Quaestio Iuris

vol. 14, nº. 04, Rio de Janeiro, 2021. pp. 1001-1038
DOI: 10.12957/rqi.2021.63178

LIBERAL JUSPOLITICAL THINKING: DEVELOPMENTS OF THE PHILOSOPHY OF HAYEK AND NOZICK AND THE RIGHT OF HOUSING

PENSAMENTO JUSPOLÍTICO LIBERAL: DESDOBRAMENTOS DA FILOSOFIA DE HAYEK E NOZICK E O DIREITO DE MORADIA

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ABSTRACT

It deals with an analytical-critical work that intends to question the presuppositions of the liberal vision, in particular that of Friedrich Hayek and Robert Nozick, in relation to social rights as sources of protection for individual freedom. Norberto Bobbio's understanding is developed, which links the idea of Human Rights to the abstraction and universalization of fundamental values which, in turn, are nothing more than the redefinition of the classification of rights in generations. It is intended to discuss to what extent it will be up to the State to pursue social rights as a right, policy or provision of services, and if in fact we are talking about a competence that delegitimizes the state apparatus. To this end, a critical analysis of the liberal foundations on the right to housing and its perspective in Brazil will be built, especially under the reading of the Land Regularization Law (Act nº. 13.465 of 2017).

Keywords: Friedrich Hayek. Robert Nozick. Liberal thinking. Right to housing. Fundamental right.

RESUMO

Cuida-se de trabalho analítico-crítico que pretende questionar os pressupostos da visão liberal, em especial a de Friedrich Hayek e a de Robert Nozick, em relação aos direitos sociais como fontes de proteção da liberdade individual. Desenvolve-se a compreensão de Norberto Bobbio que filia a ideia de Direito Humanos à abstrativização e universalização de valores fundamentais que, por sua vez, são nada mais que a ressignificação da classificação dos direitos em gerações. Pretende-se discutir em que medida compete ao Estado perseguir os direitos sociais como direito, política ou prestação

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DOI: 10.12957/rqi.2021.63178

de serviços, e se de fato se está falando de uma competência que deslegitima o aparelho estatal. Para tanto, se construirá uma análise crítica dos fundamentos liberais em cima do direito de moradia e sua perspectiva no Brasil, em especial sob a leitura da Lei de Regularização Fundiária (Lei nº 13.465 de 2017).

Palavras-chaves: Friedrich Hayek. Robert Nozick. Pensamento liberal. Direito a moradia. Direito fundamental.

INTRODUCTION

The freedom or lack of freedom of individuals does not depend on the range of choices, but on the possibility of determining their conduct in accordance with their current pretensions. Thus, freedom presupposes that the individual is assured of a private sphere, that there is a certain set of circumstances in which others cannot interfere.

From this perspective of Liberty, it is proposed to discuss possible developments of the philosophy of Friedrich Hayek and Robert Nozick in terms of the Housing Right, enshrined in art. 6 of the 1988 Federal Constitution.

The State of Liberty will first be understood in the context of the reduced coercion that some exert over others. It is called individual freedom. The task of a policy of freedom, therefore, will be to minimize coercion or its negative effects. Therefore, freedom and coercion will be intrinsically linked in the thinking of philosophers.

However, in the current socio-normative context of philosophical thought, the core of the goal of the search for freedom is equality before the law. For these thinkers, the equality established by the general legal and conduct norms is the only form of equality that leads to freedom and the only one that we can obtain without destroying freedom.

Therefore, the particularities of each system of philosophical thoughts will be analyzed and, at the end, a critical analysis of philosophical thought will be built in relation to fundamental rights as a source of measurement of this legal equality, in particular the right to housing.

1. LIBERAL THINKING AND SOCIAL RIGHTS:

1.1. Friedrich Hayek, the foundations of freedom and the law:

Friedrich Hayek and Robert Nozick represent two of the most evident philosophical landmarks in the liberal fundamentals of the USA and build their jusphilosophical thought based on the individuality of the human being. Therefore, the main foundations of their thoughts will be

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debated, as well as the historical moment in which both aim to develop a fairer and more balanced view of society.

Friedrich Hayek, in his work The Constitution of Liberty, takes as its central objective to show that since the 19th century the principles of Western civilization were in ruins. Among them, freedom was less and less respected (HAYEK, 1983, p. 33-35). For the author, individual initiative will be the vector that makes man a complete and self-fulfilling being.

In that period, there was great concern with the economic policy crises arising from the welfare state system. In Western countries, these first signs stemmed from a fiscal crisis caused by the inability to harmonize public spending with economic growth. In response, Friedrich Hayek showed great concern for the systematic dirigisme of welfare economic policy, showing that it was all about the decay of the basic principles of freedom.

Freedom is then understood as a universal and timeless concept (HAYEK, 1983, p. 39). It comes to be considered not just a specific value, but a condition for all moral values within a society. Hayek describes the foundation of freedom as the initial foundation for man to understand the value in itself of each individual being. From this understanding, man understands that the function of a policy of freedom will be in the possibility of living together collectively without a system that takes away his individuality.

