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IS LAW POSSIBLE DURING THE WAR? SPECIFICITY OF THE CORPOREAL EXPERIENCE

abstract

In the theory and philosophy of law, war is often considered as a legal remedy. For example, according to H. Kelsen, war is a sanction of international law. These sanctions, like sanctions in national law, consist in the forcible deprivation of life, liberty, and other goods, notably of economic value. In war, human beings are killed, maimed, imprisoned, and national or private property is destroyed. By way of reprisals, national or private property is confiscated and other legal rights are infringed. At the same time, it seems clear that the human experience in conditions such as suffering, pain, and death, has nothing in common with law. The decision of a sovereign state to start a war means a rejection to recognize both the norm of law as well as the generalized Other. Then, despite all the norms and guarantees of international law, the living experience of human beings during war is an experience of lawlessness, because they are harmed and at the same time not even recognized as legal subjects. Therefore, in order to answer the question about whether law is possible during war, we have to clarify in what way law exists outside the traditional norms of law, whether positive or natural.

keywords

law, war, liminality, recognition, modality, locality, subjectivity

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1. Introduction

The Russian invasion of Ukraine is one of the greatest challenges to the world order since the Second World War. It is not only a military challenge, but also a political, economic, cultural, as well as a legal one. The aggressive war that Russia began without any legal presupposition highlights great uncertainties around international law in its current form. Does any international law exist for countries with nuclear weapons? Or does it simply consist of a couple of non-binding recommendations which are not valid for these countries? It seems that in such circumstances we can speak about two different kinds of international law – one for countries with nuclear weapons and another for everyone else.

The situation described above gives rise to no fewer questions around law and legal order inside national borders. Does any positive, customary, or natural law exist during war, when neither life, nor property or civil rights are granted by state power or legal order? What law is valid in the occupied territories when the public order of aggressor state "overrules" the public order of the occupied country? And what are the rights and legal duties for non-combatants during air bombardment or shelling, when life, property, or freedom can be taken away by the will of unknown combatants without any valid restrictions? It seems that the wisdom of the ancient Latin phrase "silent leges inter arma" is much more relevant than any progressive norms of international law. That is why the question concerning the possibility of the existence of law during war is the topic of this article. To obtain a reasonable answer, we have to clarify why the metaphysical conceptions of law (both positivists and non-positivists) become questionable due to war (II). After that we can see which representations of law are much more relevant to the reasoning supporting the existence of law (III) and move on to the conditions of the corporeal experience as an embodiment of law during war (IV). The final conclusions will concern the possibility of law in this kind of situation (V).

2. War as a legal remedy? Myths about the continuous existence of law

It seems that since Aristotle till Heidegger philosophy and metaphysics are so close. As we know, metaphysics is based on the distinction between natural (physical) and supernatural[1] (metaphysical) world (Heidegger, 1991, p. 10). In the epistemological perspective the same distinction transforms into the difference of *a priori* (transcendental-logical) and *a posteriori* (empirical) cognition (Kant, 1998, p. 136). In other words, the subjects of the latter are *phenomenons* (natural, empirical entity) and the subjects of the former are *noumenons*

1 *Übersinnliche* (Germ.)

(supernatural, transcendental or transcendent entity) (Kant, 1998, pp. 338-353). The aforementioned situation was changed by Heidegger (2000), who "accused" the metaphysics in the "forgetfulness of Being" and declared the "ontological difference" and "Being-historical thinking" as the way to overcome metaphysics in the philosophy (pp. 67-98).

In the philosophy of law the named "metaphysical distinction" of the natural and supernatural world turns into the "deontological difference" between "*Sein und Sollen*" – Being[2] and Ought. The latter is a legal order, which is established on the transcendental or transcendent presuppositions. The former is our everydayness as ordinary Being-with-one-another (Mitsein). Both mainstream trends of legal philosophy – natural law philosophy as well as legal positivism – are based on this dichotomy. The difference is that the natural law philosophers consider as Ought the eternal laws of nature, morality, or reason, while the positive law (legislation) is a Being as a social fact. For example, in order to be the "true law", law as a social fact presupposes the ideal dimension of a moral correctness.[3] In their turn, legal positivists proclaim that law as Ought is localized in the norms of legislation and designate as Being the rest of the social facts. But despite the aforementioned difference it seems that both branches of legal philosophy coincide in the fact that they consider that a law exists as a "metaphysical Ought": as a transcendental category of law (in legal positivism) or as a transcendent idea of law (in natural law philosophy).

