

WAR – THE DISENCHANTMENT OF LAW?

I. War and the Philosophy of Law

The attack of the Russian Federation on Ukraine has many consequences not only for the practice but also for the philosophy of law. Not least, it invites reflection on the meaning of the experience of war for the understanding of law. War is widely and rightly regarded as the negation of law. The rule of law is the epitome of the human attempt to rationalize the social order and substitute arbitrary power with rules that provide certainty and guarantee foreseeable forms of social interaction.¹ The rule of law is also intrinsically connected to material values of justice, solidarity and fundamental rights. War, in contrast, silences the voice of law; naked force throws off the shackles of normative constraints and rules supreme.

This antagonism has motivated centuries-old attempts to tame war by the means of law² and, ideally, to prevent new wars from being begun.³ These attempts have culminated in international humanitarian law and the prohibition of aggression in the UN Charter, Art. 1 (4)⁴ – both, however, with limited practical effect.

War is a challenge to law – but what kind of challenge exactly? Is it a challenge to the effective rule of law? Is war the cause of disenchantment with law because of the frustrating experience of the limits of its power in times of crisis? War shows, one could argue, that when conflicts become serious, only force rules. This is not just true, however, for international relations – it is only more obvious on this level. It is also ultimately true on the national level. This becomes obvious during times of fundamental political antagonism in a society, when

*Matthias Mahlmann, Prof. Dr. iur., University Professor, University of Zurich (Switzerland).
Маттіас Мальман, професор, Університет Цюріха (Швейцарія).
e-mail: Ist.mahlmann@rwi.uzh.ch

¹ Cf. for an example of such arguments Aristotle, *Politics*, 1286a, 1287a ff.

² Cf. for example Hugo Grotius, *De Iure Belli ac Pacis Libri Tres*, Ed. Nova, Vol. I, *Reproduction of the edition of 1646* by J. Brown Scott (Washington: Carnegie Institution, 1913), Prolegomena, para. 25; III, I ff.

³ Grotius, *De Iure*, I, I, II on the limits imposed by the idea of *bellum iustum*, just war doctrine; Immanuel Kant, “Zum Ewigen Frieden,” in *Kant’s gesammelte Schriften*, Vol. VIII, ed. Königlich Preußische Akademie der Wissenschaften (Berlin and Leipzig: G. Reimer, 1923), 341 ff. English Translation: Immanuel Kant, “Toward Perpetual Peace,” in *Practical Philosophy*, *The Cambridge Edition of the Works of Immanuel Kant*, trans. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 311 ff.

⁴ *Charter of the United Nations* (UN Charter), 1 UNTS XVI, October 24, 1945.

law must cede the reins to power, or so the argument goes.⁵ From this perspective, law is not necessarily entirely useless and its normative claims to realize justice not completely empty. Its importance is, however, limited to periods of peace and a lack of divisive political conflict.

Or is war the reason for disenchantment with law in a deeper sense because war reveals some other, even more unpleasant truths about law's real foundation? Which kind of truth could this be if we radicalize the analysis? If we do not shrink away from doing so, does it not turn out that not only is law helpless against power in times of profound and ultimately violent conflict, but also that the reign of force during such times reveals the true nature of law, which is force itself? Reasons and theories regarding the legitimacy of law only create a cozening façade; from this perspective, they are not the true source and essence of law. Law is not the offspring of reasons and argumentation that convince, but of victorious power that imposes its rules on those it is able to subdue. This is always the case; war only makes this obvious.

Interestingly, such theories are defended from different political quarters, both left and right. There is a tradition of disdain for the complicated world of law from supposedly radical movements on both sides of the political aisle that hope to substitute it with social arrangements that embody their respective political ideals in an order that is stable and capable of recreating itself over time without the crutches of legal rules.

Let us consider what merits these claims have. First, we will recapitulate some interpretations of war in classical philosophical texts. Second, we will explore the connection between law and force in a paradigmatic radical approach asserting the ultimate identity of law and force: the philosophy of Nietzsche. Third, we will offer a critique of the identification of law and force. And fourth, we will draw some not least political conclusions.

