

Peace and the rule of law: A brief theoretical overview



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Abstract:

Having in mind that peace is a basic, universal social and legal value and a substantial prerequisite for realising all other values, the author observes the complex relationship between peace and the rule of law. In that relationship of mutual dependence, one of the disputable matters could be the fact that the issue resembles a chicken-and-egg dilemma: which of the two values is the preceding factor, which one is older, which one should be considered the cause and which one the consequence? Is peace a necessary environment for the rule of law establishing, or the rule of law is a necessary prerequisite for peace? The answer to this question depends primarily on how the rule of law is perceived. Following the prevalent view that the rule of law is a formal/material concept, which implies that it has both institutional and value aspects, the author takes a standpoint that the value-openness of the rule of law concept should be regarded as its advantage rather than a weakness. The author criticises the one-sided perception of the rule of law based exclusively on the ideology and values of liberalism and the tendency among western countries to present that vision of the rule of law as the only one that can ensure peace. According to the position of liberal scholars, without 'liberal peace', war and disorder would govern. However, the reality proves that imposition and export of a liberal version of the rule of law and the tendency to establish universal 'liberal peace' could also feed wars and conflicts. Correlation between peace and the rule of law is required but is not necessary (if one perceives the rule of law in its 'thinnest' form - the existence of an order). However, without peace, it is impossible to establish any kind of value-based 'thick' rule of law. On the other hand, no one-sided value-burdened vision of the rule of law is a necessary prerequisite for the existence of peace and order. The author believes that if there is a wish to take a step in the direction of 'perpetual peace' in Kant's sense, the necessary presumption is tolerance and open-mindedness toward different ideological (value) models of the rule of law.

Keywords: social values; peace; war; rule of law; right of the stronger

PEACE AS FUNDAMENTAL SOCIAL AND LEGAL VALUE

Peace means the absence of violence in human relationships and comes from human nature itself. From the Antiquity to the Modern Age, peace has represented a political and legal ideal, which makes it perceivable as a universal value. It seems that it is not until the modern era, with the rationalistic natural law thinking, that peace takes its deserved place as one of the supreme legal values. Already the first representative of modern iusnaturalism, Hugo Grotius, in his famous book *On the Law of War and Peace*, advocates for peace and end to wars, although (like Aurelius Augustinus) he also considers the possibilities of a just war (Grotius, 2012). However, Hobbes went the furthest, declaring peace a fundamental law of nature. Given that in the state of nature every man has a right to everything and that in it, a war of everyone against everyone is on the stage, the general rule of reason demands 'that every man ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war' (Hobbes, 1998, p. 87). Therefore, it is the reason that imposes upon every man to seek peace and maintain it and establishes a natural right to defence by all possible means. Hobbes, from this first basic law of nature, deducts the second one. He perceives it as man's readiness, if all others are also ready, in seeking peace, to waive his right to all things and be satisfied with as much liberty as he is willing to admit to others, following the Christian principle: "what you would have others do unto you, do likewise unto others" (Hobbes, 1998, p. 87). Similarly, Kant held that the dictate of the mind is to establish genuine, true peace, and it

means abandoning the natural state governed by war. However, although Kant's opus reflects striving for perpetual peace (but not as an ideal, blissful state), not in a single moment does he aspire towards the achievement but towards the approximation to perpetual peace, bearing in mind that peace is essentially a temporary state. "If it is a duty to realize a condition of public right, and if there is well-founded hope that this can be attained, even if only in the form of an endlessly progressing approximation of it, then the perpetual peace that follows the peace treaties that have been concluded up to now (although they have wrongly been designated so, since they actually are mere cease-fires) is not an empty idea, but rather a task which, carried out gradually, steadily moves toward its goal (since the periods in which equal advances are made will hopefully grow shorter and shorter)" (Kant, 2006, p. 109; Babić, 2012; Kindić, 2016).

Today, the existence of peace and order is often taken for granted by almost every society. People are not even aware of the importance of these values that man, as civilization has been developing, began to presume. It is only in situations where it comes to their breach that people become aware of the significance of these crucial value. Lukić (1995) uses a good comparison pointing out that no one notices peace (and its importance for the survival of the society) until a situation arises that disturbs it, just as no one notices the lack of air until they start lacking it. Peace and order are fundamental social values that represent the *conditio sine qua non* for realising all other social, primarily legal values. These values help create an environment where all other values coexist unhampered and are free to be expressed.

