ISSN 2227-7153 (Print)
ISSN 2707-7039 (Online)

ФІЛОСОФІЯ ПРАВА І ЗАГАЛЬНА ТЕОРІЯ ПРАВА

PHILOSOPHY OF LAW AND GENERAL THEORY OF LAW

НАУКОВИЙ ЖУРНАЛ
ACADEMIC JOURNAL

Журнал внесено до Переліку фахових видань України,
Міжнародної наукометричної бази даних
“Index Copernicus International” (Польща),
Міжнародної наукометричної бази даних
“EBSCO Publishing, Inc.” (США)
і Міжнародної бази даних “Ulrichsweb”

1/2023

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Журнал засновано

як додаток до юридичного журналу "Право України" у 2012 р.,
відновлено як окреме видання у 2019 р.

Адреса редакції

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м. Харків, 61024, Україна

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Видається

2 рази на рік

Свідоцтво про державну реєстрацію

Серія КВ № 23923-13763 Р від 03.04.2019
Попереднє свідоцтво про реєстрацію
Серія КВ № 18647-7447 Р від 30.01.2012

Засновник

Національний юридичний університет
імені Ярослава Мудрого

PHILOSOPHY OF LAW AND GENERAL THEORY OF LAW

ACADEMIC JOURNAL

Founded

as a supplement to the legal journal
"Law of Ukraine" in 2012,
renewed as a separate edition in 2019

Address of the Editorial Office

77 Pushkinska str.,
Kharkiv, 61024, Ukraine

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e-mail: philosophyoflawjournal@gmail.com
www.phtl.nlu.edu.ua

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Published

twice a year

State Registration Certificate

Series KB № 23923-13763 P from 03.04.2019
Previous Registration Certificate
Series KB № 18647-7447 P from 30.01.2012

Founder

Yaroslav Mudryi
National Law University

ISSN 2227-7153 (Print) **ISSN 2707-7039 (Online)**

Рекомендовано до друку вченою радою
Національного юридичного університету імені Ярослава Мудрого
(протокол № 12 від 30.06.2023)

Філософія права і загальна теорія права : наук. журн. / редкол.: С. Максимов та ін. – Харків : Право, 2023. – № 1. – 124 с.

Philosophy of Law and General Theory of Law : Academic Journal / edit. S. Maksymov and others. – Kharkiv : Pravo, 2023. – № 1. – 124 p.

1/2023

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DOI: https://doi.org/10.21564/2707-7039.1.307881

Сергій Максимов і Наталія Сатохіна*

Шановні читачі!

Поточне число журналу присвячено філософському осмисленню співвідношення права і війни. Воно стало продовженням панельної дискусії **"Право і війна: голоси філософів,"** проведеної в рамках VI Харківського міжнародного юридичного форуму, до учасників якої пізніше приєдналися інші автори. Як і дискусія, що йому передувала, цей тематичний випуск журналу мотивований бажанням надати голос праву серед зброї через надання голосу філософам і таким чином вкотре поставити питання про сенс права.

Перші три статті так чи інакше повертають нас до питання про природу права, що в умовах війни постає як питання про його існування. Число відкриває стаття швейцарського філософа, Президента Міжнародної асоціації філософії права та соціальної філософії ***Маттіаса Мальмана*** (Цюрих) "Війна – розчарування у праві?" У ній автор реконструює деякі філософії війни та намагається з'ясувати, чи існує внутрішній зв'язок між правом, етикою та розумом, з одного боку, та силою, з іншого. Професор Мальман доводить, що норми не можуть бути зведені до сили, як і розумні підстави, а війна – це заперечення верховенства права та обґрунтованих етичних принципів, а не їхнє приховане ядро. Натомість філософії, які ототожнюють зобов'язання та розумні підстави із силою (як-от філософія Фрідріха Ніцше), посилюють позицію тих, хто хоче

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замінити крихкі та обмежені елементи верховенства права на національному та міжнародному рівнях руйнівними силами нормативно необмеженої влади.

У статті ***Олексія Стовби*** (Харків) "Яке право 'є' можливим під час війни?" автор у феноменологічному ключі протиставляє право у мирні часи як "тихе підґрунтя повсякденності," схоже на повітря або світло, праву в умовах війни, коли нам не вистачає "повітря або світла," і право існує не як мовчазний постійний фон, а як спалах у пітьмі. Якщо у мирні часи, – пише автор, – право дає існувати соціальному світові в цілому і нам як частинкам цього світу, то під час війни спільний світ буття-з-Іншими чи горизонт спільних можливостей виявляється замкненим.

Професорка університету Палермо (Італія) ***Ізабель Трухільо*** доходить висновку про необхідність переосмислення поняття права досліджуючи співвідношення прав людини і війни. У статті "Права людини та *jus contra bellum*" авторка показує, як практика захисту прав людини, започаткована з метою уникнення воєн, еволюціонувала неоднозначно до такої міри, що початкове протиставлення захисту прав і війни перетворилося на свою протилежність: права людини стали складовою *jus ad bellum*, *jus in bello* та *jus ex bello*, замість того, щоб бути складовою *jus contra bellum*. Цю еволюцію вона вважає провалом початкового проєкту через небажання держав змінюватись відповідно до їхніх власних пропозицій, а також збереження словника та логіки природних прав, які не є правами людини. Логіка прав людини і логіка війни, на думку авторки, залишаються несумісними.

Наступні декілька статей присвячено морально-правовій проблематиці. Зокрема, директор Інституту філософії імені Г. С. Сковороди НАН України ***Анатолій Єрмоленко*** (Київ) у своїй статті "Морально-правовий дискурс війни в умовах російської агресії проти України" досліджує морально-правові аспекти філософського дискурсу російської агресії проти України як предмету практичної філософії. Автор показує спорідненість сучасного соціально-політичного режиму Росії з німецьким націонал-соціалізмом і зауважує постмодерністський характер ідеологічного забезпечення його легітимності, а також виявляє соціально-психологічний фундамент "русского мира." У тексті актуалізовано також полеміку з Юрґеном Габермасом, зокрема піддано критиці його концепт перемовин, в якому фактично ігноровані законні інтереси України. Наголошуючи на обмеженості звернення до перемовин і необхідності спротиву російським агресорам, автор зауважує неправомірність заперечення евристичних можливостей комунікативної парадигми в сучасній практичній філософії.

Професор Афінського національного університету імені Каподістрії (Греція) ***Константінос А. Папагеоргіу*** пропонує нам переосмислити поняття справедливої війни на прикладі російської агресії проти України. У статті "Вочевидь несправедлива (але й вочевидь справедлива) війна" він доводить право України захищатися від російської агресії, як з точки зору міжнародного права, так і в контексті теорії справедливої війни, а також обґрунтовує морально-політичний обов'язок демократичних країн виявляти солідарність з Україною і в такий спосіб сприяти розвитку відносин незалежності та рівності свободи між державами.

Поняття справедливої війни стало також предметом осмислення польського дослідника ***Пьотра Шиманця*** (Валбжис), який, зокрема, задається питанням "Чи потрібне нам юридичне поняття справедливої війни?" в однойменній статті. Стаття містить огляд витоків та розвитку юридичної концепції справедливої війни від Цицерона до Емера де Ваттеля і показує, що сутінки цього поняття зумовлені, по-перше, гіпертрофією ідеї державного суверенітету, а по-друге, переважанням правового позитивізму. Автор наполягає на тому, що концепція справедливої війни може бути використана ефективно і без лицемірства, а в сучасному міжнародному праві може бути місце для дуже вузько сформульованого поняття справедливої війни.

Наступна стаття являє собою доволі нетривіальне дослідження в рамках напрямку "право і література." Польські дослідники ***Мацей Піхляк*** (Вроцлав) і ***Бартош Сувінський*** (Ополе) у своєму есеї "'Тримається на точності.' Паралелі між правом і поезією у воєнний час" розглядають деякі спільні моменти між правом і поезією на фоні війни. Спираючись на вибрані вірші Сергія Жадана та деяких відомих польських поетів покоління після Другої світової війни, автори виділяють три аспекти, які роблять право і поезію схожими одне на одне: спосіб опису реальності зосереджується на індивідуальному і шукає точності; обидва дискурси служать засобами пам'яті, як індивідуальної, так і колективної; вони можуть встановлювати зв'язки та взаємність між різними або навіть протилежними елементами, у крайньому випадку – навіть пов'язувати ворогів. У статті також розглядається питання про дорегулятивні функції права, зокрема впорядкування людського досвіду у хаотичній реальності.

Завершує число стаття японського дослідника з Університету Хоккайдо ***Юічіро Морі*** "Про моральну неправильність заборони залишати батьківщину лише для чоловіків." Автору йдеться про заборону громадянам України – чоловікам залишати країну в умовах воєнного стану, яку він аналізує з точки зору аргументу недискримінації та дорадчого погляду на свободу і стверджує, що згадана заборона несправедливо та морально неправильно дискримінує громадян України – чоловіків за ознакою їхньої статі.

Наступне число журналу стане продовженням низки згаданих тут дискусій, передовсім дискусії про природу права та його співвідношення з війною, і буде присвячено темі "Право під час війни. Феноменологічні перспективи."

DOI: https://doi.org/10.21564/2707-7039.1.307465
УДК 340.12

Matthias Mahlmann*

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 law[2] 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

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[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 devasting 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 force[13] 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 "devine 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.

Одержано/Received 24.04.2023

DOI: https://doi.org/10.21564/2707-7039.1.307483
УДК 340.12

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WHAT LAW "IS" POSSIBLE IN WARTIME?

During the peaceful time a law is silence. It is a silent background of the everyday life, where to give money means to receive goods, to buy a ticket – to reach your destination, to go out from home – a safety walk through the streets and parks. In such cases law is hidden behind the similar activity. It's like an air or light, which exist in the space without self-presentation. And similar to the air and light as the part of our world law as the silent background of our everydayness makes the latter possible. Metaphorically say, law lets the whole social world to be – and lets us to be as the part of this world. It is A. Stifter's "soft law" ("sanfte Gesetz")[1] which brings us to the truth of our Being and gives possibility for us to be, who we are – purchases and sellers, neighbors, employers, pedestrians and drivers and so many other modes of being-as-someone (das Alssein, in terms of W. Maihofer), which are derived from the horizon of the social world.

In opposite, a war is loud. The sounds of shelling, rocket strikes or air bombardments are deafening the silence of the "soft law," silence of the mute background which gives the word to the truth of our life with one another. In the similar case silence as the tissue of our common Being, which is woven by the law, is broken apart by the shelling, gun machine's bursts or sirens of air-raid warnings. If in peaceful times we "inhale" the law or "light up" our lives by the law "in the background regime" then during the war we don't have "enough air or light." We try to "inhale breath of law" frantically or – during the discrete "flash of law" – to look, who we are, where we are and is there any world yet – common world of our Being-with-others – or the whole horizon of the social possibilities is closed already? In other words, in the war times the silence of law is broken and law does exist not as silent continual background, but only as discrete spark in the darkness of war. The world is closed by the war.

The similar metaphorical introduction strives to make visible the core of our questioning – does any law possible during the war and if "yes," what means "to be" for the law at the wartimes? Then, firstly, I try to explicate, how law is rooted in the world being-historically

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[1] Erik Wolf, *Der Rechtsgedanke Adlabert Stifters* (Frankfurt-am-Main: Vittorio Klostermann, 1941), 64; Martin Heidegger, *Der Weg zur Sprache//Unterwegs zur Sprache* (Stuttgart: Klett-Gotta, 2007), 259.

(seinsgeschichtliche) as the common world order, which is not restricted by the state borders but makes them valid (I). Further my concern is to show, in what way law exists in our everydayness. The foundation of my view lies in Heidegger's philosophy (II). The third part of my article will be dedicated to the comprehension of war in the horizon of law and to reconsidering of that, what means for the law "to be" in the wartimes. It seems to me, that the similar attempt gives us the key to the sense of what is going on in Ukraine now (III).

I

From the metaphysical point of view law presents itself as ideal dimension of the "Ought" ("Sollen"), which is opposite to the world of Being ("Sein"). The similar tradition is traced in the thought of Plato and has lasted to present day. The concepts of law of legal positivists (H. Kelsen, J. Raz, E. Bulygin) as well as non-positivists or natural law philosophers (R. Alexy, J. Finnis) are rooted in the similar view. This approach as an attempt to organize Being in accordance with Ought is hostile in its core to every possible event.

At the same time paradoxically, the named reasoning of law itself is grounded in the being-historical event of the land delimitation, "der Nomos der Erde," as it called by German philosopher of law C. Schmitt. He emphasized: "the seizure of the land < … > is the original type of the process, which constitutes the law. It generates the very radical legal ground, which is ever possible, "radical title" in the true sense of the word."[2]

The similar capture of the territory as the primary delimitation of the land is the ontological ground for domestic so as an international law. Schmitt says that

> the seizure of the land establishes law in two directions, internal and external. In internal direction, as in the frame of the capturing group the original order of all relations of property is established through the primarily delimitation and distribution of the land < … > In the external direction the capturing group confronts with the other similar groups or states as the owners of the land.[3]

Thereby, law as the silent background of the national legal order, so as the order of external affairs between the states, has its ontological ground in the land, in the territory. On the similar territory law regulates relations inside the society (domestic law) or between different states (international law). So, the original law is the unity of the order and localization, which is marked by Schmitt with the word "Nomos."[4] As he says, this word – "Nomos" – received its common meaning as the Ought, that is opposite to Being – in the polemics between Socrates and sophists, as the opposition of Physis and Nomos.[5]

[2] Carl Schmitt, *Der Nomos der Erde im Voelkerrecht des Jus Publicum Europaeum* (Berlin: Duncker und Humblot, 1997), 17.
[3] Ibid, 16.
[4] Ibid, 36.
[5] Ibid, 37–38.

At the same time, it is quite clear, that war destroys the homogeneity of the delimited territory through the creation of such its kinds like a deep rear, occupied territory and frontline as the heterogeneous and the ever-changed spaces.[6] In other words if the law is unity of the order and localization, so the delocalization of law due to the occupation and liberation of the lands at war times makes legal order impossible. In the similar case we are not able to conceive the war in terms of the metaphysically interpreted law.

II

Taken into the account post-metaphysically, law is not the Ought, that is opposite to Being, but shows itself as the concrete and unique event, a singularity. The normativity of the similar law is not universal but depends on the concrete situation. Metaphorically speaking if the normativity of the metaphysical law looks like sunlight, then normativity of the post-metaphysical law likes a flash of lightning.[7] The similar reasoning of law is rooted in the philosophy of Heidegger. As we know, he didn't pay much attention to the law. From all over his corpus of works we can extract only rare remarks about law – one page from "SuZ," his "legal-philosophical aphorism" from the "Brief ueber Humanismus" and passage about "das sanfte Gesetz" ("soft law") of Stifter in "Der Weg zur Sprache." Not so much. But what we can obtain from this?

Work/page Language	*Sein und Zeit* (Tuebingen: Max Niemeyer Verlag, 2001), 282. *Being and Time* (State University of NY Press, 1996), 260.
German original	Dieser vulgäre Bedeutungen von Schuldigsein als "Schulden haben bei…" und "schuld haben an…" können zusammengehen und ein Verhalten bestimmen, das wir nennen "sich schuldig machen," das heißt durch das Schuldhaben an einem Schuldenhaben ein Recht verletzen und sich strafbar machen… Das geschieht nicht durch die Rechtsverletzung als solche, sondern dadurch, dass ich Schuld habe daran, dass der Andere in seiner Existenz gefährdet, irregeleitet oder gar gebrochen wird. Dieses Schuldigwerden an Anderen ist möglich ohne Verletzung des "öffentlichen" Gesetzes.
English Translation	This vulgar significations of being guilty as "having debts with…" and "being responsible for…" can go together and determine a kind of behavior

[6] The content of the contemporary practice of European Court of Human Rights is so close to the named issues. For example, there is the question to define a defendant – what a state has to be defendant in the cases, concerned the human rights violation on so-called "contested territories," such as North Cyprus, Crimean Peninsula, Transnistria and so on? Is it "juridical sovereign" of the territory, or the state-occupant, which holds the contested area under control in fact? More details about similar questions see: Marco Milanović and Tatyana Papić, "The Applicability of the ECHR in Contested Territories," *International & Comparative Law Quarterly* vol. 67, issue 4 (October 2018): 779–800.

[7] To see the grounding on the similar view on law more closely: Алексей Стовба, *Темпоральная онтология права* (Санкт-Петербург: Алеф-пресс, 2017).

	which we call "making oneself responsible," that is, by having the responsibility for having a debt, one may break a law and make oneself punishable. …That does not occur by breaking a law as such, but through my having the responsibility for the other`s becoming jeopardized in his existence, led astray or even destroyed. This becoming responsible to others is possible without breaking the "official" law.
German original	Der formale Begriff des Schuldigseins im Sinne des Schuldiggewordenseins am Anderen lässt sich also bestimmen: Grundsein für einen Mangel im Dasein eines Anderen, so zwar, das dieses Grundsein selbst sich aus seinem Wofür als "mangelhaft" bestimmt. Diese Mangelhaftigkeit ist das Ungenügen gegenüber einer Forderung, die an das existierende Mitsein mit Anderen ergeht. Es bleibe dahingestellt, wie solche Forderungen entspringen, und in welcher Weise auf Grund dieses Ursprungs ihr Forderungs- und Gesetzescharakter begriffen werden muss.
English translation	The formal concept of being-responsible in the sense of having become responsible to other can be defined as being the ground for a lack the Da-sein of another; in such a way that this "being-the-ground" itself is defined as "lacking" in terms of that for which it is the ground. This kind of lacking is a failure to satisfy some demand placed on one's existing being-with with others. It remains a question how such demands arise and in what way their character of demands and law is to be conceived on the basis of this origin.

Work/page Language	"Brief uber Humanismus," *Wegmarken* (Frankfurt-am-Main: Vittorio Klostermann, 1976), 360–61. "Letter on Humanism," *Pathways*.
German original	"Nur sofern der Mensch, in die Wahrheit des Seins ek-sistierend, diesem gehört, kann aus dem Sein selbst die Zuweisung derjenigen Weisungen kommen, die für den Menschen Gesetz und Regel werden müssen. Zuweisen heißt griechisch *νέμειν*. Der νομος ist nicht nur Gesetz, sondern ursprünglicher die in der Schickung des Seins geborgene Zuweisung. Nur diese vermag es, den Menschen in das Sein zu verfügen. Nur solche Fügung vermag zu tragen und zu binden. Anders bleibt alles Gesetz nur das Gemächte menschlicher Vernunft. Wesentlicher als alle Aufstellung von Regeln ist, dass der Mensch zum Aufenthalt in die Wahrheit des Seins findet. Erst dieser Aufenthalt gewährt die Erfahrung des Haltbaren. Den Halt für alles Verhalten verschenkt die Wahrheit des Seins."
English translation	Ek-sisting in the truth of being, only to the extent that man is part of this giving of be[-ing] can commendation of those directives that are bound to become laws and rules for man come from being itself. To commend in Greek is *νέμειν*. A *νόμος* is not merely a law, but <thought> in a more

	original way, <it means> the restrained commendation <of directives> of what is becoming of be[-ing]. Only this makes it possible to instruct man in be[-ing]. Only such a dispensation <of directives> is able to <reach man> and obligate <him>.Otherwise, all law is only what has been made by human reason. More essential for man than all establishment of rules is finding his place in the truth of be[-ing]. The experience of what is lasting first furnishes this place. The truth of be[-ing] provides the support for all <ways of> behaving.

Work/page Language	"Der Weg zur Sprache," *Unterwegs zur Sprache* (Stuttgart: Klett-Gotta, 2007), 259. "Path to Language," *On the Way to Language.*
German original	wir verstehen unter dem "Gesetz" die Versammlung dessen, was jegliches in seinem Eigenen Anwesen, in sein Gehöriges gehören lässt, dann ist das Ereignis das schlichteste und sanfteste aller Gesetze, sanfter noch denn jenes, das Adalbert Stifter als das "sanfte Gesetz" erkannt war. Das Ereignis ist freilich nicht Gesetz im Sinne einer Norm, die irgendwo über uns schwebt, ist keine Verordnung, die einen Verlauf ordnet und regelt. Das Ereignis ist das Gesetz, insofern es die Sterblichen in das Ereignen zu ihrem Wesen versammelt und darin hält.
English translation	We understand by the "law" the gathering of that, which gives [an opportunity] to everything to be on their own, to belong to their belonging itself, then event is very simple and soft law, softer than that Adalbert Stifter as "soft law" marked. Of course, event is not the "law" in the sense of certain norm that is flying over us somewhere and it's not the regulation that arranges and regulates a process. The event is the law so far it gathers mortals in the appropriation of their own essence and keeps them in it.

As we can see, the interpretation of law by Heidegger has changed from one work to another. In the "Being and Time" he considers law as the anonymous demand (die Forderung) which is turned to the existing Being-with-one-another. In the "Letter on Humanism" law is the directive (die Weisung) of Being itself. But in "On the Way to Language" law turns into the event (das Ereignis) as the "soft law" for those, who are involved in the similar event. As we can see, eventually the law as event doesn't have its ontological ground in the delimited space or territory but finds its embodiment in the human beings, which are involved in the similar event.[8] In this case the human body is the certain horizon of the experience of law.[9] The very special feature of the body as the similar horizon is *liminality* as the corporal ability to put the limits for the human beings' deeds towards one

[8] Стовба, *Темпоральная онтология права*, 284.

[9] Oleksiy Stovba, "Experience of Law and Legal Experience," in *The Experience of Law. Collection of Articles and Essays* (Kharkiv, IVR Library, 2019), 8 and further.

another. Instead of delimitation the certain territory in the similar case law delimitates the human Beings through their living corporal experience of liminality. But there is a question: does this delimitation possible in wartime, when the corporal human being itself is constantly under the threat of shelling and bombing and turns into the horizon of the *aggressive, unmotivated and anonymous violence*?

III

At first sight, war manifests itself as the "total event" (Levinas), which excludes all the rests of possible horizons. But in my opinion, it's true about the *world war* only, which puts in question not the worlds of the war's parties, but the world as such. All the others kinds of war remain in the frame of much higher order whether European or even worldwide. As Schmitt says:

> The international law doesn't able to exist without the original and most effective relationship. It's not such relationship as that lies in the doubtful self-restraint of the sovereign states, but it manifests itself as the connective power of the Eurocentric order, which embraces all the sovereign states. The core of its Nomos consists in the delimitation of the European territory on the lands of the states with the stable borders.[10]

Thus, each aggressor, that begins European war, encroaches not on the territory of another state, but on the Nomos of whole Europe as the unity of European order and localization. As Schmitt underlines "the one, who begins European war, already knows that all European countries are interesting in its outcome. < … > the community, which is born by the space order, is much more important than the sovereignty and prohibitions on intervention."[11]

At the same time the similar order is not maintained by itself. War, as S. Geniusas marked in his "Horizon-article" is a senseless event.[12] In my opinion, to establish the sense of the similar event is able the human being (Dasein) as Being-with-one-another. It happens through the *putting limits* to one another in the common Being, as the things themselves make it in the famous "Spruch von Anaximander," and by the way of similar establishing they bring sense into the event which they are involved in. In the event of war, we may be able to experience law in way that was not possible in peaceful time – not as the legal experience of contact with legislation and legal institutes, but as experience of liminality. In other words, under conditions of war the authority of the legal norms and rules is questionable and replaced by the law as the corporal experience of liminality. Of course, the "experience" means here any "internal" or "psychological" event. Rather "… to be an experience is to hold inner communication with the world, the body and other people, to be with them instead

[10] Schmitt, *Der Nomos der Erde*, 120.
[11] Ibid, 161.
[12] Saulius Geniusas, "War as Phenomenological Theme: Methodological and Metaphysical Considerations," *Horizon* 11 (1) (2022): 386 and further, https://doi.org/10.21638/2226-5260-2022-11-379-401.

of being beside them."[13] Equally from the similar point of view "liminality" is the "external feature" of the human body, which manifests itself as its ability to establish the limits for the other people, for their legal relevant actions toward one another. As J. Butler says, "the prohibitive law is not taken into the body, internalized or incorporated, but rather is written *on* the body, the structuring principle of its very shape, style, and exterior signification."[14] So, liminality as the sense of a living corporeal experience is the *embodiment of law* as the limit to the external physical intrusion. During wartime the similar embodiment is the only valid law and it substitutes an official norms and rules of legislation.

Conclusions

Thus, I think, it's possible to conceive the war in the horizon of law. The latter is not the metaphysical and continual field of the Ought. Rather the law presents itself as the syncretic integrity of its so-called "macro" and "micro" levels. The "macro" level of law is "Nomos of Earth" as the unity of order and localization. On the other hand, the "micro" level of law consists of the set of singular and discrete events of law. The mentioned above events find their embodiment in the experience of liminality, as the living corporal experience of human Beings involved in the similar event.

Let's take the current situation in Ukraine as an example of how law exists at the "macro" and "micro" levels.

At the "macro" level law is maintained as the so-called "soft law" and "hard law" by the means of establishing "Nomos" as the unity of order and localization.

The subjects of the application of the "soft law" are Europe and British Community (USA, Great Britain, Canada, Australia and so on). It consists of such means as "exile" (for example, exile of state-aggressor from G8, which turns to G7), sanctions (elimination from the trade and sports competitions, seizure of assets), blockade (air traffic ban, travel ban), and creation of the special court or tribunal and so on.[15]

The subject of the application of "hard law" is Ukraine. Its means are: armed self-defense (armed reaction on aggression),[16] economical self-defense (confiscation of the assets and

[13] Maurice Merleau-Ponty, *Phenomenology of Perception* (London, New-York: Routledge Classic, 2002), 111.
[14] Judith Butler, "Foucault and the Paradox of Bodily Inscriptions," in *Foucault and Law* (Surray: Ashgate, 2010), 231.
[15] In accordance with the legal assessment, which was requested by the European Parliament's Subcommittee on Human Rights, "the so-called Russian 'special military operation' launched on 24 February 2022 was an unprecedented act of aggression that would justify an unprecedented creation of an *ad hoc* tribunal." More details see in: Olivier Corten and Vaious Coutroulis, "Tribunal for the Crime of Aggression against Ukraine – Legal Assessment," *European Parliament's online database, "Think Tank:"* 3.
As we know, Parliament of the EU now considers the question about creation of special tribunal for the crime of aggression against Ukraine. Also, 17/03/2023 International Criminal Court issued arrest warrant against Putin.
[16] As marked in the aforementioned legal assessment, "being the victim of an armed attack, Ukraine is entitled to exercise its right to self-defense in conformity with article 51 of the UN Charter. Basically,

reparations), and juridical self-defense (the criminal prosecution of the persons, who are blamed in the armed aggression, collaborationism and other war crimes).[17]

In its turn, law at the micro-level exists as the living corporal experience of liminality. Liminality is the constitutive feature of the corporal experience of Being-with-one-another. It means that the human body is an embodiment of the limits for the human beings' acts towards one another. The specificity of the experience of liminality in wartime is that the condition for such an experience is unmotivated anonymous aggression. The structure of the similar experience has to be revealed yet.

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Олексій Стовба. Яке право "є" можливим під час війни?

Анотація. У мирні часи право є тиша. Право є тихим підґрунтям повсякденності, коли сплатити гроші означає отримати товар, купити квитка – дістатися пункту призначення, а вийти з дому – здійснити безпечну прогулянку вулицями та парками. У подібних випадках право приховане за такими подіями. Воно схоже на повітря або світло, які існують у просторі

this right consists in military measures deployed on the Ukrainian soil and designed to put an end to the continuing attacks and persistent territorial occupation perpetrated by Russia." More details see in: Corten and Coutroulis, "Tribunal for the Crime of Aggression against Ukraine:" 33.

[17] It is worth to mark, that on October 2022 in Ukraine there were investigated 39 551 war crime cases.

не показуючи себе. І так само як повітря та світло, які є частиною нашого світу, право як тихе підґрунтя повсякденності робить її можливою. Метафорично висловлюючись, право дає існувати соціальному світові в цілому – і дає бути також і нам як часткам цього світу. Це той "м'який закон" ("sanfte Gesetz"), про який згадував Адальберт Штифтер. Цей закон приводить нас до істини нашого буття і дає нам можливість бути тими, хто ми є – покупцями та продавцями, сусідами, роботодавцями, пішоходами і водіями і бути-з-Іншими (бути-як-хтось, словами В. Майхофера) всіма іншими різноманітними способами, які походять з горизонту соціального світу.

Війна, навпаки, є галас. Звуки обстрілів, ракетних ударів чи бомбардувань заглушають тишу "м'якого закону," тишу мовчазного підґрунтя того, що дає слово правді нашого буття з Іншими. У подібних випадках тиша як тканина нашого спільного буття, яка сповита правом, розривається обстрілами, автоматними чергами чи звуками повітряної тривоги. Якщо за мирних часів ми "вдихаємо" право чи "освітлюємо" ним наше життя у "фоновому режимі," то під час війни нам не вистачає "повітря або світла." Ми прагнемо "вдихнути права" чи – протягом раптового його спалаху – побачити нарешті, хто ми є, де ми є – і чи існує досі який-небудь світ – спільний світ буття-з-Іншими чи горизонт спільних можливостей вже замкнено? Іншими словами, під час війни тиша права порушена і право існує не як мовчазний постійний фон, але як спалах у пітьмі війни. Світ є замкненим війною.

Ключові слова: право; війна; лімінальність; порядок; локалізація; тіло; втілення.

Oleksiy Stovba. What Law "Is" Possible in Wartime?

Abstract. During the peaceful time law is silence. It is a silent background of the everyday life, where to give money means to receive goods, to buy a ticket – to reach your destination, to go out from home means a safety walk through the streets and parks. In such cases law is hidden behind similar practice. It's like an air or light, which exist in the space without self-presentation. And similar to the air and light as the part of our world law as the silent background of our everydayness makes the latter possible. Metaphorically say, law lets the whole social world to be – and lets us to be as the part of this world. It is Adalbert Stifter's "soft law" ("sanfte Gesetz") which brings us to the truth of our Being and gives possibility for us to be, who we are – purchases and sellers, neighbors, employers, pedestrians and drivers and so many other modes of being-as-someone (das Alssein, in terms of W. Maihofer), which are derived from the horizon of the social world.

In opposite, a war is loud. The sounds of shelling, rocket strikes or air bombardments are deafening the silence of the "soft law," silence of the mute background which gives the word to the truth of our life with one another. In the similar case silence as the tissue of our common Being, which is woven by the law, is broken apart by the shelling, gun machine's bursts or sirens of air-raid warnings. If in peaceful times we "inhale" the law or "light up" our lives by the law "in the background regime" then during the war we don't have "enough air or light." We try to "inhale breath of law" frantically or – during the discrete "flash of law" – to look, who we are, where we are and is there any world yet – common world of our Being-with-others or the whole horizon of the social possibilities is closed already? In other words, in the war times the silence of law is broken and law exists not as silent continual background, but only as discrete spark in the darkness of war. The world is closed by the war.

