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Hayek's Market: Adaptability, Institutionalization, and Limitations

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Introduction

Economic literature from the last decades has shown how liberal institutional frameworks have major effects on the long-run economic outcomes. Liberal economic institutions at a general level have been marked as a fundamental cause of long-run growth and development for societies (Acemoglu, Johnson & Robinson, 2001, 2002, 2005a; Rodrik, Subramanian & Trebbi, 2004; Acemoglu & Johnson, 2005; Acemoglu, Gallego, & Robinson, 2014). Besides, other more general institutions have also reported being significant causes of growth. Checks on authoritarianism (Acemoglu, Johnson & Robinson, 2005b), state capacity (Acemoglu, García-Jimeno & Robinson 2014) and even democracy (Acemoglu, Naidu, Restrepo, & Robinson, 2019) have recently shown positive impacts on economic development outcomes. The path for modern societies could seem clearer based on this neo-institutionalist literature.

Yet a final word on the analysis of institutional frameworks asks for a wider perspective. Such is the theme of this dissertation. I attempt to use F. A. Hayek's work to understand the advantages and limitations of liberal (or 'market-made') institutions. Hayek was awarded his Nobel Prize in Economics because of his "analysis of the interdependence of economic, social and institutional phenomena."¹ For this reason, as I hope to show, exploring his theory of the market can help us in the search for the 'wider perspective' with which to assess the adequacy or desirability of institutional frameworks. On the one hand, Hayek developed a theory that covered from the neuropsychological foundations of individual learning to the evolutionary processes that may govern social progress. On the other hand, he developed his own proposal for what could be an adequate institutional framework for modern societies. The two elements, clearly, are interrelated; that is the starting point. Herein, I will analyze the psychological foundations of market evolution, its relevance for the design of public institutions, and the possibilities for it to sustain pluralist development. I claim Hayek does offer psychological foundations for the adaptability of market processes. Such grounds offer a delimitating

¹ The Nobel Foundation. "The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1974." *NobelPrize.org*, retrieved from: www.nobelprize.org/prizes/economic-sciences/1974/hayek/facts/.

principle for his design of institutional frameworks but also set the reach of his design in terms of pluralist coexistence between social groups.

Hence, the purpose of this dissertation is not merely historiographical. My intent is, overall, to search within Hayek's work for clues that allow for a clearer comprehension of market phenomena and market institutions. In this sense, this attempt to return to Hayek 'rivals' with that of the previously mentioned institutionalists. Henceforth, my argument will restrict itself to the textual analysis of Hayek's works only in the first two chapters. Within them, I'll draw upon the contributions and the debates from Hayek studies literature to point out how some key issues in the interpretation of his work could be resolved. That will be the case for the study of epistemic adaptability in Chapter 1 and for its relevance in the design of public institutions in Chapter 2. Afterwards, Chapter 3 I attempt at an outsider revision of Hayek's work. Indeed, even if Hayek argued himself evoking pluralism, I will construct an evaluation grid on the basis of external literature, namely, Mäki (1997) and Foucault ([1979] 2004). This dissertation starts to develop the foundations for an up-to-date review of Hayek's ideas, and then makes a first attempt at it.

From this perspective, it will be possible to give a coherent outlook to the project of this dissertation. Even if its chapter have been set up in a manner that would allow for an independent (and maybe even isolated) reading, I hope the reader does miss how each chapter lays the ground for the next one. The first chapter will deal with the psychological ground from which Hayek may ultimately appreciate market phenomena. The second utilizes such a background to show how it provides epistemic grounds for the delimitation of his institutional proposal. Thus, finally, after having a panorama of what are his institutional proposals, the third chapter proposes an external grid for how institutions may (or may not) be pluralist. The dissertation actually forms part of the single intention to discover the reach and the limitations of Hayek regarding our future economic and social challenges.

Advantageously, Hayek's work has been vastly commented upon. Some great books on his theory include Gray's (1998) work on Hayek political and economic stances, Petsoulas' (2001) critique of his alleged inspiration in the Scottish Enlightenment, Scheall's (2021) development of his political

epistemology, and Bruce Caldwell's (2004b) intellectual biography². Besides, an insurmountable number of papers on particular aspects of Hayek's work have stemmed parallelly. Thus, we might find ourselves at a point where major contributions and debates can be pointed out, even if the extent and plurality of Hayek's oeuvre has not been (and maybe *will never be*) exhausted. This dissertation starts by recognizing the need to face that incredible amount of literature.

Indeed, the point of departure for the text will be the analysis of the literature who has commented on Hayek's grand work on psychology, *The Sensory Order*. In Chapter 1, I argue that the unresolved epistemological significance of the book might be cleared out by analyzing Hayek's latter evolutionary theory. Therein, I show that academic literature has asserted the usefulness of the book for Hayek's criticism of his intellectual opponents. The literature has also provided good reason to believe the book gave ground to posterior epistemological work by both Hayek and, more recently, Hayekian researchers. Nevertheless, the positive contribution of the book to Hayek's comprehension of the market has been controverted, and there is some ambiguity around the epistemological coherence of Hayek's book with the rest of his work. In this regard, Chapter 1 delves into Hayek's evolutionary understanding of market phenomena to establish a possible resolution. I argue that Hayek's psychological work gave ground to the development of his evolutionary theory, in which knowledge is both subjective and corrigible.

Chapter 2 takes the previous argument as an input to delve on the institutional consequences of Hayek's epistemology. Literature from the last decades has debated upon the consistency of Hayek's regards on spontaneous orders with his attempt to design a proper set of institutions. In this regard, however, Servant's article in 2018 seems to have brought a resolution. If one follows his contribution, the remaining problem for Hayek studies lies in clearing out what spontaneity is according to Hayek and what it requires from institutional frameworks. Servant finds Hayek both a promoter (epistemically) and a protector (institutionally) of "freedom to experiment" (p. 16). Consequently, following both the concern for consistency of the previous debate and Servant's (2018) line of resolution, Chapter 2 delves into Hayek's delimitation of public institutions. Therein, I show how

² Other notable works include Vanberg (1994), Fleetwood (1995), Feser (2006), Hayes (2009), Butos (2010).

Hayek's understanding of individual learning and innovative processes might serve as a delimitating principle for the role of public institutions and policy. In this manner, this dissertation proceeds to clarify the reach of Hayekian market-based institutions.

In Chapter 3, I propose an assessment of them beyond the adaptability that Hayek attributed to them³. Particularly, I pretend to assess the pluralist character of Hayek's institutions, for which he alleged explicitly. First, the chapter builds a simple framework to account for the pluralist character of institutions. Then, it analyzes the interrelation between Hayek's conception of private law and his theory of cultural evolution to determine how group competition might influence the law. Therein, reviewing the terms of competition, I conclude that Hayek's conception of morality is determinant for the openness of institutions. Therein, Hayek's regards on morality suggest, first, the impossibility of 'pure' pluralism within his market-based law and second, that the possibility of partial pluralism depends on the moral traits of dominant groups.

My dissertation, in sum, follows the concern of the institutionalist literature for assessing the potentialities of liberal frameworks while opting for wider assessment criteria. In this manner, I hope to contribute to the literature on Hayek studies, where much development has already taken place. The dissertation draws on the steps performed by work published during the last decades to contribute to, first, the understanding of Hayek's psychological work and its relevance, second, the understanding of his institutional design and his policy stances, third, the one of the reach and capacities of market-based institutions. In this manner, I hope to bring together some of the major points from academic discussion and further the understanding and utility of Hayek's work. The dissertation expects to discuss how market phenomena are valuable for societies and thus, how it is important to recognize its internal limitations. I conclude with future ways in which such a path of research might be pursued.

³ The sense of adaptability in Hayek's theory of the market is part of the major argument of Chapter 1. It enters, also, within the discussion of what Hayek means by 'progress', in Chapter 2 (pp. 31-2).

1. The Psychological Underpinnings of Market Evolution

Abstract

Literature of Hayek's *The Sensory Order* has grown continuously during the last decades without reaching an agreement on the significance of the book. This paper, first, attempts to offer a brief overview of the state of the art. Therein, I highlight main contribution and categorize the literature to show that there is a remaining tension about the book's relation to Hayek's other work. Friedman (2013) claims that, under Hayek's psychological interpretivism, market interaction does not offer any correction mechanism for individual (fallible) knowledge. Thus, second, I review Hayek's evolutionary theory to show Hayek does indeed consider correction mechanisms both at a group level and at the individual level. Finally, I show how the individual learning processes within Hayek's cultural evolution may be psychologically grounded in his 1952 book on theoretical psychology.

Keywords: Psychology, Hayek, Market, Learning

Hayek's *The Sensory Order* (1952) can be interpreted as an attempt to have an all-round conception of the individual and the sciences. Literature on Hayek's *The Sensory Order* (1952) has spurred between the last three decades, suggesting the importance of the book to understand Hayek's thought. These articles focus on the capacity the book has to ground Hayek's claims on individual ignorance and his critique to social planning. Yet it seems to me that one the main positive impacts of the book for the development of Hayek's thought has been largely ignored. While the literature seems conscious of the book's significance for Hayek's later epistemological themes, they miss out its political relevance. In this chapter, I attempt to it while bringing a wider perspective on the book's contribution. *The Sensory Order*, in fact, is the first instance where Hayek publicly and clearly associates individual learning with adaptative advantages.

My review, thus, will show how the literature has disregarded a main contribution from the book to Hayek's epistemological and political theory. I argue first that in the literature there is an unsolved tension related to the epistemic significance of the book. Next, I show how a revision of Hayek's (latter) evolutionary theory might dissolve the tension. Finally, I show how the evolutive elements that allowed for a resolution are grounded on psychological concepts from *The Sensory Order*. I will thus conclude that the book was an important (instead of contradictory; cf. Friedman 2013) milestone for

the development not only of Hayek's critiques of behaviorism and physicalism (Caldwell 2004a) but also of his general positive political and economic theory.

This chapter has 5 sections, following this introduction. Section I offers a brief introduction and summary of the book. Section II revises the literature that has commented on it, categorizing the most relevant portion for the sake of the present argument. Section III revises three exemplar articles that reveal an unresolved tension within the commentary of the book. Section IV, through a revision of Hayek's individualism and then of his psychology, takes up the task of dissolving such tension and showing its psychological grounds. My conclusions for the significance of the book are in section V.

I. An overview of the book

Very briefly, this section will deal with Hayek's book itself. *The Sensory Order* (TSO, hereafter) was Hayek's great -but not his *first*- incursion in psychology. Hayek himself says "is the outcome of an idea which suggested itself to me as a very young man when I was still uncertain whether to become an economist or a psychologist" (1952, p. v), in a then unpublished essay from 1920. Getting to the 50s, newly appointed as a professor in the Chicago University and after more than a decade of confrontation with economic and political totalitarianism, Hayek return to develop his ideas. His book was motivated by the concern for the "logical character of social theory", which he claimed could be approached from the point of view of 'theoretical psychology' (p. v). In this manner, Hayek wrote a book exposing what is his theory of how the mind works, that is, explaining the path from stimuli to perception, behavior, and thought. His subsequent publications would focus on politics and epistemology, as shown by *The Constitution of Liberty* (1960) and *Studies in Philosophy, Politics, and Economics* (1967).

Synthetically, TSO develops Hayek's understanding of the mind, our capacity to perceive and process stimuli. His argument is that

[I]n the course of its phylogenetic and ontogenetic development the organism learns to build up a system of differentiations between stimuli in which each stimulus is given a definite place in an order, a place which represents the significance which the occurrence of that stimulus in different combinations with other stimuli has for the organism. Hayek 1952, p. 42.

That is, Hayek argues for the mind being a developing classification system, where the recognition of stimuli is learned and the associations between them construed. The mind receives stimuli from both the external world and the internal environment of the organism. It is genetics and experience that it learn to classify them. As a result, the mind is able to provide an intelligible picture of the world, arriving even to consciousness and abstract processes of thought.

The chapters of the book elaborate Hayek's theory of how such classification happens and how it entangles different levels of complexity. After an exposition of the terms of the problem in chapter 1, chapters 2 and 3 develop the main sketch of how the mind classifies external stimuli. Chapter 4 deals with the way in which stimuli, both internal and external, affect individual conduct. Therein, Hayek introduces the connection between the mental order and motor responses and introduces also the role of evolution and learning. Chapters 5 and 6 deals with the development of the mental order. Chapter 5 develops and account of how the mind gets pictures of the environment and displays purposeful behavior. Chapter 6 offers an account of how the evolution of the classification system allows for the development of consciousness and abstract thought. The last chapters deal with further interests for the book's audience. Chapter 7, first, offers an account of the facts that confirm the theory and those who would refute it, suggesting also new experimental studies. Chapter 8 draws the main consequences of Hayek's theory for the philosophy of science.

II. An overview of the state of the art

This section will present an overview of the literature who has dealt with TSO. The first thing to say, evidently, is that TSO has been thoroughly commented throughout the last three decades. Following Butos (2010), academic literature trying to understand Hayek's thought hardly even considered the book before the 90s. The first attempts to review it and its significance for Hayek's thought began along the lines of Yeager (1984), Streit (1993), and Butos and Koppl (1993, 1997) (Butos 2010, p. 4). These papers were the first within economics to review the book: the first two in relation with Hayek's epistemology and the limitations of government, the third in relation to its significance for the comprehension of market expectations. Yet they represent just the beginning of the commentaries.

A second strand of literature came around the change of millennia with the pretension to assess the importance of TSO for the development of Hayek's thought. This literature arrived at a time where

Hayek studies had a grown body of published research and had a more historiographical intent. They were trying to assess the place of the book within Hayek's intellectual career. Most notably, articles from this period include Birner (1999), Horwitz (2000), and Caldwell (2004a). These articles debated the contribution of TSO to Hayek's political thought. While the first claimed it supposed a lonely contradiction to the rest of his social theory, the second pointed out how it could help understand the epistemic character of his theory of law. The third, beyond the debate, emphasized the contribution of the book for Hayek's analysis of complexity and his critique of behaviorism (and then, positivism and socialism). Caldwell's (2004b) intellectual biography of Hayek followed in the same year of his article.

Further literature came in a more varied fashion in the subsequent years. McQuade & Butos (2005) explored the adaptative properties of Hayek's psychology. Two whole symposia, one directly on TSO and another on "Cognition and Economics", also delved into the book. More than ten new articles spurred commenting on the psychology of Hayek, highlighting different aspects of the theory, from its interest for behavioral finance (e.g., McQuade 2007) to its economic relevance (Horwitz 2010). Next, Friedman (2013) argued how TSO could suppose a contradiction with Hayek's previous texts. More recent articles have offered perspectives of how TSO suggests lines of research and limitations for nudge economics (Frantz & Leeson, 2013, Rizzo & Whitman 2009, 2019, 2021). In this manner, the latest strand of literature has turned its focus from the historiographic pretense the previous one still held, maybe save Friedman (2013).

Taking this into account, my review will focus more on the literature of the second group, which deals more directly with the general significance of TSO. I attempt to track here an epistemological tension that prevails in the development of the literature. Herein, leaving aside Birner's (1999) contested article, I will take the other two representatives mentioned before. Horwitz (2000) and Caldwell (2004a) propose approaches which bring together some of Hayek's main themes and epistemological claims. In this review, I will first show how their revision of the psychologic limitations of human knowledge left space for Friedman's (2013) critique. Then, I will argue that TSO contains elements that answers Friedman's claim along the lines of evolutionary psychology.

III. Contributions, and a remaining tension

In this section I will make a review of the three mentioned articles. Horwitz (2000) reviews the book proposing its significance for Hayek's law, while Caldwell (2004a) brings forth its significance for the overall development of his thought, dealing with pervasive themes from Hayek's later works. Notwithstanding, Friedman (2013) argues there is contradiction between the epistemology in TSO and previous some previous epistemological outlooks from Hayek's work from the 40s. I contend the way in which the first two's focus on epistemic limitations allowed for Friedman's critique.

For starters, Horwitz's (2000) article proposes a review of how Hayek's TSO might be "crucial to understanding both his economics and his politics" (p. 23). His review of the book focuses on how Hayek's 'phenomenal picture' of the world and how it implies limitations for individual knowledge. Horwitz returns to how the book describes the individual knowledge of the environment. In the book, he says, Hayek offers a theory about how complex neuronal linkages allow individuals to have a 'map' of the it, of the general relationships it involves between different elements. Additionally, those linkages allow for a particular 'model' of present situations. In this sense, beyond having a general sense of how to perceive and relate things, the individuals make themselves with a picture of the determined scenarios in which they find themselves. Here some remarks may be added: 1) the map and the model by which the individual comprehends her world are a product of the minds classification, 2) such a classification implies that there are complex ways of dealing with stimuli, and 3) classification -and more so, complex levels of it- are a product of evolution, of both genetic and individual experience. Consequently, human knowledge is complex (ultimately unpredictable), not always explicit, and limited, based on local and historical paths.

Horwitz claims, for these reasons, that the main feat of TSO is to offer a dynamic and limited perspective on human knowledge. In his words, "[t]he limits of explicit human knowledge form the basis for Hayek's economic and social thought and are the crucial difference between his approach and that of both socialism and modern neoclassical economics" (p. 27). Then, from all his comparisons and linkages between Hayek's approach and other economists'/philosophers, it is possible to highlight that Horwitz associates the price system as a complement to individual limitations. Passing through a comparison with Mises and neoclassical economics, Horwitz argues how the construction of modes of classification implies the need for learning and thus, imperfect information processes. Therein, he claims Hayek establishes institutions and price systems as information communicators as a response to the structural limits to knowledge that he posed in his

theory of mind. Thus, Horwitz concludes his argument by analyzing Hayek's law, which he understands as a rules-of-conduct provider. The restriction of law, on the one hand, and its formulation in terms of rules of conduct, on the other, are two sides of the same coin. In other words, they respond to the same individual that asks for restricting the sovereign and aiding the disperse civilians (pp. 36-37).