Peace and order constitute the condition essential for the efficient and balanced functioning of any legal order: namely, if being violated for an extended time, the war ensues as a negation of peace, as the anarchy - disorder. On the other hand, Radomir Lukić (1995) is right to see peace and order as the values that are most fully realised by law and that, as a rule, law and order ensure peace, that is, that law is the most crucial means of maintaining peace in that it has coercion (by state) as a last resort to that end. Law does serve the peacekeeping function as a primary tool to resolve the conflicting social interests. However, a question arises whether peace constitutes a prerequisite for establishing legal order or whether legal order is a prerequisite for establishing peace? Undoubtedly, be it as it is, legal order can also exist in the periods of unrest in the state, even during the war. The situation is further complicated when the existing legal order comes to be replaced by the rule of law doctrine.

JANUS'S CHARACTER OF THE RULE OF LAW

The relationship between the rule of law and peace depends primarily on what we understand by the rule of law. Can the rule of law be confined to the existence of formal principles (guarantees), or does this doctrine also entail ideological, value determination?

In seeking the answer to this question, one should start from the roots, the outlines of the legal state and the rule of law found as early as in ancient Greek philosophy, but also its practice. Already that period had perceived certain formal guarantees of the rule of law, to use the modern terms. Thus, the practice of the Athenian polis was characterised by the existence of the principle of legality, some form of separation of powers, an independent judiciary, and guarantees for individual rights to some degree, all, of course, in line with the character of that society (Avramović, 1998). However, it is distinctive that even at that time, the ideological conception of these principles was burdened and substantially 'filled' with the perception and values of the upper social classes and their related dominant social interests. In Plato's and Aristotle's works, one can clearly see the strong connection between the state and law, on the one hand, and the politics and ethics, on the other hand. Aristotle (2003) is explicit that the supreme power should be vested in wisely drafted laws, and only exceptionally, where rules are imprecise, in power of power-holders. However, he also underlines the old problem of conceptual formulation of "wise laws": namely, laws could be "good or bad, just or unjust" (Aristotel, 2003, p. 1282b), just like governmental systems. Hence, already the ancient writers paid importance not only to the factual existence of laws but also to the quality of laws, their justness or unjustness, the determination of which resulted from the value orientation of that time.

The same line of thinking was followed by medieval Christian natural law thought, insisting on the compliance of human laws with the eternal, divine law. Only that quality of positive law of being truly just, namely, aligned with god's will, could ensure what we today call the rule of law.

While, at first glance, the modern-era rationalistic natural law approach seemed to have finally reached the eternal, always just, invariable, universal law founded on the idea of freedom and equality of all people, ideological influences, particularly after the great world revolutions, became nonetheless more than apparent, leaving an indelible mark to the present day. Matić (1997) rightly notes as adverse this tendency of imposing postrevolutionary natural law ideals as universal, omnipotent principles that characterise the entire modern epoch. "That pretension will quite soon be finalised in an open hypostasis of a liberal state as the final and perfect invention of the entire political history that sees in them its natural end (*Fukuyama*) and therefore, in a typically ideological understanding of modern history" (Matić, 1997, pp. 194-195). Of course, this all affects the contemporary understanding of the rule of law as a doctrine burdened by a one-sided ideological orientation.

History has demonstrated that the rule of law and the legal state as teachings about the need to constrain power must be understood as notions/concepts with both formal and material aspects. However, also evident was the most significant challenge lying ahead of the legal state, or the rule of law - the ideological moment. That ideological challenge can lead not only to the suppression but also to the elimination of the "formal principle of a legal state by a one-sided material notion of a legal state, through the elimination of legality by invoking one idea of legitimacy, which, ultimately, can no longer be controlled" (Deninger, 1991, p. 38).