II. Critique and Apology in the Philosophy of War

War is a controversial subject in philosophy. From one point of view, it is the natural task of philosophy to critique war and to lay the foundations to overcome this plague on humanity. If that turns out not to be possible, or at least not achievable in the short term, one has to formulate rules that at least mediate its devastating effects. This is the point of the project of humanitarian law.

One classical example is Grotius' attempt to formulate reasons why we should limit the effects of war by the means of law. The starting point of his reflections is the observation of the many devastating effects of the wars of his time. He drew a conclusion from what he observed that remains important to this day: the way a war is conducted must at least be of such a kind that peace between the parties remains possible when the hostilities end.⁶ The violence of war should not be allowed to destroy the basis for reconciliation. Grotius, like other natural lawyers, also developed a theory of just wars that is differentiated and

⁵ Cf. Carl Schmitt, *Politische Theologie*, 2nd ed. (Berlin: Duncker & Humblot, 1934), 11.

⁶ Grotius, *De Iure*, I, I, I.

interesting and restrictive in many senses, but also open to imperial abuse and thus as ambivalent as many elements of normative thinking in the history of ideas.⁷

Kant's particularly influential reflections in his essay "Towards Perpetual Peace" echo some of these thoughts but add important elements to the philosophical critique of war: he, like Grotius, underlines the importance of maintaining the possibility of peace during war by limiting the damage done by war.⁸ He formulates some concrete rules to this effect. More importantly and famously, he considers the question of what means would help prevent a war from being waged in the first place. He has some interesting proposals, including the abolition of standing armies or the prohibition of debt to finance a war machine.⁹ One idea was of particularly lasting influence: that the best way to prevent war is actually to establish a commonwealth of democratic republics. If everybody in a body politic has a voice, he thought, people will decline to vote for war because they themselves will pay the price for such hostilities.¹⁰

There is another equally important thought in Kant's essay that has gained less attention, though it merits even more than the previous notion: the justice of social order, he thinks, generates peace.¹¹ He does not fully elaborate this thought, but he clearly assumes that society tends towards peace when moral principles structure the bodies politic, when rights are respected and duties taken seriously and when a legal system secures fundamental normative principles. There would be fewer conflicts in such a world. Moreover, such a "kingdom of ends" would be deeply attractive to its members, offering ways to achieve "eudaimonia" by satisfying the ethical desires of human beings, with the consequence that war would lose its attraction.

These thoughts rest on the conviction that peace is a central good for human beings. This may appear obvious if one thinks about the reality of wars, but philosophically it is not. As in other parts of human culture, one also finds apologists of war in the higher echelons of philosophy. A good example is Hegel's metaphysics of war. Hegel's philosophy of law culminates in reflections on world history. He thinks that nation states embody some particular form of ethical life that is irreconcilable with the ethical lives of others. These conflicts cannot be overcome by other means than war until the superior form of ethical life prevails – in his view, the Germanic world.¹² This is the very opposite of Kant's views, with nothing to recommend itself: that nation states manifest a form of ethical life irreconcilable with other such forms of life is not deep philosophy but shallow ethno-essentialist ideology, wedded in Hegel's case to unsavoury illusions about Germanic superiority couched in the terminology of the Spirit's dialectic self-realization in history. The heterogeneity of any

⁷ Cf. for example Grotius, *De Iure*, II, XX, XXXVIII.

⁸ Kant, *Zum Ewigen Frieden*, 346.

⁹ *Ibid*, 343 ff.

¹⁰ *Ibid*, 349 ff.

¹¹ *Ibid*, 378.

¹² G. W. F. Hegel, *Grundlinien der Philosophie des Rechts, Werke Vol. 7*, eds. Eva Moldenhauer and Karl Markus Michel (Frankfurt am Main: Suhrkamp, 1986), §§ 324, 333 f., 358.

human society on the one hand and the fact of the many values and interpretations of what is important in a human life being shared across borders on the other show after only brief reflection how little such simplistic essentialism has to do with the reality of complex human cultures and societies.

The adoration of force and a sombre romanticizing of war can be found in other contexts, too. One persistent theme is the culture-building force of war. Even such a person as Thomas Mann succumbed in his early years to this siren song of force¹³ before he resolutely turned his back to these kinds of errors and supported peace and democracy.

