The Inescapability of Law

And of Mises, Rothbard, and Hoppe

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You invited me to talk on "how I came to develop my novel anarchistic arguments against the classical liberal and social democratic conceptions of the state, which parallel, but are not based on the views of Murray Rothbard and Hans Herman Hoppe". Indeed, I am not a longtime participant of your conferences and the Mises organizations. It is relatively late that I got in contact with you. But it was at a moment, when I realized, there is a group, there is a movement whose way of thinking is precisely or let's say, very close to what I think.

In any event, I feel deeply honored to present this Murray Rothbard Lecture on how I came to these almost same conclusions. The short answer is, because it's inescapable. And a more extensive answer on how I came to this inescapable result will follow now.

What is Law?

At the beginning, there was not something like, there is a fundamental problem with the state, or property rights should be supported in a much better way. At the beginning, there was a different and quite simple question: What is law? When I began to study this subject, I didn't know exactly why. If you choose medicine as the subject of your education, it's much easier to imagine the topic. But law is something quite abstract and I really wanted to learn what it was. The answers in the first courses were quite disappointing. In the basic studies as well as in later courses for the bar exam I just learned something like a professional hand work, but not what this remarkable phenomenon of Law is.

A bit later I came closer to the answer of my question, when I spent a year at Harvard Law School with interesting comparisons between our european system of codified law on the one hand and the US and English tradition of the precedent based common law on the other hand. There I met different ways of thinking about sources of the law and related questions such as whether the law is just there or whether it emerges on special occasions and whether the law needs judges to apply and legislators to produce it. I then deepened these aspects in my habilitation thesis some years later and came to the conclusion that law does not depend on official authorities such as judges, magistrates or legislators, but that the law gives answers even though there are no statutes or no precedents at all, and that the final "source" of law is the conflict at the occasion of which the law is called upon. Or in short, the conflict creates its own legal solution.

That gave a first answer to what law is: Law is a phenomenon that emerges under certain situations. It's not just there as a preexisting body of abstract norms, but it is something, some reaction, some need that appears if there is a conflict to be solved.

Law, that was a further consequence, is somehow a side effect of a world in movement and in change, it is a function of something which is happening. It is a dynamic phenomenon, not a static one. It is a correction of something happening and not a correction of something being.

And thirdly, law depends on being articulated within a conflict of colliding and therefore incompatible interests. I.e. law is something that comes up loud, which in turn has to do with its dynamic aspect just mentioned. The law is articulated, there are outraged arguments, there may be crying or shouting, there are subjects impacted by the conflict and assuming the role of parties of a legal dispute.

Legal Principles

Now, within this context, parties are relevant only as far as they collide with each other. Any other properties or features of the parties are irrelevant, i.e. no party is of more value than another party. They just collide. And out of just the collision all elements to deal with the case emerge. This quite trivial aspect is nothing less than the principle of Equality before the Law.

Then, only as far as their collision is in contrast with the parties' subjectivity you have to deal with law. Otherwise, i.e. if a party agrees with the collision there is no need to consider the legal consequences. This – again quite trivial– aspect shows a further well-known principle of law, i.e. the principle of consent or of contract, or in Latin: Volenti Non Fit Iniuria, no injustice is done to the consenting party.

And a third triviality, so to speak, that can be drawn out of the facts of a conflict is that preexisting positions are stronger than later ones. What you already have, such as your body, your personal belongings, the land you stand on etc. become objects of a conflict if somebody else touches or takes or destroys them. What is then being articulated by the previous holder of these objects is nothing but Property and the nonaggression principle or again in Latin: Neminem Laedere, do not hurt anybody.

All these principles are developed out of the conflicts themselves. Historically too, one could say that almost all western legal tradition, not only the common law tradition, the European one as well, have emerged from court cases. The ancient Roman law is primarily court made law. Even most parts of the famous Corpus Iuris Iustiniani were not state made legislation. They were long time collections of court decisions. And private law in general, even in the European continental system, is court made law. The many codes in that tradition are derivations out of court decisions, at least until the mid-19th Century.

All this means that both theoretically as well as historically, principles of law do not need the state. They just come out of the conflicts at stake and of long traditions of courts handling them. You do not need anybody, namely no state legislator, to make law, you just need people and organizations that find it, such as judges, courts, or mediators. This was especially interesting for me as a civil law lawyer accustomed to look first for answers in the state made code. In any event this brought me close to anarchism, even though I did not say yet the State is illegitimate. That came later.