Keywords: law; war; liminality; order; localization; body; embodiment.

Одержано/Received 05.04.2023

DOI: https://doi.org/10.21564/2707-7039.1.307631
УДК 340.12+341

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HUMAN RIGHTS AND JUS CONTRA BELLUM

Introduction

The practice of human rights is one of the most important contemporary legal phenomena not only because it concerns the protection of individual human beings, and then is worthy and relevant per se, but also because, according to the continuity between constitutional rights and international human rights, their protection represents the most important commitment for political and legal actors both in the domestic and in the international scenarios. It can be considered the most relevant and titanic attempt to universalize a content of justice as a limit to any power, in particular, of States, but not only.[1]

Human rights are not only a legal practice, but a more complex phenomenon, with political, social, and moral dimensions. Nevertheless, they are strongly attracted by law. In other words, human rights "want" to be "legal." We want them to be legal, because we considered their legal protection to be crucial for their success. This calling has important implications for the concept of law. The due respect for human beings is introducing a necessary content into a notion otherwise pretending to be content-independent.[2] The latter was the dominant mind-set in the last century, together with the idea that the main element for the definition of law was coercion.

Looking from human rights, States have duties and limits, more than absolute power and force. Human rights are the content of a project of protecting human beings by the States and by the whole international community, including non-governmental and private organizations. This goal clashes with a State-oriented paradigm of law in which the use of force is its crucial

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[1] Isabel Trujillo and Francesco Viola, *What Human Rights Are Not (Or Not Only). A Negative Path to Human Rights* (New York: Nova Science Publishers, 2014).

[2] At the time of the beginning of the legal practice of human rights, after the second world war, even the most strenuous supporter of a content-independent concept of law – Hans Kelsen – agreed with the idea that peace was the goal of law. As well known, this was not the case of justice (Hans Kelsen, *Peace through Law* (Chapel Hill: The University of North Carolina Press, 1944), 3; Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Vienna: Franz Deuticke Verlag, 1934), §8). On content-independence as a feature of law see Stefan Sciaraffa, "On Content-independent Reasons: It's Not in the Name," *Law and Philosophy* 28 (2009): 233–60.

character. From the perspective of a law conceived as a State product, war is the last word of States affirming their power unilaterally in the context of an international community in which they are almost the only players and the most powerful ones. And yet, on the one hand, international law has made a long road since the second world war and States are no longer the only legal actors, and, on the other hand, human rights introduce limits to their actions, in particular, against the possibility of warfare.[3] My perspective on the topic of war starts from human rights but has the focus on the concept of law, and, in particular, on the transformation that human rights have stimulated (or were supposed to stimulate) in the legal domain.

Not everything is already clear in the practice of protecting human rights. There is an articulated and complex debate on their features, on their role and on the very meaning of the whole enterprise of protecting human rights. Recently, the most compelling debate has regarded their relationships with equality and neoliberalism, but many other points are under analysis: their concept, interpretation and limits, as well as their differences from other legal phenomena such as natural rights. The Natural-rights tradition is just one of the traditions that (controversially) converged into the new practice of human rights, but there are relevant differences between natural rights and human rights.[4] Human rights do not imply a general moral order and are developing their own ethical conception that is different from that of natural rights of modernity. Natural rights arose in the thoughts of philosophers for the purpose of dictating the conditions of existence and legitimacy of political society. Human rights, instead, have been sanctioned in international treaties and in national constitutions as a reaction to the second world war, and have developed through a legal practice that is in continual expansion today. They are the content of a process of humanization of the legal systems and institutions. These differences are evident also when considering their list: some primary goods such as life, liberty, and property in the case of natural rights; an open and long list in the case of human rights.[5]

The critics of the link between human rights and neoliberalism affirm that human rights increase inequalities. In other words, it seems that despite their long list of social, cultural, and economic rights, they are not a programme of social justice.[6] The point is obviously disputable. But, notwithstanding the current war in Ukraine, it is hard to deny that human rights are (or were) a project against wars. After the second world war, the practice of protecting rights was certainly planned "to save succeeding generations from the scourge of war" (Preamble of the United Nation Charter).

What I want to emphasize in this paper is that in order to achieve that goal, human rights put on the agenda a legal revolution, beginning with the revision of the dominant concept

[3] Erik Melander, Therése Pettersson, and Lotta Themnér, "Organized Violence," *Journal of Peace Research* 53 (5) (2015): 727–42.

[4] According to Beitz human rights don't fit the mold of natural rights because they are not pre-institutional, they don't belong to people naturally and they are not timeless. See Charles Beitz, "What Human Rights Mean," *Daedalus* (2003): 36–46.

[5] Trujillo and Viola, *What Human Rights Are Not (Or Not Only)*, 2–10 and 79–89.

[6] Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015).

of law. Some steps have been taken in that direction, but history is never linear. The challenge concerns law and the modern State, and it has some corollaries on the question of the status of international law as true law. To be defied is also the idea that the distinctive feature of law is the use of force. From this point of view, the looking for sanctions in international law – reprisals and wars – in analogy with State law features is out of context.[7] Obviously a new theory of law in accordance to these elements goes beyond the scope of this article. My limited aim here is to work on the germinal antinomy between wars and human rights.

Unluckily, the starting point is a story of failure. In fact, it is possible to observe that the practice of protecting human rights after the second world war promised but (sadly) did not achieve the non-violent legal revolution in which individuals' rights were paramount for all legal systems, domestic and international, and wars were eliminated or prohibited. But any paradigm shift requires time and efforts and involves attempts and failures. I will present two sides of the problem. The first one regards the internal evolution/departure of the practice of human rights from the original rejection of war and the undermining of the right to peace, a trend that I consider a defective implementation of their legal enterprise. The second one regards some evident contradictions between the logic of human rights and the logic of wars. Before following those two arguments, I will analyse the status of self-defence in international law, a question that can be considered independently of human rights, but not of the paradigm of natural rights.

I. Individual and Collective Self-defence in International Law

The whole traditional doctrine of *bellum justum* made plausible the idea that war was not permitted. Nevertheless, its status in international law was uncertain until the second world war. But, if in the 1940s Kelsen could keep the question open as to whether war was or was not prohibited under international law, after the United Nations Charter and the Universal Declaration of Rights, this question has a clear-cut answer. War is prohibited. In the case of aggression – unambiguously, an illicit warfare –, self-defence is permitted. The justification is, roughly, the admissibility of the reaction for the survival of the State and its citizens.

As it is well known, Grotius built the laws of international warfare – in his famous *De iure belli ac pacis* – on the grounds of the old principle of natural law that it is permissible to repel violence by force (Ulpian, DIG 43.16.1.27).[8] This idea belonged to the tradition of *jus gentium* and common law for centuries, and it consolidated – once mixed with the theory of inalienable natural rights to life, liberty and property – in the right to self-defence and self-preservation by using deadly force. As a recent confirmation of this line of reasoning, in 2008, the U. S. Supreme court's decision in *District of Columbia v. Heller* affirms the natural right "to use arms in defence of hearth and home," interpreting the Second Amendment

[7] Hans Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940–41* (Cambridge, Mass.: Harvard University Press, 1942).

[8] Hugo Grotius, *On the Law of War and Peace*, translated by Francis W. Kelsey (Oxford: Oxford University Press, 1925).

of the U. S. Constitution as covering not only the right to a collective defence by arming a militia, but also as an individual right to the use of force.[9] The European tradition on the use of arms is more restricted than the American one. But what it is worth noticing is that the recalled decision considers the use of force in self-defence as a natural right and not a human right. Self-defence fits with the link among life, liberty, and properties, typical of the natural rights tradition. It is not then by chance that when the Human Rights Council has faced a similar question, it has considered the use of small arms and light weapons as a threat to human rights, and in no case it has recognized it as a human right. The intentional lethal use of small arms may only be made when strictly unavoidable in order to protect life,[10] according to the exceptional character of self-defence, with the disappointment of some commentators.[11] In the same resolution, the Human rights council has insisted upon the need of preventing the use of force and of encouraging alternative forms of dispute resolutions, both crucial features of the practice of human rights since its beginnings. It is true that this kind of resolutions are not compelling, but its relevance is related to the consistency with the general meaning of the practice of human rights.

In any case, the natural right to individual and collective self-defence, even when considered justified, has always limitations: it is possible to use force but not at any cost. Here is where the analogy with personal self-defence in the criminal field comes up.[12] In the individual case, a justified self-defence requires an imminent and serious danger, as well as a proportionate reaction. Self-defence is generally excused by the attacked victim's state of mind and circumstances, that have to be verified by a judge.[13] Collective self-defence is grounded on the analogy between the rights of the State and the exceptional individual permission to kill in order to preserve her own life from aggression,[14] but the leap between the individual and the collective level is not trivial.

The justification of the individual natural right to self-defence is obviously the protection of life, together with the protection of properties, according to the idea that there is a link between them. On the one hand, the protection of individual life and the survival of a collective existence of the State are two different things and they can be uncoupled.

[9] *District of Columbia, et al. v. Dick Anthony Heller*, 554 U. S. 570 (2008).
[10] A/HRC/Sub.1/58/L.11/Add.1 24 August 2006.
[11] David B. Kopel, "The Natural Right of Self-defense: Heller's Lesson for the World," *Syracuse Law Review* 59 (2008): 165–308. Kopel assumes that natural rights and human rights are equivalent and criticizes the Human Rights Council for not recognizing the right to the use of arms.
[12] Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009). For a strong criticism against self-defense, to the point of denying any plausibility to the justification of the preference for saving our lives on lives of enemies, see Yitzak Benbaji, "Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense," *Canadian Journal of Philosophy* 35 (4) (2005): 585–622.
[13] Against the analogy between self-defence in criminal law and the collective self-defence, see the recent work of Thom Brooks, *Just War Theory and Self-defence*, unpublished ms, 2023.
[14] The model worked clearly as a legacy of an organic theory of State, and it followed the logic of exceptionalism. Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).

Individual survival is possible even though outside the State. On the other hand, the territory of a State should not be regarded as a collective property.[15]

Collective self-defence could hardly fit other exceptional circumstances of individual self-defence, as the imminence of danger. Recent anthropological research has shown that war is an unnatural evolutionary adaptation of the human species and that, at a certain point, three hundred thousand years ago, there has been a clear line of evolution towards the prevalence of proactive aggressions over reactive wars. Reactive aggression is impulsive and warm, whereas proactive aggression is calculated, premeditated, actuated only when it is likely to be successful. This means that war is decided on the basis of a calculation of costs and benefits and not under imminent danger.[16]

Apart from the controversial analogy between individual and collective self-defence, there are other objections to the war in international law. War – even as a counter-war, that is, as a response to an illicit war of aggression – can be hardly considered as a legal sanction for some technical reasons. As Kelsen used to say: it is not decided by an impartial judge and there is no equivalence between wrong and sanction.[17] International law has rejected war as a punishment: it is initiated by a biased judge (the victim of a claimed aggression) and it has to be won for being considered a payback. It reminds the old practice of the duel, in which it is necessary to win to vindicate the wrong. In addition, even a war for retribution can transform in revenge and anger, lacking proportionality towards the wrongdoing or even missing the very wrongdoers. The disasters of wars are distributed regardless culpability.[18]

For sure, wars cannot be understood as means of settling conflicts. In order to settle conflicts, we need an impartial judge or a form of arbitration. From this point of view, it is worth noticing that in perfect harmony with the protection of human rights, international law has developed a huge number of procedures and courts able to settle international disputes, according to the first article of the UN Charter. This non-belligerent proposal, that went hand in hand with the flourishing of the practice of human rights, was at a turning point at the beginning of the 21st Century when the protection of human rights has enlarged and potentiated the laws of wars. But from this point of view, the current practice of human rights must be considered paradoxical or at least controversial.

II. Human Rights and Wars

In the last two decades, instead of giving birth to a *jus contra bellum*, the doctrinal debate on human rights has emphasized different roles of human rights in the laws of war: in the

[15] Even if there are some similarities, territorial rights entail a public right of jurisdiction. See Margaret Moore, "Territorial Rights and Territorial Justice," in *The Stanford Encyclopedia of Philosophy*, ed. by Edward N. Zalta, (Summer edition 2020), https://plato.stanford.edu/archives/sum2020/entries/territorial-rights/ (20 February 2023).

[16] Richard W. Wrangham, "Two Types of Aggression in Human Evolution," *Proceedings of the National Academy of Science* 115 (2) (2018): 245–53 and *The Goodness Paradox: The Strange Relationship Between Virtue and Violence in Human Evolution* (New York: Pantheon 2019).

[17] Hans Kelsen, "Peace through Law," *Journal of Legal and Political Sociology* 2, no. 1 and 2 (October 1943): 52–67.

[18] David Luban, "War as Punishment," *Philosophy & Public Affairs* 39 (4) (2011): 299–330.

jus ad bellum (the law of waging wars) human rights can justify wars.[19] In the *jus in bello* (the law in wartime), they fix limits for actions within wars.[20] In the *jus ex bello*[21] (the law of revoking wars, also known as "peace keeping"), they can transform an unjust war into a just one and justify continuing to fight.[22] In the jus post bellum (also called 'peace building'), human rights establish criteria for transitional justice.[23] The justification for this crucial involvement is linked to the idea that human rights make it possible to identify objective injustices. It is argued that if we do not react to their violations, human rights will inevitably seem irrelevant. From this point of view, wars would be no longer only about self-defence, but also about the protection of human rights.

The first chapter of this transformation can be identified in the revision of conventional just war theories. The new theories contest the lack of relevance of violations of individual rights in the classic accounts.[24] This pattern has been completed by the so-called "doctrine of responsibility to protect" (R2P), which establishes that it is primarily the responsibility of a State to protect its own people.[25] Under certain circumstances (a serious harm to the people and/or an inability of the State to protect), the principle of non-intervention gives way to an international responsibility. As is well known, this doctrine has been controversially interpreted as opening a door to armed interventions. The link is made by raising the issues of genocide or other war crimes, and of the absence of universally binding tribunals. The lack of an international army closes the circle. But international organizations – as well as States – use to externalize coercion,[26] giving to third States the chance of reacting (even militarily) against the disobedient.

In truth, there has been a point of ambiguity since the very beginning of the human rights practice, but it has its origin in the resistance of States. States' worry of external interference

[19] Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press Scholarship Online, 2012).
[20] Juana María Ibañez Rivas, "El derecho internacional humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos," *Revista Derecho del Estado* 36 (2016): 167–98.
[21] Darrel Moellendorf, "Jus ex Bello," *Journal of Political Philosophy* 16 (2008): 123–36.
[22] Cecile Fabre, "War Exit," *Ethics* 125 (3) (2015): 631–52.
[23] Athanasia Hadjigeorgiou, "The Relationship Between Human Rights and Peace in Ethnically Divided, Post- Conflict Societies: Theory and Practice" (PhD diss., King's College, 2016). Quoted with Author's permission.
[24] Cf. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1978).
[25] A/RES/60/1, 16 September 2005.
[26] Oona Hathaway and Scott J. Shapiro, "Outcasting: Enforcement in Domestic and International Law," *The Yale Law Journal, Faculty Scholarship Series,* paper no. 3850 (2011), http://digitalcommons.law.yale.edu/fss_papers/3850. This essay is very interesting and innovative. It illustrates eight different forms of externalized outcasting regimes. It also shows how States externalize coercion, even in the domestic domain. But the main point is that it supports the idea that it is wrong to identify the force of the State with its physical version: outcasting means excluding from cooperation, not necessarily using physical force. The authors show how law can be enforced with devices different from physical coercion. Nevertheless, outcasting makes the use of economic sanctions disputable. Otherwise, only the worst off could be subjected to force. See also, on this specific problem, Michael Sandel, *What Money Can't Buy. The Moral Limits of Markets* (New York: Farrar, Strauss and Giroux, 2012).

motivated the explicit introduction of limits on the protection of rights, with the possibility of suspending them in the event of public emergency for national and security reasons.[27] These limits inevitably suggested that human rights were for peacetime. There is then a wartime when it is possible to suspend human rights. Only recently has the International Court of Justice developed a doctrine against this idea, establishing that international human rights law is for both peace and wartime.[28]

The result is that human rights come closer to justice than to peace. Their link to war derives precisely from their link to justice because war is about justice.[29] But even the conventional just war theories were devoted to limiting wars, not only unjust ones, but also those that are disproportionate, without chance of success, and illegitimate. The legal regulation of wars concerns not only the status of the wrong to react to, but also the kind of remedy proposed, which must also be just, proportionate, legitimate. Justice is then not only about just causes, but also and especially about just remedies. And this is the problem.

To pass from justice to war, there is a supplementary leap that is neither logically necessary nor consistent with the human rights programme. It is the idea of the inevitability of war as a legal remedy. But, as said, the way in which law typically solves conflicts is through the recourse to a third party. Again, it is usually argued that the main problem here is that in the international scenario there is no third and impartial party to appeal to. Nevertheless, this reasoning is circular because the way of imagining this third party as a central authority with legitimate force depends on the concept of modern State; a paradigm that, unluckily, is still the normative pattern for any kind of law, including international law. On the contrary, law is a differentiated phenomenon and can change and evolve, together with its remedies, to the extent that they are no longer appropriated for any reason. Human rights are very good reasons for eliminating wars. Human rights are trumps against wars.

III. The Missing Right to Peace

At a certain point of the history of human rights, the close relationship between rights and peace was the reason for proposing the codification of a human right to peace.[30] In 1969, the Istanbul Declaration, adopted during the 21st International Conference of the Red Cross, proclaimed the right to a lasting peace as a human right. Later, this declaration was also endorsed by Unesco, which was established in 1945 with a commitment to promoting peace and making war impossible.[31] Very soon the right to peace was transformed into a more general programme of a culture of peace.

[27] Art. 15 European Convention of Human Rights (1950).
[28] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement, I. C. J. Reports* 2005, 168ff. See Alexander Orakhelashvili, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflicts, Parallelism, or Convergence?" *The European Journal of International Law* 19 (1) (2008): 161–82.
[29] David Luban, "Just War and Human Rights," *Philosophy and Public Affairs* 9 (2) (1980): 160–81.
[30] William O. Peterfi, "The Missing Human Right: The Right to Peace," *Peace Research* 11 (1) (1979): 19–25.
[31] Fernando Valderrama, *A History of Unesco* (Paris: Unesco Publishing, 1995), 30.

But before losing its legal status, the right to peace was put forward as part of a new generation of rights. In addition to the first generation of rights (inspired by freedom) and the second (inspired by equality), there was a third one, inspired by the third and forgotten principle of the French Revolution: fraternity.[32] The interests to be promoted were collective in nature and they could be obtained only through cooperation among States.[33] This generation of rights would reverse the trend of the Western individualism in declining human rights, but at the same time it makes the balance between the priority of individuals and the collective dimension problematic. The right to peace is not alone in this category. There were also the rights to self-determination, participation, development, and humanitarian relief.

Among those rights there are differences in terms of legal implications. There are collective rights that claim to be transformed into collective powers, and others that claim shared goods. The balancing between them and with individual rights is different. Some rights are problematic insofar as they turn into powers, and in particular into collective powers such as self-determination. But the logic of human rights is characterized by the priority of individuals. The contextualization within the legal practice of rights implies that the two conflicting rights must be made compatible. The conflict is not obviously a problem for a legal practice, which is used to balancing rights, provided that they are all of equal relevance and must be implemented as far as possible. Rights deal with protecting individuals' fundamental interests, and, in doing so, they indicate a duty to optimize their normative impact. From a legal point of view, they work as principles,[34] i.e. normative claims to be implemented as far as possible without compressing completely the right in balance. The work of balancing produces a contingent rule of prevalence but does not debase the weight of the opposite principle. Rights do not trump other rights.

Eventually, the United Nations codified the right to peace as a Peoples' right, with the Declaration of rights of Peoples to Peace in 1984.[35] This brief Declaration insisted on the UN aspiration to eradicate war from the life of mankind and on the conviction that life without war serves as the primary requisite for the full implementation of the rights proclaimed in the UN framework. At the time, the main concern was with nuclear wars. States should renounce the use of force in international relations and opt to settle international disputes by peaceful means on the basis of the UN Charter. This is also the trend of the last resolution of the General Assembly containing a Declaration on the Right to Peace (2016).[36]

[32] Douglas Roche, *The Right to Peace* (Ottawa: Novalis, 2003), 133.
[33] The idea of a third generation of rights involves collective rights and was suggested by Karel Vasak in 1979. Stephen P. Marks, "Emerging Human Rights: A New Generation for the 1980s?" *Rutgers Law Review* 33 (1981): 435–52.
[34] Robert Alexy, "On the Structure of Legal Principles," *Ratio Juris* 13 (3) (2000): 294–304.
[35] David Keane, "UNESCO and the Right to Peace," in *The Challenge of Human Rights. Past, Present, and Future*, ed. by David Keane and Yvonne McDermott (Chettelhem: Edward Elgar, 2012), 74.
[36] A/HRC/32/L.18, 24 June 2016.

It is also worth noticing that the development of the culture of peace coming out of this evolution in the practice of human rights challenged the link between genetics and aggressive behaviours. The Seville Statement on Violence (1986), which was adopted by scientists from around the world and by Unesco, affirmed that the same species that invented war is capable of inventing peace, and that there is no reason for believing in human beings' biological tendency to war. Perhaps the point is that also peace is a possibility. At the same time, the Unesco's statement also underlined that political and economic agreements are not enough to build a lasting peace, which should be set up on the basis of humanity, education, intellectual progress and solidarity.

IV. The Logic of Human Rights v. the Logic of Wars

Coming to their role in the legal systems and thanks to their status as principles, human rights claim the supremacy of individuals over collective concerns. They establish an institutional priority for individuals.[37] From this point of view, rights are trumps against the prevalence of collective interests. And wars always follow a collective logic. As Jeremy Waldron has clearly noticed, the undeniable collective approach to war is still evident in the condition of "massive or gross violations of human rights" as admissible cause of war in international law. Paradoxically, armed interventions are very rare in spite of the huge number of human rights violations, and this is because judgements about military interventions involve a lot of other factors: costs, alternative possibilities, chance of success, political unpopularity of the decision, and so on. A single right violation does not trigger an armed intervention. This confirms that war has to do with costs and benefits, more than with the protection of individuals.[38] Logically, if the implementation of human rights had not aimed at making war impossible, war would have to be more frequent. The reason is that in the logic of human rights, each individual matters. Likewise, human rights are against any instrumentalization of human beings, and against the jeopardizing of their rights. Then they are against the admissibility of sacrificing some individuals for the sake of the whole, first of all the soldiers, but also the casualties of any kind. What from the point of view of individuals could be justified on the basis of their self-determination (soldiers or people refusing to evacuate), from the point of view of the States protecting human rights must be avoided.

States should protect rights, even if individual rights are dangerous for the collective interest. Within the logic of rights, collective claims are not goals in themselves but only if oriented to individuals' protection, that is always prominent. Then, the exercise of the right to self-determination cannot collide with and prevail over individuals' rights. The reason is that collective rights have to be compatible with, and be directed towards,

[37] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), 269.
[38] Jeremy Waldron, "Human Rights: A Critique of the Raz/Rawls Approach," *Public Law & Legal Theory Research New York University School of Law Paper Series* no. 13–32 (2013): 9.

individuals' protection. This is clearly a structural limit of the legal practice of human rights. Within that practice any collective claim is prima facie controversial.

V. Challenges for the New Theory of Law

The only way of explaining the paradoxical outcome of belligerent human rights is to abandon their original rationality, and to look at States, and at their realpolitik. On the one hand, it is certainly difficult to contest the model of an instrumental State in the abstract, but once a State is established, with a people, an identity, and a common history,[39] collective and local reasons try to resist to individuals' priority. Behind this, there is the problem of the parochial altruism, the idea according to which the capacity of empathy is always limited. The problem of wars comes up when the limited domain of empathy is connected to an aggressive attitude towards those who are not the object of our allegiance and altruism. But human rights have extended the concern and responsibility of every legal actor for each human being. Human rights are the right of others for which each one ought to work.

On the other hand, the identification of law as a product of States endowed by the monopoly of force went hand by hand with a content-independent concept of law. This version is just one possible reading. State-law is perhaps a special concept of law but not its central case. State-law is special because it is a form of law rooted in a territorial political community, as developed in the last two centuries. But law has always been a differentiated phenomenon and it has been recognizable for its ability to coordinate and solve conflicts peacefully (even when its only way was limiting wars). The challenge is to work on the features of a broader and inclusive concept of law, starting from developing the original mission of human rights against wars.

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[39] David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), 17–47.

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Isabel Trujillo. Human Rights and *jus contra bellum*

Abstract. The practice of protecting human rights, initiated after the second world war with the purpose of avoiding wars for future generations, has evolved with some ambiguities to the point that the initial opposition between the protection of rights and war, seems reversed. Human rights have become elements of a *jus ad bellum*, *jus in bello*, and *jus ex bello*, instead of elements of a *jus contra bellum*. This evolution ought to be considered a failure of the original project. It is to be attributed to the resistance of the States to change in accordance to their own propositions, as well as to the survival of the vocabulary and the logic of natural rights that are not human rights. The logic of human rights and the logic of war are still incompatible.

Keywords: human rights; rule of law; war; jus contra bellum; self-defence.

Ізабель Трухільо. Права людини та *jus contra bellum*

Анотація. Практика захисту прав людини, започаткована після Другої світової війни з метою уникнення воєн для майбутніх поколінь, еволюціонувала неоднозначно до такої міри, що початкове протиставлення захисту прав і війни здається таким, що перетворилося на свою протилежність. Права людини стали складовою *jus ad bellum*, *jus in bello* та *jus ex bello*, замість того, щоб бути складовою *jus contra bellum*. Цю еволюцію слід вважати провалом початкового проєкту. Це пояснюється небажанням держав змінюватись відповідно до їхніх власних пропозицій, а також збереженням словника та логіки природних прав, які не є правами людини. Логіка прав людини і логіка війни все ще несумісні.

Ключові слова: права людини; верховенство права; війна; *jus contra bellum*; самозахист.

Одержано/Received 21.04.2023

DOI: https://doi.org/10.21564/2707-7039.1.307632
УДК 17+340.12

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МОРАЛЬНО-ПРАВОВИЙ ДИСКУРС ВІЙНИ В УМОВАХ РОСІЙСЬКОЇ АГРЕСІЇ ПРОТИ УКРАЇНИ

Насамперед хочу зауважити значущість і актуальність проведення Панельної дискусії "Право і війна: голоси філософів" у рамках VI Харківського міжнародного юридичного форуму, адже цей захід присвячено правовим аспектам війни, розв'язаної Росією проти України. Звісно, війна – це явище, яке має багато вимірів. Його коментують, інтерпретують, пояснюють фахівці різних професій: історики і економісти, політичні та військові експерти. Відбуваються конференції, круглі столи, семінари тощо. У червні минулого року в нашому Інституті філософії також було проведено круглий стіл під назвою "Війна як соціокультурний феномен," матеріали якого опубліковані в третьому числі часопису нашого Інституту "Філософська думка." Відбувся також науковий семінар *Центру академічної етики та досконалості в освіті "Етос" "Війна і відповідальність." У жовтні минулого року проведена конференція пам'яті Івана Бойченка "Людина. Історія. Мир і війна."*

Дискусія "Право і війна: голоси філософів" на перетині таких дисциплін, як філософія і право, утворюючи проблематику практичної філософії, складником якої є філософія права. Тема моєї доповіді називається "Морально-правовий дискурс війни в умовах російської агресії проти України" лежить також у річищі практичної філософії, серцевину якої складає етика. Спершу вона здається досить широкою і ціннісно нейтральною. Проте як раз на таку неупередженість, об'єктивність та ідеологічну незаанґажованість спрямована тематика нашого заходу, що традиційно утворює, як уже сказано, проблематику філософії права, серцевиною якої є питання взаємодії етики і права.

У мена ця тема невипадкова. По-перше, це полеміка із видатним філософом сучасності Юрґеном Габермасом, одним із засновників, поряд із Карлом-Отто Апелем, етики дискурсу і соціальної філософії комунікативної дії. Отже, каталізатором чи поштовхом для вибору цієї теми стала стаття Юрґена Габермаса "Дилема заходу. Війна

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та обурення,"[2] опублікована в досить впливовій газеті "Süddeutsche Zeitung" 16 травня минулого року, на яку мені довелося відреагувати в газеті Frankfurter Allgemeine Zeitung статтею "Спротив замість перемовин."[3]

По-друге, сам термін "дискурс війни" певною мірою відбиває те ставлення до агресії серед інтелектуалів, зокрема і філософів, яке існує в західному світі. Ми слідкуємо за суперечками між політиками різних країн, за зміною їхньої позиції. За приклад може правити ставлення до України, до російсько-української війни з боку Генрі Кісінжера, яке зазнало суттєвих змін останнім часом. Однак і філософи активно беруть участь у цьому дискурсі. По-третє, попри те, що зміст поняття "дискурс" має досить багато вимірів, я розглядаю дискурс насамперед як арґументативний діалог.

Почну з такого невеличкого зауваження з цього приводу: напочатку російського вторгнення до мене звернулись із Громадського радіо прокоментувати ці події. Зокрема ведучий мене запитав: чи хтось із російських колег-філософів зв'язувався зі мною, чи висловлював хоча б якесь занепокоєння? Я відповів: **"ніхто!"** І хоча співпраця нашого Інституту філософії з росіянами фактично припинена з 2014 року, проте багато хто з працівників нашого інституту до війни мали досить щільні наукові зв'язки з Росією. Я певен, що і вони не отримували якихось листів із засудженням російської агресії, або, принаймні, висловити солідарність із українцями.

Подібна ситуація і з Білоруссю. Не так давно, 2019 року, ми уклали угоду з Інститутом філософії НАН Білорусі про співпрацю. З початком війни я написав директорові Інституту Анатолію Лавриновичу листа-повідомлення про припинення в односторонньому порядку цієї угоди про співпрацю у зв'язку з тим, що Білорусь є союзником Росії у війні проти України. На цей лист він відповів: "С большим сожалением воспринимаю Вашу информацию. С другой стороны, я Вас очень хорошо понимаю. Мне очень жаль, что так все произошло. Будем, тем не менее, надеяться на лучшее." Тут, висловлено, принаймні, якесь розуміння ситуації.

