

# The Law and the Stateless society: A Legal Case for Entrepreneurship in Government Services

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**Abstract:** This paper presents the main attributes of the law with regard to the development and prosperity of an economy, following the principles set forth by the Austrian School. The law has an intrinsic nature with the market economy and yet is ignored by its researchers. The libertarian legal theories allow us to fully understand that since its inception, the law is a means of structuring the behaviors of individuals. And the stronger and spontaneous were its institutions, the more the society thrived. Nevertheless, the State significantly weakened the pillars of the law, seizing its foundations and making itself its sole operator, rotting its most vital roots. We must treat the State as a player in the vast market of government. In so doing, it will be responsible for its mistakes because only competition in a huge market can drive a nation to prosperity with the right laws.

**Keywords:** Law, libertarianism, Stateless society, private government services.

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## El Derecho y La Sociedad Sin Estado: Un Caso Legal para Emprendedurismo en Servicios Gubernamentales

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**Resumen:** Este trabajo consiste en presentar los principales atributos del derecho en relación con el desarrollo y la prosperidad de una economía, siguiendo los principios establecidos por la Escuela Austriaca. El derecho tiene una naturaleza intrínseca a la economía de mercado y, no obstante, es ignorado por sus investigadores. Las teorías legales libertarias nos permiten comprender plenamente que desde sus inicios, el derecho es un medio para estructurar los comportamientos de los individuos. Y cuanto más fuertes y espontáneas eran sus instituciones, más prosperaba la sociedad. Sin embargo, el Estado pudo debilitar los pilares de la ley, apoderándose de sus cimientos y convirtiéndose en su único operador, pudriendo sus raíces más vitales. Debemos tratar al Estado como empresario y responsabilizarlo por sus errores, porque sólo la concurrencia en este enorme mercado podría llevarnos a un futuro próspero y el derecho es esencial para ello.

**Palabras clave:** Derecho, libertarianismo, Sociedad sin Estado, servicios gubernamentales privados.

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## A lei e a sociedade apátrida: um caso jurídico para o empreendedorismo nos serviços governamentais

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**Resumo:** Este artigo apresenta os principais atributos da lei em relação ao desenvolvimento e prosperidade de uma economia, seguindo os princípios estabelecidos pela Escola Austríaca. A lei tem natureza intrínseca à economia de mercado e ainda é ignorada por seus pesquisadores. As teorias legais libertárias nos permitem entender completamente que, desde a sua criação, a lei é um meio de estruturar os comportamentos dos indivíduos. E quanto mais fortes e espontâneas eram suas instituições, mais a sociedade prosperava. No entanto, o Estado enfraqueceu significativamente os pilares da lei, confiscando suas fundações e tornando-se seu único operador, apodrecendo suas raízes mais vitais. Devemos tratar o Estado como um ator no vasto mercado do governo. Ao fazer isso, ele será responsável por seus erros, porque apenas a concorrência em um mercado imenso pode levar uma nação à prosperidade com as leis certas.

**Palavras-Chaves:** Direito, libertarianismo, Sociedade sem Estado, serviços de governo privado.

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## Introduction

The aim of this paper is to put entrepreneurship as the main driver in the realm of governmental services, but instead focusing solely on the role of the entrepreneurs and how they should act, which have been done by several libertarian authors, we will approach it in a different light. We will focus on the legal foundations that make all of it possible. The legal institutions perform a paramount function to any society and a stateless one is no different, it may even be more crucial to its functioning system, due to the uncertainty of such projects, old institutions may be a safe harbor.

The Austrian school has economics at its core, but one who believes that only in this sphere has it something to teach us would be wrong. The theories of law that permeate the Austrian school should be praised, for those ideas demonstrate how relevant law is to the development of a society and why its subversion is catastrophic. The ideas of the Austrian School in the field of law, led by Hayek, show readers the immense contributions that a legal system can make in society, especially if we take step further and demonstrate the lack of need for the state in our lives.

In section 1, of this paper, we will bring the core of libertarian ideas, with the focus shined on Hayek and other proponents, such as Rothbard and Menger, on institutions and their importance for libertarian thinking, going over the fundamental aspect of the legal institutions, specifically the role played by spontaneous orders for a functioning legal system; and the rule of law. It is important to stress that was through spontaneous order that we were able to reach the complexity of our society and thus understanding their main characteristics is a fundamental task to ground any society, including one without the state. In section 2, we will continue analyzing libertarianism, but focusing on its most important institution: private property, and how it is fundamental to lead a society. Private property and its derivative non-aggression principle pave the way for peace and prosperity. In fact, it is hidden in the non-aggression principle, the important and often overlooked aspect of consent within a governmental service. Individuals must be able to agree with their jurisdiction rules and customs, and the state rarely concedes such opportunity.

For these reasons, we will then demonstrate in section 3 that we need to see government as a market and the state as an inefficient player within this market. Thus, it will be easy to understand that entrepreneurship in this sector is not only possible but essential to solidify the concepts herein exposed. With that in mind, the private government services market is already under development, and the course taken seems encouraging. It is crystal clear that libertarian roots are growing and solidifying around the globe. As a result, new ways of living have been imagined.

Then, in section 4, having addressed in previous chapters the importance of the rule of law and libertarian ethics, we will make a logical construction by applying such concepts to governmental services, adding contract theory and enforcement to them. Contribution to all this is vast in the academic field of law. However, these doctrines rarely stand out for the preeminence given to freedom; neither do they show the strength that a contract requires

from its peer. On the contrary, they even relativize the contract in favor of other principles. In contrast, libertarian writers have produced few but crucial contributions in this field, which we will approach as a means of making sense of voluntary exchanges in a complex but stateless society.