Caldwell's (2004a) aims are different in a large extent. Instead of making associations between bits of Hayek's thought (what Horwitz (2000) did), he delves into the place TSO has within Hayek's intellectual career. Hence, Caldwell develops a great historiographical account of Hayek's writing, in two ways. On the one side, he deals with how the book might be a product of earlier writings. On the other, he deals with the way in which the book might contain theses that helped the development of his subsequent work. Therein, he offers an account of what might have been Hayek's purpose for publishing TSO and of the original ideas which it grounded for later work. All in all, Caldwell argues TSO has a vital piece for Hayek's campaign against physicalism and behaviorism, two very present contemporary currents in philosophy and psychology that he attempted to defeat.

The first part of Caldwell's account is to bring to light to contributions of the (then unpublished) 1920's essay of Hayek, *Contributions to a Theory of How Consciousness Develops*. That early essay contained already some of the main themes that would be developed in his later work. One thing would be the role of the mind classifying stimuli, which allow for complex linkages in the mind, and the importance of memory for processing and driving consciousness. Another would be the critical stance of his theory in relation to pre-war psychological theories. The two lines were later brought together in the subsequent years. Hayek's early anti-empiricist approach followed Wesley C. Mitchell's appreciation of his work (Caldwell 2004a, pp. 244-5) and his critique to 'Scientism' followed his psychological reject of one-to-one correspondences between physical stimuli and perception. Thus, "Hayek used his theory to criticize certain 'objectivist' theories, like behaviorism, which take the sensory order as fundamental and unproblematic" (p. 246). Even if the psychological theory behind was not explicit, one can reasonably agree with Caldwell that it is the one who inspired Hayek's claims.

TSO, then, would be a further occasion to undermine behaviorism and its philosophical companions, Caldwell argues. In Hayek's views, behaviorism claimed all psychology could be reduced to the study physical stimuli, that could then directly explain behavior. That's precisely the contrary of Hayek's

theory, but “[i]f his argument relied on a physiologically grounded (read, again, *scientific*) psychological theory, he could have the added pleasure of reinforcing his claim (...) that behaviorists and physicalists were not the real scientists after all, but only scientific pretenders” (Caldwell 2004a, p. 246; emphasis in the original). Therefore, he embraced the task of explicitly undermining its foundations, by means of two central claims. First, Hayek restated and refined the theory of the sensory order (the mind) as a parallel and distinct order from the physical order that behaviorist claim to regard. Second, he explained how the degrees of complexity of sensory classification imply limitations for human knowledge and for the predictability of ourselves. These studies, concludes Caldwell, would later have great impact in Hayek epistemology of science and his theory of complex phenomena. TSO, in sum, would have been an important stage for Hayek’s advancement in his challenging positivism-associated theories, which started early in the 20s.

Friedman (2013) takes a contrary stance in relation to the role of TSO. He believes the book led to the emergence of “two contradictory strands of Hayekian epistemology” (p. 278). In his account, the complexity of the mind’s classification and the history dependence of perception makes knowledge “fallibilist and interpretivist” (p. 278). Friedman claims Hayek’s TSO poses knowledge as error-prone, full of interpretation, and biases, as a consequence of Hayek’s evolutionary and complex psychological account. Meanwhile, he argues, Hayek’s 1946 essay, *The Use of Knowledge in Society*, would propose another epistemology. Friedman claim such epistemology to be a defense of trustable knowledge. In his words, “[i]n 1945 the local “man on the spot” *knows* what to do about whatever he observes locally (...) as long as he also has access to prices that transmit to him “knowledge” from other parts of the economy” (p. 286). While TSO poses a fragile epistemic condition, Hayek’s 1945 condition would presume agent who unequivocally are able to interpret and use information.

Friedman goes on to discuss how the fragile epistemology from 1946 seems to have reigned over his political and economic writings after TSO was published. Among other claims, he argues the interpretivist epistemology is unable to ground Hayek’s political and economic outlooks, because it fails to offer a secure rationale for social coordination. In his regard, TSO accounts well for how knowledge may be flawed and how individuals might be able to receive feedback from the environment, yet “contrary to what Hayek says there, the experience of a frustrated expectation does not, on its own, “indicat[e] the required corrections”. He adds, “[a]ll one “knows” after a failed

experiment is that something went wrong” (p. 291). In his perspective, subjectivism, even with the capacity to be corrected, does not offer a secure path for individual knowledge to be valuable.

Thus, he goes on, spontaneous interaction in the market can be anything but efficient. Friedman recognizes that “the ability to try alternative products (...) may allow one to hit upon a better result” (p. 291). Therein, “[n]atural selection, of course, is the ideal type of an unconscious sorting mechanism” (p. 292). Nevertheless, he says there is no such real sorting mechanism that can be reasonable identified for social phenomena. Friedman says,

it is almost never the case that the habits followed by people—whether as individuals or groups—in modern societies so radically affect their chances of surviving and then passing on their genes that natural selection can be sorting good habits from bad ones. Evolutionary processes of rule selection (e.g., cultural processes) that lack a sorting mechanism such as natural selection, however, may well produce perverse rather than helpful habits and traditions (Friedman 2013, p. 292).

Friedman concludes there is, in the end, no sorting mechanism for that assures something as Hayek’s cultural *evolution*. Error-prone knowledge is risky and there is no secure way of guiding creativity. From there, though, it seems that there is no other point of correction for knowledge, and that spontaneity is thus prone to social error as well. Friedman concludes the way to get a coherent interpretation of Hayek’s epistemology and his social & political thought would be to follow the non-interpretivist version that he gets from the 1945 essay, which is incoherent with the other of Hayek’s writings.

In sum, Friedman (2013) poses a challenge for the interpretation of the significance of TSO within Hayek’s intellectual career. Horwitz (2000) and Caldwell (2004a) attempted to show the book’s relevance for the delimitation of individual knowledge in Hayek’s theory. In other words, they focused on how the book has delved into the limitations for knowledge, arguing its necessary complexity and subjectivism (which calls for aid from the law, would add Horwitz). However, Friedman posed a challenge to the positive part of Hayek’s account. He claimed the psychological foundations from TSO are unable to ground Hayek’s adaptive view of market processes. The absence of a sorting mechanism for adequate and inadequate behavior makes the theory unreliable. Furthermore, claims Friedman, such an unreliable construction would suppose a paradox for the interpretation of Hayek’s epistemology and his economic and political theory. The next sections will advance contrary

arguments, showing how individual accident is sorted out at both individual and social level, thanks to the psychological foundations of TSO.

IV. Learning and cultural evolution

Friedman (2013) argues that the lack of a true correction or sorting mechanism for rules of conduct makes the market order unreliable. Yet his review of Hayek's selection mechanism seems rather superficial ('as it is almost never the case... cultural processes lack a sorting mechanism such as natural selection...' is insufficient). Even if Hayek's evolutionary theory does not follow the rules of a 'natural selection' (see 'selection is based on survival probabilities' in Friedman 2013, p. 292), Hayek does put forth a theory of cultural evolution with a mechanism of selection. In this section I will argue that a regard upon Hayek's evolutionary theory reveals the presence of individual and group selection mechanisms. These mechanisms are grounded in Hayek's psychological remarks from the TSO, so I offer elements to answer Friedman's critique and suggests that the book was a decisive step for Hayek's intellectual development, confirming the analysis of other articles.

a. Individual creativity, socialized selection

Hayek offered an extensive account of how markets process individual knowledge (and thus, shape conduct). Hayek framed social dynamics within individual processes of learning. Knowledge, he says, is the key to social phenomena as long as it carries within previous feedback from individual conduct ([1960] 2011, p. 77). Indeed, goes on Hayek, "[o]ur habits and skills, our emotional attitudes, our tools, and our institutions—all are in this sense adaptations to past experience which have grown up by selective elimination of less suitable conduct" (Hayek [1960] 2011, p. 77). Hayek calls the process by which these widely conceived knowledge gets accumulated and selected the process of *cultural evolution*. How does it happen? How to understand such 'selective elimination' of conduct?

Lange-von Kulesa (1997) shows Hayek's evolution involves both individual and group processes, bringing together methodological individualism with holist analysis. Herein, however, the argument might be best exposed in a separated manner. For starters, there is a process of individual learning and variation of behavior. Individuals learn behavior by means of imitation, following their

introduction to the world (Hayek [1967] 2014), in their particular context, in a particular company. Then, they become able to distinguish differences in rules of conduct and individual outcomes. Therein, they may modify, copy, randomly variate, refine their behavior. Thus, they reinforce the knowledge of the rules of conduct they possess already and/or learn of new ones (Hayek [1960] 2011, p. 139, 143).

The learning and innovation of individuals becomes visible (and available) for others through social interaction (cf. Lange-von Kulesa, 1997). As a result, knowledge may spread (Hayek [1982] 2013, p. 488): others get to adopt it and test it, unleashing new processes of learning and innovation. In this manner, codes of common rules emerge, and social institutions consolidate (Hayek [1982] 2013, p. 18). Institutions continuously bring together the learning from individual experience and make new knowledge available for others (Hayek [1948] 1980, p. 88). In this manner, they allow new processes of learning, adaptation, and testing of shared rules. This processes of confirmation and learning, dissemination and variation, lead to what may be called social groups.

Then, selection happens by means of society's chief group evolutive process, namely, group selection. Here, the diversity of beliefs becomes a starting point: "[t]he existence of individuals and groups simultaneously observing partially different rules provides the opportunity for the selection of the more effective ones" (Hayek [1960] 2011, p. 124). Differences in rules of conduct, as tools for dealing with the environment and attaining goals, lead to aggregate differences in social outcomes (Hayek [1982] 2013, pp. 42-3). At last, the most successful groups prevail over others by their capacity to attain their goals and/or prosper relative to others (cf. Hayek [1960] 2011, p. 88). In Hayek's theory, group selection is this constant tension from diversity to prevalence.

Thus, a critical remark regarding Friedman's review is that a sorting mechanism *does* exist. Nevertheless, (as Hayek himself said) the mechanism is not some sort of "natural selection" as Friedman would ask for it (guided by survival probabilities)⁴. Instead, Hayek makes sure to remark

⁴ Some literature stemmed at the beginning of the millennium discussing the similarity of Hayek's theory of evolution to others more traditionally associated to biology and the natural sciences. For an introductory article to this literature, see Caldwell (2002).

that it is society's most *effective* practices and institutions that prevail through the evolutionary process. This was already present in the quotes above (Hayek [1960] 2011, p. 124, cf. p. 77 'suitable'; [1982] 2013, pp. 42-3). Yet individuals and groups represent two levels of selection, so it is necessary to undertake a more precise analysis to understand what 'effectiveness' may indicate.

Regarding selection at a group level, Hayek states rather clearly what he might have thought to be the main criteria. He said that when groups prevail it is "because some practices enhanced the prosperity of certain groups and led to their expansion, perhaps less by more rapid procreation than by the attraction of outsiders" (Hayek [1982] 2013, p. 492). Thus, first, cultural groups prevail as they overcome others in terms of relative prosperity or adaptability (Hayek [1982] 2013, p. 77, 140, 172, 498). In this regard, they prevail as they become able to overcome hazards that others are unable to (was it this that Friedman had in mind?), or as they become able to sustain higher standards of living that other groups are unable to reach.

Second, groups prevail as they exceed others in their capacity to multiply their numbers. Herein, Hayek presents two non-exclusive mechanisms for population growth to drive selection: groups can multiply by their own reproduction rate and/or by the inclusion of new members. Most notably, whereas the internal reproduction rate of a cultural group may not directly affect the relationship between groups, a group's disposition to include, absorb or exclude other members does.

Hence, it is possible to separately conceive the prevalence condition that deal with the groups' internal characterization from those that deal with the relationship with outsiders. On the one side, prevalence may be attained as a result of internal factors such as technical/political/economic efficiency, or the internal reproduction rate of the population. On the other side, prevalence involves the inclusion or exclusion of outsiders. Groups and individuals present diverse sets of rules, but they may change them. It is also easy to see that for Hayek a group is not an equivalent to a society, or anyhow of a particular institutional framework. Thus, when he considers "the attraction of outsiders", that means that some part of the evolutionary selection depends on individual processes. Here, while it is possible to say how attraction may be operated by group violence, it is most interesting to note that there can be other type of behavioral changes in individual evolutionary processes.

Consequently, says Hayek, “competition on which the process of selection rests must be understood in the widest sense. It involves competition between organized and unorganized groups no less than competition between individuals” (Hayek [1960] 2011, p. 88). Parallely (though not *independently*) to the group selection process, individuals are selecting conduct. In other words, the are ‘sorting’ mechanisms not only at the group level but also at the individual level. enters the selection process at the individual level. In this sense, Hayek remarks that “in social evolution, the decisive factor is not the selection of the physical and inheritable properties of the individuals but the selection by imitation of successful institutions and habits” (Hayek [1960] 2011, p. 118). The problem is understanding how ‘effective’ behavior is passed from individual to individual.

Hayek links the passing of effective knowledge (behavior) to individual action. He says, “[i]t is in the pursuit of man’s aims of the moment that all the devices of civilization have to prove themselves” (Hayek [1960] 2011, p. 88). Individual purposive behavior is the scenario for the selection of behavioral devices, for therein “the ineffective will be discarded and the effective retained” (Hayek [1960] 2011, p. 88). The first element for the selection of conduct is purposive behavior. Therein, behavior is aimed at some individual goal.

The second element, correspondingly, is the possibility of learning. According to Hayek, the purpose in behavior means behavior carries, therefore, some kind of associative expectations. Indeed, from purpose comes the possibility of learning: “[m]an learns by the disappointment of expectations” (Hayek [1960] 2011, p. 82). The difference between expected outcomes and actual experience allows individuals to discriminate the efficacy of conduct. Thus, it induces the judgement of ineffective conduct and the accumulation of knowledge. Purpose and disappointment bring forth an adaptative conception of efficacy, the sorting criteria for which Friedman (2013) had asked.

Friedman was right, though, to point out that failed experiments do not necessarily entail future success. Even if Hayek identifies a mechanism to judge inefficient behavior, that does not secure the emergence of a truly effective one. Hayek would agree. In fact, he says:

Humiliating to human pride as it may be, we must recognize that the advance and even the preservation of civilization are dependent upon a maximum of opportunity for accidents to happen. These accidents occur in the combination of knowledge and attitudes, skills and habits, acquired by individual men and also when qualified men are confronted with the particular

circumstances which they are equipped to deal with. Our necessary ignorance of so much means that we have to deal largely with probabilities and chances. Hayek [1960] 2011, p. 81.

Hayek says, indeed, “[c]ertainty we cannot achieve in human affairs” (Hayek [1960] 2011, p. 82). So how does the individual subjective efficiency translate into a social process of development? Allowing for ‘accidents to happen’.

If they are allowed to happen, disappointment may induce -and further increase- the disposition to vary one’s conduct. The answer to the question for the best method to attain one’s goals is often unknown. Indeed, there is no way to know which of the emergent behavioral devices will be in the end useful for the whole of society:

It is difficult to conceive all the combinations of knowledge and skills which thus come into action and from which arises the discovery of appropriate practices or devices that, once found, can be accepted generally. But from the countless number of humble steps taken by anonymous persons in the course of doing familiar things in changed circumstances spring the examples that prevail. Hayek [1960] 2011, p. 79

Consequentially, Lange-von Kulesa’s reading of Hayek’s evolution states a clear run of the process that follows:

individuals, observing other successful people, try to behave in similar ways. The realized advantage of a certain rule attracts more and more individuals to adopt this rule, thus establishing a jointly regarded institution. Imitation of observed behaviour is never perfect. Erroneous or conscious variation effects a mutation or recombination of rule-guided behaviour. This means that new rules of conduct or, to say it more generally, innovations, possibly come into existence by chance. Lange-von Kulesa 1997, pp. 276-7.

Imitation, innovation, erroneous variation all feed an uncertain process of adaptation of individuals in the pursuit of the aims of the moment. In this manner, Hayek will finally describe the way in which the overall re-adaptation of society takes place:

The undesigned novelties that constantly emerge in the process of adaptation will consist, first, of new arrangements or patterns in which the efforts of different individuals are co-ordinated and of new constellations in the use of resources, which will be in their nature as temporary as the particular conditions that have evoked them. There will be, second, modifications of tools and institutions adapted to the new circumstances. Some of these will also be merely temporary adaptations to the conditions of the moment, while others will be improvements that increase

the versatility of the existing tools and usages and will therefore be retained. Hayek [1960] 2011, p. 84.

Thus, the individual learning and innovative processes are in the end the ones who “allow for gradual and experimental change” (Hayek [1960] 2011, p. 124). Freedom to act allows for the variation of conduct, while learning processes allow to discriminate between the less efficient ways of conduct. The argument for the market in Hayek’s theory is one of probabilities and not of certitude, so Friedman’s claim is somehow misplaced. Hayek is not saying ‘the market offers certainty of getting things right’. He is rather making an argument about where there are more chances that useful knowledge appears. Where there is free social interaction, there may be various simultaneous experiments, whereas, where there is not, the whole institutional framework functions as a unique experiment for the whole of society. In Hayek’s words, “[w]here all are made to serve the same ideals and where dissenters are not allowed to follow different ones, the rules can be proved inexpedient only by the decline of the whole nation guided by them” (Hayek [1960] 2011, p. 129). The ‘catallaxy’ offers some more chances.

Yet Friedman’s main remark calls a more precise comprehension of what Hayek understands by accumulation of knowledge. The disperse knowledge of individuals, their behavioral devices or, in Friedman’s words, their ‘opinions’ (cf. Friedman 2013, p. 285), represent more than simple lines of thought. Indeed, they are valuable because social market processes allow for them to be tested and retained in relation to the prevalent goals that individuals have at the moment. “Man is as much a rule-following animal as a purpose-seeking one”, says Hayek ([1982] 2013, p. 12), and he contends the joint operation of both elements serves the accumulation and depuration of inefficient behavior. The problem is, then, would he justify his conception?

b. The psychological underpinnings of liberty and responsibility

TSO may be seen as Hayek’s attempt to ground a particular conception of individual action. The endeavor of the book, instead of supposing a contradiction with some of his previous work, was intended to support it. Thus, beyond stating the complexity of the mind and its unpredictability (Caldwell’s highlight of the book), it posed the grounds for the epistemic requirements of what later

he called 'social evolution'. In fact, Hayek developed a psychological framework for understanding purposive action and, thus, learning. This section develops that argument.

