Bargaining Societies: Towards a Hayekian Stakeholder Theory?

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Summary: In Europe, it is many times seen some kind of incompatibility between libertarianism and corporate social responsibility. CSR may be seen as putting too much red tape on businesses or, even more, as diverting companies from their real social task, deliver profit to shareholders. Others, from different ideological stands, may see libertarianism as an entirely selfish perspective in which everything that makes profit is allowed and stands for unrestricted competition with no regards towards society or suffering individuals. In the present article we assert that, while radical-lined views on stakeholder theory are certainly excluded from a libertarian perspective, some common ground may be found with Hayek's theory on law and legislation and even with his notion of "spontaneous order".

Keywords: stakeholder theory; Hayek; business regulation; self-regulation; catallaxy.

Introduction

Stakeholder Theory has become one of the key elements of business ethics and corporate social responsibility studies. Its benefits and potentials are however very much criticised by some main authors within what in political terms we would call classical liberalism, or in modern moral philosophy's taxonomy, libertarianism. It is mandatory to remember Friedman's famous article "The Social Responsibility of Business is to Increase its Profits"

[1970]. To libertarians, other ends besides fulfilling their due task within the market system are nothing but intrusions that will in the end condemn it to gradual degeneration. This "pure and unadulterated socialis[t]" [Friedman, 1970] theory risks to tear the capitalist building down by the simple fact that there is no middle ground, no third way between socialism and capitalism: "Whichever principle we make the foundation of our proceedings, it will drive us on, no doubt always to something imperfect, but more and more closely resembling one of the two extremes." [Hayek, 1981]

Nevertheless, it is also true that the roots of such stakeholder theory can also be found within this political and philosophical field (notably, among others, with Freeman) and thus we must question if stakeholder theory is such a negative intrusion on business. We put this question in relation with Hayek's broader political theory. On a first glance we should be able to recognize stakeholders as just another word to name the particular groups that fight and bargain for undue privileges at the expenses of one another and at the cost of a freer society. However, a deeper look into it will make us question if stakeholders don't in fact have something to give to a libertarian argument, not only (and we may say so, not essentially) concerning business ethics, but more importantly regarding its standing towards politics and law. Is there, then, a place for stakeholders in a libertarian world?

Having this in mind, we will first analyse Hayek's theory of State and society. We will analyse his critique of the present state of democracies and we will see its concept of "societies" within the "Great Society". We will then review some of the work already done relating stakeholder theory and libertarianism. Afterwards, we will address the issue of law and regulation. How can the tension between general abstract laws and the more basic rules be overcome? What or who is entitled to give laws and rules? Can stakeholders have a say on the issue? We will end our argument by considering the possibility of a Hayekian stakeholder theory, limited nevertheless to a given scission between politics and the economy and, in fact,

protecting in a certain way that same (for liberalism) foundational separation between the two areas.

I – The slippery slope of "social" justice

Before advancing into Hayek's critique of social justice, some previous remarks must be made about the ideological loose terms many times used. They vary from politics to ethics. In fact, it is even a theme that worried Hayek, leading him to write the chapter "Why I am Not a Conservative" in *The Constitution of Liberty*. Politically, the liberal family can be divided between social liberalism, classical/ conservative liberalism and libertarianism; the second and the third are more economically liberal, while the second and the third are more morally progressive. Classical liberalism and libertarianism are named by their opponents as "neoliberals", designating thus all the critics of Welfare State that have gained power from the seventies on. The problem is that neoliberalim or "new liberalism" was also a name that was a few decades ago used to name progressive, social liberalism and that as also some connections with the german *ordoliberalism*. This flood of designations of competing political families both inside and outside the liberal family don't enlighten the discussion. Hayek felt uncomfortable with the alliance between pro-market forces and conservatives due to the moral and political aggressiveness of the latter. Nevertheless, he regretted that the liberals of his time (social liberals, ordoliberals) were entering into the socialist trap of "social justice". He refused the term "libertarian" for being an artificial term – and thus preferred to call himself "Old Whig".

This is not of much usefulness to us. Moral philosophy, on the other hand, offers us less divisions, and at the same time a better clear-cut image. Authors that politically may fall in one of the previously loose definitions are essentially here divided between libertarianism (in which Hayek is undoubtedly included through its view of individual autonomy, which cannot

be endangered by any collective or “social” imperative) and egalitarian liberalism (such as Rawls for example). It is nevertheless very important to mention that even within philosophical libertarianism many nuances appear, ranging from economically left to right visions (although probably nowadays the right-wing libertarians compose the majority of this family).