There are currently several ways to enforce the law, both privately and publicly. However, it is the state that has the most substantial share in enforcement and conflict resolution. However, when we analyze conflict resolution as an industry, we increasingly see private methods, e.g., arbitration, for such. By proposing to resolve conflicts privately, we are warning the state that its intrusion is unnecessary in a particular deal, on the contrary, such interference would be detrimental to the involved parties and, precisely to move away from the state, individuals have been devising private solutions.

When considering all the elements to be addressed in this paper, we can find similarities in the past and, perhaps, future societies. It is in this spirit that, in section 5, we will present a survey of how the incipient government services market is mobilizing to find solutions that may limit or even exclude the state from our lives. Looking at libertarian movements in this direction, and within an environment of increasing interference with our freedom, we create the expectation that there is still a path to be built. And within all of these new proposals, the law is a fundamental part of them.

It is not the intention of this paper to propose a stateless society model. Other authors have proved successful in this task and served as the basis for this work, but here we simply aim to show the reader that law, permeated by libertarian principles and by its institutions—duly analyzed from the point of view of the teachings of the Austrian school—shows us that the state may be unnecessary in our lives. It is indeed hard to imagine that in the current scenario, other institutions, decentralized and private, would play the role of the state. However, entrepreneurship and human capacity over the years have been able to attain numerous achievements, and this will be yet another.

## 1. Libertarianism and the Development of Institutions

Libertarianism follows from the notion that the individual is at the center of all, he is the highest asset of a society and thus his freedom is the utmost trait to be valued. Rothbard boils down the core of libertarianism in the following way (ROTHBARD, 2006, p. 47-48):

The central core of the libertarian creed, then, is to establish the absolute right to private property of every man: first, in his own body, and second, in the previously unused natural resources which he first transforms by his labor. These two axioms, the right of self-ownership and the right to “homestead,” establish the complete set of principles of the libertarian system. The entire libertarian doctrine then becomes the spinning out and the application of all the implications of this central doctrine.

In the above, we can already see the emphases in institutions, namely private property. For Rothbard, as we can see above, the liberty of the individual begins with the right to establish

private property. Thus, the goal here is to understand how this fundamental institution to libertarianism is formed and, obviously, protected, according to their main proponents.

One of the main insights of libertarianism is the application in their theory of institutions the notion of spontaneous order which states that throughout human history, the behavior of individuals has developed organically in such a way to allow human beings to live in harmony and flourish, which Hayek describes in a few words as the “product of the action of many men, but are not the result of human design” (1973, p. 20), this simple and important concept, was introduced by Chuang-tzu (369-286 BC) and later developed by Proudhon, in the nineteenth century, and, of course, by Hayek, as pointed out by Rothbard (1990, p. 46).

In this regard, we will focus on the argument of spontaneous order through the lenses of legal institutions so we can later understand the apparent antagonistic role of an institution developed in a spontaneous order may play in a newly found society. In this regard, we will start with the founder of the Austrian School who was already not oblivious to the notion of spontaneous order as an important aspect of legal institutions, as he argues below (MENGER, 1985, p. 175):

The further development of law, too, they say, like that of language, does not occur by arbitrary intention, but organically, by inner historical necessity, even if in the course of cultural development and for a variety of reasons legislation does enter in beneficially. Even in the latter case, the lawgiver is to be regarded only as a representative of the people, as the representative of the true spirit of the people, and the continuity of law is to be respected by him.

Hayek includes the concept of law within the broad notion of order, which for Hayek is “a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct” (HAYEK, 1973, p. 151-152).

Thus, the law is built after a spontaneous order, which exists at a given time for a society, just like the market and language would be other types spontaneous orders (HAYEK, 1973, p. 34). And by inserting institutions within this broad concept of order, we can understand its praxeological ramifications to a society, due to the fact that “it is clear that every society must in this possess an order and that will often exist without having been deliberately created” (HAYEK, 1973, p. 34). With regards to Law, Hayek argues it developed an institutional role for making sure that these spontaneous orders can prevail in the relations between the agents of a society.

Hayek developed, besides the concept of spontaneous order, which is one of the topics he is best known for, but also the notion of organization orders, which are deliberately created with sole purposes of preserving the existing spontaneous orders as a functioning body in the society (HAYEK, 2003, p. 182). The most prominent example would be the state, which for Hayek is an organizational order that should exist with the strict purpose of enforcing the general rules already existing in the several spontaneous orders of a society (HAYEK, 2003,

187-188). Therefore, those two concepts should be regarded later on when we approach the ratification of spontaneous orders into a valid legal system.

Libertarians such as Hayek stress the importance of the Law to guarantee and preserve our freedom because only the rule of law can accomplish this. The rule of law has among its most essential characteristics the sovereignty of the law, which means rules and principles are established in order to preserve rights and guarantee justice in a given jurisdiction. The rule of law must have as its core the limitation of the state in the private sphere and the consequent guarantee of the freedom of its individuals so that peace and order prevail.

Since this Rule of Law is a rule for the legislator, a rule about what the law ought to be, it can, of course, never be a rule of the positive law of any land. The legislator can never effectively limit his own powers. The rule is rather a meta-legal principle which can operate only through its action on public opinion. So long as it is generally believed in, it will keep legislation within the bounds of the Rule of Law. Once it ceases to be accepted or understood by public opinion, soon the law itself will be in conflict with the Rule of Law. (HAYEK, 1953, p. 520)

Hayek shows us above that not the individuals should be restricted by the rule of law, but the state. This insight above and the principles of private property may be deemed the most fundamentals of the libertarian theory of institutions.