Understanding freedom for Hayek is to see that he legitimizes and recognizes the need for social coercion to restrict freedom, as long as it is minimal. Only in this way I can understand the role of the State and the Law, Caridad Velarde says that Hayek recognizes it (VELARD, 1994, p. 155). The role of the State will be to minimally guarantee social security without intervening in individual choices. The role of Law will be primarily to preserve the contracts and civilly signed agreements, always respecting the volition of the parties.

Friedrich Hayek shows as a characteristic of freedom the adoption of its negative concept that will only become positive when we make use of it (HAYEK, 1985, p. 234). Although it does not guarantee us any kind of opportunity, it leaves up to us how to see the circumstances. Freedom is thus only one, although its meanings can be described differently.

Coercion is a negative element within Hayek's thinking. From it is postulated the ability to know and evaluate the things of individuals, being an instrument in the hands of third parties. It recognizes that coercion, despite being negative, is an inevitable evil within society (HAYEK, 1983, p. 61). Therefore, coercion cannot be completely avoided, as coercion itself should be used for this. The solution will therefore be to hand over the monopoly of coercion to the State. It will be the Government that will protect the individual spheres against all other external interference.

It is necessary to understand the role of the State in order to delimit the limits of Hayek's thought regarding the realization of social rights, seen until then as a poor management in the face

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of the crisis in the social welfare system. For this, society starts to be understood under a vision of historical overcoming. When man acquires knowledge, he transmits it to future generations, until we reach the point that acquired knowledge is increasingly specialized[3]. To that extent, by forcing and allowing man to take risks I legitimize the advancement of civilization. Individual freedom is based on the recognition of men's ignorance. There would be no reason to defend freedom if you already knew everything. Freedom is essential, therefore, for the unforeseen to exist.

Freedom, then, means relinquishing control of the individual efforts of a free society that can use much more knowledge when it forms part of a harmonious whole. Friedrich Hayek does not fail to understand the idea that freedom is associated with the aspirations of individuals that are not limited, as an individual's effort can later be adopted by the majority. Individual inspirations help to perpetuate the ideas of groups that may remain the same, or undergo changes (VELARD, 1994, p. 181).

It is to say that all men cannot be considered equal, which is a misleading assumption. Freedom and equality are not related, and the recognition of individual freedom leads to the production of inequalities. The equality seen by Hayek will have a direct connection with the exercise of Law, and it will have the function of ensuring equal treatment between different people when it comes to the law (VELARD, 1994, p. 183).

Hayek further explores the theme of freedom and law in chapter 5 of his book Law, Legislation and Liberty (HAYEK, 1985, p. 247). The judge, being the representation of the applicator of the Law, are recognized as an institution that must approach the ideal of the liberal order. Law represents a new spontaneous order, that is, a system that is totally distant from the mandatory conduction of social duties.

Law does not derive from authority; law is pre-existing to society. Law will be an indispensable condition for the formation of society, since it preexists its genesis. The law is not the content that comes from the elaboration of the Legislative Power, it is beyond this. What matters is the factual observance that leads to the formation of an order of actions (law), while its application or not is a secondary interest.

However, the legal apparatus in Hayek's thought emerges with the objective of ensuring and improving an already pre-existing system of norms (global order) (HAYEK, 1997, p. 16). Here the judgment is not about whether or not the parties have obeyed someone's will, but about whether the actions have lived up to the expectations of the everyday conduct of the group members. Customs gain importance. The satisfaction of what he calls “expectations” does not say that someone will be

[3]Progress, therefore, depends on a maximum of opportunities for things to happen. The institutions of freedom are therefore adaptations to ignorance so that all possibilities can be dealt with. For more information, see: HAYEK, Friedrich A. **Os fundamentos da liberdade**. São Paulo: Visão, 1983, p. 91

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obeying someone else's will, but something that is expected by every collectivity or group. If an impartial judge needs to be used, it is because he will enforce the custom, that is, what is expected by anyone in a similar position.

The main purpose of Law for Hayek is to keep the peace (VELARD, 1994, p. 149-204). The concept of peace is the maintenance of an existing order of expected actions. The legal norm will have the objective of facilitating the correspondence of these expectations, being only necessary when there is a breach of this correspondence. Thus, it can be concluded that Hayek adopts a true negative concept of Law in face of its role as maintainer of individual freedom.

Fair rules of conduct will be those that value the evaluation of the progression of customs. Thus, the author considers that the Law will always be in a constant movement of improvement by the judges, not being a systematic imposition of authoritarian actions, but an observation of an entire pre-existing global order.

Judges do not have the freedom to pronounce the rule that they see fit. Hayek explains that their conduct should guide the gaps in current legislation, so that they can serve to maintain and improve the order of existing actions (HAYEK, 1983, p. 124-126). The author considers that any assumption that causes judges to decide beyond the maintenance of this overall order of freedom will cause them to act not through reason, but through emotional or personal preference, their compassion for the plight of one of the litigants, or their opinion about the importance of a particular goal, ultimately influencing their final decision. The maintenance of peace is compromised by the violation of individual freedom.

As we go through the author's understanding of social rights, it can be said that their implementation should not be an integrating element of the concept of freedom and global order. Through the implementation of social rights, there is no prestige due to the risk that each individual must assume regarding their abilities, and the State and the Law would be favoring certain individuals at the expense of others. The conclusion is reached that there will not be the civilizing progress that is expected and, consequently, incurs the outbreak of crises of a legal, political, and financial nature (HAYEK, 1983, p. 128).