А як могло бути інакше, хіба могли російські філософи, науковці загалом висловити солідарність із українськими науковцями? Адже 4 березня 2022 року сотні ректорів університетів Росії підписали ганебну Відозву спілки ректорів на підтримку вторгнення Росії в Україну, на підтримку Путіна, серед них і ректор Московського університету Віктор Садовничий, до речі, родом із України, з Харківської області. Певен, що усі про це добре знають. У зв'язку з цим варто зауваажити, що ця відозва нагадує іншу відозву, а саме Звернення німецьких професорів до Гітлера 1933 року, яку підписало біля тисячі науковців Німеччини, зокрема й відомі всім нам філософи: Арнольд Ґелен, Ганс Ґеорґ

[2] Jürgen Habermas, "Krieg und Empörung. Das Dilemma des Westen," *Süddeutsche Zeitung*, Mai 1, 2022, https://www.sueddeutsche.de/projekte/artikel/kultur/das-dilemma-des-westens-juergen-habermas-zum-krieg-in-der-ukraine-e068321/?reduced=true.

[3] Anatoliy Yermolenko, "Widerstand statt Verhandlung," *Frankfurter Allgemeine Zeitung*, Mai 23, 2022, 1–8. Див. переклад українською мовою: Анатолій Єрмоленко, "Спротив замість перемовин," *Філософська думка* 3 (2022): 59–63.

Ґадамер, Мартін Гайдеґер та ін. Гайдеґер взагалі виступив з програмною промовою, в якій ішлося про те, що прихід націонал-соціалістичної партії до влади – це не тільки політична революція, це революція онтологічна, революція у всьому німецькому бутті.

У наш час ми спостерігаємо іншу «онтологічну революцію», націонал-соціалістичну революцію в Росії, хоча це не є чимось новим чи цілковито несподіваним. Зараз науковці і публіцисти сперечаються, як назвати сьогоднішній путінський режим: фашизом, рашизмом, нацизмом тощо. Зокрема відомий філософ й історик Тімоті Снайдер, виокремлюючи певні ознаки фашизму, називає путінський режим фашистським. Я вважаю, що сучасна Росія є нацистською державою. Понад це, попри всю марксистсько-ленінську риторику і сталінський режим був латентним російським націонал-соціалізмом, про це свідчить не тільки виступ Сталіна на урочистостях на честь перемоги 24 червня 1945 року, а ще раніше, а й його інші, ще довоєнні виступи. Про це свідчить заграваннz з Православною церковою в 40-і роки минулого сторіччя, зрештою перетворення марксистсько-ленінської ідеології на політичну релігією, годі вже казати про політику. Так само російським націонал-соціалізмом був і режим пізнього, чи "вітхого" тоталітаризму за часів "розвиненого соціалізму," в основі якого була ідеологема "советского народа как новой общности," серцевиною якої був концепт "русского народа." І це є певним продовженням того великодержавного російського шовінізму, який існував у російській імперії.

Сьогодні нацизм в Росії проявився відкрито, він позначився навіть на символіці – недолугій свастиці. Який націонал-соціалізм, така і свастика! Останнім часом, коли йдеться про сьогоднішню Росію, часто-густо наголошують на соціально-психологічному ресентименті росіян, російської політики загалом. Однак я хочу додати до цього ще один складник, це соціально-політичний гібрис. Ресентимент породжує гібрис (дав.-гр. ὕβρις "зухвалість"). Гібрис є продовженням ресентименту у вигляді таких проявів, як зарозумілість, пиха, гіпертрофоване самолюбство, зверхність, пихатість, постаючи механізмом сублімації комплексу меншовартості як складника і похідної ресентименту. Ці соціально-психологічні якості лягли в основу ідеології "русского мира" – ядра російського нацизму та агресиної імперіалистичної політики Росії.[4]

Тимчасом як Фридрих Ніцше в праці "До генеалогії моралі" розкрив духовні виміри ресентименту, зокрема в етиці християнства, Макс Шелер у книжці "Ресентимент у структурі моралей" дослідив соціально-практичні спрямування ресентименту на прикладі робітничих рухів. Перетворення ресентименту на гібрис стало ознакою націонал-соціалістичного руху в Німеччині після Першої світової війни, що призвело до реваншистської імперіалістичної політики Гітлера. Гадаю, що таку соціально-практичну спрямованість має й ресентимент в Росії, перетворюючись на гібрис як спонукальний чинник соціальної та політичної дії.

[4] Анатолій Єрмоленко, "Ресентимент і гібрис у контексті стратегії насильства та комунікації порозуміння," *Філософська думка* 2 (2019): 6–13.

Ресентимент можна прослідкувати і на особистісному (за приклад можуть правити біографії Гітлера і Путіна), і на соціальному рівнях, що можна проілюструвати прикладами імперіалістичної політики нацистської Німеччини та імперіалізмом нацистської Росії. Ресентимент "розпаду Радянського Союзу як найбільшої геополітичної катастрофи XX сторіччя" трансформується в гібрис реваншистської імперіалістичної політики, спрямованої на відновлення російської імперії, граничним проявом якої стала військова агресія Росії проти України. Цей гібрис проявляється й вербально, у таких висловлюваннях, як "Росия поднялась с колен," "можем повторить," "превратим весь мир в ядерный пепел" тощо.

Про це свідчить і той факт, що в правовій площині в російському законодавстві вже давно діє принцип пріоритету російських законів над міжнародним правом. У зв'язку з цим заперечується принцип універсалізації в легітимації моральних та правових норм. Як не згадати тут сумнозвісне запитання-пастку Гітлера: "так право для народу, чи народ для права?"[5] Така онтологізація права призводить до того, що його легітимація редукується до фактичності наявного політичного порядку, ігноруючи трансцендентальний (ідеальний) вимір комунікації як регулятивної ідеї. Апеляція до сфери фактичності в легітимації правових норм зводиться до ухвалення їх простою більшістю в представницьких органах влади, інспірованою панівною верхівкою, що спирається на силу, де не враховуються найважливіші процедурні питання: яким чином досягнено згоди, чи не було примусу (внутрішнього і зовнішнього) в досягненні такої згоди, якою мірою обговорення було відкритим тощо.

Слід зауважити, що часто-густо до засобів такої легітимації залучається російська вульгарна історіографія з її концептами "духовних скреп," "исторической справедливости," "исторической правды" тощо, які урешті-решт цинічно довершуються поняттями "исконно русских земель" та "исторических территорий," що розкриває справжні цілі агресії Росії проти України. Небезпека таких "методологічних" підходів полягає в тому, що легітимативні правила, які мають бути ухвалені у правовій площині у вигляді міжнародних договорів та угод на основі відповідних процедур, підміняються зверненням до історичної тяглості традиції, усталених звичаїв і заведень, історичних прецедентів тощо.

При цьому ігнорується той факт, що в історії на будь-який звичай чи традицію можна знайти ще давніші звичаї чи традиції, що цілковито підважує такий спосіб легітимації. І якщо такий підхід застосовувати до самої Росії, то це призведе до її цілковитої руйнації, адже в Росії майже півтори сотні етносів і націй, які мають свої традиції та звичаї. Годі вже казати про те, що чимало звичаїв та традицій було зруйновано в процесі індустріалізації та під впливом глобалізації. До того ж самі звичаї й традиції як засіб легітимації обираються довільно, аби тільки вони виконували головну свою функцію: легітимації імперіалістичної політики Путіна. Цей підхід можна було б назвати нео-

[5] Див.: Карл-Отто Апель, "Етноетика та універсалістська макроетика: суперечність чи доповнювальність," у *Комунікативна практична філософія* (Київ: Лібра, 1999), 363.

консервативним, в якому традиційні цінності, апеляція до історичних "духовних скреп" набувають легітимативного спрямування. Саме про про це йдеться в Указі президента РФ від 09.11.2022 р. "Про затвердження Основ державної політики щодо збереження та зміцнення традиційних російських духовно-моральних цінностей." Проте, враховуючи постмодерністську методологію, в якій використовується геть усе для виправдання влади, можна зауважити, що такий неоконсерватизм є лише одним із складників панівної гібридної ідеології.

В міжнародному праві така легітимація в крайному разі зводиться до компромісу через виторговування преференцій, де велику роль також відіграє чинник сили чи погрози її застосування. Такий підхід до легітимації правових норм приводить до того, що міжнародні правові норми розглядають як прості домовленості на основі фактичних компромісів, здебільшого спрямованих проти "третьої сторони." До того ж їх завжди можна "переграти," "передомовитись," або взагалі ігнорувати. Це призводить до порушення міжнардних договорів, конвенцій та угод, зрештою, – до руйнації світового правового порядку як такого. За приклад тут може правити цілковите карколомне порушення Росією всіх договорів і угод з Україною. Проте така криза легітимації стосується і внутрішнього правового порядку, коли порушуються будь-які закони, включаючи і конституцію РФ, що призводить до правового нігілізму.

Таким чином, постмодерністська еклектична (гібридна) ідеологія є легітимативним підґрунтям гібридної політики і гібридної війни. Адже гібридна війна – це війна в якій використовуються всі засоби, порушуються міжнародні конвенції ведення війни, моральні норми і цінності. "Головне у визначенні гібридної війни полягає в тому, що вона відбувається як війна без правил, що є логічним продовженням аномійності суспільства загалом."[6] Проте гібридність, як було зауважено, набуває в Росії тотального характеру, перетворюючись на світогляд, на ідеологію для виправдання агресивної імперіалістичної політики.

В царині етики – це жахлива перевага партикуляристського етосу, архаїчних звичаїв та традицій, що зорієнтовані в минуле. Здебільшого це найпримітивніший непотизм мафіозного штибу. Слід зазначити, коли порівнюють путінський режим із фашизмом чи націонал-соціалізмом, нерідко зауважують, що в ньому немає якоїсь єдиної ідеології, ідеології, так би мовити, із "єдиного шматка." І це справді так! Тому слід зауважити такий собі російський постмодерністський націонал-соціалізм, складниками якого є концепти постправди і постморалі. Це ідеологічний феномен, коли геть усе – православний фундаменталізм, євразійство, нацизм, фашизм, соціалізм і комунізм – увесь цей "русский мир," усе це ідеологічне лахміття цинічно використовується задля однієї мети: легітимації та зміцнення влади Путіна.

Така парадигма цілком відповідає сучасній "ситуації постправди," постістини, постморалі, що дістає свого обґрунтування в філософії вульгарного постмодернізму, коли

[6] Анатолій Єрмоленко, "Ціннісно-нормативні аспекти сучасної війни," *Філософська думка* 1 (2015): 7.

префікс "пост" нерідко постає у вигляді "до." Такий собі «до-пост-модерн,», у якому заперечуються концепти істини, правди, нормативної значущості моральних належностей. "Пост-сучасність, – зазначає один із протагоністів постмодернізму Д. Ольшанський, – відміняє трансцендентність закону, притаманну класичній етиці. Її заступає релятивна етика (чи егика), де сама людина постає законодавцем і визначає, що добро, а що зло. Невротична реальність, яка оберталась довкола табу, поступається перверсивною реальністю, що трансгресує закон."[7] Дмітрій Ольшанський, мабуть, не є безпосереднім ідеологом "русского мира." Але подібні твердження, розмиваючи межі між цінностями різних культур і роблячи рівновалентними етики християнства, нацизму, фашизму та комунізму, фактично утрамбовують шлях до ідеології "русского мира." Така позиція цілковито розмиває такі системні коди сфери етичного, як добро/зло, добре/погане, правда/кривда тощо, що призводить не тільки до правового, а й до морально-етичного релятивізму і нігілізму.

До того ж, як бачимо, російські філософи також надають певні свої послуги для легітимації таких дій. Можна згадати тут про публікацію в "Вопросах философии" статей про "один народ." І це почалось не сьогодні. З цього приводу хочу згадати одну зустріч з московськими колегами, що відбулась 2005 року на Міжнародному симпозиумі "Суспільна мораль: методологія дослідження, нормативно-етичні та етико-прикладні проблеми" в Київському національному університеті імені Тараса Шевченка. Згадаймо, це були часи, коли Росія розпочинала економічні й торговельні війни (м'ясну, молочну) проти України, саботуючи торгівлю товарами з нашою країною. Після конференції, в неформальному спілкуванні я зауважив як позитивний факт проведення цієї конференції разом із російськими філософами попри торговельно-економічну війну з боку Росії. На мій подив один із членів російської делегації заперечив: "а никакой войны нет." І сьогодні єдине, на що змогли спромогтися російські філософи, зокрема Інститут філософії РАН, це виступити з ініціативою надати гуманітарну допомогу "народам Донбасу."

Тимчасом як повоєнна Німеччина здійснювала акти каяття за злочини нацизму через переосмислення усього, що сталось, мало не в усіх сферах суспільного життя – літературі, соціології, філософії тощо, Росія цей акт каяття щодо злодіянь комуністичного режиму, за винятком деяких творів художньої літератури, так і не зробила. І сьогодні, під час війни, росіяни ("хорошие русские") все ще прагнуть усю провину звалити тільки на владу. Хід думок такий: спершу йшлося про те, що "винний Путін, чи політична верхівка, а народ до цього не має жодного стосунку." Згодом почали говорити про те, що й народ відповідальний за те, що сталося, а "великая русская культура тут не причем." Хоча це абсолютно неправильна позиція. Свого часу Томас Манн, аналізуючи джерела нацизму в Німеччині, зокрема в своєму романі "Доктор Фаустус," показав, що вони містяться в самій німецькій культурі. І чимало німецьких письменників, таких

[7] Дмитрий Ольшанский, *Релятивная этика: от либерализма к перверсии* (Институт философии РГПУ им. А. И. Герцена), https://youtu.be/WtKaZiOKuHw.

як Гайнрих Бьоль, Леонгард Франк, Зіґфрид Ленц та ін., також переосмислили часи націонал-соціалізму. Велика робота була проробленa і в соціології, згадати хоча б працю Альфреда Вебера "Розрив із історією." Такому переосмисленню в повоєнній Німеччині було присвячено чимало праць і з філософії, зокрема й колективна монографія "Руйнація моральної самосвідомості: шанс чи загроза?"[8]

Те саме нам слід зробити і стосовно російської культури. Саме так чинять деякі українські філософи. У Томаса Манна є ще й досить повчальний есей "Достоєвський, але помірно." Цей принцип "помірно" варто було б поширити і на всю російську культуру (літературу, філософію тощо) загалом: "російська культура, але помірно!," до того ж не раніше, ніж за сто (як мінімум) років після нашої перемоги над російським нацизмом. Урешті-решт у Німеччині цей акт каяття було узагальнено категоричним імперативом Теодора В. Адорно: "щоб Аушвіц не повторився знову, щоб нічого подібного більше не сталося!"[9] І якщо вся Європа відзначає перемогу над нацизмом під гаслом: "ніколи знов!," то росіяни – "можем повторить!"

Однак є ще й інший вимір сучасних подій: з початком війни до мене звернулись із пропозицією про підтримку чимало моїх колег з багатьох країн світу, зокрема з Аргентини – Альберто Даміані, з Америки – Вітторіо Гьосле і багато інших. До речі, хочу зауважити інтерв'ю Гьосле для журналу *"Münchner Merkur"* під назвою: "Путін буде надзвичайно жорстоким,"[10] яке він дав у березні місяці, одразу після нападу Росії на Україну. Також варто згадати його статтю 2015 р. "Влада та експансія. Чому сьогоднішня Росія небезпечніша від Радянського Союза 70-х років."[11]

І цей дискурс триває. Я вже зауважував статтю Юрґена Габермаса "Дилема Заходу. Війна та обурення" в газеті "Süddeutsche Zeitung," а також, сподіваюсь, мою відповідь на цю статтю "Спротив замість перемовин," опубліковану в газеті "Frankfurter Allgemeine Zeitung." Варто зауважити, що певною мірою цей дискурс, який Габермас означив як "дилему Заходу" відбиває не тільки інтелектуальні настрої в Німеччині, а й політичні позиції, і не тільки в Німеччині. Адже за Габермасом "дилема, перед якою опинився Захід, очевидна, вона полягає у необхідності вибору між двома, сповненими ризиків альтернативами, тобто між подвійним злом – поразка України або ескалація обмеженого конфлікту до третьої світової війни." Наполягаючи на цій дилемі, Габермас вважає, що Україна не має *виграти* цю війну, але має "*не програти*"? Опонуючи цій

[8] *Zerstöhrung des moralischen Selbstbewußtseins: Schance oder Gefärdung? Praktische Philosophie in Deutschland nach dem Nationalsozialismus* (Hrsg. von Forum für Philosophie, Bad Homburg. – Frankfurt a.M.: Suhrkamp, 1988).

[9] Theodor W. Adorno, *Negative Dialektik* (Frankfurt a.M.: Suhrkamp, 1975), 358.

[10] Vittorio Hösle (im Interview), "Putin wird äußerst brutal vorgehen," *Münchner Merkur* Nr. 53, 5./6. März, 2022, 5. Див. також через лінк: https://www.merkur.de/politik/ukraine-krieg-schweden-putin-russland-angriff-baltikum-geschichte-merkel-europa-news-91392394.html.

[11] Vittorio Hösle, "Macht und Expansion. Warum das heutige Russland gefährlicher ist als die Sowjetunion der 70er Jahre," *Blätter für deutsche und internationale Politik* 6 (2015).

позиції Габермаса, я зауважую, що тут "немає дилеми," і що Україна має не тільки "не програти у цій війні." Україна має перемогти!

Проте, на жаль, від думки про сумнівні перемовини з Росією Габермас не відмовився і через рік російської агресії. У своїй останній статті "Благання про перемовини" в "Süddeutsche Zeitung" від 14 лютого цього року знову йдеться про "своєчасні перемовини, що не дадуть довготривалій війні забрати ще більше життів і завдати ще більших руйнувань і врешті-решт поставлять нас перед безнадійним вибором: або активно втрутитися у війну, або, щоб не спровокувати першу світову війну між ядерними державами, залишити Україну напризволяще."[12] Як бачимо, Габермас ще раз наголошує на перемовинах, альтернативою яких, на його думку, є сумнозвісна дилема: або вкинути світ у ядерну війну, або відмовитись від України. Проте в цьому разі він покладає на Захід "моральну співвідповідальність за жертви й руйнації," чим, власне, повторює наративи російської зовнішньої політики і пропаганди.

Звісно, практика діалогу укорінена в європейській та українській культурних традиціях, однак вона має й свої методологічні та соціально-онтологічні межі. Тому, критикуючи зазначену Габермасову статтю "Дилема Заходу," я наголошував на тому, що "складно вести діалог, коли в тебе стріляють," складно домовлятися, коли твій співбесідник не тільки не хоче домовлятися, а й прагне тебе знищити, цинічно висуваючи таку безглузду пропозицію: "погоджуйся на те, що тебе треба вбити." З наукового погляду, в цій пропозиції очевидна перформативна суперечність твердження самому собі, підкріплена онтологією соціальної дії, спрямованою на загрозу знищення свого співбесідника. У цьому разі треба застосовувати іншу парадигму – парадигму стратегічної дії, граничним проявом якої є війна. Адже людський розум має не тільки комунікативні, а й цілераціональні виміри, що концептуалізується в ідеї стратегічної раціональності.[13]

Так само і стаття "Благання про перемовини" не враховує той простий факт, що Росія може піти на перемовини тільки в тому разі, коли Україна визнає всі загарбані агресором території. Ця сумнівна позиція піддається критиці і політиками, і громадськими діячами Німеччини. Наприклад, голова постійної Мюнхенської міжнародної конференції з безпеки Вальфґанґ Фридрих Ішинґер у своєму інтерв'ю газеті "Welt" від 17 лютого виступив з гострою критикою Габермаса: "З усією повагою до Юрґена Габермаса: я не можу взяти з цієї статті нічого, про що я не чув 35 разів від інших, хто більше обізнаний з конкретною ситуацією війни."[14] Звісно, Габермас не пропонує припинити постачання зброї Україні, як це роблять, скажімо, представники Лівої партії Німеччини, або Альтернативи для Німеччини, однак він вводить громадськість в оману,

[12] Jürgen Habermas, "Ein Plädoyer für Verhandlungen," *Süddeutsche Zeitung*, Februar 14, 2023, https://www.sueddeutsche.de/projekte/artikel/kultur/juergen-habermas-ukraine-sz-verhandlungen-e159105/?reduced=true&fbclid=IwAR3tuDT8l4YtUi-mkGH5RPztnKeCWRPp0QZAX4M_hORL4Th6DXHO1t8SNnI.
[13] Yermolenko, "Widerstand statt Verhandlung."
[14] "'Bei allem Respekt für Jürgen Habermas' – Ischinger kritisiert Ukraine-Essay," *Welt*, Februar 17, 2023, www.welt.de > politik > ausland„Bei allem Respekt für Jürgen Habermas" – Ischinger kritisiert…

вважаючи, що можливий компроміс у перемовинах з Росією, яка добровільно (такий собі "жест доброї волі") ніколи не поверне загарбаних територій.

Проте я не хотів би, щоб ми через ці публікації Габермаса цілковито поставили під сумнів філософію дискурсу і дискурсивну етику. Гадаю, що дискурсивна етика відповідальності як раз і уможливлює критику подібних ідеологічних конструкцій. Принцип дискурсу дає можливість тестувати конкретні дії політиків та пропагандистів, їхні твердження та ідеологічні навіювання на предмет їхніх домагань значущості, істини та хиби. Звісно, тут велика роль фахівців-експертів, які розуміються на тих чи тих проблемах, вони особливо потрібні в часи війни, коли пропаганда неймовірно посилюється. Але тут має бути й особлива роль філософії як осереддя аргументативного дискурсу, хранительки розуму, за визначенням того самого Габермаса.

Тут у нагоді стане і критична методологія виявлення перформативної суперечності твердження самому собі, і спростування прихованих перлокутивів (використання партнера в діалозі "всліпу"); це й глибинна герменевтика, наприклад, коли російські пропагандисти застосовують історіографію, намагаючись довести, що російський і український народи – це один народ, або звертаються до концепту "історичної справедливості" як засобу квазілегітимації імперіалістичної політики. Така вульгарна історіографія перетворюється на ідеологію, для розвінчання якої слід використовувати концепцію критики ідеології, яку розробляли Апель і Габермас, полемізуючи з Г. Ґ. Ґадамером у праці "Hermeneutik und Ideologiekritik." І це та проблематика, яка утворює поле практичної філософії, складником якої є й філософія права. Зокрема і проблеми легітимації моралі, права, політики, соціальних інституцій.

Однак слід зауважити, що така позиція, по-перше, пов'язана з тим, що концептуальна стратегія Габермаса, як й інших представників комунікативної філософії, формувалась у часи холодної війни, коли загроза ядерної війни була особливо великою. Загроза всезагального знищення людства була одним із каталізаторів розбудови концепції відповідальності Ганса Йонаса, а також парадигми дискурсу як аргументативного діалогу, порозуміння і консенсусу. Хоча й тоді провідні політики західних держав не боялися протистояти Радянському Союзу, згадаймо хоча б карибську кризу.

По-друге, така позиція випливає з того, що Німеччина свою провину в Другій світовій війні чомусь ще й досі усвідомлює насамперед як провину перед Росією. Той факт, що Радянський Союз фактично був союзником нацистської Німеччини в розв'язанні Другої світової війни, не надто рефлексують. До того ж головний тягар війни припав як раз на Україну, коли німецькі загарбники повністю захопили її територію і поневолили її громадян. На жаль, не багато хто з німецьких філософів зауважував цей факт. За виняток може правити книжка Д. Бьолера "Відповідальність за майбутнє з глобальної перспективи," у якій він зокрема наголошує: "на східноєвропейській, і не останньою чергою на українській землі проводилась жахлива політика приниження і знищення, як під прикриттям, чи навіть за безпосередньої участі вермахта, так і у вигляді органі-

зованих масових злочинів СС."[15] А тим, хто ще й досі має ілюзії щодо можливості подальших союзів з РФ, нагадаю, що такі союзи не врятували Україну за часів обох світових воєн, понад це, Україна й постраждала більше всіх.

По-третє, позиція "не дати Росії програти" означає збереження status quo, тобто залиши їй захоплені території. А як бути з правами тих українських громадян, які вимушені були залишити свої домівки, своє майно тощо? Як така позиція може бути поєднана з концептом "прав людини" – провідним для комунікативної парадигми і в площині обґрунтування моралі, і в площині обґрунтування права. Годі вже казати про те, що Україна як суверенна держава визнана іншими державами світу, зокрема й РФ, саме в кордонах 1991 року.

У зв'язку з цим я не можу ще раз не згадати сучасного німецького філософа Дитриха Бьолера, великого друга і симпатика України, який одразу після початку війни написав мені листа, у якому висловив свою підтримку, навіть запропонував прихисток усій моїй родині. Звісно, я як директор Інституту філософії не міг скористатись його дружнім запрошенням. У зв'язку з цим хочу зауважити таке: Бьолер дуже відомий філософ, засновник Центру Ганса Йонаса, тривалий час був його очільником, а зараз – Почесний голова цього центру, який гуртує багатьох німецьких, і не тільки німецьких, інтелектуалів. Ця, досить впливова, організація направила Німецькому уряду звернення з вимогою підтримати Україну в боротьбі з російською агресією. Зокрема в ній йшлося й про припинення Північного потоку – 2, про надання нам зброї тощо. Так діє народна, зокрема і наукова дипломатія.

У зв'язку з цим хочу нагадати ще про одну знаменну дату. Минулого року виповнилося 100 років із дня народження К.-О. Апеля, сучасного німецького філософа, який започаткував новий напрям: трансцендентальну прагматику. У зв'язку з цим журнал "Філософська думка" запланував розмістити матеріали на честь цього видатного філософа, якого називають Кантом сучасності.

Я звернувся до Д. Бьолера і він написав статтю "Єдність розуму та його диференціація за Карлом-Отто Апелем." Я згадав про цю, здавалось би, суто академічну, подію ще й тому, що до цієї статті Бьолер написав подвійну посвяту. Перша, зрозуміло, "на шану Апелю, мислителю комунікативного розуму," а друга звучить так: "***у захваті перед хоробрими, величними українками і українцями з президентом Зеленським, які боронять свободу Європи."***[16]

Додам також, що 11–12 червня в Бад Кісінгені відбувся симпозиум **"Дискурс і відповідальність за доби кризи та війни в умовах деджиталізації,"** на якому ключовим питанням було питання російської агресії проти України. На цьому симпозиумі була проголошена й моя доповідь: "Спільна відповідальність інтелектуалів в умовах росій-

[15] Дитрих Бьолер, *Відповідальність за майбутнє з глобальної перспективи*, пер., примітки, передмова Анатолій Єрмоленко (Київ: Стилос, 2014), 9.

[16] Дитрих Бьолер, "Єдність розуму та його диференціація за Карлом-Отто Апелем," *Філософська думка* 2 (2022): 7.

ської агресії проти України." Зауважу, що слоган цього симпозиуму такий: "***у захваті перед звитяжною боротьбою за свободу українок і українців з президентом Зеленським, які боронять і свободу Європи.***"

Це дуже важлива оцінка, адже це оцінка європейського інтелектуала, філософа зі світовим ім'ям. Справді, українці боронять свободу Європи, боронять європейські, а точніше, загальнолюдські цінності, згідно з якими ми боронимо і самих себе. Тому говорячи про війну Росії проти України, варто зауважити, що з боку Росії – це загарбницька імперіалістична війна, з боку України – **це національно-визвольна війна.** Саме на такому визначенні я хотів би наголосити, і, на мою думку, не варто використовувати в назві нашої боротьби з російською навалою совєтську кальку "вітчизняної війни."

Ця війна – складник багаторічних, навіть вікових, **національно-визвольних змагань** України з Росією, це війна за визволення нашого народу від російських загарбників. Урешті-решт, це війна за наше існування як держави, народу, нації. Адже путінські агресори під ідеологемами "одного народу," "русского мира" хочуть знищити все українське: культуру, звичаї, традиції, мову, віру. Це не боротьба культур чи цивілізацій, це боротьба культури з войовничим невігластом, це боротьба цивілізації з варварством.

Причому ми боронимо свою землю не тільки як етнос, або націю. Ми боронимо себе і як політичну націю з загальнолюдськими, або універсалістичними цінностями, протагоністом яких був і Апель. Я тут застосовую поняття саме універсалістських цінностей, адже поняття загальнолюдських цінностей є емпіричним, а тому певною мірою партикуляристським, що не може претендувати на загальну значущість. Універсалістські норми і цінності, як вони складались протягом історії всього людства: від золотого правила моральності через принцип універсалізації категоричного імперативу Канта, засадниченого розумом, аж до принципу дискурсу комунікативної філософії, який є інтерсуб'єктивним розумом. Тому цінності, засновані принципом універсалізації, чинні для всіх розумних істот, навіть для Бога, як зауважував Кант. До того ж застосування такого розуму потребує мужності, ще раз звернімося до Канта.

Принцип універсалізації не є якимось узагальненням, спільним знаменником, якимось шаблоном, під який мають бути підведені і уніфіковані партикулярні культури. У вигляді запитання він звучить так: "Чи погодився б будь-хто і без примусу, з максимою дії, а також із тими наслідками і побічними наслідками, які здогадно випливатимуть із її всезагального застосування, аби вона стала всезагальним законом?" У стверджувальному вигляді цей принцип постає як принцип дискурсу (принцип "D"), який і є інстанцією обґрунтування моральних належностей і соціальних (правових, політичних, економічних тощо) норм та інституцій. Ствердження і застосування цього принципу і потребує тих цінностей, які називають європейськими, або загальнолюдськими, що їх і заперечує сучасна Росія, зокрема і приматом внутрішнього права над міжнародним.

Сьогодні ці цінності спираються на інтерсуб'єктивний розум громадян і громадянського суспільства, розвиненість якого дає можливість тестувати актуальні норми і ціннісні орієнтації сучасного суспільства, тобто він може діяти операціонально,

як принцип прикладної етики. Як зауважує Бьолер у підготовленій для нашого журналу статті,

> Пов'язана з принципом "D" орієнтація є цілком достатньою і в ситуації підступної (hinterhältiger) влади і брехливої пропаганди, властивих, наприклад, терористичним режимам, вбивцям та воєнним злочинцям, на кшталт путіністської влади. Адже для виправдання їхніх дій, їхніх злочинів навряд чи можна очікувати обґрунтованої згоди усіх можливих партнерів у дискурсі, однак така згода цілком очікувана для засудження, покарання та ізоляції таких злочинців.[17]

Звісно, аби цей принцип діяв, треба пройти довгий і тривалий шлях, який називається процесом історичного навчання (Lernprozeß) і засвоєння загальнолюдських цінностей. Навіть для Європи цей шлях не був простим, очевидним і операціональним. Адже дилема цінності versus інтереси часто-густо вирішується на користь інтересам. Розуміння пріоритету цих цінностей потребує не тільки розуму, воно потребує мудрості, проте воно потребує ще й відваги і звитяги, тим більше, що дискурсувати досить складно, коли в тебе стріляють.