Furthermore, empirically the rule of law has been shown to be the most significant source of wealth of a nation. According to data presented by the World Bank in its 2006 report, the rule of law was considered as the most critical point to analyze the source of wealth of a country, stating that its economic value exceeds even the value of the degree of education of a nation, as well as tangible sources of wealth (WORLD BANK, 2005, p. 98). Tom W. Bell perfectly defines the silent character of the importance of the rule of law, saying that only when one conceives a world without the rule of law is it possible to understand its value and, analogously to health, the rule of law is the measure of a healthy government, as our body would be ours<sup>1</sup>. The importance of the rule of law to any society is clear, without it the markets would not work, there would be no property and chaos would ensue. The interest question focused herein is how institutions would keep the rule of law working, Hayek, as seen above, answered this question with a customary law approach.

Hayek's institutions arise from evolution, which will "choose" those emergent institutions-orders-outcomes which are the most successful in bringing the most relevant knowledge to bear on the problems at hand" (ARNOLD, 1990, s/p). For Hayek, institutions which did not follow such steps would not have 'survived' because

[l]ong before man had developed language to the point where it enabled him to issue general commands, an individual would be accepted as a member of a group only so long

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<sup>1</sup>In his own words, "[o]nce you imagine a world without the rule of law, you can better appreciate how it quietly makes our world so wealthy. Like health in our bodies, the rule of law measures whether a government functions well. As with bodies, there remain crucial question about what to do with a functioning government. But without health, and without the rule of law, none of those questions matter." (BELL, 2018, p. 9)

as he conformed to its rules. Such rules might in a sense not be known and still have to be discovered, because from ‘knowing how’ to act, or from being able to recognize that the acts of another did or did not conform to accepted practices, it is still a long way to being able to state such rules in words. (HAYEK, 2003, p. 262)

Hayek goes further and argue that the institutions of the modern society reached the level of complexity existent due to the fact that they grew as a spontaneous order, but general rules are still necessary to preserve said institutions and this should be done by indirectly “enforcing and improving the rules conducive to the formation of a spontaneous order” (2003, p. 226). Hayek is nevertheless skeptical with regards to the coexistence of deliberate organization and spontaneous order, he argues that even though they should coexist, it should be done so as long as an organization is kept strictly to particular activities that keep the spontaneous order running smoothly (HAYEK, 2003, p. 182-184). This should also be applicable to the enforcement of any society, be it the state or even a company, the responsibility to enforce the general rules (HAYEK, 2003, p. 184).

## 2. Private Property

The concept of private property, which can be considered one of the greatest inventions of humanity<sup>2</sup>. It is essential for human beings to be, in fact, free, in addition to the many efficiencies that such an institution generates. Bastiat already said this, by electing three significant pillars of life: (i) the individual; (ii) freedom; and (iii) the property, and by considering that one cannot exist without the other. In his words,

[n]ature, or rather God, has bestowed upon every one of us the right to defend his person, his liberty, and his property, since these are the three constituent or preserving elements of life; elements, each of which is rendered complete by the others, and that cannot be understood without them. For what are our faculties, but the extension of our personality? and what is property, but an extension of our faculties? (BASTIAT, 2007, p. 2)

Private property is not exclusive to libertarianism. Most political systems have guarantees of private property, but they also have prerogatives for their relativism, which is unacceptable. David Friedman shows us why we need institutions that protect property (FRIEDMAN, 2014, p. 3-4):

Two facts make property institutions necessary. The first is that different people pursue different ends. The ends may differ because people follow their narrow self-interest or because they follow different visions of high and holy purpose. (...) The second fact is that there exist some things which are sufficiently scarce that they cannot be used by everyone as much as each would like.

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<sup>2</sup> The concept of private property as opposed to common property can be referenced to Democritus (460-370 BCE), who argued that private property generated greater economic efficiencies than common property. (COLOMBATTO; TAVORMINA, 2017, p. 4).

Hoppe also demonstrates that, through the protection of private property, libertarian ethics is a vital ally in the pursuit of legal certainty and provides the core to a government (HOPPE, 1989, p. 18):

To develop the concept of property, it is necessary for goods to be scarce, so that conflicts over the use of these goods can possibly arise. It is the function of property rights to avoid such possible clashes over the use of scarce resources by assigning rights of exclusive ownership. Property is thus a normative concept: a concept designed to make conflict-free interaction possible by stipulating mutually binding rules of conducts regarding scarce resources.

Such a logic that pervades the norm of private property is so compelling that, as Rachels argues in his model of a stateless society, it causes the state to lose its legitimacy formally. Let us look at the following epistemological analysis of state and property. Acquiring a property is only accomplished in two ways: (i) homestead; or (ii) through voluntary exchange. Analyzing the means that most states used to acquire their territory throughout their existence, we see it is not reflected in any of the above. We can then infer that the state is a governmentally null force (RACHELS, 2015, p. 69-70). *Contrario sensu*, in the free market, private property is only legitimate in one of the two hypotheses listed above. If not, such acquisition would not be lawful.