At first sight the aforementioned statement is relevant only for the theory of natural law, because legal positivists reject metaphysical presuppositions. As H. Kelsen (2002) said, "traditional theory even today is under the influence of conservative natural law theory, with, as mentioned above, its transcendent concept of law. This concept corresponds completely to the metaphysical character of philosophy during the period in which natural law theory prevailed..." (p. 21). Such an impression becomes even stronger, when we read the next fragment on the same page: "to be sure, the law is no longer presupposed as an eternal and absolute category; its content is recognized as subject to historical change, and the law itself, as positive law, is recognized as a phenomenon conditioned by temporal and spatial factors" (Kelsen, 2002, p. 21).

So, the positive law is a *phenomenon* and belongs to the empirical sphere of space and time. The idea of an unchangeable and eternal Being of law is strictly denied. It seems reasonable to expect, then, that in such case law has to be a subject of empirical, *a posteriori* knowledge. However, for Hans Kelsen (2002) "the 'ought' designates a relative *a priori* category for comprehending empirical legal data" (pp. 24-25). Doesn't it look like an "original metaphysics", to explain the empirical facts through the transcendental category? But nevertheless H. Kelsen (2002) underlines, that "the Pure Theory of law is the theory of legal positivism" (p. 36).

Indeed it is not a matter of a simple logical contradiction, but rather of the ambiguity of the methodological foundations of legal positivism. As we know, H. Kelsen has declared himself as legal positivist and neo-Kantian at the same time. He considers law as a normative order, as a system of norms that regulates the behavior of men (Kelsen, 2005, p. 193). Such a view presupposes the reason for the validity of such a normative system. But "the reason for

2 The so-called "deontological difference" designates the crucial feature of legal metaphysics – the opposition between "Sein und Sollen". It's possible to translate in English "Sollen" as "Ought", but there is a problem to translate in English "Sein". English doesn't have any appropriate noun and the possible variants are "existence" or "Being". As it seems to me, "existence" refers much to the human existence (ek-sistence, in Heidegger's term). This is why I prefer "Being" (from the capital letter), to distinguish it from "being" or "entity" as equivalent of German "Seiende."

3 The similar point of view is maintained by one of the most well-known contemporary legal non-positivists R. Alexy (2019, pp. 42-51).

the validity of a norm cannot be a fact. ... The reason for the validity of a norm can only be the validity of another norm" (Kelsen, 2005, p. 193) and so on. So, to avoid an endless regress in the chain of norms Kelsen has to add metaphysical normative foundation to his legal-positivistic constructions. That is why he added his positivistic interpretation of law by the transcendental-logical presupposition of the basic norm. As he said "the basic norm is the common source for the validity of all norms that belong to the same order – it is their common reason of validity" (Kelsen, 2005, p. 195). This basic norm of a legal order is not a material or positive norm, but rather a presupposed norm; unlike the norms of positive law (phenomena), it has no spatial-temporal existence. The existence of the basic norm is the eternal and unchangeable existence of a noumenon just like the Being of natural law. More exactly, basic norm is transcendental-logical presupposition of the interpretation of each positive legal order as valid (Kelsen, 2005, pp. 201-202).

