

HAYEK ON THE ROLE OF THE STATE: A RADICAL LIBERTARIAN CRITIQUE

Gerard Radnitzky

Was Hayek really a 'minimal' state theorist? After all, he thought that we needed the state, not only as protector but also as provider of 'public goods'. This turns out to be somewhat problematic, as it could generate outcomes of which he would not approve.

For our purposes, it suffices to define the state as the last instance of power against which there is no appeal to another instance; in short, the state is a territorial monopolist of violence. Voluntariness or its absence (coercion) is not its defining characteristic. The state would be a state even if, contrary to fact, social contract were a tenable theory. The basic questions with respect to the state are: Can it be legitimised?, Is it indispensable for external and internal security?, Is it a necessary condition for binding agreements (as a last enforcer)? (de Jasay 1997, ch. 8; Radnitzky 1997: 41-46)

The origin of the state is brigandage. That the first state system is despotism can be explained by the fact that it is harder to develop a cooperative, voluntary order than it is for somebody who is militarily strong to develop a coercive order. A situation of anarchy, or better synarchy (several equally strong groups), is unstable. Sooner or later an individual or a group proves to be superior to all rivals in the capacity for organising violence. They then use this power to extract taxes from the inhabitants of the territory over which they are able to project military or police power. *The extraction of taxes is therefore the state's most salient feature.*

The classical function of the state, the protective function, follows directly from the need to protect the tax base against rivals from outside (other governments) and rivals from inside (potential other governments). External and internal security (the latter at least when it threatens the tax base) are immediate byproducts of the state. Certain other 'public' goods (more correctly, tax-financed

goods or services) are indirect byproducts—for example, roads needed for military mobility and for access to taxpayers. Any of these services, if evaluated as useful or necessary by those who have to finance them, requires and legitimises taxes.

What changes are brought about by the creation of a state? To the extent to which the state sticks to its classical mandate, the protection of property, which from a Lockean perspective also includes the body and life, efficiency will increase because of the greater security of property rights than in anarchy, and hence less exclusion costs. Individuals will be motivated to invest in productive activities such as production and trade.

The main difference between a situation of anarchy and a politically structured order is the method of redistribution: in anarchy, force or threats of force are openly used, whereas in a politically structured system more subtle methods are deployed. Now, the main vehicle for redistributing from others to oneself is engagement in the political process. The individuals hurt by the redistributive legislation have two main options. They can engage in the political process in order to get the legislation changed or to get more of the 'public goods' they desire—resulting in increased politicisation—or they can attempt to circumvent or violate the legislation, e.g. by working in the parallel economy or by moonlighting (Seldon 1998).

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Law and legislation

The great economist and political philosopher, Friedrich Hayek, attacked the state and warned against the intrusion of public law into the area reserved for private law. Himself a scholar of jurisprudence, he considered the bulk of legislators' productivity to be mere legislating rather than creating laws.

A law is basically an abstract rule governing the disposal of property, in a broad Lockean sense, and its function is to guarantee freedom (private law). A new type of law, however, emerges in contemporary Western democracies: *'public' law* (including constitutional and administrative law). Public law is not merely a law; it is a 'higher' law. When it emerges, a gradual erosion of private law ensues, as private law is increasingly replaced by public law. A government 'ruled' by public law tends to employ its power increasingly for the purpose of legislation, i.e. for the creation of 'positive' civil law. The distinction between law and legislation is therefore blurred.

The result has been what de Jasay called the 'Churning Society' (redistributing within the middle strata so that 'suckers' and free-riders are largely the same persons), the welfare state and the high-tax society. Law becomes increasingly unpredictable and, at the same time, respect for all laws is systematically undermined. Crime is promoted, as there is no immutable standard of 'right', and no firm definition of 'crime'.

The welfare state has also created a new sort of individualism—individualism without responsibility. Product liability risk, medical malpractice risk and frivolous litigation represent the greatest deadweight cost to the American economy. This is just one example of the profound effect of jurisprudence upon the efficiency of social arrangements. Equally important is the influence of law on the security of property rights—hence on the scope for using politics to achieve redistributive goals favouring one section of society over another, or one generation over the next. Finally, the nature of law has a feedback effect on the means required for its enforcement. Whereas convention and custom rely on



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informal and decentralised enforcement, statute law relies on centrally organised enforcement, with evident consequences for the resulting political and social order. Recently, in reaction to these developments, private arbitration courts have become a growth industry, particularly in the United States.

