

Frank Dietrich

Individual Interest and Political Legitimacy

Abstract:

Criticism of contract theory has always played an important role in Hartmut Kliemt's writings on political philosophy. Notwithstanding his objections to a consent-based justification of the state he has never subscribed to an anarchist position. In Hartmut Kliemt's view, a minimal state which protects the basic liberties of its citizens has to be considered legitimate. The article begins with a brief restatement of the most influential objections that have been raised against the various forms of contract theory. Thereafter interest-based accounts of political legitimacy are critically examined; it is argued that individual interests fail to provide a justification for any kind of political authority. Finally, philosophical anarchism is suggested as a possible alternative to contract theory and interest theory. Although philosophical anarchism holds that no state has a moral right to rule, it can be reconciled with the view that it is in the individual's interest to create and maintain a minimal state.

1. Introduction

Contract theory has, from the very beginning, played a prominent role in Hartmut Kliemt's writings on political philosophy. Although he has persistently criticized contractual accounts he has not asserted that there is no justification for any exercise of political power. Quite to the contrary, he has always considered a minimal state to be legitimate which protects the basic liberties of its citizens. In the following I will dwell on two closely related questions suggested by this line of reasoning. I will ask what the alternative to a contractual defense of the liberal state is and what it would mean if one could not come up with any plausible justification.

I will begin, in the second section, with a brief restatement of the most important objections that have been raised against contract theory. Thereafter, in the third section, I will critically examine interest-based accounts of political legitimacy. I will argue that neither of the two theories succeeds in justifying the authority of a liberal state. In the fourth section, I will explore 'philosophical anarchism' as an alternative way of imagining the relationship between the individual and the state. In particular, I will consider to which extent a non-revolutionary form of anarchism could be reconciled with a liberal position.

2. The Failure of Contract Theory

Contract theory in its various classic and modern forms is based on two moral assumptions which are at the core of political liberalism. The individuals in the state of nature who deliberate on the founding of a political community are described as *equal* and *free*. The first assumption, of course, is not meant to deny that human beings differ with regard to their physical strength and intellectual capacity. The individuals are considered to be equal in so far as nobody is in a position of natural supremacy or subordination vis-à-vis the other. The second assumption refers to freedom in the political, not metaphysical, sense of the word. Initially, individuals are not subject to any political authority, and any restriction of their freedom has to meet their approval. According to the aforementioned assumptions, the state is only entitled to wield political power if each individual consents to its rule. The contract that is signed in the state of nature specifies the conditions under which the agents of the state can legitimately use coercive force. However, the act of consent not only warrants the state's use of power but also creates political obligations for its subjects. By entering into the contract, the individuals make a binding promise to obey the laws the sovereign rightfully enacts.

With regard to the argument that is put forward in the next section it seems important to distinguish between two aspects of contract theories. On the one hand, contractual accounts explain the individuals' willingness to leave the state of nature and to accept restrictions of their freedom. They give reasons why everybody may expect to benefit from overcoming anarchy and entering into a political society. Thereby they demonstrate that the individuals take a rational decision when agreeing with the creation of a state. On the other hand, contract theories aim at establishing a normative relationship between the state and its citizens. They account for the state's moral right to exercise political power and for the moral obligation of the citizens to comply with the law. As will become apparent when I discuss interest-based theories of political legitimacy, the *motivational* and *normative* features of the contract should not be conflated.

The key problem of contractual arguments pertains to the individual consent on which the justification of the state is based. The idea of a contract that is concluded in the state of nature is purely fictitious; there is no historical evidence that any state has ever come into being through a voluntary agreement of its subjects. Even if some states were founded by contract in the dim and distant past, nothing would follow for their contemporary citizens. Since, according to contract theory, consent is required of each individual personally, the decisions of some remote forefathers cannot have any binding force.¹ But the citizens of contemporary states have not signed a contract, nor have they expressed in any other explicit form their willingness to comply with the existing legal and politi-

¹ In his *Two Treatises of Government* Locke stated: "[...] Whatever engagement or promise any one has made for himself, he is under the obligation of them, but cannot by any compact whatsoever bind his children or posterity. For his son, when a man, being altogether as free as the father [...]." (Locke 1970, §116, 364)

cal institutions. Thus theorists who wish to stick to a contractual approach are left with two alternatives: they can base their arguments either on *tacit consent* or on *hypothetical consent* (Dietrich 2008, 60–65).