It came when I thought that those principles of Equality before the Law, of Consent and of Nonaggression should be applied to the state as well, and then realized that the state violates these principles in an almost excessive way:

Equality of Law

According to the Lex-Rex slogan, formulated in the Scottish enlightenment by Samuel Rutherford, the king or the state should be subject to law. This is what we call today the "Rule of Law", i.e. that the state should not act arbitrarily but according to legal rules. And in fact, if you look at the formalities of today's state behavior you see that the state – usually – corroborates his activities with paragraphs of statutes, ordinances, guidelines etc. The problem however is that all these laws are made by the state itself. I.e. the law that should guide and control the state is made by itself!

And so, it is no accident, that the state preaches water and drinks wine (as we say), i.e. the state grants broad privileges to itself while he denies them to normal people. The most prominent case is the explicit distinction between private and criminal law on the one hand and public law on the other. Private law for normal people like you and me or private enterprises, and public law for the State itself. In practice this means that the state allows itself to collect taxes even against the will of the taxpayer while the very same behavior made by a citizen, would be punished as a criminal offense, namely theft. And it furthermore means that in case of litigation between the state and a citizen, it is a state paid court that decides on the case, while an analogous dependence of a judge from one party in a private lawsuit would be prohibited. And many examples more. There is an institutionalized violation of the principle of equality before the law, a breach of this important principle by the very fundamental structure of our law system.

A next element of the Rule of Law is Separation of Power, in order to prevent risks of concentration of state power. Traditionally, we distinguish between the legislative power, the executive power and the judicial power which means that these are three different organizations for these three functions. Now are there three organizations? In reality there is just one! The notion "branches of governments" is as accurate as treacherous: Three branches of the one and very same tree, a concentration of all three powers to one organization. All three powers are on the same pay role, financed by taxes levied by the one and same state.

Democracy

Now, what about the next principle, the principle of consent we developed from the conflict. Once you scale up this principle from a small-scale contract to society as a whole, you will get to a principle of democracy. Since the state's field of activity is society as a whole and if the state respects the principle of consent then it must grant democracy. In a strict sense of the Greek Demos and Kratein, it is the people who govern themselves. Or in a saying of the French revolution "… that under democracy men are not governed by other men but exclusively by laws, and thus by laws that nobody has made but themselves."

This sounds convincing, but reality is different. Take as an example Switzerland, which is proud of its direct democracy, as opposed to just an indirect, parliamentary one. Here, the figures – on the federal level – show this:

Level of Democracy	**quote-part of enact-ments**	**Ratio of Democracy**		**Total**
Direct Democracy	0.8%	Rate of Approval	55%	0.09082 %
		Participation in the Vote	43%	
		Rate of Swiss Citizens	80%	
		Rate of Full Age Citizens	80%	
		"Fading out" Rate	75%	
			11%	
Indirect Democracy via Parliament	25%	Rate of Lists reaching Parliament	66%	0.00003 %
		Rate of Candidates reaching Parliament	40%	
			26%	
		Participation in the Election	48%	
		Rate of Swiss Citizens	80%	
		Rate of Full Age Citizens	80%	
		"Fading out" Rate	95%	
			8%	
		Rate of Representation	1/30'000	
		Representation by Parliament	0.00026%	
		Rate of Approval in Parliament	66%	

		Participation in the Vote	75%	
			0.00013%	
Legislation Delegated to Executive Branch	74.2%	Representation by Parliament	0.00026%	0.00011 %
		Rate of Approval in Parliament	66%	
		Participation in the Vote	100%	
			0.00017%	
		Rate of Approval in Executive	90%	
			0.00015%	
Total	**100%**	**Aggregate Ratio of Democracy**		**0.09096 %**

Direct democracy in the meaning that people vote on material legislative bills sometimes takes place in deed, but to an almost neglectable extent. It is rather an allusion to democracy, than democracy itself. Much more legislation is rendered by the people's representatives, i.e. the deputies in the two parliamentary chambers. But this is not a representation such as a power of attorney you can grant along with specific instructions and withdraw again, it is rather something like tutorship by a guardian. Because you share "your" representative with 30'000 other "principals", you are not allowed to give instructions and you cannot withdraw the power. Therefore, the ratio of representation, beside other quantitative modification, must be divided by 30'000 which leads to a very low rate under indirect democracy. And finally, 74% of all legislation is not even rendered by the parliament but by the executive branch, which has nothing to do with democracy at all.

When I realized that all the many state interventions such as taxation, economic regulation etc. are based on virtually no consent of the people themselves, which is a flagrant violation of the principles mentioned before including the Nonaggression Principle, I got even more sympathetic with anarchy. It was clear now that the state is not only unnecessary in order to have legal order, but that it is the pure opposite of lawfulness. In other words, with a state you cannot have a legal order.

