Archiv für Rechts- und Sozialphilosophie – Beiheft 168

Franz Steiner Verlag | Auszug aus:

DIGNITY, DIVERSITY, ANARCHY

Proceedings of the Special Workshops "Human Dignity in Europe" and "The Anarchist Critique of the State, the Law and Authority" held at the 29th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR) in Lucerne, 2019

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Franz Steiner Verlag, Stuttgart 2021

Table of Contents

Preface 5

KLAUS MATHIS / LUCA LANGENSAND
Introduction 11

I. Dignity and Diversity

1. Human Dignity in Post-Secular and Pluralistic Society

PAOLO BECCHI
Human Dignity within Post-Secular Society 17

DAMIR BANOVIĆ
Philosophical and Legal Foundations for LGBT Rights 29

2. Human Dignity in Latin America

RENATO RABBI-BALDI CABANILLAS
The Principle of Proportionality, Human Dignity and the Jurisprudence of the Argentinian Supreme Court
An Analysis Based on the Thoughts of Robert Alexy 55

MARCOS AUGUSTO MALISKA
Human Dignity and Constitutional Pluralism
The Brazilian Constitution of 1988 in Times of Deep Political Dissension 69

ANTONIO PELE
The Rise (and Fall) of Authoritarian Dignity
Political Struggles & Tropical Necropolitics in Brazil 79

II. Diversity and Anarchy

1. Historical Approaches to Anarchism

MAURICE SCHUHMANN
Vive la Révolution!
Anarchist Perspectives on the French Revolution 99

KLAUS MATHIS
William Godwin's Utilitarian Anarchism 117

ANNA BUDZANOWSKA / TOMASZ PIETRZYKOWSKI
Edward Abramowski's Idea of Solidarity and Stateless Cooperation
A Polish Contribution to the Anarchist Thought 129

2. Anarchist Approaches to Domination, the State, Law and Social Order

JAMES HUMPHRIES
Domination, the State and Anarchism 143

ALEKSANDER MIŁOSZ ZIELIŃSKI
From "Insurrection" to "Counter-revolution"
Post-anarchism and the Critique of the State 169

PETER SEYFERTH
The Case for Anarchist Litigation
Why the Enemies of Legal Institutions Want Legal Institutions 203

LUCA LANGENSAND
Anarchist Law?
Ideas of Social Order and Regulation without Domination 219

3. Critical and Alternative Approaches to Anarchism, the State, Law and Authority

WANSHU CONG
Levinas' Anarchy, State and International Law 255

CLELIA BARTOLI
State Without Territory
A Legal-Political Heresy 279

JUAN CARLOS RIOFRIO / RICARDO LOPEZ
Limits and Possibilities of Anarchism
Proposing a "Focused Anarchism" 311

DAVID DÜRR
Anarchism, Capitalism, and the Law..... 333

Anarchism, Capitalism, and the Law

DAVID DÜRR

Abstract: To many, anarchism is connoted or even equated with socialist collectivism. There is however an individualist market-oriented tradition of anarchism as well, going back to the 19th century and today still alive. A salient feature of this "capitalist" anarchism is how it deals with the Law: While for collectivist anarchism law is a matter of material justice, for individualistic anarchism however law is rather a matter of correct procedural rules.

Keywords: Individualist anarchism, capitalist anarchism, law without state, state as illegal institution

I. Introduction

There is a long tradition of fundamental contradiction between anarchism and capitalism. This seems plausible for certain historical developments in the 19th century, when capitalism and statism acted as powerful close allies and therefore became quasi twin targets of hostility from the side of socialist anarchism. However, there were contrary movements too, much less known in our days, of strong critique against state power from the side of entrepreneurial or capitalist positions. It is out of this tradition that came out what was later called "Anarcho-Capitalism" or "Anarcho-Libertarianism" or "Market Anarchism".[1]

Today, it seems that this sort of anarchism is probably more living, more outspoken and namely much more oppositional to statism than "traditional" socialist anarchism, which became in part quite befriended with anti-capitalist policies of the welfare state. By focusing on the rejection of private property, collectivists or communists care little about state legislation restricting private property such as by taxation, finance regulation, real estate restrictions etc. or they even deplore insufficient state regulation.[2]

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1 Hülsmann, pp. 1023 et seq.; Rothbard (2011), pp. 267 et seq.; Rothbard (2002), pp. 257 et seq.; Long.
2 E. g. Gordon, p. 281.

II. Entrepreneurial anarchists in the 19th century

1. Statesmen and entrepreneurs

In the 19th century exponents of the then newly emerging capitalism usually stood close to state power. In Switzerland, a rather typical example was Alfred Escher (whose 200th birthday was recently celebrated as well as critically debated). He was a capitalist in an almost literal sense, collecting private capital in large amounts and organizing typically capitalist structures such as shareholders' companies for railroads or banks; and at the same time he was member of the highest political levels of the country, including the government of the newly (and in violation of international law principles)[3] formed Swiss Confederation. He was both, a capitalist politician and a political capitalist. His political party was called "liberal", but this did not prevent him from war-waging against catholic cantons that took the liberty to form a federation of their own. Escher's party won that war and forced the Catholic cantons into the then newly formed Swiss Confederation.

Not by accident, earliest capitalist structures typically did not emerge out of free entrepreneurial motivations but came from political rulers that diversified into business opportunities, such as prominently Gustav Wasa of Sweden, Franz I. of Austria or Jean-Baptiste Colbert of France.[4] And their successors of the 19th and early 20th century such as the railroad, steel or finance barons Vanderbilt, Carnegie or Rothschild though being private entrepreneurs were sort of princes with very tight relations to political circles protecting their business monopolies. And not too rarely their financial exposures were intrinsically intertwined with public means.[5] So it was quite logical that anarchist resistance against such powerful centers were directed not just against the state but very much against capitalists, as well or even more so.[6]

However, there were much less-known capitalists in fundamental opposition to the state, such as the American businessman and lawyer Lysander Spooner, the French Frédéric Bastiat or the Belgian Gustave de Molinari.[7] They too welcomed the technical, organizational and financial opportunities of the new age liberated from mercantilism, however not in coalition but in opposition to the state.

Their reasons for the critique against state intervention were in part quite close to the one articulated by socialist or communist anarchists. For they were critical not only against the then emerging welfare state (which in turn was not the main concern of the anarchists) but also and quite outspokenly against the state as an institution

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3 Cf. infra footnote 45.
4 Taghizadegan, pp. 20 et seq.
5 Taghizadegan, pp. 39 et seq.
6 Such as Proudhon.
7 Infra 338, 339.

of monopolized legislation and law enforcement. This brought them into conflict not only with socialist tendencies supporting growing welfare state legislation, but also with so called "liberal" positions like the one of Escher mentioned earlier, who supported or even formed state structures themselves.