Learning, drawing from above, would secure a process of selection at the individual level, one that goes beyond group selection, even if not independently. The core of the learning process had two elements: purposive action and the processing of feedback, but the former gave the ground to the latter. In the first place, it must be noted that Hayek poses an ultimate physiological answer for the origin of purposiveness: "[t]he question of what determines (or what is meant by) purposiveness is in the last instance really the same question as that of what ensures the continued existence of the organism" (Hayek 1952, p. 82). The problem of purposiveness starts by assuring the organism stands for survival, close to the natural selection process suggested by Friedman.

However, purposiveness is wider than what survival would dictate. Hayek considered a full account of purposiveness, both at higher and simpler levels, was not possible at the moment. In this regard, he stated "we do not possess a fully adequate biological theory [even] of the comparatively simpler kind of purposive functioning" (Hayek 1952, p. 82). For that reason, he said "we must content ourselves to refer in this connection to W. B. Cannon's concept of homeostasis" (Hayek 1952, p. 82). In other words, Hayek relies on drives that would direct individuals toward some kind of "steady states", where the organism's equilibria pose some finality for its action. Anyhow, the nervous system would direct behavior towards some kind of self-maintaining states⁵.

Within this account, central directions pervade all behavior, as they "direct" attention and guide any choice of behavior the organism makes. Hayek states "attention is thus always directed, or confined to (...) events for which we are on the look-out" (Hayek 1952, p. 139). That means that the whole comprehension of the world the mind offers is mediated by its homeostatic directions. All the same,

⁵ The study and update of Hayek's study in this regard and its consequences for the purposive action of individuals and, thus, their capacity to learn, could clear up the reach of his theory. Joaquín Fuster has advanced how "Hayek's prescient concepts on the cerebral cortex have received substantial support from modern neuroscience" (2011, p. 3). His work provides modern grounds for Hayek's associative theory of perception, of memory, and of the general mechanism by which human organisms process feedback. However, the contrast of the last element is not extensive, partly because modern findings might have been just "intuited" by Hayek (p. 3). Therefore, a thorough study of the drives that guide the mind's evaluation of stimuli and action may still help to understand the reach of the adaptability of our behavior.

the picture of the world is itself a result of an adaptative direction, and that direction makes the criteria with which the picture is formed. Hayek highlights:

The 'desired' result will be singled out from the many possible outcomes of the existing situation because it will form part of the following not only of the environment but also of the 'urge' or 'drive' for a certain class of results. Hayek 1952, p. 124.

That is, internal directions, 'drives' or 'urges' play a mayor role in determining the aim of behavior at any moment. In this manner, particular aims guide individual action, even under environmental conditioning.

Besides, the purposive directions go along with the formation of expectations on how the environment works (model, again). The picture of the environment the mind offers follows the internal drives that pervade behavior and the mind's interpretation of them. The model of the circumstances where an individual finds herself considers the possible ways to attain individual goals. Thus, it also offers an overview of the conduct adequate to attain desired aims. From internal directions grow expectations on the adequacy of conduct:

"The adaptive and purposive behavior of the organism is accounted for by the existence of the 'model' of the environment formed by the pattern of impulses in the nervous system. In so far as this model represents situations which might come about as the result of the existing external situation, this means that behavior will be guided by representations of the consequences to be expected from different kinds of behavior. If the model can pre-form or predict the effects of different courses of action, and pre-select among the effects of alternative courses those which in the existing state of the organism are 'desirable', there is no reason why it should not also be capable of directing the organism towards the particular course of action which has thus been 'mapped out' for it. Hayek 1952, p. 124.

Following Hayek, in the models of our particular situations different sets of expectations are associated to different courses of action. Then, the expectations drive the election of a particular path. Purposiveness lies in these operations from directions, 'drives', to a chosen conduct, so that - consciously or unconsciously, behavior follows some kind of guided intent. Therein, the individual learns to bet on the possibility of obtaining a consequential reward for its action. Behavior, altogether, manifests purpose.

Accordingly, in the second place, TSO offers psychological grounds to sustain the processes of learning. Hayek identifies the space for learning processes in the process by which the mind

incorporates the feedback it receives from behavior. Therein, individuals ‘test’ the ways of classifying stimuli they hold (thus, behavior included). In Hayek’s words, “the experience that the classification based on the past linkages does not always work, i.e., does not always lead to valid predictions, forces us to revise that classification” (Hayek 1952, p. 168). That is, the mind responds to the perceived results of behavior so that, when they does not meet expectations, it considers the need for correction.

At this point, one can see the disappointment of expectations serves is the psychological principle according to which the mind deems some behavior ineffective and searches for a replacement:

The reclassification, or breaking up of the classes formed by the implicit relations which manifest themselves in our discrimination of sensory qualities, and the replacement of these classes by new classes defined by explicit relations, will occur whenever the expectations resulting from the existing classification are disappointed, or when beliefs so far held are disproved by new experiences. Hayek 1952, p. 169.

The mind’s work of classification processes disappointment as a sign of the need for change. Indeed, Hayek remarks that “[t]he current sensory reports about what is happening will be checked against expectations, and the difference between the two will act as a further stimulus indicating the required corrections” (Hayek 1952, p. 95). Repeated monitoring reinforces the insufficiency of current conduct. Hence, individuals are able to judge -consciously or unconsciously- what is effective conduct when striving for goals. In sum, such processing of behavioral feedback, drawing on the purposiveness of conduct, allows individuals to learn.

V. Conclusion

The potential contribution of Hayek’s TSO may have been understated by the literature. While Horwitz (2000) and Caldwell (2004a) have highlighted its contribution to the understanding of individual epistemic limitations, Friedman (2013) has claimed the book is in contradiction with some of Hayek’s other work. Notably, I have here revised his argument against the psychological foundation of Hayek’s evolutionary theory. Concluding the argument seems to demonstrate that Hayek’s book allowed him to give new grounds to his economics and politics.

Throughout a revision of Hayek’s evolutionism, I pushed two main arguments. First, there are social ways of sorting out subjective failures. In a free social environment, widespread creativity faces

individual and group selection mechanisms, fostering the encounter of useful behavioral tools. Second, the learning processes required by individual selection mechanisms are psychologically grounded in TSO. Hayek put forth a framework for behavioral purposiveness and the processing of feedback, thus allowing for discrimination between more and less effective behavior. Thus, my argument suggests that TSO's revision of psychology was a fundamental step for the development of Hayek's posterior evolutionary ideas in the 60s⁶. It might have been psychology that allowed him, at the same time, to retain epistemic subjectivism and social efficiency within market processes.

In this manner, this article opens the field for research that contrasts Hayek's psychological work with recent updates. Fuster (2011) has opened the path of contrast between Hayek's psychology and modern scientific findings. His work shows how Hayek's main accounts of perception, memory, and classification might find solid grounds within modern neuroscience. Nonetheless, his contrast of Hayek's account of the correctives drives and mechanisms by which the individual processes feedback is less extense. Fuster suggests Hayek might have only "intuited" the main mechanisms of the process (p. 3), yet that is, as argued above, the main foundational claim for individual learning.

The possibility of better comprehending the adaptative advantages or the flexibility of market processes could be nurtured by the findings of modern science. Hayek grounded market adaptability in learning, and learning in psychology. Thus, further contrasts and updates of the theory would allow to comprehend the reach of adaptative correction. Therein, the ways in which individuals and groups are able to process adaptative failure might be better assessed. This chapter suggests the need for an interdisciplinary scientific approach to the possibilities of individual behavior and market phenomena.

⁶ For a revision of how such ideas got introduced into Hayek's thought and a discussion of their origins, see Caldwell (2000).

2. The Privilege of Experience: An Institutional Framework for Disperse Learning

“There are more things in heaven and earth, Horatio,
than are dreamt of in your philosophy.”
(Shakespeare, Hamlet, 1.5.167-8, Hamlet to Horatio)

Abstract

Hayek seemed to be having a hard time with criticisms during the 40s. His theory was seriously discredited among academics, and it seemed ambiguous in its political implications: the ‘where to draw the line’ debate. Still, academic debates upon the consistency of Hayek’s appreciation of spontaneity and his design of public institutions have brought new light into the matter. Hayek’s political theory could revolve around the “freedom to experiment” (Servant, p. 16). In this paper, I turn to his evolutionary epistemology to show that his appreciation of individual learning and innovative processes serves as a delimiting principle for the role of the state. Along the psychological grounds from the previous chapter, Hayek provided a general evolutionary account of how individual ‘experience’ could be the main building block of social progress. Consequently, he developed his theory of law and of the state. The Rule of Law might be best seen as a constitutional attempt to protect and privilege spontaneity. The state, first, materializes such concern by acting as a guardian of the law. Second, it acts as an assistant, to open the possibility of social processes where spontaneity on its own cannot cover social demands.

Keywords: Hayek, Liberalism, Epistemology, Evolutionism, Government

I. Towards a ‘workable set’ of institutions

The reception of *The Road to Serfdom*, in Hayek’s words, “went so far as to completely discredit me professionally” (Hayek 1994, p. 90). Hayek found himself facing serious questionings by the second part of the 40s. Caldwell (2004b) recalls how both Dickinson’s, one of Hayek’s fiercest opponents, and Keynes’ reactions to the book⁷. Their critiques took similar paths. On the one hand,

⁷ See also Alvin Hansen in Hayes (2009, p. 81) and in Servant (2018, p. 18).

Dickinson asked ‘the liberal opponents of collectivism’ to come up with a “workable set of institutions” that could back up their vision of society (Caldwell, 2004b, p. 288). On the other hand, Keynes made a similar remark in a personal letter he sent to Hayek after reading the book:

You admit here and there that it is a question of knowing where to draw the line. You agree that the line has to be drawn somewhere, and that the logical extreme is not possible. But you give us no guidance whatever as to where to draw it. Keynes to Hayek, 28 June 1944, in Keynes 1980, 386; in Caldwell 2004b, p. 289.

Keynes, sharply, grasped that Hayek’s proposal was not to disregard the existence of government. Clearly, neither was it for government to grow indiscriminately; any “logical extreme” was to be discarded. However, if Hayek really agreed, how could one really trace a precise line for the role of government? This question of where to draw it remains a fundamental problem for economics and public policy, today as always, and an interesting question to ask Hayekian studies. Hayek’s intellectual development went beyond its state from the 40s, as some of his later writings will testify.

The present chapter will deal precisely with that issue. Literature from the past decades has pointed out some interpretative trouble with Hayek’s institutional proposal. Rodrigues (2012) -echo of Keynes- identified a tension between Hayek’s remarks on state action and his appreciation of spontaneous orders. Following his analysis, Hayek’s positive regards on state action make him incur in “ideological impurity” (Rodrigues, 2012, p. 1029). Consequently, Rodrigues regards Hayek as half a libertarian and half a piecemeal institutionalist. Nevertheless, Rodrigues (2012) is but a single exponent of a great variety of literature who claimed Hayek’s incoherence. Servant (2018) has extensively reviewed the controversy signaling the main arguments in favor of Hayek’s inconsistency and finding a form of reconciliation. The formula that solves the issue within Hayek’s theory, following his account, lies in Hayek’s particular appreciation of freedom, “freedom to experiment” (p. 16).

Nevertheless, Servant’s (2018) conclusion leaves enough space for further precision. The consistency he views in Hayek’s theory lies in the modified forms of the ‘spontaneity’ and the ‘constructivist’ thesis:

T1**^{*}: The development of institutions ought not be consciously designed—it ought to proceed spontaneously, which means being consistent with the conditions of a liberal order.

T2*: The conscious design of a constitution is necessary, so as to secure a liberal order.

Servant (2018, p. 19).

Servant equates spontaneity to what he calls as a 'liberal order'. Yet, even if Servant discusses the Hayek's conception of articulated law, the role of the state in a 'liberal order' remains unclear. Servant himself acknowledged his paper had a restricted focus on the consistency of spontaneity and constitutionalism. Thus, beyond consistency issues, we may ask, what is the positive role of public institutions within Hayek's 'liberal order'?

Herein, I will argue that his appreciation of individual learning and innovative processes serves as a delimiting principle for the role of the state. Along the psychological grounds from the previous chapter, Hayek provided a general evolutionary account of how individual 'experience' could be the main building block of social progress. Consequently, he developed his theory of law and of the state. The Rule of Law might be best seen as a constitutional attempt to protect and privilege spontaneity. The state, first, materializes such concern by acting as a guardian of the law. Second, it acts as an assistant, to open the possibility of social processes where spontaneity on its own cannot cover social demands. Thus, this chapter presents an overview of the kind of tasks Hayek attributed to the state and the precise delimitations it may face in relation to the evolutionary process of society.

In this manner, this chapter offers a two-fold contribution to Philosophy of Economics and the History of Economic Thought. On the one hand, I show the epistemological and political significance of Hayek's concern for individual 'experience' as it developed since the 60s. My findings further reinforce the claim that Hayek's psychological studies in the previous years had an underestimated positive impact on his intellectual development, as advanced in chapter 1. On the other, it allows me to show how Servant's (2018) theoretical resolution has deep epistemological roots and allows for a precise interpretation of the role of the state. Indeed, my argument provides an account of the tasks and the open possibilities Hayek envisioned for the state and a plausibly Hayekian criterion for the assessment of public policy.

This article has four sections, following this introduction. Section II offers an account of Hayek's evolutionary epistemology and its significance for his social theory. Consequently, section III offers an account of Hayek's conception of the Rule of Law and the general characteristics of the institutional

framework he proposes. Section IV, afterwards, delves into Hayek's view of the state and the precise tasks he assigns to it. I resume and suggest future lines of research in section V.

II. The social relevance of individual experience

Even though Hayek did sketch his idea of the rule of law during the decade of 1940 (Hayek [1944] 2007; [1948] 1980), he deterred from providing clear cut perspectives for the role and shape of public institutions. Hayek discussed the basic principles of the rule of law and made some general positive assertions regarding the social security schemes, but they did not point out precise criteria for the delimitation of the role of public institutions. Keynes's challenge pushed for precision and clarification.

The literature has traced the formal articulation of evolutionary ideas into Hayek's social and political thought back to 1960, with the publication of *The Constitution of Liberty* (Caldwell, 2000, p. 12; 2004b, chapter 13). Through the lens of Hayek's evolutionism, a shifted focus on the knowledge of 'individual experience' leads to positive answers about the value of fragmented and fallible individual knowledge, the irreplaceability of spontaneous contexts of interaction for social development, and the precisely role of public institutions. This chapter develops the argument for these three problems.

The change in Hayek's theory lied not in the characterization of spontaneous orders or in the meaning of knowledge, but rather in what knowledge is *about*. Since 1960, Hayek interpreted knowledge "to include all the human adaptations to the environment in which past experience has been incorporated" ([1960] 2011, p.77). The two key additions to Hayek's conception of knowledge, thus, would be the conception of 'experience' and its 'incorporation' into new ways of relating to the environment. With the first lies its new adaptative character. Knowledge, rather than referring solely to individual beliefs about local circumstances, refers also to the individuals' *process* of adaptation to them. In other words, 'knowledge' includes the feedback that individuals perceive about the effectiveness of their conduct for attaining their goals⁸. Altogether, 'knowledge' opens to the knowledge of 'experience': a trying-

⁸ See the previous chapter for an extended explanation of how Hayek offers psychological grounds for the concept of experience.

and-judging process by which an individual gains beliefs about the efficiency of her methods for attaining goals. Therefore, it is possible to interpret that, as individuals suffer or relish the results of their actions, that is, as they are responsible, they can judge the efficiency of their conduct (Hayek [1960] 2011, p. 139, 143). Knowledge captures processes of individual *learning* (Hayek [1982] 2013, p. 18).

Second, this conception leads to a new sense of how knowledge accumulates. What does it mean for behavior to ‘incorporate past experience’? A first answer could be to say that it *reflects*, somehow, past experience. However, in a second instance, that implies that behavior adapts in different ways from time to time; it changes, somehow, considering previous feedback from the environment or, better, the individual’s judgment of it. This way, one can understand that conduct may *incorporate* an individual’s learning process in the sense that individual learning can shape future conduct. Thus, as individuals can willfully modify their conduct (as they are *free*), knowledge leads to processes of *innovation* (Hayek [1960] 2011, p. 123).

Hayek’s renewed focus on individual learning and innovative processes (ILIPs, hereafter) allowed him to associate spontaneity with the adoption of more efficient ways of conduct among individuals. We might recall the functioning of the process, already exposed in section IV.a of the previous chapter. The mechanism is simple: when individuals freely interact, they make their experience with new and old conduct visible for others. Thus, their knowledge can spread (Hayek [1982] 2013, p. 488) as those others share it and/or test it. Therein, shared practices and rules of conduct lead to the emergence of social institutions (Hayek [1982] 2013, p. 18). Institutions, again, combine and communicate individual knowledge, guiding a process of accumulation of knowledge about the most efficient ways to attain individual goals. Then, as individuals freely interact with one another and use social institutions they are constantly testing them and triggering new processes of selection by which society’s most effective devices prevail (Hayek [1960] 2011, p. 88).

Indeed, a key feature of spontaneity is that it fosters the critical appreciation of conduct. Hayek notes that “liberty and responsibility are inseparable” (Hayek [1960] 2011, p. 133). As long as individuals experiment success or failure in the attainment of their goals, choice may lead to learning and

innovation⁹ (Hayek [1960] 2011, p. 139, 143). Thus, individual dissent from shared rules becomes an opportunity for development. Here, “the existence of individuals and groups simultaneously observing partially different rules provides the opportunity for the selection of the more effective ones” (Hayek [1960] 2011, p. 124). The most effective sets of rules might become visible through the groups’ capacity to attain their goals and/or prosper relative to others (cf. Hayek [1960] 2011, p. 88). Finally, as successful groups prevail, the somehow more efficient rules of conduct are selected. That selection, be it through (i) elimination or (ii) cooperation and inclusion between groups, brings forth the individual process of selection to a collective level.

Such account brought along a renewed concept of social efficiency or ‘progress’. Even if Hayek argued “it is questionable whether the statement has a clear meaning that the new state of affairs that progress creates is a better one” ([1960] 2011, p. 95), he acknowledges the possibility of accumulating knowledge about how to attain goals. This knowledge, though procedural, would make society more capable of attaining its goals, whatever they are. Hayek came to identify progress with the increasing efficiency of our methods to couple with our circumstances. That progress he defined as increasing “power over nature” (Hayek [1960] 2011, p. 95, cf. p. 139).

