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Social Justice and the Formal Principle of Freedom

Abstract The aim of this paper is to show, *contra* the right-libertarian critique of social justice, that there are good reasons for defending policies of social justice within a free society. In the first part of the paper, we will present two influential right-libertarian critiques of social justice, found in Friedrich Hayek's *Law, Legislation and Liberty* and Robert Nozick's *Anarchy, State and Utopia*. Based on their approach, policies of social justice are seen as an unjustified infringement on freedoms of individual members of a society. In response to this critique, we will introduce the distinction between formal and factual freedom and argue that the formal principle of freedom defended by Hayek and Nozick does not suffice for the protection of factual freedom of members of a society, because it does not recognize (1) the moral obligation to help those who, without their fault, lack factual freedom to a significant degree, and (2) the legal obligation of the state to protect civic dignity of all members of a society. In the second part of the paper, we offer an interpretation of Kant's argument on taxation, according to which civic dignity presupposes factual freedom, in order to argue that Kant's justification of taxation offers good reasons for claiming that the state has the legal obligation to protect factual freedom via the policies of social justice.

Keywords: social justice, social policy, taxation, freedom, dignity, Hayek, Nozick, Kant

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Should a society enforce policies of social justice and on what grounds? We will deal with this problem by presenting two influential right-libertarian arguments against the policies of social justice and against the very meaningfulness of social justice – arguments offered by Friedrich Hayek and Robert Nozick. We will argue that their critique is based on what they claim to be the grounding principle of a legitimate social order – which we will call the formal principle of freedom. In response to their critique we will suggest that, in order to justify policies of social justice, such as taxation, social minimum, social housing, universal health care, public education, unemployment benefits, gender justice and similar policies aimed at greater equality among members of a society, we need a more robust concept of freedom. This will lead us to propose a difference between formal freedom on the one hand and factual freedom on the other hand, in order to show why we believe that social justice indeed has a meaning and what we see as the main elements constituting its meaningfulness. As we intend to show, justifying social justice requires attributing value to another principle: the principle

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of factual freedom, i.e. the principle of respect for human life and dignity. Moreover, the principle of factual freedom can be understood not only in the ethical sense of governing individual behaviour, but has an important legal dimension as well. In the second part of the paper we will discuss the latter via Kant's argument on taxation which, as we will argue, rests upon an implicit defence of factual freedom, and thus can help us respond to the right-libertarian critique of social justice.

The issues revolving around the concept of social justice that we will discuss emerge in the context of the aftermath of the Second World War, The Cold War, and the problems of planned economies. Hayek's and Nozick's critiques presented here are mainly directed at the socialist planned economies and Keynesian economics, which was the dominant economic model from the later part of the Great Depression until the 1970s. Both sources of which we make use, Nozick's *Anarchy, State and Utopia*, as well as Hayek's *Law Legislation and Liberty* were published in the 1970s, the years which saw first the economic recession and then the general acceptance of neoliberal policies and neoliberal economic theories (with Hayek as one of their main proponents), as well as libertarian political ideals Nozick influentially advanced. Arguments against social justice discussed here should therefore be seen as contributing to the arguments against state planning of the economy and as an attempt to limit government intervention in the society. We begin with a presentation of Hayek's and Nozick's critique of social justice.

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Critiques of Social Justice

Hayek's Four Arguments

When discussing Hayek's critique of social justice we can distinguish four interrelated key arguments: the ontological, the epistemological, the economic and the political argument.

The ontological argument is in fact the argument for social justice as a meaningless concept. The argument is called ontological because it reflects the ontological view of society as comprised of individuals and rejects the idea that there is a social entity with its own collective will. Only individuals with their individual wills exist. Our societies, says Hayek, are ordered, we have laws, institutions, customs, and we respect certain rules. We tend to understand this order as produced by somebody's deliberate design (whether it is a particular person, or a group of persons, an institution, or a class). However, this is not always the case. In fact, social order can, and in very complex societies most of the time does arise spontaneously, out of many discrete actions of many individuals which are mutually ignorant of any overarching goal or the entirety of the process. (Hayek 2013: 34–50) Out of this Hayek

derives his critique of social justice. For Hayek, only distributions that have been deliberately brought about can be called just or unjust. The term ‘justice’ has meaning only within the domain of deliberate actions. Unequal distribution of wealth produced by the “impersonal process of the market” cannot be called unjust, because it was not intentionally produced. When we attribute justice or injustice to the market, we mistakenly transfer our experience of personal face-to-face relationships to a realm where this is inapplicable. (Hayek 2013: 231–234, Tebble 2009: 583–585)