The tacit consent of a person is not expressed explicitly in spoken or written word but has to be inferred from his or her behavior. The most famous instance of a contractual argument that relies on tacit consent is to be found in John Locke's political philosophy. In Locke's opinion, mere residence on the state's territory indicates that the individuals approve of the political authority.² Provided that the individuals are not forcefully prevented from leaving the country, they have a choice between different political and possibly even anarchist communities. If they voluntarily decide to remain in the state, they thereby tacitly consent to the obligations that are connected with residence.

Against Locke's justification of political authority it has been objected that residence on the state's territory cannot be plausibly interpreted as a sign of approval.³ First of all, it must be remembered that for many citizens emigration involves considerable costs and risks. In other countries they may be confronted with cultural barriers, such as a foreign language, and may find it difficult to make a living. Consequently, they may have strong reasons to stay in the state, even if they do not agree with its exercise of political power.⁴ Moreover, one important alternative that the tacit consent argument presupposes is no longer available today. Contrary to the 17th century, when Locke developed his theory, nowadays the territory of the earth is completely occupied by states. Therefore, individuals who wish to realize their anarchist ideas cannot return to the state of nature. They have to live in one state or the other, despite the fact that they oppose any form of political authority (Kliemt 1980, 100).

This criticism notwithstanding, contract theorists can still maintain that the argument is not fundamentally flawed. They can assert that the state could plausibly assume tacit consent if it satisfied a number of requirements. To begin with, the state has to see to it that all its citizens, irrespective of their social status, reach a certain standard of education. If its citizens acquired important qualifications, such as language skills, emigration would become a realistic op-

² Locke remarked: "[...] Every man, that hath any possessions, or enjoyment, of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it; whether this his possession be of land, to him and his heirs for ever, or a lodging only for a week; or whether it be barely traveling freely on the highway; and, in effect, it reaches as far as the very being of anyone within the territories of that government." (Locke 1970, §119, 366)

³ In addition, John Locke's version of contract theory has been criticized for a number of other reasons. For instance, it has been objected that a person's act or omission can only count as tacit consent if he or she is aware of the normative consequences. However, generally citizens do not think that they undergo political obligations simply by remaining in the country where they were born.

⁴ In his essay *Of the Original Contract* David Hume wrote: "Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires. We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her." (Hume 1993, 283)

tion for them. Furthermore, the state must guarantee the widest possible range of exit rights, including the right to secede and the right to live in anarchy. Regarding the latter alternative, Harry Beran (1987, 59) proposed to set up a ‘dissenter’s territory’ where no political authority is exercised.⁵ Thus, each citizen would be allowed to choose between the present state and other options—he or she could apply for membership in other political communities, try to establish an independent state, or decide to live in the state of nature. Even then, some citizens might not be able to realize their political goals, e.g. other countries might reject their request for immigration or not enough people might support their separatist aspirations. It must be stressed, however, that the state has not illegitimately confined their range of options. All restrictions result from other people’s exercise of their rights to political association and dissociation. Therefore, all citizens enjoy the widest range of options that is compatible with the equal rights of other people. If they remain in the state, it may be concluded that they tacitly agree with its rule, not as the best of all conceivable options but as the best of all available options. Consequently, tacit consent is a normatively meaningful category and can in principle justify the exercise of political power. However, at present all states fail to meet the aforementioned requirements and cannot be regarded as legitimate.⁶

As an alternative to tacit consent, many proponents of contract theory have focused on hypothetical consent. Their justification for the right of states to wield political power over their citizens shows a counterfactual structure. Political institutions are deemed legitimate if the individuals would have opted for them in a fictitious choice situation. Arguments referring to hypothetical consent are put forward in two different versions that need to be carefully distinguished (Morris 1996, 219–221). On the one hand, there are contract theories that—following the Hobbesian tradition—describe the choice situation in a rather realistic manner. Accordingly, James Buchanan takes the natural distribution of power resulting from the bodily strength and intellectual capabilities of the individuals as a starting point for his argument (Buchanan 1975, 23–25). On the other hand, there are contract theories that—following the Kantian tradition—specify the choice situation in view of certain moral ideals. Most famously, John Rawls imagines a decision behind a veil of ignorance that bars the individuals from all information they could use to their advantage (Rawls 1971, 118–123).