These two elements of cultural evolution and progress allowed Hayek to offer an answer to why the disperse and fragmented knowledge of individuals may be important for society. Throughout cultural evolution, the selection of more efficient rules of conduct brings forth progress. Herein, individual knowledge becomes increasingly corrected by the test of intersubjectivity and the hazard of the environment¹⁰, leading to increasingly precise knowledge about the efficiency of our ways in relation to our aims and resources (Hayek [1982] 2013, p. 290). For this reason, older institutions, tested by

⁹ Even though Hayek acknowledges that a significant part of the evolutionary process works through the unconscious rule-following of individuals, he does not claim that all rules of just conduct remain either unconscious or unarticulated. Oğuz, F. (2010) studies the role of unconscious processes within Hayek’s theory.

¹⁰ Up to have I have seen, there have been no thorough studies on the epistemological correction/testing mechanism that social interaction supposes for individual knowledge. This whole theory rests on the assumption that both social interaction and goal-attaining behavior in a conditioned environment work as correction mechanisms for individual knowledge. Friedman (2013) questions these hypotheses, while the previous chapter of this dissertation poses an initial response. Further scientific studies on what ‘correction mechanisms’ mean, how could be operate and to what extent are they reliable are yet left unanswered, for future research to come.

more and different challenges, may be more likely to serve individual ends, but they may also become dispensable as humanity advances. As we accumulate experience, we may learn both the usefulness or the futility of certain methods of conduct and institutions in relation to certain objectives. Thus, spontaneous orders assure “a process of formation and modification of the human intellect, a process of adaptation and learning” (Hayek [1960] 2011, p. 94), where some epoch’s growing institutions might be known to be obsolete during another¹¹. And the individual knowledge in ILIPs fuels that process.

Does that change his argument in favor of spontaneity? This time, Hayek adds an extra step to the efficiency criterion to assess social orders. According to him, beyond the possibility of attaining any sort of social progress, the assessment must consider the uncertainty surrounding it. He states “[i]t is difficult to conceive all the combinations of knowledge and skills which thus come into action and from which arises the discovery of appropriate practices or devices that, once found, can be accepted generally” ([1960] 2011, p. 79). Besides, the answer to *who* will bring forth those new forms of behavior or devices is also unpredictable (Hayek [1960] 2011, p.79). Thus, “[o]ur necessary ignorance of so much means that we have to deal largely with probabilities and chances” (Hayek [1960] 2011, p. 81). In other words, the problem of social organization becomes that of *maximizing* the chances for progress.

Where are there more chances of progress happening, spontaneity or direction? Hayek’s answer becomes clear: “it is because every individual knows so little and, in particular, because we rarely know

¹¹ In this sense, the debate raised by Angner (2004) on the normative character of spontaneous orders within Hayek’s theory to be mistaken in its persistent discussion about their optimality or ‘desirability’. That I share with Caldwell and Reiss (2006). However, they are all still missing the depth of Hayek’s study of knowledge in evolutionary orders. If, as they say, Hayek’s normative remarks were based “on the discovery, preservation, transmission, and coordination of knowledge”, this statement opens, rather than closes, the problem.

Hayek’s evolutionary conception brings more light about the benefits of freely adaptive processes than about the static optimality of institutions. The accumulation of knowledge brings a desirable *path* of social evolution. This way, neither can spontaneous orders and institutions be guaranteed any degree of optimality. The progress Hayek associates to the accumulation of knowledge fosters only the possibility that society learns, both from success and failure (Hayek [1960] 2011, p. 94), that is, its capacity to adapt to the environment. It, however, does not guarantee that all attempts towards goal attainment succeed. That is the mistake of the ‘asymptotic’ interpretation of Hayek’s theory, but also call for a change in the way the debate has been held. Further studies on the conditions required for the process of cultural evolution to enhance society’s capacity to adapt, such as those suggested in the previous footnote, might be needed to further this argument.

which of us knows best that we trust the independent and competitive efforts of many” (Hayek [1960] 2011, p.81). Hayek’s answer, in other words, is leaving the widest space for experimentation¹². The more people are learning and trying out new and old devices and ways of behavior, the greater the probability of finding the useful ones and of them spreading throughout society. Thus, the widest room for the emergence of ILIPs makes spontaneous orders more efficient forms of organization (cf. Hayek [1960] 2011, p. 82, pp. 474-5).

Central planning, on the contrary, can offer but a reduced growth. The limits of centralized organization begin where spontaneous behavior is cut off and individuals are not allowed to contribute with their knowledge, the *coercion* limitation. Within directed orders, individuals are not allowed to behave freely. Thus, they cannot test out new forms of conduct nor can they incorporate past experience into their actions (cf. Hayek [1960] 2011, p. 124). Hence, the development of ILIPs is blocked and there are fewer chances for progress to happen. As disperse individuals are dissociated from society’s evolutionary process, social planning becomes increasingly inefficient in contrast with spontaneity.

Therein, Hayek’s evolutionary account offers a reinterpretation of the *single-mind* limitation of directed orders. As the over-all order considers only the director’s preferred ways of adapting to the environment, that means that direction reduces society’s ILIPs to the directing head’s own process. For this reason, the single-mind limitation implies that a directed society puts the social plan as its single bet in its process of adaptation to the environment. Direction centralizes learning and innovation and reduces society’s chances of progress to those already foreseen (Hayek [1982] 2013, p. 474).

Thus, Hayek concludes that spontaneous orders are, again, the method for humanity to put its full capacity in service of the achievement of its aims (cf. Hayek [1960] 2011, p. 143). Hayek’s focus on the waste of disperse and local *experience* better links free behavior to social progress. Hayek calls for acknowledging the potential of “a civilization (...) grown from the free efforts of millions of

¹² For a parallel treatment of this same issue, see Servant (2018). Sections IV, V and VI offer a social and political account of how the trial-and-error process of institutional emergence lead Hayek into his ultimate argument in favor of giving “freedom to experiment” (p. 16).

individuals” ([1974] 1989, p. 7) in long term evolutionary processes. That is, he calls for attention to the disperse, spontaneous forces of individual learning and creativity.

Herein, Hayek posed an answer to why individual freedom could be socially irreplaceable. After the account of Bergh (2019) and Wright and Mata (2020), policy techniques of data-gathering posed a challenge to Hayek’s appreciation of freedom. However, his renewed focus on ILIPs shows how those techniques, though valuable, are unable to solve the whole knowledge problem of public policy. Bergh’s (2019) account of the Hayekian knowledge problem is both valid and incomplete: ‘time and place’ knowledge is not the only kind of valuable disperse knowledge. Therefore, even if such techniques are able to capture *a priori* valuable information, they would still be missing the disperse knowledge of experience, which requires ongoing spontaneous orders to emerge. For that reason, Hayek remarks that “[l]iberty is essential in order to leave room for the unforeseeable and unpredictable (...) [for] the emergence of what we shall want when we see it” (Hayek [1960] 2011, p. 81). It is a requirement for there to be free contexts of interaction for ILIPs to become visible and spread within society, so centralized action cannot possibly replace the individuals’ learning and creative processes.

This way, the problem left for section III is to understand if Hayek’s epistemics of individual experience allow us to articulate a ‘workable set’ of political institutions. I claim this problem can be given an answer, which will be the argument of the following sections. As shown by Servant (2018), Hayek’s study of social orders leads to the conclusion that the pace and reach of social progress lie in the favorable or unfavorable conditions given for the process of social evolution. Consequently, as Servant continued, a constitutional design that secures conditions that are favorable for spontaneous evolution is a necessity rather than a contradiction. At this point, however, Hayek went beyond the general idea of a ‘liberal order’ as identified by Servant. Hayek did take the endeavor of designing a general institutional framework for society and of specifying the role of the state within such political order. Examining these proposals at the light of his epistemological turn will be the task of sections V and VI.

III. A political order for disperse learning and innovation

Hayek's evolutionary epistemology allows for a bridge from social theory to institutional design. The formerly ambiguous relationship between knowledge combination and public institutions is redefined in relation to the social and individual processes where experience is generated and accumulated. Consequently, his first detailed account of policy and the rule of law appears with *The Constitution of Liberty* (1960) and is further refined with *Law, Legislation, and Liberty* (1973, 1976, 1979 in Hayek [1982] 2013). Hayek's politics reflect his concern with the happening of social progress and thus, subordinates public institutions to spontaneous social developments. In this section I offer an account of how his ideal of the rule of law is intentioned to make the political order privilege the ongoing process of cultural evolution.

Rather than a contradicting proposal for politics, Hayek's concern with spontaneous orders would ask for some political organization that allows them to operate and grow; there would be a necessary complementarity. The materialization of that complementarity is in Hayek proposal of the rule of law's over-all adjustment of the political institutions. First of all, under the rule of law, all organizations, individuals, and groups are subject to rules. The power in public institutions is withheld by "only guardians and servants" of those rules (Hayek [1960] 2011, p. 242). Therein, Hayek's conception of the law, those 'rules', embed his politics in the process of social evolution. The 'law', according to him, refers to the "rules which govern the conduct of individuals towards each other" ([1982] 2013, p. 83). Hayek does not restrict law to the articulated laws of jurisprudence or the more general laws of constitutionalism. Within his theory, law corresponds to the modes of conduct that individuals generally agree with and practice in their interactions, either by using them or taking them as guides for their expectations of the others' conduct (Hayek [1982] 2013, p. 80). As a result, the general idea of the rule of law is intended to rid society's evolutionary process from arbitrary intervention (cf. Hayek [1960] 2011, p. 310).

The protection of the law, in the general sense, passes through the characterization of *articulated laws*. Hayek proposes there to be two types of (articulated) laws, roughly, private and public. On the one hand, private law deals with what he called the 'general, abstract rules' that govern the conduct of individuals towards each other (Hayek [1982] 2013, p. 82; cf. [1960] 2011, p. 72). On the other hand, public law is that which concerns the guidance of the efforts of common organization, i. e., 'the rules of organization of government' (Hayek [1982] 2013, p. 125; cf. p. 69, p. 116, p. 120). Hayek's rule of

law establishes “a rule concerning what the law ought to be, as a meta-legal doctrine” ([1960] 2011, p. 311).

The subordination of the political order to the spontaneous social evolution is given by the tasks that each type of law gets assigned and the relationship between them. Hayek assigns two functions to private law in order to make the political order reflect society’s evolutionary process. The first one is to reflect the knowledge from society’s ongoing order of actions (cf. Hayek [1982] 2013, p. 113). That means that this law must capture social knowledge, but also adapt to the ongoing changes within society (Hayek [1960] 2011, p. 124). Capturing such knowledge implies that private law adequately reflects the individuals’ current order of actions. Meanwhile, adapting to such knowledge means that law is flexible enough to incorporate the spread fruits of ILIPs and keep up with society’s progress. Private law adapts regulations to the social accumulation of experience and to the new developments that come around in the process.

Besides, private law has the second function of securing space for spontaneous growth. From the previous section, this means leaving space for ILIPs to emerge and be spread, so the task for private law is to guarantee the necessary conditions for that to happen., i. e., individual freedom and responsibility. The second task of private law is to guarantee that *all* individuals have a space, or “sphere”, of freedom and responsibility (Hayek [1960] 2011, p. 231). These spheres, on the one side, provide “to each individual a known range within which he can decide on his actions” (Hayek [1960] 2011, p. 224). On the other side, they tell the individual “what possible consequences of his actions he must take into account or what he will be held responsible for” (Hayek [1960] 2011, p. 225). In sum, the second task of private law is to secure a range of action where the individual can decide uncoerced over her own conduct and learn from her choices¹³. It reflects a whole intent of promoting

¹³ Hayek’s concern about freedom is, thus, instrumental. He defends freedom not as an end, but as a means for the ongoing process of social evolution to unfold. Legutko (1997) states (with scarce evidence) that Hayek has a parallel intrinsically moral argument in favor of freedom, while other commentators rightly pointed out Hayek’s instrumentalism (e.g., Petsoulas (2001, p. 31) and Gamble (2013, p. 348)). Clearly, he says “the chief aim of freedom is to provide both the opportunity and the inducement to insure the maximum use of the knowledge that an individual can acquire” (Hayek [1960] 2011, p. 144). That is, freedom is appreciated as a possibility to further the accumulation of knowledge by which we, eventually, become more able to distinguish the most efficient ways of attaining our goals. That means progress, power over nature, but not necessarily prosperity as Friedman (1997) has suggested.

spontaneous growth: reflecting the individuals' common practices and rules would have no sense within Hayek's theory if, in addition, there were no room for them to change.

But can private law fulfill those functions? For this purpose, Hayek draws upon the Anglo-Saxon tradition of common-law, where judges are in charge of formulating the rules of private law. Here, judges perform law-discovery procedures, where they “merely articulate already observed practices or (...) required complements of the already established rules” (Hayek [1982] 2013, p. 116, cf. p. 69). These rules become ‘rules of just conduct,’ because they reflect the articulation of rules already found and practiced within society. They reflect the state of actions that individuals already follow, sometimes unconsciously or through tacit rules of conduct. The law-finding practices of jurists unveil such rules having in mind two criteria: they protect reasonable expectations and leave the widest space for individual freedom. Thus, the law arises in the form of general, abstract rules that would support the shape of the ongoing order of actions and leave space for its development. Rules of just serve to protect freedom *as well as* the over-all order of actions, fulfilling the tasks attributed to private law.

However, the effectiveness of private law is guaranteed by Hayek's constitutionalism. Following him, “a constitution is essentially a superstructure erected over a pre-existing system of law to organize the enforcement of that law” (Hayek [1982] 2013, p. 128)¹⁴. Hayek uses the constitution as a means to regulate the relationship between any public institutions and private law. Herein, his constitutionalism is to establish the system of rules of just conduct and, then, regulate the role of public organization (Hayek [1982] 2013, p. 379). Thus, he establishes that public law must be subject to private law.

Such relationship means that the rules that govern the activity of government and public organization cannot bypass what the rules of just conduct call. They cannot voluntarily interfere with the order of actions that private law reflects, nor can they trespass the individual spheres of freedom and responsibility that it defines. Consequently, Hayek's constitutionalism makes public organization develop as a parallel device to private order, leaving behind its possibility to direct the conduct of

¹⁴ A more thorough analysis of Hayek's constitutionalism, his characterization of the law and the political institutions he proposes (besides the more general role of the state) exceeds the possibilities of this paper. Boykin (2010) serves as a great introduction to the whole Hayekian political order and Martin & Wenzel (2020) dig into a more critical account. Hayek's own discussion can be found in the third volume of *Law, Legislation, and Liberty* (Hayek [1982] 2013).

individuals where private law does not consent it (Hayek [1982] 2013, pp. 484-5). It rules out arbitrary intervention on spontaneous growth.

Hayek's political ideal of the rule of law serves as a way to make social regulations and public institutions subject to the evolutionary process of society. First, by establishing the rule of the law, it gives emerged rules of conduct authority over all individuals. Second, by characterizing articulated law, the law (in the wide sense) is privileged by the establishment of private law as rules of just conduct and spheres of freedom and responsibility. Such privilege is secured by the constitutionalist positioning of private law over public law. The remaining general order reflects an intent to secure the spontaneous development of society, where ILIPs continuously bring change to ever-adapting articulated laws. The role of government within such restricted context is addressed next.

IV. The state: a needed guardian and ever-possible assistant

Under Hayek's political scheme, the state (or 'government' -following Hayek, I use them indiscriminately-), part of public organization, requires some deliberately made rules to clarify its functions. However, its space does not correspond to a parallel sphere of social design. Rather, the role attributed to it embedded and dependent on the operation of cultural evolution. Taking into account Hayek's evolutionary turn, it is possible to identify and delimitate the role of the state in guarding and supplementing spontaneous growth.

Hayek identified the need for an enforcement mechanism that secures the rule of law and the political order it characterizes. Even if private law is to have a privileged position, law by itself has no power to secure compliance. Individuals or organizations might attempt to impose their will upon others, forcing particular sets of rules of conduct or interfering with the individual spheres of freedom and responsibility. For this reason, the rule of law requires some kind of control or restriction of coercion on individuals and organizations. Consequently, Hayek attributes the state its first task as a guardian of the social order: the solution is to *minimize* coercion, giving its monopoly to the state, so that it may be used only as the law provides (Hayek [1960] 2011, pp. 71-72).

Why can such monopoly be understood as the role of a guardian? Recalling the characterization of law from the previous section, the state is bound by public law, which is in turn bound by private law.

Therefore, the monopoly of coercion, the enforcement of the law, is bound by the spontaneous development that the rule of law privileges. Taking into account such restrictions, in the first instance the state can but protect (guard) what the law provides and is unable to direct it.

Therein, the role of a guardian has three visible consequences. Enforcing private law implies doing two other things: to guarantee society's defense from outsiders and to levy taxes for its functioning (Hayek [1982] 2013, p. 383). For one thing, the state's monopoly of coercion must be usable against foreigners that threaten to direct or coerce the local order. For another, the establishment of the rule of law, the workings of the law (both public and private), and the monopoly of coercion require funding. Hence, in the interest of society's spontaneous development is the need to allow the government to forcefully levy taxes and fund its activities. Compulsory taxes are a kind of necessary coercion, along with law enforcement and national defense, in order to maintain the process of social development spontaneous.

However, Hayek does the state has much to contribute besides a necessary protection. Here I can remark that, contrary to private law, public law responds not to what people and jurists recognize as rules of just conduct or expected behavior. Public law is deliberately made by legislative institutions, so government activities, however subject to private law, may go beyond enforcement. Though unable to interfere with spontaneous development, the state gets a second task in the open space to supplement it.