Not by coincidence, there is an interesting parallel to socialist anarchists in conflict with statist socialists such as the famous enmities between the anarchists Michail Bakunin and Pierre-Joseph Proudhon on the one side and the statists Karl Marx and Friedrich Engels on the other. In both cases of the capitalist and the socialist anarchists, the positions were not hostile to law and order as long as law and order were not monopolized by a central instance like the state.

2. Anarchism and the law

At first glance, this might sound contradictory: How can law and order be organized and maintained if there is no ultimate instance and consequently no "last word"? No ultimate instance = no *arche* (Greek = first, top, *arch* like *arch*duke), seems to mean no ultimate fixed point to enforce law, and therefore no stability and no order. A typical anarchist response to this is that people can voluntarily agree on their law, they can democratically decide their rules, choose their courts etc., and by this form a fully legitimate basis for society-wide law and order – without the need for a strong monopolist.[8]

But what if they do not agree? What about hard but very frequent cases where conflicts are not solved by agreement, procedures are not defined by arbitration clauses and judgments are not complied with voluntarily? This dilemma leads (1) either to contradictoriness by nevertheless allowing some alternative entities to coercively intervene against dissenting addressees; (2) or to embarrassment for not being able to contribute a useful solution; or finally (3) to a completely different approach in dealing with the phenomenon of law: Not in a normative sense, asking for *what should be,* but instead in a recognizing sense, asking what the phenomenon of law *is all about*; not in the sense of creating and enforcing norms but of searching with scholarly care for regularities of social behavior and then to work with these like engineers investigating the laws of reactivity, gravity, friction or inertia and using these for the construction of useful devices and machines.

And what are the consequences of this natural science approach? – In case a machine gets too hot while running, the wise engineer will react by adjusting the design in order to comply with the laws of nature. If he doesn't react this way and his machines keep exploding or melting, he will soon be out of business. If he reacts by forbidding

8 Bell, pp. 75 et seq., pp. 81 et seq.

the machine to behave this way, he will be laughed at as a lunatic. And if, in addition, he even forbids other engineers to be wiser than him, to delve deeper into the laws of nature and to develop more sophisticated machines, then he will be behaving in just the way the state does with the laws of social behavior.

III. How to deal with the dilemma?

This was the dilemma faced by the anarchists of the 19th century (and also by other scientists of that time such as the then emerging sociological approach to the law)[9]: On the one hand they realized that there were rules existing as natural regularities of social behavior and that they would naturally occur out of these corrections without anybody ordering such rules; on the other hand the outcome in social reality though producing positive economic effects included negative consequences as well, namely for those members of society that got the designation "Proletariat". In any event, there were different ways to deal with this dilemma:

1. The Marxist approach

One approach was to force the natural laws to behave the way one thought they should. This was the Marxist approach which assumed that history "must" – in the sense of such a natural law – lead to an egalitarian structure of society without different classes, without top-down structures and therefore without a state. And since the development *must* go in that direction (or rather: even though the development *will* go in that direction) one should force it to go there. And this enforcement had to be that imperative that it even justified to "provisionally" use the strongest top-down structure conceivable altogether which is the state; or in other words to enter into a tactic alliance with the ultimate strategic adversary.[10]

As already mentioned, this brought Marxism into a fundamental opposition to anarchist theories such as Bakunin's, Proudhon's, or later Buber's, Landauer's, Mühsam's and other socialists' theories.[11] However, this is not the subject of this paper.

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9 Cf. Ehrlich, pp. 81–110; cf. Also von Mises, infra 266.
10 Marx and Engels, Part II.
11 Bakunin.

2. The anarcho-socialist approach

The socialists just mentioned, though being on the same collectivist side as Marx, decidedly criticized Marxism for being contradictory in its means: Fighting against the state by acting as a state does not solve but confirm the problem.[12]

They agreed however with Marxism in two respects: First, that there are natural regularities influencing the development of society,[13] and second, that the development tends to a more "social" structure of equal face to face relations. But unlike Marxism they thought of this tendency not as a normative command but as a fact. Even though they welcomed and advocated socialism they did not endeavor to enforce it. Nevertheless, they supported it by finding and formulating legal rules in order to strengthen collectivist structures such as cooperatives (Genossenschaften) and groups of cooperatives with the goal of collective self-help.[14]

Their conviction that those natural regularities would lead to such collectivist structures was prominently based on the fact that they are *general* rules, that they have effect *equally on everybody* and that – as a logical consequence – the outcome must be an egalitarian structure without top down domination, without chiefs and subordinates, without patrons and workers. In other words, they equated the generality and equality of regularities as such with their outcome in the highly complex context of society; they excluded or at least neglected the possibilities of voluntary deviations from egalitarian structures such as hierarchies of business enterprises, churches, families etc. One might debate whether such a vision is realistic or not, in any event its articulators (or at least many of them) did not commit the contradiction to advocate coercive enforcement of egalitarian structures against unwilling people.

And apart from that, this isn't the subject of this paper either.

3. The anarcho-capitalist approach

A third approach, the one this paper is dealing with, is even more consistent in taking natural regularities not as orders to create a certain kind of society, not even as norms that will lead to a certain kind of society, but just as regularities that influence the course of society like – again – natural laws that influence the course of the world. Such an approach is not interested in some ideal final vision of society, but rather in the way the members of society deal with each other, how they handle collisions, how they react to positive or negative behavior of other members etc. The "justice" of this approach is not in the outcome but in the way to get there.

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12 Bakunin; Buber, on Proudhon and Kropotkin, pp. 46–80.
13 Which was ultimately the basis of dialectic materialism; Engels, mainly chapter II.
14 Buber, note 12, pp. 100–136.

When Frédéric Bastiat, in his essay "The Law", deplores the abuse of legislative power to enforce political goals of the holders of power, he does not start by criticizing these goals, but he starts from natural regularities: "Nature, 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?" As a consequence the law and the rights it attributes to the individuals are essentially negative; i. e. at its core the right to defend oneself – and thus to defend against political goals of any kind as long as one does not voluntarily adhere to them.[15]

This is what we are calling here the anarcho-capitalist approach; not primarily alluding to capitalism in the historical context of the 19th century, just described when "capitalists" entered into alliances with statist top-down structures. What is meant here, as basic structure of capitalism, is an approach that locates legitimacy for any intervention against individual positions exclusively in these very positions as such and their collisions with other such positions. Or in legal terms: The source of law cannot be found in heaven or with some lifted authority or in some political vision of how society should be, but only in the conflicts between individuals or groups or classes or any other entities subjectively articulating their reciprocal incompatibilities.