The purpose of the Law will be not to serve any particular purpose, but rather to consider numerous different purposes of different individuals. It just provides the means to accomplish a great number of different purposes that, in their totality, no one knows about. Among all the multipurpose instruments, law is probably, after language, the one that helps the greatest variety of human purposes (HAYEK, 1997, p. 12).

Thus, the problem of social rights for Hayek will lie in the warning that there are certain accepted values that are not those values that guide the actions of different individuals. The author disagrees with the view that the purpose of law is to give each person his due, by assigning to each

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individual certain things (HAYEK, 1983, p. 131). Everything that departs from the unidirectional premise of drawing limits so that the actions of different individuals do not interfere with each other constitutes a way of restricting the exercise of freedom.

Since freedom will not presuppose equality, since it legitimizes inequality as a necessary deviant for the progress of civilization, it is understood that there will be expectations that can be protected and others that cannot. Some need to be protected in order to maximize the possibility that expectations in general will be satisfied. There are legitimate expectations, which the law must protect, and other, which it must allow to be frustrated.

Therefore, not all expectations will be protected by general norms. The author recognizes that it is not always advantageous to prevent all actions that could harm someone. And this will be its justification in relation to social rights, as it is to legitimize the State to act in an authoritarian manner, removing the decision-making power of individuals, of their capacity, of the necessary assumption of social risks indispensable to the progress of civilization. The law's unique function will be to prevent the actions of certain individuals from affecting others. As laws are not capable of predicting all hypotheses, it is the role of judges to confront them with social disputes (VELARD, 1994, p. 155-157). So, we have a harmonious correspondence between the role played by Law, judges and the State in confronting individual freedom as a justification for a just society.

It can be said that for Friedrich Hayek the realization of social rights has no part in the triad judge, State and Law. This is because rights that demand positive actions are based on the assumption of government authoritarianism. Planning a pre-ordering of actions within civilization is to create obstacles to expectations within a spontaneous order.

This is what the author considers social justice activism. It has no application in a society of free men. It can be said that social justice has only gained prominence over time due to claims from particular groups that sought to have a greater participation in the good things in life, disrespecting global free enterprise and interfering with the individual freedom of other people who took advantage of their capacity and took risks to reach their goals (HAYEK, 1997, p. 18).

This is the criticism that the author makes against the concept of distributive justice, as the redistribution of goods and services in society. And yet Friedrich Hayek asserts that to live in society is to accept beyond the inequalities that there will be people dissatisfied with the existing distribution system. At the same time they do not know what justice is, for in claiming the redistribution of goods and services for themselves at the expense of others, without any just reason that makes them superior in relation to the ownership of capabilities, they generate in civilization a flagrant social inequality and compromise public resources that will lead to economic policy crises (HAYEK, 1983, p. 144).

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To this extent, he criticizes the socialist model for representing a revolt against impartial justice, which considers only the conformity of individual actions to norms independent of ends, without taking into account the effects of their application to particular cases. Therefore, for Law to be considered just, it must ensure a universal and abstract application and not be aimed at a group or groups that would be privileged, which would violate the formal equality of laws.

Ultimately, the difference between the norms of just conduct that emerge from the judicial process and the organizational norms established by authority, which we will examine in the next topic with Robert Nozick, lies in the fact that the former derive from the conditions of a non-human-created spontaneous order, while the latter serve the intentional construction of an organization that serves specific purposes, violating legitimate expectations.

The State's only role is the duty to prevent and control actions contrary to order, if we think about the role of Law in Hayek. The idea of a fair norm is antagonistic to constructivist behavior, which is the proposal of the State for social welfare, which is based on equality of opportunity through government intervention. Justice will never be in the predetermination of actions within civilization, but in the protection of a whole spontaneous order of expectations created freely by society, and the State must minimally guarantee, through laws, the safety of the exercise of this individual freedom without being at the mercy of interference interests of third parties.

1.2. Robert Nozick and the State's Role in Positive Rights:

Robert Nozick's fundamental work in his philosophical thinking on civilization is the essay Anarchy, State and Utopia (1974) (NOZICK, 2011, p. 199). In this topic, we intend to explore the assumptions of the minimum state in relation to social rights.

Nozick's critique, like Hayek's, is directed at Welfare State, coinciding with the moment of its crisis in western democratic societies. The author uses the assumptions of John Locke to bring the conception that each individual is his own owner. Everyone is naturally endowed with freedom to dispose of themselves and their goods as they see fit, because it is assumed that they were acquired through the efforts of their own work, of property. This will consist of the limits of the State's action, insofar as it intervenes in the body or in individual goods, it is exceeding its functions (WOLFF, 1991, p. 14-15).

But what functions are these? To answer this question, it is necessary to consider that Robert Nozick's essay is a response to the work Distributive Justice by John Rawls. What constitutes a just society today is not the social equality of people, as is advocated by John Rawls, because equality does not presuppose freedom, as Friedrich Hayek advocates. Nozick clarifies that to achieve equality Rawls needs to support an interventionist state in people's private lives, which takes away

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their freedom to make their own decisions. In anarchy Nozick clearly sees that total freedom also gives rise to inequality, which gives rise to injustice.