We may clear out a common misunderstanding before characterizing such space: Hayek does not endorse a political defense of the minimal state or of minimizing the role of government. He clearly says:

Since (...) we are mainly concerned with the limits that a free society must place upon the coercive powers of government, the reader may get the mistaken impression that we regard the enforcement of the law and the defence against external enemies as the only legitimate functions of government. Some theorists in the past have indeed advocated such a 'minimal state'. It may be true that in certain conditions, where an undeveloped government apparatus is scarcely yet adequate to perform this prime function, it would be wise to confine it to it, since an additional burden would exceed its weak powers and the effect of attempting more would be that it did not even provide the indispensable conditions for the functioning of a free society. Such considerations are not relevant, however, to advanced Western societies, and have nothing to

do with the aim of securing individual liberty to all, or with making the fullest use of the spontaneous ordering forces of a Great Society. (Hayek [1982] 2013, p. 382)

Privileging society's spontaneous growth does *not* mean the state must limit itself to guarding it. Rather, the state become a powerful asset towards social evolution by assisting and complementing society's spontaneous developments.

Here, if the state is not to replace the spontaneous order or build a parallel social order, Hayek considered its functions to be defined in relation to the workings of spontaneous processes. Therefore, the most critical thing to take into account are the limitations to what spontaneous orders can provide. These limitations allowed Hayek to identify the two wide areas where state action can contribute to the outcomes of spontaneous developments: service provision and inclusion mechanisms.

The incursion in government service provision is also characterized by two types of market failures. Hayek's support was evidenced as he said:

we find it unquestionable that in an advanced society government ought to use its power of raising funds by taxation to provide a number of services which for various reasons cannot be provided, or cannot be provided adequately, by the market. (Hayek [1982] 2013, pp. 382-3).

Within society's spontaneous growth there may be services that "cannot be provided, or cannot be provided *adequately*, by the market". There, where agreement arises about the desire or the necessity to provide such services and spontaneity, the ongoing ILIPs, are not able to answer such agreement, there is the case for using the means of common (public) organization.

When does Hayek consider that a service "cannot be provided, or be provided adequately, by the market"? First, he talks about those goods and services which the market does not offer. Though eventually open to include different kinds of goods and services, he viewed 'collective' or public goods as exemplary cases. In this case, the impossibility of restricting the consumption makes it difficult or impossible for spontaneous mechanisms to provide them (Hayek [1982] 2013, p. 383). Other analysis cover also both the positive and negative consequences of market externalities, where needed adjustments may not appear spontaneously. There where the spontaneous planning cannot offer the services or corrections society requires, government activity is a feasible solution. Other examples are the protection against external enemies, epidemics, or natural disasters, but also 'many of the amenities which make life in modern cities tolerable,' like most roads where tolls cannot be charged, "the

provision of standards of measure, and of many kinds of information ranging from land registers, maps, and statistics to the certification of the quality of some goods or services offered in the market” (Hayek [1982] 2013, p. 385). According to Hayek, these may be cases where the market on its own fails to fulfill people’s needs or desires and, thus, where the state may supplement spontaneous developments. Second, there is a case for government provision where market provision exists but is *inadequate*. This case amounts to the services that society may desire to provide to all while the market secures provision to only a few. Here, when desired by the population, Hayek brings forth the occasion for universal public services. Some examples of these services are health services, security services, information services, and education.

After service provision, the second area for government activities is the provision of inclusion mechanisms. Hayek acknowledged spontaneous (market) processes may end up totally excluding some of the population from participating in social life. In his words, the “problem here is chiefly the fate of those who for various reasons cannot make their living in the market, such as the sick, the old, the physically or mentally defective, the widows and orphans” (Hayek [1982] 2013, p. 395); that is, those who cannot make a living by means of spontaneous social interaction, including also the unemployed (Hayek [1960] 2011, p. 424). The situation of these people, according to Hayek, represents exemplar risks that are common to all and that are hardly solved by individual or group means. Therefore, addressing this issue by means of public organization could become “a necessary part of the Great Society in which the individual no longer has specific claims on the members of the particular small group into which he was born” (*ibid.*). Such considerations allow for public security arrangements, while the point remains open to any means for attending people in such situations¹⁵.

Still, there is one caveat to this interpretation. Hayek was wary of the possibility that the state’s role as a complement of spontaneity lead it to *replace the spontaneous order or build a parallel social order*, as mentioned above. He was aware that giving space for government activity might end up being

¹⁵ Hayek, nonetheless, did not give an extensive account of the social security arrangements he thought about. However, he explicitly mentioned “[t]he assurance of a certain minimum income for everyone, or a sort of floor below which nobody need fall even when he is unable to provide for himself” (Hayek [1982] 2013, p. 395, cf. [1960] 2011, p. 426). Rallo (2019) discusses whether Hayek supported, or not, a universal basic income. His article may provide a more thorough discussion on the issue of Hayekian social security schemes, which goes beyond the scope of this paper.

understood as entitling it with ‘spheres of planning’, contrary to the intent of privileging spontaneous growth. In this regard, he says that an “important point to be remembered throughout [the discussion of government activity] is that (...) we are resorting to an *inferior* method of providing these services because the conditions necessary for their being provided by the more efficient method of the market are absent” (Hayek [1982] 2013, pp. 387; emphasis on the original). Following my account from section IV, government provision is still a *second best* relative to spontaneous resolutions.

Thus, I identify three conditions within which government activities may unfold. First, Hayek calls for private participation whenever possible:

[C]ontrary to an assumption often tacitly made, the fact that some services must be financed by compulsory levies by no means implies that such services should also be administered by government. Once the problem of finance is solved, it will often be the more effective method to leave the organization and management of such services to competitive enterprise. (Hayek [1982] 2013, p. 386-7)

That is, at any possible stage the state must leave room for ILIPs and social institutions to solve or collaborate in service provision. Hayek recognized this might not be always possible, so the condition remains that government be on alert and available to these possibilities.

Second, the case for government activity is contingent upon the emergence of spontaneous solutions. The space for state provision continuously depends on the absence of spontaneous processes able to attend the desired activity (Hayek [1982] 2013, p. 387-8). Hence, as spontaneous innovations eventually allow for an adequate private provision of services that the government was asked to provide, the case for public provision disappears. Hayek does not conceive the state’s service provision as a set of functions reserved to the government, but as contingent tasks that society asks the government to perform given the circumstances of the moment ([1982] 2013, p. 388).

Third, because the government is a second best, its regulation must leave the door open to the emergence of spontaneous processes that solve the needs it attends. In other words, government activity must leave the space for leveled competition/cooperation on behalf of private enterprise:

[G]overnment needs no other special power than that of compulsorily raising means in accordance with some uniform principle, but in administering these means it ought not to enjoy

any special privileges and should be subject to the same general rules of conduct and potential competition as any other organization. (Hayek [1982] 2013, p. 388).

That government organizations work under the same conditions of private enterprise is necessary to leave room for the emergence of spontaneous competition and further social development. This works a guarantee that state action supplements, rather than substitutes, spontaneous growth.

The second task of the state within Hayek's theory can be comprehended as that of an assistant. 'Assistant', because it is to complement and contribute there where spontaneous orders do not provide solutions to social needs or desires. The state can never substitute or back off spontaneous activity, but it can add up to what it offers and open spaces for it to develop. In sum, the state's role is that of an assistant and a guardian. It is possible to understand both roles as ways of attending, being alert about, the different ways in which spontaneous processes develop. The comprehension of spontaneous evolution and the importance of ILIPs calls for both a secure environment and a dynamic understanding of its capacities in relation to political determinations. This way, Hayek draws the line on state intervention there where freedom and responsibility may allow others to try and do better (Hayek [1960] 2011, pp. 88-89). Beyond the 'freedom to experiment' already identified by Servant (2018), such a line asks to be continuously reviewed and modified considering the primordial functions that government has within Hayek's theory. Thus, it is possible to affirm that Hayek's vision of the role of government molds up to the drive of individual experience in the process of cultural evolution.

V. Conclusions

A precise understanding of Hayek's institutions may be found in his evolutionary epistemology. Even if prior reactions suggest ambiguity in his work, turning to it for an interpretative key may be a first attempt to solve the problem. ILIPs and the accumulation of experience become the essential building blocks of unforeseeable social progress. Spontaneity becomes indispensable as it allows for ILIPs to appear and nurture social evolution. A clear concept of the Hayekian political order appears with both a general protection of rules of conduct (Rule of Law) and a precise role for the state to accomplish. Having identified the epistemological change in Hayek's theory, it is possible to articulate his epistemology and his social theory with his political theory to extents the literature had not reached.

Altogether, understanding Hayek's turn towards experience allows to understand the role of the state as a necessary guardian guard and possible assistant of spontaneous growth.

This work suggests new lines of research within Hayek's epistemology and politics are still open. The one most immediate to me seems to be the further study of the origins of Hayek's epistemological turn in relation to his psychological work in *The Sensory Order* (1952). Further studies might clear out the actual motivation for such a change and the theoretical background with which Hayek counted by the time he worked on *The Constitution of Liberty* (1960)¹⁶. Therein, also, the adequacy of modern policy projects such as Cass Sunstein's (2021) "Hayekian Behavioral Economics" must be judged. Rizzo & Glenn's (2009, 2019, 2021) approach, though precise and scrupulous about the limitations of Sunstein's project, has not offered clear policy guidelines for it to follow. The criteria here exposed for the delimitation of Hayekian institutions might serve a more practical and feasible critical review.

In second instance, I have to express that the understanding of Hayek's social and political theory is still incomplete. As said above, the study of epistemological mechanism of adjustment/correction for fallible individual knowledge has only begun. That is, the epistemological conditions under which individual experience can effectively be tested, refined and communicated remain to be found. However, beyond the theoretical discussion of the correction of experience from Chapter 1, the problem here remaining is more related to institutionalism. In this sense, another interesting line of research seems to me that of the risks and the -always- opportunity of intersubjectivity. Therein, as will be showed in Chapter 3, the intromission of morals within cultural evolution remains to be explored and could be one of the main obstacles to the liberalism Hayek proposed.

Finally, the door remains open for further studies on the particular public institutions that Hayek proposed since 1960. My attempt to study the general role of government has not been exhaustive and the political institutions proposed by Hayek such as, e. g., legislative chambers and majority rule have yet to be understood. More thorough studies of these institutions from an evolutionary perspective might also bring light to modern policy issues such as intergenerational conflicts over

¹⁶ This may be noted specially at the moment I write these conclusions, when the new version of Hayek's biography is yet to be published.

politics, for which Hayek proposes representation quotas by age groups, and the role of technocracy within modern societies. Along these lines, further research could bring forth the different ways in which Hayek's theory can offer new insights into and ways the advantages and limitations of market institutions.

3. Pluralism and the Moral Limitations of the Market in F. A. Hayek's Rule of Law

“Si vamos a construir un nosotros, tiene que ser también con la gente que se equivocó”¹⁷
-Francisco de Roux, unregistered chatter.

Abstract

There is a consensus that Hayek's judge-made law build upon the lines of his social theory. Hayek thus asserted that he proposed a pluralist framework for social coexistence. This paper attempts to test Hayek's claim. I start by building a general framework for assessing the pluralism of institutions. Next, I delve into Hayek's rule of law, where private law reflects the trends of market behavior. Therein, the dynamics of group selection condition the relation between individuals and the spectrum of allowed behavior. Afterwards, I revise the role of morality for the formation of social groups and for the inclusion/exclusion of diverse individuals. I conclude his legal proposal is at best the scenario for partial (*within*) pluralism, where insider diversity may depend on dominant moral traits while outsider diversity is likely to be excluded from the institutional framework.

Keywords: Liberalism, Hayek, Law, Pluralism, Morals, Market, Development

I. Introduction

Hayek argued for the institutional protection of the market on pluralist grounds. Indeed, he sustained “a free society is a pluralistic society without a common hierarchy of particular ends” (Hayek [1982] 2013, p. 269), referring to the market's capacity of incorporating different values and social goals into social interaction. This claim grounded his prescription for political protection of the market and his proposal of legal regulation. However, the extent to which the market and market-based institutions are able to preserve plurality is not clear. This paper undertakes a first approach to such a task. In this

¹⁷ “If we are going to build a ‘we’, it has to be also with the people who got it wrong” (my translation).

chapter, I argue that a revision of the role of morality within Hayek's theory of the market reveals how his conception of law institutionalizes potential dynamics of exclusion.

Friedrich Hayek dedicated his studies to the "analysis of the interdependence of economic, social and institutional phenomena"¹⁸. As said in different parts above, most of these elements have been widely reviewed: Hayek's critique of socialism and his subsequent critique of the welfare state (Caldwell 2011), the ambiguities of his evolutionary theory (Lange-von Kulesa 1997, Caldwell 2002, Caldwell & Reiss 2006), the delimitation of state intervention (Servant 2018), his epistemology (Scheall 2015a, 2015b), his regards on morality (Diener 2017), among others. Yet an evaluation of his pluralism would require a further articulation of these different elements.

Some (recent) literature has delved into broader interpretative perspectives for Hayek's theory. As discussed above, a great variety of literature has dealt with Hayek's psychology and his regards on institutions. However, the remaining internal critiques of his political proposal have not been that many. To be noted, Ferey (2008) argues for the epistemological implausibility of Hayek's market-based theory of law. Besides, Faria (2017) has shown how Hayek's conception of morality may pose obstacles for his evolutionary assessment of markets. Herein, after a proper panorama of Hayekian institutions, I aim to continue the study of how morals have an impact within them.

This chapter aims to continue the path opened by Faria to analyze the role of morality within the wide interpretation of Hayek's liberalism that other works show. I delve into the evolutionary grounds of Hayek's work to study his theory of law, following Ferey's (2008) contribution. Therein, I aim to offer two different contributions. On the one side, I show how morals have an impact on evolutionary group dynamics and thus, on the characterization of law. On the other, I construct a basic matrix to assess the pluralist character of Hayek's own institutional proposal by analyzing private law. Hence, I draw upon the literature on evolutionism and the study of morality to characterize the capacity of Hayek's private law to support pluralist development. As I will argue, the relation between moral judgments, personal esteem for others and group formation diminishes the pluralist character of

¹⁸ The Nobel Foundation. "The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1974." *NobelPrize.org*, retrieved from: www.nobelprize.org/prizes/economic-sciences/1974/hayek/facts/.

Hayek's social and institutional theory. This paper uncovers the mechanisms by which market-based institutions may present biased schemes for legal regulation and entail the waste of diversity in the path of development.

This paper is divided into seven sections, including this introduction. Next up, section II offers a grid for the assessment of pluralism, drawing two basic conditions for its existence. Section III develops an account of Hayek's theory of law and shows how it makes market behavior a normative reference for the regulation of conduct. Section IV shows how evolutionary processes determine the benchmarks of market behavior, which ultimately depend on behavioral epistemology and group selection. Then, section V analyzes how diversity is dealt with within group selection, exploring how Hayek's conception of morality plays a key role in determining market outcomes. Section VI argues that Hayek's morality establishes a disregard for diversity within evolutionary processes, which in turn determine the normative standard for legal regulation. Therein, I advance that Hayek's proposal for private law does not hold up to basic pluralist standards. Section VII sums up the whole argument and offers clues for future lines of research.

II. Two conditions for pluralist development.

Hayek spoke of pluralism in terms of not having 'a common hierarchy of particular aims.' Indeed, he said, "[i]t is often made a reproach to the Great Society and its market order that it lacks an agreed ranking of ends. This, however, is in fact its great merit" (Hayek [1982] 2013, p. 269). Allegedly, the market-based institutions he envisioned would be able to support the coexistence of different types of behavior. If it were true, his institutional proposal could support some sort of pluralism, as he argued, but what is pluralism? What does it mean for society to "lack an agreed number of ends"? The purpose of this section is to develop a framework that allows to test his theory for pluralism. Parting from the common definition of the word and the views of Mäki (1997) and Foucault [1979] 2004, I recover two negative conditions that may account for institutional pluralism. As long as pluralism refers to the differences in behavior and the appreciation of them, it is possible to examine institutions by their capacity to foster or restrict such diversity.

Pluralism has been a rather loosely used word (Mäki 1997). So, to attempt at a rigorous examination of it, the first thing is to be clear on its meaning. In this sense, a basic way of approaching the word lies in the definitions that the Cambridge dictionary offers¹⁹:

- The existence of different types of people, who have different beliefs and opinions, within the same society.
- The belief that the existence of different types of people within the same society is a good thing.

The definitions, evidently, deal with the diversity within society in two different ways. While the first highlights the ‘existence’ of diversity, the second highlights the value judgement over the existence of diversity. The first definition brings forth a positive way of identifying pluralism. That is, it deals with how to recognize if there can be pluralism within a particular social environment. Herein, pluralism, in the first instance, can be understood as the presence of diversity, meaning differences in ‘beliefs and opinions.’ However, in a more general way, pluralism could be first identified with differences in the rules of thought or, moreover, differences in rules of conduct. In such differences coexist within society, there would be pluralism.

The second definition highlights the institutional character of pluralism. That is, diversity may (or may not) be recognized as valuable within a particular institutional arrangement. Mäki (1997) offers a similar approach when he says, “[p]luralism is a theory or principle that justifies or legitimizes the plurality of items of some sort” (1997, p. 39). His work develops an approach to pluralism which states the need for reasons/arguments and an object of plurality behind pluralism. This way, taking up from above, pluralism would be the justification of legitimation of differences in rules of conduct.

Mäki’s speech of justifying or legitimizing echoes Foucault’s studies on the restriction of discourse and practices. Foucault, however, might suggest a framework for the identification of pluralism at an

¹⁹ “Pluralism” in *Cambridge Dictionary of English* (2022). Cambridge University Press. Retrieved from: <https://dictionary.cambridge.org/dictionary/english/pluralism>.

institutional level. In his regard, it is possible to identify an opposite concept, veridiction. Veridiction (or the 'statement' of truth, from its Latin roots) consists of a way to restrict plurality by means of the distinction between truth and falsehood (Foucault [1979] 2004, p. 18). Herein, that means that different rules of conduct receive different qualifications: some may be 'true' while others 'false'. 'False' conduct is restricted because it is contrary to the normative 'truth'. Thus, institutions who establish strict normative reference points reduce plurality. This way, the restriction of conduct would not be pluralist, at least to some degree. Through Foucauldian lens it may be possible to characterize institutional pluralism: institutions are pluralist in as much as they consistently *allow for* differences in conduct. Those who instead reduce diversity in favor of an proper normativity are contrary to pluralism. This sets the present paper's starting point.