As a conceptual clarification, we will refer to Hayek as a libertarian, and we will do so having in mind that we are not talking in political, but in ethical terms. We hope through this remark having made more accessible our analysis. Understanding that there are not only slight nuances but also very usually strong differences between authors catalogued as belonging to some kind of political or philosophical family, and that sometimes using these labels serve deeper motivations that go beyond academic purposes, is not without importance.

In *Law, Legislation and Liberty*’s first volume Hayek describe the three types of social legislation. The first two are perfectly admissible within the framework of Hayek’s liberalism, while the last one is part of the expanding and at the same time dissolving concept of democracy.

The first type, the purest, so to speak, consists on the abstract rule of non-discrimination. According to this principle, fair procedures have to be built in order to assure everyone has the maximum chances possible to achieve his maximum potential. This does not mean that some kind of outcome can or should be produced (such as some kind, or some level, of distribution of gains), but only that the outcome was achieved through an impartial process in which all parts were treated equally and without “deception, fraud or violence” [Hayek, 1978 a, p.141]. The second type of social laws regards the setting of some kind of social minima provided by the State. Where the market fails, a general rule may be set concerning the levels according to which someone is entitled to have some support and also the mechanism for

raising the necessary means to fund such minima. This second type is very difficultly inserted into the libertarian argument, and its insertion is most probably a concession to common sense morality than a result of coherent reasoning within libertarian theory. Nevertheless, it is true that if it remains fully limited to those who cannot by any means be integrated in the market (disabled persons, for example), its acceptability can still be argued.

It is the third type of social laws that is pointed as a corrupting one. Generally speaking, these laws do not aim to build a framework for free and fair trading, nor to integrate the very few exceptions of social relations not solvable within the trading scheme, but to escape it, producing (or desiring to produce) some kind of result. Before advancing on the issue, it is important to notice that that same danger was already enclosed not only on the second type of social laws (after all, how do we define the minima? who can we say isn't able to be integrated in the market?) but also on the very first. For example, does equality of treatment include the provision of education and health for all? If not, can we say that the libertarian justice rule according to which the fair society must provide the maximum possibilities for each to achieve maximum gain (and this of course excluding entirely any kind of re-distribution; so we can still argue that after having the same medical care and education throughout their youth, two individuals reach a given age in radically different social ranks and that thus the principle of procedural rules is not violated) is being observed?

It is this slippery slope evolving from the philanthropist care for the most unfortunate that ends in the mere "protection of vested interests" [Hayek, 1978 b, pp. 139-142], and namely of those groups whose power tends to decline. It is precisely the reference to such "interests" that is relevant for our theme. Hayek's argument is that there is a dialectical movement of growth of "government" (or State) that feeds and his fed by this interests or this groups. Their main concern is protecting their interests under the cover of social justice and of correcting the effects of the market, and for that they organize themselves creating para-governmental

institutions directing at putting pressure on the government. Given that the government itself has already initiated the process of attending particular interests, to keep power, politicians must provide positive answers to produce what we may call “fake” majorities.

By “fake” majorities we mean that in this “bargaining democracy”[Hayek, 1981, p. 99] there is no real majority in the Hayekian sense; to be more explicit, there is no possibility of having a majority of people agreeing on very specific questions such as fixing given benefits to specific professions, for example. What we have, on the contrary, is nothing but legal bribes that politicians distribute between a coalition of interests – social groups inspired by tribal sentiments such as loyalty, and not by abstract procedural justice – each group supporting the political power and consenting on other groups privileges as long as they also have their privileges ensured. It is precisely due to these feelings that Jensen [2002, pp.243 and 244] criticizes, from a Hayekian vision, stakeholder theory. It puts the firms under the strain of selfish group emotions and, by diverting it from its real task (value creation) damage the whole society. However, and with our later discussion of other libertarian contributors to the theme, and with the separation between the legitimate and illegitimate tasks of stakeholders, we hope to show that such a critique is very far away from being incompatible with our argument.

As a result, Hayek’s view on stakeholders may certainly not be the most positive one. Trade unions are corporative organisations trying to get away with the highest possible benefits outside of market mechanisms. Charities may be directing their efforts to companies (whose function is not to give money) pressuring them to act in ways that treason their commitment to produce profits blackmailing them through public opinion, instead of appealing to contributions from individuals. Consumer associations may be trying to disrupt the normal market process by collective action, while what should be expected was that each consumer evaluated directly in the market which goods or services to buy.

Companies, through the activity of stakeholders, may find themselves in the very same swampy field that democracy has fallen into after accepting more and more claims regarding “social justice”. The bargaining would no longer be the one we should expect in the economic field, but would become more and more a political one. Not only politics, then, would have been invaded by economic negotiations, but also the economy would become more and more politicized, something that we may very easily say that does not fit into libertarianism perspective.