Related, though not identical, is an apologism for violence in its various, not necessarily warlike forms as the source of the creation of political orders. Examples include Carl Schmitt's legal thought that meandered between various outlooks such as decisionism and thinking in concrete orders (*konkretes Ordnungsdenken*)¹⁴ and led to the idea that the taking of territories could create laws, a crude version of the justification of imperial policies.¹⁵ Within the Marxist tradition, Walter Benjamin mused about "divine force," which in his view is capable of establishing a new, un-estranged society.¹⁶ In view of the role of violence in the history of so-called socialist states, culminating in the atrocities of Stalinism, this is a less-than-attractive vision.¹⁷

But let us turn now to another voice that has experienced a renaissance in recent years and is a paradigmatic case of a philosophical justification, even celebration of power and violence: the philosophy of Friedrich Nietzsche.

III. Nietzsche as a Paradigmatic Case

1. *Will to Power*

Nietzsche is perhaps the most influential apologist of force. Power and force rule in the imagined new world beyond good and evil that he evokes with prophetic vigour. Nietzsche postulates the existence of a "will to power" (*Wille zur Macht*) as the "intelligible character" of the world.¹⁸ This will to power is a principle of life. It drives life forward to metamorphose into ever-new forms, arrational, powerful, creating the plethora of beings that make up the ever-changing world: "Above all, a living being wants to discharge its strength – life itself

¹³ Thomas Mann, *Betrachtungen eines Unpolitischen* (Frankfurt am Main: Fischer, 2009).

¹⁴ Carl Schmitt, *Drei Arten rechtswissenschaftlichen Denkens* (Berlin: Duncker & Humblot, 1934).

¹⁵ Carl Schmitt, *Der Nomos der Erde* (Berlin: Duncker & Humblot, 1950).

¹⁶ Walter Benjamin, "Zur Kritik der Gewalt," in *Gesammelte Schriften, Vol. II-1*, ed. Rolf Tiedemann and Hermann Schweppenhäuser (Frankfurt am Main: Suhrkamp, 1991), 179 ff.

¹⁷ As Walter Benjamin's close friend, Hannah Arendt, for instance, analysed in Hannah Arendt, *Origins of Totalitarianism* (London: Penguin Books, 2017).

¹⁸ Friedrich Nietzsche, "Jenseits von Gut und Böse," in *Sämtliche Werke, Vol. 5: Jenseits von Gut und Böse, Zur Genealogie der Moral, Kritische Studienausgabe*, eds. Giorgio Colli and Mazzino Montinari (München: Deutscher Taschenbuch Verlag, 1999), Aphorismus 36. English translation: Friedrich Nietzsche, *Beyond Good and Evil*, trans. R. J. Hollingdale (London: Penguin Books, 2003).

is will to power – self-preservation is only one of the indirect and most frequent *consequences* of this.”¹⁹

There are no moral bonds to this force of life. Its aim is not a world of moral perfection but the realization of ever-higher forms of life, nobler in a non-moral sense, and, ultimately, in the human sphere to the birth of the “superman,” *den “Übermenschen.”*²⁰

2. Epistemology

This analysis of existence in terms of a will to power extends to epistemology, too. It is not truth that guides thinking, but the desires and impulses of the thinking person. The result is a perspectivism that underlines the multitude of world interpretations:

There is only a perspectival seeing, only a perspectival “knowing;” the more affects we are able to put into words about a thing, the more eyes, various eyes we are able to use for the same thing, the more complete will be our “concept” of the thing, our “objectivity.” But to eliminate the will completely and turn off the emotions without exception, assuming we could: well? would that not mean to *castrate* the intellect?²¹

Nietzsche does not deplore the plurality of these perspectives. On the contrary, he holds that it is an asset:

Finally, as we knowers, let us not be ungrateful towards such resolute reversals of familiar perspectives and valuations that the mind has raged against itself for far too long, apparently to wicked and useless effect: to see differently, and to want to see differently to that degree, is no small discipline and preparation of the intellect for its future “objectivity” – the latter understood not as “contemplation without interest” (which is, as such, a non-concept and an absurdity), but as having in our power the ability to engage and disengage our “pros” and “cons:” we can use the difference in perspectives and affective interpretations for knowledge.²²

¹⁹ Nietzsche, *Jenseits von Gut und Böse*, Aphorismus 13 (emphasis in the original).

