bismarck's Prussia) could also offer some kind of welfare state. However, the welfare state alone does not satisfy my understanding of social justice: As I said above, social justice is also related to anti-discriminatory policy, equality of opportunity and capability attitude. Therefore, we should be very careful while defending the welfare state against opponents of social justice.

In conclusion, I tried to ground the idea of social justice by opposing to Hayek's social philosophy. Hayek thinks that social justice should be excluded from the concept of justice. I mainly tried to object to this exclusivist social theory. The idea of social justice does not have to presume only the equality of outcomes, namely equality of material power. In that sense, Hayek understands social justice in its strict socialist understanding. The capability theory and the people who reconcile equality and liberty do not seek for equality of outcome, but seek to expand capabilities which bring more freedom to be able to achieve one's ends. The capability theory is also compatible with the rule of law as indicated above because it enforces the main element of the rule of law.

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