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The second, epistemological argument states that if we attempt to create and preserve a just distribution in our society, we are faced with an insurmountable difficulty. Namely, we cannot predict the outcome of our actions, because there is too many factors in play. Market does not operate according to a deliberate plan and its outcomes are unpredictable. Deciding how to distribute resources based on some non-market criterion, such as people’s needs or equality, will necessarily be flawed, because people’s needs and intentions are many and changing, they are individual and impossible to calculate. They are in fact best reflected by the price of goods in the free market and the best way to manage them is to let people decide by themselves about their needs. (Hayek 2013: 250–253, Tebble 2009: 586–588)

Furthermore, according to Hayek, economically speaking it is more prosperous not to intervene in the market. Interventions are dangerous for the economy because they disturb the natural system of prices, which are only capable of giving us accurate information about supply and demand, enabling us to make good economic decisions. Moreover, economic inequality is socially necessary. The market only functions properly “at the price of a constant disappointment of some expectations”. (Hayek 2013: 267) This is the value of free competition for Hayek. It makes all the economic agents, both the successful and the unsuccessful ones, learn from the process, develop their skills, adjust and innovate. It is through such dispersion of knowledge that society can prosper.

Last but not least, social justice endangers individual freedom by putting too much power in the hands of the government. Prices “lose the guiding function they have in the market order and would have to be replaced by the commands of the directing authority.” (Hayek 2013: 245) “No less than in the market order, would the individuals in the common interest have to submit to great inequality – only these inequalities would be determined not by the interaction of individual skills in an impersonal process, but by the uncontradictable decision of authority”. (Hayek 2013: 245) The pursuit of social justice “must progressively approach nearer and nearer to a totalitarian system”. (Hayek 2013: 232) Instead of this futile attempt at creating a society of social justice, Hayek argues, the state should provide the framework

for the free market, i.e. it should provide the set of formal conditions for the free competition in the market to take place.

However, it is worth mentioning that Hayek ultimately defends the state provision of the economic minimum. In the end, he conceded that there is no reason to reject the minimal income safety net in a free society, as long as we find some outside-of-market mechanisms for this. (Hayek 2013: 249). What does this mean though is not completely clear, because redistribution always involves at least via taxation, some sort of intervention in the market. This concession actually made his theory vulnerable to attacks, because it contradicts his earlier arguments against social justice (Tebble 2009). It shows perhaps that contrary to everything previously said, Hayek was aware that in a free society some role should still be left for social justice.

Nozick's Entitlement Theory

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Nozick gives us some similar arguments as Hayek. He too accepts spontaneous order explanation and uses it to argue that the main aim of the state should be the protection of individuals against infringements on their freedom. The infringements involve use of violence, coercion, murder, theft, fraud, etc. Any more extensive state is unjustified because it violates individual rights of its citizens. Whereas Hayek's arguments are more epistemologically based (Hayek argues that we don't know what others need, we don't know what possible ill effects our actions could have on the market, so it's best to leave the market to function on its own), Nozick's arguments are based on the theory of natural rights. This allows him to make an even stronger case for inappropriateness of state intervention and redistribution, because in order to rectify inequalities, the state would infringe upon private property rights of individuals.

Social justice is about redistribution. It is about taking away from the wealthier and giving to those who are less fortunate. Nozick argues that this is not morally justified because every person should be guaranteed the right to decide on his or her property.

