The Ethics of Physics

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Around the same mid-1980s when Hans-Hermann Hoppe in Frankfurt am Main went deep into questions of ultimate foundation of law I did about the same not too far away in Basel am Rhein; he an academic at the chair of Jürgen Habermas – I a practicing lawyer on my office chair; he with a broad philosophical and economic overview – I trying hard to understand my daily work; he a few years older finished with his habilitation thesis – I still working on mine. What came out some years later as my own habilitation thesis was quite close to Hans' positions even though we did not know each other at that time and probably none had read the other's writing (which was not difficult for Hans because by then there were no noticeable writings from me).

Discursive Law and Argumentation

The title of my habilitation thesis (translated from German) was "Discursive Law – Theoretical Foundation of Legal Interference on Social Conflicts"[1]. By "Discursive Law" I meant law emerging out of the discourse of the conflict itself i.e. out of the physical collision of bodies and other things, and not out of theoretical discussions about how the world should be.

By "Social Conflicts" I meant conflicts not between individuals or other typical private law parties such as companies, families etc. but between broader and less defined entities such as neighborhoods, broad interest groups or other subparts of society. My focus was on constellations that are often dealt with as "political" or "social" conflicts that go beyond individual parties. I thought of normative articulations such as to protect the environment, to distribute real property in a just way, to strengthen the consumers, to help weak members of society or to grant law and order. Such

[1] Diskursives Recht – zur theoretischen Grundlegung rechtlicher Einflussnahme auf überindividuelle Konflikte", Zürich 1993.

articulations typically collide with contrary positions and these are not less abstract and open, such as advocacy of economic freedom, of stable property rights, of autonomy of the family or of the right to be left in peace[2] and the like. Nevertheless, these *are* conflicts though not between A and B or between group X and organization Y. It seemed to me that there are not parties engaging in such conflicts but conflicts producing their parties, not preexisting holders of rights and obligations but collisions out of which emerges subjectivity.

Why was and is this interesting? For three reasons:

First, because it makes it plausible that the mutual interdependence of conflict and subjectivity is a pattern applicable not only to those broad "political" conflicts but for any conflict including the typical private law dispute between A and B as well. There is a functional connection between physical incompatibility and its subjective articulation, between conflict and argumentation, or – as Hans-Hermann Hoppe insists on a fundamental level – between reality and rationality[3].

The second reason for this being interesting is this: Those broad "political" positions are that open and that general in scope that it seems impossible to subsume them under an even more general rule. In a way they are general rules themselves. And if they collide with other evenly broad rules one tends to solve the conflict not by legal adjudication but by political decision. One then says that none of both sides is right or wrong but that there is no even broader rule at hand – such as Kelsen's flopped "Grundnorm"[4] – to be applied on the broad conflict at stake; all we have is the conflict as such. In practice this means then, that a decision is made by democratic majority vote, authoritative order or other totalitarian means.

However, we know from the first reason just presented that the conflict itself gives answers about how to solve the conflict: it lets emerge mutual subjectivities

[2] According to Roland Baader, the only true Human Right is the right to be left in peace – by all not invited and welcomed (translation from German) cited from Rahim Taghizadegan, 2016.

[3] Hans-Hermann Hoppe, The Economics and Ethics of Private Property, 2006, p. 347 et. seq.

[4] Hans Kelsen, Pure Theory of Law, 1960 and 1967, Originally in German: Reine Rechtslehre, 1st edition 1934, later relativized by himself in General Theories of Law and State, 1st edition 1945.

> that become the articulators of argumentation accompanying the conflict into the direction of its solution.
>
> The third reason for this being interesting is that once the solution comes out of the conflict itself, we do not need the help of an arrogant ruler such as the state.

In a short foreword of my book I wrote that my Theory of Discursive Law seems to be quite close to the Discursive Theory of Law advocated by the Frankfurt School of Jürgen Habermas but that still it was not the same. While Frankfurt and in its tradition Hans-Hermann Hoppe lay its emphasis on the "Diskurs" in the sense of a scheme or argumentative interaction that enables us to get answers concerning the solution of the conflict at stake, my emphasis was and is more on the incompatibilities of the colliding interests themselves which are able to give answers how to solve the conflict, as well. Hans solves the conflict by arguing *about* it, I do it by interpreting the conflict's own discourse. His direction is rather top down, mine bottom up. He is closer to metaphysics with an intrinsic relation to reality, I closer to physics with an intrinsic relation to rationality. His ethics lie in argumentation, mine in the laws of the physical conflict.