The idea of a counterfactual contract has been persuasively criticized by Hartmut Kliemt in many of his publications. First of all, he has raised a principled objection against the assumption that moral rights and obligations can be

⁵ Anarchists may protest against their confinement to a ‘dissenter’s territory’ because they regard all kinds of political borders that restrict their freedom of movement without their prior agreement as illegitimate. In response to this objection, contract theorists may argue that all individuals have the right to establish a state and to exclude potentially dangerous persons, provided that they leave ‘enough and as good’ territory for others.

⁶ Furthermore, contract theorists may argue that the decision not to leave the country may express different degrees of consent. The more costly it is for an individual to emigrate, the less consent he or she articulates by remaining in the state. This line of reasoning is persuasively criticized in Kliemt 2004, 180–182.

created by hypothetical consent. As outlined above, a contract binds a person because he or she has voluntarily made a promise to perform or omit certain acts. The obligation must, in other words, be self-imposed by a free person who could have decided not to enter into the contract. Therefore, a fictitious choice a person would make under certain conditions cannot in reality bind him or her to comply with the law. If arguments that rely on hypothetical consent have any normative relevance at all, this must be so for reasons which are not aptly characterized as contractual.

Over and above his principled rejection of hypothetical consent as a possible source of moral rights and obligations, Hartmut Kliemt has raised strong objections against the Rawlsian type of argument. As he has convincingly demonstrated in a number of articles, decisions which are taken behind a veil of ignorance could justify highly questionable practices. For instance, if the individuals are ignorant of their present physical condition and their future health prospects, they would agree to mandatory kidney donation (Kliemt 1998). Living with one kidney usually does not cause serious problems, whereas being dependent on renal dialysis significantly reduces the quality of life. Thus, rational individuals should try to ensure that they have at least one functioning kidney and can evade permanent medical treatment. An institution of compulsory organ sharing could guarantee that nobody has to undergo renal dialysis. Whenever both kidneys of a person fail and cadaveric organs are not available, he or she would receive one kidney from a fellow citizen. If nobody were prepared to offer a suitable organ on a voluntary basis, the state would randomly select a 'donator' and enforce the transplantation. Since the individuals behind the 'veil of ignorance' could expect to benefit from mandatory kidney donation, they would agree to this practice.⁷

A state which organizes the forceful extraction of organs from citizens rejecting the 'donation' evidently violates fundamental liberal principles. More specifically, such an institution, as Hartmut Kliemt has emphasized, would fail to respect the 'separateness of persons'. Consequently, the same objection that John Rawls has raised against utilitarian accounts applies to his own version of contract theory. Since the individuals in a fictitious choice situation cannot withhold their (hypothetical) consent, they are deprived of their veto power. Contrary to factual contracts, their most basic rights, such as the right of bodily integrity, can be trespassed without their prior agreement. According to Hartmut Kliemt, contract theories of the Rawlsian type must be seen as potentially dangerous from a liberal point of view. They can be used to justify coercive state practices to which some, or even many, citizens do not agree. Thus, reference to terms like 'hypothetical consent' or 'acceptability' may serve as a camouflage for the absence of 'real consent' or 'acceptance' (Kliemt 2003).

⁷ The argument takes yet other aspects, such as the age of a potential receiver and his or her responsibility for the organ failure, into consideration. However, to understand the critique of contract theories which refer to the hypothetical consent of the citizens it may suffice to explain the basic idea of the institution.

3. Individual Interests and Normative Claims

In the above section I have argued that tacit consent—in contrast to hypothetical consent—may in principle serve as a basis for political rights and obligations. However, only states which meet very high demands are justified in interpreting the residence of their citizens as a sign of tacit consent. At present, no government can rightfully claim that the individuals living on its territory tacitly agree to its rule. Even modern democracies, which grant their citizens fundamental liberties and a general franchise, do not meet the aforementioned requirements. As I have already stated in my introductory remarks, Hartmut Kliemt has not been led by his critique of contract theory to join the anarchist camp. Quite to the contrary, he has maintained that living in a state that conforms to liberal principles is the best we can hope for. According to Hartmut Kliemt, it is in the individuals' interest to establish and preserve a liberal state that protects their lives, bodily integrity, and property. In his view, even a minimum welfare state that respects the principle of equality before the law has to be regarded as legitimate (Kliemt 1993, 167–170).⁸ In the following, however, I will not discuss normative reasons for and against redistributive schemes of a certain type; instead I will raise the more fundamental question whether any justification for the exercise of political power can be derived from individual interests.

