

LEGAL SYSTEMS UNDER ANARCHO-CAPITALISM

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INTRODUCTION

Among the objections raised against anarcho-capitalism is the claim (unfounded, of course) that there is no provision for a system of rational courts and objective law. Underlying this attack is the mistaken belief that limited government somehow makes such provisions. Since rationality cannot be legislated nor mandated nor even (at least for the present) genetically implanted by the technicians of our brave new world, it seems evident that no political system is going to guarantee competent or rational judges or competent or rational legislatures which will enact rational and objective legislation. The truth of the matter is that advocates of limited government at best can offer a written constitution to bind the government or the people whenever it suits their purpose. At this point the advocate of limited government introduces his *deus ex machina*: for a limited government to be established it would require a cultural change which would affect the quality of the ideas of the people, the legislature, or the judges. Of course, that cultural trend might reverse itself the next day, but in any case what is conceded by the limited government advocates is that success requires great numbers of supporters among those in a position to affect public opinion.

This article deals with civil law as opposed to criminal law. Civil law deals with the violation of a person's rights where the violation results from mistake or accident and what a person's proper relation is to those who violates his rights under such means. Criminal law is the field dealing with the deliberate intentional knowing violation of a person's rights and the proper relation of people towards criminals.

Civil law is divided into two general categories, Contract law and Tort law. A contract is a promissory agreement between two or

more persons which creates, modifies, or destroys a legal relation. Contract law deals with such matters as how a contract is created, what the contract means and what happens when the provisions are violated. Tort law deals with the problem of violation of rights not arising from a contract (e.g. trespass, assault, negligence).

Although Real Estate problems fall into either of those two areas (a deed is a contract, a trespass is a tort) later in the article I will touch on the issue separately due to the special significance such problems have for a capitalist society.

COURTS

A court is an institution that serves to determine whether or not it would be morally proper to exercise the use of force and whether such force ought to be accepted and respected by civilized persons. The underlying basis for courts is that man is neither omniscient nor omnipotent. Since it is possible for rational men to have differences of opinion where one or more of such persons does not have knowledge of all the facts, or where it is not possible to know all the facts, and since, further, it is desirable for civilized persons to know that some individual whom they neither know nor care about is properly engaging in the use of force, rational, civilized persons have an interest in seeing that there are institutions available which are impartial, fair to all concerned, and in favor of justice.

Therefore, the proper attitude of rational civilized persons toward a court which is impartial, fair and just is to respect its rulings and to give it their moral support. Where such an institution has properly established for itself such a reputation, rational civilized people ought to respect its decisions whether the decision deals with them or some other person whose situation they know nothing about. In no way does the existence of a government monopoly of the courts guarantee that such courts are deserving of proper respect, support or obedience. The only test one ought to apply towards a court is in deciding whether the court is impartial, fair, just and respectful of human rights. If the court exists independent of any government and satisfied the test, it is more deserving of a person's sanction than a court established by a government which does not meet such a test.

Naturally, my preceding remarks raise such questions as: how does a court independent of government become established, what right does it have to many any judgments concerning people, and what protection does one have to ensure proper courts?

Firstly, a court may be any institution that proclaims itself a court. This could take the form of a one-time act such as an individual hired by two disputants to resolve the dispute, to a continuing in-

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stitution that exists for solving disputes, such as the American Arbitration Society (which is in essence an anarchist court presently existing within the American business community).

Courts should be established by a group of individuals who rely on their reputation and earn their sanction from the public on the basis of their reputations. Another possible method of earning sanction where the court has no reputation to rely on would be through the franchising of the sanction of professional associations of lawyers or scholars. For example, the New York Bar Association (a lawyer's group) could publish a list of organizations whose integrity is respected by the NYBA. Similar lists could be published by the National Association of Manufacturers or the AFL-CIO, the Better Business Bureau, or any other group. The important thing is to remember that appearing on a list does not guarantee validity; it is only a means for establishing respect among as many individuals as possible. Organizations could also publish list of courts of which they disapprove. The effectiveness of a court is ultimately based on a large scale acceptance or indifference. Where a court has substantial opposition it will be ineffective and lose clients.

One of the important questions is: how does a court exercise jurisdiction over anybody? The first method would be voluntary agreement between the disputants. The serious problem arises when there is no agreement.