Robert Nozick's great emphasis is on the uniqueness of the State's functions in society. The title of his work is divided into three parts. The first, which concerns anarchy, Nozick will argue that it is not good to exclude the state figure, as it will be essential and necessary to ensure individual freedom, and its genesis is an inevitable process. According to Thomas Scanlon, as man becomes associated, litigation becomes common and the need for security grows. Associations will be a path to the formation of the State, since through them, individuals minimally create mechanisms to protect their assets (SCALON, 1981, p. 109-110).

It is observed that the figure of the State is recognized as an evil to civilization. However, it is a necessary evil. The big question is to know how to measure the parameters of what will make it legitimate. His philosophy is very strong in its inviolable defense of the rights of the individual, such as the right to life, liberty, property (understood not only as movable or immovable property, but also one's own body, ideas, and thought), and non-coercion. These are examples of inviolable rights that concern these natural rights of each and every individual.

Second, utopia concerns the interventionist state by John Rawls, insofar as talking about a fair distribution of goods and services would be something practically intangible. For that, we would only need to look at the socioeconomic crises of the welfare state. Thus, the third and last figure is the state that is centered in the middle of the title of Nozick's work.

Nozick intends to reinforce the idea of the minimal State as something that will not be fragile or fall short, as any increase in its strength would result in the asymmetry of rights between the State and the individual (NOZICK, 2011, p. 210). Also a State with more power than necessary will certainly make it go beyond its legitimate defense function. Nozick demonstrates a moral and ethical concern with the exercise of freedom as well as a political concern with the exercise of that freedom. It is from this point onwards that he reinforces the minimal state.

In order to understand the effects of social rights in Robert Nozick's minimal state, it will be necessary to unravel its presuppositions of Law. The author believes that people in a just society will want to be compensated for the benefit provided, and this indistinctly leads to competitive relationships between individuals. As a result, the market price of benefits would be lower than the highest price the beneficiary would be willing to pay, and this surplus in favor of consumers would represent the benefit of living in a free society.

It is a mistake to consider that Nozick is not a supporter of a Democratic State. The minimal State is the representation of the Democratic State, as there would be no violation of the individual rights of anyone. To that extent, Nozick's civilization will be the one that guarantees the decent

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existential minimum for all people, and that everyone should have the same opportunities to succeed in life (NOZICK, 2011, p. 287-288).

It is important to consider that Robert Nozick is not a liberal, but a libertarian. In this perspective, it is important to know that his general conception of freedom reaches all areas of human life, not restricting itself to economic matters and the freedom of the market. It involves a party of freedom over the whole being, its body, its mind, its beliefs, its desires, etc.

Thus, it can be said that his philosophy even meets utilitarianism. It is the idea that the greatest good is to provide the greatest possible happiness for the greatest number of individuals, even if that means sacrificing a minority. For the author, this thought is inconceivable, completely rejecting this position (POGREBINSKI; FERES JÚNIOR, 2010, p. 56-69). After all, it is the role of the State to guarantee to everyone, without exception, the protection of their freedom and not just to the detriment of a larger group.

The rights considered inviolable will be all those we already possess before we consider ourselves part of a civilization. This is what the author calls the state of nature. In the State of Nature he makes use of John Locke's conceptions in which we were all free and traded among each other (LACEY, 2001, p. 26). But there was one problem: there was no entity to judge conflicts impartially and, therefore, it was not known what a fair judgment would be. From this premise comes the English philosopher's classification of legal uncertainty. That's why Locke says there is a need to create an entity with sufficient authority to bring impartial justice, ensuring a minimum of legal certainty.

However, unlike John Locke who will be considered a contractualist, since the creation of the state will occur through a social pact or social contract, Robert Nozick will resignify his philosophy by considering elements of anthropology. The state is created spontaneously, as people come together to create *protection associations* (NOZICK, 2011, p. 324-325). They protect individuals from the violence of other individuals who are not part of the associations, initially serving to judge conflicts impartially and fairly.

For Nozick, these protective associations are not yet the representation of the figure of the State, as they still demand a complex organization that was not possible at that original moment. However, the fact that people inevitably create these associations removes any anarchist foundation, since as stated earlier, the organization of the State will be an indispensable prerequisite for coexistence in society.

However, we are not talking about just one protective association, but several that coexist in time and space. The moment comes that naturally there will be associations that have grown so much that they have dominated an entire geopolitical region, as the number of members will grow as people will want to have more specialized protection. What used to be simple associations where

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individuals helped each other, these specialized associations demanded a more complex organization as well as the payment of goods or services from their users to become only beneficiaries of the protection services provided by these agents. This is what Nozick calls the emergence of the ultra-minimal state that will give rise to the minimal State (NOZICK, 2011, p. 358).

The minimal State will be the only morally legitimate State, as it will not violate individual rights, as originally the protective associations and their evolution focused not on controlling people, but on abstaining from a violation of individual freedom (NOZICK, 2011, p .367). It will be a State that will protect individuals from the violence of other individuals, protect them from theft, fraud and guarantee the execution of contracts.