Такого розуму якраз і бракує сучасній Росії, яка знову пішла колом свого історичного розвитку. Але цього розуму не позичати нам, українцям. Цей інтерсуб'єктивний розум формувався як громадянське суспільство на Майдані під час Помаранчевої революції, він перетворив наше суспільство на політичну націю Революцією гідності, він загартувався в боях нашої звитяжної армії в національно-визвольній війні проти російських загарбників. Це приклад практичного розуму і мудрості нашого народу, це приклад мужності і звитяги Збройних Сил України. У зв'язку з цим варто зауважити, що серед захисників нашої Батьківщини є й співробітник нашого інституту Олександр Киричок, який звитяжно бився з російськими загарбників і після поранення і реабілітації повернувся до академічної діяльності.

Україна має не тільки "не програти у цій війні." Україна має перемогти! Україна переможе!

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Анатолій Єрмоленко. Морально-правовий дискурс війни в умовах російської агресії проти України

Анотація. Зміст цієї статті є дослідженням морально-правових аспектів філософського дискурсу російської агресії проти України як предмету практичної філософії, зокрема й філософії права. Концепт дискурсу застосовано в парадигмі арґументативного діалогу комунікативної філософії. У дослідженні показана спорідненість сучасного соціально-політичного режиму Росії з німецьким націонал-соціалізмом, зауважено постмодерністський характер ідеологічного забезпечення його леґітимності, коли для збереження влади використовують різноманітні ідеологічні засоби: євразійство, православ'я, нацизм, фашизм, комунізм, суміш архаїчних світоглядів і практик. Пов'язана з постмодернізмом ситуація постправди і постморалі призводить до морально-етичної та правової деградації російського суспільства. Агресивна ідеологія та політика російського імперіалізму має своє морально-психологічне виправдання в ресентименті, пов'язаному з пермантентним відставанням Росії в модернізації економічних та соціально-політичних інституцій. Ресентимент компенсується гібрисом, що утворює соціально-психологічний фундамент "русского мира" – ідеології агресивної імперіалистичної політики Росії. У тексті актуалізована також полеміка з Юрґеном Габермасом, зокрема піддано

критиці його концепт перемовин, в якому фактично іґноровані законні інтереси України. Наголошуючи на обмеженості звернення до перемовин і необхідності спротиву російським агресорам, зауважено неправомірність заперечення евристичних можливостей комунікативної парадигми в сучасній практичній філософії, зокрема й етики дискурсу. Висновок: боронячи свою країну, українці боронять свободу Європи і універсальні цінності, тому Україна має не тільки "не програти у цій війні," Україна має перемогти.

Ключові слова: війна; гібрис; дискурс; мораль; право; перемовини; ресентимент.

Anatoliy Yermolenko. Moral and Legal Discourse of War in the Conditions of Russian Aggression against Ukraine

Abstract. The content of this article is a study of the moral and legal aspects of the philosophical discourse of Russian aggression against Ukraine as a subject of practical philosophy, in particular the philosophy of law. The concept of discourse is applied in the paradigm of argumentative dialogue of communicative philosophy. The study shows the affinity of the modern socio-political regime of Russia with german national socialism, notes the postmodern nature of the ideological support of its legitimacy, when various ideological means are used to preserve power: eurasianism, orthodoxy, nazism, fascism, communism, a mixture of archaic worldviews and practices. Associated with postmodernism, the situation of post-truth and post-morality leads to the moral-ethical and legal degradation of Russian society. The aggressive ideology and policy of Russian imperialism has its moral and psychological justification in the resentment associated with Russia's permanent lag in the modernization of economic and socio-political institutions. Resentment is compensated by hybris, which forms the socio-psychological foundation of "Russian world" – the ideology of Russia's aggressive imperialist policy. The text also updates the controversy with Jürgen Habermas, in particular, criticizes his concept of negotiations, which actually ignores the legitimate interests of Ukraine. Emphasizing the limitations of the appeal to negotiations and the necessity of resistance to the Russian aggressors, the illegitimacy of denying the heuristic possibilities of the communicative paradigm in modern practical philosophy, in particular the ethics of discourse, is noted. Conclusion: by defending their country, Ukrainians are defending the freedom of Europe and universal values, therefore Ukraine must not only "not lose in this war," Ukraine must win.

Keywords: discourse; hybris; law; morality; negotiations; resentment; war.

Одержано/Received 27.02.2023

DOI: https://doi.org/10.21564/2707-7039.1.307635
УДК 340.12

Konstantinos A. Papageorgiou*

A MANIFESTLY UNJUST (BUT ALSO A MANIFESTLY JUST) WAR**

Hitler and Stalin rose to power in Berlin and Moscow, but their visions of transformation concerned above all the lands between. Their utopias of control overlapped in Ukraine.
Timothy Snyder, Bloodlands – Europe Between Hitler and Stalin

I. The Tragic Particularity of "Bloodlands"

The war in Ukraine has reminded us of evils we know about (loss of life; the trauma and overall horror of war, particularly for civilians; the collapse of organised and civilised coexistence; the destruction of infrastructure, especially in cities; devastating economic and social consequences; global instability, etc.) but has added, in my opinion, some new elements. This conflict exhibits certain singularities that at first glance render an objective assessment a challenging proposition. *Firstly*, the war is happening in our broader neighbourhood and was initiated by a power that is essentially European. We should not forget that Russia, despite its marked "eastern" characteristics (also linked to a particular perception of orthodox Christianity), a long tradition of tsarist and Stalinist despotism and Putin's authoritarian and oligarchic regime, remains an integral part of European history and European civilisation.[1] The contribution of Russian music, painting, cinema and of course literature (but also science) to what we regard as our

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** I am grateful to Sergiy Maksymov and Nataliia Satokhina who organized the panel "Law and War: Voices of Philosophers" on 7 October 2022 and to all participants for their valuable comments. I also wish to thank Yannis Voulgaris, Hugo Dixon, Antonis Karabatsos, Dimitris Kyritsis, Yorgos Nikolou and an anonymous referee for related discussions and comments on an earlier draft. I presented a shorter version of this paper at a panel on Ukraine *held* in Molyvos, Lesvos on *28 August 2022 in memory of Stavros Tsakyrakis.*

[1] Thinking in this context of Russia because it is the aggressor state should not make us oblivious of the fact that the same holds for Ukraine and other countries colonized by Russia. It should also not blind us to the fact that Ukrainians and other colonized peoples were equally isolated and trapped under the Soviet sphere of influence. I owe these important points to an anonymous referee.

common civilisation is immense. We must never forget that, however repellent the conduct of Putin's regime. We should not exaggerate it either. Perhaps the underestimation of the common history and culture by the architects or administrators of the new political reality that emerged after the collapse of the communist regimes played its role in the gradual political alienation that ensued. *Secondly*, the war is in a way a result of the realignments occasioned by the collapse of the Soviet Union and the divergent courses followed by Russia and Ukraine thereafter. It may also be regarded as a delayed effect of much earlier events that took place during the Second World War and even earlier. *Thirdly*, although the two countries involved in the war are both successor states to the Soviet Union, they represent, at least in principle, a different view of governance but also of foreign policy. *Fourthly*, this war is of major significance not only for Ukraine; it has serious political, economic and trade-related consequences for all of Europe and the world. It is not therefore a local war at a remote part of the world, which we could regard as not affecting us directly. As we are all bitterly aware, this has an impact on the strategy of the Russian aggressor but also on the capacity of Ukraine to defend itself.

These characteristics encompass the particular reasons for which the West displays, to a high degree, solidarity with Ukraine, and actively opposes Russia. However, these same characteristics can perhaps also give cause for a more sceptical approach, less condemning of Russia, or more pacifist. I would like us first to evaluate the facts of the war in Ukraine and examine whether and to what extent they provide reasons for war. Then, I would like us to examine whether the special features I outlined above can alter or modify our verdict. Let us then start at the beginning.

II. Illegality and Injustice of Aggression

The Russian invasion of Ukraine was an illegal act according to International Law. The Charter of the United Nations contains very clear provisions prohibiting so-called aggressive war (§ 4, article 2) and essentially permitting (subject to ch. 7) defensive war.[2] The Russian claims to the effect that the "military operation" in the Ukraine has a preventive character have absolutely no basis in fact; there was not the slightest threat that could conceivably

[2] Cf. James A. Green, Christian Henderson and Tom Ruys, "Russia's Attack on Ukraine and the jus ad bellum," *Journal on the Use of Force and International Law* 9 (1) (2022), https://www.tandfonline.com/toc/rjuf20/9/1: "There is no question that Russia's invasion – the largest military offensive in Europe since the Second World War – was a prima facie breach of the prohibition on the use of force, as enshrined in Article 2(4) UN Charter and in customary international law. Indeed, when tested against the non-exhaustive list of 'acts of aggression' in the UN General Assembly's Definition of Aggression, the operation pretty much ticks every box, involving, as it does, the invasion and occupation of another state's territory (Article 3(a)), the bombardment of another state's territory (Article 3(b)), the blockade of the port of Mariupol and the Sea of Azov (Article 3(c)), an attack against the land, sea or air forces of another state (Article 3(d)) and even the sending of armed bands, irregulars or mercenaries (including Syrian fighters or mercenaries from the 'Wagner Group') (Article 3(g)). It is worth recalling that the prohibition of aggression is widely considered to be a jus cogens norm, from which no derogation is permitted."

emanate from Ukrainian territory.[3] Further, no humanitarian crisis was unfolding nor was there any threat of a mass violation of human rights to justify, even on the controversial grounds of a "humanitarian intervention," the use of military force. If the region's Russian speakers felt that their rights to their language and cultural heritage were being infringed, they could appeal to the European Court of Human Rights. The overwhelming majority of Ukrainians are not Russian, or at any rate do not perceive themselves as Russian, and Ukraine is an independent sovereign nation. Nor can anyone consider seriously the claim that the country is governed by a Nazi political regime. The Russian arguments about self-defence would have been well founded only if we accepted that Ukraine is part of Russian territory. Russian ultra-nationalists may harbour a deep-rooted conviction that this is so, but that is not an adequate justification.

However, beyond being *illegal*, the invasion of Ukraine was also *unjust* from the viewpoint of the theory of just war. The Just War Theory is a complex theoretical tradition developed since the Middle Ages with the purpose of articulating conditions for the justification of war.[4] It thus emerged long before the theory and practice of international law. Despite its imperfections, the viewpoint represented by this theory provides a platform to criticise the actions of states even when their conduct appears to be in line with International Law. I should say here that for many centuries the criteria for an ethical justification of the use of force were, in a way, only addressed to the consciences of kings. There was no international law as we know it today. Further, in contrast to the medieval and scholastic tradition,[5]

[3] Cf. Anthony Dworkin, "International Law and the Invasion of Ukraine," *European Council of Foreign Relations*, February 25, 2022, https://ecfr.eu/article/international-law-and-the-invasion-of-ukraine/. As Dworkin points out, "Russia's invasion of Ukraine is a clear act of aggression and a manifest violation of Article 2.4 of the UN Charter, which prohibits the "use of force against the territorial integrity or political independence of any State." In his speech announcing the attack on Ukraine, President Vladimir Putin made various attempts to justify Russia's actions. He pointed to what he described as Western violations of international law in Kosovo, Iraq, and Libya. But – leaving aside the differences between these cases – they have no bearing on the illegality of Russia's moves. Referring directly to the UN Charter, Putin also argued that the invasion was an act of self-defence – one designed to protect both Russia and the separatist enclaves in Donbas from an assault by Ukraine and NATO. These claims are nonsense. Neither Ukraine nor NATO had launched or was about to launch any such attack. And, as the enclaves are not independent states (despite the fact that Russia recognised them as such), they cannot ask another state to defend them. In any case, in the run-up to the invasion, there was much more force directed outwards from the enclaves than against them."

[4] Cf. Konstantinos A. Papageorgiou, *War and Justice. A Political Philosophy for World* (Athens: Polis, 2008).

[5] Ripstein aptly distinguishes between the scholastic tradition which, in addition to Aquinas, includes the great theologians of the School of Salamanca (Vitoria, Suarez), and the modern tradition of Grotius, Pufendorf and Vattel. One basic characteristic of the first was the acknowledgment of a type of a "universal jurisdiction" application of justice which (despite the attempts at its conceptual entrenchment by Vittoria and others) empowered the Spanish Conquistadors to hold themselves as the agents of justice around the world. A fundamental characteristic of the second tradition was the perception of the use of force as a means of unearthing justice and resolving disputes. See Arthur Ripstein, *Kant and the Law of War* (Oxford: Oxford University Press, 2021), 5–12.

political thought in the early modern period (Grotius, Pufendorf, etc.) did not restrict the right to resort to force to a few exclusive cases, such as self-defence or correcting an injustice, but left the issue to the discretion of states and their leaders – which is why Kant considers these philosophers "sad apologists" (*"leidige Tröster"*).[6] This view essentially changed only after World War II.

So how would the Just War Theory assess the case of Ukraine? Let us examine one by one the standard conditions set in the law of war.[7] Evidently, Russia's war against Ukraine cannot be based on a *just cause* (*justa causa*); according to current thinking, just cause is legitimate self-defence or correction of a previous injustice (e.g. expulsion from illegally occupied territories). The legality of a defensive war is closely linked with the idea of an international system of law ensuring primarily the peaceful co-existence of sovereign nations. This just cause can be invoked by Ukraine, but not by Russia. And as we have noted, the claims forwarded by Russian officials about the deeper causes of the war (NATO encirclement syndrome, defence of enclaves, denazification, protection of the Russian-speaking population, Russian territory, etc.) are obviously a pretext. Therefore, what has been called *recta intentio* (sincerity of intention), the second condition of the just war theory, does not apply either. The objectives that Russia pretends it pursues, are different from the objectives it does in fact pursue. I will not discuss here the issue of *legitimate authority* (*legitima auctoritas*), which is the third condition. Being a sovereign nation, Russia has the formal authority to conduct war. The question of course, is whether a state governed by an authoritarian and anti-democratic regime which does not respect the rule of law and fundamental rights, is entitled in the first place to resort to force, even in the most obvious of cases such as the defence of its people's legitimate interests. In my view this question has not been adequately addressed by either the just war theory or international law.[8]

One question that is raised for all wars is their *proportionality* in relation to the outcome sought. Even if we could, on any grounds, concede to Russia some "right" regarding its earlier political conflict with Ukraine (and the rest of the world), the means chosen in this case, i.e. war, should be in proportion to the outcome sought, let us say Russia's "right." But as we saw, no "right" justifies war other than legitimate self-defence. In other words, when it comes to Russia there is no right so important as to justify the loss of tens of thousands of lives on both sides and the immense economic, social and environmental catastrophe occasioned by this war. There is no proportionality here, from the outset, because the war has no just cause on Russia's side and is manifestly unjust.

[6] Immanuel Kant, "Toward Perpetual Peace," in *Practical Philosophy*, trans. and ed. by Mary J. Gregor, general introduction by Allen Wood (Cambridge: Cambridge University Press, 1996), 326.

[7] The order that I follow here is not common, and someone could certainly start out with the third condition, legitimate authority. Perhaps that would be more conceptually sound. However, the justa causa, just cause, forms the axis around which all other conditions must revolve.

[8] Cf. Konstantinos A. Papageorgiou, "Legitima auctoritas, Krieg und Demokratie," in the forthcoming volume edited by Armin Engländer – Frank Saliger, *Autorität und Autoritarismus* (Stuttgart: Steiner Verlag, 2023).

In Just War Theory, the principle of proportionality can also be invoked regarding the defending party. Is then the resistance of the Ukrainians proportional? Ukraine's defensive war is manifestly legitimate in ethical-political terms because there was no peaceful alternative option if it was to repulse Russia's illegal attack. Ukraine is entitled to do whatever is necessary in order to repel the Russian armies and liberate its territories. Even so, could we not suggest to Ukraine to accept a compromise peace deal, even if it entails the loss of some territories?[9] I believe that Ukraine is not obliged to do so, even if we considered that such a course would be in its own interest or in the interest of the West or the whole world. No one is entitled to force a country that is defending itself to come to terms for the sake of peace – although it has as a sovereign country the right to opt for peace at any stage of the war if it believes it is in its interest. Some modern-day Just War Theory writers seem to favour such a course, balancing a nation's sovereign rights against the consequences of a war. This is an entirely erroneous approach that seems to ignore or underplay the fundamental importance of defending the rule of law in the international legal order. Forcing sovereign nations to come to terms corresponds to forcing an individual to agree in the suppression of his personal liberty and personal rights for the sake of general welfare.

It is considered that war must not only be an *ultima ratio* after all other options have been exhausted (without however this entailing an obligation to accept *faits accomplis*), but must also have a reasonable likelihood of success. Initially at least, no one believed that Ukraine would be able to withstand a massive Russian invasion. The resistance offered by the Ukrainians proved otherwise. And we should acknowledge here that even the sacrifice of soldiers and civilians is never without reason. The Ukrainians showed to the invading Russians that there is a cost for any act of aggression and that they themselves were willing to bear that cost. Indeed, one could say that the resistance of the Ukrainian people, as that

[9] This is what Jeffrey Sachs ("Jeffrey Sachs: The West's Dangerous Narrative About Russia and China, and the Urgent Need for a Draft Peace Agreement: The Great Game in Ukraine is Spinning Out of Control," *Meta*, https://metacpc.org/en/jeffrey-sachs-2/) and others seem to suggest when they approach the Russian invasion as the continuation of a proxy war between the US and Russia and demand negotiations and the immediate ending of the war. Sachs attributes the war exclusively to American and NATO policies vis-à-vis Russia. But even if third parties share ante bellum political responsibility for a violent conflict, the fact does not per se diminish the injustice of an act of aggression and the right of an independent state and its people to defend themselves. What I find generally striking in Sachs's approach is his understanding of world politics as a conflict among big players, some of which (e.g. the US) happen to be more malevolent than others (e.g. Russia, China, Iran etc.). World peace will accordingly be established once the conflict reaches a certain point of equilibrium, in harmony with the geopolitical ambitions or fears of the big players. A serious shortcoming of this view is a total lack of a normative appreciation of the standing of smaller independent states and the rights of their peoples. These states and their peoples are factored in not as collectives to be respected but at best as humans to be protected. Cf. also Isaac Chotiner, "Jeffrey Sachs's Great-Power Politics, The Economist Discusses What the U. S. Gets Wrong About Putin and the War in Ukraine," *The New Yorker*, February 27, 2023, https://www.newyorker.com/news/q-and-a/jeffrey-sachss-great-power-politics?utm_source=onsite-share&utm_medium=email&utm_campaign=onsite-share&utm_brand=the-new-yorker.

of any people against a conqueror, constitutes irrefutable proof of their political existence and unity.[10]

However, the just war theory is interested in the legitimacy of war not only in principle (*jus ad bellum*), i.e. as to the decision to resort to armed force as such, but also as to the way force is used by the belligerents (*jus in bello*). Even if a war is in principle just – that is, justified as to its purpose – it must be conducted by rules that are morally acceptable and in line with humanitarian law and the four Geneva Conventions[11] (1949 plus the 1977 protocols). The most important point here, is the protection of non-combatants. From that viewpoint, the war that Russia has conducted is barbaric and unjust. Typical examples include ground and air bombardment of entire cities, the destruction of Mariupol being a case in point, and the targeting of hospitals, railway stations and other sites that are not purely military facilities. In this, Russia failed to respect the principle of distinction. Particularly aggravating are actions such as impeding the exit of civilians from cities besieged by Russian forces, and of course the execution of non-combatants in the city of Bucha. Any country in a state of war naturally tries to minimise its own losses, and air bombardment is one way to pursue that aim. A parallel here is the bombardment of Serbia at the time of the Kosovo conflict. However, the cost for civilians is excessively high; in value-based terms, disproportionate to the strategic aim. I believe that this disproportion is further aggravated by the fact that Russia is the unjust aggressor.

In recent years philosophical discourse has raised doubts about the classical distinction between the moral justification of the decision to go to war as such (jus ad bellum) and the moral evaluation of the way the decision has been carried out (jus in bello). This classical distinction (sometimes called "independence thesis") has been forcefully defended by Michael Walzer in his seminal work *Just and Unjust Wars* (1977). The idea is that regardless of the justifiability of the initial decision to revert to arms (some wars are patently unjust), how the war is being conducted is also of moral importance. Soldiers have therefore an equal moral status (sometimes called "symmetry thesis") regardless on whose side they are fighting, they are in this respect morally speaking neither better nor worse than any other soldier and they have insofar an "equal right to kill" provided they respect the rules of the laws of war. In other words, the ad bellum justice of a war has no impact on the in bello rights and obligations of combatants.

Some philosophers however, notably so Jeff McMahan, have recently argued against the classical reading. They claim that if a war is unjust in principle, as for example the war unleashed by Russia on Ukraine, then the aggressor's soldiers cannot be considered equal to the combatants of those in defence. They too act unjustly. The lack of justifying reasons in principle for the war a country conducts against another country trickles down so to speak

[10] Some philosophers call upon the idea of a people's self-respect. See Saba Bazargan-Forward, "War Ethics and Russia's Invasion of Ukraine," in "Philosophers on the Russian Attack on Ukraine," *Daily Nous*, https://dailynous.com/2022/03/02/philosophers-on-the-russian-attack-on-ukraine/.
[11] https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf.

to the level of individual acts. Far from being morally equal with combatants of a country that conducts a just war, those who fight on a side with no just cause, should be considered as "unjust combatants" and will have no justification in killing others, be it combatants or civilians. This reading of the status of soldiers on the aggressor's side and their characterization as unjust combatants has some far-reaching consequences for the way we should understand the principles governing jus in bello.

This revisionist critique expresses a powerful intuition: the army of the state that wages an unjust war and its modus operandi cannot have the same normative standing as the army of a country defending itself. For instance, it seems right that at least the protection of the aggressor's civilians can never be on the same plain, and even less so is that of its soldiers. We can see this when we examine the necessity for a military operation. No military operation can be considered necessary when its aim, let us say the conquest of another nation, is unjust. On the other hand, as Walzer himself conceded in discussing the carpet bombing of German cities in WWII the army of a country in defence may do whatever is necessary to avert an invasion or an unjust occupation. This seems intuitively correct, and is as a rule acknowledged by the peace treaties that cover unjust wars and the impact they have on the citizens of the unjust aggressor.

The asymmetry and dependence thesis which McMahan has launched coincides with a more general trend in the philosophy of international relations and the ethics of war. We can call it pure cosmopolitanism in war (PCW). According to this trend use of force in the international community should be understood in terms of the morality of individual action without acknowledging the fact that wars are, as a rule, conflicts between states. In fact, PCW conceives the constitution of international or global society through the prism of individual relations between moral agents without taking into account the fact that world society is constituted primarily by states and not by individuals. This moralistic twist promoted by PCW is in my opinion a philosophically problematic theory about the ethical-political constitution of the world but also a theoretical trend that instils erroneous views into international relations, international law and the foreign policy of many western states. Paradoxically, it ultimately advances the ideas of the realists because it favours an understanding and reading of International Law and Justice not as a necessary framework for the co-existence of nations, but rather as an ideological tool used by powerful agents to enforce their policies.

III. Injustice, Political Responsibility and World Peace

However, these reflections take us back to the second question we raised at the beginning, about the particular characteristics of the war in Ukraine. A subject often raised by analysts and media is how Russia was treated after the disintegration of the Soviet empire. This is not the place for a detailed account, but we may reduce the issue to one fundamental question: Is perhaps the West also responsible for the radicalisation of Russia? I think we could say that reasonably or not, the West was unable or unwilling to integrate Russia into a stable

and mutually beneficial framework of peaceful co-operation. The fact however that many states, formerly under the Soviet sphere of influence for decades, opted for self-rule and decided to pursue their own independent way, certainly intensified Russia's sense of isolation. The fact that Ukraine gained political independence and self-rule did not merely deprive Russia of a neutral buffer zone, but also established at its borders a social and political regime that is potentially opposed to Russian political standards and culture. But even if we accepted that "the West is to blame for this," would that change anything in relation to the war? Could we say that Russia was provoked and that the West is equally or more to blame for the injustice of the war? The answer is no. Even if we could attribute political responsibility to western powers and leaders, it would not alter the fact that from the viewpoint of international law and the just war theory the invasion was an illegal and unjust action. We can have no say about other peoples' personal choices regardless of whether they displease or perhaps offend us; we have no right to force them into behaviour that we consider agreeable. We could say the same about states, even when their choices are opposed to our interests – except if their actions infringe upon our rights.

There is however a counter-argument here. Is it perhaps the case that we are pointing the finger at Russia while we have acted in not dissimilar ways? Let us remember the United States and the enforcement of the Monroe doctrine by Theodore Roosevelt in 1904[12] or NATO's involvement in former Yugoslavia (not without sufficient reason, especially after Srebrenica) or the American and British intervention in Iraq in 2003 (without sufficient reason, as was incontestably shown later). Are we perhaps applying double standards when we condemn Putin or others for scorning the principles of international law and just war? Ultimately, are perhaps the rules of legality and ethics nothing but a smokescreen for consolidating state power? And if all behave so, why should we expect someone to do otherwise?

I think that this realistic argument is based on a misunderstanding. First of all, Russia itself tries to justify its actions in terms of legality, not power. It simply fails to convince. Kant has made a very perspicuous observation in his *Perpetual Peace*:

> This homage that every state pays the concept of right (at least verbally) nevertheless proves that there is to be found in the human being a still greater, though at present dormant, moral predisposition to eventually become master of the evil principle within him (which he cannot deny) and also to hope for this from others; for otherwise the word *right* would never be spoken by states wanting to attack one another, unless merely to make fun of it, as a certain Gallic prince defined right: "It is the prerogative nature has given the stronger over the weaker, that the latter should obey him."[13]

[12] Roosevelt Corollary to the Monroe Doctrine, 1904, https://history.state.gov/milestones/1899–1913/roosevelt-and-monroe-doctrine.
[13] Kant, *Perpetual Peace*, 326–27.

Furthermore, we must distinguish the issue of the objectivity and fairness of certain principles and rules that (should) govern relations between states, from the issue of their implementation. During the Second World War no one questioned the right of the Stalinist Soviet Union to defend itself against Hitler's armies, drawing its right from a perspective of peaceful co-existence of nations, even if it did so only if and when it found it convenient. Today Putin is behaving in terms that applied before the end of Second World War and it is not coincidental that the invasion was condemned by the overwhelming majority of UN member-states. The distinguished British journalist Hugo Dixon[14] recently tried to classify arguments about the war in Ukraine as to whether they stand for fairness or for power and state interest. I believe that fairness in relations between states is in their interest, especially so of course when they wield less power, though an international system governed by fixed and relatively fair rules is also in the interest of large states, even of the superpowers. What Russia is doing in Ukraine is not only manifestly unjust but also against its own interests.

Perhaps the most difficult moral question concerns the stance of the West and of the European countries, which reasonably harbour feelings of solidarity for Ukraine.[15] This stance entails some risk and comes at a high cost due to the sanctions imposed by the United States and the European Union on Russia. Let us set aside the purely political discussion about the necessity and effectiveness of these measures. The internal political consequences of the sanctions and the issue of energy security pose significant challenges, especially for the West. It is a parameter that must certainly be taken into account, but is not the primary concern. The morally significant issue is whether we have an ethical-political obligation to display solidarity towards Ukraine. The answer is yes, based on the idea that democratic states respecting the rule of law have not only the negative duty of not undermining the independence and sovereignty of other states, but also the positive duty of supporting states that are trying to defend and consolidate their freedom, by, for example, offering military assistance or imposing sanctions. It is their duty to pursue the development of relations of independence and equality of freedom between states.

It is of course an imperfect duty, because support is also related to the needs of the recipient. Therefore, assistance to Ukraine is necessary on the grounds of upholding a principle, even if other reasons also apply, such as stopping the expansionist policy of a revisionist power. The cultural features of Russia, but also of Ukraine, are not directly relevant in this case, nor is their history, even if we have reason to deplore the human catastrophe unfolding again in the same lands after less than a century.[16] We do not help

[14] For an intriguing side-effect of the war cf. "Hugo Dixon: War Boosts Need for 'Green Marshall Plan,'" *Reuters*, https://www.reuters.com/breakingviews/dixon-war-boosts-need-green-marshall-plan-2022-03-11/.
[15] For a wise and sensitive account cf. Jürgen Habermas, "Krieg und Empörung," *Süddeutsche Zeitung*, April 29, 2022, https://www.sueddeutsche.de/projekte/artikel/kultur/das-dilemma-des-westens-juergen-habermas-zum-krieg-in-der-ukraine-e068321/?reduced=true; Jürgen Habermas, "Indignation. The West's Red Line Dilemma," *Reset Dialogues on Civilizations*, May 6, 2022, https://www.resetdoc.org/story/jurgen-habermas-war-indignation-west-red-line-dilemma/.
[16] Cf. Timothy Snyder, *Bloodlands, Europe between Hitler and Stalin* (Vintage, 2015).

Ukraine because it is similar to us, nor do we oppose Russia because we consider it an oriental power, alien to western traditions. Such stereotypes are irrelevant for the appreciation of the (in)justice of the war. What is important is that a nation is trying to constitute itself into an independent and sovereign democratic state and is being violently prevented from doing so by a neo-imperialist, nationalist and revisionist power governed by an authoritarian regime. Free states respecting the rule of law have a duty to help Ukraine despite the cost that this may entail for their prosperity; in any case, it is in their own interest in the long term. Free states have the obligation to do whatever is in their hand to preserve peace but this may also entail going to war (or for that matter supporting a country defending itself) if there is no other way to protect the sovereignty and the rights of their peoples.

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Константінос А. Папагеоргіу. Вочевидь несправедлива (але й вочевидь справедлива) війна

Анотація. У статті оцінюється законність і справедливість війни в Україні. Це робиться для того, щоб відхилити аргументи Росії на користь вторгнення і довести право України захищатися від російської агресії, як з точки зору міжнародного права, так і в контексті теорії справедливої війни. На справедливу причину може посилатися Україна, але не Росія. Твердження російських офіційних осіб про глибинні причини війни, очевидно, були лише приводом. Але чи пропорційний опір українців? Оборонна війна України є вочевидь легітимною ще й тому, що не було мирної альтернативи для відбиття незаконного нападу Росії. Україна в принципі має право зробити все необхідне, щоб дати відсіч російським військам і звільнити свої території. Вона не може бути змушена прийняти компромісну мирну угоду, як деякі припускають, навіть якщо такий курс буде в її власних інтересах або в інтересах Заходу чи всього світу. Ніхто не має права примушувати країну, яка захищається, до згоди заради миру – хоча вона як суверенна країна має право обрати мир на будь-якому етапі війни, якщо вважає, що це в її інтересах. Ще одне складне моральне питання стосується позиції Заходу та європейських країн, які цілком резонно відчувають солідарність з Україною. Така позиція пов'язана з певним ризиком і дорогою ціною через санкції, запроваджені Сполученими Штатами та Європейським Союзом проти Росії. Внутрішньополітичні наслідки санкцій і питання енергетичної безпеки створюють значні виклики, особливо для Заходу, і це параметр, який, безумовно, потрібно враховувати, але він не є першочерговим. Морально важливе питання полягає в тому, чи мають ліберальні політики морально-політичний обов'язок виявляти солідарність з Україною. Відповідь – так, оскільки демократичні держави, які поважають свободу та верховенство права, мають не лише негативний обов'язок не підривати незалежність і суверенітет інших держав, але й позитивний обов'язок підтримувати держави, які намагаються захистити та зміцнити свою свободу, наприклад, пропонуючи військову допомогу чи вводячи санкції. Це їхній обов'язок – сприяти розвитку відносин незалежності та рівності свободи між державами.