To support this claim he develops the entitlement theory of justice. We will quote Nozick's summary of his theory: "the holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer or by the principle of rectification of injustice." (Nozick 1974: 153) These two principles, of acquisition and transfer basically state that if a person acquires property in a morally permissible, lawful, just way (whatever this is, is rather complex and depends on the context), he or she is entitled to that property. The same goes if that property is transferred in a morally permissible, lawful and just way to another person. "Entire distribution is just if everybody

is entitled to the holdings they possess under the distribution.” (Nozick 1974: 151) And: “Whatever arises from a just situation by just steps is itself just.” (Nozick 1974: 151)

Nozick argues that it is important to take into account how a particular distribution came about, that is, whether a person acquired a holding in a just way and is therefore entitled to it, rather than simply looking at the distribution at a given time and judging that it is just or unjust based on the distribution itself. For example, if somebody judges that it is not just that so many people are starving, while a minority is extremely wealthy in a given society, that would be an ahistorical approach to justice and for Nozick the judgement would be flawed as long as it does not take into account the history of the acquisition. (Nozick 1974: 153–155)

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Moreover, Nozick labels his entitlement theory as non-patterned, which means that the just distribution is not generated by some sort of decision on who and based on which characteristics should get what, but by a set of formal principles, formal rules in the game of just acquisition and just transfer.

Nozick gives a vivid and concrete example of his views in describing a hypothetical case involving a very successful basketball player at the time, Wilt Chamberlain. (Nozick 1974: 161–163) Nozick says let us start with any distribution that you consider just, let it be for example, that everyone has an equal share of wealth. Now, Wilt Chamberlain attracts audience, everybody loves to see him play, because he is so good, and various basketball teams compete to have him on their team, and so on. He decides to sign a contract with his basketball team, whereby he will get 25 cents out of every sold ticket. Everybody is ready to pay the price but in the end Wilt Chamberlain will have 25 000 dollars more. The distribution of wealth will become unequal. Where did everything go wrong? Nozick says, nowhere, Wilt is entitled to his money because no injustice has been done to anyone during the transfer, everybody willingly agreed to give him one small portion of what they have in exchange for the pleasure of seeing him play.

What this argument is meant to show is that any distribution of wealth in a free society will be unequal. If we allow people to freely exchange their holdings, we will inevitably end up with an unequal distribution. If we want to keep the distribution equal we would have to constantly interfere with people's lives. (Nozick 1974: 163)

Finally, why we shouldn't stop this from happening, why not simply stop the free exchange, is because it would be immoral. It would interfere with individual property rights, the rights to choose what we want to do with what we have. The basic fact of morality is that everybody should be allowed to live his or her life the way he or she wants, as long as they don't hurt anybody

else. Nozick is radical in endorsing this principle, so much so that for him taxation is the same as forced labour, because it forces us to do unrewarded work for others. (Nozick 1974: 172)

Should we say that for Nozick social justice is meaningless? The weight of Nozick's argument does not rely primarily on social justice being meaningless concept. However, it deprives social justice of its moral meaning. This effectively makes demands for social justice meaningless, because they rely on the premise that social justice is a morally desirable goal.

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From these arguments we can derive the main principle both Nozick and Hayek see as the principle that every legitimate social order must respect. They did not invent this principle. It is the very same principle we find in Adam Smith, John Locke, John Stuart Mill and other classical liberals. It represents the social ideal of individual independence and liberty. It respects as the basic moral fact that everybody has their own life and should have freedom to decide on what makes their life valuable. In the words of John Stuart Mill: "The only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others." (Mill 2003: 80) The free society is the society which fulfills this condition.

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The freedom established by this principle is identical with what Isaiah Berlin calls negative freedom, freedom from infringement. "I am normally said to be free to the degree to which no man or body of men interferes with my activity. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree." (Berlin 2002: 169) We named this principle the formal principle of freedom, because it fixes only the necessary formal condition of freedom, but not the sufficient conditions of factual freedom. The latter include all the possibilities open to me and all those closed to me based on the concrete, material circumstances of my life and the society I live in. It is the factual, not the formal freedom that we experience in our everyday lives. We experience freedom and unfreedom in relation to certain concrete possibilities that we have or don't have. Most of the time, such experience is linked to the resources that we have or don't have, and to the concrete power relations in our society. Resources have an important influence on the factual freedom, because they greatly determine how much power we will have to change circumstances that are unfavourable to us.¹

¹ The term 'factual freedom' is also used in order to defend social constitutional rights by Robert Alexy. See Alexy 2002: 337–348.