Thus, social rights are disregarded in Robert Nozick's thinking, as it makes the State assume more functions than those that it should minimally have. The State would have no duty to guarantee health, leisure, education, social security, transport, etc. In his view, social rights are not even considered as rights, but as the provision of services (LACEY, 2001, 31-32).

The services are those that each one must pursue so that they can enjoy them. One wonders if what will happen if all the services in the end are launched under the responsibility of the State, who will have to bear the costs of their benefit directly? The State itself, meaning, in addition to making civil life more expensive, a direct violation of individual freedom and isonomy. This is a strong criticism that Nozick makes of Rawls, as the State does not have the resources to provide these services to society as a whole.

Nozick's logic comes from the fact that for the State to provide these services it will inevitably have to take resources from those individuals who have them to give to those who don't. This, in the view of Nozick's philosophical theory, is illegitimate, as it follows Rawls' foundations of distributive justice. It is not possible to legitimize the use of an individual as a source of resources for another individual considered less favored, even though both are starting from the same position of freedom. Nozick takes up Kant's philosophy and affirms that each individual must be considered an end in itself (NOZICK, 2011, p. 7). His maxim is: no one can be sacrificed for someone else.

To exemplify his thinking, Nozick uses taxes. In this example, the State could not confiscate its property to give to other less favored individuals, aiming at equality. As a result, the State becomes illegitimate and thus loses its raison d'être. Therefore, it can be said that the freedom of individuals is what plays the central role of limitation, what would be feasible and what is considered legitimate in terms of State action. Among the state functions there is no function to ensure the realization of social rights.

The striking feature of Nozick's philosophy, according to John Exdell, is the assertion that this freedom and these rights restrict what can be done in terms of justice and in terms of State

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action (EXDELL, 1977, p. 143). Justice will be nothing more than respect for original freedom and ownership of oneself and the ownership of things that individuals have legitimately acquired throughout history.

Thus, he shows throughout his work that rights and freedoms are classified as constitutive in nature, that is, resulting from an agreement or a contract. And this matters insofar as social rights do not belong to the constitutive classification, but being qualified as deliberative in nature, which is not legitimate to permeate the functions of the State.

Nozick's State has some characteristics that can be delimited: i) the State claims the monopoly of deciding who can use force and how much force one can use; ii) the State asserts that it alone can decide on who will use force and under what conditions; iii) the State reserves the exclusive right to transfer the legitimacy and permissibility of any use of force within its borders (in the modern state this is what happens when it is transferred to soldiers, police, security agents, etc.); iv) the State claims to have the right to punish all those who violate its claimed monopoly of force.

Robert Nozick will establish differences between the minimal state and the ultra minimal state: i) The minimal state will be the state that assumes the function of protecting everyone against violence, theft, fraud, etc., and therefore charges all taxes; ii) The ultra-minimal State will be the one in which those who choose to pay the contribution will be protected. For Nozick, those protective associations will first generate the ultra-minimum state and then qualify as a minimal state (WOLFF, 1991, p. 37-38).

At this point, the minimal state can be configured as redistributive, because the wealthiest individuals pay to finance the protection provided to those who cannot afford it. However, isn't funding the benefits of some at the expense of the exclusive burden of others illegitimate to Nozick? The author will answer that this redistribution is only an appearance, the justification for which lies in his adoption of the concept of Law.

The Law to be adopted must always be that of a negative conception, that is, it is based on an idea of abstention and not provision. When we approach the right to life as an inviolable individual right, we can view it under both a positive and a negative conception of rights. If positive, it is to say that through the right to life, the State must provide society with everything it needs to survive, such as food, health, education, etc. Through the negative conception of the right to life, the State would have no obligation to society, but only to ensure that everyone else refrains from putting my right at risk, such as an attempt at murder, for example.

Thus, the rights to Nozick are negative, and they serve as indirect restrictions. And they are more important than all other moral considerations. The protection offered to everyone in a given territory is justified by the maintenance of indirect restrictions, not as an element aimed at increasing

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general well-being, or aimed at minimizing the violation of rights, or expanding the total number of rights in a utilitarian vision.

2. FUNDAMENTAL RIGHTS, POLICY OR SERVICES?

Considering the assumptions of each of the above liberal thinkers, we conclude that social rights are distinguished from the entire framework of rights considered fundamental (natural law), since they are not part of a spontaneous order and demand a positive provision by the State. However, the recognition of this attribution renders illegitimate the State's action and the co-participation of the Law in protecting these interests, since social rights are not even considered rights per se, but the provision of services.

Accordingly, this topic will not explore to what extent social rights, with special attention to the right to housing, are as important as individual freedom to ensure equality. The goal will be to circumvent the limitations of liberal thought in the face of the assumptions they themselves have adopted as foundations of a minimal State.

It is questionable to what extent social rights would have the nature of fundamental rights or services. According to the understanding of liberal thinkers, these are the considerations to be analyzed: 1) social rights demand positive benefits; 2) social rights matter in the inequality of treatment under the laws; 3) have the nature of providing services.