In other words, it is an essentially decentralized approach connected to and starting from those uncountable instances in society that articulate to be bearer of rights or obligations, to be subjectively competent for specified goods, to be the subjects of objects, to be the "head" – the *caput* – of something. Common understandings of capitalism, mainly the pejorative ones, have gradually deviated from this pure etymological explanation and equate capitalism with a system of high concentration of economic means that allows the capitalists to dominate many others. This might be the practical consequence of that decentralized individual approach in case of certain facts and conditions but it is not necessarily the essence of it. Such consequences might rather be due to other aspects in the historical context of that alliance of capitalists with the state; or in other words, with the mere opposite of decentralized bottom up-structure i. e. with an interventionist top-down structure.

But again: What is the answer given by such a decentralized approach to the challenge of ruthless aggressors that do not respect other individuals' belongings such as their body or personal belongings? Or in other words, how can security be guaranteed without a state, or at the least – as collectivist anarchism would admit – without one over-individual security cooperative? Gustave Molinari, already mentioned above, was one of the first to offer a convincing approach on how to deal with this problem: He

15 Bastiat, pp. 2–19.

did not, in the first instance, forbid the state to produce security but only forbade to prevent others from competing in the security business: "That the production of security should, in the interests of the consumers of this intangible commodity, remain subject to the law of free competition. Whence it follows: That no government should have the right to prevent another government from going into competition with it, or to require consumers of security to come exclusively to it for this commodity."[16] The term "government" sort of changes from an official state authority to a mere entrepreneurial entity – or in other words: The problem of the state is not primarily what he does but that he pretends a monopoly and a right to enforce his commodities onto the subjects.

While this shows that the state is not indispensable for the production of security another outspoken anarcho-capitalist of the 19th century, Lysander Spooner, insists that the state does not only lack legitimation but quite to the contrary, that it is a thoroughly criminal institution by its very essential functions of legislation and coercive justice. His main argument is that traditional and insofar natural law has developed rules of mutual behavior, security, protections, equivalence etc. generally followed by people in their mutual relations; and that now the state comes in and exempts itself from all these rules by its pure power of legislation.[17] What it forbids the subjects, it generously allows itself as an arbitrary privilege; it preaches water and drinks wine.

IV. Finding and not making the law

The history of European law reaching back to ancient Roman law, as well as to tribal Germanic law and other traditions, resembles the earnest engineering work described supra[18]: In general, one has dealt with law as something not to create but to understand, something not to order but to describe, not to prescribe but to write down in restatements.[19] Even such a prominent code like the Corpus iuris civilis of the byzantine emperor Iustinianus was mainly[20] a compilation of court decisions – decorated with the imperial seal – which experts of the classical era had searched for and collected. As long as the content of such a collection corresponds to the reality of legal practice, the imperial seal, though being dispensable, is at least not harmful.

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16 Molinari, pp. 22 et seq.
17 Spooner, Chapter 7 and 11.
18 Supra, p. 335 et seq.
19 The well-known *Restatements of the Law* edited by the American Law Institute since 1923 are thus in the line of a long tradition that goes back to Roman law compilations, then to European medieval collections sometimes called "Spiegel" and finally to broad scientific restatements of the 18th and 19th centuries.
20 Except the *Codex iustiniani*, which was a part of the Corpus that contained a collection of imperial statutes mainly in the administrative and military matters; the Corpus was collected by order of Emperor Iustinianus between 528 and 534 A. D.

This pattern of searching instead of ordering fundamentally changed in 19th century Europe when the rising nation-states decided to create their own national codes such as the French Code Civil, the Prussian or the Austrian Allgemeines Bürgerliches Gesetzbuch, later the German Bürgerliches Gesetzbuch or the Swiss Zivilgesetzbuch. The raw material of these voluminous and encompassing codes had mainly consisted of field research by scholars of law and legal history and so the first editions of these codes were something like a snapshot of the reality of law at that very moment. But then a dramatic change took place: The codes as such once issued by the state became the "source of law". Their force was no longer based on material criteria such as justice, God, reason, nature, naturalness, tradition etc. but on the mere fact that they were decided by the official state legislator.

This was something like the "Fall of Man" in the evolution of law.[21] – Not because justice, God, reason, nature, naturalness, tradition etc. would grant an uncontestable foundation of law, but because nobody else does either. Therefore, *nobody* should have the competence to ultimately decide what the law is. This is of course also true for the laws of Justice, of God, of reason, of nature etc. and there were and are always temptations for those claiming to be the official representative of God, or the intimate expert of nature, or the top specialist of reason. But typically, all these representatives and intimates and specialists do not pretend *to be* God, nature or reason themselves. And if they did so they should be accused of hybrid arrogance or blamed for argumentative inconsistency or at the very least laughed at for their absurdity.

Such useful social reactions were sort of switched off when in this 19th century "legislative turn" the state itself became the source and thus the original producer of law. From that time on the state legislator was not compelled any more to justify its interferences with people by appealing to justice, God, nature or reason, from now on the state legislator was its own justification. No wonder that it used its function less and less for its original task of legal engineering in the sense described before, but abused it more and more for the purpose of its own power with all those terrible excesses of statist totalitarianism emerging in the 19th and 20th centuries.[22]

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21 The famous essay by Friedrich Carl von Savigny of 1814 (1st edition), *Of the vocation of our age for legislation and jurisprudence (original in German), vividly but unsuccessfully warned against this tendency*.

22 Such as namely the 1935 *Nürnberg Race Legislations*, that were not just ordered by the NSDAP, but carefully formulated in statutes that in turn were passed by the official legislator, i. e. the Reichstag, and then officially published in the *Reichsgesetzblatt (=official gazette of laws)*.

1. Chantecler and the rule of law

Nevertheless, it is not easy to imagine *what* law to apply if not the one produced by the state legislator.[23] Who shall make the law if not the state?! This reminds me of the question often raised by statists when shocked by libertarian positions: Who shall build the streets if not the state?! My usual answer has been a counter question: And who shall bomb the streets if not the state?! And why shall we not answer the law question with the equally cynical counter question: Who shall pervert the law if not the state?! There are indeed not a few examples of states abusing their legislative power to justify brutal injustices. It is not even necessary to recall the extreme albeit not untypical race legislations of the German National Socialist Regime. As will be shown hereafter state legislation even in our days creates a full-scale scheme of misuse of state power that contradicts fundamental principles of law.[24]

But nevertheless and again: Who makes the law if not the state?! – This insisting question reminds us the animal fable of "Chantecler" by the French author Edmond Rostand[25]: Every morning Chantecler the proud cockerel of the hen house, loudly and solemnly shouts out his cry, and thanks to his strong will and voice the sun rises. That is why Chantecler's authority is absolutely uncontested. All hens are convinced: Who makes the sun rise if not Chantecler?!