Furthermore, there may be two ways to specify this concern for diversity. If pluralism begins by the coexistence of diversity, the first thing would be not to eliminate or marginalize *existing* differences in conduct. In other words, a first condition for pluralist institutions is for them not to exclude diversity from the social interaction, that is, not to force out they who present diversity. The first thing, then, would be to analyze how institutional arrangements handle differences in conduct. Where differences are preserved without sacrificing diversity, it is possible to speak of fully pluralist institutions. On the contrary, if differences bring forth the elimination or the homogenization of differences, the same is not possible. Henceforth, the initial step to identify pluralist institutions is to find the mechanisms by which diversity is dealt with in an institutional environment.

The second thing, then, is for institutions to show some consistency in its welcome to diversity. That is to say, in a dynamic framework, the pre-existence or initial existence of diversity in discourse is not enough. Rather, as the second definition from above suggested, pluralism asks for such diversity to be treated as an asset. Consequently, a second condition for the assessment of pluralism would be for institutions to welcome *new* diversities that appear along social processes. Institutions may be pluralist in as much as they may embrace diverse conduct and the new possibilities for it. Closed institutional frameworks, even if diverse *within*, would be disregarding a part of the problem. In sum, pluralism would ask institutions to respect (1) and welcome (2) diversity.

The two basic conditions for institutional pluralism can be thus restated:

1. For an institutional arrangement to preserve existing differences in terms of conduct (respect); that is, neither to eliminate or homogenize diverse conduct as a result of its operation.
2. For an institutional arrangement to present open mechanisms to incorporate within society new diversities that come to be as a part of the social process (welcome).

These conditions differentiate *within* from *exterior* diversity. The first condition calls for an analysis of how diversities are dealt with when they are already present within the institutional environment. The second, instead, calls for an analysis of how diversities that are somehow exterior are approached (or not). For this reason, such an assessment of pluralism calls not only for a comprehension of political institutions but also of how individual conduct is theorized and inserted into the social environment. Only then it would be possible to judge if such a political framework is able to sustainedly be pluralist or not.

The problem that emerges is thus methodological: which is the adequate way to inquire into Hayek's theory and test out for these conditions? The present attempt will follow the suggestions from above. The present analysis of Hayek's theory will first account for his political theory. Then, his theory of the market will allow to comprehend how conduct is dealt with in the social process. Finally, I will identify the political restrictions imposed on the diversity of conduct.

III. A political order for market behavior

This section delves into Hayek's political theory. Hayek's is a sketch of a particular institutional design. Therefore, a revision leads to understanding the kind of social interaction he intended to privilege. Hayek, both an economist and a lawyer, based his political ideal on legal grounds. Therefore, this section will carry on the argument that his theory of the Rule of Law reflects the intention of making the market a self-regulatory principle of the political order. Therein, the spread rules of conduct from individuals determine the ways of the law in its intent to resolve social conflict. Thus, I will pave the way for an understanding of the origins of law and its social implications for pluralism, which will be the object of the following sections.

a. Hayek's design of the Rule of Law

This section will offer a reconstruction of Hayek's general design of political institutions and the way it regulates social conduct. Hayek developed his political ideal of the Rule of Law in *The Constitution of Liberty* in 1960, to later refine it in *Law, Legislation, and Liberty* (1973, 1976, 1979 in [1982] 2013). His theory, admittedly, starts by defining the general terms of freedom and coercion between individuals. Hayek's concern with freedom, as disentangled by Servant (2018), is essentially to provide "freedom to experiment" to individuals (p. 16). However, far from being an anarchist, Hayek attempts to incorporate the widest freedom -in the negative sense of the term- to the political order of society. Herein, by political I mean the organization of public institutions and all which conforms the "state" or "government", which I use indiscriminately. Within his political ideal, government and individuals are both subjects to rules, while government has the monopoly of coercion (Hayek [1960] 2011, pp. 71-72). Therein, market interaction becomes the criteria that dictates the adequacy of political institutions and regulation.

His political theory Hayek calls the Rule of Law. As the name suggests, its central theme lies in the power of laws, rather than of specific individuals or groups within society. Hence, its first characteristic is to make all organizations, individuals, and groups are subject to rules or, in other words, to establish rules as superior in command to any particular will. Thus, the power of government is immediately subject to the rules of society. In fact, Hayek speaks of government officials (or any powerful individual in office) as "only guardians and servants" of those rules (Hayek [1960] 2011, p. 242).

The protection of the law, in a general sense of 'rules', passes through the characterization of *articulated laws*. Hayek's rule of law establishes "a rule concerning what the law ought to be", or, as Hayek called it "a meta-legal doctrine" ([1960] 2011, p. 311). Particularly, he proposes two types of articulated law. On the one hand, private law deals with what he called the 'general, abstract rules' that govern the conduct of individuals towards each other (Hayek [1982] 2013, p. 82; cf. [1960] 2011, p. 72). Private law provides a general framework for social interaction beyond government action. On the other hand, public law is that which concerns the guidance of the efforts of common organization, i. e., 'the rules of organization of government' (Hayek [1982] 2013, p. 125; cf. p. 69, p. 116, p. 120). This one, instead, defines government functionalities, its range of action, and the possible use of coercion. Then, the

political order of society depends on the characterization of the legal system and relationship between the types of law.

Hayek assigns two functions to private law. The first one is to capture the knowledge from society's order of actions (cf. Hayek [1982] 2013, p. 113). Simply, that implies that private law must reflect ongoing ways of conduct but also adapt to their reconfiguration over time (Hayek [1960] 2011, p. 124). Therein, it has the task of institutionalizing the more general expectations about interpersonal relationships, constraints for individual action, and the possible social regulations of conduct, widely understood. Hayek's aim is for it to foster an "increased correspondence of expectations" about one's and others' conduct (Hayek [1982] 2013, p. 283). Private law first protects the beliefs that individuals already display.

Besides, private law has the second function of securing space for experimentation. In other words, the task for private law is to guarantee individual freedom and responsibility, i.e., the necessary conditions for it to happen. Hayek thinks of this guarantee as an individual space, or "sphere", of freedom and responsibility (Hayek [1960] 2011, p. 231). Those spheres, on the one side, provide "to each individual a known range within which he can decide on his actions" (Hayek [1960] 2011, p. 224). On the other side, they tell the individual "what possible consequences of his actions he must take into account or what he will be held responsible for" (Hayek [1960] 2011, p. 225). The spheres have the task of delimiting a range of action here the individuals face both choice and repercussion. Herein, though, the tasks of private law intertwine, as the protection of individual beliefs also shaped the regulation of individual freedom.

How can private law fulfill those functions? Hayek draws initially upon the Anglo-Saxon tradition of common-law. Therein, judges formulate the rules of private law, far from willful legislation. According to Hayek, judges are to perform law-discovery procedures. They "merely articulate already observed practices or (...) required complements of the already established rules" (Hayek [1982] 2013, p. 116, cf. p. 69). Therein, the role of judges requires both a meticulous attention to the ways of social interaction and the flexibility to re-adapt constantly:

The efforts of the judge are thus part of that process of adaptation of society to circumstances by which the spontaneous order grows. He assists in the process of selection by upholding those

rules which, like those which have worked well in the past, make it more likely that expectations will match and not conflict. He thus becomes an organ of that order. Hayek [1982] 2013, p. 113.

The law-finding practices consider two criteria: they protect reasonable expectations and leave the widest space for individual freedom. Thus, the law arises in the form of general, abstract rules that would support the ongoing order of actions and leave space for its development. Hayek calls the result ‘rules of just conduct,’ as they tend to reflect the legitimate expectations between individuals.

Any supplementary laws or corrections along the ways of regulation would be performed by a Legislative Assembly²⁰. The latter would have to sanction “all enforceable rules of conduct” (Hayek [1982] 2013, p. 450). It would secure the well-functioning of the whole system and democratic agreement. Thus, the judge’s discovery processes would be embedded in a democratic supervision for the formulation of rules of just conduct.

Public law, on the other hand, regards the “law of the organization of government” (Hayek [1982] 2013, p. 126). Hayek decidedly straps it of any regulatory function for individual conduct. Instead, its laws “would more appropriately be described as the regulations or by-laws of government” (Hayek [1982] 2013, p. 126). They are simply in charge of laying the instructions for the buildup and the action of government. Thus, “[t]heir aim is to authorize particular agencies to take particular actions for specified purposes” (Hayek [1982] 2013, p. 126). Public law oversees the mandatory and possible range of action of the state.

Thus, Hayek concerns himself with the distinction between legislative processes:

The ideal of a democratic control of government and that of the limitation of government by law are thus different ideals that certainly cannot be both achieved by placing into the hands of the same representative body both rulemaking and governmental powers. Hayek [1982] 2013, p. 369.

²⁰ More thorough analysis of Hayek’s design of political institutions, extended descriptions of the law-making procedures, and studies on his constitutionalism exceeds the possibilities of this paper. Boykin (2010) serves as a great introduction to the whole Hayekian political order and Martin & Wenzel (2020) dig into a more critical account of his constitutionalism. Zarama-Rojas’s (2021) working paper offers an account of the functionalities of the state, just as the second chapter of this work. Hayek’s own discussion can be found in the third volume of *Law, Legislation, and Liberty* (Hayek [1982] 2013).

Public law, clearly, is the one that reflects the ‘democratic control of government’. Therefore, Hayek proposes for it to be drawn by ‘Governmental Assembly’ ([1982] 2013, p. 454). Like the Legislative Assembly, this one is to be elected democratically, according to majority agreement (Hayek [1982] 2013, p. 350). However, they differ in their functions, the details of its composition (with which I will not extend myself), and their relation to the judicial system. The Governmental Assembly has the task of creating the laws from his government action stems, and thus has direct relationship with judges. Thus, *designed* public sets the ground for public institutions and public-private relationships.

What ends up assuring the over-all order of society is Hayek’s constitutionalism. Following him, “a constitution is essentially a superstructure erected over a pre-existing system of law to organize the enforcement of that law” (Hayek [1982] 2013, p. 128). In other words, a constitution serves to define the relationship between different types of law and to settle the grounds for their enforcement. Herein, his constitutionalism is to establish the system of rules of just conduct and then, regulate the role of public organization (Hayek [1982] 2013, p. 379). The basic principle of the ideal constitution would have to be:

[T]hat in normal times, and apart from certain clearly defined emergency situations, men could be restrained from doing what they wished, or coerced to do particular things, only in accordance with the recognized rules of just conduct designed to define and protect the individual domain of each. Hayek [1982] 2013, p. 445

That means that public law, on normal grounds, cannot interfere with the regulation of private law. This way, Hayek makes public law subject to private law. The authority of government, the organization of political institutions, and the demands from private-public relations come in second in relation to rules of just conduct (Hayek [1982] 2013, p. 454). Thus, constitutionalism closes the system of Hayek’s proposal for law.

b. The normative charge: market-based institutions

Where does the Rule of Law point towards? Hayek’s political ideal serves as a means to make social regulations and public institutions subject to the evolutionary process of society. First, by establishing the rule of the law, it gives authority to rules over all individual or group will. The rule of law stands originally intends to distance itself from old despotisms, authoritarianisms, aristocracy, or oligarchy.

By contrast, here the power and ultimate source of legitimacy is the conformity with a set of rules. Thus, the rule of law constraints the legitimacy of political leadership. Society and political discourse are confined within compliance with rules, so the arbitrariness or geniality of individuals/groups can express only within their legally defined roles.

Second, through articulated law, Hayek makes the political order follow the trends of social interaction. But how does he understand 'law'? Hayek does not refer immediately to democratic or technocratically drawn law. Neither does he restrict law to the articulated laws of jurisprudence nor the more general laws of constitutionalism. Hayek's conception of the law refers to the "rules which govern the conduct of individuals towards each other" ([1982] 2013, p. 83). That is to say, law corresponds to the rules of conduct that individuals generally practice in their interactions (Hayek [1982] 2013, p. 80). Therefore, the primacy of these rules means that the power passes from a personalized sovereign to the customs of social interaction. From its conception, the rule of law is intended to attribute the market order the status of the sovereign (cf. Hayek [1960] 2011, p. 310).

Hayek's theory of private law is an attempt to materialize such intention. The discovery processes of judges are to make sure that private law reflects the individuals' current order of actions. Besides, the continuous adaptation of law separates it from simple conservatism: reflecting the order of actions implies incorporating widespread changes in individual conduct. This way, private law reflects a whole intent of promoting the market as a normative reference for social development: it 'smooths' present market dynamics as expectations coordinate just to foster their evolution. On the one hand, private law protects competition by institutionalizing its behavioral fruits. The regulation of private conduct is made according to the expectations that have already been spread within the market. In other words, private law protects the behavioral devices that the majority utilizes. On the other hand, private law institutionalizes the space for experimentation. Spheres of freedom and responsibility assure that individuals get the chance of varying, modifying, copying, discarding behavior, so that new market processes arrive. The purpose of law, then, is to protect the dynamics of market interaction, to assist the autoregulation of the market.

Indeed, the system of private law makes market behavior a normative benchmark for society. In first instance, law gives it space to operate without other intromission and assume its consequences. According to constitutional design, the rules that govern the activity of government and public

organization cannot bypass the calls of rules of just conduct. Therein, one can presuppose that intromission are not *worth it*, because the law regards ideally for the market to run on its own. In other words, Hayek's private law communicates that the freedom of market behavior is more desirable than any intervention within it. In second instance, private law institutionalizes the behavior that the majority practices... on market standards. In other words, the criterion to select the rules of behavior that institutions protect is its popularity within the market. Private law resolves conflicts in favor of what market agents may learn to expect. Consequently, Hayek's constitutionalism makes public organization develop as a parallel device, which thus becomes unable to direct or alter the ongoing ways of behavior (Hayek [1982] 2013, pp. 484-5). All along, the favorability of institutions towards some displayed behavior depends on its proximity to expected market behavior.

For that reason, Hayek's rule of law serves to give institutional protection what becomes expected behavior in the market. The market dictates the 'truth' of conduct; it dictates what is allowed. Transgressing such expectations implies sanctions. Thus, along these lines Hayek says widespread manners become 'just' rules. Therefore, the political order makes the market a normative reference for over-all interaction.

Hayek's liberalism would impose a sort of tyranny of the market, even if it is the market's *displayed* and not its *declared* conduct who is protected. In this sense, his liberalism is really a form of biopolitics²¹. The rule of law, as a general theory of law and the state, offers a form of regulating all social behavior, without restricting itself to traditionally economic areas. Hayek places his understanding of the market as general framework for the comprehension of social phenomena. Therein, the political order makes the market a normative reference for all conduct. Market behavior defines what is 'just' (true) or 'unjust' (false) conduct in all the aspects of life, and government is not allowed any interference.

In sum, in the rule of law the autonomous dynamics of market interaction are the ones who govern society, as they are both protected by, and the shapers of, political institutions. Yet the origin of what judges might recognize as 'market behavior' has not been made clear. If market behavior is the normative standard for both the political and the social orders, how to characterize it? How does it

²¹ I take the term's usage from Foucault ([1979] 2004).

discriminate between just and unjust behavior? Can there be any form of pluralism within this confined political regime? Knowing that Hayek's theory gives prevalence to the market, the possibility of pluralism lies in answering those questions.

IV. The evolutionary clashes of the market

Hayek himself said that his individualism (and, thus, his liberalism) "is primarily a theory of society, an attempt to understand the forces which determine the social life of man, and *only in the second instance* a set of political maxims derived from this view of society" (Hayek [1948] 1980, p. 6; my italics). He claimed to ground his political ideal on his understanding of social processes. Therefore, a thorough comprehension of this theory of law asks for a revision of his social theory. This section will take up that part of the argument: it will show how market behavior is the result of an evolutionary social process. Parting from a revision of Hayek's epistemology, I will argue that protecting market behavior entails the protection of a form of market autoregulation, namely, group competition.

a. Epistemology: knowledge for social coordination

Hayek studies social phenomena regarding the problem of social coordination. Particularly, the object of Hayek's studies is the way in which individual plans coordinate. He sketches the main problem of his theory as follows:

There is a further question (...) which appears to have received no attention at all, and that is how much knowledge and what sort of knowledge the different individuals must possess in order that we may be able to speak of equilibrium. (...) Clearly there is here a problem of the *division of knowledge* which is quite analogous to, and at least as important as, the problem of the division of labor. Hayek [1948] 1980, p. 50; emphasis on the original.

The coordination of individual plans lies in the coordination of individual knowledge. That is, understanding social coordination implies understanding the knowledge that guides individual action. What is knowledge, which knowledge is relevant and how it is transmitted between individuals become central problems for social theory. The first problem, then, is to understand Hayek's epistemological underpinnings of individual behavior.

As hinted by last quotation, the relevant knowledge for coordination is nowhere to be found as a coherent apprehensible whole (Hayek [1952] 1979, p. 92). But what is knowledge? According to Hayek, knowledge exists “solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess” (Hayek [1948] 1980, p. 77; cf. Hayek [1952] 1979, p. 92). For Hayek, knowledge is fragmented, incomplete, and also contradictory. It is decidedly incomplete, possessed by ‘bits’, and some of them may be in conflict with others. His conception of knowledge is nowhere near to the standard Western tradition, as Scheall (2015a) has advanced. Instead of the ‘justified true belief’ or, more simply, the ‘true belief’ conceptions from the Aristotelian tradition, Scheall concludes that what Hayek means by knowledge are simply ‘beliefs.’ Following him, Hayek takes knowledge for the beliefs that individuals carry, consciously or not²².

Because of that, knowledge may be adjusted or corrected, or changed in any way. It characterizes individual processes of learning and discovery. Hayek’s study of the market responds to these epistemological conditions:

The significant point here is that it is these apparently subsidiary hypotheses or assumptions that people do learn from experience, and about how they acquire knowledge, which constitute the empirical content of our propositions about what happens in the real world. [...] But the assumptions or hypotheses, which we have to introduce when we want to explain the social processes, concern the relation of the thought of an individual to the outside world, the question to what extent and how his knowledge corresponds to the external facts. And the hypotheses must necessarily run in terms of assertions about causal connections, about how experience creates knowledge. Hayek [1937] 2014, p. 69.

Knowledge forms part of a process where beliefs are correctable. The problem lies in delimiting what knowledge is essential to social coordination and how does learning occur.