2.1. Positive concept of social rights:

The positive concept of social right is at the heart of Robert Nozick's justification for dismissing the idea that the minimal state can be criticized for showing itself to be redistributive. The negative concept of law is recognized as the quality of fundamental rights that will privilege individual freedom and, at the same time, ensure equality.

The construction of the idea of social rights is directly rooted with the end of World War II and the constitutional framework of the State's interventionist character in the social and economic sphere, with the 1917 Mexican Constitution and the 1919 Weimar Constitution. The thinkers start from the concept that by imposing social functions to the state competences one would necessarily be working with the idea of utilitarianism of law (NOZICK, 2011, p. 19). Therefore, the utilitarianism of law in this context would be in a kind of maximization of legal security at the expense of freedom.

When addressing the right to housing, recognized as a right of social nature, it would be to affirm that this right can come from either a negative or a positive conception. Thus, the negative

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conception of the right to housing draws a lot of attention, since it is, to a certain extent, blends together with the conception of another right that is extremely protected by libertarian thought: the right to property (ROLNIK, 1999, p. 41).

Dealing with a negative concept, it is stated that the right to housing would be the necessary State protection so that individuals can have the exercise of guaranteed housing without the interference of third parties. Housing and property are two concepts that have always been mistaken, to the point that housing is represented more as an effect arising from the protection of property rights.

Housing policies in Brazil clearly reflect the confusion. In response to the flagrant housing deficit that made it difficult to organize and manage growing cities, in 1964, the State created the Banco Nacional de Habitação (National Housing Bank) (NASCIMENTO, 2013, p. 36). Its purpose was to finance real estate projects and promote urban housing development in the country.

However, the end of BNH in 1986 was due to some main reasons: default; corruption and; above all, the Housing Finance System was not able to meet the main demand of the country's housing deficit – those with income below 5 (five) minimum wages (NASCIMENTO, 2013, p. 38).

From the perspective of liberal thought, the crisis at the BNH would be justified by the lack of sufficient public resources to meet the demand of a special group of individuals. However, the BNH proposal was never centered on housing, but on the commodification of property rights.

The much-publicized “dream of owning a home”, which was well nourished in the 1980s and 1990s, had an evident impact on the commercialization of housing, in the form of ownership. In other words, one visualizes the right to live as an effect of exercising ownership of the property. The BNH's failure also occurred not because it was incapable of solving the housing deficit problem, but because it masked a commercial production of properties that ended up serving only the interests of individuals who were not included in the priority groups.

Accordingly, the construction and commodification of property rights by the State would be within the positive conception of a fundamental right of freedom for the thinkers. As such, it is argued that the mere negative conception of the right ends up being insufficient to ensure individual freedom.

The fact is that the BNH was never really a social housing program, but a capitalization of resources for the production of properties. What is discussed is that the liberal model necessarily means state intervention to a certain extent, whether in the social sphere or in the economic sphere (MALUF, 2011/2012, p. 845).

Addressing the positive conception will not necessarily be seen as the justification for the state's inability to assume a natural function. It is to say that negative conceptions will never

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generate costs, which is a mistake. Maintaining the security of individual properties requires all the management of public resources for the cost of personnel, service objects, infrastructure, etc.

This leads to a redefinition of the understanding of fundamental rights and their conception. According to Mariana Chiesa, fundamental rights have their own identity and cannot be divided or suppressed here. In this bias, the subdivision of a negative and positive concept of law is being overcome by an idea of a fundamental right (NASCIMENTO, 2013, p. 81).

Conversely, the role of the minimal State becomes questionable, since its limitation merely to the negative conception of rights shows the absence of a control over the guarantee of individual freedom, since there will be individuals who, due to social and historical peculiarities, will not be able to exercise their right to housing and, consequently, will not have their individual freedom safeguarded. This is what Aldo Francisco Migot defends, for whom the right to housing is nothing more than the door for each and every individual to exercise all the other 1st generation rights (MIGOT, 2033, p. 90).

Reframing the right to housing within the above context reveals the need to overcome the subdivision of positive and negative rights towards a single interpretation: fundamental rights. Fundamental rights are those in which the State has the duty both to observe, in order to prevent third parties from violating their right, as well as to enforce them, insofar as it is fundamental, it is guaranteed to each and every individual.

The justification is to ensure equality, as the idea of legal utilitarianism will inevitably have to be overcome. To the extent that thinkers confess that paying tribute to the state to finance protection we are facing a redistributive reality anyway. There will be more wealthy individuals paying for the protection that will be provided to those who cannot afford it. Understanding this context, even though under a negative conception, does not rule out that equality in the exercise of freedom is being guaranteed to some to the detriment of others.

Social rights, as well as the right to housing, can show themselves as positive conceptions of rights. However, liberal thought cannot deny that there will always be a minimum redistributive bias in the negative conception of law, since by recognizing social inequality, it is assuming the burden of financing protection services for those who cannot afford it (FUKASSAWA, 2013, p. 181).

The right to housing is a strong representation of the idea of guaranteeing the individuality of each being. There is an overcoming of the idea of 1st and 2nd generation rights, as they end up being merged in a certain way in the promotion of individual good (FUKASSAWA, 2013, p. 187). And to the extent that I ensure the individual good, I manage to achieve the collective good. Without housing protection, the individual cannot have security, work, free enterprise, etc.