Ключові слова: агресія; справедлива війна; пропорційність; легітимність; відповідальність.

Konstantinos A. Papageorgiou. A Manifestly Unjust (but Also a Manifestly Just) War

Abstract. The paper assesses the legality and justice of the war in Ukraine. It examines only to dismiss the arguments of Russia for the invasion and argues for the right of Ukraine to defend itself against Russian aggression both on the basis of International Law and Just War Theory. A just cause can be invoked by Ukraine, but not by Russia. The claims forwarded by Russian officials about the deeper causes of the war were obviously a pretext. But is the resistance of the Ukrainians proportional? Ukraine's defensive war is manifestly legitimate also because there was no peaceful alternative option if it was to repulse Russia's illegal attack. Ukraine is in principle entitled to do whatever is necessary in order to repel the Russian armies and liberate its territories. It may not be forced to accept a compromise peace deal, as some have suggested, even if such a course would be in its own interest or in the interest of the West or the whole world. No one is entitled to force a country that is defending

itself to come to terms for the sake of peace – although it has as a sovereign country the right to opt for peace at any stage of the war if it believes it is in its interest. A further difficult moral question concerns the stance of the West and of the European countries, which reasonably harbour feelings of solidarity for Ukraine. This stance entails some risk and comes at a high cost due to the sanctions imposed by the United States and the European Union on Russia. The internal political consequences of the sanctions and the issue of energy security pose significant challenges, especially for the West and it is a parameter that must certainly be taken into account, but is not the primary concern. The morally significant issue is whether liberal polities have a moral-political obligation to display solidarity towards Ukraine. The answer is yes, since democratic states respecting freedom and the rule of law have not only the negative duty of not undermining the independence and sovereignty of other states, but also the positive duty of supporting states that are trying to defend and consolidate their freedom, by, for example, offering military assistance or imposing sanctions. It is their duty to pursue the development of relations of independence and equality of freedom between states.

Keywords: aggression; just war; proportionality; legitimacy; responsibility.

Одержано/Received 10.04.2023

DOI: https://doi.org/10.21564/2707-7039.1.307638
УДК 340.12

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DO WE NEED THE LEGAL CONCEPT OF JUST WAR?

I. Introduction

The concept of a just war (*bellum justum*), taken seriously as a legal concept, was part of the theory of the law of nations (*ius gentium*) in modern times. Later it was replaced by the concept of legal war (*bellum legale*). The seventeenth-century famous French writer, François duc de La Rochefoucauld (1613–1680), famously said that: "*Hypocrisie* is a Sort of Homage which *Vice* pays to *Vertue.*"[1] Was the concept of a just war such a hypocritical concept that obscured the real intentions and politics of territorial expansion? Legal arguments justifying, for example, the territorial claims of Louis XIV can be considered as justification for aggression. But did the concept of a just war, even if abused, add any value to the law of nations? Do the legal concepts we use shape in some way our attitude to reality? In the article I will discuss the possible advantages of "just war" as a legal concept. The article is divided into five parts. In the first part, I will present comments on the relationship between legal concepts and the attitudes of legal actors. In the second part, I will show the origins of the concept of just war, and in the next part the mature cob, as it was understood at its height in the 17th and 18th centuries, will be elucidated. The twilight of the concept is analyzed in the fifth part. The last part is devoted to the possible contemporary application of the concept of just war.

II. Language of Law and the Reality

Law is a phenomenon inextricably linked to language, although in my opinion it cannot be reduced solely to language. The importance of language is not limited only to the role of performative utterances, which were characterized by John L. Austin in his speech act theory. Austin rightly pointed out that changes are made in the external world, especially changes in legal relations, by means of or using the utterance of certain formulas. Performative utterances are part of illocutionary acts. The vows spoken during the marriage ceremony

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[1] François de La Rochefoucauld, *The Moral Maxims and Reflections of the Duke de La Rochefoucauld with an Introduction and Notes by George H. Powell* (London: Metheun & Co. Ltd., 1912), 73.

can serve as an obvious example.[2] Ancient laws, especially Roman law, had many situations in which certain actions were legally binding after completing certain rituals, including the uttering of formulas.

Law is related to language in an even deeper sense. As the eminent comparative law specialist, Bernhard Grossfeld, observed, "man recognizes the world around him through the medium of language, and language enables him to grasp and to define reality. Through language he attains power."[3] By giving names, also in the sphere of law, man gains a sense of control over the reality around him. The scholar pointed out further: "Language is not only a means to comprehend the world: it is even a means to recognize it. It is a mental device to enable the mind to comprehend what it sees."[4] Therefore, names also determine the way in which this reality is comprehended. The names we use influence how we think about the phenomena we label with these names. Thus, the way we describe a given legal phenomenon using certain language influences how it will be perceived. For instance, if we describe a specific claim in the language of subjective rights, and even more so when language of fundamental rights is chosen, we will attach a different importance and meaning to this claim than if we use merely the category of legally protected interest.[5] The legal terms used to describe a specific phenomenon undoubtedly influence attitudes towards this phenomenon.

At the end of the 1960s and in the 1970s, thanks to the so-called the Cambridge School made a breakthrough in research on the history of ideas. Scholars such as Quentin Skinner, John G. A. Pocock and John Dunn expressed the view that this history should be understood as the history of discourses and languages in which specific ideas appeared. The methodology developed by the Cambridge School can be successfully applied to the study of the history of law. Gunnar Volke Schuppert proposed just such a perspective in his book on the history of languages of law. In this book, Schuppert pointed out that in the Western history of last four centuries "almost all legal acts marking revolutions and upheavals are formulated

[2] John L. Austin, *How To Do Things with Words* (Cambridge, Mass.: Harvard University Press, 1975), 4–11, 109ff.

[3] Bernhard Grossfeld, "Language and the Law," *Journal of Air Law and Commerce* 50, no. 4 (1985): 795. The author refers to Ernst Cassirer's work *Sprache und Mythos: Ein Beitrag zum Problem der Götternamen* (Leipzig: B. G. Teubner, 1925). In this not very long essay Cassirer wanted to confirm the thesis that the essence of the ancient gods corresponded to their names. These names, however, were created in the process of long development. Moving to the field of law, it can be said that the very terms chosen to describe a legal concept influence the content that this concept will later be filled with during the process of applying the law. To put it simply, the label influences what the labeled thing will later become.

[4] Grossfeld, "Language and the Law," 797. In the further part of his considerations, Grossfeld uses Noam Chomsky's thesis about the existence of a "deep structure of human laguages." He points out that if such a deep structure of language exists, it can be hypothesized that such a deep structure, independent of cultural conditions, must also exist in relation to law, due to the influence that language has on law. At the same time, Grossfeld notes that a law that does not correspond to the linguistic sensitivity of a given society will be more difficult to internalize. Cf. ibid. 802–03.

[5] I am leaving aside the issue of Rudolf von Ihering's theory which bases subjective law on the notion of interest.

as documents of rights."[6] He showed interestingly how the French Revolution and the takeover of power in Germany by the Nazis in 1933 caused a break with the existing language of jurisprudence and meant a "linguistic-conceptual seizure of power," carried out also in the sphere of law.[7] The radical change in the language of law is therefore a symptom of a much broader political and social change, and the study of this language may bring new insights into the change itself. In this article, I will use the approach proposed by the Cambridge school to show, through the analysis of the discussion on just war, the change that took place in the language of the law of nations at the turn of the 18th and 19th centuries.

III. The Origins of the Concept of Just War

The term bellum iustum appeared in Roman thought, but its meaning coincided with what was later referred to as legal war. It was about a war declared in accordance with applicable customs. Cicero devoted some space to reflections on war in *De officiis* ("On Duties," 44 BC), where he stated that sometimes the path to peace leads through war. According to Cicero, war against the side that refused to repair the harm it had caused was justified.[8] In Christian thought, St. Ambrose of Milan (339–397) presented the division of wars into just and unjust. He understood the first category very narrowly as it included only wars in defense of the homeland and wars fought to protect others from unjustified attack.[9] Saint Augustine of Hippo (354–430) was of the opinion that all wars, regardless the causes, produce misery to men. However, there is a category of wars which are justified because they are reaction to the wrongdoing done by one of the parties. These wars can be named just wars and they have the character of punitive wars: "For it is the wrong-doing of the opposing party which compels the wise man to wage just wars; and this wrong-doing, even though it gave rise to no war, would still be matter of grief to man because it is man's wrong-doing."[10] The wrongdoing that justifies waging war includes unjustified attack, taking of property and causing damage. Augustine demanded that war must be the only possible means of punishing the sinner. Moreover, during hostilities, good faith must be maintained, also in relations with the enemy.[11]

[6] Gunnar Folke Schuppert, *A Global History of Ideas in the Language of Law* (Frankfurt am Main: Max Planck Institute for Legal History and Legal Theory, 2021), 17.
[7] Ibid, 16.
[8] Marcus Tullius Cicero, *De officiis libri tres* (Leipzig: B. G. Teubner, 1915), 11–15; 83–85; Leszek Winowski, *Stosunek chrześcijaństwa pierwszych wieków do wojny* [The attitude of Christianity of the first centuries towards war] (Lublin: Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, 1947), 9–10.
[9] Winowski, *Stosunek chrześcijaństwa pierwszych wieków do wojny*, 56.
[10] Aurelius Augustine, *The City of God*, trans. Marcus Dods (Edinburgh: T. & T. Clark, 1871), Vol. II, 311 (XIX, 7). Augustine emphasized: "For even when we wage a just war, our adversaries must be sinning; and every victory, even though gained by wicked men, is a result of the first judgment of God, who humbles the vanquished either for the sake of removing or of punishing their sins:" ibid, Vol. II, 324 (XIX.15). Cf. John Langan, "The Elements of St. Augustine's Just War Theory," *The Journal of Religious Ethics* 12, no. 1 (1984): 19–38; Andrej Zwitter and Michael Hoelzl, "Augustine on War and Peace," *Peace Review* 26, no. 3 (2014): 317–24.
[11] Winowski, *Stosunek chrześcijaństwa pierwszych wieków do wojny*, 73–74.

In the High Middle Ages, the concept of holy war appeared. An obvious example of wars that were considered sacred were the Crusades. According to Georges Minois, the concept of a just war was, on the one hand, a continuation and secularized modification of the concept of a holy war, and on the other hand, its development was connected with the consolidation of royal power. The motives of a just war were to be judged as just, but did not have to be of a religious nature.[12] Saint Raymond of Penyafort (1175–1275) and Saint Thomas Acquinas (1225–1274) were the two major exponents of just law doctrine of this time. Raymond formulated five conditions for a just war. The defense of the country or the recovery of property was the only permissible object (*res*) of war. The spirit (*animus*) of war could not include hatred, the desire to gain power or revenge. Clerical persons (*personae*) who were forbidden to fight could not take part in the war. The condition of authorization (*auctoritas*) was that the appropriate superior (sovereign) gave permission to wage a war.[13] In his monumental *Summa theologiae*, St. Thomas presented a just war doctrine with only three conditions. Firstly, such a war was to be declared by the rightful superior authority (*auctoritas principis*), and therefore not by a usurper or a private person. Secondly, the reason for the war was to be just (*justa causa*), i.e. Thomas considered the war of plunder to be a crime, and the goals justifying the war were: protection of the population, fighting against the pagans (although Thomas was against converting them by force) and repairing the harm done to the rightful authority. The final condition was the "righteous intention" of the war (*intentio recta*).[14]

During the conflict between Poland and Lithuania with the Teutonic Order (Order of Brothers of the German House of Saint Mary in Jerusalem), a scholar active in Karków, Paweł Włodkowic (Paulus Vladimiri, between 1370 and 1373–1435/1436) argued that a war started solely for the purpose of converting pagans could not be a just war.[15] A similar view was expressed over a century later by Francisco de Vitoria (ca. 1486–1546), who was a representative of the late scholastic Salamanca School and simultaneously, one of the most important authors writing on the law of war in the 16th century.

IV. The Developed Concept of Just War

The outstanding British historian of ideas, Richard Tuck, distinguished two basic currents in early modern thought on law of nations. The first one is called humanistic and the

[12] Georges Minois, *Kościół i wojna. Od czasów Biblii do ery atomowej* [L>Église et la Guerre. De la Bible à l'ère atomique], trans. Adam Szymanowski (Warszawa: Oficyna Wydawnicza Volumen, 1998), 165–66.
[13] Magdalena M. Baran, *Znaczenie wojny. Pytając po wojnę sprawiedliwą* [The meaning of war. Asking about just war] (Łódź: Fundacja Liberté, 2018), 192–93; Minois, *Kościół i wojna*, 170–71.
[14] Saint Thomas Aquinas, *The Summa Theologica*, Vol. II, trans. Laurence Shapcote (Chicago: Encyclopaedia Britannica, Inc., 1990), 577–81; Saint Thomas Aquinas, *On Law, Morality, and Politics*, ed. William P. Baumgarth and Richard J. Regan (Indianapolis and Cambridge: Hackett Publishing Company, 1988), 220–22.
[15] Ludwik Ehrlich, *Polski wykład prawa wojny XV wieku. Kazanie Stanisława ze Skarbimierza* De bellis iustis [Polish lecture on the law of war of the 15th century. Stanisław of Skarbimierz's sermon *De bellis iustis*] (Warszawa: Wydawnictwo Prawnicze, 1955), 85–86; Ludwik Ehrlich, *Paweł Włodkowic i Stanisław ze Skarbimierza* (Warszawa: Państwowe Wydawnictwo Naukowe, 1954), 169–72.

influence of Italian Renaissance thought on it's concepts is very visible. It puts first the right of the state, understood as a political community, to security. In this respect, it follows the path set by Niccolò Machiavelli who was undoubtedly the most influential Renaissance "philosopher of security" (later, this primacy of security is present, e.g., in the thought of Thomas Hobbes). This current treats war instrumentally and at the same time allows colonization as a method of building the state's power. Moreover, it recognizes that the superior authority is only slightly bound by moral norms. Tuck sees Alberico Gentili (Gentilis; 1552–1608) to be the major representative of humanistic current. The second current, reversely, saw humanity as creating moral community. This current was associated with late scholastic thought and represented by the leading figures of the Salamanca School: Francisco de Vitoria and Luis de Molina (1535–1600).[16]

The equivalent of the notion of *justa causa* in de Vitoria's concept was *injuria* which included the following justifying reasons of war: defending the public good, returning confiscated property or receiving its monetary equivalent, seizing enemy property to cover the costs of war and destruction caused by the enemy, achieving peace and security, and punishing the guilty. Moreover, de Vitoria allowed for a punitive war, but assumed that the punishment should be proportional to the damage caused to one state by another. Such reasons for waging a war as the desire to expand territory, the barbarity of certain peoples, religious differences or the supreme authority's desire for prestige were described by de Vitoria as dishonest.[17] De Vitoria also paid attention to the manner and consequences of waging war. He argued that the ruler should give up waging a war for which he had a just cause if this war were to cause the death of very many people. De Vitoria wrote shortly after the discovery of America, and the beginnings of colonial expeditions undoubtedly influenced his thought. He believed that not only the conversion of pagans by force, but also the taking of their territory could not be justified from the perspective of the law of war. According to the Spanish philosopher, the conquistadors' war against the "Indians" (Native Americans) could only be a just war if it was waged against a chief who punished his subjects for adopting Christianity.[18] Molina dealt with the issue of just war in his work *De justitia et jure* (1592),

[16] Richard Tuck, *The Rights of War and Peace. Political Thought and International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 16–19.

[17] Francisco de Victoria, *De Indis et de Iure belli Relectiones, Being Parts of Relectiones Theologicae XII*, trans. John Pawley Bate, ed. Ernest Nys (Washington: Carnegie Institution, 1917), 171–73; Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires de France, 1983), 170–72; Quilicus Albertini, *L'œuvre de Francisco de Victoria et la doctrine canonique du droit de la guerre* (Paris: A. Chevalier-Marescq & Cie, Éditeurs, 1903), 109–34; Ernest Nys, "Introduction," in Francisco de Victoria, *De Indis et de Iure belli Relectiones, Being Parts of Relectiones Theologicae XII* (Washington: Carnegie Institution, 1917), 93–94.

[18] Nys, "Introduction," 72, 85–87, 89–91; Andrzej Szafulski, *Inspirujący wpływ myśli Francisco de Vitoria na rozwój podstawowych praw człowieka i wspólnoty międzynarodowej* [The inspiring influence of Francisco de Vitoria's thought on the development of basic human rights and the international community] (Wrocław: Papieski Wydział Teologiczny, 2009), 133–46. Albertini, *L'œuvre de Francisco de Victoria et la doctrine canonique du droit de la Guerre*, 166–77, 224–34; Minois, *Kościół i wojna*, 212–16.

where he also added a new element to these considerations, namely the modern concept of the sovereignty of state power or the monarch (the concept which was exemplarily expressed by Jean Bodin). The addition of this element meant that, as scholars dealing with this issue note, the entire concept of Molina became ambiguous. Molina stated that a war resulted from harm caused without fault could be considered a just war. Certainly, this may take place when the harm was real. Molina argued that because monarchs are sovereign, there is no judge who could assess the fault of state authority.[19] This ambiguity of Molina's concept means that, according to some authors, this concept allows many aggressive wars to be considered just.[20] Peter Haggenmacher is of the opinion that Molina and other Catholic thinkers of the period after the Council of Trent fell into contradictions, therefore de Vitoria's doctrine should be considered "the decisive clarification" (*clarification décisive*) of the idea of just war.[21]

The founding father of law of nations, Hugo Grotius (1583–1645) presented the most famous of early modern doctrines of just war. His thought followed in the footsteps of the concepts developed on the one hand by the Salamanca School and by Roman Stoics on the other. The scholar emphasized that the behaviour of states and individuals during both war and peace was subject to the law of nature which showed what actions implemented natural justice, being the "sum" of all virtues. According to him, the reasons substantiated a just war are essentially the same as the reasons for a legal action between natural persons. These reasons can be reduced to three, namely: causing harm, unlawful taking of property and commiting offenses which should be punished.[22] It must be noted that, according to this Dutch lawyer, harm also meant the need to take defensive actions. The fear of attack could also justify pre-emptive actions that could meet the conditions of a just war, but this fear had to be justified by actions taken by the opposing side, such as placing troops at the border[23] (it is worth stating that Grotius still permitted private wars, although Gentilis before him questioned the legality of such wars). Grotius believed that just as individuals should try to reach a settlement before starting a trial, states should use negotiations or proceedings before an independent arbitrator before starting a war. When mediation measures fail to produce results, the use of military force becomes permissible.[24] Grotius assumed that

[19] Cf. Luis de Molina, *De Justitia et Jure. Opus in sex tomos divisum* (Moguntia: J. G. Schönwetter, 1659), Vol. I, 409–30.
[20] Cf. Minois, *Kościół i wojna*, 250.
[21] Haggenmacher, *Grotius et la doctrine de la guerre juste*, 172.
[22] Hugo Grorius, *De jure belli ac pacis libri tres, Volume Two: The Translation by F. W. Kelsey* (Oxford: Clarendon Press – London: Humphrey Milford, 1925), 171–85 (book II, I, II–XVIII); cf. W. S. M. Knight, *The Life and Works of Hugo Grotius* (London: Sweet & Maxwell, 1925), 19697; Franciszek Kasparek, *Zasady Hugona Grocyusza o prawie interwencyi ze stanowiska dzisiejszej nauki filozoficznego i pozytywnego prawa narodów* [Hugo Grotius' principles on the right of intervention from the standpoint of today's philosophical teaching and positive law of nations] (Kraków 1872), 34–36, 45; Haggenmacher, *Grotius et la doctrine de la guerre juste*, 549–52.
[23] Grotius, *De jure belli ac pacis libri tres*, 549 (book II, XXII, V); Ibid, 184 (book II, I, XVII).
[24] Ibid, 560–63 (book II, XXIII, VII–VIII).

the state was created as a result of social contract, but this contract did not allow for the right of resistance on the part of the subjects (citizens). Therefore, according to Grotius, the subjects had the only allowable means of defense against tyrannical power at their disposal, i.e. applying for help from a foreign state (sovereign). Thus, the scholar assumed that the defense of foreign subjects against unjust harm was an acceptable premise for a just war.[25] For this reason, some contemporary authors see Grotius as a precursor of the concept of humanitarian intervention.[26] It is worth adding that Gentilis also allowed such an intervention, while another representative of the school from Salamanca, Francisco Suarez (1548–1617), strongly rejected its legality.[27]

Emer de Vattel (1714–1767) was the most famous author writing about the law of nations in the second half of the 18th century. He based the entire concept on the view that states are in a specific state of nature, so there is no superior over them. At the same time, he rejected Hobbes' view that the state of nature must be a state of actual or potential war. According to Vattel, the state of nature is only a state of uncertainty.[28] Relations between states are not based solely on force, but also on the principles of independence, equality and freedom of each state in relations with others.[29] The assumption that states are sovereign means that these principles can be provided to each of them. In this concept, the institution of sovereignty has a guarantee function. Moreover, Vattel maintains that the virtue of justice, prescribed by natural law, also applies in relations between states. However, states are only responsible for unfair actions only in mutual relations, and not in internal relations. Interference with internal affairs of the state in the name of preventing injustice is contrary to the principle of sovereignty. Thus, Vattel rejected Grotius' view on the possibility of intervention in a situation when the state treats its own subjects unfairly.[30] Vattel assumed that citizens had the right to resist, so allowing external interference was not necessary. However, he believed that once a civil war against a tyrant was underway, the warring citizens could ask other states to intervene.[31]

Vattel believed that repelling an attack and acting to redress harm and punish the state causing the harm in order to deprive it of the ability to harm in the future could be reasons for a just war. Doubts about the rights of the parties to a conflict do not automatically make a war unjust, but Vattel emphasized that the parties must act in good faith and with the intention of reaching an agreement. According to Vattel, an attempt to resolve the conflict

[25] Ibid, 583–84 (book II, XXV, VIII).
[26] Jerzy Zajadło, *Studia Grotiana* (Gdańsk: Wydawnictwo Arche, 2004), 191.
[27] Theodor Meron, "Common Rights of Mankind in Gentili, Grotius and Suarez," *American Journal of International Law* 85, no. 1 (1991): 114; Minois, *Kościół i wojna*, 251.
[28] Cf. Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns. Volume Three: Translation of the Edition of 1758 by C. G. Fenwick* (Washington: Carnegie Institution of Washington, 1916), 7a.
[29] Ibid, 9a, 10a, 6–7.
[30] Ibid, 12a – 13a, 6, 7–8; cf. *ibid.*, 135, 222.
[31] Ibid, 131–32: cf. Zajadło, *Studia Grotiana*, 196–97.

peacefully did not condition the admissibility of war. Moreover, when the reason for the conflict was minor, but the other side refused to resolve it peacefully, war was permissible.[32] The scholar distinguished "essential rights," i.e. those that were key to sovereignty. In his opinion, in the case of their violation, a peaceful way to resolve the dispute was completely out of the question. Like Thomas Aquinas, Vattel also emphasized the condition of righteous motives in war. As he emphasized, such motives certainly did not include the pursuit of wealth, the desire to conquer new territory, passions, hatred of a specific nation, the desire for revenge or the manifestation of power.[33] Vattel expressed the view that pre-emptive military action, if based on a real threat and not on unverified suspicions, could be justified.[34] Similarly, he justified punitive wars. Therefore, the category of lawlessness justifying war has been extended to cover threats that are, in a sense, potential. It should be emphasized that Vattel's ideas were a kind of swan song for the concept of just war in the law of nations.

V. The Twilight of the Just War Concept

The first factor that cast doubt on the concept of a just war was the spread of a radical version of the doctrine of state sovereignty. At the end of the 17th century, Samuel Pufendorf (1632–1694) was the most respected author on the law of nations. He combined the focus on state security, borrowed from the thought of Thomas Hobbes, with the idea of humanity as a moral community, which had previously been proclaimed by Grotius. As Richard Tuck points out, Pufendorf's position was a point of reference for German scholars of the time. Christian Wolff (1679–1754) was one of Pufendorf's most important successors. Wolff developed the idea of a world moral community and claimed that states, as a result of mutual agreements, created such a community, namely: *civitas maxima*. Simultaneously, he accepted the view of Hobbes who emphasized that the sovereignty of states excludes the existence of any authority resolving disputes between them. The consequence of this view was the statement that even if one of the belligerent states had a just reason to start a war, a just reason to start a war, other states cannot judge how just this view actually was because they cannot act as judges. Therefore, Wolff believed that states must be free to decide whether the conditions justifying war were met.[35] Molina's considerations, mentioned earlier in this article, showed that the adoption of the modern doctrine of sovereignty led to ambiguity

[32] Vattel, *The Law of Nations*, 223–28.

[33] Cf. Ibid, 243–47, 254.

[34] Cf. Ibid, 304. It is worth adding that the Scottish thinker Adama Ferguson (1723–1816), recognized by Ludwik Gumplowicz as the founder of the sociology of war, allowed not only a pre-emptive attack, but also a war initiated to stop the development of the power of another state. Ferguson expanded and at the same time "diluted" the concept of just war even more than Vattel: Adam Ferguson, *Principles of Moral and Political Science. Being Chiefly a Retrospect of Lectures Delivered in the College of Edinburgh* (London: A. Strahan and T. Cadell – Edinburgh: W. Creech, 1792), Vol. II, 300–02. Cf. Ludwik Gumplowicz, *Die soziologische Staatsidee* (Graz: Leuschner & Lubensky, 1892), 67–70.

[35] Christian Wolff, *Jus gentium methodo scientifica pertractatum. Voliume 2, trans. J. H. Drake* (Oxford: The Clarendon Press – London: H. Milford: 1934), 324–25; cf. Ludwik Ehrlich, "The Development of International Law as a Science," *Hague Recueil* I (1962): 232–35.

in considerations about a just war. Deriving extreme consequences from this doctrine makes concept of a just war impossible.

The gradual departure from the idea of law of nature and the adoption of positivism in the theory of the law of nature, which took place in the second half of the 18th century, was another factor influencing the decline of the concept of just war. Johann Jacob Moser (1701–1785), a prominent German lawyer who adopted positivism, proposed focusing on the concept of legal war (*bellum legale*) and examining whether a given cause of war was not excluded between specific parties due to the provisions of the treaty concluded by them.[36] Although the turn of the 18th and 19th centuries in Europe was a period of constant wars, another German professor, Georg Friedrich von Martens (1756–1821), was of the opinion that the norms of natural law had never been realized in positive law to such an extent as in his times. He distinguished fundamental rights in the law of nations *(droits primitifs)* which were protected by both natural law and positive law. These included the right to security and independence, the right to occupy territories not held by other states and to enter into treaty relations with others.[37] The violation of the right to security and independence by another state justified a declaration of war.

VI. Concluding Remarks: The Possibility of Renaissance of the Just War Concept

The category of justice continues to be one of the most widely discussed in the philosophy of law. There are also many opponents of using this category. Leon Petrażycki (1867–1931) was one of the most ardent among them. He argued that all judgments about justice are in fact the judgments of emotions. Judgments about justice are always projections of the intuitive law of persons who use category of justice.[38] In his early work, *Die Lehre vom Einkommen* ("The doctrine of income"), Petrażycki ridiculed all attempts to create a coherent concept of distributive justice. According to him, any attempt to create such a concept is of subjectivist character and each is marked by "crude, unreasonable materialism."[39] However, later attempts to create a theory of distributive justice, to mention only presented by John Rawls and Amartya Sen,[40] prove that it is difficult to eliminate the very category of justice from the philosophy of law. Petrażycki himself proposed replacing the category of justice

[36] Joachim von Elbe, "The Evolution of the Concept of the Just War in International Law," *The American Journal of International Law* 33, no. 4 (1939): 683; cf. Robert A. Kann, "The Law of Nations and the Conduct of War in the Early Times of the Standing Army," *The Journal of Politics* 6, no. 1 (1944): 99.
[37] Kann, "The Law of Nations and the Conduct of War in the Early Times of the Standing Army," 99–100, 104.
[38] Leon Petrażycki, *Teoria prawa i państwa w związku z teorią moralności* [The theory of law and the state in connection with the theory of morality], ed. Wiktor Leśniewski (Warszawa: Państwowe Wydawnictwo Naukowe, 1960), Vol. II, 288–95; Leon Petrażycki, *Law and Morality*, trans. Hugh W. Babb (Cambridge, Mass.: Harvard University Press, 1955), 241–44.
[39] Leo von Petrażycki, *Die Lehre vom Einkommen. Vom Standpunkt des gemeinen Civilrechts unter Berücksichtigung des Entwurfs eines bürgerlichen Gesetzbuches für das Deutsche Recht. II. Band. Einkommensersatz* (Berlin: H. W. Müller, 1895), 475–77, 485–86.
[40] Cf. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); Amartya Sen, *The Idea of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 2009).

with the ideal of universal love which was by him the rebirth of the law of nature.[41] This ideal is even more ambiguous than the concept of justice, not to mention that it is difficult to imagine its practical implementation. It should also be emphasized that the controversy surrounding distributive justice does not concern to the same extent retributive justice, which, after all, refers to the redress of suffered harm. References to the concept of justice also appear in many legal systems. Therefore, the ambiguity of the concept of justice is not an obstacle to the introduction or use of the concept of just war.