To begin with, the assertion that it is in the interest of each individual to live in a liberal (or minimum welfare) state allows for different interpretations. We commonly use the expression 'in the interest of' to point out that something is better for a person than other options. Thus, to gain a full understanding of the phrase we have to know to which alternatives it, i.e. the object or state of affairs that is said to be in someone's interest, is compared. As we have seen, contract theories take the state of nature as a benchmark and argue that the individuals have strong reasons to establish political institutions. One problem with this kind of comparison is that we do not have much empirical knowledge on the risks that stateless societies entail.⁹ Not surprisingly, the accounts of the state of nature the proponents of classical and modern contract theories have given differ considerably. Some theorists, such as Thomas Hobbes, have made rather pessimistic assumptions about human nature, whereas others, such as John Locke, have painted a less gloomy picture. Depending on how negative or positive the state of nature is portrayed, a more or less extending class of states appears to be justified (Kliemt 1980, 29).

⁸ In an article on the justification of welfare states Hartmut Kliemt pointed out: "[...] A classical liberal political economist who wants to live in a free western society seems bound to accept that founding a kind of welfare state is (normatively) legitimate." (Kliemt 1993, 160)

⁹ In *Solidarität in Freiheit* Hartmut Kliemt argued that in view of our historical experience the introduction of a state has to be considered to be more dangerous than the maintenance of anarchy. However, in the state of nature individuals cannot effectively protect themselves against the combined forces of others who will most likely form a political organization. Thus, overcoming anarchy may be said to be in the individuals' interest because it is the only way to encounter the threats that the creation of states by others pose to them (Kliemt 1995, 21–23).

Against the contractual approach one may object that the state of nature does not provide us with an adequate standard of comparison. If one wishes to justify a particular state or type of state, it seems more appropriate to weigh its relative advantages against other states or types of states. However, no state can plausibly claim to promote the interests of each of its citizens better than any other existing, let alone conceivable, state. Evidently, some individuals always stand to gain from a change of the political or economic institutions of the state. For instance, members of a territorially concentrated minority would benefit from a devolution of power to local authorities, and economically less successful people would benefit from a more comprehensive welfare system. Contract theories and interest theories appear to face similar problems: the former cannot prove that any state meets with the unanimous approval of its citizens; the latter cannot demonstrate that any state is in everyone's best interest.

Moreover, contract theories give an explanation for the creation of moral rights and obligations that is, at least, theoretically persuasive, whereas it is difficult to see how the moral right to wield political power and the moral obligation to comply with the law can arise from individual interests. Here it is important to recall the distinction between the motivational and the normative aspects of contractual accounts which I have briefly explained in the last section. According to contract theories, it is from everyone's perspective rational to overcome the state of nature and to establish a political community. Thus, each individual is assumed to have an interest in the creation of a state which motivates him or her to agree to the contract. However, moral rights and obligations do not come into existence until the prospective citizens have actually signed the contract. Interests can provide strong motives for an individual to grant other persons' moral rights and to undertake moral obligations. But taken as such, interests are neither capable of conferring moral rights nor of imposing moral obligations on anybody. Consequently, if one wishes to justify a normative relationship between the state and its citizens, it does not suffice to demonstrate that the latter stand to benefit from the services of the former. One still has to explain how the government's right to use coercive force and the individual's obligation to comply with the law has been established.¹⁰

The relationship between interest, consent and obligation, as it is described in contract theory, has a firm basis in our moral intuitions. In everyday life we take it for granted that our interests give us prudential, not normative, reasons for a certain course of action. One may, for instance, have a strong incentive to buy a car because the ability to travel around is a prerequisite for getting a better paid job. Yet the fact that it would be in one's interest to own a car does not mean that one is morally obliged to acquire it. Given the opportunity to obtain a higher income, the decision not to buy a car may be imprudent, but it certainly deserves no moral criticism. Even more evidently, nobody has a moral right to sell his or her car because another person can be expected to benefit from owing

¹⁰ For the argument that we only can expect others to respect our interests if we are prepared to respect their interests see Hoerster 1987.

it. Until both parties have reached agreement and actually signed a contract, no moral rights and obligations have been created.