The metaphysical presuppositions described above change the whole Being of positive law. Instead of being a relative spatial-temporal *phenomenon* it turns into the transcendental *noumenon.* In other words, the Being (validity, "oughtness") of the positive law cannot be even "broken" or "violated", like the Being of the natural law or laws of mathematics. As Kelsen (2005) said

> Such words as 'illegality', 'breaking' or 'violating' the law, express the thought of a negation of the law; they give the idea of something, that is outside the law and directed against it, threatening, interrupting or even abolishing the existence of law. This idea is misleading; ...The existence or validity of a norm commanding a certain behavior is not "broken" by the opposite behavior – in the way that a chain that fetters a man might be broken. The chain of law fetters even the man who "breaks" the law; the norm is not "violated" like a human being can instead be "violated" (that means, injured in his existence) by an enforcement action, directed against him. If a normative order commands a certain behavior merely by attaching the sanction to its opposite, then the essential facts are exhaustively described by a conditional statement that says: "if a certain behavior is present, then a certain sanction ought to be executed." In this statement the delict appears as the condition, not as the negation of the law; and this shows that the delict is not a fact that lies outside – much less in opposition to – the law, but a fact inside the law and determined by it – it shows that the law, according to its nature, refers specifically to this fact (pp. 112-113).

So, the metaphysical – transcendental Being of law as Ought cannot even be harmed by a crime or civil delict.

The situation is the same in international law, which even considers war as a legal remedy (G. Husserl, 1964, pp. 314-360). Since the formative era of international law, the idea of war as some kind of legal action has never wholly lost its hold in the minds of international lawyers. This idea of war originated with the scholastic doctrine of the just war (Husserl, 1964, pp. 315-316). From this kind of thinking, the line between law (as an "obligation" to follow certain rules and norms) and war (as a "right" to achieve a purpose using violence) totally disappears. As G. Husserl (1964) says,

> International law recognizes war as a legal institution. In so doing, it puts in the hands of sovereign states a weapon which has been wrested from the hands of individuals a long time ago. In that, and in so far as, the remedy of war has been made available to them, states and nations are granted the power to settle their disputes without judicial interference: to make and enforce their own decisions (p. 318).

Furthermore, in accordance with Kelsen's (2005) point of view, war, like reprisals, is a sanction based on international law (p. 322).

> These sanctions, like sanctions in national law, consist in the forcible deprivation of life, liberty, and other goods, notably of economic value. In war, human beings are killed, maimed, imprisoned, and national or private property is destroyed. By way of reprisals, national or private property is confiscated and other legal rights are infringed. These sanctions of international law are not different in content from those of national law. However, they are "directed against the state", as the saying goes. If war and reprisals have the character of sanctions, and if these sanctions are described as being directed against the state even though they are directly directed against human beings—that is, if the suffering of the sanctions is attributed to the state—then this attribution expresses the idea that the human beings who suffer the sanctions "belong" to the state, that is, are subject to the legal order whose personification is the state as the subject of international law, and, as such, the subject of the international delict which is the condition for the sanctions (Kelsen, 2005, p. 322).

Thereby, as we can see from the positivistic point of view, war is a legal sanction and a crime at the same time. Just like the crime is a fact inside law, war is a crime until it's not a sanction. The one who suffered from the sanction in the national law is the guilty person i.e. offender himself. But war as sanction makes people (non-combatants) suffer. So, Kelsen tries to avoid this evident injustice by the way of the legal fiction – to establish the responsibility of the non-guilty civilians due to the simple fact of their citizenship or location,

But it seems as though in the face of war, the legal status of human beings is not recognized by the parties of war. Despite all the norms and guarantees of international law, the living experience of human beings during war is an experience of lawlessness, because they are harmed and at the same time not even recognized as legal subjects. As the Ukrainian researcher Natalja Satokhina (2019) stressed

> [I]t seems that such an experience is gone through by people in situations that are conceptualized in modern philosophy by means of the notion of the "state of exception", denoting the suspension of law by a sovereign decision. As a result of such an act, the rejection to recognize a norm and the rejection to recognize the generalized Other results in the experience of a radical non-recognition of a particular individual, or the experience of lawlessness (which is equal to rightslessness). The radicalism in this case is that, unlike the experience of the victim of a crime, which is guaranteed a minimal public recognition through the institutions, here this recognition is fundamentally impossible, as it happens in the case of war, dictatorship, or refugee condition" (p. 24).