Globalisation will empower the 'small players' in their efforts to opt out, as democracy can function in small units, communities and even Kantons. However, the internationalisation of economies offers considerably more hope for freedom than any revision of the method of collective decision making.

In a media-soaked mass democracy, the state is—in de Jasay's memorable wording—'an enforcing mechanism to enable a winning coalition to exploit the residual losing coalition *without recourse to violence*, the delusion of necessity and convenience are of

course an aid to the efficiency of the process.' (Jasay 1997: 2, italics added). In most cases, the persons exploited (the 'suckers') and the persons benefiting from the redistribution (the free-riders or rent-seekers) are identical. The state is, at the same time, both exploiting the taxpayers and being exploited by pressure groups that are vote providers.

The problems of 'public goods' and taxation: the coercive solution

Hayek is regarded as a champion of 'limited' government. However, the expression 'limited' has little, if any, meaning, since not even a totalitarian state can be all embracing. 'Minimal' is useable, but it is a flexible term and its meaning has to be clarified.

What role did Hayek assign to the state?

With the exception of steadfast libertarians, political philosophers and others are of the opinion that socialising some means of production is justified, namely the means for producing external security and national defence. They all hold that the production of these ultimate 'violence services' should be in government hands, and they do so by claiming that this is an area where transaction costs/risks make a total control of agents necessary. Hayek goes much further. He claims that the state is necessary not only because it guarantees external security, but also because there are legitimising arguments for the

socialisation of the means of production with respect to many other 'highly desirable' services.

For Hayek, the state's mandate is the provision of 'public' goods and services: (i) to enforce the rules of 'just' conduct such as protection, security of property, etc. (the classical example of a 'public' good); (ii) to render additional 'highly desirable' services. Hayek considers such government service to be compatible with 'liberal' principles so long as 'the wants satisfied are collective wants of the community *as a whole*' (Hayek 1978, 1:111, italics added).

How do we find out what the wants of the community are '*as a whole*'? The idea of 'the wants of the community as a whole' comes dangerously close to the Rousseauian concept of 'General Will' (the will of 'the People', when not mistaken about what 'the People' really want). Several assumptions inform this approach: (i) individual preference-aggregation into a collective ordering is possible; (ii) there is a method through which 'the People' can express and communicate the composite of interests and preferences, summed up in some agreed procedure; and (iii) the most widely agreed manner to find out what 'the People' really want is the democratic method, in the sense of one-man, one-vote majority rule. Some argue that this is the decision or rule that 'the People' have freely accepted or *would* have (rationally) accepted: contractarianism (de Jasay 1993: 85; 1997, ch.1).

Assumptions (i) and (ii), however, are false because the various interests in a society are always conflictual. Individuals are unique and cannot have identical interests. If there is unanimity, social choice has lost its point. Assumption (iii) rests on contractarian theory, which is untenable. Since Hayek is sceptical of the above-mentioned way of practicing democracy, this approach does not harmonise with his other views on the matter.

Hayek trusts in the possibility of suitable *constitutional limitations of social choice*. How helpful is this constitutionalist approach? Under popular sovereignty, there is never an answer to the key question: *quis custodiat ipsos custodes?* Inventing a constitution of liberty is relatively easy.

But how can the practical problem be solved, *the problem of finding the conditions, if any, under which the constitutional limitations would be likely to be respected for long enough to do any good?* (de Jasay 1993: 87)

Hayek appears to be overly optimistic about such conditions. He writes: 'To limit power does *not* require that there be another power to limit it.' (1978: 93). He suggests that a second or third chamber, standing above coalitions of particular interests, would provide such limits or safeguards.

But he does not give any reasons why the opinion or ruling of this chamber would be accepted as binding by any substantial part of society in a situation where other powerful groups wanted to use collective decision-making for breaking down constitutional limitations.

Indeed, inventing such safeguards appears to be a problem of squaring the circle. (de Jasay 1993: 87). Political parties would capture it as fast as they have regional chambers (Senates). By the way, James Buchanan and most of the modern public-choicers are guilty of much the same naivety as Hayek with respect to man-made rules constraining political power.