Law without the State

Rulers are not necessarily arrogant. They might earnestly endeavor to make a professional and useful job. For instance, they could understand their function not in the sense of creating and enforcing rules but to search with scientific care for regularities of social behavior and then to work with these like engineers searching into the laws of reactivity, gravity, friction or inertia and using these for the construction of useful devices and machines. In case a machine gets too hot while running the wise engineer will react by adjusting the design in order to better comply with those laws of nature. If he did not react this way and his machines would keep exploding or melting he would soon be out of business. If he reacted by forbidding the machine to behave this way he would be laughed at as a lunatic. And if in addition, he even forbade other engineers to be wiser than him, to search deeper into the laws of nature and to develop more sophisticated machines, then he behaves quite the way the state does with the laws of social behavior.

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 just described: In general, one 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[5]. Even such prominent a code like the Corpus iuris civilis of the byzantine emperor Iustinianus was mainly[6] a compilation of what legal experts of the classical era had searched for and collected out of court decisions – decorated with the imperial seal. As long as the content of such a collection corresponds to the reality of legal practice the imperial seal though being dispensable at least is not harmful.

This pattern of searching instead of ordering fundamentally changed in 19th century Europe when the rising national 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 consisted mainly of field research by scientists of law and legal history and so the first editions of these codes were something like a snapshot of the reality of law in 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 not based any more on material criterions 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 the Fall of Man in the evolution of law[7]. – Not because justice, God, reason, nature, naturalness, tradition etc. would grant an uncontestable foundation of law, but because *nobody* else does neither. Therefore, *nobody* should have the competence to ultimately *decide* what the law is. This is of course also true for the laws of justice, God, reason, nature etc. and there were and are always temptations to claim to be the official representative of God or the intimate expert of nature or the top specialist of reason. But typically all these arrogant representatives and intimates and

[5] 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 century.

[6] 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.

[7] 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.

specialists do not pretend *to be* God, nature or reason themselves. And if they did so nevertheless they would be accused for hybrid arrogance or blamed for argumentative inconsistency or at the very least laughed at for absurdity.

Such useful social reactions were sort of switched off when the state himself became the source and thus the producer of law. From that time on the state legislator was not compelled any more to justify his interferences by appealing to justice, God, nature or reason, from now on he was his own justification. No wonder that he used his function less and less for his original task of legal engineering in the sense described before but abused it more and more for the purpose of his own power with all those terrible excesses of statist totalitarianism coming up in the 19th and 20th century[8].

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[9]. Who shall make the law if not the state?! It reminds us of the question often raised by statists when shocked by libertarian positions: Who shall build the streets if not the state?! They ask, and the answers is our cynical counter question: And who shall bomb the streets if not the state?! And so, we can answer the law question with the evenly cynical counter question: And 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 NSDAP-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. We will come back to this[10].

But nevertheless, and again: Who makes the law if not the state?! – At this question always comes to my mind the animal fable of “Chatecler” by the French author Ed-

[8] 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).
[9] 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.
[10] Infra ……………..

mond Rostand[11]: Every morning Chantecler the proud cock 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 cock to care for light and dark. But astonishingly, many of us think that we need the state in order to care for right and wrong, that we need state legislation to forbid murder. But: 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 correlation to) the sun rise.

This corresponds to a principle we experience in everyday life and scientists articulate 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 cocks or others,
> and neither by causeless cincidence,
> 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.

This Rule of Law is not in force because somebody orders its force but because it is there. To take the classical Newtonian example, it is not 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[12] but also by those who try to attribute legitimacy to the state. These too, advocate the "Rule of Law" which allegedly means according to the same trilogy, that the state

[11] Edmond Rostand, 1868 to 1918, a French poet and dramatist, who wrote "Chantecler" in 1910.
[12] Cf. Stephen Hawking, Leonard Mlodinow, The Grand Design, London etc., 2010.

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 played and play 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[13] 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 by far not fulfilled even though the current mainstream keeps pretending this being the case.

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

The Conflict and its Rules

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

This law works irrespective of whether it is subjectively perceived. It does not only apply to golf beginners but also to stones crashing into each another. 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 blow 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

[13] Samuel Rutherford, LEX, REX, or the Law and the Prince; a Dispute for the Just Prerogative of King and People, 1644.

fly and in 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.