The formal principle of freedom does not suffice for the protection of factual freedom of members of a society, because it does not recognize (1) the moral obligation to help those who, without their fault, lack factual freedom to a significant degree, and (2) the legal obligation of the state to protect civic dignity of all members of a society.

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The formal principle of freedom does not recognize (1) because it only protects individual freedom from infringement. Therefore, if I choose not to help somebody in danger crying out for help, even if helping would not represent any significant risk for me, I am not morally responsible, according solely to the formal principle of freedom. In a similar way, although taxes could be used to help the less fortunate members of a society and guarantee to them a degree of factual freedom necessary for living a dignified life (and not just mere subsistence), Nozick could still say that they are infringement on rights of those who have to pay taxes. In the case of conflict which one should we choose? If we wish to keep the moral obligation to help intact, we need another principle, the one that would protect factual freedom as well. However, we cannot prove that this is a desirable moral goal for everyone. Nozick could still argue that private property rights are more basic moral rights. We need another argument in order to show that, irrespectively of what we individually believe to be morally valuable, the state is somehow legally obliged to ensure some amount of social justice.

In response, we wish to stress the importance of another principle governing social life: respect for human life and dignity. We intend to show that this principle requires not only respect for the formal principle of freedom, but also an increase in the factual freedom of all members of a society, given that the factual, not the formal freedom is the sufficient condition for living a dignified life, because it presupposes having a concrete infrastructure to realize our freely chosen goals. This principle also includes the above mentioned moral obligation to help those less fortunate. In addition to being morally relevant in this way, we will show that it has legal relevance as well. This would justify redistribution via taxation, and other policies of social justice, to the extent to which they are means for improving chances of each member of a society to in fact live a dignified and free life. We will also show that the demand to protect factual freedom of members of a society includes the protection of civic dignity, i.e. equal rights of citizens to take part in the political life of their society.

In the next section, we intend to show how Kant's theory of justice can help us accomplish this goal, by recognizing how the question of factual freedom and civic dignities is related to the problem of taxation and social justice. We will conclude with a brief critique of Nozick's and Hayek's arguments informed by Kant's theory.

Kant's Argument on Taxation

In many points Nozick's argument about formal principle of freedom is similar to the Kantian view of formal justice. Nozick even used Kant's claim to treat others as ends in themselves to defend his own thesis (Nozick 1974: 32). Taking this into consideration, it could look like the formal principle of freedom suffices to protect dignity in a Kantian sense (the possibility to choose one's own ends). Moreover, like Nozick, Kant actually rejects the idea that justice can require the redistribution of resources in response to needs (V-MS/Vigil, AA 27: 517,526), explicitly rejects juridical relevance of material inequality (TP, AA 08: 289–290) and "mere" needs and wishes (MS, AA 06: 213,230).

However, in *Metaphysics of morals* Kant is also explicit about the right of the state to introduce taxation of the rich:

To the supreme commander (*Oberbefehlshaber*) there belongs indirectly, that is, insofar as he has taken over the duty of the people, the right to impose taxes on the people for its own preservation, such as taxes to support organizations providing for the *poor*, *foundling homes*, and *church organizations*, usually called charitable or pious institutions. (MS, AA 06:326)

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In his *Lectures on Ethics (Moralphilosophie Collins)* Kant holds even more egalitarian view:

One can participate in the general injustice even if one does no injustice according to the civil laws and institutions. Now if one shows beneficence to a wretch, then one has not given him anything gratuitously, but has given him only what one had earlier helped to take from him through the general injustice. For if no one took more of the goods of life than another, then there would be no rich and no poor. Accordingly, even acts of generosity are acts of duty and indebtedness, which arise from the rights of others. (V-MO/Collins, AA 27: 416)

For right-libertarians, such as Nozick, these claims contradict justice based on the principle of formal freedom. One of the solutions is to understand taxation as founded on the ethical duty toward the other, i.e. as the right of the state to enforce duty of benevolence – as claimed by Onora O'Neill (O'Neill 1989: ch10–12.). However, Kant explicitly rejects both that state could rely on voluntary contributions and, more importantly, that enforcement of current contributions would be a legal way to satisfy the needs of the poor², and rather argues for legal public taxation (MS, AA 06: 326). As we will argue, Kant's argument is specifically juridical and not (merely) ethical.