We as enlightened human beings know of course that the sun rises anyway with or without Chantecler, the hens do not need the cockerel to care for light and warmth. But remarkably, many human beings think that they need the state in order to care for law and order, that they need state legislation to forbid murder. But that said: Is it forbidden to kill somebody because the state's penal code says so? Or do all the states' penal codes contain such paragraphs because it is forbidden anyhow to kill one another? Of course, the latter is true, and not in less an obvious way as it is true that Chantecler's cry is not the cause but the consequence of (or maybe another positive correlation to) the sunrise.

This corresponds to a principle we experience in everyday life and scholars have articulated as one of the strongest phenomena of the world: The Rule of Law. It says that this world

- does not function by independent willfulness of Gods or cockerels or others,
- and neither by causeless coincidence,
- but by rules such as e. g. the laws of gravity or of "action equals reaction" or by many other regularities of nature, evolution, behavior, thinking etc.[26]

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23 This problem might be smaller for Common Law traditions, where private law issues are traditionally decided on the basis of precedents, but here too public regulatory matters are dominated by state produced legislation.

24 Infra, 349 et seq.

25 Edmond Rostand, 1868 to 1918, a French poet and dramatist, who wrote *Chantecler* in 1910.

26 Cf. Hawking and Mlodinow.

2. The rule of law above the king

This Rule of Law, in turn, is not in force because somebody orders its enforcement but because it is there. To take the classical Newtonian example, it is not a coincidence that an apple falls to the ground once it breaks from the branch of a tree. The next apple breaking from the branch will fall down the very same way; and again, not because somebody orders it *should* do so but because it *does* so.

Interestingly the term "Rule of Law" is used not only by natural scientists such as astro- and quantum physicists[27] but also by theories trying to attribute legitimacy to the state. These too, advocate the "Rule of Law" which means according to the same trilogy, that the state

- does not function by independent and thus arbitrary will of the government,
- and neither by causeless coincidence,
- but by the legal laws that apply to everybody, to the small and the big, the poor and the rich, the citizen and even the state itself.

It is namely the first and the third elements which have played a prominent role when subordinates argue against arbitrariness of their leaders and when the latter try to put themselves in a good light. An early example for the first case is the book "Lex – Rex" written in the 17th century by the Scottish minister Samuel Rutherford[28] who as a consequence was accused for high treason (and escaped death penalty only by dying of old age). And yet his only crime was to argue that the king should be subject to the law. Rutherford was not against a king governing a whole country without any democratic control, but he argued the king should do so in a lawful instead of an arbitrary way. As we will see later, Rutherford's demand even in our days is still by no means fulfilled.[29]

But let us first return to the Rule of Law in that broader and rather "natural" sense, in order to derive from it the foundation of the law which shows the unlawfulness of state made law.

V. The conflict and its rules

If a body physically collides with another body, the force applied to the latter will strike back against the former. Everybody has learned this law of Action equals Reaction (AER) in school and has probably experienced it in his first golf lesson when smashing the club into the ground, and after his second attempt he knows for sure that AER is a reliably foreseeable regularity, i. e. a law.

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27 Cf. Hawking and Mlodinow.
28 Rutherford, mainly by the questions XXII to XXVII.
29 Infra, 349 et seq.

This law works irrespective of whether it is subjectively perceived. It does not only apply to golf beginners but also to stones colliding with each other. Even though this does not "hurt" the stones in the sense we attribute to this notion, the law of AER produces its full effects: Both stones ricochet away in different directions, one or both break apart etc. And they do it irrespective of whether spectators like us take note of it or whether we can predict what precisely will happen, in what direction stone A will fly and into how many parts stone B will break, or what precisely will be the consequence of hard stone A falling on soft tree T, or of tree T falling on the head of Homo Sapiens X.

1. The conflict "producing" his parties

Even us as Homines Sapientes will not be able to precisely predict what Homo Sapiens X will do as a reaction to tree T falling on his head. It will be even more difficult to predict what the stone's or the tree's reactions are since Homo Sapiens X will show a much more sophisticated reaction: Apart from the simple and direct application of AER much more complex additional reactions will be triggered such as experiencing pain, then activating moves developed over millennia of phylogenetic evolution e. g. to protect by specific gestures sensitive organs like eyes[30], activities probably acquired mainly in the individual ontogenetic evolution such as stemming oneself against the tree and trying to push it away etc. And it becomes even more complex if we assume that X keeps cool, does not just automatically react but first analyzes his unpleasant situation and deliberately decides e. g. not to push away the heavy tree to the one side but instead to sneak out himself by the other side.

If in fact there is a Rule of Law all these hardly predictable reactions are but applications of it. Then, even those "analyzing" decisions e. g. to sneak here instead of pushing there are neither arbitrary nor accidental but follow natural regularities. There are good reasons to follow this approach even though it increases the complexity in comparison to simply rationalistic or to simply naturalistic theories.[31] One has to combine both these aspects, i. e. taking rationality as a reality without ignoring its biology and exploring nature without omitting its subjective elements.

In any event the collision between tree T and Homo Sapiens X and the pains it produces to the latter provoke subjective reactions with a tendency to fight against T. While pushing it away X would probably shout "Away, you bloody tree!", and once escaped out of his unpleasant position he would perhaps "punish" the tree by angrily kicking it. The reader is probably familiar with such reactions from his own experience:

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30 Such as described by Michael Graziano as a very old element of human behavior influencing many of today's signs of social communications, cf. *The First Smile* https://aeon.co/essays/the-original-meaning-of-laughter-smiles-and-tears (access: 06.11.2019).

31 Cf. high interdisciplinary complexities e. g. in approaches by Wilson; Gruter; Alexander.

One inadvertently pushes against a table which hurts and makes one blame and even beat the wicked table (which hurts again, AER). In other words,

– the collision creates pain
– which in turn gives rise to subjective perception
– and thus, articulation of blame,
– which again urges one to take action against the colliding body,
– and finally allows the emergence of rational classifications of "wrong" or "unjust" or "illegitimate" etc.

2. The parties and their argumentation

The same of course will happen, in reciprocal duality, when Homo Sapiens X does not collide with a tree but with Homo Sapiens Y. Then, both Homines Sapientes will suffer pain, shout at the opponent, blame the other and be convinced that the opponent is wrong and illegitimate. In a more cultivated context, they will develop the mutual shouting into a discussion, the pains suffered into the argument of "my property" and the blame of wrongness into the more sophisticated theory of "violation of a right". It seems though that corrective reactions to physical interferences as well as the accompanying debates and also the theories invoked during such a corrective process are but functions of the physical incompatibility of the collision – and not the other way round: There are no rights at the outset that must be implemented into this wrong world, but there are collisions in the world that lead to mutual reactions and initiate debates along with subjective rationalizations accompanying the whole process. The mainstream of these correlations work bottom-up, not top-down. – In the beginning was the *World* – the *Word* came much later.[32]

Reality is of course much more complex than sketched here. This is particularly true of rationality und its articulation in the context of argumentation. Even if one follows the bottom up approach just mentioned, rationality and argumentation are far from being a mere byproduct decorating the physical process, so to speak. Rationality and argumentation are powerful elements which not only accompany but also strongly influence the course of things. Therefore, many effects of argumentation, such as embarrassing or convincing the opponent and thus causing him to behave in a less incompatible way, or alerting bystanders to support the arguer's position[33] etc., may show patterns of influence from an outside rationality taking influence on reality, but the occasion and thus the ultimate cause for such influences is still the incompatibility of the conflict as such. In other words, argumentation is part of the reaction to a collision.