Nevertheless, we must not forget that this critique is directed essentially to the action of particular groups in the political field. We must then go deeper and analyse if in fact Hayek is absolutely against the union of individuals in associations of any kind. If he is not completely against them, we will afterwards have to understand which types of associations are legitimate and/or give a positive input to society.

II – Society and the societies: the communitarian element of an individualistic perspective

Before advancing to Hayek’s position towards what he calls “societies” we will first put the question of intra-societal organisations in context resorting to a classical perspective (Hegel) and to a contemporary one (Donald and Dunfee). We will also show, with Nozick, that the community level approach is very far from being opposed to libertarian perspectives, also justifying, nevertheless, why Nozick provides a less deep support to the theme than Hayek.

Hegel’s perspective is foundational to all the later developments about “civil society” or “civic community”. By dividing his Ethical System between family, civic community and the State, he established the second element has a crucial one, bridging between the particular and

the universal. The civic community is the place of individuals that nevertheless don't exist in pure isolation but in relation with others. Being ends to themselves, individuals require other individuals (that then become means to the satisfaction of their ends) in a system of mutual dependence. It is within the civic community that a *system of wants* appears, where universal good and individual desires are satisfied through interweaved particular interests. Hegel's system of wants is then very much in line with libertarianism's faith in market. Where the problem arises, nevertheless, is that Hayek puts the State as "one of many organizations" [1981, p.140] and not an independent reality. Its function is only to enforce general abstract rules of conduct, and has no existence beyond the guarantee that the market structures in which the individuals work function properly (and thus also provide the few goods that the market can not provide). On the contrary, Hegel says quite clearly "Were the state to be considered as exchangeable with the civic society, and were its decisive features to be regarded as the security and protection of property and personal freedom, the interest of the individual as such would be the ultimate purpose of the social union. It would then be at one's option to be a member of the state. —But the state has a totally different relation to the individual. It is the objective spirit, and he has his truth, real existence, and ethical status only in being a member of it." [§254, Note]

In *Ties that Bind*, Thomas Donaldson and Thomas W. Dunfee defend a contractarian approach to business ethics by setting up a double layer system of hypernorms (universal principles that everyone must abide) and microsocial contracts (norms developed inside businesses and industries). "Integrative Social Contract Theory" (ISCT) is more worried about the problem of cultural diversity and the problems of international business (even if being fully applicable also on national levels, and not only in multicultural countries), which is not of course the concern of Hegel. The almost monolithical civic community (built around labour) is transformed into a pluralistic society composed by a never-ending multitude of

communities of the most variable kind, dimension, duration, goals and composition. It is the recognition of the immense diversity of global players that leads the authors, following the communitarian argument, to conclude that it is not possible to agree on "thick" conceptions of morality. What then must be sought is an overlapping set of values (hypernorms) that all players may agree upon. These norms may be of three different kinds: procedural or formal; structural (political and social organization) and substantive (conceptions of the right and good). The origins (if they are biological or rational) are irrelevant to the authors because what is important is that they exist in order to allow a moral free space of communities (each community being free to setting its one rules), on the one hand, but not an unlimited freedom of the group, that would in such case oppress the individual. As we shall see, this is much in line with Hayek's perception of communities (or societies).

After defending a minimal State (throughout the first part of the book) and demonstrating why the State should not be any more than a minimal one (second part), Robert Nozick closes *Anarchy, State and Utopia* talking also about communities. In fact, Donaldson and Dunfee's communities owe not few of it's main characteristics to Nozick, the most relevant of which may be the right to exit: nobody must be bound to belong forever to any group. This, of course, is only possible if we see that the main trait of these approaches is *not* communitarianism, but individualism. It is the individual who has the final right to decide. The community does not dissolve the person in a mass. The ideal situation for Nozick would be to have different "worlds". Each person could create its one world or live in another world, and at any moment leave that world and exchange it for some other. He would not (and this has great relevance to our point) have the right to change such a world, because it would hurt the other inhabitants' right to live by the rules that constitute the character of such *utopia*. Of course, that is not possible. So, "[i]n our actual world, what corresponds to the model of possible worlds is a wide and diverse range of communities which people can enter if they are

admitted, leave if they wish to, shape according to their wishes" [Nozick, 2001, p.307]. This passage raises the question: in communities, contrary to what happens in the "worlds", are opt-outs and changes allowed? According to the author, "a community needn't offer its members an opportunity to opt out of these arrangements while remaining a member" [p.321] although they may "slightly modify the ones they don't like" [p.316].