Meanwhile, the existence of non-positive law during wartime is questionable as well. Robert Alexy (2019), one of the most known contemporary non-positivists shows that law has a dual nature and includes a factual dimension (law as social fact) and an ideal dimension as a claim to moral correctness (p. 42). In turn, "the existential grounds" of such an interpretation of law is the mutual recognition of human beings as legal subjects. This recognition allows us to establish law as a social fact while the ideal dimension is a certain criterion or legal standard. If human rights depend on their justifiability and on nothing else, and they are justifiable on the basis of discourse theory (Alexy, 2019, p. 49), the condition of possibility for such a discourse is the mutual recognition of its participants. So, if the claim to correctness is an "essential

component" of law, mutual recognition is its "*existentia*". However, war makes the claim of correctness in law questionable if understood in terms of the possibility of mutual recognition. It is easy to notice the fact that armed conflict itself appears from the mutual claim of its parties on the correctness of their respective positions, deeds, and normative grounding. In fact, such claims are so absolute and mutually exclusive that this leads to war.

So, it seems that both positivist and non-positivist conceptions of law have common methodological presuppositions. Despite their differences, they coincide in the metaphysical view that the Being of law is quite close to the concept of Being in classic metaphysics. Law, whether positive ("The Basic Norm") or natural (idea of law – justice, morality, etc.), "always exists" as abstract demands of the transcendent or transcendental "Ought".

However, at the same time, the consideration of law—whether international, positive, or natural—as a legal remedy, which is always present-at-hand for a state, is a weak argument for the victims of wars, revolutions, and other armed conflicts. It is quite clear that death and destruction have nothing in common with law, and the "pure" existence of norms and rules as certain "tools" is not equal to the existence of law. Such a situation forces us to much more carefully consider the issue of the existence of law and to think of law "out of law", i.e. out of the context of legislation or natural law. As the Danish philosopher of law G. Cohn (1967) said

> According to conceptual jurisprudence, the law is contained in norms, rules and statutes, and systematic digests and precedents. But we assert that the law lies in the concrete singular case and its solution. The law is in a free, unfettered, even unforeseeable evolution. In each single new situation it creates itself, its own problems and their solution, its own questions and answers. Its entire is required here and now: only to a limited extent can it pay regard to preceding norms and their logical results (pp. 104-105).

Therefore, in order to answer the question about whether law is possible during war we have to clarify in what way law exists outside the continual norms of law, whether positive or natural.

3. Law in the concrete situation: The discrete existence of law

War, revolutions, and other similar events show us very evidently that the existence of law and legal order is not continuous, like a magnetic field or gravitation, but is discrete in its core. The existence of law and order in every moment of space and time is not constant. The existence of law "today" does not guarantee that law will exist "tomorrow" or "after" a war or revolution. In the same way, when law is "here", it does not mean that law exists "there" at the same time (Stovba, 2017, p. 212). That is why it seems reasonable to presuppose that, ontologically, law is not localized in the abstract dimension of norms and rules, but in a *concrete situation,* in which law either is there or is not there. As G. Cohn (1967) stressed, "legal reality lives thus in the concrete, singular case, in the legal conflict and its solution" (p. 21). In other words we can deal as much as we want with lawyers, legal institutes, or legislative norms, but at the same time we do not deal with law as such. "Neither command nor force nor stare decisis nor predictability are identical with the law. Where it is necessary the law must fight these concepts in each single instance. Thus, the law demands a personal involvement, a risk, a responsibility that must be assumed by those who wield it: they may no longer cower behind general rules or formalities which were appropriate in other cases but not here and now" (Cohn, 1967, p. 117). Considered in the same manner, law shows itself not as a continuous set of legal norms and rules, which exist in the ideal dimension of the positive or natural "Ought", but as a discrete, self-reproducing phenomenon, whose existence is questionable and depends on human efforts in a concrete situation (Stovba, 2005, p. 7).