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 than 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 millenniums of phylogenetic evolution e.g. to protect by specific gestures sensible organs like eyes[14], then 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 cold blood, does not just automatically react but 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[15]. 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. You are probably familiar with such reactions out of own experience: You inadvertedly push against a table which hurts you and lets you blame and even beat

[14] Such as described by Michael Graziano as a very old element of human behavior influencing many his today's signs of social communications, cf. The First Smile https://aeon.co/essays/the-original-meaning-of-laughter-smiles-and-tears visited 7-1-2018.

[15] Cf. high interdisciplinary complexities e.g. in approaches by Edward O. Wilson, Sociobiology, 2nd edition 1980; Margret Gruter, Law and the Mind: Biological Origins of Human Behavior, 1991; Richard D. Alexander, The Biology of Moral Systems, 2nd edition 2009.

the wicked table (which hurts you again, Actio = Reactio). In other words, the collision creates pain which in turn gives rise to subjective perception and thus articulation of blame, which again urges to take action against the colliding body, and finally lets emerge rational classifications of "wrong" or "unjust" or "illegitimate" etc.

The Rules and their Argumentation

And of course, the same will happen, in reciprocal duality, when Homo Sapiens X does not clash against a tree but against Homo Sapiens Y. Then, both Homines Sapientes will suffer pain, will shout at the opponent, will blame him, and will 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 in 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 main stream of these correlations work bottom up not top down. – In the beginning was the *World* – the *Word* came much later[16].

Reality is of course much more complex than sketched here. This is particularly true for 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 do not only accompany but strongly influence the course of the 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 arguers position[17] 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

[16] Cf. John 1:1, In the beginning, the Word existed… (according to "International Standard Version").
[17] Infra …..

incompatibility of the conflict as such. In other words, argumentation is part of the reaction to a collision.

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 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 of pain and anger and probably rebuff each other, but each of them *argues* that he is right and the other is wrong. In a first instance this does not mean 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 derived insofar 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[18]. 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.

The Arguments and their Physical Force

But again: *How* can the pure facts involved in the conflict induce substantive answers about its solution? For incompatibility as the core of the conflict is mutual and for both sides identical (Actio = Reactio). 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[19]?

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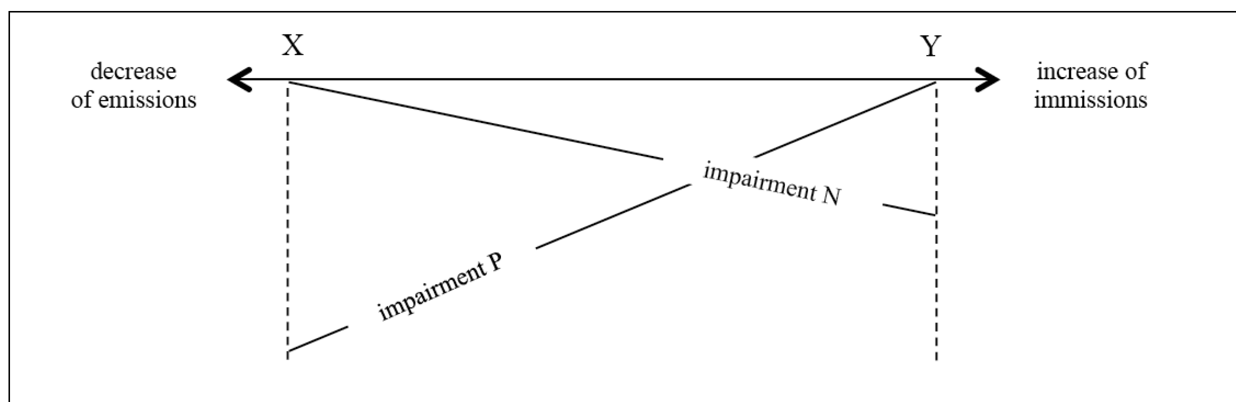
[18] HHH ………….