Among the prominent representatives of the quite one-sided, liberal material concept of the rule of law stands firmly Friedrich Hayek. He perceives the rule of law as a doctrine on what the law ought to be, namely what features laws must have in order to be consistent with the rule of law. Giving this definition out of fear that the rule of law will be reduced to a mere principle of legality, he requires that it be more than that (which assumes touching the very content of the law). Then, however, Hayek gradually slides to the other end of the spectrum by defining the rule of law not as a rule of the law, but as a "meta-legal doctrine or a political ideal", which will be effective only if the legislator himself feels bound by it. "In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority" (Hayek, 2010, p. 181). Perceiving the rule of law primarily as a political ideal Hayek (2010), holds that it can only be approached but never fully realised. Therefore, the validity of positive law is directly contingent upon the requirement for justness.

In a more recent theory, it is worth noticing the differentiation insisted on by Randall Peerenboom between two types of the rule of law - *thick* and *thin*. Illustrating China's road to the rule of law, Peerenboom defines the thin rule of law as one of satisfying elementary procedural requirements that are the *conditio sine qua non* of every legal system, whether autocratic or democratic, socialist or capitalist (Peerenboom, 2002). On the other hand, the thick rule of law assumes building on the basic procedural guarantees provided by the thin rule of law by adding the elements of the political, ideological (Avramović, 2009). However, in contrast to most liberal theorists, and primarily Hayek, by adopting the idea of social pluralism Peerenboom allows the possibility of various variants of *thick*, the substantial versions of the rule of law. Each of them would be coloured by different social and political philosophies (from liberal-democratic, through state-socialist, to the one founded on the Asian values) but still bound to achieve the thin rule of law that remains the epicentre in any variant (Peerenboom, 2002).

PEACE, RULE OF LAW, AND RIGHT OF THE STRONGER

Wars are led in the name of the rule of law, but the question always remains: which rule of law? The typical platitude that began to be used even colloquially is "the fight for peace". This syntagm essen-

tially represents *contradictio in adiecto*. Therefore, the fight is instituted, which implies unrest, for the sake of establishing peace. Radbruch (1998) correctly sees that the task of war is to create new law, not to prove the existing law. However, the new law entails a set of novel, essentially foreign values. Lukić (1995, p. 251), proceeding from the assumption that man is inherently "a being of peace and order, of creation, not destruction" and that most people still do seek order and peace, concludes that order and peace disturbances derive from the striving to create *better* (underlined by the author) peace and order. This Lukić's idea is essentially the Aristotelian search for happiness: "we work to have leisure, and wage war to live in peace" (Aristotel, 1980, p. 1177b). A similar observation is made by the Aristotelian Hugo Grotius, who begins his first book *On the Law of War and Peace* with the statement that the ultimate goal of war is to establish peace. The said conclusion by Lukić is highly problematic because it opens another Pandora's box of possible interpretations of what 'better' peace and order entails. 'Better' peace means the specific, different value determinations from the existing ones. Therefore, if the rule of law is taken in the overall social discourse as it is, the integral, formal-material concept, not just as a rule through law but also as, for instance, capitalism or socialism, "then the formal rule of law is not likely to command the range of neutral support that it merits (and requires), for then the rule of law cannot be so readily seen to be a set of institutionalized forms and values worthy of the support of all officials and citizens, regardless of political allegiances" (Summers, 1993, p. 137).

For this precise reason the rule of law should never be set against unrealistic expectations. Peerenboom rightly sees it as a critical practical concern in approximating the rule of law and justice: "No legal system to date has produced a perfectly just society, and none ever will. People should not expect a legal system or rule of law to address all social ills" (Peerenboom, 2004, p. 9).

Nevertheless, due to this objective deficiency of the rule of law, the law of the stronger comes into play, seeking to establish, by means of war, as Lukić would put, 'better peace' founded on its own principle of justice. The law of the stronger doctrine has a solid basis already in Greek philosophy (mainly owing to the sophists and the relativism they advocated); however, it has also become a dominant feature of modern international relations. The ancient Thrasymachus' natural law doctrine of the right of the stronger Plato elaborates in his *Republic*. Thrasymachus affirms that "the just is nothing else than the advantage of the stronger" (Plato, 1937, p. 338c). And he is not far from the truth. As he says, "each form of government enacts the laws with a view to its own advantage [...] and by so legislating they proclaim that the just for their subjects is that which is for their - the rulers' - advantage and the man who deviates from this law they chastise as a lawbreaker and a wrongdoer" (Plato, 1937, p. 338e). In that way, all states (regardless of the form of government) have the identical principle of justice and that is the advantage of the established government, the advantage of the stronger (Plato, 1937, p. 339a). Furthermore, Thrasymachus reproaches Socrates for being far from a just man and justice and unjust man and injustice because of his not knowing "that justice and the just are literally the other fellow's good - the advantage of the stronger and the ruler, but a detriment that is all his own of the subject who obeys and serves" (Plato, 1937, p. 343c). Thrasymachus fully realises that "injustice on a sufficiently large scale is a stronger, freer, and more masterful thing than justice", because the just is the advantage of the stronger (Plato, 1937, p. 344c). And a one-sided view of the rule of law, in the vision of merely one, expressly just variant, truly is another's good, which only serves the stronger who want to impose those values (by hook or by crook) on their submissive counterparts.