²⁰ Friedrich Nietzsche, *Sämtliche Werke, Vol. 4: Also sprach Zarathustra, Kritische Studienausgabe*, eds. Giorgio Colli and Mazzino Montinari (München: Deutscher Taschenbuch Verlag, 1999), 14, 16. English translation: Friedrich Nietzsche, *Thus Spoke Zarathustra*, trans. R. J. Hollingdale (London: Penguin Books, 2003), 43.

²¹ Friedrich Nietzsche, “Zur Genealogie der Moral,” in *Sämtliche Werke, Vol. 5: Jenseits von Gut und Böse, Zur Genealogie der Moral, Kritische Studienausgabe*, eds. Giorgio Colli and Mazzino Montinari (München: Deutscher Taschenbuch Verlag, 1999), III, Aphorismus 12. English translation: Friedrich Nietzsche, *The Genealogy of Morality, Cambridge Texts in the History of Political Thought*, ed. Keith Ansell-Pearson, transl. Carol Diethe (Cambridge: Cambridge University Press, 2017) (emphasis in the original).

²² Nietzsche, *Zur Genealogie der Moral*, III, Aphorismus 12. Cf. similarly Friedrich Nietzsche, *Sämtliche Werke Vol. 2: Menschliches, Allzumenschliches, Kritische Studienausgabe*, eds. Giorgio Colli and Mazzino Montinari (München: Deutscher Taschenbuch Verlag, 1999), I, Aphorismus 6 (emphasis in the original). Here, Nietzsche states: “You shall become master over yourself, master also over your own virtues.

3. *The Origin of Morality*

The will to power is also the true reason for the existence of morality, “morality understood as a doctrine of the power relations under which the phenomenon of ‘life’ arises.”²³ There is, however, a corrupted form of morality, too: the morality of the “herd,” the weak who attempt to and are even successful at enchaining the strong by their invented moral concepts: “What they want to strive for with all their might is the universal, green pasture happiness of the herd, with security, safety, contentment, and an easier life for all; their two most well-sung songs and doctrines are called: ‘equal rights’ and ‘sympathy for all that suffers’ – and they view suffering as something that must be abolished.”²⁴ Religion can be a tool, useful for the “work of chastening and education” that counteracts these egalitarian tendencies:

Finally, as for common people, the great majority, who exist and are only *allowed* to exist to serve and to be of general utility, religion gives them an invaluable sense of contentment with their situation and type; it puts their hearts greatly at ease, it glorifies their obedience, it gives them (and those like them) one more happiness and one more sorrow, it transfigures and improves them, it provides something of a justification for everything commonplace, for all the lowliness, the whole half-bestial poverty of their souls.²⁵

Impulses like pity and compassion, cultivated by religions, merely save existences that deserve to die. Caring for the sick and suffering is “working in word and deed for the *deterioration of the European race*.”²⁶ There is no genuinely altruistic action. Those who

Formerly *they* were your masters; but they must be only your instruments besides other instruments. You shall get control over your For and Against and learn to display first one and then the other in accordance with your higher goal. You shall learn to grasp the sense of perspective in every value judgement – the displacement, distortion and merely apparent teleology of horizons and whatever else pertains to perspectivism; also the quantum of that resides in antitheses of values and the whole intellectual loss which every For, every Against costs us. You shall learn to grasp the necessary injustice in every For and Against, injustice as inseparable from life, life itself as conditioned by the sense of perspective and its injustice. You shall above all see with your own eyes where injustice is always at its greatest: where life has developed at its smallest, narrowest, neediest, most incipient, and yet cannot avoid taking itself as the goal and measure of things, and for the sake of its own preservation secretly and meanly and ceaselessly crumbling away and calling into question the higher, greater, richer – you shall see with your own eyes the problem of order of rank; and how power and right and spaciousness of perspective grow into the heights together” (emphasis in the original). English translation: Friedrich Nietzsche, *Human, All Too Human, Cambridge Texts in the History of Philosophy*, ed. and trans. R. J. Hollingdale (Cambridge: Cambridge University Press, 1996), 9–10. In this passage, it is easy to trace how the seemingly equal perspectives give way to an exalted view that asserts its own rightness – a view that gains “power and right and spaciousness” because it understands the significance of the order of rank that justifies sacrificing the lower for the sake of the higher – a thesis that, as mentioned above, is a leitmotif running through Nietzsche’s reflections.