In founding a government system in libertarian ethics, we see that the state does not even pass, according to libertarian theory, the test of the legitimacy of its property—but, ironically, we depend on it to protect ours. This essential principle that is violated daily by the state refers to the principle of non-aggression, which broadly proposes that “[i]n short, no violence may be employed against a non-aggressor. Here is the fundamental rule from which can be deduced the entire corpus of libertarian theory” (ROTHBARD, 2000, p. 116). This postulate allows us to understand that any type of aggression to property, whether from the state (by the collection of taxes) or by any individual (e.g., when committing a theft), would be illegitimate in a libertarian society.

With the principle of nonaggression, we understand that the attribute of consent exists within its deontological postulates. The consent of an individual must always prevail in all relationships between agents in order to prevent his or her private sphere from being hurt. We see, therefore, that we are faced with something intrinsically positive and essential to our lives—collectively and individually—in our perspective, but we do not stop to think about the countless times that the state and also individuals act by breaking our consent. Thus, nothing more in line with libertarian ethics than a system where consent is the gateway to any individual.

Tom Bell builds an inspiring argument about consent, starting with Kantian logic about justifying consent through a transcendental argument (BELL, 2018, p. 78) and ending with practical solutions that states can apply to increase consent in their jurisdictions. Bell claims

that the actions of a government can only be justified with the consent of its individuals<sup>3</sup>. The express consent of an individual is not something simple to be obtained, especially in a state, but it would be the essential requirement for its existence in the case of a stateless society founded on libertarian ethics and strengthened private government<sup>4</sup>. A simple signature on a contract would suffice. By contracting a government service along these lines, that individual is consenting to clear and pre-established terms. The consent can never be surpassed for there was an express agreement, in this case, by signing a contract.

In principle, the above postulates allow the solidification of any governmental force—with or without a state—guaranteeing the development and prosperity of a given society. This has been seen in the history of mankind in countries in which individuals were free, but it naturally developed obeying innate rules and principles in its time. Therefore, when we return to the central theme of this work, we understand that the real role of law is to be based on libertarian ethics, ensuring that it is respected and that its positivity is evident and expressed — generally and abstractly — allowing that the future creation of law be founded on the rule of law, and consequently ensuring legal certainty for its individuals.

The present work, elucidating the precepts of libertarian ethics and its epistemological development, in its axioms based on individualism and all that we draw from it, allows us to understand a bottom-up order, created spontaneously. However, as we shall see below, while libertarian ethics is essential, the flourishing of a society cannot solely rely on it. Law must have clear rules about freedom of initiative and entrepreneurship, the strength of the contract, and sound institutions for conflict resolution, which are crucial for this endeavor.

### 3. Entrepreneurship in Government Services

The present work aims to ground, by law, a stateless society. However, as explained above, the law is not capable of making a society flourish alone, but it is necessary to enable its agents—being those responsible for its growth—to be able to act freely. Thus, by understanding the law by the characteristics already discussed in previous chapters, we envision a society that ensures that the individual is free to be entrepreneurial. The entrepreneur is the engine of a market; he is the one who reigns in the multi-market economy, in his search for profit.

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<sup>3</sup> Tom W. Bell makes an analysis of one governed by a state who has never consented to that government in opposition to the original argument, which considers descent as the basis for justifying consent in the country. According to Bell, “If we aim to respect the consent of the governed, after all, we care what they think when they read the plain text of the constitution – not what people long dead once thought about the text, or what judges and legal commentators now think.” (BELL, 2018, p. 99)

<sup>4</sup> By introducing consent, we understand that this is an ethical foundation that alone guarantees, among many other aspects, the superiority of private government services over the state. Therefore, by introducing also the concept of private government service, which will be explained in more detail below, we aim to show the reader a trend in libertarian circles, in which academics and entrepreneurs postulate private enterprise competition in the government market and how the state can be replaced by a private entity. Thus, we will show later what is the current scenario of this market.

Acting in unknown territory, players drive a market from which they absorb information, opportunities, and warnings, and then act accordingly. It is, therefore, precisely the process of discovery and market knowledge that allows players to make decisions. While acting in the unknown, the market process shows that entrepreneurs are apprehensive and aware of their competitors, as the market is real and should be treated in this way.

In this sense, Iorio teaches (2011, p. 45):

Note also that the relevant set of information is essentially subjective in nature because it depends on those enterprising agents who are intuitively able to discover it. Even that kind of information or knowledge that is generally regarded as 'objective', such as prices themselves, is in fact generated by subjective information, such as that which led José to seek Maria to offer her to purchase the object, and then look for João to tell him that he was willing to sell it.

In other words, the subjective action of the entrepreneur and his pursuit of profit enable the entrepreneur to communicate with the market through trial and error, absorbing its information and opportunities, and then acting accordingly. Thus, this process of discovery and knowledge of the market allows basing the actions of entrepreneurs, where any mistake can allow competition to take his place (KIRZNER, 1997).

Looking at the significance of entrepreneurship for society and merely comparing the above with the state-provided activities and services, we see that it is in full disagreement with the most basic principles of entrepreneurship. The state earns its income by aggression towards its "consumers" and yet we are not sovereign as consumers, we are subjects (ROTHBARD, 2013, p. 233). If the state competed in the free market, it is clear that it would have been extinct long ago. However, the state has a monopoly on government services, and therefore, the rules that apply to every society do not apply to it. However, what if the state was a player in a free market? In this sense, Titus Gebel explains the nature of the market the state is in, and how important it is to society (2018, p. 10):

States also exist because there is a demand for them. A state order creates a framework within which people can interact socially and exchange goods peacefully. The existence of security and fixed rules makes it possible for large numbers of people to live together. Such coexistence is so attractive that people are willing to accept considerable restrictions on their personal freedom to enjoy it. Even the subjects of the most violent dictator will likely choose the status quo over the life of Robinson Crusoe on a lonely island. Man is a herd animal.