This view of the modern world, where the stronger had triumphed, was presented in a highly provocative way by Fukuyama (1992) (which subsequently made him a target to criticism by many authors), in his thesis on "the end of history" and the endpoint of humankind's ideological evolution, which has no alternatives, while being embodied in the triumph of Western liberal democracy. Domination of the liberal concept and its future universality would be realised by promoting and exporting a liberal value set called 'good governance' (Fukuyama, 2006).

By contrast, Huntington (1996, p. 183) envisioned the main conflicts of the future to be the conflicts among civilizations caused by "Western arrogance, Islamic intolerance, and Sinic assertiveness". However, history is another indicator that with the universal level of civilization, its peoples become blinded by "the mirage of immortality" convinced of it to be the final form of human society, as in the case of the Roman Empire (Huntington, 1996, p. 301). And indeed, missionary activities of Western democracies (primarily the US) aimed at imposing liberal values worldwide as universal (among others, the rule of law) have suffered and will undoubtedly continue to suffer failures in the future. Huntington (1996) rightly warned that imperialism could bring about an inter-civilizational war between the largest countries in the world. A further fact attesting to Huntington's farsighted words is that the Third World War is looming at the point of this writing, with the US and Russia in the lead roles, the immediate cause being the Russian armed intervention in Ukraine. As early as the 1960s, French philosopher Aron (2001) expressed his fear of a nuclear war that could lead to human self-destruction or the occupation of the whole planet by one people. And indeed, Western imperialism and the US aspiration to rule the entire world (setting up its armed arsenal in close proximity to the Russian borders) prompted the fratricidal war in Ukraine. The motives of this conflict are more than apparent to many people and countries in the world. Ukraine constitutes vulnerable area from the Russian point of view in terms of its territorial integrity (*Hanibal ante portas*). It was noticed openly by the Pope himself, who used recently astonishing wording about "NATO barking at Russia's door". The US, with the unveiled request to expand the NATO alliance, basically tends to confirm the right of the stronger and to impose their own values (their vision of the rule of law and good governance). The tendency of building the so-called liberal peace as a basis of the Western vision of good governance (the rule of law, human rights, democracy) become a common place after armed conflicts (Paris, 2004; Voorhoeve, 2007).

Strategies have been made about establishing, both theoretically and institutionally, the rule of law of the Western model, which is perceived as the only one capable of producing peace and prosperity in post-conflict societies (Stromseth, 2008). Importantly, wars initiated by the US are almost always categorised as "just wars" aimed at establishing the rule of law and respect for human rights. Only in the period from 2000 onwards, acting to this end, the US carried out multiple bombing attacks in Yemen, Iraq, Afghanistan, Pakistan, Somalia, Libya, and Syria. Chesterman (2001) has put forward a serious criticism of the dichotomies of the just war or just peace, regarding them as false, misleading, and dangerous. Confusing law and morality, once again, as always, proves to be a very dangerous tendency, all under the guise of promoting the rule of law. The rule of law was gradually turning into a mantra as the efficient US solution to all world's problems (Carothers, 2006). It is the only one capable of producing the so-called liberal peace, represented as a condition without alternatives. In its absence, disorder and constant warfare follow. Failed attempts to export (promote) the rule of law were described by Humphreys (2010), comparing the rule of law with a theatre staging a morality tale about the good life, but one essentially unready to admit its own contradictions.