2 See Varden 2016.

Kant's main argument goes:

The general will of the people has united itself into a society that is to maintain itself perpetually; and for this end it has submitted itself to the internal authority of the state in order to maintain those members of the society who are unable to maintain themselves. For reasons of state the government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs. The wealthy have acquired an obligation to the commonwealth, since they owe their existence to an act of submitting to its protection and care, which they need in order to live; on this obligation the state now bases its right to contribute what is theirs to maintaining their fellow citizens (MS, AA 06: 326).

As we see, Kant refers to the state right based on a 'duty of the people' (*Pflicht des Volks*). The preservation of the people, here in question, is not material existence of the state ("for it is rich"), but existence of its members *as citizens*.

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Selbständigkeit, factual freedom and civic dignity

Kant characterizes citizens of the state with three main attributes:

The members of such a society who are united for giving law (*societas civilis*), that is, the members of a state, are called *citizens of a state* (*cives*). In terms of rights, the attributes of a citizen, inseparable from his essence (as a citizen), are: lawful *freedom*, the attribute of obeying no other law than that to which he has given his consent; civil *equality*, that of not recognizing among the *people* any superior with the moral capacity to bind him as a matter of Right in a way that he could not in turn bind the other; and third, the attribute of civil *self-subsistence*, of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people. From his self-subsistence follows his civil personality, his attribute of not needing to be represented by another where rights are concerned (MS, AA 06: 314).

The most controversial of them is the attribute of self-subsistence (*Selbständigkeit*), not owning one's existence to the choice of other people. Unlike the first two attributes, self-subsistence is connected with factual (material) situation. Kant gives us varieties of examples, including servants, a minor (*naturaliter vel civiliter*), controversially all women, but also some explicit examples of economic organizations of society: "the blacksmith in India, who goes into people's houses to work on iron with his hammer, anvil, and bellows, as compared with the European carpenter or blacksmith who can put the products of his work up as goods for sale to the public; the private tutor, as compared with the schoolteacher; the tenant farmer as compared with the leasehold farmer, and so forth" (MS, AA 06: 314–315). In a word "anyone whose preservation in existence (his being fed and protected) depends not on

his management of his own business but on arrangements made by another (except the state)“ (*ibid*). Though many of Kant’s claims here could be taken as dubious and politically incorrect³, it is important that he acknowledges the fact that status of the (active) citizen of the state could be violated by some material aspects of that person’s life, e.g. by an infringement on her factual freedom – as it is the case with economic dependence on another person.

Implications of these claims are also controversial. Kant uses them to introduce a distinction well known from the French post-revolutionary Constitution, between active and passive citizens. On the one hand, Kant, as the old French Constitution, claims that those who lack (above all) economic self-subsistence are passive citizens, enjoying the protection of the state, but lacking rights to vote and participate in other public political decision-making. From this point of view, it could seem that Kant is only an old-fashioned theorist who promotes the unacceptable idea that some citizens should be deprived of their basic political right to vote. On the other hand, although Kant accepts that one could naturally or voluntarily lose the status of an active citizen, he insists that there must be rightful conditions for everyone to become an active citizen:

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It follows only that, whatever sort of positive laws the citizens might vote for, these laws must still not be contrary to the natural laws of freedom and of the equality of everyone in the people corresponding to this freedom, namely that anyone can work his way up from this passive condition to an active one. (MS, AA 06: 315)

Kant’s weak claim „that anyone can work his way up from this passive condition to an active one” could certainly not be used to defend egalitarian view of a society, nor the premise “to everyone according to their needs”. However, it could be used as a strong argument in favour of some social policies, which are today in danger; for example, public health and social insurance, free public education, etc (Shell 2016).