While some of this may have some common ground with stakeholder theory, there are serious transposition problems from the political utopia to economic reality. After all, Nozick's communities are essentially political groups. People are free to choose which group they live in (and ensuring such freedom is one of the State's most important roles), but seem to be, apart from some marginal improvements, at the mercy of whichever utopia they live in. And may they be a part of more than one community? Well, it seems rather difficult in this framework. On the contrary, a single individual can be (and he will difficultly not be) a member of more than one stakeholder. He may be a worker and a consumer; or he can be a shareholder and a consumer, *and* a manager. By the way, being a manager (unless the manager is an entrepreneur, unless he is the actual owner of the company – something rare if not completely absent from most of the larger corporations) implies *also* being a worker (although, it is certain, of a special kind). Stakeholders are not necessarily "face-to-face" communities [p.322], argument used by the author to defend the imposition of rule's conformity within them, but not within the nation. He is absolutely right when he says that "people are complex [a]s are the webs of possible relationship among them" [p.312]. What this tells us is that we cannot use Nozick's libertarianism to approach stakeholder theory. His ideas may certainly have in some way influenced later formulations on this topic coming from authors following this philosophical tradition, but it is in itself rather useless: if a nozickian community is a group of people sharing a global worldview with more or less stability in rules and living in permanent face-to-face interaction, then there is little we can do to sustain

stakeholder theory, in which different groups composed by people with different worldviews within themselves compete inside and outside for different goals and have different priorities, in an ever changing environment. Maybe we could establish an analogy between community and stakeholders on the one side, and nations and companies on the other – but it seems a far-fetched argument in need of too many adaptations and creativity when analysing concrete situations.

In *The Political Order of a Free People* Hayek, on the other hand, states that we are in fact part of "many different overlapping and interlacing societies" and then defines what he means by society: "Society is a network of voluntary relationships between individuals and organized groups, and strictly speaking there is hardly ever merely one society to which one person exclusively belongs" [1981, p.140]. This deserves a further clarification. The State (or, in Hayekian terms, the "state"), although being a society among others, is according to him "made" in the sense that it requires coercion to exist; the rest of the societies, on the contrary, don't have or at least must not have coercive powers. Regarding the rules of conduct of the multiple small groups that compose the "Great Society" (as the system of freely interacting individuals and societies, with no centralized direction of any kind) he writes "since in a society of free men the membership in such special groups will be voluntary, there must also be no power of enforcing the rules of such groups" [1978 b, p.148].

While stressing the relevance of the monopoly of coercive power, the public purposes are not an exclusive of the government, and in fact must first of all be pursued essentially by these voluntary associations. What these purposes may be, whichever its content, is something that individuals and societies have to define themselves – and not the government. The problem arises: which are the legitimate societies? Which can claim to have a say on public purposes? This is the same problem that we find in stakeholder theory. How do we define, in the chaos of thousands or millions of societies/communities (whether they are

companies, trade unions, NGO's, consumer associations, neighbourhood committees, etc.), which may be relevant to pursue or at least to have a say in each theme/area? What are they entitled to do, and where are they meddling with the free functioning of the market?

III – Freeman, a libertarian approach on stakeholder theory

"Listing everyone who might qualify as a stakeholder for a large firm tends to produce messy combinations of overlapping groups with exceedingly diverse claims and interests." [Donald & Dunfee, 1999, p.238] Although the main issue of an analysis of Hayekian thought in connection with stakeholder theory is the "what" (What – if anything – can stakeholders do, what role may they have in the market or in the Great Society), we will first try to delimitate which societies or communities can be understood as stakeholders. Since the author does not address the issue, we will consider other approaches made to the theme.

The broadest, and the presently classical definition of stakeholder is Freeman's "A stakeholder in an organization is (by definition) any group or individual who can affect or is affected by the achievement of the organization's objectives" [1984. p.46]. Mitchel, Agle and Wood [1997] analyse the existing notions of stakeholders, starting with Freeman's definition, and more importantly create a framework for stakeholder criteria based on *power* to influence the firm, *urgency* of demands and the *legitimacy* of their claim. This allows them to divide stakeholders into seven categories: dormant (have power, but no urgency nor legitimacy), discretionary (only legitimacy), demanding (only urgency); dominant (power and legitimacy), dangerous (power and urgency), dependent (urgency and legitimacy, but no power). The definitive stakeholders are those who gather the three elements. Another question is that of *salience*, which means the relevance that managers give to each stakeholder. Driscoll and Starik [2004] separate broader visions of stakeholder definitions, which are morally grounded, and narrower definitions centred on managerial perspectives. They revise Mitchel *et al.*

argument around power, legitimacy and urgency arguing that nature is the prime stakeholder since: it holds the balance of power; there is a symbiotic relation between firms and nature (legitimacy) and that probability of interaction should also be including when assessing urgency. At the same time, they add "proximity" as a further criterion; given nature's ubiquity, it is natural that this criterion gives it special status. These perspectives have arisen because of the very broad definition that initially was given for stakeholder. If we were to accept a stakeholder definition based on Hayekian societies, it would also be not that much enlightening, given that "societies" mean essentially any group of individuals voluntarily united over some common interest.