After presenting specific characteristics of the state's market, Gebel analyzes its size and its inefficiency (2018, p. 10):

The market of living together is not only the most important but also the largest market. State activity accounts for approximately 30% of the gross domestic product of all countries. Nonetheless, the performance is poor. The largest "company", the United States of America, shows losses of approximately 1,000 billion dollars per year on its balance sheet. Some market participants, such as Sweden and Germany intentionally attract unqualified customers in need of alimentation and thus drive away their high paying, regular costumers. Some

competitors, such as Iran or North Korea, even go as far as to kill their own customers for behavior that wouldn't even be considered punishable elsewhere. Any reasonably skilled entrepreneur should be able to do better.

The above passage only ratifies what has been said throughout the present work— the state is inefficient. For that reason, we must pay attention to the last sentence above, because we see that, in reality, there is no doubt that an entrepreneur could do a better job than the state has done. It is only a matter of time, perhaps not so far, as we will see below, for entrepreneurs to enter that market. Competition, as an organic process, not only can but must exist in a government service market. The state needs innovation. Entrepreneurship has achieved magnificent developments in various industries, and it will do the same for government services—the governed must be treated as a consumer, and the latter must be sovereign to the state. It should be noted here that government service, like any market, can take on many facets. It can be authoritarian, libertarian, anarchist, socialist, democratic, or other—it would suffice to have consumers or such.

On the other hand, the state has no incentive to do an excellent job in its task of governing, as there are no uncertainties for a nation's rulers to take a \$1,000 billion loss, according to Gebel's example, above. There is no skin in the game for the government to work and be efficient—the right incentives are not present in the state (BELL, 2018, p. 110). However, they are present to the entrepreneur. From basics of free markets in entrepreneurship, the logic that if a service offered by the government is not pleasing to a particular individual, for whatever reason it may be, it is up to him/her to switch services. So make no mistake: every private government will do everything to retain and acquire consumers.

For that reason, competition as a process teaches us that entrepreneurship in a free market necessarily implies uncertainties that entrepreneurs must face and conquer because if their service falls short of expectations, all their work will be discarded and there will be no state and taxpayers to save him. Consumers, and consequently, resources end up flowing where efficiency resides, as they walk side by side. In the free market, a private government will have in its services the responsibility to comply with what was agreed, and also shoulder the burden of uncertainties in case it does not do so. Therefore, its action must be justified to its consumers.

Thus, Tom Bell formulates and answers the question: “[w]ant a more justified mode of government? Supply laws, adjudication, and enforcement services on expressly consensual terms, under contract” (2018, p. 110). The author goes on to provide a list of six best practices, formulated in theory and practice, aimed at abstracting the state's inefficiencies for a private government service, as follows: (1) respect for consent; (2) protection of fundamental rights; (3) independent adjudication; (4) clear rules and fair interpretations; (5) measures against abuse; and (6) freedom to exit (BELL, 2018, p. 111).

Alignment with Tom Bell's ideas is no coincidence. He has devised a legal system that can be used in private cities and government services. Such a system aids special jurisdictions and, it seems, will be chosen for implementation in a Special Economic Zone (ZEDE), which will be explained in detail, below, but broadly speaking, it refers to a territorial zone with legal

and economic independence of the host country, provided for in the constitution of Honduras<sup>5</sup>. The legal system that Tom Bell proposes is called the Ulex, an open-source system, formulated in a series of rules, adopted from many different jurisdictions, available to all, that “protects personal and property rights with efficient and fair dispute resolution processes and rules, encouraging economic growth and promoting the rule of law” (2018, p. 189)<sup>6</sup>.

This chapter began with a brief exposition of entrepreneurship and ended with the concept of entrepreneurship applied to government services, first designed by Rothbard in his libertarian manifesto and recently resumed with the rising libertarian tendency. The state enjoys a monopoly on government services and maintains it through aggression and its threat to its individuals who reside—not by will but by convenience—in its territory. However, as we saw above, this does not need to be the rule. Players are growing in this market to change the *status quo*, and it is not surprising that law is involved in all the processes. Thus, the following chapter aims to present how to substantiate and guarantee the state of the law in such a service where the private government is charged with fulfilling its mandate like an entrepreneur would in a free market.

#### 4. Contract and Private Enforcement

As outlined above, libertarian ethics allow us to guide a legal order with the necessary clarity of the rules that will be implemented in a given jurisdiction. The law has the significant obstacle of ensuring that such rules are respected, and the means to that is to ensure legal certainty for their individuals. To achieve it, solid contract and enforcement institutions must be created. We introduced the concept of private government services in the previous section and, therefore, we will address here its foundation: the contract. Then, how one would enforce such a service.

In the present case, the contract would assume two functions. One of them would be the instrument which bases the relationship between the head of the private government service and its consumer, laying down the appropriate rules on its performance, similar to a constitution when compared to states. Obviously, in its most ordinary sense, the one that is present in our daily lives, as it is the legal environment that enables individuals to have fruitful relationships with their peers (GEBEL, 2018, p. 196-197). However, the contract must be fulfilled, and its signatories must, once more, have the legal certainty that when signing a contract, it will be respected either by the contracted government service itself or by a supplier. In either case, enforcement is paramount to achieve this (KINSELLA, 2013, p. 12).