²³ Nietzsche, *Jenseits von Gut und Böse*, Aphorismus 19.

²⁴ *Ibid*, Aphorismus 44.

²⁵ *Ibid*, Aphorismus 61 (emphasis in the original).

²⁶ *Ibid*, Aphorismus 62 (emphasis in the original).

consider the prohibition against harming others and the requirement to assist them as far as possible to be fundamental principles of morality are sentimentally “playing the flute” in a “world whose essence is will to power.”²⁷

4. *A Cruel Aristocracy*

Nietzsche imagines the new, culture-creating aristocracy of higher human beings to be full of vitalist energy, unprejudiced and uninhibited, creative and desiring action. He pictures them as a “self-rolling wheel,”²⁸ full of “wild wisdom,” even as a “magnificent *blond beast* avidly prowling round for spoil and victory”²⁹ and as “tropical monsters.”³⁰ The path to these higher forms of existence requires us to shake off moral ties, the oppressive “spirit of gravity.”³¹ These are to be replaced with the courage of a lion, as Nietzsche writes, and Thou shalt! replaced with You will!³² However, free will appears no more than an illusion to him.³³

5. *Law Hostile to Life*

These principles motivate his contempt for fundamental elements of modern law, such as equal rights, constitutions or representative democracy. A rule of law can only have a transient existence because it hinders the prospering of life:

To talk of right and wrong *as such* is meaningless, and an act of injury, violence, exploitation or destruction cannot be “unjust” *as such*, because life functions essentially in an injurious, violent, exploitative and destructive manner, or at least these are its fundamental processes and it cannot be thought of without these characteristics. One has to admit to oneself something even more unpalatable: that viewed from the highest biological standpoint, states of legality can never be anything but exceptional states, as partial restrictions of the true will to life, that seeks power and to whose overall purpose they subordinate themselves as individual measures, that is to say, as a means of creating greater units of power. A system of law conceived as sovereign and general, not as a means for use in the fight between units of power but as a means *against fighting* in general, rather like Dühring’s communistic slogan that every will should regard every will as its equal, this would be a principle hostile to life, an attempt to assassinate the future of man, a sign of fatigue and a secret path to nothingness.³⁴

From this perspective, it is easy to imagine war as the revelation of the deepest truth behind law: the will to power as the intelligible essence of the world creates its forms and

²⁷ Nietzsche, *Jenseits von Gut und Böse*, Aphorismus 186.

²⁸ Nietzsche, *Also sprach Zarathustra*, 90; Nietzsche, *Thus spoke Zarathustra*, 55.

²⁹ Nietzsche, *Zur Genealogie der Moral*, I, Aphorismus 11 (emphasis in the original).

³⁰ Nietzsche, *Jenseits von Gut und Böse*, Aphorismus 197.

³¹ Nietzsche, *Also sprach Zarathustra*, 241; Nietzsche, *Thus spoke Zarathustra*, 210.

³² Nietzsche, *Also sprach Zarathustra*, 30; Nietzsche, *Thus spoke Zarathustra*, 55 (emphasis in the original).

³³ Nietzsche, *Jenseits von Gut und Böse*, Aphorismus 18.

³⁴ Nietzsche, *Zur Genealogie der Moral*, II, Aphorismus 11 (emphasis in the original).

makes them serve its ends, not some other source (e.g. reasons that are not related to any will to power but only enjoy the strange force to convince). The law also is an expression of this driving force of life. Legal states are only useful in an instrumental sense as means to create bigger power units. A system of law that limits force and perhaps even overcomes its reign and substitutes arbitrary power with legal rules is a system “hostile to life,” as he says. Visions like Kant’s or the system of international law erected after 1945 are, from this point of view, not only missing the deepest reasons for the existence, structure and content of law, they are also detrimental to true purposes of human life.