From the perspective of economic theory, my argument against an interest-based justification of moral norms may appear to be mistaken. Supporters of this approach hold a non-cognitivist position in metaethics, i.e. they do not believe in objective values, moral truth and the like.¹¹ They consider categorical imperatives on which moral theories traditionally have focused to be incompatible with non-cognitivism. In their view, moral argument has to confine itself to hypothetical imperatives of the kind ‘if you wish that X, than do Y’. Hypothetical imperatives can be understood as prudential rules which recommend a course of action that will most likely lead to a desired end. Thus, the distinction between prudential and normative reasons which I have presupposed in my argument appears to be mistaken. From an economic point of view, there is simply no alternative to an interest-based justification of moral norms. It would go beyond the scope of this article to discuss the economic approach to morality in any detail. In the remainder of this section I will merely examine if individuals actually have an interest in supporting the liberal state.

Individuals evidently have prudential reasons to obey the law insofar as they wish to avoid punishment. Fear of legal sanctions, such as imprisonment, or social sanctions, such as exclusion, may often prevent citizens from breaking the law. Their interest in the maintenance of a liberal state, however, does not provide the individuals with a reason to comply with its law. Although citizens may have a reason to wish that a liberal state exists, they may have no reason to act in accordance with its law. In modern states, which usually consist of many million people, single acts of disobedience do not have any discernible effects. Most obviously, the state will still be able to fulfill its basic functions if one citizen or a small group of citizens does not respect the law. Only the cumulative effects of many acts of disobedience may lead to the breakdown of public order. However, for two reasons rational individuals deliberating on whether to comply with the law do not need to take this scenario into account. Firstly, a person’s own disobedience will not prompt (many) other people to violate legal norms; if a critical level of non-compliance will be reached this does not depend on his or her decision.¹² Secondly, it is highly unlikely that the behavior of this particular person will tip the balance and make the maintenance of public order impossible. Hence, prudential reasons to comply with the law only result from the state’s ability to deter its citizens from acts of disobedience. It is irrelevant

¹¹ In Hartmut Kliemt’s words: “Im Rahmen der normativen Ökonomik lassen sich grundsätzlich alle Fragen der non-kognitivistischen Ethik behandeln. Insoweit kann der ökonomische Imperialismus zur Eroberung auch des traditionellen Territoriums der Ethik ansetzen und Moralrechtfertigungen auf gegebene Interessen stützen.” (Kliemt 1997, 157)

¹² When Socrates in the *Crito* dialogue (Plato 1971) reflected on the consequences of his disobedience, he was in a somewhat different position. He could for two reasons more plausibly assume that his escape from prison would pose a serious threat to the legal order. Firstly, contrary to most modern states, Athens was a small city state which comprised only some thousand citizens, and, secondly, Socrates attracted many young adherents who might have followed his example.

if the existence of a particular (type of) state can be said to be in the individuals' interest, i.e. to be preferable to other (types of) states or the state of nature.

Of course, as a matter of fact many individuals may hold the opinion that it is in their interest to live in a liberal state. This conviction may be the reason why they feel obliged to support the state and to comply with its law.¹³ Moreover, many citizens of democratic states may approve of the decision procedures by which legal norms are created. In pluralist societies, majority decisions may appear as the only way to deal fairly with the high number of conflicting views. As a consequence, citizens may feel bound to respect each law the parliament enacts, irrespective of their own preferences (Baurmann and Kliemt 1990, 25–27). If we wish to maintain a democratic state we evidently have strong prudential reasons to promote these feelings in our compatriots. It is in our interest that as many people as possible voluntarily support the state and obey its laws even if the risk of detection is low. However, if my argument has been correct, an interest-based justification of political authority does not stand up to critical examination. Neither a moral obligation nor a prudential reason to obey the law does result from the fact that it is in the individuals' interest to live in a liberal state. Thus, the propagation of interest theory appears to be vulnerable to the same objection that has been raised against hypothetical contract theory. By pointing to the advantages of a liberal state one may try to camouflage that its exercise of power lacks theoretical justification.