The problems created by the stakeholder broad definition, and its further developments, motivated a new article in 2002 in which Freeman (together with R.A. Philips) tried to set the principles for a libertarian stakeholder theory, arguing that such theory has libertarian origins. He starts by separating the instrumental thesis of stakeholder theory (managing for stakeholders ads value for shareholders) and the normative thesis (essentially an ethical argument, stating that shareholders have property rights, but that those rights can not endanger rights from other individuals). In a crossing between rights-recognition of stakeholders, and a somewhat instrumental notion of what stakeholder theory may have in compatible with libertarianism, the authors state that "The classical role of the state to solve coordination problems […], provide or regulate public goods, and serve as a court of last resort, was to be usurped by these voluntary agreements, precisely to limit the involvement of the state in the affairs of the corporation." [Freeman & Philips, 2002, p.339] This may probably be the best clue in this article, but we will analyse it later. Finally, five principles are set as being at the core of this "libertarian stockholder capitalism": stakeholder cooperation (through voluntary agreements they can satisfy their needs), stakeholder responsibility (facing harms unduly inflected on third parts), complexity (human beings are not simply altruist or economic

maximizers, but act on a variety of values and points of view), continuous creation (creation does not have to destroy a previous creation, as Schumpeter would say) and emergent competition (competition emerges out of cooperation, it does not have the goal of inflicting a defeat on another element).

All or at least some of these principles are in reality highly controversial from a libertarian perspective. Consider the last one: saying that competition emerges out of cooperation, and not the other way around, is actually difficult to sustain in most ethical theories. A contractarian approach could easily point Kant's famous idea that even a people of demons need some kind of agreement (so, of cooperation) in order to better practice there malevolent actions (and, thus, to compete); and so the basic problem is that individuals want to compete, and do in fact compete. Sooner or later, they will realize that they need to have some kind of rules to compete, and it is only then that they realize that cooperation is also needed. James A. Stieb in fact affirms that Freeman and Philip's article does not present a libertarian perspective in the sense that either stakeholder theory presents nothing else other than "business as usual" or "it clashes with the views of libertarians he wishes to convince." [Stieb, p.403] This presents more a question on the "what" than on the "who", but Stieb's assertion is that Freeman is stuck in altruism and distributive justice, which clearly fall out of any libertarian theory. The basic problem about Freeman's position is that its first definition could in fact lead to a libertarian stakeholder theory (should there be any), as in fact it could lead (and has lead) to an infinity of any other ethical and managerial positions. But such a claim was not made. On the contrary, his late article states a libertarian position, but closes the discussion on dubious claims, such as Stieb as noted [p.412], about the rights of stakeholders to participate in the control and management of companies.

There is, nevertheless, an element that needs further attention, and that is Freeman's argument about regulation. Stieb remembers that in a libertarian approach it is not much

relevant if in fact regulation comes from the government or from some place else, because an eventual third party would be nothing but a second government. In one way or the other, market is always being damaged by foreign intrusion. We state, on the contrary, that this may be the point in which libertarianism and stakeholder theory can find some common ground, and that it is not impossible for someone professing economic liberalism and philosophical libertarianism to accept some kinds of regulation. That is what we will then investigate using Hayek's work on *Law, Legislation and Liberty*.

IV – Law and legislation

We have previously concluded that using stakeholders to achieve some kind of concrete social justice would not be compatible with the Hayekian perspective. We have, nevertheless, seen that what we call "stakeholders" may not necessarily be excluded from his "Great Society", being in fact a crucial element for its good functioning. The problem was then to understand what can the stakeholders do; we then used Richard Freeman approach, which we believe has opened the way to connect libertarianism and stakeholder theory, not necessarily in the broad sense he and Philips desired, but eventually in a narrower sense. Regulation may be then an answer to our problem. For that we must go further in Hayek's perspectives regarding the issue of "law" and "legislation", namely into the critique of legal positivism, the concepts of law and legislation, the *catallaxy*, and the three layers of rules.

He thoroughly criticizes what we may call the *positivist trap*. He accuses throughout the eighth chapter (volume 2) of *Law, Legislation and Liberty* authors like Hobbes and Kelsen of having subverted the meanings of law and justice and thus opening the way to totalitarianism. For positivist legal theory, law emanates only from will and not from reason. There can be method of asserting, from an abstract point of view, the justice of a given situation. That test

submits only to concrete laws emanating from the sovereign. Law is then a creation, a deliberate product of the political authority's will and it is from conformity or inconformity with this positive law that we can ascertain the justice or injustice of a given situation. What exists is the law, and the law is the justice. At the same time, this law assumes always the form of a command, that is, "conditional orders to officials to apply sanctions." [Hayek, 1978 b, p.47] Positivist law does not submit to a previous concept of justice. It is the law that defines what is just.