6. Nietzschean Errors

None of the main Nietzschean theses is particularly convincing. To identify a “will to power” with the essence of the world is a strange piece of free-wheeling metaphysics that is only of interest as a symptom of the cultural constellations that fed into Nietzsche’s errors – not least, perhaps, the dawn of an imperialist, deeply anti-egalitarian political epoch in Germany and beyond.

His epistemological stance is, of course, already on the first view self-contradictory – there are clearly superior perspectives in Nietzsche’s thinking. He even treats his own thought with quasi-messianic pathos, as manifested in his most famous work, *Also sprach Zarathustra*. To interpret one’s own thought as prophetic implies that one takes it to be more than a contingent perspective among others. It has to be a justified insight, even a revelation of the deepest truth, to become a tool to facilitate humanity’s redemption.

Moreover, he employs standard reasons of argumentation. He does not appeal to drives that supposedly determine intellectual systems down to the last detail. Instead, he sketches the phenomenology of certain objects of reflection and relies on psychological theories and causal and historical analysis. His arguments are sometimes illuminating, but sometimes they lead him into obscurantism, including racist theory – for example, as to the origins of the ideals of human equality, which are promoted by the herd:

to all intents and purposes the subject race has ended up by regaining the upper hand in skin colour, shortness of forehead and perhaps even in intellectual and social instincts: who can give any guarantee that modern democracy, the even more modern anarchism, and indeed that predilection for the “commune,” the most primitive form of social structure now common to all Europe’s socialists, are not in essence a huge *throw-back* – and that the conquering *master* race, that of the Aryans, is not being defeated physiologically as well?³⁵

Morality is the very opposite of a force of domination – it aims to control such impulses to create an order of freedom and other human goods that respects justice and what we owe to each other. Such norms are not the expression of a low herd morality, but, on the contrary,

³⁵ Nietzsche, *Zur Genealogie der Moral*, I, Aphorismus 5 (emphasis in the original), 11.

of obligatory, just respect for others that implies, by the way, respect for oneself, as it is derived from the common humanity of all.

There is thus no discernible reason why a morality and law of equal rights, constitutionalism, democracy and social justice should not lead our way. Nietzsche's depictions of his higher life forms of conquest, subjugation, exploitation, rule and hierarchy only serve to confirm this conclusion. They do not constitute any higher form of life at all. His visions offer nothing but the narrow-minded, petty and stale pleasures of imagined power and cruelty.

Consequently, his analysis of law misses law's most important point, which is to protect a justified ethical order of justice, respect and solidarity. To identify it with manifestations of power is analytically flawed and politically dangerous.

IV. Fallacies of the Apologists of Force

We identified some problems of the apologist philosophies of war in the preceding arguments. These included Hegel's metaphysical essentialism of the ethical identities of political communities, celebrating Germanic superiority and asserting insurmountable antagonisms between nations breeding war and the whitewashing of war as the seed of culture, positions that defenders such as Thomas Mann abandoned after understanding what the trenches of First World War really meant for those who fought in them. Nietzsche's philosophy does not fare better. His epistemology is contradictory and self-refuting, his moral psychology shallow, his meta-ethics false, his vision of higher life stale and sordid and his theory of law untenable.

Against the background of these debates, one can identify two main fallacies in the argument that we are critically investigating and that holds that a sufficiently deep analysis of law and its ethical foundation reveals that the true core of law is power and force and that, consequently, war as the most intense form of the use of violence and power is only at the surface the very negation of law.

1. The Phenomenological Difference Between Force and Norms

First of all, it is important to remind ourselves that force has no normative dimension. The fact that *A* can force *B* to do or forebear *X* does not mean that *B* is under any obligation to do or forebear *X*. There is a clear-cut phenomenological difference between the two. This is a point repeatedly made in reflections about might and rights.³⁶

As force as such creates no obligations, the question arises: where do obligations stem from? One answer is that a precondition for an obligation is that there are good reasons for accepting that such an obligation exists. The source of ethical duties and rights is human moral understanding and its wellsprings and principles. Consequently, it is a basic element of any critical theory of law not to regard groundless obligations, prescriptive rules for which there are no reasons, as legitimate.