Replacing the concept of war with the concept of armed conflict in international law was associated, first of all, with the desire to eliminate wars as a means of implementing state policy (General Treaty for Renunciation of War as an Instrument of National Policy, known as the Kellogg – Briand Pact of 1928; Article 2 (4) of the United Nations Charter). Secondly, the purpose of this was to extend the protection guarantees for civilians, private property and cultural property, that were established in international humanitarian law in the case of war, to all armed conflicts, regardless of whether the parties were states or any "organized armed groups."[42] Certainly, extending these guarantees is expedient, appropriate and uncontroversial.[43] However, there is a price that must be paid for abandoning the concept of war (and of just war in particular), namely, the concept of armed conflict has a rather vague connotation and is therefore susceptible to being diminished or "diluted." Any armed conflict can be called a "special military operation" (*специальная военная операция*), so the actual nature and meaning of the conflict are no longer clear. However, there is a price that must be paid for abandoning the concept of war, namely, the concept of armed conflict has a rather vague connotation and is therefore susceptible to being diminished or "diluted." Any armed conflict can be called a "special military operation" (*специальная военная операция*), so the actual nature and meaning of this conflict is no longer clear. The category of just war, if understood precisely, provides a clear connotation that is missing in the concept of armed conflict. Undoubtedly, the notion of just war shapes the attitudes towards a phenomenon which is named by it. Simultaneously, the marginalization of the concept of war in international law has caused this concept to be abused in the current political discourse and used for current political purposes. An example would be the phrase "war on terrorism." The term "just war" has also been used to justify, for example, the American military operation in Iraq as an example of so-called preventive use of force.[44]

In my opinion, Michael Walzer may have been right when he wrote that "a theory of just and unjust uses of force" is needed today.[45] Walzer explained his view as follows: "When

[41] Cf. Petrażycki, *Die Lehre vom Einkommen*, II. Band, 477–78, 486.
[42] The fraze used in the International Criminal Tribunal for the former Yugoslavia's judgement in the case *Prosecutor v. Dusko Tadić*, IT-94–1-AR72, Appeals Chamber, Decision, 2 October 1995, point 70.
[43] The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 could serve as the example of sucha n extantion.
[44] Cf. David Mellow, "Iraq: A Morally Justified Resort to War," in *War, Torture & Terrorism*, ed. David Rodin (Oxford: Blackwell Publishing, 2007), 51–70.
[45] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006), XV.

we define the criteria by which war and the conduct of war can be judged, we open the way for favorable judgments. Many of these judgments will be ideological, partisan, or hypocritical in character and, therefore, subject to criticism, but some of them, given the theory, will be right < … >"[46] There is no need to comment here on Walzer's own considerations and the doubts they raise. Suffice it to say that the reflections of Francisco de Vitoria that I have mentioned show that the concept of a just war can be used effectively and in a way devoid of hypocrisy. As I have shown, the concept of just war ceased to be used, firstly, due to the hypertrophy of the idea of state sovereignty, and secondly, because legal positivism became the dominant view on the essence of law. It seems that contemporary international law no longer fetishizes sovereignty so much and is no longer based on extreme positivism. Therefore, there may be room for the concept of just war in the contemporary international law if it is understood as an exception to the general principle of refraining from using force and its premises are defined with appropriate precision and very narrowly. The reasons justifying such a war had to include only an open attack or interference with the functioning of state authorities by other states.

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[46] Michael Walzer, *Arguing about War* (Yale: Yale University Press, 2004), X.

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Пьотр Шиманєц. Чи потрібне нам юридичне поняття справедливої війни?

Анотація. У статті представлені витоки та розвиток юридичної концепції справедливої війни від Цицерона до Емера де Ваттеля. Порушується питання про значущість самого цього поняття. Автор показує, що сутінки цього поняття зумовлені, по-перше, гіпертрофією ідеї державного суверенітету, а по-друге, переважанням правового позитивізму. Ба більше, стверджується, що концепція справедливої війни може бути використана ефективно і без лицемірства, як показали ідеї Франциско де Віторія. На думку автора, у сучасному міжнародному праві може бути місце для дуже вузько сформульованого поняття справедливої війни.

Ключові слова: справедлива війна; справедливість; філософія права; міжнародне право; війна.

Piotr Szymaniec. Do We Need the Legal Concept of Just War?

Abstract. The article presents the origins and development of the legal concept of just war from Cicero do Emer de Vattel. The question about the significance of this very concept is raised. The author shows that the twilight of the concept was caused, firstly, by the hypertrophy of the idea of state sovereignty, and secondly, by the predominance of legal positivism. Moreover, it is argued that the concept of a just war can be used effectively and in a way devoid of hypocrisy, as the ideas of Francisco de Vitoria revealed. In the author's view, there may be room for very narrowly coined concept of just war in the contemporary international law.

Keywords: just war; justice; philosophy of law; international law; war.

Одержано/Received 25.05.2023

DOI: https://doi.org/10.21564/2707-7039.1.307639
УДК 340.12

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"BASED ON ACCURACY." THE PARALLELS BETWEEN LAW AND POETRY IN WARTIME

True poetry
is always based
on accuracy.[1]

I. Introduction: Why Law and Poetry?

This essay aims to discuss some common points between law and poetry in what they say, and what they do, in the face of war. Both law and poetry are regarded here as special forms of discourse, or (as Weisberg and Barricelli put it) "a formalized attempt to structure reality through language."[2] "Structuring reality" means naturally something more than merely reflecting it. It is rather shaping the reality with specific forms, unique to each of these discourses. The world description offered by law differs from those of other forms of discourse, say, particle physics or TikTok. Our aim, therefore, is to expound affinities between how poetry and law structure their realities.

Just as with any other social discourse, law and poetry have various impacts on social relations, thanks to the performative dimension of language. In other words, social discourses are not only about "saying" but also about "doing" by words. Such impacts, which are traditionally categorised as social functions of language, are also of interest in this study.

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[1] Serhiy Zhadan, "Wielcy poeci smutnych czasów" ["Great poets of sad times"], in *100 wierszy wolnych z Ukrainy* [100 free poems from Ukraine], ed. and trans. Bohdan Zadura (Kołobrzeg: Biuro Literackie, 2022), 5–7. Trans. to English Maciej Pichlak.

[2] Richard H. Weisberg and Jean-Pierre Barricelli, "Literature and the Law," in *Interrelations of Literature*, ed. Jean-Pierre Barricelli and Joseph Gibaldi (New York: The Modern Language Association of America, 1982), 150.

Hence, it is both the saying and doing of law and poetry – their forms and functions – that we are going to track in the paper.

The title of the issue to which we submit the paper is "Law and War: Voices of Philosophers." An immediate question occurs hence, why confront law with poetry rather than philosophy? Why do we decide to engage in this interdisciplinary dialogue, and therefore to go out of the box of each one's expertise? There are at least two reasons for such a confrontation, no matter how challenging it is.

The first reason is related to the endemic Polish perspective of both authors of this paper. In Poland, when we think about war, our thoughts go spontaneously and irresistibly to World War Two. And it was poetry, much more than philosophy, that gave a common voice to the Polish experiences of wartime and occupation. Like Gadamer said: "The poetic word, too, often becomes an attempt to find out what is true, because the poem awakens the hidden life in words that seem weathered and worn out, and teaches us about ourselves."[3]

The horror of those days gave birth to the "splendid generation" of outstanding poets, including Nobel Prize-winning Czesław Miłosz and Wisława Szymborska (but also Zbigniew Herbert, Tadeusz Różewicz, Krzysztof Kamil Baczyński, Tadeusz Gajcy and others). The poetic discourse has dominated the general consciousness and collective memory of war and remains the primary point of reference in that respect. In Poland, when we think and speak about war, we do it through poetry.

All this explains our personal commitment, but might be of little relevance to external readers, settled in other contexts and traditions. After all, war (sadly as it is) is a global experience. It has also been reflected in all possible discourses, including all available forms of artistic expression: prose (e.g. Remarque's "All Quiet on the Western Front"), non-fiction (Alexievich's "Boys in Zinc"), cinema (Coppola's "Apocalypse Now"), painting (Picasso's "Guernica"), music (Penderecki's "Threnody to the Victims of Hiroshima") …

By referring to the poetic discourse on war, and to our Polish cultural competencies, by no means we deny the validity of other discourses and alternative perspectives. Still – and this is the second, more universal reason for our choice – there are some intriguing affinities between poetry and law that deserve exploration on their own terms. The affinities include how both discourses describe the reality, and how they affect social relations: how they "structure" the reality of war.

Section 2 provides a general theoretical background for "law and poetry," as a sub-discipline of law and literature studies. In Sections 3 to 5, we discuss three parallels between the discourses of poetry and law, in the manner of describing the world, the role in shaping collective memory, and rejoining together conflictual parties. In a sense, these three points may be perceived as parallels in legal and poetic semantics (describing the extralinguistic reality with linguistic signs – Section 3), pragmatics (practical function of both discourses – Section 4), and syntax (forms of uniting diverse elements into one structure – Section 5).

[3] Hans G. Gadamer, *Prawda i metoda. Zarys hermeneutyki filozoficznej* [Truth and method. Outline of philosophical hermeneutics], trans. Bogdan Baran (Warszawa: PWN, 2013), 604.

The analyses in these sections are additionally inspired by selected poems of Ukrainian and Polish authors writing about war – most notably of Serhiy Zhadan, probably the most relevant contemporary Ukrainian poet. Section 6 concludes.

II. Theoretical Background: The Links between Law and Poetry

"Law and poetry" may be perceived as a sub-discipline of the "law and literature" studies – even though a relatively underresearched one. Of course, there is neither space for nor point in describing here all the tenets and varieties of this rich theoretical movement. Let us note just one point instead, about the dominant approach: Most of the studies in the field of law and literature focus on the differences between these two narratives. In a nutshell, the claim is that literature (resp. poetry) may bring into legal thinking what law lacks, or is short of: imagination, creativity, and sensitivity to the human condition. Hence, literature is recommended to legal professionals (and "law and literature" courses are offered to law students) to broaden their imagination and deepen their understanding of human and social contexts of law. Literature is useful to lawyers, the argument goes, because it is so much *different* from the legal mindset.[4]

This is a valid perspective. Still, in this article we take an opposing view: rather than stressing their disparities, we focus on *similarities* between law and poetry. This may seem paradoxical at first sight, but we hope to prove that this is also a legitimate way of approaching relations between these two discourses. We are encouraged by the fact that we are not alone in this way. Great figures have preceded us in stressing the links between the two fields – most notably Percy B. Shelley, the canonical English poet. In his often-quoted statement, Shelley claims that "poets are the unacknowledged legislators of the World" – for they discover "those laws according to which present things ought to be ordered" and behold "the future in the present."[5] There is more to these words than just a catchy saying. Shelley repeats this thought in the context of the political turmoil of his days (what he calls a "civil war"), in his remarks on needed political reform.[6] Apparently, for Shelley, these are poets who can offer perspectives for terminating havoc and transforming society into the post-crisis stage. This goes hand in hand with Serhiy Zhadan's appeals to "poets of sad times" that they should "speak about hope" when others say about anxiety, dead-ends and lack of chances.[7] For both writers, therefore, poetry has a relevant political role to play, particularly in sad and turbulent days.

[4] For an example of this perspective, see Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge: Cambridge University Press, 2011), 6–9, and the literature cited. In the field of legal education, see Bald de Vries, "Law, Imagination and Poetry. Using Poetry as a Means of Learning," *Law and Method* (2019), https://doi.org/10.5553/REM/.000039.

[5] Percy B. Shelley, "A Defence of Poetry," in *Selected Poems and Prose*, ed. Jack Donovan and Cian Duffy (London: Penguin Books, 2016).

[6] Percy B. Shelley, "A Philsophical View of Reform," in *Selected Poems and Prose*.

[7] Zhadan, "Great poets of sad times."

More recently, such authors as James Boyd White[8] and Alyson Sprafkin[9] delved into some parallels between law and poetry, for instance in how they use language to communicate ideas, what methods of interpretation are employed in both fields, and how they are taught in formal university education. In this vein, White noted the attention to each piece of the text and single words, none of which should be regarded as redundant (the method of close reading, or "literal interpretation" as this term is understood in law). This is accompanied by the search for the coherence of the whole text – a poem, a legislative instrument, or a judicial opinion (what law calls "systemic interpretation").

There are also further, deeper affinities between law and poetry, on the level of their ethical commitments. Both poetry and law can be said to elevate the dignity of every single person to the rank of priority. They call for weaker and silenced voices. Poetry – like law – is an interventional activity in a sense that it tries to create a context in which each voice will resound. It is the domain of freedom, repelling the temptations of the market, a space for an open debate and dialogue. It is an open space confronting different points of view with each other, multiplying the experience of reality. Poetry, like law, is the art of negotiating, clashing arguments, and freeing up space for someone else's voice so that it can fully articulate its truth. It tries to ground its order, its "world," based on the values of the writer. In his essays, Leszek Koczanowicz remarks: "If politics is the domain of freedom, we are certainly unable to define it."[10] We can replace the word "politics" with "poetry" here and make further attempts to define it. Poetry commemorates, saves from oblivion, builds bonds. If there is a community of law and poetry, it is undoubtedly based on a community of sensitivity and ethical obligations. Like Tzvetan Todorov said: "Literature can do a lot. It can give us a helping hand when we are deeply depressed, help us towards other human beings, help us to understand the world better, and even help us to live. By that, I do not mean it is some kind of soul rejuvenation centre, but since it reveals the world to us, it can transform each of us from the inside out."[11]

Needless to say, all the abovementioned claims apply only to certain types and uses of both poetry and law. This is inevitable, considering the immense internal diversity of both discourses. There is neither a single model of poetry nor law. Poetry comprises multiple genres and sub-genres, from romance to sonnet to haiku, and accepts various styles, tones and forms of expression. The same stands for law, with such genres as legislation, judicial opinions, bills of indictment, etc. More importantly, both may and have been used to serve

[8] James B. White, "The Judicial Opinion and the Poem: Ways of Reading, Ways of Life," in *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, London: The University of Wisconsin Press, 1985).

[9] Alyson Sprafkin, "Language Strategy and Scrutiny in the Judicial Opinion and the Poem," *Law & Literature* 13, no. 2 (2001).

[10] Leszek Koczanowicz, *Lęk i olśnienie. Eseje o kulturze niepokoju* [Fear and dazzle. Essays on the culture of anxiety] (Warszawa: IBL PAN, 2020), 119.

[11] Tzvetan Todorov, "Po co nam literatura"? ["What do we need literature for?"], trans. Olga Mastela, in *Literackie doświadczenie nowoczesności. Antologia artykułów z "New Literary History"* [Literary experience of modernity. Antology of articles from "New Literary History"] (Warszawa: IBL PAN, 2017), 79.

various goals and interests, from promoting liberty to justifying terror. Thus, both law and poetry are characterised by what White calls "many-voicedeness:" they are "profoundly against monotonal thought and speech, against the single voice."[12]

As a consequence, we are condemned to partial descriptions. It should be stressed that our approach is by principle affirmative to both law and poetry. We try to find out what positive role they can play in "sad times," being fully aware that they may also serve as ideological instruments in hands of autocrats. It is sometimes claimed that what such instrumental uses produce is usually bad poetry and bad law, but we are not sure of whether such claims offer more than a false consolation. Rather, the potential instrumentalisation of law and poetry is a factor that increases the need for, and the relevance of, this type of their interpretation that we propose here.

III. To Describe

As we already noted, law and poetry are types of discourses, and therefore they both bring their unique forms of description of the world. Pierre Bourdieu noted that "[l]aw is the quintessential form of the symbolic power of naming"[13] and the same holds for poetry. There are at least two points in which both discourses resemble each other in how they name and describe. These are, as we show beneath, the search for linguistic precision and the focus on individual cases. Let us begin their discussion by introducing a passage from Zhadan's poem "Great poets of sad times:"

And because birds do not listen,
the poet begins to count them
in their autumnal, sky flocks.

He carefully counts, writes down
every swallow in his notebook.
As many as flew away
should come back.

All must be counted.
None should be forgotten.

True poetry
is always based
on accuracy.[14]

[12] White, "The Judicial Opinion and the Poem," 124.
[13] Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38 (1977): 838.
[14] Zhadan, "Great poets of sad times."

Both abovementioned aspects are present here: the focus on the individual (due to which the poet "writes down every swallow in his notebook"), and on precision or "accuracy." But what do the swallows from the poem represent? The answers, as always in interpreting great poetry, may vary. Let us follow an interpretation that puts this text in the context of war. According to this interpretation, the swallows symbolize the victims of war: soldiers who went to a battlefront, and civilians who have stayed in conquered territories. All those who were killed, lost, captured, or buried secretly. This interpretation gets stronger grounding if one reads Zhadan's text as a dialogue with the poem by Zbigniew Herbert, "Mr Cogito on the Need for Precision:"

Mr Cogito
is alarmed by a problem
in the domain of applied mathematics

the difficulties we encounter
with operations of simple arithmetic
< … >
over the immensity of history
wheels a spectre
the spectre of indefiniteness

How many Greeks were killed at Troy
– we don't know

to give the exact casualties
on both sides
in the Battle of Gaugamela
at Agincourt
Leipzig
Kutno

< … >
somewhere there must be an error
a fatal defect in our tools
or a sin of memory
and yet in these matters
accuracy is essential
we must not be wrong
even by a single one

we are despite everything
the guardians of our brothers[15]

One can note an intriguing interplay between these two poems. Herbert makes explicit what Zhadan suggests: the universality of the problem and the related ethical challenge. The same story repeats on every war and battlefield – from Troy to Gaugamela to Kutno. The story of the impossibility, and the necessity, of fulfilling the demand to take into account, and by this virtue show respect to, every individual. "All must be counted. None should be forgotten,"[16] and "we must not be wrong even by a single one:"[17] this is the impossible ambition of both poetry and war.

1. In the search for precision

Poetry is a permanent lesson in attention. A lesson in precise thinking. An affirmation of individual consciousness trying to tell the life of her thoughts. It directs its light to what is singular and separate. Poetry draws our attention to the world, as it was, showing that it is an eternal becoming and constant transformation, which words can only try to accompany somehow. Poetry is the greatest civic lesson of attention – to another human being, to this tree, bird, bottle cap, or garbage. Who of today's young people can name three trees and three birds that one passes on the roads of everyday routine activities? Poetry is also the ability to enter the silence, come to terms with the unspoken, and accept the impossible. Poetry takes the side of truth, examines the use of words, and stigmatizes abuses towards others and otherness. A good reading of a poem is primarily about the existential experience, and only then about an attempt to understand it, to place it on the plan of action. Conciseness, simplicity – these are the names of these poems that hit us the hardest. The precision of simplicity has the power to attract our attention and direct it to specific areas illuminated by the subjective light of our imagination. Poetry focuses on the concrete, the detail, the word. Andrzej Zawada noted in that context:

> Literature is perhaps even older than science and, like science, serves cognition. But because it examines the inner reality of humans, immaterial and unique, immeasurable, and therefore non-objective, it is considered a figment of fantasy. Although it is to the same extent as quantum physics, organic chemistry or mathematics.[18]

If one moves to the law, naming and describing accurately is the primary, most elementary role of law. How to call what was done by the Russian army in Bucza, Irpin, Mariupol, and other places? What is the status of Ukrainian territories unlawfully annexed by the Russian

[15] Zbigniew Herbert, "Mr Cogito on the Need for Precision," in *Report from the Besieged City and Other Poems*, with the assistance of John Carpenter, and Bogdana Carpenter (Oxford: Oxford University Press, 1986).
[16] Zhadan, "Great poets of sad times."
[17] Herbert, "Mr Cogito on the Need for Precision."
[18] Andrzej Zawada, "Pracownia literacka" ["Literary studio"] (Wrocław: Warstwy, 2021), 183.

Federation? To answer this type of questions, law is the best instrument at our disposal. The law can reach the level of precision unavailable to other discourses because every word counts here, and it establishes differences that may be inexistent in other discourses. To offer but one example: the difference between homicide, manslaughter and murder may be opaque for most people, yet it is consequential legally speaking. The law defines precise, clear-cut lines in what otherwise would be blurred – and it is very "poetic" in that respect. As Sprafkin aptly noted:

> Law < … > produces the judicial opinion, in which the slightest nuance in language could mean the difference between one argument prevailing and another <...>. Poetry <...> produces the poem, in which the slightest nuance in language could mean the difference between one self-discovery and another, between one self-denial and another.[19]

2. Focus on individual

In their interest in individual beings and details, both law and poetry differ sharply from, e.g., politics or economics. The latter are interested mainly in massive processes and broad categories. The former pay attention to individuals and their unique experiences. Dozens of tanks, thousands of soldiers, millions of bullets: this is what matters in wartime politics. One bullet, one victim, one perpetrator – politically irrelevant – might be of focal interest for poetry and law.

This approach characterises, once again, the poetic language of Zhadan. Zhadan is a poet of great class and mastery, whose language solidifies with pure sounds and moods. He shares his delight with us. He looks at birds and trees sensually, following the flight of a single quill, paying attention to a protruding root. Colours and scents, places and voices, people and animals, day and night, numerous wavings and imperceptible changes of volatile and solid states of matter and dispersion organize his eye and mind to a complete extent. Joy and sadness, fear and anxiety, melancholy and given glances, minutes. That's what poems are for, to tell us about it – about a tiny life in a universe of matters and events, which are sometimes taken care of by the second, as fragile as the first.

Poetry is a lesson in central and peripheral seeing at the same time. The detail occupies poetry constantly. Its domain is not failing to notice what is different, what is unique and separate. Poetry is interested in existence, fragments of thoughts, vibrations of the membranes of the mind. An inclination for details is its undeniable ability. The field of the poem's attention reveals everything that is the sum of the poet's attention – the semantic field of their meditation here and now, their fixation on the present. Poetry speaks with an ordinary person, representing the name of the author who writes it. It is an autonomous and personal voice, looking for a "you." It usually does not give up its subject competencies, it is stubbornly single, individual, the only one. Working with a poem is, above all, learning to see details, and the ability to notice overlooked and smallest things. Poetry is approaching reality,

[19] Sprafkin, "Language Strategy and Scrutiny in the Judicial Opinion and the Poem," 283.

processual nature we hardly remember. It embraces with its verses everything that wants to advertise itself to us with its content.

The interplay of individual and universal, already noted in poetry, is also definitional for law. The law usually perceives an individual as an instance of a universal category: as a "case" that is interpreted with abstract and universal norms. The paradox of law is that to do justice to a particular individual it must abstract her to such categories, for justice, and justification, require universalisation (or, at least, universalizability).[20] Hence, every legal decision "is about particular persons, part of whose nature or circumstances enable us to state that they belong in certain classes, satisfy certain predicates, or instantiate certain universals."[21]

It would be wrong to conclude, though, that the law fully subordinates particular to universal, or that individual evaporates in abstract categories. There are at least three reasons why the individual must not be denied in legal decision-making. First, many legal norms are deliberately open and/or flexible, and by this virtue, they require to consider the particularities of the case in their application. Second, in the situation of conflict between two alternative norms, the reference to a particular, unique situation under decision may be the only way to counterweigh conflicting norms and decide which of them should prevail. This applies especially, but not solely, to conflicts of general principles. Third, a court (or another decision-making authority) should always be aware of the possibility that legal norms are illegitimately over- or under-inclusive to the case at hand. In other words, it should be ready to ask whether the law rightly binds specific legal consequences with a particular situation. If the answer is negative, it should launch legal creativity to give the individual what is due.

These three ways of taking a particular into account may be called, following traditional legal terminology, *intra legem*, *praeter legem* and *contra legem*. All of them prove that the relationship between individual and universal in law is far from being straightforward. It is full of dialectical interplay of both components, none of which can be subordinated to another. And again, law resembles here poetry, which treats particular persons, objects or situations described in a poem as representations and instantiations of more general ideas. Hence, as White puts it: "Both poetry and law unite the particular and the general, the image and the idea, the general principle and the particular case."[22]

IV. To Remember

Both the law and the poetry are the media of individual and collective memory. They memorise, and stitch together the past and the future, with the hope that the future will allow us to deal with the past. This is a "therapeutic" role of memory that has been noted by Zhadan in another poem:

[20] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford, New York: Oxford University Press, 2010), 97–100.
[21] Ibid, 83.
[22] White, "The Judicial Opinion and the Poem," 119.

She's fifteen, sells flowers at the train station.
Sun and berries sweeten the oxygen beyond the mines.
Trains stop for a moment, move further on.
Soldiers go to the East, soldiers go to the West.
< … >
Her memory is being formed, consolation formed.
Everyone she knows was born in this city.
At night she recalls everyone who left this place.
When there is no one left to remember, she falls asleep.[23]

In the poem, memory brings consolation and allows coming to terms with reality. But memory may also serve to document wrongdoing, to witness crime – and both these functions are equally important in the context of war. This is the latter that Czesław Miłosz wrote about: "You who wronged a simple man / < … > Do not feel safe. A poet remembers. / < … > The words and deeds shall be written down."[24] Therefore, let us analyse how poetry and law serve memory.

1. Remembering in poetry

Poetry saves us from oblivion and gives testimony. Poetry and memory are closely intertwined, and one is dependent on the other. Poetry is an attempt to stop time, to rewrite presence into a poem. Poems can remember like people and carry their difficult truths, their wounds and anxieties, resonating anew with each subsequent reading. "A poet remembers," as Miłosz wrote. The poems remain and can be a constant indictment, or an everlasting admiration for reality, fragments of which poetry includes between its lines. Memory has the power of creation, deciphering the past, arranging it in its own way – similarly, poetry treats the past as a span to its present.

It was also the poetry that recorded the experience of the most tragic moments of 20th-century history. It tried to describe the world of the "inverted apocalypse." It was often an asylum for a battered imagination looking for a form to channel its despair. What can we add to Tadeusz Borowski's verses devoted to the inhuman times of World War II and the attempt to deal with the trauma experienced? Borowski writes about the lack of exit from existential paralysis of people affected by the experience of war. He writes about a man who becomes his own caricature. Stripped of all signs, he stumbles over his own steps in a dehumanized world. He lacks orientation and morality seems like a pipe dream. Lost, he finds no respite, neither waking nor asleep:

[23] Serhiy Zhadan, "*** [She's fifteen, sells flowers at the train station]," trans. John Hennessy and Ostap Kin, accessed October 10, 2022, https://intranslation.brooklynrail.org/ukrainian/three-poems-by-serhiy-zhadan/.
[24] Czesław Miłosz, "You Who Wronged," trans. Richard Lourie, accessed October 10, 2022, https://www.poetryfoundation.org/poems/49482/you-who-wronged.

neither verse nor prose,
just a piece of rope
only wet earth –
here is the way back.
neither bread nor vodka,
only wrath and short anger,
only more and more –
this is youth and love.
neither dream nor waking,
nor laughter and fun,
only crying at night catches –
here is a knife, rope and paper.[25]

A few gestures, a few movements of the imagination. Finality as a solution to a painful existence devoid of values in times when human ideals were buried and abandoned in rubbish heaps, set with their backs to tradition and the past. Poetry remembers. At a time when evil is taking its toll, poetry becomes a realm of living memory, a space for witnessing.

2. Remembering in law

The law, too, plays a critical role in crafting collective memory. What might be less obvious, is the increasing tendency in recent decades to legally regulate the manner of remembering historical events – a phenomenon that has been named the "memory laws," laws aimed to "regulate historical discussion and collective memory."[26] The growing significance of such laws fuels claims about the rise of "mnemonic constitutionalism,"[27] which means the constitutionalisation of official interpretations of the past.

Memory laws raise serious doubts as vulnerable to political instrumentalisation and potential tools of limiting basic freedoms and censorship.[28] Still, the mnemonic role of law is not limited to this type of provisions. Every court's verdict offers an official interpretation of past events and can be seen, hence, as a measure of shaping and sanctioning memory. But the law does more: it serves also as a tool of official oblivion, of forgetting. In such institutions

[25] Tadeusz Borowski, *Wspomnienia. Wiersze. Opowiadania* [Memories. Poems. Stories] (Warszawa: PIW, 1981), 35. Trans. to English Elżbieta Olak.

[26] Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias, "Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice," in *Law and Memory: Towards Legal Governance of History*, ed. Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (Cambridge: Cambridge University Press, 2017), 1.

[27] Uladzislau Belavusau, "Final Thoughts on Mnemonic Constitutionalism," accessed February 24, 2023, https://verfassungsblog.de/final-thoughts-on-mnemonic-constitutionalism/.

[28] See Belavusau and Gliszczyńska-Grabias, "Memory Laws;" Filip Cyuńczyk, "Instrumentalization of Law in the Context of Memory Policies in Central and Eastern Europe after 1989," *Archiwum Filozofii Prawa i Filozofii Społecznej* 3 (2020).

as expiration, abolition or amnesty, the law let us forget. This aspect of law has been called "Lethe's law," from the ancient Greek goddess of oblivion.[29] Thus, one can note one more dialectical tension within the law, between two Greek goddesses: Mnemosyne and Lethe, memory and oblivion. Some facts are officially preserved in memory, some others are decided to be forgotten. The question is, who makes such decisions, in what procedure and with what criteria? These dilemmas are particularly vivid in the area of transitional justice, but they are present in the everyday operation of law as well.

V. To Rejoin

1. Joining a polyphonic

Finally, law and poetry join what is divided and establish mutualities. In the context of law, these might be conflicting interests or opposing parties. In poetry, these are often different voices and idiolects. In his analysis of affinities between law and poetry, White revokes in this context Coledrige's definition of the imagination of a poet as "the balance or reconciliation of opposite or discordant qualities."[30] White adds: "The poem comprises, brings together in one place and within one form, voices or feelings or languages < … > that are normally not placed together and among which severe tensions or contradictions can be found."[31] The same, White suggests, does the judicial opinion.

Joanna Roszak writes: "If we start to consider poems as common places of societies, the way will open to a similar view of the space of human existence: as a commonplace."[32] As will be noted below, a very similar thought has been expressed in the context of the law.[33] Poetry is the art of negotiating and uniting around common, essential issues. This is achieved also thanks to the already noted polyphony of poetry, its "many-voicedeness." Again, we find this way of thinking in Zhadan's understanding of poetry. The poet writes that one should look at the world like a paediatrician looks at children: listen to their stories with openness, and be always ready to make a diagnosis adequate to the patient's condition. Because poets, as we read in *Telephone Book of the Dead*, listen to the appropriate intonations, they are sensitive to the melody of the language, to the sound of a single phrase. They try to organize their experience in syntax, and perhaps even better: through it. Poets listen to polyphony, and their task is to hear harmony and sense in it. Poetry creates reciprocity and unites by force the phrases of those who are divided:

[29] Emilios Christodoulidis and Scott Veitch, eds., *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Oxford, Portland, OR: Hart Publishing, 2001).
[30] White, "The Judicial Opinion and the Poem," 114.
[31] Ibid.
[32] Joanna Roszak, "Poezja o wojnie. Poezja jako akt pokoju" ["Poetry about war. Poetry as an act of peace"], *Studia z Kultury Popularnej* 2 (2018–2019), 8.
[33] See Zenon Bańkowski, "The Long Goodbye: A … Life In and Out of the Law," in *The Anxiety of the Jurist: Legality, Exchange and Judgement*, ed. Cláudio Michelon and Maksymilian Del Mar (London: Routledge, 2016).

Poetry begins where
your vocabulary supply ends.
The language sticks to the voice
like civilization sticks to the rivers.[34]

The same can be repeated about the judge. Her role is also to listen to polyphonic voices and to find a harmony that leads to the right resolution of the case. The law, just as poetry, is about "bringing together" what is divided. This ability results from the formal qualities of both discussed discourses, from their very syntax. Yet these formal aspects have strong ethical implications, for what is eventually rejoined is diverging perspectives and individuals that share these perspectives. Hence, this formal quality of law and poetry has an interpersonal weight: it allows to build a *dia-logical* and *dia-lectical* relationship between persons.[35]

2. Joining a hostile

But how about perhaps the most challenging of all relations: the one with our enemies? Are poetry and law able to build bonds across such radical divisions? In the context of war, this question becomes of key importance. The answer is positive, yet with some caveats. Both poetry and law reveal their uniting force even in such an extreme case, but they do it in different manners.