The contract is nothing but an extension of private property, as it prescribes an instrument of obligations whereby one may dispose of something or force himself to do something, voluntarily. It is a legal deal, which works as a tool to allow property rights in certain assets to be disposed of under terms agreed upon by two or more parties. It is how the will of each

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<sup>5</sup> Available at: [http://zede.gov.hk/english/About\\_ZEDE](http://zede.gov.hk/english/About_ZEDE). Accessed: Nov 27 2018.

<sup>6</sup> To check the Ulex, see Bell (2017).

party will be described under legally applicable conditions in that particular legal relationship (KINSELLA, 2013, p. 13). This definition of the contract follows a tradition based on natural rights, which differs from the prevailing view that sees a contract as a convention aimed at guaranteeing the expectations of the parties (EVERS, 1977, p. 3).

A normative system based on contracting law is, in almost all its characteristics, superior to constitutional law, and the main reason for this can be traced to the concept of institutions in section 1 above. Individuals have entered into contracts for millennia and proved extremely capable to do so, forming the bases of development. On the other hand, constitutions are comparatively new and have not yet proven effective in providing their subordinates with clarity in their rules, ease of interpretation, and consent. A constitution is imposed on the individual born in a given territory while a contract is voluntarily signed (BELL, 2018, p. 118). This distinction is clear when asking which should have the highest legal force.

Freedom to contract with other individuals of such jurisdiction must be guaranteed and protected by law. Freedom to hire is one of the pillars of the free market, as well as of society at large, but such conflicts and disputes over contracts will always exist, however clear they may be. It is then up to the courts to resolve existing gaps and their arising conflicts—not only from the contracts themselves but any conflicts within their jurisdiction. This occurs through enforcement of the law. Thus, it refers to the means available in a normative system that can guarantee the rule of law and convey the legal certainty that the laws are being, and indeed will be, enforced. Currently, enforcement is global, performed almost exclusively by public authorities. However, private entities also play an essential role in conflict resolution and have been doing so for many years, even more efficiently than public authorities (HOPPE, 2011).

We live with conflict daily, and most of it is not resolved by any third party but rather in a friendly manner between the parties—often because of its simplicity and lack of need to incur costs if the parties involved can resolve it between themselves. These conflicts are solved with soft law instruments that including gentleman's agreements and joint declarations (BORGAN, 2005, p. 71). However, in many cases in which the parties, for whatever reason, cannot resolve between themselves, they seek an impartial third party to resolve it for them. In recent times this impartial third party has been the state. The state, however, is as inefficient in conflict resolution as it is in any other area. The motivation of the state to resolve a society's conflicts is clear: it has the last word on any activity that exists in a particular jurisdiction (RACHELS, 2015, p. 158). Still, it is up to us to ask if the state is essential to perform this task. Several recent and old examples show that the state has not always been responsible for conflict resolution, and current legislation in much of the world allows other means of resolution to be employed in conflicts such as via arbitration, which is a "private dispute settlement mechanism whereby a third party, chosen by the litigants, imposes its decision, which must be complied by the parties" (CARMONA, 2009, p. 31).<sup>7</sup>

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<sup>7</sup> In Brazil, an arbitral decision has the same weight as a court decision, as provided in art. 31, of the Arbitration Law (Law 9.307/96) and may even be judicially enforced.

Conflicts have long been resolved privately with widespread success. Since ancient Rome, jurists, and judges were responsible, respectively, for the opinions and judgments and the consequent creation of laws (LEONI, 1991, p. 209-211). It turns out that jurists were private citizens, and their legal opinions were applied until medieval times. Without state intervention, mercantile laws, formed primarily by contractual law and were highly respected by the merchant class, according to a study by Bruce Benson (2011, Loc. 913 of 10535):

Merchant court decisions were backed by the threat of ostracism a very effective boycott sanction. If a merchant court ruled that a London-based merchant had breached a contract with a merchant from Cologne at a trade fair in Milan, for example, the London merchant had strong incentives to pay the compensation the court judged appropriate. If he did not, other merchants would no longer trade with him. But this sanction, while a real threat was not often required.

Private conflict resolution is not only more efficient but also fairer from an ethical point of view. As Locke argues in his *Second Treatise*, no man should be the judge of himself, but that is what the state does as it judges its conflicts. In a libertarian society, several mechanisms can curb such practices. There are hundreds of arbitration chambers around the world; citizens may be part of a decision in specific courts; laws of various jurisdictions may be chosen as applicable; judges from other jurisdictions could be hired to judge freely; even virtual enforcement is possible.

As seen, the choices a government service can make in one jurisdiction are many. While we have regressed regarding enforcement means by relying almost entirely on the state for it, we have also developed technologies such as smart contracts, which are protocols on platforms like *blockchain* — same with bitcoins — that help companies ensure fulfillment of the contract virtually via algorithms, only<sup>8</sup>. Several companies are already operating in this field, and their potential for growth is enormous.

Contracts and enforcement are institutions dating from when individuals began to relate, being essential for the organic development of law over time, in which it was sought to ensure that acceptable behavior of individuals was applied. The individual needs the legal certainty that something that has been agreed upon will indeed be fulfilled and, if not, that there are effective remedies to compensate for such default. There is no doubt that the stronger the contract and law enforcement institutions, the higher the legal certainty and consequently, the greater the flourishing of a society. Libertarian theory shows us that we can be effective in these areas even without the presence of the state.