By hiding the distinction between *rules of just conduct* and *rules of organization* positivists have managed to apply "legislation" - specific commands to pre-determined ends within an organization, a centralized system - to the overall society, which can not be submitted to such kind of rules. Polycentric, polyarquic, a free society, a society of free individuals can only be ruled by abstract universal rules - "law" - that serve to protect each person from the arbitrariness of other individuals and from political power. It is a negative concept. The test of justice is not made by matching each situation to concrete conceptions of what is acceptable, but by evaluating if a given conduct is or is not compatible with an universal, impersonal rule.

While redefining the traditional sense of "law", positivist theory also was responsible for an invasion of a new kind of public law in all spheres of lives. This public law refers to the areas of public intervention. As we have previously seen and under the motto of social justice, the State intervenes in an ever growing set of areas, transforming traditional private law into regular coercion-oriented public law. "The existence of private law appears to [positivists] as an anomaly which is bound to disappear." [Hayek, 1978 b, p.47] Nevertheless, argues Hayek, it is this "private" or "common" law, the law of spontaneous order, that is more appropriate to complex societies.

The spontaneous order, or order of the market, is what Hayek denominates by *catallaxy*, substituting the incorrect term of *economy* [Hayek, 1978 b, pp. 107-132]. *Economy* refers to a

unitary plan (a household, for example) while the market does not; on the contrary, it is a network of economies with no hierarchy of ends. *Catallaxy* can have, in greek, three meanings, all of them interconnected: exchange; be admitted into a community and changing from enemy to friend. There is here a very tight bond with Hegelian philosophy of law. In fact, the basic argument is that each individual works for the good of others without knowing them nor their objectives, simply by pursuing their own goals. The order spontaneously borns after the union of different knowledges, abilities, and purposes. That is why there is no need from public authorities to create policies directed to particular ends, but simply securing an overall order to allow this wealth-creating (not zero-sum) game. At the same time, it is very important to understand that law will never (be it end-independent rules of just conduct, be it organizational style commands) erase all sources of uncertainty. This means that, besides the merit, success in the market order also is a result of luck. While this may be seen as unfair, trying to eliminate it through regulations directed to create specific results ("interference" or "intervention" through the use of "commands") will deregulate the overall order of the Great Society. The fulfilling of general expectations through "rules of just conduct" (that serve "the reconciliation of the different purposes of many individuals" [Hayek, 1978 b, p. 128]) is done through a *process of trial and error* that will always involve disappointment of some expectations.

It is such "processes of selective evolution" [Hayek, 1981, p.158] that allow the overall order; *evolution* and *spontaneous order* are "twin concepts", meaning that adaptation is a permanent process to constantly changing systems of which each individual of organisation only knows small parts. To understand this, we must focus on the division between the three layers of rules described by the author in the third volume of *Law, Legislation and Liberty*. The first layer is composed by those genetic orientations that change very slowly. The second layer, less solid, is composed by the inherited social structures. On top, we find "the thin layer

of rules, deliberately adopted or modified to serve known purposes"; the evolution in human societies from pre-historic bands to civilisations and present open society "was due to men learning to obey the same abstract rules instead of being guided by innate instincts to pursue common perceived goals." [Hayek, 1981, p.160] Hayek considers praising "natural" as a negative attitude, given that the control of our instincts is what as allowed human evolution. On the other hand, he also rejects the misleading dualism referring to the origin of laws; while some desire to see their origin in biology, others defend their rational genealogy. However, "[w]hat has made men good is neither nature nor reason but tradition." [Hayek, 1981, p.160] Civilisation is not a product of nature, and it is not either a result of rational design. It was being created throughout human history by spontaneous order, adaptation, learned customs that each individual and society receives and then transforms to respond their own specific needs. The form of rules (and even their nature) may be rational (specially the "laws"), but their origin is cultural.

V – Regulation and the double-level normative structure

We cannot enter such a subject, nor end our argument, without answering a much tougher question. We have said that Hayek says nothing of concrete regarding who could be the societies. We have also said that regulation could be the bridge between Hayek and stakeholder theory. But are we allowed to? Has Hayek ever approached the stakeholder theme? In fact, he has. In his article "The Corporation in a Democratic Society: In Whose Interest Ought it To and Will It Be Run?" [Hayek, 1980. First published in 1960.] he very clearly endorses Friedman's opinion of the dangers of social responsibility. He says that the only contribution of a company to social welfare is the "long run maximization of the return on the capital" [Hayek, 1980, p.300]. The fact of adding "long run" is of course, and how it is

known in the field, not irrelevant. Jensen [2002] has argued that what we need is an enlightened version of value maximisation that excludes short-term visions that destroy value and menace the company's survival. To this enlightened value maximisation would correspond an enlightened stakeholder theory, whose function would be helping the company to avoid short-term tendencies and refocus it on survival.