One can refer here to another poem of Zhadan, "They buried their son last winter," in which the narrator talks about – and to – his former friend who died:

They buried their son last winter.
Strange weather for winter – rain, thunder.
They buried him quietly – everybody's busy.
Who did he fight for? I asked. We don't know, they say.
He fought for someone, they say, but who – who knows?
Will it change anything, they say, what's the point now?
I would have asked him myself, but now – there's no need.
And he wouldn't reply – he was buried without his head.

It's the third year of war; they're repairing the bridges.
I know so many things about you, but who'd listen?
I know, for example, the song you used to sing.
I know your sister. I always had a thing for her.
I know what you were afraid of, and why, even.

[34] Serhyi Zhadan, "Antena" ["Antenna"], trans. Bohdan Zadura (Wrocław: Warstwy, 2021), 46. Trans. to English by Bartosz Suwiński.

[35] It is to be noted that these two words: "dialogue" and "dialectics" share the same ethymology in Greek, as they are both composed out of the words *dia* and *logos*.

Who you met that winter, what you told him.
The sky gleams, full of ashes, every night now.
You always played for a neighbouring school.
But who did you fight for?

To come here every year, to weed dry grass.
To dig the earth every year – heavy, lifeless.
To see the calm after tragedy every year.
To insist you didn't shoot at us, at your people.
The birds disappear behind waves of rain.
To ask forgiveness for your sins.
But what do I know about your sins?
To beg the rain to finally stop.
It's easier for birds, who know nothing of salvation, the soul.[36]

The poem symbolically speaks about "repairing the bridges" that might be read as an illustration of the even more important process: That of "repairing" the relationship with the former friend from childhood, who allegedly became an enemy, and who now lies dead and buried. This is the fact of death – with all its ultimateness, its "calm after tragedy" – that urges to "ask forgiveness" for sins, to try healing memory and relation.

Again, one can note close bonds between the poetic imagery of Zhadan and Zbigniew Herbert, who wrote in "September 17" (the poem about the Russian invasion of Poland in 1939):

My defenseless country will admit you invader
and give you a plot of earth under a willow – and peace
so those who come after us will learn again
the most difficult art – the forgiveness of sins[37]

For both authors, poetry is thus a "pre-exercise" in forgiveness and reconciliation. Yet the price or the condition of this process is extreme: in both cases, it is the death of at least one party of the relation. Only in the face of death, forgiveness becomes an option.

The law differs here from poetry in twofold ways: first, it does not put such radical conditions to establish relations. Mutuality in law is available much easier than in poetry. This results from the second difference, in the nature of such a relationship, which does not require forgiveness or reconciliation. The law allows for establishing relations in which conflicts and differences are not necessarily lessened, but they might be even strengthened.

[36] Serhiy Zhadan, "They buried their son last winter," trans. John Hennessy and Ostap Kin, accessed January 16, 2023, https://www.poetryfoundation.org/poetrymagazine/poems/150753/they-buried-their-son-last-winter.
[37] Zbigniew Herbert, "September 17," in *Report from the Besieged City and Other Poems*.

In the context of war, to describe relations between a victim and a perpetrator in legal categories means to recognise a mutuality between them, and to claim they have something in common, without blurring the differences or false equalising. The victim remains a victim. The perpetrator remains a perpetrator. Yet, there is an overarching structure of law that binds them together – and that allows for making the perpetrator responsible. According to Zenon Bańkowski, this defines the ethical sense of law: the ability to create a "borderland" where we can encounter others – even our enemies.[38]

VI. Conclusion: Beyond Law's Regulatory Function

Are these functions enough? Does the poetry – and the law – make sense against brute force? Let us revoke two symbols that suggest the negative answer. In Ukraine, the monument of Taras Shevchenko, the most prominent Ukrainian poet of all time, has been shot in Borodianka – what may be seen as the symbolic assassination of the Ukrainian poetry. And in the first period after February 24th, Serhiy Zhadan suspended writing.

By analogy, these of us who tend to think about law sociologically, as a set of institutions, or as a means of regulating human behaviour, may be confused with a situation when these institutions fade or collapse under the pressure of military aggression. Does the law have any point if it is unable to play its regulatory functions properly, if holding the aggressors and perpetrators immediately liable for their deeds is not feasible?

As our considerations demonstrate, something important remains even in such a case: a remnant, the most rudimentary aspect of law. The one that Hans Kelsen might have in mind when he called the law an "interpretive scheme:" law as a form of discourse that helps to order human experience in a chaotic reality. Sometimes this is all we have – law as a language – but it is not an insignificant asset. As Serhiy Zhadan (so often quoted on these pages) noted:

> We are all linked by our language. Even if, at a certain moment, its capabilities seem limited or insufficient. < … > After all, what do we have in order to make our point, to express ourselves? Our language and our memory. < … > Sometimes language seems weak. Actually, though, in many cases, it is a source of energy. It can step away from you for some time, but it isn't capable of betraying you, which is what matters most. As long as we have our language, we have, at the very least, the vague chance to articulate ourselves, speak the truth, and tidy up our memories.[39]

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[38] Bańkowski, "The Long Goodbye."

[39] Serhiy Zhadan, "Speech delivered by the acceptance of the Peace Prize of the German Booktrade," accessed January 16, 2023, https://lithub.com/poetry-after-bucha-serhiy-zhadan-on-ukraine-russia-and-the-demands-war-makes-of-language/.

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Мацей Піхляк і Бартош Сувінський. "Тримається на точності." Паралелі між правом і поезією у воєнний час

Анотація. Цей есей має на меті розглянути деякі спільні моменти між правом і поезією на фоні війни. І право, і поезія розглядаються тут як особливі форми дискурсу, зі своїми унікальними формами структурування реальності та соціальними функціями, які кожна з них виконує. Стаття аналізує подібність права та поезії в обох цих аспектах. Виконуючи це завдання, вона спирається на вибрані вірші Сергія Жадана, одного з найактуальніших сучасних українських письменників, та деяких відомих польських поетів покоління після Другої світової війни.

Стаття суперечить домінантному в дослідженнях "право та література" підходу, який зосереджується на відмінностях між ними. Натомість ми демонструємо, що право і поезія мають багато спільного. Спорідненість можна знайти на формальному рівні (як обидві форми дискурсу підходять до тексту та які методи інтерпретації вони використовують), але також у їхніх етичних зобов'язаннях.

У статті детальніше обговорюються три аспекти, які роблять право і поезію схожими одне на одне: по-перше, спосіб опису реальності, який зосереджується на індивідуальному (або, точніше, на взаємодії між індивідуальним і універсальним) і шукає точності опису. По-друге, що обидва дискурси служать засобами пам'яті, як індивідуальної, так і колективної. По-третє, вони можуть встановлювати зв'язки та взаємність між різними або навіть протилежними елементами: точками зору, перспективами, окремими особами. У крайньому випадку війни вони можуть навіть пов'язувати ворогів – жертв і кривдників – без жодного помилкового зрівняння.

Аналізуючи ці різні аспекти права та поезії, стаття також ставить питання про дорегулятивні функції права. Як показано, навіть якщо право не може належним чином виконувати свою

регулятивну функцію (наприклад, через відсутність ефективної влади), найбільш рудиментарна функція права все одно залишається. Це право як форма дискурсу, яка допомагає впорядкувати людський досвід у хаотичній реальності.

Ключові слова: право і поезія; право і література; право як дискурс; закони пам'яті; індивідуальне та універсальне у праві; право і війна; поезія і війна; Сергій Жадан.

Maciej Pichlak and Bartosz Suwiński. "Based on Accuracy." The Parallels between Law and Poetry in Wartime

Abstract. This essay aims to discuss some common points between law and poetry in the face of war. Both law and poetry are regarded here as special forms of discourse, with their unique forms of structuring reality and social functions each of them plays. The paper analyses similarities of law and poetry in both these aspects. In fulfilling this task, it builds on selected poems of Serhiy Zhadan, one of the most relevant contemporary Ukrainian writers, and some renowned Polish poets from the post-World War Two generation.

The paper goes against a dominant approach in "law and literature" studies that focuses on differences between the two. The above notwithstanding, we demonstrate that law and poetry have much in common. The affinities may be found on formal level (how both forms of discourse approach the text and what methods of interpretation they employ), but also in their ethical commitments.

The paper discusses more in depth three aspects that make law and poetry similar to each other: First, the manner of describing reality, which focuses on individual (or, more precisely, the interplay between individual and universal) and searches for the accuracy of description. Secondly, that both discourses serve as media for memory, both individual and collective. Thirdly, that they can establish links and mutualities between diverging or even opposing elements: viewpoints, perspectives, individuals. In extreme case of war, they can even link enemies – victims and perpetrators – without any false equalising.

By analysing these various aspects of law and poetry, the paper poses also the question about pre-regulatory functions of law. As it demonstrates, even if the law cannot properly serve its regulatory function (e.g., due to the lack of effective power), the most rudimentary function of law still remains. This is the law as a form of discourse that helps to order human experience in a chaotic reality.

Keywords: law and poetry; law and literature; law as a discourse; memory laws; individual and universal in law; law and war; poetry and war; Serhiy Zhadan.

Одержано/Received 18.03.2023

DOI: https://doi.org/10.21564/2707-7039.1.307642
УДК 172

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ON THE MORAL WRONGNESS OF A MALE-ONLY BAN ON LEAVING ONE'S HOMELAND**

Introduction

The aim of this paper is to examine whether it is morally wrong to ban only male citizens from leaving a country in wartime, and if it is, why it is the case.

On February 24th, 2022, Russia, led by President Vladimir Putin, launched an invasion of Ukraine. On the same day, Ukraine's President Volodymyr Zelensky declared martial law and ordered a general mobilization, prohibiting male citizens aged 18 to 60 (who could be conscripted into military service) from crossing Ukraine's international border. Since then, while women, children under 18, and elderly people over 60 are allowed to cross the border to leave the country, male Ukrainian citizens of conscription age are, with a few exceptions,[1] no longer able to do so.

While many Ukrainian men and women are bravely fighting for their homeland against Russian troops, the justifiability of the ban on men of conscription age leaving Ukraine is in dispute, even among Ukrainians.[2] After Alexander Gumirov, a lawyer in Odesa, started

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** This work was supported by JSPS KAKENHI Grant Numbers JP18H00790, JP20K13298 and Inamori Foundation Research Grant (2020).

[1] Among those falling into these exceptions are men who independently raise a child under the age of 18, men on whom are dependent three or more minor children, men who care for a child with a disability or severe or rare diseases, men with disabilities, men with special work duties (e.g., drivers, railway workers, sailors, athletes, and volunteers), and so on. For all possible legal options for men aged 18 to 60 to go abroad, see "How to Go Abroad for a Man During Martial Law: All Possible Legal Options," *VisitUkraine.today*, accessed June 16, 2023, https://visitukraine.today/blog/1065/how-to-go-abroad-for-a-man-during-martial-law-all-possible-legal-options. See also "Departure of Men Abroad in 2023: What Has Changed for Military Servicemen," *VisitUkraine.today*, accessed June 16, 2023, https://visitukraine.today/blog/1385/departure-of-men-abroad-in-2023-what-has-changed-for-military-servicemen.

[2] According to a survey conducted by Human Security Lab, fewer than half (44.7%) of Ukrainians believe that men should be forced to stay in the country, whereas the rest outright oppose the travel ban (28.3%) or have an opinion "different than both options" (27%). Of those who believe that men should be forced to stay, many qualify that support by suggesting changes to the law, such as training be made mandatory and the ban be also extended to women. See "New Survey from Human Security Lab Shows Majority of Ukrainians Want

a petition to lift the ban, which gathered over 25,000 signatures,[3] President Zelensky negatively responded to it, saying: "[Should it be addressed to] those parents who [have] lost their sons < … > who sacrificed their lives to defend an oblast or a city in our country?"[4] Another lawyer, Dmytro Busanov in Kyiv, criticized the ban for violating Article 33 of the Constitution, saying that it restricts the right to freely leave Ukrainian territory without parliamentary legislation.[5] He has already taken on two cases to fight the ban and said he is even considering filing an application with the European Court of Human Rights.

These opponents of the ban have each made a case based on legal and moral dimensions. Regarding the *legal* dimension, some scholars (and Busanov) have argued that the ban violates important human rights guaranteed by international law (e.g., the right to life, the right to leave, and the right to conscientious objection).[6]

In terms of the *moral* dimension, there are several categories of argument to challenge the ban. First, from a consequentialist standpoint, it can be argued that to forcibly conscript reluctant fighters would corrupt the morale of combat units, or that it would be economically more beneficial to allow men to work abroad and send money home. The second, based on individual freedom, invokes the importance of individuals' moral right to move freely (especially when leaving one's country in wartime, where one's life and bodily integrity are under threat) and opposes the ban because it infringes on this fundamental right without compelling reasons. The third is an argument based on fairness or non-discrimination. Since the ban is addressed only to male citizens aged 18 to 60 and exempts females, it can be argued that it unfairly or wrongfully discriminates against men.

In this paper, I focus on the third argument and argue that the ban unfairly and morally wrongfully discriminates against male Ukrainian citizens on the basis of their gender. First, I define discrimination and apply it to our case. Second, moving from the descriptive definition of discrimination to its moral wrongness, I argue that the male-only ban is unfair and morally unjustified. Third, I argue that the ban can also be deemed morally wrong from one of the prominent views in the field of the ethics of discrimination; that is, the deliberative freedom view.

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to End Travel Ban," *Human Security Lab*, accessed October 25, 2022, https://www.humansecuritylab.net/news/new-survey-from-human-security-lab-shows-majority-of-ukrainians-want-to-end-travel-ban.

[3] Олександр Гуміров, "Скасувати заборону виїзду з України чоловіків віком від 18 до 60 років та запровадити приоритет призову під час мобілізації добровольців," ЕЛЕКТРОННІ ПЕТИЦІЇ: Офіційне інтернет-представництво Президента України, May 18, 2022, https://petition.president.gov.ua/petition/139292.

[4] Roman Romaniuk, "Zelenskyy: Up to 100 Ukrainian Soldiers Killed Each Day in Eastern Ukraine," *Ukraniska Pravda*, May 22, 2022, https://www.pravda.com.ua/eng/news/2022/05/22/7347852/.

[5] Paul Waldie, "Ukraine's Ban on Adult Men Leaving the Country Faces Growing Legal Challenges," *The Globe and Mail*, August 29, 2022, https://www.theglobeandmail.com/world/article-ukraines-ban-on-adult-men-leaving-the-country-faces-growing-legal/.

[6] e.g., Amy Maguire, "Why Banning Men from Leaving Ukraine Violates their Human Rights," *The Conversation*, March 8, 2022, https://theconversation.com/why-banning-men-from-leaving-ukraine-violates-their-human-rights-178411; Pia Lotta Storf, "Ukraine's Travel Ban, Gender and Human Rights," *Völkerrechtsblog*, March 18, 2022, https://voelkerrechtsblog.org/ukraines-travel-ban-gender-and-human-rights/.

I. The Concept of Discrimination

Since the ban prohibits only male citizens from leaving the country, the most natural way to challenge it would be to argue that it unfairly or morally wrongfully discriminates against them.

Although there are variations, the concept of discrimination can generally be defined as follows:

X discriminates against Y in relation to Z if and only if:

X treats Y less favorably than X treats Z; and

It is because (X believes that) Y has a property (P) and (X believes that) Z does not have P that X treats Y less favorably than Z.[7]

When we apply this definition to our case, we can argue that since the Ukrainian border guards who implement the ban (X) prevent male citizens aged 18 to 60 (Y) from crossing the border while permitting female citizens who are otherwise similarly situated (Z) to do so, and they do this because (they believe that)[8] the former have the property of being male and (they believe that) the latter do not have this property (that is, having the property of being female instead), they discriminate against these male citizens (i.e., the ban discriminates against men).

Alternatively, the concept of discrimination can be defined more narrowly by adding to the above formulation another condition that P is membership of a socially salient group; that is, a group whose membership is considered important to the structure of social interactions across a wide range of social contexts.[9] Although my sympathies lie with the broader definition, we can remain neutral in this choice, since the relevant ban can be classified as discrimination under either definition, given that one's gender is socially salient in this sense in almost all of the world's societies (including Ukraine).

II. The Unfairness and Moral Wrongness of Discrimination

Even if a particular act or rule constitutes discrimination in the sense explicated in the previous section, it does not follow that it is *morally wrongful* discrimination. The (partial)

[7] I have constructed this definition from Kasper Lippert-Rasmussen's "generic discrimination" (Kasper Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford: Oxford University Press, 2014), 15) and Benjamin Eidelson's "working definition of discrimination" (Benjamin Eidelson, *Discrimination and Disrespect* (Oxford: Oxford University Press, 2015), 17).

[8] Sometimes, the border guards do not allow female citizens to cross the border because they (mistakenly) believe that they are male. This happens especially when transgender female citizens try to cross the border and their passports or ID cards identify them as male (Enrique Anarte, "Trans and Non-Binary People Trapped in War-Torn Ukraine," *Openly*, March 4, 2022, https://www.openlynews.com/i/?id=f5cb8051-fd75-4420-a3c6-5e4e1f4ce2f7&utm_source=news-trust&utm_medium=redirect&utm_campaign=context&utm_content=article).

[9] cf. Andrew Altman, "Discrimiantion," in *The Stanford Encyclopedia of Philosophy*, ed. E. Zalta, April 20, 2020, https://plato.stanford.edu/entries/discrimination/; Lippert-Rasmussen, *Born Free and Equal?* 30, 45–46.

mobilization (under martial law) of only those who have *consented* to be servicemen (/-women) or reserves (in peacetime) does constitute discrimination against them (at least under the broader definition) in relation to those who have not consented to do so, but it is far from clear that this way of mobilizing them is morally wrong (at least as long as the country is fighting in self-defense).

One way of arguing that an instance of discrimination is morally wrong is that it is *unfair*. Although there is more than one way of defining this concept, we can safely argue that fairness has its root on Aristotle's articulation of justice, namely "To treat like cases alike and different cases differently."[10] John Broome developed this articulation further and conceptualized fairness as the requirement that "claims should be satisfied in proportion to their strength."[11] According to this notion of fairness, "equal claims require equal satisfaction <…> stronger claims require more satisfaction than weaker one, and <…> [even] weaker claims require some satisfaction <…> [so] must not simply be overridden by stronger ones."

To illustrate why fairness should be so defined, Broome gave an example of a dangerous mission, on which "[s]omeone has to be sent" but in which the person sent "will probably be killed."[12] In this scenario, "[t]he people available are similar in all respects, except that one has special talents that make her more likely than others to carry out the mission well (but no more likely to survive)." Broome contended that "[w]hile it could plausibly be thought that the right thing is simply to send this person <…> it is also very plausible that doing so would be unfair to her." This is because, he argued, "[this] talented candidate has a claim to the good of being left behind, and her claim is as strong as anyone else's."[13]

The requirement of fairness that Broome has explicated is not absolute and can be outweighed by other reasons, all things being considered. In the case of the dangerous mission above, he contended that "fairness is outweighed by expediency, so that on balance it is right to send the talented candidate <…> depend[ing] on the circumstances."[14]

Now we can go back to our case of the ban on leaving one's country in wartime. To determine whether or not the ban is fair (or nonetheless morally justified despite its unfairness), we need to examine whether those female citizens who are situated similarly to their male counterparts (yet are allowed to leave their homeland on the basis of their gender) have a stronger claim to the good of being able to evacuate such a life-and-body-threatening place and whether there are some reasons (other than those of fairness) strong enough to settle our case in favor of the ban, all things being considered.

[10] Aristotle, *Nicomachean Ethics*, trans. W. D. Ross (Raleigh, N. C.: Generic NL Freebook Publisher, 2000), book 5, chap. 3.
[11] John Broome, "Fairness," *Proceedings of the Aristotelian Society* 91, no. 1 (June 1991): 95.
[12] Ibid, 90. I focus on this example of Broome partly because this relevantly resembles our case of the ban, in that the fairness of the distribution of the good of being in safety is at issue.
[13] Ibid, 94.
[14] Ibid, 90.

1. On the moral justifiability of (male-only) conscription

Before examining the fairness and moral justifiability of the ban, we need first to consider the elements of the (male-only) conscription system of Ukraine. Since the aim of the ban can naturally be understood as to mobilize citizens who can be conscripted into military service,[15] and under Ukraine law, only male citizens are being (and have been) conscripted against their will,[16] the moral justifiability of the ban will be seriously challenged if it can be argued that male-only conscription is unfair and morally wrongful discrimination. The same will hold true if the system of conscription itself is unjustifiable in the first place, whether it is male-only or gender-neutral.

It is undeniable that the volunteer military system has important advantages over the conscription system. Given the fact that we all have different conceptions of the good, regardless of gender (for instance, some are aggressive and willing to risk their lives, while others are modest and do not like fighting), the volunteer system is respectful of individuals' autonomy, which is considered a supreme value in contemporary liberal societies.[17] In addition, given that armed forces made up of professional soldiers are better able to carry out missions than those including conscripts who have trained for less time and against their will, and that to force young citizens, who would otherwise serve in the labor force, to engage in military service for one or two years may impose a severe burden on the domestic economy, the volunteer system is efficient in terms of military effectiveness and economic development. Hence, for the conscription system to be justified, we need to provide compelling reasons strong enough to outweigh the merits of the volunteer system.

Some theorists, *inter alia*, communitarians or civic republicans, argue that the conscription system is necessary to cultivate civic virtue and encourage citizens' participation in democratic

[15] "[Ukraine's state border guard service (DPSA)] adds the measure [of banning all Ukrainian men aged between 18 to 60 from leaving the country] is aimed at 'guaranteeing Ukraine's defence and the organisation of timely mobilization."' ("Ukrainian Men Banned from Leaving Country," *BBC News*, accessed October 26, 2022, https://www.bbc.com/news/live/world-europe-60454795).

[16] In peacetime, female citizens can be accepted for military service and service in the military reserve only voluntarily, and even in wartime, only females who have (voluntarily) registered themselves and have certain specialties and/or professions related to a corresponding military specialty (and thus subject to military registration) can be legally conscripted (Law of Ukraine, March 25, 1992, No. 2232-XII, "About Military Duty and Military Service" [UA], art 1, pt 11, 12).

[17] If the respect for autonomy is all that we are concerned about, it might be argued that we need only to exempt from military duty those exercising conscientious objection, rather than abolishing conscription altogether. In principle, it may be the case. However, I suspect this will not work in our real case. First, individuals' autonomy cannot be sufficiently respected if the menu of alternative (non-military) service available to them is quite limited. Second, in Ukraine, alternative (non-military) service for those exercising conscientious objection is available only for those belonging to one of the religious groups listed by the government, and even for them, "there is … no clear provision in the legal framework concerning conscientious objection and alternative service" in times of mobilization (Caroline Morin-Terrini and Thomas Schrott ed., *Fact Finding Mission Report: Ukraine* (Fontenay-sous-Bois: French Office for the Protection of Refugees and Stateless Persons, 2017), 32–34).

society.[18] Even if this is the case, it is unclear why they think these aims cannot be attained by making them engage in *non-military* community service. Another argument is that the volunteer system is unfair because only those from disadvantaged backgrounds are forced to join the armed forces out of economic need, whereas others are not.[19] However, there are other dangerous occupations in which the disadvantaged tend to be overpopulated (e.g., firefighters and coal miners), so it is hard to understand why only military service should be compulsory for every citizen. Moreover, if the problem of "economic conscription" is about economic injustice, a more constructive way to tackle it would be to redress this injustice through social policies rather than by introducing universal conscription while leaving the underlying injustice intact.

A more promising argument for conscription is that it is needed to suppress the irresponsible belligerent impulse of citizens in democratic society. Under the volunteer military system, the argument goes, the majority of citizens can easily support wars (whose *jus at bellum* is highly suspect) while being in safety, imposing all the combat danger exclusively on professional solders, who are in a minority. We can disincentivize the majority from supporting unnecessary wars only under the conscription system, which will directly expose them to life-threatening danger if they decide to do so.[20]

While it seems true that the conscription system can exert such a disincentivizing effect on the majority citizens, there are surely other factors (e.g., geopolitical position of the country, character of majority citizens, severity of economic disparity, and the degree to which the government respects the freedom of expression) that can make a difference as to the belligerence of a nation, so it is still an open question of *to what degree* the conscription system can contribute to this overall effect compared to these other factors. Considering the fact that countries have started aggressive wars even under the conscription system (e.g., the U. S. vs. Vietnam, Israel vs. Lebanon, and Russia vs. Ukraine), this openness makes the argument highly vulnerable to manipulation.

To take the ongoing war as an example, if Russia had decided to withdraw from Ukraine only a few months after the rise of its citizens' anti-war movements following Putin's declaration of partial mobilization, the proponents of this argument would explain that it is Russia's conscription system, under which Putin could mobilize citizens, that significantly contributed to the decision. If Russia were to continue its military operations in Ukraine

[18] "Neither a professional nor a 'volunteer' army is compatible with democratic citizenship … Both armies are mercenary in character and contribute to the privatization of social life that has been corrosive to citizenship in other realms" (Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley, Los Angeles and London: University of California Press, 1984), 299).

[19] "[A volunteer army] makes [military] service a function of economic need – in reality the poor, the undereducated, and the ill-trained volunteer, certainly not freely but because they have no alternatives" (Barber, *Strong Democracy*, 299).

[20] "A professional or volunteer force can be used abroad for purposes that a conscript army might not brook (the American experience in Vietnam and the Israeli experience in Lebanon in 1982 are illustrations of conscript armies resisting unpopular wars)" (Barber, *Strong Democracy*, 299).

for one or two more years after the mobilization, I assume the proponents would argue that it is because the mobilization was only "partial" and attribute the continuation of Russian's invasion to such other factors as Putin's "dictatorship" and oppression of free speech instead of conceding that the conscription system does not significantly make a difference to countries' decisions regarding war. This kind of cherry-picking evaluation of the facts renders their thesis (i.e., the conscription system is necessary to suppress the irresponsible belligerent impulse of citizens) substantially unfalsifiable.[21] Moreover, we also need to consider that under the conscription system, the government can suppress anti-war movements by selectively calling to arms those individuals that have joined in the protests, as Russia did.

So far, I have examined the arguments for conscription, none of which I find sufficiently compelling. But even if they can show the justifiability of the conscription system *per se*, the important thing to note is that their rationales cannot be employed to justify *male-only* conscription. First, since both women and men are citizens, the cultivation of civic virtue and democratic participation cannot be invoked to justify discriminatory treatment between two genders regarding conscription. Second, if the unfairness of "economic conscription" under the volunteer system lies in the fact that only some citizen groups (e.g., the poor and the undereducated) are forced to join the armed forces, this unfairness will remain the same (or even be intensified) in the case of male-only conscription because, unlike the poor and the undereducated, who have a few occupational choices other than military service under the volunteer military system, men have to choose between military service and legal punishment under the conscription system, given that they cannot change their gender on their individual efforts.[22] Third, since women constitute (more than) half of citizens, and hawks are present in both gender groups, it is far from clear that male-only (rather than universal) conscription is sufficient to suppress the belligerent impulse of the majority, if the conscription system has such a function in the first place. Alternatively, if it suffices to suppress this impulse so that only a substantial number of citizens are being conscripted, it does not follow that male-only conscription should be adopted, because *ex hypothesi* the same aim can also be attained by, say, *female*-only conscription. Hence, for the exemption of female citizens from conscription to be justified, we need to provide independent arguments as to why this is fair or morally justifiable despite its unfairness.

2. On the moral arguments for female-only exemption from conscription

It is widely believed that since women are generally physically weaker than men, and thus unfit for combat, an unconditional exemption of female (but not male) citizens from conscription is morally justified. This argument is analogous to the one employed in Broome's

[21] See Karl Popper, *The Logic of Scientific Discovery* (London: Hutchinson, 1959), which advocated for falsifiability as a condition of a scientific theory.

[22] I already discussed the problems with the availability of alternative (non-military) service for those exercising consciousness objection in note 17, above.

dangerous mission earlier. The situation of male citizens in our conscription case corresponds to that of "the talented candidate" in Broome's dangerous mission. Since the strength of claims to the good of "being left behind" seems the same for all in both cases (because all human beings have the equal right to life and bodily integrity regardless of gender, and the unfitness for combat on the part of female citizens no more gives them a stronger claim to "the commodity of staying behind" than the lack of talent on the part of the untalented candidates does in the dangerous mission case),[23] the question before us is whether female citizens' *alleged* physical weakness (hence, unfitness for combat) can nevertheless justify their exemption from conscription, despite its unfairness.

Even setting aside that military service involves functions other than combat, this argument is flawed for the simple reason that there do exist some females who are physically strong enough to carry out combat if they are properly trained. Therefore, if the underlying concern is about drafting those fit for combat to improve military effectiveness, the appropriate response will be a gender-neutral (rather than male-only) physical examination for all. Admittedly, running such a universal examination might place a substantial burden on the national budget, but given that some European countries (e.g., Sweden and Norway) have introduced conscription for both genders, it is unclear why Ukraine cannot follow that path. After all, if we are sincerely concerned about efficiency and the economic effect of universal conscription, then what is recommended is not male-only conscription but a volunteer military system made up exclusively of professional soldiers (as I argued in the previous subsection).

Another argument for the general exemption of females from conscription focuses on their *physiological* differences from males, *inter alia*, their distinctive function to bear children. This argument may be construed as providing a reason to outweigh the requirement of fairness. Since women's menstruation and potential to take maternity leave hinder military forces' operations to a significant degree if they are conscripted, the argument goes, female-only exemption from conscription can be justified for the reason of overall military effectiveness, even though this unfitness as such does not give them a stronger claim to the good of being left behind. Alternatively, the argument may be interpreted in terms of fairness itself. Since only women bear children, and reproduction involves both physical burden and contribution to the survival of the nation (comparable to military service), it is unfair to conscript female citizens, the argument goes, because it would mean imposing on them more than their fair share of the burden of the nation's survival; that is, all citizens have the same claim to the *overall* good of being relieved from the self-sacrifice in the interest for all, and female citizens' self-sacrifice in the context of delivering the next generation gives them a stronger claim to the good of being relieved from the self-sacrifice in another context of national defense.

[23] "In the case of dangerous mission, there are reasons for giving the commodity of staying behind to the untalented candidates … [b]ut their lack of talent does not give the untalented candidates a stronger *claim* to this commodity" (John Broome, *Weighing Goods: Equality, Uncertainty and Time* (Oxford: Basil Blackwell, 1991), 195).