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32 Cf. John 1:1, In the beginning, the Word existed … (according to "International Standard Version").
33 Infra, 345 et seq.

This in turn means that argumentation is a *normative* kind of articulation, not a *describing* one. Argumentation does not just state that this or that is so. By *arguing* one takes up a position against an opposing allegation which in turn is typically formulated in a respective counterargument. This normative aspect is particularly strong when the cause of argumentation is a physical conflict such as the one between X and Y just mentioned. Both sides not only shout in pain and anger and probably rebuff each other, but each of them *argues* that he is right, and the other is wrong. In the first instance this means nothing more than that the other's body collides with his and that from his body's position this is a negative impact. But "argument" means more than this. Etymologically the notion stems from *Argentum* = silver, the brightly shining metal, and insofar alludes to putting light on the object of argumentation. Arguments therefore specifically have to do with the object of conflict, they are insofar derived from the illuminated facts of the conflict at stake.

And when the parties then succeed in pursuing this specific path of argumentative illumination, and not in influencing the opponent by intimidation, fraud or coercion, then *ethics of argumentation* take place.[34] Not however ethics in the sense of some substantive moral principles created in heaven to be applied on earth, so to speak, but ethics in a procedural sense; no ethics of *what* but of *how;* no ethics of *good* but of *correct*. And first of all, no ethics implemented top down by some creator of morals but emerging from bottom up out of the conflict.

3. The arguments and "their" physical force

Once these facts are involved in the conflict being at stake, *how* can they induce substantive answers about this conflict's solution? For incompatibility as the core of the conflict is mutually interrelated and thus identical for both sides (again AER). At first glance, therefore, it seems that the conflict as such does not contribute very much to a solution; why should X and not Y be the one to prevail or to retreat respectively?[35]

As an approach to find argumentative solutions out of the conflict one might consider the mutually caused impairments suffered by the parties in order to decide in a utilitarian way i. e. to give preference e. g. to the party whose impairment in case of retreat is smaller than it would be for the opponent:

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34 Hoppe.

35 We will see that the main feature of state made law is that it makes such an illegitimate distinction between X and Y, i. e. that for the state itself there are fundamental privileges in relation to normal citizens, infra 353 et seq.

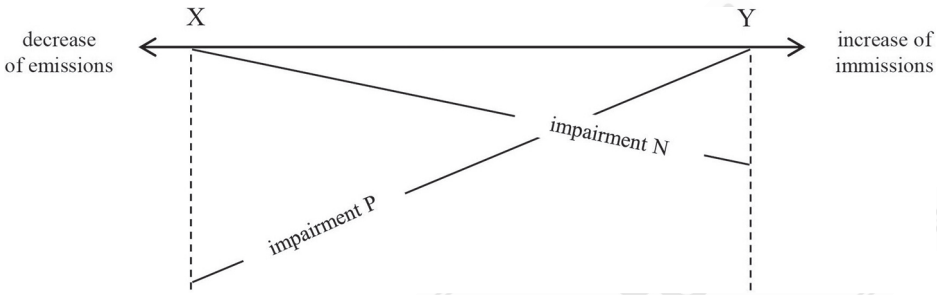

Fig. 1

Shall e. g. (Figure 1) producer P go ahead producing up to point Y even though this creates unhealthy consequences for neighbor N? Or the other way around, shall N have the right to push back P up to the point X which causes high costs or losses for P? What is higher rated, health or wealth? What is worse, impairment of N's health or reduction of P's profit? It is obvious that such a confrontation will hardly bring forth any criteria acceptable to both sides: P will hardly be convinced by the Pro Health Argument, N hardly by the Pro Wealth Argument. And, above all, usefulness is not part of the incompatibility.[36]

Another approach however opens opportunities for answers: Since argumentation – as shown before – stands in a close functional relationship to the collision at stake, the extent of the mutually caused impairments proves to be a consistent criterion. And so, the more one position is pushed back the more intensive is its subjective perception and the "stronger" – in *this* very sense of the word – are its arguments. Applied to the conflict between Producer P and Neighbor N this means that the answer cannot be *either* for P *or* for N, but *more* for the one and *less* for the other. The more the constellation tends toward point X the higher the subjective perception of a negative effect by P or by its entourage or by broader parts of society; and the other way around in the opposite direction (Figure 2).

In any event there will be a tendency towards leveling off at the crossing point Z. Not because this is the objectively true or the morally just solution but because at point Z the arguments against P and those against N will be balanced. This in turn does not mean that the positions stabilized at point Z are valued to be equal as such, but that the mutually graded arguments reach the same intensity; at this point each of them needs more force to improve his position than his opponent to avoid an impairment of his.

The question still remains how such an outcome will be enforced if one side refuses to comply. But this question has already been answered: The described force of

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36 This dilemma is well known in connection with the prominent "Coase Theorem" according to which the socially most effective positions will prevail in any event; Coase: on the other hand it leaves undecided which of the parties is better or worse off.

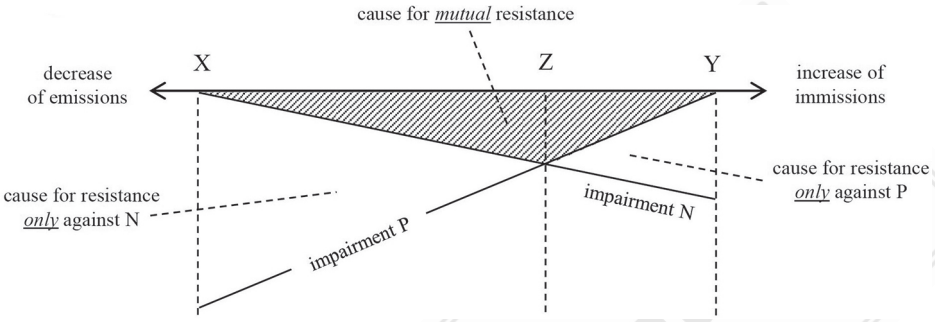

Fig. 2

the arguments mirrors the force of the respective physical reactions against the collision (AER). The strength or the weakness of mutual arguments corresponds to the strength and weakness of the mutual reactions. The stronger a reaction the stronger its arguments and consequentially the stronger the tendency toward *physical* influences into the "right" direction and thus towards "enforcement" of the outcome of argumentation.