To sum up this part of the text, Kant had recognized the dependence of person’s possibility to be an active participant of political life from economical and factual situation. What is here at stake are not only basic needs, nor

3 Alessandro Pinzani and Nuria Sánchez Madrid listed three key limitations of Kant’s account of passive citizenship. 1) They found Kant’s argument that the poor should not vote, because they would sell their votes, double-edged – for the same argument could be used against the rich (buyers), and it was used for ostracism in Ancient Athens. 2) Kant addresses formal obstacles to attaining full active citizenship, while (intentionally or not) economic privileges and inequalities are left out of consideration. 3) Kant is very insensitive to the gender issue, for he finds that a woman renounces her civil independence by entering into marriage. (Pinzani, Madrid 2016)

universal human rights, but rather *civic dignities*.⁴ Civic dignity implies equal rights to possibilities to take part in political decision-making, i.e. to become an active citizen of the state. Kant acknowledges that those rights could be affected through the material limits, limits of one's factual freedom, caused by dependence of their material existence from someone else. Although Kant's ethics certainly implies duties toward the other, to help others who are in trouble, the obligation implied by argument about self-subsistence of citizens is not reducible to (mere) ethical duties and, as we will see in the next part of the text, is connected with juridical questions and rights of the state.

General will, civil union and society

Kant makes a distinction between society and civil union:

The civil union (*unio civilis*) cannot well be called a *society* [Gesellschaft]; because between the *commander* (*imperans*) and the *subject* (*subditus*) there is no partnership (Mitgenossenschaft). They are not social fellows [Gesellen]; rather, one is *subordinated to*, not *coordinated with*, the other, and being co-ordinated with one another must regard themselves as equals inasmuch as they stand under the same common laws. It is thus less the case that this union [Verein] is a society than that makes one. (AA 06: 306–307)

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It is important to notice that civil society, thus, is not simple uniting of people who live in a same place, but, as previous quotation suggests, a society which has been made by a civil union, a society of active citizens living at equal as lawgivers, whose dignity is founded on public laws of the state. Kant refers to civil society both in the argument about taxation (“The general will of the people has united itself into a society”) and in the argument about self-subsistence of citizens (“The members of such a society who are united for giving law (*societas civilis*)”).

It is now clear that “preservation”, previously mentioned in an argument about taxation, is not material preservation of the state, nor of existence of its members, but preservation of the civil society, which would be corrupted if the members of the state lose their active role in a society. Moreover, this right, according to Kant, belongs to the dignities of the state:

Every state contains three *authorities* within it, that is, the general united will consists of three persons (*trias politica*): the *sovereign authority* [*Herrschergewalt*] (sovereignty) in the person of the legislator; the *executive authority* in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge (*potestas legislatoria, rectoria et iudiciaria*). (AA 06: 313)

4 This term was introduced by Josiah Ober. He distinguishes *civic dignity*, as defined above, from universal human dignity and aristocratic or elitist dignity related to the social statuses and ranks (Ober 2012)

All of those authorities in the state are dignities (Würden), since they arise necessarily from the Idea of a state as such, as essential for the establishment (constitution) of it, they are *dignities of the state (Staatwürden)* (AA06: 315)

The legislative authority can belong only to the united will of the people. (AA06: 313)

With this, Kant's juridical argument about taxation and social policies is completed: the infringement on the factual (material) freedom of the people, if it happens that they become poor, implies that they will lose their active status in society and if people lose possibilities to become active members of society, civil society would become corrupted, thus the state has the right to impose taxes to enable those in a passive status to become active members of the society for the preservation of the civil society. But, there is also an additional argument, mentioned above, that probably could imply even more egalitarian consequences. Those who are rich are dependent on civil society in at least two ways: they owe their protection to the civil society, to the public laws, that regulate this society; and they owe to the society, because they became rich only in and with the help of the society (which protects trade rules, property, encourages others to cooperate inside its institutions, etc.)