So we can (as we in fact had) exclude philanthropy. Reaffirming this is not without importance. The confusion between giving money to charities and industry self-regulation comes up more often than it should. For example, Falck and Heblich [2007] use the argument of CSR as a management strategy to enhance a company's reputation but then mix "strategic philanthropy" with "filling [governamental] regulatory gap". These are two very different things. The authors even use Hayek [p.252] to support such a vision. And they could, but they would have to omit the philanthropic dimension. After all, he states very clearly, and following the principal-agent logic, [Hayek, 1980. p.301 and 305] that it is not the management who can use the company's money to allocate it to "social" ends. We should nevertheless point out that both Jensen and Falck and Heblich seem to give to stakeholders a function of "market watchdogs", as if companies need someone to ensure that some rules are being done, and that the market in itself may not be able to solve all the problems. Would Hayek agree on that?

Saying that companies must provide profit does not mean nevertheless that they are allowed to do everything; in fact, "they ought to be restrained by general legal *and* moral rules." [Hayek, 1980, p.301. Author's italic.] In section IV he inclusively justifies "why there should be a need for any special regulation of corporations and why we should not be content to let the market develop appropriate institutions" [p.306] by saying that general rules should guarantee the interests of the shareholders, for their apathy (something that many other authors, and from other standpoints, such as Galbraith in *The New Industrial State* have also

stated) “is largely the result of an institutional set-up” [p.307]. We may then say that Hayekian *law* must, regarding to corporations, limit itself to the protection of the shareholder. But as we have seen, he differs law and legislation, and since he also believe that corporations must conform to not only legal rules, but also moral ones, we can seriously pose the defence of self-regulation (as a kind of soft-law, or mixed ethical-legal normativity lacking systematic structure and even at many times escaping any attempt to be fully understood either by observers or by its authors, produced by a plurality of social actors, and answering particular problems) as the missing link.

Richard Bellamy has pointed the fact that Hayekian “rules are Kantian in form and Humean in substance” [Bellamy, 1994, p.421] meaning that they are abstract and universal rules that protect individual rights emerged in the context of interests-oriented and unconscious practices. Hayek stated it at the very beginning of his work on which we have been focusing, and this is very much present in his division between law and legislation, and between public and private or common law. There is a double-level structure in a various range of authors that is common to Hayek's vision and that has roots in contractarian thought in general, and in that of Kantian origin in particular.

Starting with the more narrow Kantian bond, and from a very different philosophical and political perspective, Karl-Otto Apel's version of discursive ethics, *transcendental pragmatics*, allies also two levels, one abstract and not-dependent of any kind of bargaining, in the sense that they respond to universal principles (the transcendental moment) possible to conceive in an ideal communication community; and a second moment (the pragmatical) that depends on the ability of the members of the real communication community to define practical rules. Such rules, composing practical ethics, are never perfect, but are progressive, evolutionary rules, responding to the Kantian concept of “regulatory idea of reason”. They will never respect fully the abstract ideal (because Man is not a pure rational being), but they

must be re-interpreted throughout time in relation to the universal level.

From the libertarian field, Nozick also points to a double-leved structure. In fact, in the end of *Anarchy, State and Utopia* he could hardly be clearer: “let me close by emphasizing the dual nature of the conception of utopia being presented here. There is the framework of utopia, and there are the particular communities within the framework.” [p.332] The framework (the minimal State) provides for the liberty of each individual and ensures peaceful relations between them and between the communities (thus enforcing some general rules) while the communities regulate themselves.

The already mentioned ISCT of Donaldson and Dunfee have the very same structure composed of *hypernorms*, what we could call a global ethical contract based on universally applicable ethical norms, and *microsocial contracts* defined in each area, with the relevant communities at stake and according to their needs and ability, within a given *moral free space* that does not conflict with hypernorms.