Probably the strongest effect of the strength of an argument is the involvement of others by catching their attention, by provoking perception of their own pain with bystanders in view of the facts of the conflict etc. In other words, the stronger an argument for one side of the conflict, the greater the probability for additional subjective perception and hence for "collecting" additional parties supporting this side of the conflict.

4. Asymmetrical constellations

There are constellations that do not fit into the mutual reciprocity just described. Imagine a mugger taking away 100 money units from his victim and being now confronted with the claim to pay back the money; shall he now argue that for him to give the 100 back is the same impairment as for the victim to be deprived of 100? And that therefore they should find a mutually balanced solution, e. g. by giving back 50 so that in the end either side has 50 and loses 50? – Certainly not, but why not?

The mistake in this mugger's reasoning is to ignore the time element. Of relevance is not a specific situation but *a change of facts*, not a moment but *a process*, not a snapshot but *a movie*. And this movie shows at the beginning of the plot a situation at point Z without any incompatibility, then an interference taking place by the mugger for reasons he values to be in his interest, such as to be enriched or to dominate another person. This in turn means that unlike in figure 2, the curve of the mugger M towards point Y runs upwards into the positive area while victim V suffers a corresponding impairment, so his curve V runs downwards into the negative area (Figure 3):

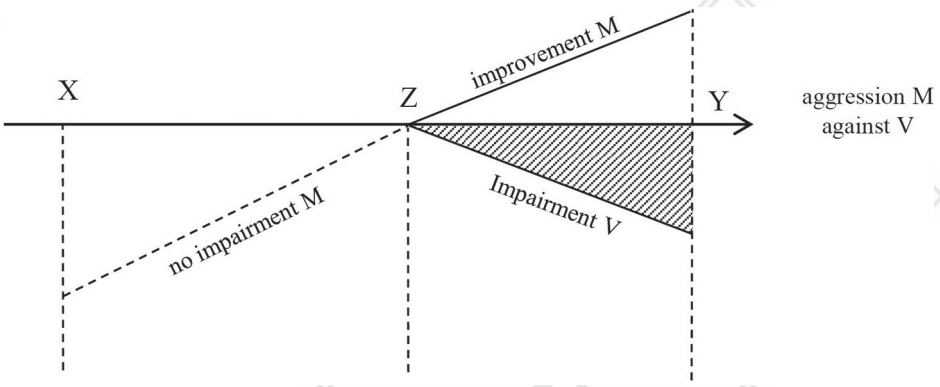

Fig. 3

As shown in figure 3, the more the victim's position is pushed back by the mugger, the more negative is his subjective perception, the more intensive his reaction and the "stronger" – again in *this* very sense of the word – its arguments. The effect of this will be to slow down the mugger's move or even to stop him and ultimately to wind back the movie altogether until the outset of the plot. In short: The mugger must pay back the full amount of 100.

Unlike in figure 2, where *both* producer P and Neighbor N *mutually* react against each other and *reciprocally* produce slow down effects, there is no mutuality in the mugger-victim constellation. Here is no stopping effect on the mugger's side *against the victim*. The mugger will not be supported by reactive energies against the victim. In other words: Aggression does not produce strong arguments on its behalf while defense does.

Assuming that these quite trivial thoughts make sense for the mugger-victim case, the same must be true for the state-citizen case:

– The state, like the mugger, interferes against his victims, uses or threatens the use of force and so induces them to do things against their own will, e. g. to pay money or to refrain from certain activities or to do certain activities.
– The state's behavior, like the mugger's, is not due to any previous activity of the victims legitimizing the state's position. They did not cause any harm to the state which would explain the latter's action as a reaction in turn; neither did they sign any contract with the state allowing it to enforce a contractual obligation (we will come back to the state's attempt to pretend something like a contract with the citizens and we will see that it is as absurd as if the mugger would try to refer to some voluntary commitment by his victims).[37]

37 Infra, 352.

– The state, like the mugger, may try to argue that to refrain from taking away the money from the victim is equally harmful for it as it is for the victims to be deprived of it. Yet we have seen, of relevance is not a specific situation *but a change of facts*, not a moment but *a process*, not a snapshot but *a movie*. And this movie shows the state, like the mugger, approaching his victims, ordering them to hand over their wallet or to file their tax return respectively and then collecting the loot, if need be by force.

This leads to the very same state's curve S (Figure 4) which starts at point Z and then runs upward toward point Y while the victim citizens' curve runs downward and therefore creates resistance along with strong arguments against the mugging state:

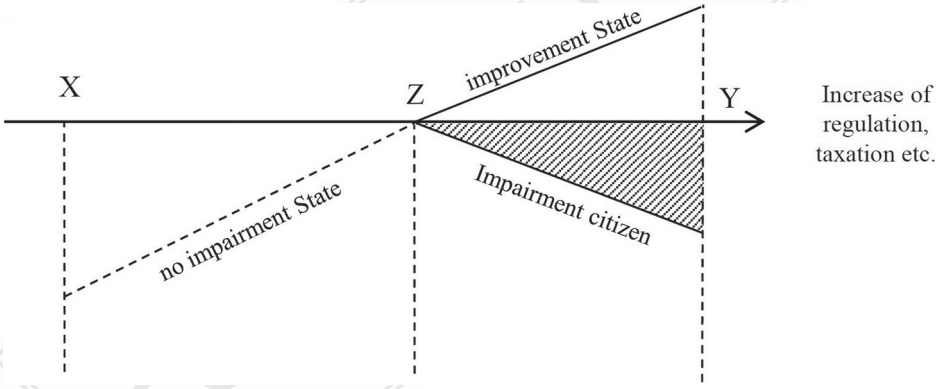

Fig. 4

Here again the natural reactive tendency "rewinds the movie back" to point Z where the curves are crossing at value zero. I. e. the mugging state must pay back all the money und refrain from mugging people in the future. And the same applies to all other interferences he commits against the citizens.

In sum we have quite a clear and simple case, a sort of exemplary constellation to show how the natural Rule of Law gives access to solutions derived out of the conflict itself and namely the one between the state and its citizen victims. And we have derived it from consequentially decentralized bottom up or anarcho-capitalist approach. We can leave open whether an anarcho-collectivist approach would lead to the same result in the end.

VI. A clear and simple case against the state

It seems astonishing that, irrespective of the clear and simple constellation just described, so many members of society accept the state's behavior. One might expect that if those natural reactions really were "in force", there should be broad resistance

throughout society against the state. But this is obviously not the case. A closer look however shows that there is no contradiction between the clear case against the state on the one hand and the state's broad acceptance on the other hand. For as soon as somebody accepts the state's behavior out of free will, he is no longer a victim but rather a voluntary member. *Volenti non fit iniuria* says an old Roman proverb.[38] *Voluntary* membership of an organization called the state does not constitute any problem. It is comparable to a membership in a church or in another edifying club or in a residential cooperative etc.