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<sup>8</sup> There are several examples of companies using smart contracts. However, in Gebel (2018, n.303) an interesting example is provided in vehicle leasing contracts. In case of default, the smart contract provides for progressive sanctions, for example, the first time the vehicle's air conditioner is cut off; if it is still in default, only one door would open, if still not paid, the car will no longer start.

## 5. Outlook of the Past and Future Societies

The indignation with the state is increasing; liberal and libertarian waves have grown in recent years, and their ideologically aligned entrepreneurs have grown together. In this paper, we have presented specific attributes of libertarian legal thought that underlie a stateless society. In this sense, the present chapter aims to show the past and the future without the presence of the state, presenting entirely successful libertarian societies such as Ireland in the Middle Ages; and also private cities that have failed colossally, such as the Fordlandia in Brazil. Also, we will show new libertarian concepts of government such as private government services, charter cities, *seasteading*, showing their current landscape and their pioneers. It is clear that we are dealing with a still incipient market, but one that may indeed be a giant in the future.

Because of the rapid evolution of information and the constant technological advancement, Mueller believes that the days of the state are numbered and it is only a matter of time before they disappear, either by “voluntary transformation or financial collapse” (2018, p. 408). According to the libertarian, we are facing an era in which true liberalism has hovered, the spread of libertarian ideals is widening, and a new order must be created (MUELLER, 2018, p. 408). Thus, we will begin to look back and analyze the hits and misses we had, for then to look to the future.

Rothbard brings to our attention the example of a libertarian society of the past, which was remarkably evolved for the time, with several features raised throughout this work, such as stateless libertarian courts and laws that lasted for about a thousand years—until it was conquered by England in the seventeenth century (ROTHBARD, 2013, p. 272). According to Rothbard, Celtic Ireland was an advanced society for its time — one without state legislation, police, and enforcement. Justice was entirely private. The politics of the time were done via the *twaths*, of which members of society could or could not be part<sup>9</sup>. At the annual assemblies, they decided public policies ranging from fighting wars to who their kings would be (ROTHBARD, 2013, p. 273)<sup>10</sup>.

The laws were based on local custom, later written by the jurists who assisted the *twaths* and also judged their conflicts, much like in ancient Rome — studied by Leoni — where jurists assisted in the creation and evolution of the law. All, as private citizens. However, unlike the ancient Roman system, there were no judges (ROTHBARD, 2013, p. 273). Moreover, the decisions of such jurists were enforced by the citizens themselves without any interference from those judges, in a system of guarantees and ostracism, as taught by Rothbard (2013, p. 274).

A system like the one described above, stateless and lasting for so long, is something we have not yet conceived in our modern society. The entire globe is constituted by nations

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<sup>9</sup> According to Peden (apud ROTHBARD, 2013, p. 273) a “*twath* is therefore a group of people voluntarily united for socially beneficial purposes, and the sum total of the territorial properties of its members constituted its territorial extension”.

<sup>10</sup> As Rothbard points out, kings were a kind of religious leader and mediator of the assemblies, and at no time did he have sovereignty before a *twath*.

where the state is ever-present, varying only in size. However, it is up to us to provide some examples of how the notion of a stateless society has evolved. Despite being lost in our history, one of the first private cities ever founded—the Fordlandia, which failed miserably—took place in our own backyard in Brazil<sup>11</sup>.

Henry Ford conceived the Fordlandia in the late 1920s in an attempt to combat the UK's monopoly on rubber production for its vehicle tires. To this end, he started negotiations with Brazil and, during a visit to the United States by then Pará Governor Dionísio Bentes, they agreed to build the Fordlandia, the first private city. With an investment of approximately 20 million dollars (equivalent to approximately 275 million dollars today) and the promise of plenty of jobs and a lifestyle like Americans had, thousands of workers with their families moved to the Fordlandia.

Several problems caused the Fordlandia to collapse and be abandoned in 1945. First, Ford, as he did in his car production line, wanted to create a new kind of mass worker. Without any knowledge of the local culture, he imposed many restrictions on the living conditions of the workers, from stipulating the type of food available, such as hamburgers and canned food, to the dance steps that the workers' children should learn. As if that was not enough, logistical failures were numerous, such as disregarding the floods and droughts of the Tapajós River, preventing fresh food from reaching the private city, which eventually caused riots of its workers against the administration. Finally, the rubber trees (*Hevea brasiliensis*) succumbed to local illnesses and pests in yet another logistical flaw, ending Ford's project (BELL, 2018, p. 42-43).

The Fordlandia shows the failure that private cities can have without minimal planning and designing a solid operating plan and total disregard for spontaneous order. For this reason, this paper has focused on presenting the legal foundations for a stateless society without trying to create a model for it, showing determinant concepts of old institutions that may guarantee the success of such a society. Hayek's argument for legal institutions provides us the insight that hampering with spontaneous order may be severally detrimental and the colossal failure of Fordlandia is one such example.

Today, Honduras has created a legal framework that allows a special economic zone in its territory, called the *Zonas de Empleo y Desarrollo Económico* (ZEDE), which allows the establishment of a jurisdiction independent of the host country in various fields, both administratively and legally, and should only "respect the constitution of Honduras on matters relating to sovereignty, the application of justice, territory, national defense, foreign relations, electoral aspects, and identity and passports."<sup>12</sup> Aside from that, a given territory may have its own laws, regulations, and fiscal policy.

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<sup>11</sup> Available at: <https://www.nytimes.com/2017/02/20/world/americas/deep-in-brazils-amazon-exploring-the-ruins-of-fords-fantasyland.html>. Accessed: Jan 28 2020.