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The main difference between Nozick and Kant is, therefore, that for Kant things in some way change with the transition from private rights (in a state of nature) to the public rights ("the sum of the laws which need to be promulgated generally in order to bring about a rightful condition", AA 06: 311). Although, both private and public rights for Kant have the same content, and only the form changes, this change presupposes united lawgiving will. But here, the reasoning is not merely private, laws must actually be based on the public reasoning, and must protect public reasoning, which includes protection of rightful conditions for everyone to take part in the civil society. And this presupposes much more than just the formal principle of freedom, including the protection of factual freedom; as Shell wrote:

As member of the general will, in other words, each wills his *own* existence as citizen only insofar as he also, and equally, wills the civic existence of every other member of the people (Shell 2016: 8)

We do not want here to discuss which view of society is ultimately better, but argument showed above indicates that Nozick does not actually defend (factual) freedom of all in the society, but the capitalist view of the society. GERAL COHEN came to the same conclusion:

Therefore Nozick cannot claim to be inspired throughout by a desire to protect freedom, unless he means by 'freedom' what he really does mean by it: the freedom of private property owners to do as they wish with their property. (Cohen 1995: 90)

From the Kantian perspective, protection of person's freedom under the public laws would imply much more than just the formal principle of freedom. It would demand the protection of factual freedom, e.g. through the relief of poverty. Thus it looks like freedom as understood by Nozick would for Kant still count as lawless freedom:

And one cannot say: a state, a man in state has sacrificed a *part* of his own innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will. (AA 06: 316)

Based on everything said above, let us dispose with Hayek's arguments as well.

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First of all, Hayek's ontological argument, seems to us unconvincing because we can in fact attribute some responsibility for a particular distribution of wealth in the society to the institutions deciding on policies which are to be adopted. Therefore, we have responsibility as a political community for the particular distribution of wealth being just or unjust, because we adopted certain policies leading to such distribution. In the light of developments within social theory in the last three decades, Hayek's ontological position seems rather naïve. There has been a significant effort lately to explain and understand various collective social institutions and their intentionality.⁵

As for Hayek's epistemological argument, he himself conceded that we can in fact have some knowledge at least regarding the minimal needs, for example shelter, clothing and food. There is no reason why we couldn't extend this even further, to encompass needs that are easily recognized as universally desirable: education, health care, sanitation, access to information, etc. Moreover, some of them directly follow from the political and economical organization of a society and enable the possibilities of factual freedom (for example, the need to use transport to go to or to find a job, or the need to use internet to access information).⁶ The problem remains of course, where to draw the line. But the issue does not really confronts us with an impossible epistemological task described by Hayek (unless we set the task too stringently, demanding e.g. establishment of some perfectly egalitarian society). Social needs are many and changing, but that does not mean that they cannot be an object of knowledge for the social sciences.

As for Hayek's economic argument, we will not dwell upon it, but we do think that he overestimates the dangers for the economy that policies of

5 See Tuomela 2007; Searle 1995, 2010; Gilbert 1989.

6 See Geuss 1981: 22.

social justice can bring. There are theories that show the benefits of alternative economic models, as well as the perils of the neoliberal one. The success of neoliberal policies in the second half of XX century was followed by the serious economic crises in the beginning of the XXI century, indicating that neoliberal economy might not be a solution to all our problems.⁷

Finally, Hayek's political argument is at least double-edged, for, as we saw above in Kant's defence of social policies, and as we can see in the world today, if the factual freedom of people is in danger, members of the society could easily lose their possibilities to actively take part in a political decision-making, leaving the doors wide open for oligarchy.

Concluding Remarks

We tried to show that we need something more than the formal principle of freedom to make our society free. If the basic fact of human life and human freedom is something that we should build our society on, then we think that in formulating the principles of a free society, we need to be careful not to underestimate the lived experience of freedom and the facticity of life. The principle of respect for human life and dignity (civic dignities included), which is not blind to the problem of factual freedom, gives us very strong reason to defend social policies. This principle enables freedom itself to be more generally dispersed than if we stick only to the formal principle of freedom.

Following this line of argument, the social policies can be defended, via the principle of human dignity and respect, as moral obligations, as a duty of beneficence which could be institutionalized by the state. In addition, and this is often omitted from the story, they can also be defended juridically via civic dignity.

The importance of questions presented here is even greater because today we witness the worldwide degradation of social policies which enable protection of the minimum of factual freedom, such as universal healthcare, free public education, social insurance, the right to fair working conditions, poverty relief, and many more.