Quite a different case however is *mandatory* membership for those who do not want to be a member. This paper is only about these cases. And when we just noted that from a legal point of view there is a clear and simple case against the state, we meant these involuntary constellations of mandatory membership.

But for these constellations too there is a broad acceptance of the state's position and of the many compulsory duties of its "members" even if these have never signed an accession declaration or the like. This is comparable to religions whose members do not only worship their own God but want to force all other people to worship this very same God, as well. This is true e. g. of the medieval inquisition of the Roman Catholic Church or of today's theocratic countries which advocate an official legal ban against atheism.[39] Sigmund Freud ultimately localized the basis of such totalitarian structures of churches (or armies) in the "Super-Ego" imprinted in a person's individual life as well as in supra-individual developments of social behavior.[40]

Not surprisingly the arguments of the religious and the statist fundamentalists are comparable with each other. They both invoke societal stability by broad acceptance on the one hand and something like a higher or "objective" rightness on the other hand. The religious fundamentalists name it "right faith" and "Law of God" respectively, the statist fundamentalists talk about "democracy" and "Rule of Law". Such terms seem to express some plausibility, until one looks at them more closely and recognizes obvious contradictions. In fact, they are rather strange excuses of the wrongdoer caught in the act, just like the mugger we described before.

1. As to "democracy",

the notion means Government by the People. However, this is hardly the case for the actually existing "democracies". In the societal organigram, so to speak, the people are not on the top but on the bottom. On the top is a relatively small professional

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38 To the willing no injustice is made, Ulpianus in *Digest*, 47, 10, which is also known as the principle of common law in the case of voluntary assumption of risk.

39 Such as reportedly in Egypt where currently a legislative project against atheism is in discussion.

40 Freud, 1921, pp. 34 et seq.

organization with an executive, a legislative and a judicial department that produces, administers and enforces rules throughout the country. And below are the people as the addressees of all these rules forming usually around 95 % of the population. Of course, one can argue that it is practically impossible that the whole people form the government and that therefore, governmental functions must be delegated to a small subgroup. But even if this were true (which is not the case)[41] the notion "Democracy" is not in line with reality.

Confronted with such challenges and perhaps somehow embarrassed, the state will then try to save its excuse by the argument of "indirect democracy" or (e. g. in Switzerland) of a "semi direct democracy". This argument means that the people after all have the power to nominate their delegates into that small governmental body or in the "semi direct" case that the people have even the power to vote on some legislative matters. And indeed, one must admit for those agreeing with delegating their decisions to the parliament or those voting directly for certain legislations there is no reason not to accept the outcome.[42] But not for those who do not accept the delegation or any specific legislative decision; for them the justification of consent obviously does not apply. For them the state's excuse will not be valid.

At this stage of the discussion the state and his defenders usually try a quite diffuse criterion i. e. they invoke something like "sufficient representativeness": Even if not all, but still a strong majority, accept this whole scheme it is justified that small minorities are obliged to follow, just as in corporate law, where tiny minorities of e. g. 5 % can sometimes be "squeezed out".[43] However, when looking at the facts e. g. in the semi direct democracy of Switzerland, the result is far away from "sufficient representativeness": As the following chart shows the ratio is lower than one percent (!), i. e. the theory of the people's consent to the rules is true to the extent of less than 1 % while it is wrong for more than 99 %.[44]

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41 Government *can* be assumed by the whole people though not in the sense of the people forming *one* governmental organization. Once government is treated as a consequently decentralized network-like system, participation of all is not an unrealistic scenario.

42 Bell, note 8, pp. 75–81 et seq.

43 Comparable to squeezing out options in corporate law whereby majorities of e. g. 90 % are allowed to force the remaining "renitent" 10 % to accept the overwhelming majority's opinion.

44 In Switzerland, on the federal level (and similarly on the cantonal levels) less than one percent of the laws are submitted to public vote; approximately 75 % of the remaining laws are rendered by the executive branch while only 25 % are submitted to the parliament. The parliament in turn can hardly pretend to be the agent mandated by a sovereign people; for the latter is not an autonomous principal free to decide himself instead of mandating an agent or to withdraw the power of attorney or even to give the agent binding instructions (which is explicitly excluded by the federal constitution); this comes close to legal guardianship and not to representation, or at best to the extent of the ratio of representation i. e. 1 : 30'000.

Level of Democracy	Quote-part	Rate of Approval	Equals in Total
Direct Democracy	0.8 %	11.35 %	0.09 %
Indirect Democracy	25 %	0.00013 %	0.00003 %
Delegated Legislation	74 %	0.00015 %	0.00011 %
Total	100 %		**0.09096 %**

Fig. 5

Another argument to legitimize the state's interventions despite of his weak democratic basis is this: Even though the majority is small, the principle of majority as such is generally accepted as the "rule of the game", i. e. by the constitution which is borne by the whole society. The problem however is that the constitutions themselves suffer from the same defect. E. g. in Switzerland the first federal constitution formed of 22 independent cantons in the revolutionary time of 1848 was not unanimously agreed upon by all member cantons but forcefully implemented by a majority of 15.5 against 6.5 cantons. The majority consisted of the Protestant winners of the civil war of 1847 while the Catholic minority was the loser forced to accept.[45] That was not only a violation of the principle of consent and of the principles of a valid *"contrat social"*[46] but also of international law accepted at that time.[47]

The ratio counted by population was even lower than the one counted by cantons: not more than 5.8 % of the people approved the new constitution. And apart from that, all those people have now been dead for many decades; why should a constitution be binding for today's Swiss population based on the fact that 170 years ago 5.8 % of the

45 The reason for that (quite harmless) war was the plan of the Catholic cantons to form their own federation of defense which was fully compatible with their quality as independent subjects of international law.
46 Rousseau, book I chapter 5, emphasizing unanimity for the first contract, while in this first contract majority votes can be agreed upon for future decisions.
47 The previous treaty entered into in 1815 by the cantons as independent subjects of international law did not provide for a majority for the decision to form a new state.

population voted for it?[48] In the meantime though, there have been two votes, in 1874 and 1999, on a total revision of the constitution, and one must admit at least that many people who voted in 1999 are still alive today. But on the other hand, the "majority" of those who were entitled to vote and went to the polls and voted yes was not more than 13 % of the country's population. So why should the new constitution be binding for the remaining 87 %?