<sup>12</sup> Available at: [http://zede.gob.hn/english/About\\_ZEDE](http://zede.gob.hn/english/About_ZEDE). Accessed: Nov 27 2018.

Honduras adapted 2018 Nobel Prize winner Paul Romer's charter cities<sup>13</sup> principles and granted the possibility of providing government services in a ZEDE to private entities rather than to another government so that their sovereignty would not be threatened. In uninhabited places, a ZEDE can be created only with the consent of the landowner (GEBEL, 2018, p. 162).

The Honduran government has kicked off bidding to start negotiations with potentially interested parties, and several candidates presented their projects, which need the approval of a special committee that will be responsible for overseeing that ZEDE. According to Gebel, "[s]everal ZEDEs are currently being initiated" (GEBEL, 2018, p. 162). The Honduran government spared no effort to allow the possibility of ZEDEs in its territory, amending even its constitution. An exclusive economic zone with dynamism and legal certainty, not existing in the host country itself, is a well-founded attempt to generate jobs, attract foreign investment, and accelerate its economy.

Another similar example is the *Seastead*, a project created by the *Seasteading Institute*<sup>14</sup> founded by two major libertarians, Patri Friedman and Peter Thiel, which consists of creating floating platforms that work as maritime zones with administrative and economic freedom, where the goal is to "test new ideas for government", as stated in the strategy area of its website<sup>15</sup>. Very early on, the institute created a strategic plan to address the considerable hurdles to a project of this magnitude, such as technological, legal, and financial issues. The institute has not yet found a sustainable way to ensure the success of the project but has already made a partnership possible by signing a memorandum of understanding with a host country, French Polynesia. However, the goal is that, in the future, the floating islands will sail in international waters<sup>16</sup>.

As Gebel states, the above examples are all of the private cities we currently have, but elaborate concepts allow this panorama to change over the years. Honduras' ZEDEs may be closest to the medium-term while floating islands will still take a few decades to come alive. However, these cases demonstrate a real libertarian advance that only existed in scholarly books and articles until recently, now with the work of prominent, capitalized entrepreneurs and a vision of the need for better government.

## Conclusion

In an attempt to ground a stateless society through the principles of law, we had to revisit the real concept of law, looking at how it developed over time and showing the weight of spontaneous order and how this seemingly simple concept have such important implications.

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<sup>13</sup> The concept of *charter cities* was coined by Romer for a solution for the economic development of developing countries, in which special economic zones would be created in certain territories, but the applicable arrangement within such zone would be that of the signatory country.

<sup>14</sup> Available at: <https://www.seasteading.org/>. Accessed: Jan 28 2020.

<sup>15</sup> Available at: <https://www.seasteading.org/about/vision-strategy/>. Accessed: Jan 28 2020.

<sup>16</sup> Available at: <https://www.seasteading.org/about/vision-strategy/>. Accessed: Jan 28 2020.

Today, the state acts as the monopolist of Law, when in fact the Law is much older than the state itself. Therefore, we went back to the intrinsic connection of law and praxeology to help us understand, aprioristically, the legal foundations that are crucial for the functioning of a society. But an axiomatic work is not enough and looking into the spontaneous order that shaped law and developed the means for individuals to live and prosper together, the aim of this paper was to bring these fundamentals of legal institutions, as studied by libertarian authors, and to see how they apply under current conditions, without state intervention.

In this sense, we went over the fact that governmental services should be seen as their own market, and also as the largest of them and once this insight reaches the minds of able entrepreneurs, the future may have indeed a different perspective altogether, because only then entrepreneurs will be eager to compete with each other in this market monopolized by such inept player. The state has tremendous weaknesses and if put the services it provides under a microscope all we see is its clear inefficiency, which cannot remain unexploited by private services. Entrepreneurs have the tools to do a better job. Competition alone would make such services meet the demands of their consumers. Not surprisingly, when considering such plans, their proponents' most significant concerns are how to ensure the rule of law and legal certainty for their future citizens.

Nevertheless, these questions remain: how can such a service be started? What would be the starting point for a project with such ambition to be genuinely formulated? With this in mind the present paper aimed to demonstrate that in order to achieve this, it is necessary to analyze where the weak points of the state are, and formulate a way, through legal theory and historical analysis, to overcome its inefficiencies and ensure that the government services market can supply them accordingly. To this end, the legal means that transcend the state and prove essential to any society are presented throughout our work.

The questions raised here allow us to conclude that there is a present constant in our society that can be seen as the root of the barriers that permeate our daily lives and inhibit our freedom. It is clear that the state is this constant. Moreover, libertarian models of stateless societies do not have clear guidelines on how to get rid of them, but instead, build their argument from an imaginary point where the state has been eliminated from our lives and thus elaborate its libertarian model. What we have attempted to do instead is show that stateless societies are possible, and have clear benefits even as an imaginary construct, but the actual setup of such societies can have such diverse and still unseen ramifications that a model can be futile. Thus, the goal of this work was to analyze the current institutions and, based on their respective characteristics, shape the legal foundations necessary for the development of a stateless society.

We are currently seeing traction on the subject, as Romer was awarded the economics Nobel prize in 2018 for his work on charter cities, or the ZEDEs and other economic zones currently under development, free private cities institute, among other projects that still need to be cataloged. But the bottom line, entrepreneurs are presenting themselves and there may be new facet of private government on the horizon, one that may not be enshrined by

a consentless constitution that intrinsically limits our freedom, but instead by a voluntarily signed contract, an institution which individuals have been using for millennia.

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