Similarly, case law is rooted in the human Being, human existence, and expresses itself as a certain kind of experience (Stovba et al., 2019). This experience is concrete and "living": it is neither speculative nor abstract. As G. Cohn (1967) pointed out, "one has to involve oneself in the concrete situation in order to understand the thing which we call "law". ... In order to know what the law is, one must experience it or have experienced it personally. Only who suffers or suffered wrong, knows what right is and he can explain it only with the help of the concrete circumstances or their memory images" (pp. 115-116). The experience of suffering is localized originally at the level of human body. But the proper fact of the legal relevant suffering as such is hidden behind the constructions of the conceptual jurisprudence. As Canadian legal researcher W. Conclin (1998) stressed, "the suffering of the experiential body is forgotten or, indeed, concealed within the very analyses of concepts because the most which one can do is to imagine or picture an external object within the mind itself" (p. 15). In other words, the corporeal experience of suffering is concealed in the legal discourse due to the role played in it by conceptual analyses, when the latter replaces the suffering as such. As W. Conclin (1998) said

> An individual's concrete experience is recognized in the legal discourse of a modern state at the cost of the concealment of the experience itself. The legal discourse belongs to the knower of a very special vocabulary and grammar, and juridical agents isolate special terms from that vocabulary. In this way the indigenously experienced harm of a non-knower is re-presented by the signs which only the knower can claim to know (p. 27).

Due to this circumstance, it seems reasonable to distinguish the corporeal experience of law from the bodily legal experience (Stovba, 2019, pp. 5-17). The latter is an "alienated" mode of the human Being-with-other, where the human body represents the field of repressions from a state power using legal remedies (Stovba, 2019, p. 9). On the contrary, the former is the experience of liminality and self-ownership, where a human body sets limits on the deeds of other human beings by the way of its corporeal presence (Stovba, 2019, pp. 14-15). Thus, based on those considerations, the Being of the human body in a concrete situation turns into a certain *norm of law*, which establishes measures to others in a much more original way than the norms of positive or natural law (Stovba, 2017, p. 284).

4. Existence of law during war

This kind of measure, established by the human body, is quite evident during peacetime. It is not abstract norms and rules, but the living corporeal presence of other people (with their "attributes", such as clothes, or "traces" like property, and so on) that puts the original limits on our freedom. In such a situation, the body establishes measures, which are two-fold—"external" and "internal". The "external" measure shows other people the limits of their possible behavior toward the "bearer" of the corporeality. At the same time, the "internal" limit is the "law sign" for the "bearer" themselves. Until the body of the latter is "whole" i.e. "safe", it means that the Others recognize them as a "legal subject", which puts limits on their deeds by their corporeal presence. As J. Butler (2010) said, "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" (p. 231). So, it seems reasonable to presuppose *that law originally exists in the concrete situation as the living corporeal experience of liminality.* More exactly, liminality is the certain *sense* of the corporal experience of Being-with-one-another. This sense means that the human body is a "prohibitive law" as an embodiment of the limits for the human beings' acts towards one another (Stovba, 2019, pp. 5-17). In other words, liminality means that "law is not literally internalized, but

incorporated *on* bodies; ... In effect, the law is fully dissimulated into the body as such; it is the principle that confers intelligibility on that body, the sign by which it is socially known" (Butler, 2010, p. 231). Of course, the situation changes during war, when the body is an "object" of *anonymous unmotivated aggression from the enemy state*. It seems that in this case, the constant threat of physical harm or even destruction "erases" the mentioned limits, both "internal" and "external". Thus, the following question arises: Is law (as living corporeal experience of liminality) possible during war?

Probably from a methodological point of view, war is equal to phenomenological reduction. This is due to its similarity to phenomenological reduction, which excludes all the empirical qualities of the subject and leaves only its ideal core. War reduces all kinds of legal beings to their original mode. This "armed reduction", which is made as a result of war, leaves human corporeality as a "phenomenological residue". Although human corporeality is constantly under the threat of destruction during war, it remains the last possible measure for human deeds. In the conditions of an armed conflict, neither the legal norms of legislation nor the ideal demands of natural law are able to define the borders of possible, allowed, or demanded human behavior.