4. Philosophical Anarchism

In the last section I have examined interest theories as a possible alternative to contractual accounts of political legitimacy. I have tried to demonstrate that interest-based arguments can neither justify the moral right to wield political power nor the moral obligation to obey the law. This leaves me with two seemingly conflicting views which have to be integrated into a coherent theoretical framework. On the one hand, there is reason to believe that a liberal state which protects its citizens against aggression and respects their basic liberties is the best one can hope for. On the other hand, even a liberal state cannot justifiably claim to have a moral right to rule that is grounded either in individual consent or in individual interest. In the remainder of this paper I will explore a theoretical standpoint which seems to be capable of reconciling both views.

In a number of publications, John Simmons has defended an anarchist position which can be characterized by two distinctive features. His theory may

¹³ See the following statement: "Sicher ist, dass einige der am tiefsten verwurzelten Überzeugungen unseres aufgeklärten Alltagsverständes uns die nahezu unumstößliche Vermutung nahe legen, auf den Staat um eines lebenswerten Lebens willen nicht verzichten zu können. Zu dieser Auffassung wird bei näherer Überlegung nahezu jeder einzelne je für sich gelangen. Insgesamt scheint sich daraus eine egoistische Rechtfertigung des Staates als einer im Interesse jedes Einzelnen liegenden Institution zu ergeben. So kommt jeder zu dem Schluss, dass es für ihn [...] notwendig ist, unter einer Zwangsordnung zu leben, und im Sinne dieser 'Einsicht in die Notwendigkeit' lebt er sogar freiwillig unter einer Zwangsordnung." (Kliemt 1980, 27)

be labeled as a posteriori anarchism (in contrast to a priori anarchism) and as philosophical anarchism (in contrast to political anarchism). As to the first distinction, supporters of a priori anarchism hold that for principle reasons no state whatsoever can be morally legitimate. Robert Paul Wolff, for instance, has argued that an autonomous moral agent cannot accept an obligation to obey the commands of any political authority. In his view, autonomous persons are ultimately responsible for their actions (or omissions) and cannot allow others to decide what they must do (or not do). Hence, any state's putative right to command, irrespective of its theoretical justification, is not compatible with the moral autonomy of competent persons.¹⁴ Conversely, adherents of a posteriori anarchism, such as John Simmons, concede that states may in principle be morally entitled to wield political power. They usually agree with contract theorists in so far as they consider states which actually receive the assent of every single citizen to be legitimate. They believe, however, that at present no state can rightfully assert to meet with the unanimous approval of its subjects. Moreover, they regard it as highly unlikely, although not conceptually impossible, that in the foreseeable future any legitimate state will come into existence.¹⁵

The distinction between political anarchism and philosophical anarchism is even more important for an adequate understanding of Simmons' position. Supporters of both theories share the view that, for principled or contingent reasons, all existing states are lacking moral legitimacy. What distinguishes political anarchists from philosophical anarchists is their determination to put an end to the state's unjustified use of coercive force. They believe that the realization of a stateless society is a viable option which is in everyone's interest. Thus, in practical terms political anarchism makes on citizens the demand to actively oppose the state and to disrespect its legal norms. Only for strategic reasons individuals may occasionally comply with the law but they may not accept the state on a permanent basis (Rothbard 1983, 183–188).

Philosophical anarchists, in contrast, are primarily concerned with the illegitimacy of the state on the level of theory. John Simmons, for instance, has been led to his position by examining the most influential accounts of political obligation, such as contractual, utilitarian or fairness-based arguments. His defense of anarchism has been motivated by the inability to come up with a plausible justification for the moral obligation to obey the law (Simmons 1979, 191–195).

¹⁴ As Wolff puts it: "The defining mark of the state is authority, the right to rule. The primary obligation of man is autonomy, the refusal to be ruled. It would seem then, that there can be no resolution of the conflict between the autonomy of the individual and the putative authority of the state. Insofar as a man fulfils his obligation to make himself the author of his decisions, he will resist the state's claim to have authority over him." (Wolff 1970, 18)

¹⁵ In John Simmons' words: "A posteriori anarchism [...] maintains that while all existing states are illegitimate, this is not because it is impossible for there to be a legitimate state. Nothing in the definition of the state precludes its legitimacy; rather, existing states are condemned as illegitimate by virtue of their contingent characters. [...] Most a posteriori anarchists [...] are not very optimistic about soon realizing their ideals (if they defend any), nor are their ideals very close to any existing modern political society." (Simmons 2001, 105–106)

Philosophical anarchists, however, do not think that the denial of a moral right to rule and a moral obligation to obey has necessarily practical implications.