Hayek states knowledge has two objects according to Hayek ([1945] 2014, p. 95), namely, general rules and particular circumstances. General rules, as above, refer to the ways of individual conduct, but also to theoretical beliefs. They make up the individual’s relationships between phenomena, herself included. The knowledge of particular circumstances, on the other hand, refers to the knowledge held

²² For a discussion of Hayek’s regard on tacit knowledge, see Oguz (2010).

by the ‘man on the spot’; it is that of “time and place, of the fleeting circumstances of the moment and of local conditions” (Hayek [1952] 1979, p.175; cf. [1948] 1980, pp. 77, 80, 83). These beliefs, according to Hayek, guide individual plans and, thus, make social coordination possible.

Hayek adds, the growth of knowledge and that of civilization are the same “if we interpret knowledge to include all the human adaptations to environment in which past experience has been incorporated” ([1960] 2011, p. 77). Accordingly, he says that “[o]ur habits and skills, our emotional attitudes, our tools, and our institutions” (ibid.) are all forms of adaptation, all form of individual knowledge. In Hayek’s view, knowledge encompasses all the behavioral devices humans have come up with. The point is, precisely, that they are devices, so they provide some sense of adaptability for the individual in relation to her environment.

Therein, the key lies in understanding Hayek’s conception of ‘experience’ and how it is ‘incorporated’ into new rules of conduct²³. ‘Experience’ opens knowledge’s adaptative character. Beyond referring to local circumstances (‘time and place’, the knowledge of ‘the man on the spot’), knowledge refers also to the individuals’ process of adaptation to them. Thus, it includes the feedback that individuals perceive about the effectiveness of their conduct. Altogether, ‘knowledge’ opens to the knowledge of ‘experience’: a trying-and-judging process by which an individual gains beliefs about the efficiency of her methods for attaining goals (that is, behaving; Hayek [1982] 2013, p. 18).

‘Incorporating’ experience brings a new sense of how knowledge accumulates. What does it mean for behavior to ‘incorporate’ past experience? It reflects, somehow, past experience. Yet beyond a simple paraphrasis that means that behavior changes, somehow, considering previous feedback or, better, the individual’s judgment of it. The way in which conduct carries all the adaptative experience that shaped it is recognizable. So, individual rules of conduct carry the judgements on their efficacy. This way, behavior may incorporate an individual’s learning process in the sense that such learning can affect or shape future conduct. Behavior is epistemologically charged. These processes of learning and adapting behavior are the building blocks of social processes.

²³ Chapter 2 of the present work presents a more dedicated discussion of what experience means and its relevance within Hayek’s thought. See especially pages 30-31.

b. The market and the coordination of knowledge

The link between individual knowledge and social progress, in Hayek's theory, lies in market processes. This section will reconstruct Hayek's general characterization of the market, extended to spontaneous phenomena, and its epistemic capacity. His study of the market deals with the mechanism by which knowledge is coordinated. He frames it within the more general study of spontaneous phenomena, which are characterized by two elements. First, spontaneity assumes there is some degree of individual freedom. In Hayek's words, that means that each individual may use "*his* peculiar knowledge and skill with the aim of furthering the aims for which *he* cares" (Hayek [1948] 1980, p. 17, emphasis in the original)²⁴. Thus, spontaneous orders are, first, contexts of "free (and therefore not 'consciously directed') collaboration" (Hayek [1948] 1980, p. 22).

Second, spontaneity allows for the emergence of social institutions. There, they reveal to have epistemic advantages:

[T]he spontaneous interaction of a number of people, each possessing only bits of knowledge, brings about a state of affairs (...) which could only be brought about by deliberate direction only by somebody who possessed all the combined knowledge of all those individuals. (Hayek [1948] 1980, pp. 50-51).

Free interaction brings forth a social order where knowledge is brought together. Hence, it grows to be more than the aggregation of individual interactions. It gathers and coordinates the transmission of knowledge beyond individual capacities.

Indeed, in Hayek's theory the market is a generalized knowledge processor. Beyond the economic field, market interactions sustain the emergence of social institutions. These allow individuals to access the otherwise fragmented and disperse knowledge:

²⁴ Admittedly, freedom does not reduce all to instinctive or selfish behavior, but, rather, is the condition where everyone is able to plan for herself (cf. Hayek [1948] 1980, p. 79). A more detailed and critical examination of Hayek's conception of liberty/freedom goes beyond the scope of this paper. However, for extended analysis and some critical reviews see Gray (1998) and Gamble (2013).

it is not by the explicit or conscious combination of all this knowledge in any individual brain, but by its embodiment in symbols (...), in habits and institutions, tools and concepts, that man in society is constantly able to profit from a body of knowledge neither he nor any other man completely possesses. (Hayek [1952] 1979, 149-50; cf. [1948] 1980, p. 88)

Knowledge becomes available to individuals by its condensation in different kinds of social institutions, broadly speaking. They condense knowledge and guide the conduct of individuals, who profit from them. For this reason, emerged institutions allow society to cope with the division of knowledge. These institutions characterize the ‘state of affairs’ brought by market interaction.

Chiefly, this conception of both knowledge and the market covers a wide range of social institutions and behavior. It encompasses the emergence of behavioral and intellectual devices (“tools”, “symbols”, and “concepts”), but it also shapes interaction (“habits”). Market institutions may encompass all the ways of relationships individuals have between them and their reality. Hence, it is safe to assume that it is no other than this process which leads to the development and modification of rules of conduct. The market’s epistemic capacity is essentially more general than what can be seen in the economic field. The problem at hand now is to understand how the social combination of knowledge happens.

c. Social dynamics: cultural evolution

Hayek offered an extensive account of how markets process individual knowledge (and thus, shape conduct). Hayek framed social dynamics within individual processes of learning. Knowledge, again, is the key to social phenomena as long as it carries within previous feedback from individual conduct. Indeed, Hayek continued, “[o]ur habits and skills, our emotional attitudes, our tools, and our institutions—all are in this sense adaptations to past experience which have grown up by selective elimination of less suitable conduct” (Hayek [1960] 2011, p. 77). The efficacy of conduct offers a criterion for its gradual selection in the course of history. Hayek calls the process by which these widely conceived knowledge gets accumulated and selected the process of *cultural evolution*. This section will show how it can be, still within political restrictions, a plausibly pluralist process.

The mechanisms of the process may be understood sequentially, though Hayek did not think of them in that manner. Initially, individuals learn behavior by means of imitation, following their introduction

to the world (Hayek [1967] 2014). Then, individuals and groups begin to experiment success and failure in the attainment of their goals. They also become able to observe a wider range of others. They may test, judge, modify, copy, randomly variate, refine their behavior. This way, they start new processes of learning and innovation (Hayek [1960] 2011, p. 139, 143), where new rules of conduct get known and tested.

The behavioral learning and innovation of individuals becomes visible (and available) for others through social interaction. As a result, knowledge may spread (Hayek [1982] 2013, p. 488) and others get to test it, unleashing new processes of learning and innovation. By these means, codes of common rules of conduct emerge and social institutions consolidate (Hayek [1982] 2013, p. 18). Institutions combine the learning from individual experience and make new knowledge available for others (Hayek [1952] 1979, 149-50; cf. [1948] 1980, p. 88). In this manner, they foster new processes of testing and selection “by which society’s most effective devices prevail” (Hayek [1960] 2011, p. 88). The process of evolution leads from individual/group knowledge to the adaptative advantage of society.

The process of selection happens by means of society’s chief evolutive process, namely, group selection. Here, the diversity of beliefs becomes a starting point: “[t]he existence of individuals and groups simultaneously observing partially different rules provides the opportunity for the selection of the more effective ones” (Hayek [1960] 2011, p. 124). Differences in rules of conduct, as tools for dealing with the environment and attaining goals, lead to aggregate differences in social outcomes (Hayek [1982] 2013, pp. 42-3). Then, the effectiveness of certain rules becomes visible as group outcomes differentiate. At last, the most successful groups prevail over others by their capacity to attain their goals and/or prosper relative to others (cf. Hayek [1960] 2011, p. 88). In Hayek’s theory, group selection is this constant tension from diversity to prevalence, where society’s most effective practices and institutions are retained.

d. Characterizing market behavior

‘Market behavior’, the practices and institutions that the rule of law is meant to protect, is but the fruits of the competitive process of evolution. Indeed, Hayek’s liberalism reveals a political stance that goes way beyond the traditional frontiers of the market economy. All could be deduced from his

epistemological characterization of the individual: “Man is as much a rule-following animal as a purpose-seeking one”, says Hayek ([1982] 2013, p. 12). For such an animal, behavior means none other than an attempt to adapt. His freedom entails the possibility of learning and of the accumulation of knowledge, in all aspects of behavior. The process of social evolution encompasses all areas of behavior – ‘emotional attitudes’, ‘moral rules’, ‘tools’, ‘habits’ -, so the prescription for freedom and market-based regulation does it as well. What Hayek’s private law protects is the rules of conduct that survive the process of competition, that is, the rules of the groups who prevail.

Summing up, Hayek’s proposal for regulating private conduct presupposes market autoregulation. It presupposes that the competition between groups makes sure that resulting rules present some adaptative advantage. Any set of widespread rules would present it and other rules that may come are but a result of some other kind of adaptative advantage²⁵. The process reassures that presently expected behavior carries with it some condensed knowledge. Indeed, it is those rules about expected behavior that become laws under Hayek’s scheme. In the end, Hayek’s rule of law has a double task: assuring competition and adapting institutions to the moment’s spread behavioral devices. The first task is to protect the evolutionary process, where behavioral devices are born. The second is to select from those devices the ones that guide expectations and hold them as normative benchmarks for all behavior. Private law may change the content of its regulations, but it will always tend to reflect the spread knowledge from social evolution, that of dominant social groups.

V. The competitive ‘solution’: the possibilities of evolutionary competition

As said above, the market behavior that law takes as the standard for conduct emerges from evolutive processes. Prevalent groups thus set the behavioral benchmarks for all of society. Yet the way in which

²⁵ Hayek’s concern about freedom is, thus, instrumental. He defends freedom not as an end, but as a means for the ongoing process of social evolution to unfold. Legutko (1997) states (with scarce evidence) that Hayek has a parallel intrinsically moral argument in favor of freedom, while other commentators rightly pointed out Hayek’s instrumentalism (e.g., Petsoulas (2001, p. 31) and Gamble (2013, p. 348)). Clearly, he says “the chief aim of freedom is to provide both the opportunity and the inducement to insure the maximum use of the knowledge that an individual can acquire” (Hayek [1960] 2011, p. 144). That is, Hayek appreciates freedom in order to further the accumulation of knowledge by which we, eventually, become more able to distinguish the most efficient ways of attaining our goals. That means progress, “power over nature” in Hayek’s words ([1960] 2011, p. 85), but not necessarily prosperity as Friedman (1997) has suggested.

groups reach prevalence is still unclear. This section argues that an analysis of the conditions for group prevalence brings light to the problem. I identify internal and external conditions for groups to prevail. Therein, the struggle for group prevalence means tension in the relationship with outsiders, who become a resource or a menace for groups. Morality ends up the duality: outsiders, if they are really outsiders and display different behavioral rules, are disregarded as less valuable. In this manner, it is possible to obtain a final characterization of market dynamics that will allow for an overall assessment of the plurality of Hayek's rule of law in section VI. I claim morality establishes dynamics of exclusion within market evolution, closing the possibility of sustained coexistence for diverse groups and individuals.

a. The conditions of prevalence

Hayek refers to prevalence as condition of cultural primacy. Thus, attaining groups determine both the social and legal framework of society. The whole point of it can be seen when Hayek describes the challenge faced by dissenters or, anyhow, individuals who adopt differing rules of conduct: "To become legitimized, the new rules have to obtain the approval of society at large—not by a formal vote, but by gradually spreading acceptance" ([1982] 2013, p. 499). That is to say, the advantageous cultural and legal position of certain groups owes itself to widespread acceptance of their culture (rules of conduct). That would be both the core and the fruit of a dominant position. Hence, the question of pluralism asks for an understanding of how it may be attained and what relation it presupposes to different groups.

Luckily enough, Hayek elucidated the conditions of by which groups attain prevalent positions. He described their rules "spread because some practices enhanced the prosperity of certain groups and led to their expansion, perhaps less by more rapid procreation than by the attraction of outsiders" (Hayek [1982] 2013, p. 492). We can say, first, that cultural groups prevail as they overcome others in terms of relative prosperity or adaptability (Hayek [1982] 2013, p. 77, 140, 172, 498). They prevail as they become able to overcome hazards that others are unable to, or as they become able to sustain higher standards of living that other groups with differing rules are unable to reach. Second, groups prevail as they exceed others in their capacity to multiply their numbers. Herein, Hayek presents two non-exclusive mechanisms for population growth to drive selection: groups can multiply by their own

reproduction rate and/or by the inclusion of new members. Most notably, whereas the internal reproduction rate of a cultural group may not directly affect the relationship between groups, a group's disposition to include, absorb or exclude other members does.

Having in mind the present concern for pluralism, it is possible to separate as independent qualities the internal conditions for prevalence from those that involve the relationship with others. On the one side, prevalence may be attained as a result of internal factors such as technical/political/economic efficiency or the internal reproduction rate of the population. On the other side, prevalence involves the inclusion or exclusion of outsiders. Therein lies the possibility to identify diversity and how the market deals with it. Groups and individuals present diverse sets of rules. Hence, the problem of plurality lies in the way in which they establish the relationship with others. For the moment, it possible to say only that, as outsiders may affect a group's dominance in the evolutive process, there cannot be any neutrality: if outsiders are not part of a group's progress, they are unmistakably competing with it. In this manner, group selection implies a tension in between groups and outsiders, that is, diversity implies tension.

b. An open possibility

Up to this point, Hayek's is still an undetermined theory in terms of pluralism. Within the political restrictions that establish market privilege, the institutional framework could flexible enough to adapt to different ways of regulating conduct. In other words, the resolution of the tension between groups and outsiders could be solved pluralistically. This section analyzes the possible ways of relation between groups in Hayek's theory. Herein, I argue that within the different ways of relation there could be peaceful coexistence between the diverse, conditioned on their moral traits.

Hayek's account of the social order considers even the possibility of physically violent dominance. Therein, dominant groups could establish their dominant by means of war and the diminishing or expelling of outsiders. Hayek said, "the displacement of one group by another, and of one set of practices by another, has often been bloody" (Hayek 1988, p. 121). This way, groups would eradicate diversity in society, by means of forced exclusion or elimination. However, Hayek also says that bloody displacement "does not need always to be so" (Hayek 1988, p. 121). He considers also non physically violent relations. Indeed, not only does he attribute the monopoly of coercion to the government but

his view on cultural evolution does not consider physical conflict an unrestrainable or cyclical impulse within the history of humanity. Rather, Hayek's stance is that even if such impulses may be present, “[m]an has been civilized very much against his wishes” (Hayek [1982] 2013, p. 500). Physical violence might happen, according to Hayek, but it is nowhere near the rule for market evolution.

Cases beyond physical violence might be more interesting for the analysis of pluralism. The possibility of a peaceful, if maybe challenging, relationship with diversity may lie in other underlying rules of conduct of dominant groups. For instance, a group who displayed high degrees of tolerance would allow for more suitable institutions, even if with similar moral codes. Hayek speaks, in this manner, of an evolution by means of “relaxations of prohibition” (Hayek [1982] 2013, p. 494). Indeed, he speaks of the market institutions as being originated by tolerant groups. In his regard, the market order rose from

the toleration of bartering with the outsider, the recognition of delimited private property, especially in land, the enforcement of contractual obligations, the competition with fellow craftsmen in the same trade, the variability of initially customary prices, the lending of money, particularly at interest. Hayek [1982] 2013, p. 494.

The development of the Mediterranean economy thus rested on rules which “were all initially infringements of customary rules” (Hayek [1982] 2013, p. 494). The tolerance of some allowed for a diversity that later spread among most. In this manner, high degrees of tolerance can foster the diversification of rules of conduct beyond what is already allowed. Therein, higher tolerance would imply for less need for homogenization. Thus, existing diversity would be allowed to survive within the social order.

Besides, a group with a genuine interest in diversity could give birth to welcoming institutions for outsiders. That is, groups who learn to appreciate diversity would adopt institutions that bring forth pluralist types of regulations and allow the diverse to coexist in society. Such a group, for instance, could lead the adaptation of institutions to different types of rules of conduct. Federalization or decentralization are instances of it, and they are considered in Hayek's work (Hayek [1960] 2011, chapter 12). In these cases, the legal framework would better cover the particularities of the different groups within society. In sum, high degrees of tolerance and a genuine interest in diversity could lead the possibility of a pluralist coexistence between groups.

c. The hazard of morality

The wider possibilities of peaceful coexistence between diverse groups and individuals contrasts with the moral dynamics that Hayek envisioned. According to him, morals determine how individuals judge diverse behavior (Hayek [1960] 2011, p. 123; [1982] 2013, p. 527). They correspond to the rules according to which individuals judge (in)appropriate conduct and, thus, the value individuals (Hayek, [1982] 2013, p. 499). For this reason, morals appear as the decisive factor to understand the relation groups have with outsiders. This section analyzes how Hayek's conception of morality shapes such relationship within the process of group selection. Henceforth, I will show how in Hayek's theory morals imply an overall disregard for behavioral diversity that institutionalizes dynamics of homologation and exclusion.

Hayek defined morals as being part of "those rules of conduct which have grown as part of it [our civilization], which are both a product and a condition of freedom" (Hayek [1960] 2011, p. 123). Morals are the rules that make sure that "members of our civilization conform to unconscious patterns of conduct, show a regularity in their actions that is not the result of commands or coercion, often not even of any conscious adherence to known rules" (Hayek [1960] 2011, p. 123). So, Hayek conceives morals as the rules of conduct most responsible for the orderliness of society. For that reason, he says they are the most important rules of them all (Hayek [1960] 2011, p. 123).

However, Hayek says, a consequence of moral beliefs is that "[t]hose who observe the rules are regarded as better in the sense of being of superior value compared with those who do not" (Hayek [1982] 2013, p. 503). Accordingly, morals are not purely behavioral devices in an individual sense, but rather the rules that guide our reactions and judgement of others. That is, they do not only imply a value assignment for acts and behavior but also a judgment over other individuals. Therefore, morals, in Hayek's theory, imply a disregard for the diverse. Cultural diversity, which presupposes the adherence to at least partially different rules of conduct, is judged as less valuable.