[19] 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 himself there are fundamental privileges in relation to normal citizens, infra ……

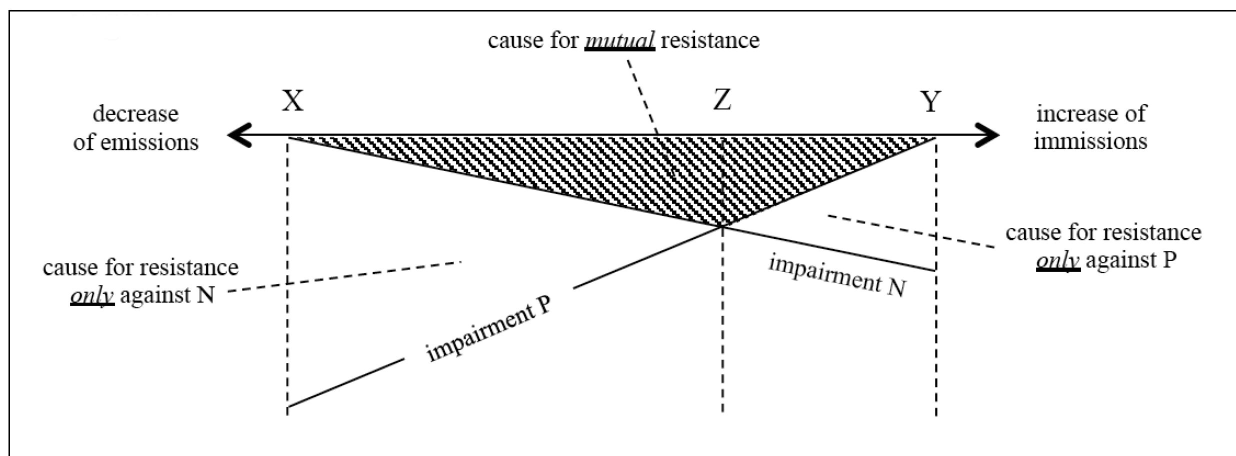
As an approach to find argumentative solutions out of the conflict one might consider the mutually caused impairments suffered by the parties in order to decide in an utilitarian way i.e. to give preference e.g. to the party whose impairment in case of retreat is smaller than it would be for the opponent:



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 criterions acceptable for both sides: P will hardly be convinced by the Pro Health Argument, N hardly by the Pro Wealth Argument. And first of all, usefulness is not part of the incompatibility[20].

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 prove out 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.

[20] 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, R.H.Coase, The Problem of Social Cost, J L&E 1960 III, p. 1 seq.; on the other hand it leaves undecided which of the parties is better or worse off.



In any event there will be a tendency towards levelling 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.

Remains however still the question how such an outcome will be enforced in case one side refuses to comply. But this question is already answered: The described force of the arguments mirrors the force of the respective reactions against the collision. 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.

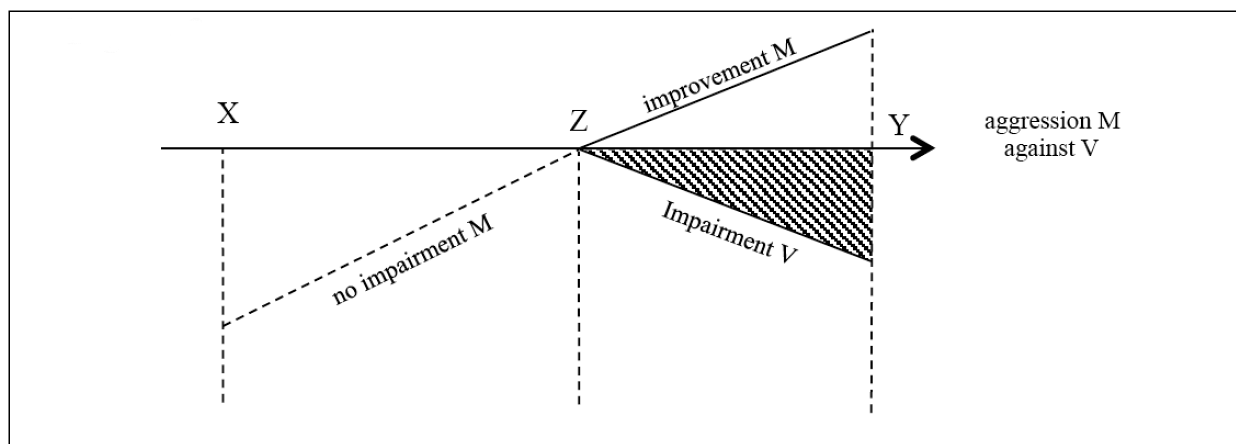
Probably the strongest effect of the strength of an argument is the involvement of others by catching their attention, by provoking perception of own pains with bystanders in view of the facts of the conflict etc. In other words, the stronger an argument for one side of the conflict the broader the probability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

Asymmetrical Constellations

There are constellations that do not fit to the mutual reciprocity just described. Imagine a mugger taking away 100 money units from his victim and being now con-

fronted 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 interference takes place by the mugger for reasons he values to be in his interest such as to by 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 the victim suffers a corresponding impairment, so his curve V runs downwards into the negative area:



As shown in figure 2, 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.