More knowledge about the Law

This outcome, in turn, is an exemplary case of the theory mentioned earlier, i.e. that law emerges out of a conflict. The unlawfulness of the state is not just there, it becomes evident only at the many occasions of its interferences with the interests of the people. It is these interferences that create reactions, argumentations, and hence the counterreaction by the state trying to justify its behavior. Not by accident it refers to principles that are objectively convincing in cases of conflicts, such as equality of law, consent and Nonag-

gression. But since its excuses are false, he turns out to be unlawful, i.e. law forbids its aggression.

In other words, law emerges in case of need and disappears (not when justice is established, but) when unlawfulness is eliminated. Law is the absence of unlawfulness, such as for instance the unlawfulness of the State. Law is essentially negative. It is destructive, but what it destroys is worth being destroyed, namely unlawfulness.

Unfortunately, this does not mean that law is always successful against unlawfulness. Its main adversary is power, and quite often power is stronger than law. So, what about the force of law? How can law have effects on unlawful facts. The answer to this again, has to do with that interrelation between unlawfulness and law: The force of law comes out of the unlawfulness it reacts on. The heavier the unlawfulness the stronger the reaction by law. Action equals reaction. The law does not need to be put into force. It is a myth that law needs some strong instance that helps enforcing it, such as the State. Law takes place, you do not deed to order it and you cannot escape it. Law is essentially inescapable. Law is what no one can escape from, not you, not me, not the universe, and of course not the state. Law is – and I think this is the answer to my original question – inescapability.

And by the way of law's inescapability, I became an anarchist.

Ludwig von Mises, Murray Rothbard, and Hans Hoppe

As inescapable as are law and anarchism, as inescapable are Mises, Rothbard and Hoppe.

Ludwig von Mises himself deals in some contexts with inescapability of law, though less of legal laws but of the laws of the market (Socialism 1951). He showed how "the discovery of the inescapable interdependence of market phenomena overthrew … [the] opinion of an ideal state. … In the course of social events there prevails a regularity of phenomena to which man must adjust his action if he wishes to succeed." And what convinced me most: "One must study the laws of human action and social cooperation as the physicist studies the laws of nature." (Human Action 1949). I think it convinced me more than von Mises did himself, since in later writings he seems to be somehow reluctant to follow this point of view.

Murray Rothbard was more important for me, namely because he – unlike von Mises – explicitly advocated anarchism. When I had already converted to anarchism myself, I came across a small article entitled "Society Without the State", some few pages, very precisely written in 1975, by an author, so far unknown to me, called Murray Rothbard. And I read sentences like "The basic point, however, is the legal state is not needed to arrive at legal principles or their elaboration…. " and "… Indeed, much of the common law, the law merchant, admiralty law, and private law in general, grew up apart from the State, by judges not making the law but fin-ding it on the basis of agreed upon principles

derived either from custom or reason. The idea that the State is needed to make law is as much a myth as that the State is needed to supply postal or police service. …".

That was precisely what I thought too, when I realized that conflicts produce their own solution. That was precisely the reason why the State is not needed. And then, of course, there are these very clear and true sentences: "Thus the State, by its very nature, must violate the generally accepted moral rules, to which most people adhere. … Thus, the State is a coercive *criminal* organization that subsists by a regularized large-scale system of taxation-theft, and which gets away with it by engineering the support of the majority …». (Ethics of Liberty 1982). By the way, it is never a majority, it is always a tiny minority, as demonstrated in my chart above.

So much for the inescapability of Murray Rothbard. And finally comes the inescapability of **Hans Hermann Hoppe**. There is that interesting link from Rothbard to Hans Hoppe: "And yet, remarkably and extraordinarily, Hans Hoppe has proven me wrong. He has done it: He has deduced, an anarcho-Lockean rights ethic from self-evident axioms." What Rothbard alludes to here is Hoppe's concept of argumentation. Its ethics are not derived from sources such as natural law, customs etc. but rational consistency, avoidance of selfcontradiction. And it seems to me that this approach is quite close to mine, once you accept that rational consistency is always related to some object. There is no meaningful argumentation without an object, no meaningful legal argumentation without a conflict to argue and to fight about. And the other way round, there is no conflict without subjects articulating their respective positions. In other words, the Hoppean Argumentation is part of the phenomenon that conflicts create their own solution, that they provoke arguments and that these arguments help to find a solution for the conflict.

Hans Hoppe's approach is more on the rational level of how to argue about the conflict, while mine is more on the real level of the conflict as such. We debated these issues on several occasions already and by this we became good friends, inescapably. Many thanks!