This becomes clear by analyzing the role morals fulfill at a social level. They determine the criteria for association and determine the formation of social groups, as "[i]t is by the separation of groups and their distinctive principles of admission to them that sanctions of moral behavior operate" (Hayek 1982, p. 503). Moral judgements define each individual's worth in the eyes of others. *Thus*, they guide

the distinction between two types of conduct. On the one hand, there is the conduct transgressions that bring interesting innovation, while, on the other, there are those which, instead, form a sort of inadmissible 'bad mannerism'. This dynamic can be seen when Hayek says:

The conscientious and courageous may on rare occasions decide to brave general opinion and to disregard a particular rule which he regards as wrong, if he proves his general respect for the prevailing moral rules by carefully observing the others. But there can be no excuse or pardon for a systematic disregard of accepted moral rules because they have no understood justification. The only base for judging particular rules is their reconcilability or conflict with the majority of other rules which are generally accepted. Hayek [1982] 2013, p. 503.

That means that morals make groups allow only for piecemeal change in behavior and, besides, that any further attempt at cultural diversity is condemned.

For this reason, in Hayek's theory, morals set the limits for tolerance and innovation. Even if 'successful' innovation can inspire followers and imitation, it turns into a motive for exclusion when it involves several differences in cultural traits²⁶. Linking moral judgement to both personal judgements and group discrimination rules out the case of a non-violent cultural association. As innovation is allowed only by tinkering tradition, diversity is either homogenized (and integrated, then) or excluded (where differences in rule-following persist). In other words, cultural evolution involves either forced domination or a struggle to establish it.

Hayek poses a *trade-off* between diversity and the rigidness of moral tradition. A rigid moral tradition makes it harder for its group to coexist with others. For the judgement anyone makes about some act *also* brings along the (dis)approval of they who performed it, and individuals are (un)welcomed accordingly. Stronger differences in rules of conduct would mean greater chances of individuals and groups excluding each other. Morals are the link between the individual esteem for others and the dynamics of group inclusion/exclusion. That is how one can interpret Hayek saying "morals are preserved by discriminating between people who observe them and those who do not" (Hayek [1982]

²⁶ Álvarez and Hurtado (2015) present a very interesting study of how this can be understood from the grounds of Adam Smith's sympathy. Through a mathematical modelling of interindividual sympathy, they show that Smith's system can also lead to social exclusion due to the asymmetrical character of the sympathetic processes.

2013, p. 502). The limits of morality are the exclusion of the outsider; the tighter they are, the more others are left out.

Morality, in sum, implies that Hayek's theory is somehow closed to the plurality of rules of conduct. First of all, as diversity is underappreciated, social groups are unwilling to welcome different individuals. Diversity is always neglected, at first, because of its relative minor moral worth. For this reason, cultural evolution purposefully leaves behind the purpose of welcoming diversity and leaving space for more flexible institutions. Thus, diverse groups and individuals face culture as an obstacle to participate in society. In second instance, morals determine the attachment to a definite set of rules as a criterion for participating in society, so cultural diversity is either excluded or homogenized. After group competition, strong differences in behavior are unlikely to persist. Hence, prevalent groups tend toward hegemony, where diversity is not allowed. In any case, considering Hayek's conception of morals, predominant groups can but homogenize or exclude outsiders.

VI. An assessment of the market's (anti)pluralism

The previous section analyzed the process of group selection and how diversity might be dealt with within it. As said above, the moral (in)disposition to welcome outsiders has consequences over the way in which the social order is constituted. This contrasted with the more open possibility offered by group selection when Hayek's conception of morality was not yet introduced. Thus, the introduction of morality conditions the social process and the coexistence of diverse groups. This section analyzes the consequences of those different scenarios for overall legal pluralism, in accordance with the conditions from section II. I advance that Hayek's conception of morality blocks the possibility of partial pluralism that may be envisioned within the rule of law.

a. The configuration of market behavior

Before a complete development of the mentioned cases, it is necessary to understand how the dynamics of group competition shape the legal framework. This section -briefly- takes on the job. Afterwards, the path will be clear for the analysis of how moral traits might influence the pluralism within the rule of law.

The starting point to understand how market behavior shapes regulation might be considering the case of a single group who holds the dominant position. Any such group would be, even unwillingly, guiding the expectations individuals have about what is acceptable conduct. Thus, generalized expectations, market behavior, would be guided by the group's common expectations. The case of co-dominant groups struggling for prevalence offers two possibilities. On the one hand, when groups struggle for dominance on equal terms, the social order might get along under the minimum common set of rules, as if it were one dominant group with partial internal divisions. Then, the conclusions would be the same as the ones drawn above in the case of a single group. On the other hand, when groups are not equally dominant among the population, market behavior could present biases that reflect the relative dominant positions of the groups. In this case, (the most) popular expectations are unclear (meaning hidden or ambiguous) or biased by the dominance of some groups in relation to others. However, expectations are not suited to the morality of every group, so diversity entails a constant battle for legitimization (homogenization). In any case, the (co)dominance of groups brings forth either some set of common minimums (baseline homogenization) or a struggle to achieve single prevalence (full homogenization). Conflicting morals mean market expectations are (1) imposed for all on a single group's basis, or (2) ambiguous and in conflict in the basis of the competing moralities of different groups.

These expectations would shape the law's regulation of conduct. Recall (section IV.d**Error! Reference source not found.**) private law is 'discovered' based on market behavior and 'just' expectations, and market behavior is identified through the social dynamics of evolution. Additionally, the dynamics of evolutions lie in the competition process of group selection. Group selection bring forth the set of behavioral devices that make the basis for regulation. Therein, morals may bias the process towards the set of rules held by prevalent groups. Thus, the disposition those groups have towards the inclusion of outsiders determines the openness of society's institutional framework.

b. (Yet) an open possibility?

Even among the normativity of market behavior, some degree of pluralism could be appreciated prior to the analysis of Hayek's morality. Thus, it is useful to return to the conditions that may allow to identify it. Pluralism as here intended has two of them: (1) for diversity to be preserved (not

marginalized or erased; condition of respect), and (2) for institutions who allow new diversities into society (welcome condition). The task of this section is to explore to what degree the rule of law could sustain pluralism.

If morality could be conceived alternatively, mild diversity could coexist within Hayek's rule of law. As highlighted in section V.b, high degrees of tolerance can let diverse individuals into the proper social sphere. If dominant groups possess the trait, the expectations for market behavior would be less tight. Therein, the number of prohibitions and regulations of private law could decrease. Then, market-based law would be increasingly adequate for diverse groups. As much as differences are tolerated, admitted diversity would no longer be homogenized or excluded. This way, higher degrees of tolerance would imply higher accomplishment for the respect (1) condition of pluralism the whole legal framework.

Nevertheless, only complete tolerance could imply a perfect accomplishment of the condition of respect. Greater tolerance means the capacity to coexist with the *more* diverse, but it certainly is limited. If groups form by sharing of rules of conduct, it is not possible to establish terms of coexistence where absolutely anything goes. Within Hayek's rule of law there would always be at least a minimum set of rules by which any group sets their cohabitation. Indeed, market behavior would always present some kind of restrictions for individual conduct. Therefore, tolerance would allow for higher degrees of respect of pluralism, but never a full accomplishment. Tolerance is not enough to preserve more radical diversity, while complete tolerance is not possible.

Therefore, in the rule of law there would always be some degree of homogenization for present diversity. In accordance with the tolerance of prevalent groups, market regulation could be less restrictive. Yet it must be restrictive somehow, in accordance with the minimum moral code that characterizes social groups. Thus, market behavior always can always be identified with a positive set of rules of conduct that will set the borders for the preservation of diversity. In other words, the pluralist condition of respect can never be fully achieved within Hayek's theory.

The accomplishment of the second condition (welcome) would rather be associated with a genuine interest in diversity. As said above, groups with such a trait could plausibly grow institutions that serve the integration of others. Within Hayek's theory, that would be the condition under which flexible

and welcoming institutions could grow to allow the coexistence of different traditions and cultural matrices. Such “culture of encounter”²⁷ could, with ever-renewed enthusiasm for otherness, allow for a development in dialogue and institutional re-adaptation, leaving space for the welcome pluralism within Hayek’s theory.

In this case, institutions such as the transitional regimes of justice, the diversification of the types of citizenships, and open labor and migration regulations could be an example. They are institutions by which a group lets outsiders into its institutional framework. Thus, they effectively allow to deal with new diversities and offer modified regulations. This implies dominant groups hold more open expectations for the conduct of outsiders who arrive, and thus common law adapts its criteria. Under these conditions, the welcome aspect of pluralism could be achieved within the rule of law.

It is possible to identify a caveat when only the welcome condition is met. If the welcome condition is attained but the respect condition is not fully accomplished, new diversities are only temporarily preserved in their complete form. In other words, newly incorporated diversities can withstand as they are only in as much as they are *entering* the institutional framework. After their entrance, they are in the situation of preexisting diversity: they are forced to accommodate to the (even minimum) regulation of cohabitation. That means that new diversities face the restrictions of the partially accomplished respect condition. They persevere in as much as their diversity is reconcilable with the minimum standards of prevalent groups, however tolerant they may be.

c. Individual morals and legal closure

The scenario changes by considering Hayek’s conception of morality. As shown before, his conception of morality implied a disregard for the diverse and its underappreciation relative to group morality adherents. Thus, group selection makes it adverse for diversity to participate within the space of social interaction. This section explores the consequences of such adversity on the dominant cultural matrices of market behavior and thus, for law. Considering the role Hayek assigns to morality

²⁷ The term “culture of encounter” does not belong to me. Rather, it traces back to Azurmendi’s (2018) anthropological studies of tribal religious communities in Spain during the past decade.

in evolution and the normativity of market behavior for legal regulation, his proposal for private law becomes a scenario of exclusion for diversity.

Indeed, the present text has shown that Hayek's conception of morality implies a disregard for the diverse and a constant pretense for homogenization. There is no chance of expecting institutional space for the diverse. Thus, the moral intolerance of prevalent groups determines what is called market behavior. Henceforth, legislation and overall legal frameworks within Hayek's theory have to reflect the expected intolerance towards diversity and regulate both freedom and coercion accordingly. In this manner, in the end, Hayek's rule of law would be an environment where diverse individuals would have to forcefully yield to the social pressure or become able to resist in spite of it (to then search a diverse hegemony themselves). When the law supports the autoregulation of the market, understood in Hayekian terms, it gives institutional protection to dynamics of exclusion.

VII. Conclusions

There is some hazard in following Hayek's institutional theory. His proposal of the Rule of Law sets clear lines for market-based institutions, in which market processes are given space to operate freely. Therein, Hayek proposes the regulation of private law on the basis of individual freedom and market behavior. Law reinforces the behavioral devices that prevail within the market. With that in mind, this paper delved into the origins of expected market behavior to understand what law is protecting within Hayek's theory. An analysis of his social theory reveals market behavior obeys evolutionary dynamics. Behavioral expectations come from the accumulation of knowledge in social adaptation, so they carry along some adaptative advantage for the group to which they belong. Both the set of behavioral devices (rules of conduct) and their adaptative advantage characterize the relative positions that groups occupy within society. Constantly, says Hayek, it is the most efficient groups who determine the behavioral matrices of society.

Within social evolution, prevalence is evaluated by wealth/welfare measures, and population growth. Many of these factors might follow internal dynamics for every group of individuals, but some part of populational growth may be attained by including or excluding outsiders. Therefore, the coexistence of different groups brings forth tension, it poses the problem of how to relate to others. The determinant factor, then, is morality. Hayek's conception of morality is such that individuals judge not

only the worth of actions, but of individuals themselves, and they disregard transgressions of moral rules. Thus, the evolutionary process is characterized by an underappreciation of the diverse. As a result, the market is the space for moral dominance, and legislation by discovery processes is biased towards dominant sets of rules. Where law supports the autoregulation of the market, it institutionalizes dynamics of exclusion.

In this manner, this study contributes to the assessment of the capabilities of liberal institutions. Following Hayek's account, market processes do provide some sense of adaptability. However, if left to autoregulation, they tend to homogenize or exclude diverse individuals. Thus, market-based law is not able to peacefully incorporate differences between social groups. In this manner, the over-all argument of this present paper puts forth a challenge for market-based institutions. The questions are left open if other conceptions of morality may resolve these inherent market dynamics or if other normative standards may be needed for an adequate design of legislation.

The questions of when, where, and for what contexts may market institutions be more adequate is also left open. The possibility for contexts and particular cultures to partially offset or reinforce the biases of political institutions suggest the need for further contextual studies. The flexibility and the biases of market institutions might be especially valuable, for example, where access to power may be evenly distributed. Still, thinking of it in a dynamic framework poses serious trouble. For this reason, among other possibilities, we have yet to engage the fascinating endeavor of associating institutional strengths to contextual paths of development.

Besides, a thorough revision of Hayek's market and moral theory shows that market homogenization and exclusion dynamics occurs primarily within social interaction. It is Hayek's conception of morality that leads to necessary exclusion within cultural evolution. Tight morals, such as Hayek's, constraint the possibilities of association and the relationship between groups and outsiders. Particularly, the way in which morality conditions the esteem for other individuals and the criteria for inclusion/exclusion of others in social interaction seem to be the main determinants of cultural violence. For one thing, as diverse individuals are considered less valuable, there is no interest in the emergence of flexible welcoming institutions, that is, in inclusion. Hence, diversity outside the group can be only homogenized or left aside. For another, as the lower esteem for the diverse marks a criterion for group membership, there are strict dynamics of social exclusion within the group. Thus, social interaction

tends towards the marginalization or elimination of diversity within the groups. Henceforth, this paper calls for a wider understanding of how individual morals may have substantial impacts over the course of social development.

Indeed, as problematic as may be, this study suggest tolerance is an insufficient foundation for peaceful development. Not only the unwillingness to exclude diverse individuals, but also the interest to let new others participate of social interaction are main conditions for the emergence of pluralist institutions. Thus, the present analysis may give ground for further theorizations of how power and dominance may exert artificial barriers to development. The defense of purely market societies is not culturally neutral. Rather, it favors of those social groups who might have better chances to attain power to resist others and/or impose themselves. The integration of economic studies with behavioral-philosophical studies is thus an open door.

Conclusion

Hayek's theory provides still a wild journey from the psychological foundations of human behavior to the characterization of liberal institutions. Consequently, Hayek allows us to consider the policy-relevance of theoretical psychology. Drawing back from the three chapters, it is possible to affirm that market phenomena pose both some kind of adaptative advantage and some moral risks. At the moment, this would stand as the judgement upon Hayek's proposed institutional framework. In this section I will gather the main arguments from the dissertation and expose the possible crossroads and paths of research they point out.

The dissertation started by discussing the psychological underpinnings of Hayek's appreciation of the market. Therein, in Chapter 1, I reviewed how the literature on Hayek has claimed both the importance of the book for Hayek's criticisms and its incapacity to ground his positive social theory. I addressed the last remark by delving into Hayek's theory of evolution, his form of social theory after TSO was published. In this manner, one could conclude that TSO provided psychological background for the understanding of market processes and the selection of effective individual experience. This argument, on the one hand, calls for further updates of Hayek's psychological theory. On the other hand, it suggests that individual experience is a foundational element for the adaptability of market processes.

The second chapter was an intent to prove that last suggestion. In Chapter 2, I reviewed the epistemology of individual experience, built around the individual learning and innovative processes (what I steadily called ILIPs). On that basis, I showed how Hayek conceived progress as crescent adaptability, or 'power over nature', framing progress within a problem of uncertainty. Thus, he viewed spontaneous orders as the major providers of experimentation. Their protection and accompaniment can be seen as the criterion Hayek utilized to delimit the tasks of public institutions. Thus, the openness to experience-making can be properly confronted as a guideline for Hayekian policy projects. Indeed, I suggests negative Hayekian assessments of policy, such as Rizzo & Glenn (2009, 2019 & 2021) and Bergh (2019), could profit from such a forward policy criterion. Yet such a possible utilization, whether it is actually implemented or not, would not erase the significance advancement

in the comprehension of Hayek's institutional framework. The study of this chapter further reaffirmed the need for further confrontation of the psychological foundations of Hayek's theory.

In this manner, after a wide comprehension of Hayek's institutions and their theoretical underpinnings, Chapter 3 attempted their assessment on pluralist grounds. Here, instead of attaining to previous contributions (also because, of my knowledge, there is nothing similar), I drew upon external literature on pluralism. Particularly, I used Mäki's (1997) reappraisal of the term and Foucault's ([1979] 2004) work on institutional veridiction to build two conditions for its accomplishment. In the end, after a thorough revision of Hayek's political and evolutionary theory, I conclude that his theory does not stand for full pluralism, as it imposes some restriction upon individual conduct. Therein, notably, the moral association of 'just' conduct and 'allowed' people pose a central problem. Notwithstanding, I also find it might be able to sustain partial versions of pluralism depending on the moral rigidity of dominant groups.

In sum, this dissertation provides an initial effort to assess the contemporary fitness of market institutions. Clearing out foundational relations, Hayek's liberalism is a defense of market adaptability and moral exclusion. This conclusion, on the one hand, elucidates the possibility of nurturing the economic assessment of institutions with interdisciplinary research able to mix economic, behavioral, and philosophic insight, such as attempted by Guala (2018). The understanding of how group interaction and individual coordination shape institutions is still open and may be object of synthesis across disciplines.

On the other hand, the crossroads between the different arguments in this dissertation suggest the need for understanding how morality may affect (or not) the efficient processing of knowledge. In an updated psychological framework, it is reasonable to expect the possibility of learning and the willingness to accept or reject different kinds of behavior to be interrelated. Thus, the whole argument here presented points also towards the study of what may be generically called 'epistemic attitudes' and how they may tamper with social evolutive processes. Hayek repeatedly called economist and social scientists for humility ([1952] 1979, p. 180; [1974] 1989, p. 7; [1982] 2013, pp. 83-4; cf. [1948] 1980, p. 32). Though unexplored within the secondary literature, both an internal (Hayekian) and updated (external) comprehension of what his call could mean could prove useful for a definitive understanding of the fruitfulness of his theory.

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