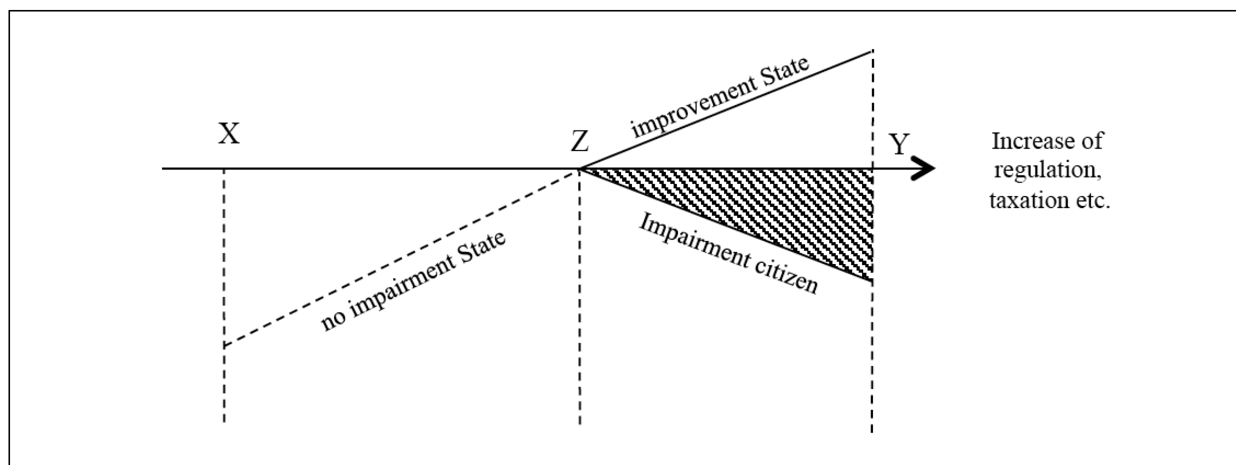
Unlike in figure 2 where *both* producer P and Neighbor N *mutually* react against each other and *reciprocally* produced slow down effects there is no mutuality in the mugger-victim constellation. Here is no stopping effect on the mugger's side *against the victim*. The mugger will not be supported 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 with 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 him to enforce a contractual obligation (we will come back to the state's attempt to fake 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[21]).
>
> The state like the mugger may try to argue that to refrain from taking away the money from the victim is identically harmful for him 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 handle out the wallet or to file their tax return respectively and then collects the prey by force if need be.

This leads to the very same state's curve S which starts at point Z and then runs upwards towards point Y while the victim citizens' curve runs downwards and therefore creates resistance along with strong arguments against the mugging state:

[21] Infra ………….



And 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 for all other interferences he commits against the citizens.

In sum we have a clear and simple case, sort of an 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 his citizen victims.

A Clear and Simple Case against the State

It seems to be astonishing that irrespective of this clear and simple constellation, so many members of society accept the state's behavior. One might wonder that if those natural reactions really are "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 once somebody accepts the state's behavior out of free will he is not a victim but rather a voluntary member. *Volenti non fit iniuria* says an old Roman proverb[22]. *Voluntary* membership in an organization called state does not constitute any problem. It is comparable to the membership in a church or in another edifying club or in residential cooperative etc.

Quite a different case however is the *mandatory* membership for those that do not want to be a member. Only about these cases is this essay all about. And when we just

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

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 his "members" even if these never signed an accession declaration or the like. This is comparable to religions that do not only worship their own God but want to force all other people to worship this very same God, as well. This is known e.g. of the medieval inquisition of the Roman Catholic Church or of todays' theocratic countries who advocate an official legal ban against atheism[23]. 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 over-individual developments of social behavior[24].

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 slogans seem to express some catchy plausibility, once you look at them closer however they turn out to be hollow and contradictory if not blunt lies. In fact they are lazy excuses of the wrongdoer caught in action, just like the mugger we described before.