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It is observed that we cannot work the protection of housing only from the positive aspect, that is, the provision of housing policies by the State, but it is also worked from the negative concept, in which the State ensures the right to housing of tenants that have been complying with the rental contract in case of disagreement with tenants, for example. Therefore, the right to housing, notably recognized as a social right, has a relevant role within the functions of the "minimum state", since individual freedom is being protected.

The redistributive role, being considered an unavoidable fact in society, leads one to believe in the re-signification of the conceptualization of rights from liberal thought, being today a vision that has been undergoing remodeling to recognize the role of the State in a more updated approach to the promotion of equality and freedom under the so-called fundamental rights.

2.2. Social rights and inequality in law:

The issue still questioned about social rights by liberal thinkers is limited to the allegation of inequality generated by Law. To the extent that the Law has the function of ensuring the maintenance of peace and this, in turn, is linked to equal treatment before the law, liberals claim that social rights necessarily generate social fragmentation[4].

However, starting from the overcoming of the subdivided analysis of the concept of law in positive or negative, it is seen that the fundamental right necessarily has the scope of safeguarding equality as much as possible between individuals.

Accordingly, what for liberal thinkers like Hayek and Nozick is seen as the imbalance of formal equality, the reading of the concept of fundamental right starts from the idea of 'reequalizing' the minimally legitimate conditions that naturally concern each individual as an integral part of his or her individual freedom. Through this reestablishment, even if not in an equal manner, of the naturally recognized individual differences, equality before the law is truly achieved.

In this sense, Caridade Velarde explains that social rights have the function of strengthening the protection of individual rights, as they minimally guarantee a less unbalanced position of individuals without affecting or restricting the exercise of freedom of being (VELARD, 1994 , p. 151). Of course, it is consensual that social differences existed, however, it is not legitimate to assume that the minimum non-interventionist State guarantees these beings a better condition and chances to exercise their potential to the point of finding themselves in better living conditions than if they received social benefits.

[4]For more information see: HAYEK, Friedrich A. **Os fundamentos da liberdade**. São Paulo: Visão, 1983, chapters 1 and 6; and NOZICK, Robert. **Anarquia, Estado e utopia**. São Paulo: Martins Fontes, 2011, preface, chapter 1 and 7-9.

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The right to property, recognized as an individual right, is the prime of the rights guarded by liberals. The right to housing, being a social right, has been shown to be much broader than the protection of property itself, but it embraces those who are vulnerable to the point of protecting, in a minimal way, the security of a right with an individual bias.

There is a very strong correlation between property rights and housing, although they are not to be confused, as said. In this way, all other rights after the 1st generation came to improve the effectiveness of individual freedom even more, and not the other way around. Thus, it is reinforced that the figure of the minimal State, as for Nozick will be the overcoming of protection associations, inevitably by the same criterion of anthropology will be overcome by the assumption of the role of rebalancing the unevenness regarding the security of the exercise of individual rights.

It can be seen that a return to perfect social equality is not being defended here, as this claim would violate the values that arise from the capacity of other individuals who have achieved considerable social levels. However, there are external factors to be considered as limiting sources that prevent individuals from departing from the same parameters, such as social condition (FUKASSAWA, 2013, p. 121). This difference is currently considered normal, but in the conception of liberal thinkers, the State's duty is to always guarantee the protection of freedom, which leads to the conclusion that these are people who socially are already having their freedom violated as soon as they are born, due to their social condition.

However, we are not adopting a vision of John Rawls and his distributive justice in which it is up to the State to offer the same opportunity in a given prestigious educational institution, both those who can pay and those who cannot pay (RAWLS, 2003, p. 81 -83). That is not what is being advocated. The State must seek, through social rights, the return to this minimum equality, not leaving out those individuals from being able to also explore their individuality in order to develop their properties and leverage with the progression of civilization.

Therefore, risk-taking would not be a problem to be faced by the State, as it acts by offering minimally these possibilities for social rights, in the end, it is ensuring the protection of individual freedom to all. This justification overcomes liberal thinkers' contention that one violates equality when some are privileged by law over others.

From a liberal point of view, social rights are being considered as real privileges. From the point of view of reframing for fundamental rights, it is denoted that they are not about privileges, but minimally about assuring everyone the concreteness of their individual freedom. What made us consider the idea of working a minimal or dignified conception of redistribution. After all, not even liberals themselves can fully oppose the civilizational drive for redistribution, with the adoption of indirect restrictions (negative concept of law) being a rationale to overcome.

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This is what happens to Enzo Bello in Brazil through land title regularization. As we face informal settlements consolidated in time and space, it makes no sense to have these people removed, based on the absence of a property right. Following Nozick's conception, these individuals occupied unoccupied land or land without any destination, which makes them legitimate owners and they need protection (BELLO, 2012, p. 224).

Protection based merely on the right to property would cause them to lose that occupation. Therefore, the fundamental right that legitimizes land regularization will be the right to housing, since to guarantee dwelling, the idea of housing, the recognition of the citizen identity of those individuals in that place is to guarantee, in a minimum way, that those people can dispose of and use their properties to contribute to the development of civilization.