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Obviously, the taxpayer. Many or most of the goods and services supplied by the state will be liked by some, while others will be indifferent toward them, dislike or even abhor them. Yet, all are coerced into paying for them.

Hayek cautions us that the corresponding government action 'involve[s] no coercion except for the raising of the means by taxation' (Hayek 1978: 111, 144; 1960: 222). However, in an era of the predatory, high-tax state, '*no coercion except for raising the means by taxation*' looks like *deadpan black humor [sic]*' (de Jasay 1993: 84; Radnitzky 1994:79, 95). Once it has raised the means, the government has applied all the coercion it can possibly need (de Jasay 1993: 84). If we treat such coercion as an admissible 'exception', what can a liberal ever object to?

Hayek leaves us defenceless against social-democratic conceptions of welfare democracy. After all, much if not most, redistribution takes place not overtly by transfers, but surreptitiously through 'public' (or rather tax-financed) goods and services, through regulations, and through various protectionist measures such as subsidies (a kind of tax the state extracts coercively with a view to benefiting special interest groups, so that these interest groups get the right to function as a sort of 'para-Treasury'). Hayek did not provide a fully fledged theory of taxation, nor did he give us a workable criterion for identifying state

interventions of the harmful type—in particular ‘overgovernment’, from which we all suffer.

Hayek does not question the standard public goods theory: either the ‘highly desirable’ goods cannot be provided sufficiently, or the social roles of taxpayer and tax beneficiary are imposed by the state and legitimised by an alleged ‘social contract’. He does not consider other possible solutions compatible with a free society such as those outlined by de Jasay (1989), namely (to put it shortly and crudely) that, if the ‘productivity’ of public provision is sufficiently superior to private-good substitutes, the risk of its failure may, for a sufficient number of people, outweigh the attraction of free-riding on its successes.

In this way, the Prisoners’ Dilemma, which is the basic assumption underlying the standard theory, can be transformed into a game where it is rational for some to contribute even if others free-ride on the public good created. The new game would permit *voluntary* cooperative solutions. The roles of ‘sucker’ and of free-rider are selected by the individuals themselves.

At the same time, it provides a test for the claim that the good in question is evaluated as ‘highly desirable’ by a sufficient number of people so as to make possible its production on a voluntary basis. If, to suppress free-riding, state *coercion* is chosen as the solution, free-riding is reintroduced in the form of overconsumption (the appetite for public goods being *sui generis* insatiable) and redistribution of the incidence of taxation (Radnitzky 1989). Elinor Ostrom (1990) has presented case studies where common-pool problems are solved by voluntary organisations (irrigation communities, fisheries, etc.) rather than by a coercive state.

The proportion of average earnings taken by the state is a rough, but useful, measure of the extent of coercion in society. Coercion remains coercion even if, as sometimes may be the case in the welfare state, many or most of those being coerced assent to the coercion involved.

By opting for more and more of the welfare despotism, people appear to be willing to sell themselves into tax slavery while, at the same time, resenting the increasing tax burden. Fortunately, the alleged justification for government actions based on the provision of public goods and services has been further reduced and will continue to be reduced by technological innovations (McKenzie & Lee 1991: 223).

Hayek’s view of taxation in general

Hayek rejects progressive taxation, not because of its economic effect, *but because it is not a general rule*, a law,

since it discriminates against one group in society—the ‘high earners’, in general, the successful and hardworking. He finds it unacceptable that taxation should have redistribution as its avowed aim (Hayek 1960: 289). However, as already mentioned, what matters are not the intentions but the consequences of welfare policies, such as the impact on morals and attitudes, i.e. the software infrastructure of capitalism (as has been demonstrated by the work of Charles Murray, particularly his ‘Law of Unintended Rewards’).

Moreover, it appears that taking from *A* by force to transfer to *B* is self-evidently unjust, even when it can be justified on some grounds. (If money is forcibly taken from an innocent Peter to give to an equally innocent Paul, the latter ceases to be innocent, and becomes an accessory to theft.) There are no substantive limitations on how much revenue government may raise, nor is there any specific protection of economic freedoms.