References:

- Alexy, Robert (2002), *A Theory of Constitutional Rights*, Oxford: Oxford University Press.
 Berlin, Isaiah (2002), "Two Concepts of Liberty" in H. Hardy (ed.), *Liberty*, Oxford: Oxford University Press, 166–217.
 Cohen, Gerald A. (1995), *Self-ownership Freedom and Equality*, Cambridge: Cambridge University Press
 Gilbert, Margaret (1989), *On Social Facts*, London and New York: Routledge.

⁷ see McNally 1993

- Hayek, Friedrich (2013), *Law, Legislation and Liberty*, London and New York: Routledge.
- Nozick, Robert (1974), *Anarchy, State, and Utopia*, Oxford: Blackwell.
- Mill, John Stuart (2003), *On Liberty*, New Haven and London: Yale University Press.
- Ober, Josiah (2012), "Democracy's Dignity", *American Political Science Review* 106 (4): 827–846.
- O'Neill, Onora (1989), *Constructions of Reason. Explorations on Kant's Practical Philosophy*, Cambridge: Cambridge University Press
- Pinzani, Alessandro; Madrid, Nuria Sánchez, "The State Looks Down: Some Reassessments of Kant's Appraisal of Citizenship", in: A. Faggion, A. Pinzani, N.S. Madrid (ed.), *Kant and Social Policies*, Cham: Palgrave McMillan: 25–48.
- Searle, John (1995), *The Construction of Social Reality*, London: Penguin
- Searle, John (2010), *Making the Social World: The Structure of Human Civilization*, Oxford: Oxford University Press
- Shell, Susan Meld, "Kant on Citizenship, Society and Redistributive Justice", in: A. Faggion, A. Pinzani, N.S. Madrid (ed.), *Kant and Social Policies*, Cham: Palgrave McMillan: 1–24.
- Tebble, Adam James (2009), "Hayek and Social Justice: A Critique", *Critical Review of International Social and Political Philosophy* 12 (4): 581–604.
- Toumela, Raimo (2007), *The Philosophy of Sociality: The Shared Point of View*, Oxford: Oxford University Press
- Varden, Helga (2016), "Rawls vs Nozick vs Kant on Domestic Economic Justice", in: A. Faggion, A. Pinzani, N.S. Madrid (ed.), *Kant and Social Policies*, Cham: Palgrave McMillan: 93–124.

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Olga Nikolić, Igor Cvejić

Socijalna pravda i formalni princip slobode

Apstrakt

Cilj ovog teksta je da pokaže, nasuprot desno-libertarijanskoj kritici socijalne pravde, da postoje dobri razlozi za odbranu politika socijalne pravde unutar slobodnog društva. U prvom delu rada, predstavimo dve uticajne desno-libertarijanske kritike socijalne pravde, izložene u knjigama *Pravo, zakonodavstvo i sloboda* Fridriha Hajeka i *Anarhija, država i utopija* Roberta Nozika. Na osnovu njihovog pristupa, politike socijalne pravde vide se kao neopravdana povreda slobode pojedinačnih članova društva. U odgovoru na ovu kritiku, uvešćemo distinkciju između formalne i faktičke slobode i tvrdićemo da formalni princip slobode koji brane Hajek i Nozick nije dovoljan za zaštitu faktičke slobode članova društva, jer ne prepoznaje (1) moralnu obligaciju da se pomogne onima kojima, bez njihove krivice, u velikoj meri nedostaje faktička sloboda, i (2) pravnu obligaciju države da zaštiti građansko dostojanstvo svih članova društva. U drugom delu teksta, nudimo interpretaciju Kantovog argumenta o porezima, prema kom građansko dostojanstvo pretpostavlja faktičku slobodu, da bismo tvrdili da Kantovo opravdanje poreza daje dobre razloge da se tvrdi da država ima pravnu obligaciju da zaštiti faktičku slobodu politikama socijalne pravde.

Ključne reči: socijalna pravda, socijalna politika, porez, sloboda, dostojanstvo, Hajek, Nozick, Kant.