As to "Democracy"

the notion means Government by the People, i.e. an allegation that people are not governed but form the government themselves. However, for the really existing "democracies" this is simply not the case. 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 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

[23] Such as reportedly in Egypt where a legislative project against atheism is in discussion.

[24] Sigmund Freud, Massenpsychologie und Ich-Analyse (mass psychology and Ego-analysis), 1921.

delegated to a small subgroup. But even if this was true (which is not the case[25]) the notion "Democracy" is a lie.

Confronted with such challenges and perhaps somehow embarrassed our mugger state will try to save his excuse by the argument of an alleged "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 opinion to the parliament or those voting directly for certain legislations there is no reason not to accept the outcome[26]. But not for those who do not accept the delegation or even some specific legislative project; for them the justification of consent does obviously not apply. For them the mugging state's excuse will definitely fail.

At this state of the discussion the state and his defenders would try it with a quite diffuse criterion i.e. to invoke something like "sufficient representativeness": Even if not all but still a strong majority accepts this whole scheme it is justified that the small minorities are obliged to follow, just like in corporate law where tiny minorities of e.g. 5% can be "squeezed out" sometimes[27]. 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 in the extent of less than 1 % while it is wrong for more than 99 %.

[25] 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.

[26] Tom Bell, Your Next Government? From the Nation State to Stateless Nations, 2018, p. 75 seq., 81 seq.

[27] Comparable to squeeze 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.

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 %**

Now comes the very last and almost desperate excuse: Even though the majority is not quite overwhelming 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 constitution formed of 22 independent cantons in the revolutionary time of 1848 was not unanimously agreed upon by all these members 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 losers forced to accept[28]. That was not only a violation of the principle of consent and of the fundaments of a valid "*contrat social*"[29] but also of international law accepted at that time[30].

The ratio counted by the 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 this, all those people are dead for many decades now; why should a constitution be

[28] The reason for that (quite harmless) war was the plan of the catholic cantons to form an own federation of defense which was fully compatible with their quality as independent subjects of international law.
[29] Jean-Jacques Rousseau, Du contrat social, book I chapter 5, emphasizing unanimity for the first contract, while in this first contract majority votes can be agreed upon for future decisions.
[30] 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.

binding for today's Swiss population based on the fact that 170 years ago 5.8 % of the population voted for it? 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 of the vote of 1999 are still alive today. But on the other hand, the "majority" of those that were entitled to vote and went to the vote 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%?

As to the Rule of Law

we already treated the Rule of Law, though not in the sense of this excuse 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 say, 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 excuse however is that the state himself produces all these acts, statutes, ordinances etc.! Not surprisingly he performs this work in a remarkably arbitrary way. He grants himself extended privileges which he 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 he leaves the judicial decisions to independent precedents – all in all called "Private Law". On the other hand, the state enacts for himself 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 its position against a fellow citizen he is not allowed just to do so, but he 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, too he has to hire an independent executer, i.e. the state.

When the state himself however wants to enforce his position, he is allowed to go for it without submitting the case to a court. He can simply put his 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 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 his 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 the other without the latter’s consent according to private or criminal law rules he will be punished for theft or robbery. When the state makes the very same (as we already saw in connection with the mugger-victim-constellation[31]) according to his 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 makes the same according to his own statutes it is fully legal compulsory military service.

When a citizen borrows money from a fellow citizen and then indebts himself in an amount twenty times the volume that volume according to the criminal law rules will be sentenced for intentional attempt of fraud. When the state makes the very same he calls it official money-creating process and treats it as fully legal.

And many more examples of the state’s attitude of preaching water and drinking wine.

A Class Action against the State

In any event all these excuses prove helpless and lazy. They cannot distract from the clear and simple fact that the state behaves like the mugger who is caught in action and then before the judge, develops – in the sense of the word – fantastic reasonings that seem at first glance plausible. But as soon as the light of argumentation falls on the facts the state’s case has as little chance as the mugger’s case i.e. none.

[31] Supra ………..

And this in turn, unleashes the reactions described before: It starts with conscious perception of the pains suffered by tax payers, by compulsory military servicers, by harassed entrepreneurs, by victims of “justice”, by spied intimacies, by brain washed children etc. This in turn, provokes arguments strong enough to find more and more additional subjective perception und hence to “collect” additional parties supporting this side of the conflict, maybe to organize what comes down to a broad class action against the state. And finally, out of this emerges a tendency to physically push back the state to the point where he came from – just like the mugger.

The physical conflict creates its own physical solution.