³⁶ Cf. Jean-Jacques Rousseau, "Du Contrat Social," in *Œuvres complètes*, Vol. 3, eds, Bernard Gagnebin and Marcel Raymond (Paris: Gallimard, 1964), I, 3.

2. Reasons and Power

There is sometimes talk of specific, thin notions of force – for example, of performative violence – that are supposed to connect reasons and force. Therefore, one may be tempted to ask: does at this point the question we pursue not re-emerge? Are reasons not themselves related to force? Is this not the core of what is called “convincing” somebody? If law is wedded to reasons and reasons in turn to force, have we not arrived at square one of our little enquiry?

Arguments that equate reasons and force, however, fail to convince not only because they tend to make the concept of force blurry and vague, but also because even within the thinnest understanding of force it remains a category error to equate it with reasons. Reasons convince – they engage the thought of the agent and the partners in enquiry. Being convinced is an act of one’s own understanding, not something that is forced upon oneself. For sure, there is the subversively compelling force of good reasons: the observation of the “compulsion free force of compelling reasons” captures this fact.³⁷ But this effect of reasons on human understanding is not the same as compulsion that uses external force or psychological pressure to make agents do something that they otherwise would not do. To think about an issue and finally to come to a conclusion based on arguments represent an example of exercised epistemic autonomy, something agents do themselves as subjects of their reflection, which is the very opposite of submission to force exercised by others.

Underlining this distinction is not only a matter of analytical clarity and precision – it also has a political dimension. It is about how we frame the use of force and sometimes violence correctly, not least to prevent the abuse of language for political purposes that aim at legitimizing the compulsion of others and sometimes even their subjugation by the means of war. To argue, for instance, that to *be convinced* by reasons that the attack on Ukraine is a “war” in the proper sense of the word is somehow phenomenologically similar to *being forced by threats of imprisonment* to profess that it is only a “Special Military Operation” banalizes the evil of force.

Moreover, it is not only an abstract possibility that there are reasons with the power to convince. There are also indications that we can identify some of these reasons – candidates for grounding the legitimacy of legal systems are, for example, those ideas of justice, freedom, solidarity and dignity that Nietzsche erroneously derided as “herd morality.”³⁸

V. Law and Force

The positive laws that govern a human community have many sources. They may be the products of traditions, of social or economic power or of interests that prevailed. This is one of the reasons why any legal system is always in need of reform and improvement. A legal

³⁷ To borrow a famous formulation by Jürgen Habermas, *Theorie des kommunikativen Handelns*, Vol. 1 (Frankfurt am Main: Suhrkamp, 1981), 47: “zwangloser Zwang des besseren Arguments,” my translation.

³⁸ For some proposals cf. Matthias Mahlmann, *Mind and Rights. The History, Ethics, Law and Psychology of Human Rights* (Cambridge: Cambridge University Press, 2023).

system, however, also aims to be legitimate. Therefore, it must be justifiable in the light of normative reasons. Law is meant to create a durable order that approaches ideas of justice. That is a core condition of its justification. Accordingly, there are no legal orders that do not claim to embody principles of justice, however unfounded this claim may be and however much it may turn out to be an ideological cover-up in concrete cases, hiding that these norms were in fact designed to protect illegitimate power and specific interests. Law's claim to material legitimacy sets it apart from naked power and force.

Material legitimacy, however, can only be derived from normative reasons that are distinct from force. Our findings are, therefore, central to the concept of legitimacy that is indispensable to the idea of law. Fortunately, as we have seen, there are no epistemological grounds discernible to deny the existence of convincing reasons categorically distinct from force that help us to distinguish a legitimate legal order from one that is not.