2. As to "the rule of law",

we have already mentioned, though not in the sense of this justification by the statist defendant but as a fundamental phenomenon, i. e. that the world functions according to natural regularities. When statists use the same expression, they suggest an analogy in the sense that state behavior is not arbitrary but follows general rules. "Equality of Rights", all are equal before the law they pretend, the small and the big, the weak and the strong, the citizen and the state. And in a purely formal sense this seems to be the case, i. e. state activities usually follow formally valid legal acts, statutes, ordinances etc. and seem not to be guided by unbound arbitrariness.

The problem with this justification however is that the state itself produces all these acts, statutes, ordinances etc.! Not surprisingly it performs this work in a remarkably arbitrary way. It grants itself extended privileges which it denies to normal citizens. The most prominent albeit barely discussed arbitrariness consists in a baldly institutionalized breach of the principle of Equality of Rights: For normal citizens, the state enacts statutes such as general civil codes, or criminal codes supporting these, or in the Common Law tradition it leaves the judicial decisions to independent precedents – collectively called "Private Law". On the other hand, the state enacts for itself a completely separate body of rules usually called "Public Law" or more specifically "Administrative Law". This is not just a formal distinction but very much a substantive one. The state preaches water and drinks wine:

– When a citizen wants to enforce his position against a fellow citizen he is not allowed to simply do so, but has to submit his position to an impartial court for examination, and even if he wins the case he is not allowed to go ahead and force his opponent (coercively) to comply with the judgment; for this purpose, he has to hire an independent executer, i. e. the state.
  When the state itself, however, wants to enforce its position, it is allowed to go for it without submitting the case to a court. It can simply put its wish into a document called "Decree" or "Order" or the like and on the spot, it is officially enforceable. If now the addressee nevertheless insists on the case being

48 Cf. The very same argument with Spooner, VI.

brought before a court it is up to him to do it. I. e. the roles are changed to the advantage of the state: the state who wants to take something from its opponent leans back while the defendant has the burden of filing the action, of eventually hiring an expensive lawyer and of bearing the burden of proof. And this is not enough: the judges of that court are on the payroll of the state!

– When a citizen takes something away from another citizen without the latter's consent according to private or criminal law rules he will be punished for theft or robbery. When the state does the very same (as we have already seen in connection with the mugger-victim-constellation)[49] according to its own public law statutes this is legal taxation.
– When a citizen forces a fellow citizen to work for him without his consent according to private or criminal law rules he will be punished for illegal coercion. When the state does the same according to its own statutes it is fully legal compulsory military (or eventually civil) service.
– When a citizen borrows money from a fellow citizen and then indebts himself in an amount twenty times the volume of that volume, according to the criminal law rules, he will be sentenced for intentional attempt at fraud. When the state does the very same, it calls it the official money-creating process and treats it as fully legal.

And there are many more examples of the state's attitude of preaching water and drinking wine.

VII. Back to capitalism

The state's tendency of preaching water and drinking wine in the sense just described is relatively new. When in Europe of the late 19th century the state began to develop more extended activities such as in the area of urban planning, infrastructure and social welfare, conflicts arising out of such contexts usually were dealt with according to civil law principles. In practice, this meant that administrative law coming up more and more at that time had to be restricted in scope to so called police matters, i. e. mainly to security and health, and was not (yet) open to broader societal issues such as social justice or efficiency of traffic or values of the environment etc.[50]

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49 Supra, 347–349.

50 Cf. a prominently debated judgment in the Kreuzberg-case of the Prussian Oberverwaltungsgerichts of 6–14–1882 (PrOVGE 9, 353) stating that public authorities are not competent to implement social utility in general, but just security and order.

1. How to fight abuse of power?

This was good for classical private law positions such as property and contracts, but it was bad for endeavors to implement over-individual goals; it did facilitate the abuse of private power, but it hindered the abuse of public privilege; it was the legal basis of capitalism.

This has dramatically changed since. Today public privilege is the dominant pattern of the legal structure with an almost complete concentration of all law related powers – legislation, jurisdiction and coercive enforcement – in the hand of the one state, and with private positions on a clearly lower and dependent level. One can say, the risk of abuse of private power like in early capitalism is considerably reduced today, but the reduction is due to the implementation of an institutionalized system of monopolized state privileges. Or in other words, we have replaced the *risk of abuse* of capitalist power by the very *fact of abuse* of state power.

If this interpretation is consistent there are good reasons to consider a reactivation of those capitalist risks, not as a societal ideal but as a smaller disadvantage. Keeping in mind that a risk is not the same as its realization, we come to the question of how big or how small the likelihood of its realization is. Or more specific: Is the likelihood bigger or smaller than the one of the state to abuse its power? Does anarchy of a consequently decentralized bottom-up approach lead to more or to less domination within society?

2. Austrian economics

In the 20th century the Austrian economist Ludwig von Mises sort of reactivated capitalist anarchism, not by supporting anarchism – on the contrary he explicitly blamed anarchists for jeopardizing legal order[51] – but by advocating a moral and legal right of secession out of a given state. And in this he was consequent enough not to restrict this right to member states leaving a bigger state but to grant it also to small communities and ultimately even to all individuals, as well.[52] By this he paved the way to younger colleagues such as namely Murray Rothbard to grant a natural right not to be forced to mandatory membership in any organization including the state, i. e. a right to leave the state without having to leave the place where you live or the country that you love.

In any case, Rothbardian anarcho-capitalism and its further developments do not articulate a right to leave the order of natural law, not because it is forbidden to do so but because it is impossible to escape natural regularities of social behavior.[53] By consequence they are not only critical of abuse of power by the state but also by private

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51 E. g. von Mises (1949), p. 149.
52 von Mises (1985), pp. 109–110.
53 Rothbard (1975), pp. 3–6.

enterprises, such as "Big Finance" and "Big Pharma". The origin however of such private abuse of power is not the realization of some anarcho-capitalist risk but the plain opposite, i. e. the highly state regulated structure of these businesses, and thus again that tight closeness of economy and state which led to a bad reputation of capitalism that still persists. These regulations do not follow the typically capitalist bottom-up but a very strong top-down approach which is only bearable for big companies which in turn leads to more and more concentration in these businesses.

What anarcho-capitalist theories insist on is – again – an utmost consequence in grounding legal argumentation on decentralized positions such as ownership of one's own body, property of one's personal belongings acquired in justified ways, enforcement of contracts voluntarily entered into, organized structures on the basis of voluntary membership etc. And this – again – is nothing but consequent anarchism, a way of taking influence on society without the help of a monopolistic center or "arch". The justification for this approach is not economic prosperity of society (even though this is a welcome side effect) but the specifically legal argument that interference with such decentralized positions creates conflicts that should be judged and settled by rules applicable in the very same way onto both sides. Or to be more specific: The parties of such conflicts whether they want or not, are subject to natural regularities that should not be disturbed by any entity such as a big ruthless company or a big ruthless state.

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