The Institution of Justice in a Minimal State

by

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One of the few legitimate roles of government is the defence of the citizenry from aggression, both internally and externally. The institution that provides this protection and the means of resolution is the institution of justice. This institution need not be a monopoly force controlled solely by the state.

A Historical review of Voluntary Legal Associations

An example from England

Anglo-Saxon(10th Century) justice and law-making was provided by a recognized institution known as the /hundred/. One member of the hundred, /the hundredsmann/ was recognized as a chief official who was informed when a theft occurred and who informed men of the several /tithings/ that made up the hundred and had a reciprocal duty to pursue and apprehend the thief. A tithing was a group of neighbours, many in those days, likely related but not necessarily. These voluntary groups were cooperative protection and law enforcement associations. Their role was raising the alarm, tracking thieves and stolen cattle, but their role went well beyond policing; they held public meetings to encourage disputing parties to settle their differences or at least submit them for arbitration. Such procedures did not evolve through coercion but parties that did not cooperate would have found themselves outside the protection of the community. The tithings acted similar to the vici of the Germanic tribes of an earlier time.

Individuals who were not bonded to such a group were essentially outcasts which provided strong incentives to join an association. The association's members, because they provided insurance(credit) for all members, had a strong incentive in screening members for good character. Thus, once expelled from one association, an outcast would find it difficult to find acceptance in another group. This helped prevent thieves and undesirables from moving from one association to another.

Tithings and hundreds organizations acted as the local judiciary. Four members of a tithing served in a hundred court along with four members of all the other tithings within the hundred's jurisdiction. From these members, a committee of 12 served as a judicial body of the court. This committee served as an arbitrator for disputes between members of separate tithings. At a higher level, disputes between different hundreds were settled by a shire court, which had a similar construction as the hundreds court. The courts did not administer punishment, but

awarded damages to the victim, and the guilty party would have to make economic restitution to the injured party. This restitution was not demanded immediately in all cases. For large fines, the guilty party might have received up to a year to make good the restitution.

An example from Iceland

A more formal and advanced system of voluntary association was in use in Iceland through the 12th century. The central figure in the Icelandic system was the Chieftain. Each Chieftain held a *a bundle of rights*; this bundle of rights was private property, it could be sold, lent, inherited. If a person wished to become a chieftain, that person found a chieftain willing to sell *his bundle of rights* and bought it from him. What were these rights? One, that Friedman calls perhaps the most important, was the right to be the link that ordinary people were attached to the legal system. If you wished to sue someone, the first question was... who his chieftain was. This would determine what court you would sue him in. Everyone had to be associated with a chieftain to be a part of the legal system, however the link was voluntary. The thingman(ordinary citizen) was free to switch his allegiance to any chieftain willing to have him.

An example of how this system worked is quoted from Friedman's Machinery of Freedom.

> *"You and I are Icelanders; the year is 1050 AD. You cut wood in my forest. I sue you. The court decides in my favour and instructs you to pay 10 ounces of silver as damages. You ignore the verdict. I go back to court and present evidence that you have refused to abide by the verdict. The court declares you an outlaw. You have a few weeks to get out of Iceland. When that time period is over, I can kill you with no legal consequences. If your friends try to defend you, they are violating the law and can in turn be sued."*

To prevent the powerful from running roughshod over the poor, the Icelanders had a "simple but elegant" solution. A claim for damages was a piece of transferable property. If the guilty party was very powerful and the injured party too weak to enforce his claim, the injured party could sell or give his claim to someone more powerful. It was then in the interest of the new holder of the claim to enforce that claim.

An Institution need not be a Monopoly

While the pursuit of cattle thieves is not the immediate concern of most people in today's society, the principles and the methods used by the tithings and hundreds are very similar to the principles of libertarians today. They were voluntary associations, that solved disputes through arbitrated resolutions with restitution, rather than punishment as the goal. Two examples have been shown that demonstrate that the State need

not hold a monopoly on the justice system. Both historical examples were also tort systems that did not recognize any difference between what we call civil law and criminal law. Any aggression was seen as damages and restitution paid to the injured party was the penalty.

Restitution rather than Retribution

Restitution has a far better deterrence value than retribution. Rather than locking someone up at the expense of others for an act of agression, having the agressor paying back the costs of his actions is both compensatory for the victim, while at the same time, revenue neutral for the rest of society. It has deterrence in that the higher the value of the property damaged or stolen, the higher the restitution. In the case of murder, the restitution may well cause the agressor to be in debt the rest of his life.

In a modern society such as Canada, voluntary associations could arise as community associations much like Neighbourhood Watch, only instead of just reporting suspicious activities to the police, these organisations could (a) organise voluntary patrols to apprehend lawbreakers, or (b) contract their protection needs to a security firm.

Justice could be dispensed through a court comprised of members of the association. Given that conflict between neighbouring associations is wasteful of time and other resources, associations would likely agree to a arbitrator to settle disputes between members of different associations, much like the hundreds court of the Anglo-Saxons.

Certainly there would not be complete uniformity of law between associations across the country, alhough certain acts would likely be considered wrong by all associations...such as the killing of another person without the need of self-defense, or theft of property.

Sources:

The Enterprise of Law, Bruce Benson, Pacific Research Institute(1990)

The Machinery of Freedom 2nd Edition, David Friedman, Open Court Publishing(1978)

The Libertarian Idea, Jan Narveson, Temple University Press(1988)

Created: Thursday, July 25, 1996