What happens when one disputant does not want to go to court? To answer this we must first return to the purpose of a court: to determine whether it would be proper to exercise force. Where a party has gone before a court and offered his willingness to abide by the decision, then the party has done everything he can to resolve the dispute through civilized and non-violent means. If the other party refuses to participate in the proceedings then the court has a moral right to say, after hearing what evidence it has before it and deciding on the behalf of the complainant, that the complainant has taken all civilized steps available to resolve the dispute. "We, the court, find that it is morally proper for the complainant to exercise force to affect the remedy." The court may have an agent of retaliatory force connected to its operation or it may leave the complainant to his own devices (the morality of his devices would be subject to discussion under the criminal law section). There would be private agencies of retaliatory force, and if they wanted to maintain the confidence, respect and support of the citizenry, then they ought to provide that it would not act unless the client can bring proof of a court decision in his favor. The agency might even publish a list of those courts whose decisions they consider respected. The failure of retaliatory organizations to have proper respect could result in popular armed opposition.

OBJECTIVE LAW

Objective law is a fundamental purpose of the legal institutions of a free society. The preparation of objective law is a product of the research and scholarship of the legal community. The legislatures have picked and chosen from the work of the legal community. The legal community has been at odds with the legislative branches of our government because of the failure of the legislatures to agree on the adoption of uniform codes of law so that the law would be the same everywhere. As it is now, law varies from jurisdiction to jurisdiction.

Legal scholarship has existed independent of the government, and in any society which permits free speech and private research, such activities will go on. The effect of the private court system would be to adopt the suggested codes produced by the private scholars, the most sensible of which being endorsed by the professional legal organizations.

The courts would make known what codes of law they would follow. The result would probably be following similar rules of law, since the legal scholars would generally agree on what was the most acceptable law. In those situations where there is not agreement, the situation could be no worse than where law is posited by the legislatures, as the legislatures would reflect such disagreements with some legislatures adopting one law and others acting contrariwise.

Other than the influence of legal scholarship there are other ways in which a *de facto* objective law system would develop. We must recognize that the purpose of objective law is to permit people unschooled in legal matters to know that there is a rule of law which is applicable to the people you deal with so that disputes can be resolved in such a way that people do not feel cheated or taken advantage of.

Under anarcho-capitalism this end is achieved in various disciplines. For example, in the field of contracts one can easily agree within the contract that any disagreement will be resolved within a particular court. This would in effect be a system of objective law since you have agreed in advance to be governed by a particular rule of law with those with whom you deal. So even if you have one rule of law governing your contract with Mr A and another rule governing Mr B's contract, you have a *de facto* rule of objective law since all parties know in advance what rules are governing their relations.

A practical example in today's society of how such a system can operate effectively would be the widespread use of private agencies by businessmen to resolve their differences and their acceptance of contrary decisions as a result of their rational self interest. This works because many businessmen know they will lose a lot of business if they do not go along with this private court system. This phenomenon arose as a result of the great inefficiency of the American court system.

In the area of torts most law suits deal with negligence problems and in a great percentage of the negligence cases you frequently have an insurance company interested in the outcome. Since insurance companies are generally on the defendant's side, but frequently on the plaintiff's side there is a great interest on the part of insurance companies in seeing that there is an existing acceptable court system; they would probably contribute to the financing of the courts. This interest would act as a counterbalance to the court's temptation to be plaintiff oriented in order to attract customers. The court would have to incline towards neutrality and objectivity because on the one hand they have to attract plaintiffs to bring the suits and the plaintiff has to expect a fair shake. And on the other hand the insurance companies (who would be most affected by a decision against the defendant) would have to expect a fair shake, or else they would reject the court's good faith and undermine the ability of the court to attract plaintiffs who would expect to be paid by the insurance companies. It should be added that these interests would frequently carry over into the field of contracts since insurance companies are frequently on both sides of contract actions.

COMPLETE OBJECTIVITY

Finally, I would like to reflect on real estate transactions, the main problem being: what manner of objective law would operate so that people could always know who owns what property? This would be done through Title Insurance companies. Title Insurance is probably the greatest stabilizing factor in real estate today. Almost every sale of real estate is accompanied by a purchase of title insurance, in which the insurer guarantees the validity of the title. In the absence of government, title insurers would develop a fair and objective system of title law and registration. It is in their rational interest to do so since they represent buyers or sellers in any transaction and have an absolutely complete need for objectivity, since they must always know in advance what the law is and who the previous owners were. Their absolute need for objectivity is the guarantee that the public would accept the title registration system as the best evidence of title.

TECHNOLOGICAL EXPERIMENT

There is one advantage to a private court system over a government court system that I have not heard mentioned before. That is that private courts do not need anybody's permission to experiment with technological advances to improve the quality of the courts and trial system. If the experimenters fail, they hurt only themselves and those who freely selected them; if they succeed, they have created something that other courts can take advantage of.