Construed either way, this argument is not convincing enough. As to the first interpretation, even setting aside that not all women menstruate and have the capacity to reproduce, we can still point out that some male citizens do rely on special commodities in their daily lives (e.g., those with myopia on glasses and those with asthma on inhaled steroids) just as able-bodied females on menstrual hygiene products, but (unlike the latter) are not necessarily exempt from conscription. Considering this fact, it is unclear why the military forces can accommodate only the former but not the latter without undermining overall military effectiveness. As to the second interpretation, we can argue that the alleged parallel between males' fulfillment of national defense and females' fulfillment of reproduction cannot be sustained, since female citizens are legally allowed not to bear any child (even if they are capable of doing so), whereas male citizens have a legal obligation to serve in the military under conscription. It is one thing to exempt only females who have actually given birth from (or shorten the term of) conscription; it is quite another to exempt *all* females from conscription, regardless of their *actual* contribution to reproduction.

We can come up with still more arguments for female-only exemption, such as the argument based on male dominance in military organizations. Since the armed forces are and have been designed to accommodate the interests of male citizens, and most members of the armed forces are male, female citizens will have to face inferior treatment (e.g., being targets of sexual harassment) in such a hostile environment and have little prospect of thriving if conscripted. Hence, the argument goes, the introduction of gender-neutral conscription should be postponed until the military forces are fully redesigned to be women-friendly.[24]

Even setting aside the problem that this argument totally ignores the fact that some men (e.g., sexual minorities and *unmanly* men) are also vulnerable to inferior treatment (including sexual harassment) in the masculinist environment of the military (yet not exempt from conscription because of their vulnerability), this argument is flawed for the simple reason that the problem of male dominance is present in *any* organization that has traditionally been dominated by men (e.g. parliaments, cabinets, and the executive committees of large firms), and in the case of these other organizations, we would normally argue first for the positive step of increasing the representation of women there to rectify the masculinist environment and the underlying male-centered norms. To be consistent, we should take the same attitude with regard to military organizations, and since it is possible that under our entrenched gender norms, merely encouraging women to join the armed forces might not change the situation whereby they are underrepresented, the conscription of both female and male citizens might be needed for proportional (or beyond-the-critical-mass)

[24] Here, too, we can construct two variations of the argument: one based on fairness and the other based on reasons outweighing unfairness. We might argue, for instance, that females have a stronger claim to the good of being left behind because they have a stronger need for this good; that is, they are more likely to be sexually harassed in such an environment. Alternatively, we might also argue that since females under such a hostile environment will not thrive, and hence meaningfully contribute to the overall military effectiveness, their exemption from military service is justified, despite them not having a stronger claim to the good of being left behind.

representation of women in military organizations.[25] In any case, male-only conscription cannot change the *status-quo*; worse still, it might even entrench it.

3. Fight for homeland broader than military combat (?)

So far, I have examined the moral justifiability of the (male-only) conscription system in Ukraine, upon which the male-only ban on leaving the country seems to rely. Although the arguments I have examined are not exhaustive, we can temporarily conclude that (male-only) conscription is morally unjustified until somebody provides any other argument unexamined in the previous subsections.

However, is there any other way in which the Ukraine government can justify its (male-only) ban on leaving the country? When considering this matter, it is important to keep in mind that for citizens to defend their country against invaders, it is not enough that only those engaging in combat remain in the country. Even apart from the importance of combat service support in military organizations, the success of the self-defending nation depends greatly on large-scale non-military cooperation on the part of its own citizens (e.g., removing debris, running transportation, and healing the injured), and for there to be such cooperation, at least a substantial number of citizens have to remain. Seen from this perspective, we might make better sense of why the government also applies the ban to male citizens who are unable to be mobilized (e.g., students). For all that the government has officially announced, it might be better to understand the rationale behind the ban as making citizens who are able to "fight" in this broader sense (including non-military cooperation) stay, rather than mobilizing them for purely military use.

At the same time, this way of justifying the ban makes it difficult to explain why only male citizens have to remain in their country, since the need for female-only exemption seems far less compelling in the case of non-military cooperation than military mobilization.

The mere need to suppress the number of refugees from the country does not suffice to justify this gender-based discriminatory treatment. Tatsuo Inoue, a Japanese legal philosopher, claimed:

> It is because the Ukraine government is fighting against Russian troops by introducing general mobilization, which prohibits males aged 18 to 60 from leaving the country while permitting women, children, and the elderly to flee aboard, that European countries, which had been closing their doors to refugees, have accepted so many Ukraine refugees, undertaking the risk of a new refugee crisis < … > If the Ukraine government had adopted the policy of allowing anybody who wanted to flee abroad to do so, European countries would not have opened their doors to Ukraine refugees so widely as they actually do now < … > It is not only because they would have had to avoid the excessive burden of accepting refugees but also because they are

[25] By saying this, I do not mean to argue that we should introduce universal conscription instead of the volunteer military system. What I am saying is only that if we are so concerned about the problem of male dominance in military forces, as are the proponents of the female-only exemption based on this consideration, the norm of consistency might lead us to support universal, rather than male-only, conscription.

not so generous as to support a country that unconditionally allows its own people to flee without fighting on their own against the invaders in the first place.[26]

However, if the problem concerns the overflow of refugees and the people's lack of eagerness to defend their own country, the fairest thing to do would seem to be to draw lots to decide who should stay and who can leave, since (as I have repeatedly argued) the strength of the claims to the good of being in safety seems to be the same for all, regardless of gender.[27] Hence, for the male-only ban to be justified, we still need further arguments as to why it is fair or morally justified (despite its unfairness).

4. On the moral arguments for female-only exemption from the ban on leaving the country

The most natural response to the question I have posed seems to be that women, whether civilians or combatants, are much more vulnerable to sexual assault (e.g., rape) than men if captured by enemy troops, so that their claim to the good of being in safety is by far stronger than that of men. Indeed, this argument seems to be in line with the requirement of special protection for women prescribed in the Geneva Conventions and Protocol I.[28]

For all its initial appeal, this argument is not without problems. Even setting aside that men too can be victims of sexual assault in war (as we saw in Abu Ghraib prison in Iraq, where US soldiers, including female ones, inflicted electric shocks on male prisoners' genitals),[29] this argument pays little attention to the possibility that male rather than female civilians are more likely to be killed by enemies if captivated. Adam Jones, citing the examples of Kosovo, East Timor, and so on, pointed out that male civilians (especially of "battle age") are and have been most targeted for mass-killing in war.[30] Indeed, as we have recently witnessed, "[o]f the 458 people killed during Russia's occupation of the Kyiv suburb of Bucha last March, 366 were men."[31] As killing is generally considered worse than sexual assault

[26] Tatsuo Inoue, *Ukuraina-senso to Mukiau: Putin toiu "Akumu" no Jisso to Kyokun* (Tokyo: Shinzansha Publisher, 2022), 240–41.

[27] Broome argued that if the strength of the claims to the relevant good is equal, yet the good to be distributed is indivisible (e.g., the claims cannot be equally satisfied), fairness would require holding a lottery because by doing this, "[e]ach person can be given a sort of surrogate satisfaction [that is, an equal *chance* of getting the good]" (Broome, "Fairness," 97–98). Indeed, Inoue himself conceded that "it is a separate question to be considered whether or not the criteria employed by the Ukraine government in deciding whom to give permission to flee abroad is fair enough" (Inoue, *Ukuraina-senso to Mukiau*, 254, n. 31).

[28] The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 11 August 1949, entered into force 21 October 1950) 75 UNTS 5 (Fourth Geneva Convention) art 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I) art 76.

[29] This example is cited from David Benatar, *The Second Sexism: Discrimination against Men and Boys* (Malden, MA and Oxford: Wiley-Blackwell, 2012), 118.

[30] Adam Jones, "Gendercide and Genocide," *Journal of Genocide Research* 2, no. 2 (June 2000): 185ff.

[31] Waldie, "Ukraine's Ban on Adult Men Leaving the Country Faces Growing Legal Challenges."

(including rape), since almost all liberal democracies maintain more severe statutory punishment against the former than the latter, it is far from evident that females have a stronger claim to the good of being in safety than males do in war.

Alternatively, we might conceive of an argument based on womens' role as caregivers. Since women are primary forces of caring for the dependent (e.g., children, the elderly, and the disabled), and these vulnerable people have special needs to be in safety in wartime, the argument goes, the female-only exemption from the ban is justified by their special role of accompanying and looking after dependents in safety.[32]

While the rationale behind this argument may intelligibly explain why male citizens who are the primary caregivers (e.g., single fathers or fathers of three or more children or a disabled child) are also exempt from the ban, the ban is obviously both over-and-under inclusive if it is wholeheartedly to commit itself to this justificatory claim; that is, it is overinclusive in that female citizens who have no dependent are allowed to leave the country, and it is underinclusive in that male citizens who are primarily (or exclusively) caring for their two children, and whose wives are full-time breadwinners and too busy to share caregiving, are made to stay under the ban. Since it seems not impossible for border guards to confirm the family status of every individual citizen who tries to cross the border from the relevant documents (as they do now in the case of only male citizens), if the Ukraine government nonetheless sticks to the current ban based on gender, overlooking its evident over-and-under-inclusiveness, I suspect the true motivation behind the female-only exemption is not the safety of the dependent but the uncritical endorsement of the traditional norms of the gender division of labor.

Earlier, I pointed out that males are more likely to be killed in war even if they are unarmed civilians, casting doubt on the argument that females have a stronger claim to the good of being in safety. However, conceding this point, one might argue that the prioritization of women for evacuation abroad is still justified for the reason of the survival of the whole nation, which is quite analogous to that of the conservation of species. Since "an individual man can father thousands of children if there were fertile women to gestate them, whereas an individual woman can produce only one child per year or so," one might argue, "too many fatalities of women [but not men] of reproductive years would inhibit a society's ability to produce a new generation and thus threaten its own survival."[33]

[32] Here, too, this argument can be based either on fairness or reasons outweighing unfairness. One might argue, for instance, that since women are burdened with the care for the dependent, and caregiving needs to be done in safety, they have a stronger claim to the good of being in safety. Alternatively, one might argue that, since the safety of the dependent (especially of children) is vital for the survival of the whole nation, and women who primarily care for the dependent can contribute to this aim by being allowed to flee aboard with the dependent, their special exemption from the ban can be justified even if they, *qua* being female, do not have a stronger claim to this good than their male counterparts.

[33] Benatar, *The Second Sexism*, 79. Benatar said that this can be attributed to Tom Digby's following argument: "If we send the women off to war and some get killed, it has a far greater impact on our ability to produce more babies than if the same number of men had been killed. Thus, societies that

Even apart from the fear that this argument might be a dangerous slippery slope toward eugenics, I find it problematic because it seems to earn its intuitive appeal by obscuring what is meant by "the survival of the whole 'nation' or 'a new generation.'" If proponents of this argument assume the "nation" to be a pure-blooded community, and members of "a new generation" are born exclusively from Ukrainian parents, the argument might be employed to prioritize women in evacuation. However, if we include those born from "international" sexual intercourse in the members of "a new generation," then the prioritization of *male* rather than female citizens in evacuation might be derived from the very same rationale of this argument, since Ukrainian males, if fleeing abroad, will be able to make more Ukrainian children (through intercourse with foreign women) than their female counterparts will (through intercourse with foreign men) in a same period, since the citizenship law of Ukraine basically maintains the principle of *jus sanguinis*, in which children automatically acquire citizenship at birth if at least one parent, whether mother or father, is a Ukrainian.[34] Either way, the argument will fail because the former will lose its intuitive attractiveness once its chauvinistic implications are brought into light and the latter can lead to self-refutation.

III. An Additional Argument on the Moral Wrongness of Discrimination: Deliberative Freedom

Sophia Moreau recently constructed a novel view on the moral wrongness of discrimination. In the field of the ethics of discrimination, theories of discrimination that locate the unfairness or moral wrongness in demeaning or lowering of the social status of the discriminated have been in the dominant position.[35] Against these theories, Moreau argued that the unfairness and moral wrongness of all instances of discrimination cannot be fully explained.[36] To show this, she gave an example of a grocery store that channels female job applicants into positions as cashiers and male counterparts into positions in the stockroom. Since neither position is regarded as inherently superior to the other, she claimed our objection to this arrangement cannot be that "the women are being demeaned relative to men or [*vice versa*], or that the policy perpetuates a lower status for either men or women." Rather, what is wrong with this arrangement seems to be stereotyping "that unfairly

have faced circumstances requiring them to insure efficient reproduction, and that would include war, have deemed men the disposable sex, comparatively, so they get assigned to combat" (Tom Digby, "Male Trouble: Are Men Victims of Sexism?" *Social Theory and Practice* 29, no. 2 [April 2003]: 256). To be fair to him, I should add that Digby only meant to provide a *descriptive* explanation about why men are and have been assigned to combat *as a matter of fact*, rather than a *normative* argument as to why they *should* be.

[34] Law of Ukraine, January 18, 2001, No. 2235-III, "About Citizenship of Ukraine" (UA), art 7.

[35] The most representative among these theories are those of Owen Fiss, "Groups and the Equal Protection Clause," *Philosophy and Public Affairs* 5, no. 2 (Winter 1976): 107–77 and Deborah Hellman, *When Is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008).

[36] Sophia Moreau, "Discrimination and Freedom," in *The Routledge Handbook of the Ethics of Discrimination*, ed. Kasper Lippert-Rasmussen (London and New York: Routledge, 2018), 166.

restrict[s] their freedom: women have no choice of becoming or envisioning themselves as strong enough to work in a stocking room, and men have no choice of being seen as anything other than their muscles."

As an alternative to these theories, she proposed a theory of morally wrongful discrimination based on the infringement of the right to "deliberative freedom." Deliberative freedom is "the freedom to deliberate about one's life, and to decide what to do in light of those deliberations, without having to treat certain personal traits (or other people's assumptions about them) as costs, and without having to live one's life with these traits always before one's eyes."[37] Indeed, the wrongness of the policy in the example of the grocery store can be easily explained from the perspective of deliberative freedom. In this case, both female and male applicants have their deliberative freedom infringed by this arrangement; that is, the former has to treat the employers' assumptions about femaleness (that is, being weak and unfit for muscular labor) as costs, and the latter has to treat their assumptions about maleness (that is, "men need to be strong") as costs, when looking for jobs.

At the same time, Moreau denies that any infringement of one's deliberative freedom constitutes unfair and morally wrongful discrimination. For it to be wrongful discrimination, one needs one's *right* to deliberative freedom to be infringed by the relevant act.[38] Whether a person has a right to a certain deliberative freedom in a particular circumstance is determined by more than one consideration. However, the most fundamental among them is, Moreau claimed, whether the infringement of this particular freedom amounts to failing to respect the person as a being who is equally capable of autonomy. When assessing if someone has the right to a certain deliberative freedom, she continued, the idea of respecting someone as a person capable of autonomy points us in the direction of a number of relevant considerations:

> One of the most important of these considerations are whether the costs that a discriminatee is being asked to bear reflect her own personal choices, or whether they reflect other people's assumptions about who she is and what roles she ought to occupy <…> But <…> it also depends on how extensive and pervasive those costs are; whether they affect goals or choices that are particularly important to the discriminatee's own conception of herself and of her life; and whether most people in the discriminatee's society, too, face the kind of deliberative burden that she is facing.[39]

The interests of other people who are affected by a particular practice are also relevant considerations.[40]

When applied to our case, it is obviously true that the ban does infringe on the deliberative freedom of male citizens because, by its presence, they have to bear the costs of their society's

[37] Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford: Oxford University Press, 2020), 84. This idea of deliberative freedom was originally developed in Sophia Moreau, "What Is Discrimination?" *Philosophy and Public Affairs* 38, no. 2 (Spring 2010): 148–49.
[38] Moreau, *Faces of Inequality*, 88–89.
[39] Ibid, 90.
[40] Ibid, 91–92.

assumptions about maleness (that is, "men should fight") when deliberating on whether to stay or leave the country in wartime. The question is whether they have a *right* to this particular deliberative freedom – that is, a right to be free from treating their society's assumptions about maleness as costs when deliberating whether to stay or leave. Does the ban fail to treat them as beings equally capable of autonomy, given the interests of others affected by the government's decision concerning it?

My answer to this question is "probably yes." First, since the costs on the part of male citizens reflect not their own personal choices (after all, we have not chosen our gender) but the assumptions of other people in the same society (including female citizens) about how men should behave in wartime, it does not seem fair to ask them to bear these costs. Second, these costs of having to take into consideration other people's assumptions about maleness when determining whether to stay or leave the country significantly impede the goals and choices of males whose conceptions of themselves and of their lives are not adaptable to the traditional gender norms (e.g., sexual minorities and *unmanly* men). Third, it is only male citizens aged 18 to 60 who are facing the relevant kind of burden imposed by the ban. Although the ban may also negatively affect the deliberative freedom of female citizens, since assumptions about how men should behave based on gender norms indirectly construct those about how women should, it is not the case at least that everyone in Ukraine must bear the burden to *equal* degrees.

As to the interests of other people, it might be argued that female citizens' more important deliberative freedom will be infringed if the ban is extended equally to them, since they will have to take their gender (being more likely to be sexually assaulted) as a cost when staying in the country. However, if I am right in arguing that women do not necessarily have a stronger claim to the good of being in safety *qua* being women (since in the case of mass killing, it might be men who are more likely to be targeted), it is unclear if the importance of this kind of deliberative freedom on the part of female citizens can outweigh that on the part of male counterparts infringed by the male-only ban. It might also be argued that the interests of female caregivers and their dependents will be infringed by the gender-neutral ban, but if this is all we are concerned about, the appropriate response would be to introduce a *gender-neutral* exemption for any citizen who has dependents to care for.

Alternatively, if we opt for lifting the male-only ban, it might be argued that the interests of Ukrainians as a whole would be infringed because no one would stay to fight for the country against Russia's invasion. I find this argument unconvincing, however, considering that a substantive number of Ukrainian citizens have already volunteered for military service and tens of thousands of Ukrainian military-age males who had lived abroad have returned to the country "to defend sovereignty and territorial integrity."[41] Overall, since the impact

[41] Irina Chevtayeva, "How Men Try to Get Around the Ban to Leave Ukraine," *DW*, July 19, 2022, https://www.dw.com/en/how-ukrainian-men-try-to-get-around-the-ban-to-leave-the-country/a-62529639. [Update: Since the acceptance decision of this paper on May 30, 2023, the situation of war has changed drastically, and Ukraine is now facing a shortage of soldiers who are willing to fight against Russian

of the ban on the deliberative freedom of male citizens is quite substantial in a way that reflects little choice on the part of them and burdens them unequally compared to others, while the interests of others are not compelling enough, I conclude that the ban infringes male citizens' *right* to be free from treating their society's assumptions about maleness as costs when deliberating on whether to stay or leave, thereby constituting morally wrongful discrimination against them.

Conclusion

In this paper, I have examined the moral wrongness of Ukraine's male-only ban on leaving the country and concluded that it unfairly and morally wrongfully discriminates against male citizens on the basis of their gender.

Before closing, I wish to make three remarks on the scope and implications of the arguments in this paper. First, since the focus has been on differential treatment based on gender, rather than on the ban on leaving *per se*, the arguments made in this paper are basically neutral regarding how the Ukraine government should rectify this morally wrongful discrimination. It might be that it should immediately lift the ban on male citizens altogether. It might be that it should extend the same ban on female citizens similarly situated.[42] Alternatively, there might be a third or intermediate way.[43] This is a question worthy of further examination.

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troops. That having been said, I still find it unnecessary to change my position on this point. First, it seems to me that the Ukraine government still has the options for increasing volunteers such as raising salaries of the soldiers, promising them the discharge from military service after the definitive period (e.g., one or two years), and so on. Second and more importantly, if there is not a sufficient number of citizens who will voluntarily stay and fight for their homeland when allowed to leave, I think this very fact can be construed as the manifestation of their collective unwillingness to continue fighting against the invasion by risking their lives and limbs (the unwillingness which reflects the uncoerced and autonomous decisions of individuals), thereby seriously undermining the claim that they have collective interests in protecting the country in the first place.]

[42] At the time of writing, there is no similar ban on female citizens as far as I know. Women who have (voluntarily) registered themselves can legally be conscripted into military service, thus being liable to be subjected to the same ban. However, Hanna Malyar, the Deputy Minister of Defense of Ukraine, announced, on July 4th, that there is no need to mobilize them ("немає потреби в примусовій мобілізації жінок – Міноборони," *Слово і Діло*, accessed October 26, 2022, https://www.slovoidilo.ua/2022/07/04/novyna/bezpeka/zsu-nemaye-potreby-prymusovij-mobilizacziyi-zhinok-minoborony). Only women with certain specialties and/or professions related to a corresponding military specialty can legally be subject to registration (Law of Ukraine, March 25, 1992, No. 2232-XII, "About Military Duty and Military Service" [UA], art 1, pt 11), but since this mandatory military registration has been postponed until October 1st, 2023, for the time being, the registration of female citizens is "exclusively voluntary" ("Departure of Women Abroad from October 1: The Final Decision of the Ministry of Defense of Ukraine," *VisitUkraine.today*, accessed June 16, 2023, https://visitukraine.today/blog/808/departure-of-women-abroad-from-october-1-the-final-decision-of-the-ministry-of-defense-of-ukraine).

[43] Viktor Andrusiv, the adviser to the head of the Ministry of Internal Affairs of Ukraine, once proposed that male citizens be able to travel abroad freely provided that they have paid "an insurance premium" of between 3000 and 5000 dollars ("The Ministry of Internal Affairs of Ukraine Proposes to Allow Men

Second, my arguments in this paper have focused exclusively on the *moral* wrongness of the relevant ban, and therefore said nothing about the duty to obey even immoral laws, which has been one of the major questions in the field of legal philosophy. This is highly relevant in our context, as the martial law and general mobilization were declared and ordered by President Zelensky and approved by a majority of parliamentarians, all democratically elected by the people. Do male Ukrainians have a moral duty to obey the ban even if it morally wrongfully discriminates against them? If some of them try to leave the country illegally under the conviction that it is morally wrongful gender discrimination, can this act be justified as civil disobedience? These are questions we need to reflect upon.

Third, all my arguments in this paper can be applied to *any* country introducing gender-based bans on leaving in wartime. As we already know, Putin ordered partial mobilization on September 21, 2022 and began to conscript (male) reservists against their will. On April 14 of this year, he even signed "a law that makes electronic military summonses equivalent to those delivered on paper. <…> After a summons is considered delivered, the eligible party will be barred from leaving the country until they appear at a military enlistment office."[44] If Russia is to implement this ban on leaving, all that I have argued against the ban in Ukraine could be equally applied to it. In any case, nothing in my criticism concerning the Ukraine government in this paper diminishes the far greater evil on the part of Russia, which has initiated an unjustified war of aggression and targeted unarmed civilians, whether females or males.

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to Travel Abroad in Exchange for an 'Insurance Fee,'" *Top War*, accessed October 23, 2022, https://en.topwar.ru/197024-na-ukraine-predlagajut-razreshit-muzhchinam-vyezd-za-rubezh-v-obmen-na-strahovoj-vznos.html). Although this proposal is not perfect from the standpoint of nondiscrimination, since female citizens are free from such requirement for permission to leave, it might be a lesser evil than the current total ban on males if it is now politically infeasible to lift the ban altogether.

[44] "Putin Signs Law on Electronic Summonses and Restrictions on 'Dodgers'," *Meduza*, accessed on June 16, 2023, https://meduza.io/en/news/2023/04/14/putin-signs-law-on-electronic-summonses-and-restrictions-on-dodgers.

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Yuichiro Mori. On the Moral Wrongness of a Male-only Ban on Leaving One's Homeland

Abstract. The aim of this paper is to examine whether it is morally wrong to ban only male citizens from leaving a country in wartime, and if it is, why it is the case. Following Russia's invasion of Ukraine, President Volodymyr Zelensky declared martial law and ordered general mobilization, at the same time prohibiting male citizens aged 18 to 60 from crossing the border. The justifiability of the ban is in dispute, and opponents have made a case in both legal and moral dimensions. In the moral dimension, there are arguments based on consequentialism, individual freedom, and fairness or non-discrimination. In this paper, I focus on the third argument and argue that the ban unfairly and morally wrongfully discriminates against male Ukraine citizens on the basis of their gender. First, I define discrimination and apply it to our case. Second, moving from the descriptive definition of discrimination to its moral wrongness, I argue that the male-only ban is unfair and morally unjustified. Third, I argue that the ban can also be deemed morally wrong from one of the prominent views in the field of the ethics of discrimination, namely the deliberative freedom view.

Keywords: war; ban on leaving the country; gender; discrimination; fairness; conscription; deliberative freedom.

Юічіро Морі. Про моральну неправильність заборони залишати батьківщину лише для чоловіків

Анотація. Метою цієї роботи є вивчення того, чи є морально неправильним забороняти лише громадянам чоловічої статі залишати країну у воєнний час, і якщо це так, то чому це так. Після вторгнення Росії в Україну президент Володимир Зеленський оголосив воєнний стан

і наказав провести загальну мобілізацію, одночасно заборонивши перетинати кордон громадянам чоловічої статі віком від 18 до 60 років. Обґрунтованість заборони оскаржується, і опоненти висунули аргументи як у юридичному, так і в моральному вимірах. У моральному вимірі існують аргументи, засновані на консеквенціалізмі, індивідуальній свободі та справедливості або недискримінації. У цій статті я зосереджуюся на третьому аргументі і стверджую, що заборона несправедливо та морально неправильно дискримінує громадян України чоловічої статі за ознакою їхньої статі. По-перше, я визначаю дискримінацію і застосовую її до нашого випадку. По-друге, переходячи від описового визначення дискримінації до її моральної неправильності, я стверджую, що заборона лише для чоловіків є несправедливою та морально невиправданою. По-третє, я стверджую, що заборона також може бути визнана морально неправильною з точки зору однієї з визначних ідей у сфері етики дискримінації, а саме дорадчого погляду на свободу.

Ключові слова: війна; заборона на виїзд з країни; стать; дискримінація; справедливість; призов на військову службу; дорадча свобода.

Одержано/Received 30.05.2023

ІНФОРМАЦІЯ ДЛЯ АВТОРІВ

Редколегія приймає до розгляду статті, переклади, рецензії, огляди, інформацію про події у царині філософії права та загальної теорії права.

Статті мають містити наукову новизну, враховувати провідні сучасні публікації з відповідної проблематики й історію її розгляду, відповідати науковому профілю журналу. З тексту має бути зрозуміло, яку проблему поставлено, якою є мета статті та які висновки з поставленої проблеми зроблено.

Рішення щодо можливості прийняття до друку здійснюється за результатами "подвійного сліпого" рецензування.

Передрук опублікованих матеріалів журналу здійснюється тільки з дозволу автора і редакції.

Підготовка та подання рукопису

Рукопис подається українською або англійською мовами.

Рукопис повинен містити:

1) інформацію про автора українською та англійською мовами (прізвище, ім'я, по батькові, науковий ступінь, учене звання, місце основної роботи, посада, поштова адреса, електронна адреса, номер телефону, ORCID ID);

2) основний текст статті;

3) бібліографію;

4) ім'я та прізвище автора, назву статті, анотацію та ключові слова (5–10 слів) двома мовами (українська, англійська).

Уся інформація повинна міститись в одному файлі у форматі .doc або .docx. Назва файлу має складатися з прізвища автора та перших 3–4 слів назви.

Рекомендований обсяг рукопису – від 20 до 40 тис. знаків (за погодженням з редакцією – до 60 тис. знаків).

Якщо у статті виокремлено тематичні розділи (бажано), то слід застосовувати нумерування римськими цифрами.

Поля – 2 см, відступ від лівого краю – 0,5 см, шрифт *Times New Roman*, розмір шрифту 14, міжрядковий інтервал – 1,5. Бібліографія та анотації подаються шрифтом 12, міжрядковий інтервал – 1,0.

Матеріали подаються електронною поштою philosophyoflawjournal@gmail.com.

Написання анотації

Публікація супроводжується анотацією українською та англійською мовами обсягом не менш як 1800 знаків, включаючи ключові слова. З тексту анотації має бути зрозуміло, яку проблему поставлено, у чому полягає особливість дослідницького

підходу, які висновки зроблено та в чому полягає їх наукова новизна. Анотація до полемічної статті має містити опис полемічних позицій.

Оформлення бібліографії

Бібліографію необхідно розміщувати після тексту статті та складати згідно з *Чикаго стиль: виноски та бібліографія (Chicago style: notes and bibliography)*. Див. https://www.chicagomanualofstyle.org/tools_citationguide/citation-guide-1.html. Джерела розміщуються за алфавітом. Назви журналів скорочувати не потрібно. Список використаний джерел має бути надрукований з виступом 0,5 см. Бібліографія подається латиницею. Опис кириличних джерел необхідно перекласти англійською та зазначити мову оригіналу. Назви періодичних видань та видавництв не перекладаються, а транслітеруються. Наприклад:

Sartre, Jean-Paul. *Being and Nothingness*: *An Essay on Phenomenological Ontology*. [In Ukrainian.] Kyiv: Osnovy, 2001.

Назви джерел мовами, які використовують латиницю, на англійську не перекладаються. Після списку джерел латиницею подається той самий список мовами оригіналу.

Правила цитування й посилання на джерела

У тексті статті мають бути дотримані загальні правила цитування й посилання на використані джерела згідно з *Чикаго стиль: виноски та бібліографія*. Посилання на нормативні акти та судові справи подаються згідно з міжнародним стилем цитування та посилання в наукових роботах *Оскола стиль* (*OSCOLA Style*). Див. https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf (с. 13–32).

Необхідно використовувати підрядкові бібліографічні посилання, які подаються мовою оригіналу. Під час нумерування підрядкових бібліографічних посилань потрібно застосовувати наскрізне нумерування в межах усієї статті арабськими цифрами. Підрядкові бібліографічні посилання повинні бути надруковані з вирівнюванням по ширині; шрифт *Times New Roman*, розмір шрифту – 10, міжрядковий інтервал – 1,0.

Для виділення в тексті цитат використовуються лапки "…". Якщо в цитованому тексті, узятому у лапки, є інші цитування та інші слова або вислови, що мають уживатися в лапках, доцільно використовувати різні лапки – зовнішні "…" і внутрішні '…' Цитата, яка складається з п'яти і більше рядків тексту (блокова цитата), подається в тексті з нового рядка 12 шрифтом з абзацним відступом зліва для всієї цитати і не береться в лапки. Перед блоковою цитатою та після неї йде один рядок відступу.

Якщо автор статті, наводячи цитату, виділяє у ній деякі слова, робиться спеціальне застереження, напр.: (курсив мій. – *С. І.*).

Свідоцтво про державну реєстрацію друкованого засобу масової інформації
серія КВ № 23923-13763 Р від 03.04.2019

Підписано до друку 12.12.2023.
Формат 70×100/16. Папір офсетний. Гарнітура Arno Pro.
Ум. друк. арк. 10,6. Обл.-вид. арк. 9. Тираж 100 прим.

Видавець – видавництво "Право"
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серія ДК No 4219 від 01.12.2011

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