It is also worthwhile to look at the problem of taxation, again from a Jasean perspective. Taxpayers have a lessened property interest in what would have been theirs in the absence of the tax. Property is defined as any desirable matter (tangible or intangible), as a present value discounted by an appropriate amount for risk and uncertainty. The law is the force that allocates property rights.

Thus, notions like the ‘rule of law’ become part of the risky measure of all rights. The economic effects of robbery and taxation in the same amount are, of course, identical. It is remarkable that states can collect, in taxes, a large part of their subjects’—or rather victims’—resources without exercising noticeable violence, although this does not make them less coercive (de Jasay 1997: 164).

How can we explain this? The statist explanation claims that the individuals are aware of (or better, believe) that compliance is for their own benefit. This, in spite of the fact that many of those ‘benefits’ are services which some, or in many cases, most of the taxpayers do not want anyway, and that ‘multi-purpose’ tax is therefore necessary to achieve a redistribution that many do not want.

Asserting that political exchange is voluntary, and justifying coercive collective choice because it enables political exchange, is self-contradictory (de Jasay, 1997: 164). Thus the state functions as ‘an enforcing mechanism to enable a winning coalition to exploit the residual losing coalition without recourse to violence...’ (de Jasay 1997: 2).

De Jasay explains this compliance by referring to the fact that the state coercion in question is an example of a situation where the individual literally has ‘no alternative’

(1997: 168). If the individual remains in the territory of the state, defined as a territorial monopolist in violence, he is made to pay regardless of what he does, e.g. going to prison does not help. This makes coercion with respect to taxation unique, because other coercive threats made by the state leave the individual with a genuine choice between obeying the law or risking punishment. This again suggests that taxation is the main *raison d'être* for the state. Certain 'public' goods follow from it such as external security (to protect the tax base against potential rivals and other governments); the state's interest in roads (to move the military and provide access to the taxpayers); and its interest in suitable fiscal laws (to give legitimacy, or the semblance of it, to the state coercion discussed here).

In the case of an individual who is not propertyless, and who remains in the territory of the state in question, coercion is present all the time and not only the threat of it. For if he ignores the request of the state, if he answers the meta-level choice thrust upon him in the negative, this will elicit an interference in his private sphere, taking away at least one option from his option space. At an objective level, freedom of choice exists between paying or being made to pay (by confiscation of all or part of his property), plus prison. This freedom of choice, however, is pointless. Hence, in everyday speech we say suggestively that in his case there were 'no alternatives'.

Conclusion

During Hayek's productive life, the signet of the era was creeping socialism. He contributed much to a tidal change in the intellectual climate. Libertarians have criticised Hayek for the 'softness' of his liberalism. Be that as it may, nobody has done more for the revival of respect for freedom in our century than Hayek has. He influenced the course of history not only by his great theoretical work, but also in many practical ways.

He was instrumental in the founding of the London Institute of Economic Affairs (IEA) in 1957. He will be remembered for his creation of the Mont Pèlerin Society in 1947, which mobilised the world's liberal intelligentsia ('liberal' in the sense of classical liberalism and libertarianism) and provided a supportive network for initiatives that led to about 80 free market, think tanks modelled on the IEA, the most recent being in Eastern Europe. He was an inspiration for conviction politicians such as Margaret Thatcher (through Keith Joseph) and President Reagan. Hayek's publication *strategy* was probably the only practical thing at the time. Had he been as uncompromising as Mises and the libertarians, he could never have made such a worldwide impact.

With respect to theory, we have to continue to work on these topics as Hayek would have expected us to do. Hayek did not give us a theory of 'public' goods. He leaves us without defence against the popular myth of public goods. This is especially virulent in view of the eco-socialists' misuse of the quest for clean air, forests, etc., as they place this quest in the service of creeping socialism ('Externalities are the last refuge of the *dirigistes*'). He did not produce a theory of *taxation*, nor did he develop a fully fledged theory of the *dynamics of democracy*. He has not provided us with effective defences against the popular myth of democratisation, and the concomitant danger that creeping socialism enters through the backdoor of democracy. In summary, Hayek's theoretical position—was he really a 'minimal' state theorist?—could generate policy outcomes of which he would not approve.

Policy

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