“[They] hold that there may be good moral reasons not to oppose or to disrupt at least some kinds of illegitimate states, reasons that outweigh any right or obligation of opposition. The practical stance with respect to the state, the philosophical anarchist maintains, should be one of careful consideration and thoughtful weighing of all of the reasons that bear on action in a particular set of political circumstances. The illegitimacy of a state (and the absence of binding political obligations that it entails) is just one moral factor among many bearing on how persons in that state should (or are permitted to) act.” (Simmons 2001, 109)

Thus, philosophical anarchists may take the view that one should not aim at overcoming a state which respects basic liberal principles. They may doubt that a stateless society would be capable of adequately protecting the physical integrity and property of its members. They need not—and in many instances do not—believe that the realization of an anarchist community would be in everyone’s interest. Subsequently, philosophical anarchists may maintain that under realistic assumptions a liberal state is preferable to any other option. Of course, although Simmons’ position allows for combining the two views which I have outlined above, its practical implications need to be spelled out in more detail. Evidently, persons who sympathize with philosophical anarchism will have a critical attitude toward any kind of state activity. If this theory strongly influenced public opinion it would, on the one hand, counter a tendency which gives liberal thinkers cause for concern. Faced with wide spread skepticism toward its legitimacy, the state would find it more difficult to expand its competences and to encroach on individual liberties. On the other hand, one may wonder whether a liberal state could persist if many of its citizens subscribed to philosophical anarchism. It might be impossible to uphold public order if too many people thought to be under no moral obligation to obey the law.

To begin with, we have to ask whether we can expect ordinary citizens to obey the rules of a state which they consider to be illegitimate. In the absence of binding political obligations, as Simmons put it, they can have three different reasons to conform to the law. Firstly, as I have already mentioned in the last section, individuals normally wish to avoid punishment. Fear of legal or social sanctions provides them with a prudential reason for refraining from violations of the law. Secondly, the citizens may feel morally obliged to comply with certain laws even though they do not believe to owe obedience to the state. They may, for instance, be willing to respect a law that forbids the killing of innocent people because they regard it as morally wrong to commit murder. Thirdly, individuals may identify with a state which they deem preferable to any other political system or the state of nature. Hence, a philosophical anarchist may be prepared

to do his or her 'share' for the stability of the state on the condition that other citizens cooperate as well.¹⁶

Neither of the aforementioned reasons on its own can guarantee perfect compliance with the law. Sometimes the risk of detection (or the level of punishment) is simply not high enough to deter people from acts of disobedience. Moral reasons merely apply to a restricted number of legal norms; they cannot motivate the individuals to comply with laws which are lacking any moral quality, such as tax regulations or traffic rules. Some people may not identify with the liberal state and may not be willing to respect its law on a voluntary basis. These problems notwithstanding, the three reasons together can possibly ensure a sufficient degree of law-abidingness. Thus, it is conceivable that a liberal state can persist even if most of its citizens do not believe to owe obedience to its legal commands.

Furthermore, we must consider if state officials who subscribe to philosophical anarchism can be expected to enforce the law. (If they were not willing to sanction norm violations, citizens would have no prudential reasons to refrain from acts of disobedience.) An official's interest in the maintenance of a liberal state does not provide him or her with a prudential reason to enforce the law. The individual behavior of any official has no discernible effect on the capacity of the state to deter potential law-breakers. Therefore, even officials who prefer a liberal state to all other options have no incentive to support the legal system. State officials have, of course, a prudential reason to avoid punishment for their neglect of duty. But they only have to fear penalty if some superiors are willing to supervise their activities and to impose sanctions on them. Since the motivation of the superiors to enforce legal norms needs to be explained as well, the initial problem comes up again. The superiors (or the superiors of the superiors, etc.) must have other reasons to fulfill their duties than fear of punishment.

State officials who adhere to philosophical anarchism may, however, identify with a political system that is based on liberal principles. As ordinary citizens, they may be willing to support the legal order of a liberal state despite the lack of prudential reasons. Even more important, state officials have, from the perspective of consent theory, a moral obligation to do their job. Contrary to ordinary citizens who have not entered into a normative relationship with the state, officials have signed a labor contract. They have made a binding promise to fulfill their tasks and are, therefore, under a moral obligation to enforce the law. Of course, it is difficult to predict whether a sufficiently high number of officials will actually be prepared to fulfill their obligations. It is, however, by no means absurd to think that a liberal state whose officials subscribe to philosophical anarchism might prove to be stable.