The area of corporeality is the most original dimension of law. In prehistoric times, a delict was originally defined not as breaking laws and rules, but as physical contact. As G. Cohn (1967) said

> In the beginning the deviation was conceived quite objectively; the conduct of the transgressor was 'different'. The danger manifests itself objectively through touch, contact, association. Thus, the crime infected those who touched the corpse of the victim or the place where he was found, the land, the tribe, the people; they became "impure" and relief from the infection was achieved by ablution, expiation, sacrifice of the criminal or of another person, transference to a scapegoat, baiting and slaughter of a representative totem animal, the flesh of which was consumed in order to identify oneself with it. Only much later, gradually, the relationship acquired a more individual and rational character (p. 67).

In a previous work of ours, we attempted to describe the experience of law in peacetime. In terms of the pure corporeality experience, law shows itself as the immanent "right direction" of human deeds. In turn, the experience of law in terms of human deeds is the embodiment of its reason. In terms of the Being-with-Others experience of law, this is explicated as the experience of liminality and, in its aspects of eventfulness, as the experience of the self-ownership, involving the Being as such (Stovba, 2019, p. 16).

As we have already seen, liminality as the main feature of the corporeal experience of law is in question during war. When the human body already exists under the threat of death and physical destruction, this experience does not always turn into an experience of law, but depends on certain conditions, which cause the "appearance" and "disappearance" of law, i.e. the experience of law. The "ordinary" experience of war turns into an experience of law due to corporeal suffering. But not every event involving this kind of suffering has relevance in law. In our opinion, this happens during war when corporeal harm is caused 1) in the wrong place; 2) in the wrong way; 3) to the wrong subject. In other words, the three conditions which make liminality possible as the main characteristic of the corporeal experience of law are locality, modality, and subjectivity.

Locality as a specific character of law during war means that the human body is only a measure of external deeds (primarily combatants) in this specific area. This is a differentiation between areas where war takes place and other "peaceful" areas. The latter includes places

without military equipment or buildings, or any combatants and military objects. This also includes the locations of various humanitarian missions, such as the Red Cross, hospitals, and so on. These kinds of places have a specific "extraterritoriality" with regard to the areas where war takes place and are "excluded" from the war. Encroachment on human corporeality on these kinds of territories is nevertheless unlawful during warfare and consequently, is the starting point of the experience of law.

Furthermore, one more specific characteristic of law during war is the way in which harm is caused or, in other words, the method of encroachment on corporeality. In peacetime, such deeds are only allowed in special cases (necessary defense, detention of a criminal, etc.). These restrictions during war are embodied in the prohibition of the ways war is waged, which excludes methods that cause harm (such as weapons of mass destruction), lead to the irreversible pollution of the environment (such as the use of phosphorous munitions), or pose a great risk of hitting peaceful populations (such as cluster projectiles). So, it is worth assuming that during war, the living corporeal presence applies measures to the combatants, even under the conditions of physical destruction through the establishing of its modality.

Then, subjectivity means the differentiation of corporeality as a measure of human deeds depending on their "bearer". First of all, we are talking about combatants and non-combatants. The latter in turn can be specified as civilians, members of international missions, medical stuff, and so on. The living corporeal presence of a non-combatant is "exterritorial" when it comes to war, when the living bodies of non-combatants are able to apply measures during war.

Thus, the three aforementioned conditions of liminality during war are neither certain "normative" presuppositions of international law nor transcendental "conditions of possibility" of natural law. Rather, these are "ontological conditions" of space and time where and when the experience of liminality remains valid even during war.

5. Conclusion

So, our answer to the question of whether law can exist during war is both affirmative and negative. It is only possible to make such statements in accordance with the discrete theory of law. If we accepted that law exists in a concrete situation, such as the living corporeal experience of human beings, which is turned into an experience of law under the condition of possible or actual suffering, we can come to conclusion that (a) law is possible during war (1) in a certain territory (2) under certain conditions in terms of the modality of corporeal harm (3) towards specific subjects. At the same time (b) law is not possible during war when (1) the aforementioned conditions are absent or (2) we consider law as a set of positive or natural norms, which exist at all times and in every place, as an eternal and constant "normative field of the Ought".

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