2.3. Social rights as service provision:

The view of social rights as provision of services rather than rights per se is a view many liberals share. Among them, Nozick argues that from a liberal perspective it violates individuality to sustain a state function that directly inflicts on people's decisions, particularly speaking of a kind of compensation with justification on the principle of equality, which in turn is claimed only under the formal aspect of legislation (EXDELL, 1977, p. 142-149).

According to Ronald Dworkin, in his discourse on the theory of law, he considers fundamental rights to be those values that are socially accepted in society and that justify the validity of an entire normative system of rights (DWORKIN, 2012, p. 312). Social rights are far from this classification, since, for the thinker, social rights do not constitute rights per se, being nothing more than a means for the realization of individual rights. Based on this premise, social rights are not considered valid assumptions for the normative system.

It is in this line of thought that Dworkin will defend that social rights are nothing more than public policies. Norberto Bobbio argues that social rights gained such prominence after World War II, especially at a time when there is an extreme concern with the universalization and abstraction of human rights (BOBBIO, 1992, p. 58-60). It is then that, according to the author, social rights are seen as fundamental values that are part of a historical and social progression of humanity, to the point where he claims a concern no longer with the positivization and implementation of natural rights, which it has been happening over the centuries, but rather a search for making these values concrete.

Therefore, unlike Ronald Dworkin, Norberto Bobbio will defend the extreme need to think of social rights not only as mere provision of services or as a policy, but as true rights, seen as no

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more than the expansion of individual rights and considering in this way, fundamental rights possible to exist in Constitutions.

Considering the above aspect and discussing the right to housing, Carlos Frederico Marés understands that, minimally, social rights came as the other side of the coin of individual rights that was lacking for the completeness of fundamental values in humanity (MARÉS, 2003, p. 22). Therefore, it can be said that over the years we must recognize that the advancement of civilization will bring the constitution of new rights, as we can see today the evolution of technological law, virtual law, climate law, etc. As Norberto Bobbio makes clear, this subdivision of rights into divisions will cease to exist, because the dynamics of society necessarily makes the law also unfold, but without losing the originality of the fundamental values (BOBBIO, 1992, p . 131).

Thus, the right to housing must be seen essentially as a fundamental value, also linked to the concreteness of the right to freedom of each individual, insofar as without it all other fundamental individual rights are at risk. It can be inferred from Professor Daniel Sarmento's central idea that land title regularization in Brazil (Federal Law No. 13,465 of 2017) is a good example of the context of protecting housing at the expense of the mere granting of property titles (SARMENTO, 2004, p. 33).

You see, it is not that we are saying that the right to property, as an individual right of primary freedom, is being replaced. In fact, property is an essential right of freedom and it is up to the State to promote its protection. However, there is already enough support to see the realization of social rights as a phenomenon that does not harm or interfere in the individual freedom of citizens, but of those who are in informal situations and excluded from the formal urban context (SARMENTO, 2004, p. 37).

And to the extent that liberal thinkers themselves cannot completely dismiss the idea of redistribution of rights in a civilizing context, it is more rational to evaluate a system of legal thought that goes beyond the idea of protection of minimum freedom by negative rights. Negative rights also demand costs, positive rights also demand costs, in the end it will be up to the State to have the role of redistributing rights in the best possible way so that everyone can enjoy them freely without any inference from third parties.

CONCLUSION

This study sought to address the main characteristics of liberal thinkers Friedrich Hayek and Robert Nozick, delimiting their main libertarian foundations of philosophical thought as well as the contrast between their understanding and social law.

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From the comparative analysis, a need to overcome the separation between individual rights of freedom and social rights was deduced. The conclusion for a re-signification of the idea of fundamental right as a successor of this classificatory thought shows the legitimate recognition of the role of the State facing the concretization of true fundamental values.

To this extent, it has gone beyond the destination of the civil organization under the minimal State. In no way is a welfare state context being defended. On the contrary, the evolution of human rights has proven that natural rights, here understood as the rights that privilege the individuality of the human being, have necessarily unfolded into other corresponding values that, in the end, are interconnected with the fundamental values of freedom. Certainly, this is very present to the extent that authors discuss the universalization and abstraction of fundamental values in the global context, and no longer locally.

From a perspective of liberal thinkers, the right to housing, an important fundamental value for Brazilian legislation, has been struggling against a history of cause and effect in the right to protect property rights. Currently, Brazilian legislation, in particular the Land Regulation law (Law No. 13,465 of 2017) ends up justifying a separation between these two foundations, without this implying a violation of individual freedom.

Therefore, the right to housing constitutes a significant example of a study that proves the re-signification of social rights merely as political or service provisions. Housing is presented much more as part of a fundamental value, which essentially guarantees the exercise of individual freedom, than as a factor of inequality or of the involution of civilization. Both the rights named here as negative and positive demand resources, which to a certain extent can be greater or smaller, but does not rule out the idea of redistribution as an indispensable prerequisite. In any case, it is possible for the effects of redistribution to coexist with the protection of individual freedom, ensuring due opportunity, risk-taking to some extent by all and ultimately the progression of civilization.

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Trabalho recebido em 27 de outubro de 2021
Aceito em 01 de novembro de 2021