¹⁶ Fairness considerations obviously play an important role for the third reason. However, contrary to fairness theorists, such as Hart 1955, Rawls 1964 or Klosko 1992, the philosophical anarchist does not accept an obligation to obey the law. In the anarchist's view, compliance to the law is a 'voluntary act' that neither the state nor other citizens can rightfully demand.

References

- Baurmann, M. and H. Kliemt (1990), "Die moderne Gesellschaft im Rechtsstaat. Eine Einführung in das Thema", in: M. Baurmann and H. Kliemt (eds.), *Die moderne Gesellschaft im Rechtsstaat*, Freiburg–München: Alber, 11–36.
- Beran, H. (1987), *The Consent Theory of Political Obligation*, New York: Croom Helm.
- Buchanan, J. (1975), *The Limits of Liberty. Between Anarchy and Leviathan*, Chicago: University Press.
- Dietrich, F. (2008), "Consent, Obligation, and Legitimacy", in: J. Kühnelt (ed.), *Political Legitimation without Morality?*, Berlin–New York: Springer, 59–70.
- Hart, H. L. A. (1955), "Are There any Natural Rights?", *Philosophical Review* 64, 175–191.
- Hoerster, N. (1987), "Die moralische Pflicht zum Rechtsgehorsam", in: N. Hoerster (ed.), *Recht und Moral*, Stuttgart: Reclam, 129–141.
- Hume, D. (1993), "Of the Original Contract", in: S. Copley and A. Edgar (eds.), *Selected Essays*, Oxford: University Press, 274–292.
- Kliemt, H. (1980), *Zustimmungstheorien der Staatsrechtfertigung*, Freiburg–München: Alber.
- (1993), "On Justifying a Minimum Welfare State", *Constitutional Political Economy* 4, 159–172.
- (1995), *Solidarität in Freiheit. Von einem liberalen Standpunkt*, Freiburg–München: Alber.
- (1997), "Interessenbasierte Moralbegründung in Ethik und Ökonomik", in: R. Hegselmann and H. Kliemt (eds.), *Moral und Interesse: Zur interdisziplinären Erneuerung der Moralwissenschaften*, München: Oldenbourg, 151–165.
- (1998), "Distributive Justice", in: P. Newmann (ed.), *The New Palgrave Dictionary of Economics and the Law*, Vol. 1, London: Macmillan Reference Limited, 630–635.
- (2003), "Die gefährliche Fiktion eines Gesellschaftsvertrages", *Aufklärung und Kritik* 7, 84–94.
- (2004), "Contractarianism as Liberal Conservatism: Buchanan's Unfinished Philosophical Agenda", *Constitutional Political Economy* 15, 171–185.
- Klosko, G. (1992), *The Principle of Fairness and Political Obligation*, Lanham et al.: Rowman & Littlefield.
- Locke, J. (1970), *Two Treatises of Government*, P. Laslett (ed.), Cambridge: University Press.
- Morris, C. W. (1996), "A Contractarian Account of Moral Justification", in: W. Sinnott-Armstrong and M. Timmons (eds.), *Moral Knowledge? New Readings in Moral Epistemology*, Oxford: University Press, 215–242.
- Plato (1971), *Crito*, in: H. N. Fowler (ed.), *Plato in Twelve Volumes*, Volume I, Cambridge/MA: Harvard University Press, 147–191.
- Rawls, J. (1964), "Legal Obligation and the Duty of Fair Play", in: S. Hook (ed.), *Law and Philosophy*, New York: University Press, 3–18.
- (1971), *A Theory of Justice*, Cambridge: University Press.

-
- Rothbard, M. (1983), *The Ethics of Liberty*, Atlantic Highlands: Humanities Press.
- Simmons, A. J. (1979), *Moral Principles and Political Obligations*, Princeton: University Press.
- (2001), *Justification and Legitimacy. Essays on Rights and Obligations*, Cambridge: University Press.
- Wolff, R. P. (1970), *In Defense of Anarchy*, New York: Harper and Row.