VI. Results

To sum up: our argument has shown that war does not reveal the true nature of law but is its ugly antithesis. War manifests not some higher law – for example, the law of history, posited in a teleological metaphysics such as Hegel's. There is neither a bridge built between war and law by the intrinsic connection of law and force nor by the ethical norms underlying law that ultimately express nothing but victorious force. It is a fundamental analytical category error to equate obligations created by norms and the compulsion of somebody by force to perform a certain act. The exercise of autonomous thought guided by reasons and their sometimes-compelling character must also not be mistaken for force that makes agents do what they do not want to do. The former is an exercise of epistemic autonomy, the latter the denial of free self-determination.

One reason for the strange move to base law on force is arguably the perception that there are no epistemic standards that reliably identify good normative reasons. Much can be said about this topic. Our short discussion seems to have given at least some indication that one should not give up the hope of warranted normative insight: that the many are not made to serve the few, for instance, seems a normative thesis that is rather hard to refute. Therefore, not only competing drives that determine (according to Nietzsche) the arguments of different parties decide the question of whether the attack of the Russian Federation violates fundamental norms of international law and is profoundly wrong in ethical terms, but better or worse reasons for holding such views. The norms forbidding aggression are not sad examples of a “herd morality” imposed on the strong by the weak but constitutional elements of a legitimate law of the international order. There are arguments and reasons why it is right to criticize this Russian aggression and to support the right of Ukrainians to defend themselves. That this conclusion is important for mobilizing international support for the defenders is obvious. That it is also regarded as important by Putin is shown by the ideological propaganda efforts with which Putin hopes to convince Russians that the war is legitimate.

Thus, war does not philosophically challenge the idea of law, but demands the reestablishment and protection of the rule of law on ethical grounds. This is evidently a rather difficult undertaking. Such large-scale conflicts such as the war against the Ukraine illustrate that maintaining an international order of law means dealing with profound political and geostrategic problems and may entail the brutal application of military might until politics of peace are possible again. The task of the philosophy of law in these struggles is to reaffirm the compelling reasons for orders of law – nationally and internationally – that respect the equality, freedom and dignity of all human beings, with the hope that at some point these reasons and not cruise missiles will win the day.

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Маттіас Мальман. Війна – розчарування у праві?

Анотація. Війна – постійна тема філософських роздумів. Ця стаття реконструює деякі філософії війни, включно з конкуруючими візіями Канта та Гегеля. Вона досліджує, чи існує внутрішній зв'язок між правом, етикою та розумом з одного боку та силою з іншого, як стверджують Ніцше та деякі сучасні теорії. На противагу цим поглядам, захищається категорична різниця між двома наборами явищ: норми не можуть бути зведені до сили, як і розумні підстави. Війна – це заперечення верховенства права та обґрунтованих етичних принципів, а не їх приховане ядро. Ці висновки є важливими для аналітичної ясності, філософського розуміння феномену права, захисту раціональної аргументації та легітимності права. Філософії, які ототожнюють зобов'язання та розумні підстави із силою, посилюють позицію тих, хто хоче замінити крихкі та обмежені елементи верховенства права, які існують на національному та міжнародному рівнях, руйнівними силами нормативно необмеженої влади.

Ключові слова: війна; філософія війни; Кант; Гегель; Ніцше; моральне міркування; зобов'язання; розумні підстави.

Matthias Mahlmann. War – The Disenchantment of Law?

Abstract. War is a persistent theme of philosophical reflection. This paper reconstructs some philosophies of war, including the competing visions of Kant and Hegel. It investigates whether there is an intrinsic connection between the law, ethics and reasons on one side and force on the other, as Nietzsche and some contemporary theories assert. Against these views, the argument defends the categorical difference between the two sets of phenomena: norms cannot be reduced to force and nor can reasons. War is the negation of the rule of law and justified ethical principles, not their hidden core. These findings are important for the sake of analytical clarity, philosophical understanding of the phenomenon of law, the defence of rational argumentation and the legitimacy of law. Philosophies that equate obligations and reasons with force strengthen the cause of those who want to substitute the fragile and limited elements of a rule of law that exist on the national and international level with the destructive forces of normatively unrestrained power.

Keywords: war; philosophy of war; Kant; Hegel; Nietzsche; moral reasoning; obligation; reasons.

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