So it seems that a double-level approach can in fact be asserted as appropriate to an Hayekian stakeholder theory. This would mean that while the maintenance of public law through abstract rules of just conduct can – and must – be under charge of the government, the “societies” would have the function of creating and maintaining the regular functioning of “common” or private law. Nevertheless, we have seen with Stieb that, to a libertarian, “regulation” is not better just because it does not come from the government. “Social” regulation is also an intrusion on market mechanisms. On the other hand, Bellamy states “Hayek's conception of limited government is quite different from and does not necessarily entail the minimal state advocated by some libertarians, such as Nozick. Hayek acknowledges that there is a whole range of issues […] where market incentives fail to work adequately and where government action is necessary.” [1994, p. 425]

We can thus conclude that in complex societies of disperse knowledge and interests,

problematic issues that often strike companies may be answered through the game of catallaxy – rules can be created as a result of the interaction of the multiplicity of actors involved, and those rules will most probably be more effective than any legislation imposed by governments. That is so for a wide range of reasons, going from the fact that the centralization rules are not incorporated into the real practices within the social game, to the fact that no government or person has the capacity to fully understand neither the complexity of each situation, nor of avoiding all the bad consequences, which are usually unpredictable. To solve specific problems we need specific answers, and that is not the task of a well-ordered government.

Also supporting our present thesis Viktor Vanberg has analysed the issues of market regulation and corporate social responsibility in relation with constitutional economics and Hayekian theory. He points the fact that there is a difference of regulation by specific orders and regulation by rules [1999, p.222] and that we can see the market as a "constitutional order" submitted to general rules; the sub-constitutional freedom of each market agent does not allow him to abrogate the constitutional principles [1999, p.232]. In a later article he developed the argument and pointed out that market agents have two major questions; the first is *choosing the rules* of the game; the second is making the right *choices within the pre-defined rules*. So, while there is an individual responsibility to respect the rules, there is a collective responsibility to define the rules and keep the system working. Vanberg concludes that while trusting too much power to stakeholders is a very dangerous choice (and that more attention should be driven to ensure a good legal framework) it is nevertheless a fact that corporations do have a responsibility not only for respecting the letter of the law (and so be formally respectful of it) but also for being in accordance with its spirit (which is possible through an informal shared ethics).

We must in any case point out that there seems to remain a problem concerning the

specific role of stakeholders. Should they be allowed, from Hayek's point of view, to produce regulation, should they be limited to the function of circulate information, share knowledge and fill the gaps left by the market, or are they completely excluded from any kind of interaction with companies? The third answer seems to correspond to more radical approaches than that of Hayek. The second is very much in line with the catallaxy model, but seems to conflict with the author's perspectives regarding the legal issue. The first answer, however, while not hurting too much of the market game, is perfectly compatible with a private law rising from spontaneous social interaction. While it is arguable that it presents a danger and a legitimacy problem, it poses basically the exact same problems that we can see on Anglo-Saxon common law and on Hayek’s customary, traditional rules. This kind of regulation is, on the other hand, also subjected to the same kind of general dynamics that the above-mentioned thinnest layer of rules (in which it is in any case included) and that correspond to the spontaneous order that arises within the game of catallactics: the rules that proved to be bad will be improved or substituted. Finally, and recalling the double-level structure between general/abstract rules and practical/concrete commands, it is crucial to understand that this regulation (this social “legislation”), produced by stakeholders and companies, is always limited in all regards by another kind of regulation, the universal “law”.

Conclusion

Throughout the present article we have tried to show that stakeholder theory and Hayekian theory are not necessarily incompatible, and that a connection may be found in what concerns to the regulation issue.

We started by addressing the issue of “bargaining democracy”, and the fact that a continuous growth of political intervention on society has lead social actors to direct their

attention to pressure government and legislation to their own benefit, instead of guaranteeing a good framework of universal laws. We then went to analyse the problem of this same social actors, “communities”, or in Hayekian terms, “societies”. We concluded that stakeholders, as “societies”, may in fact not be completely excluded from a libertarian view. Thus, and in the absence of conclusive answer within Hayek's works, we analysed R. Freeman's perspectives and, after eliminating the most controversial aspects, found a hint concerning regulation. We needed to go deeper into the legal issue, and we approached the problem of “law” and “legislation”. We found that Hayek supports “private law” and that it has a relation with the “spontaneous order” of the market, in the sense that it results of a non-centralized process of social construction of rules by individuals and societies and based in tradition but also adapting to an ever-changing environment. We finished by seeing that there is a double-level normative structure that, securing a good governmental sphere, confined to generate and enforce general abstract rules, allows the creation, application and change of a more disperse and fluid grid of *social legislation* in which stakeholders can then fully, and more important, *legitimately*, participate. They can leave the political sphere, bargaining democracy may disappear, and we can simply get “bargaining societies”, societies trying to define appropriate specific rules to specific problems.

We can thus assert that the link between stakeholder theory and Hayek may not be the strongest one; it does not correspond neither to a hard-lined stakeholder theory, nor to a radical libertarian vision. Nevertheless, it seems to be far from impossible.

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