Obviously, in more and more countries, promoting the rule of law has been an essentially imperialist endeavour, whereby foreign (Western) rulers backed by armed forces tend to assume governance over societies they previously proclaimed unready to govern themselves (Ehrenreich Brooks, 2003). Dangers of confusing law and morality are known to all, yet they all make that mistake repeatedly. Thus, even famous German philosopher Jurgen Habermas characterised NATO intervention in Kosovo in 1999 as "illegal but morally justified". Drawing on this position, Walzer (2010a) subsumed the NATO aggression in Kosovo under a just war because, in his view, when compared with moral justification, the illegality fades away. Although recognising that NATO intervention in Kosovo fits within the UN definition of aggression, Walzer (2010a) acknowledges its moral legitimacy, like most Western theorists. Already during the World War I, Radbruch (2018) observed that debates are not led on the right to war but on the "blame for the war", where all sides aim to be free from moral responsibility. Because of seeing war in itself as injustice and of its being imposed, everyone pleads moral innocence regarding its outbreak (Radbruch, 2018).

John Rawls (1999, p. 47), in his *Law of Peoples* of 1999, created a theoretical and ideological ground for those aspirations of western societies, describing how it would be possible to have a world society of liberal and decent peoples (well-ordered peoples), which, likely due to their superiority, reflected in their well-practiced observance of shared principles of legitimate government, "are not swayed by the passion for power and glory". "The longterm goal of (relatively) well-ordered societies should be to bring burdened societies, like outlaw states, into the Society of well-ordered Peoples" (Rawls, 1999, p. 106). Needless to say, burdened societies and those Rawls categorise as "outlaw states" would most easily be brought into well-ordered societies by exporting a one-sided vision of the world, values, human rights, and the rule of law.

The essential cultural and social differences have always remained the primary source of conflict. In those circumstances, in all its glory comes to light the right of the stronger, who want, either by grace or force, to impose their own values without realising that this need for universalism can also lead to the downfall of the stronger. While transplantation of both legal and biological transplants can prove effective, it can equally lead to the rejection of a transplanted tissue if it does not match the man/state to which it is donated. This is particularly true if no regard is paid to the elementary compatibility between the donor and the recipient of the institution/value/organ. Also, not to be overlooked is the third possibility, which involves the death of the donor and recipient man/state (naturally, insofar as it is a living/existing donor or recipient). Of course, this latter possibility results from the weakening of the donor/recipient due to transplantation, which then makes the whole undertaking meaningless.

TRIUMPH OF PEACE OVER A ONE-SIDED VISION OF THE RULE OF LAW

Finally, a question remains whether the rule of law is a prerequisite for peace or is the reverse true? Either way, peace is necessary for achieving any value concept of the rule of law. On the other hand, the unilaterally conceived rule of law is not the essential condition for the existence of peace. Obviously, there are countries where order and peace are established but are not of the quality required by the Western rule of law doctrine. Not a single *thick* version of the rule of law can be identified *a priori* as the only one capable of ensuring peace. Peace is necessary for achieving legal order, but not any specific one. Therefore, the *thin* version of the rule of law (rule of law in the narrow sense), as the very essence of the order, forms the basis for attaining peace. Bearing in mind that the rule of law is a formal-material concept, it should be allowed for it to be expanded, in line with Peerenboom's ideas, to include different value determinations, the *thick* conceptions of the rule of law.

The idea that deploying war and coercion can help establish the rule of law in its one form is profoundly controversial and essentially is *contradictio in adiecto*. Kelsen (2005, 1998) is right when he argues that no order can be imposed as absolutely just because justice is an irrational ideal, inaccessible to human knowledge, which can understand only relative values. Rationally cognizable are only interests and conflicts of interests. A similar observation was made by Walzer (2000), who finds unconvincing, given that justice is a human creation, the view that it can be secured only in one way. The one solution that Kelsen (2005, pp. 13–14) sees as possible is that "only a legal order which does not satisfy the interests of one at the expense of another, but which brings about such a compromise between the opposing interests as to minimize the possible frictions, has expectation of relatively enduring existence. Only such an order will be in position to secure social peace to its subjects on a relatively permanent basis".

Instead of attempting to impose one ideological matrix on the entire world by 'exporting' the Western version of the rule of law, it is necessary to foster dialogue among different societies, observing the factual existence of cultural diversities. Douzinas (2007, p. 196) correctly concludes that "social and political systems become hegemonic by turning their ideological priorities into universal principles and values". The rule of law is one essentially vulnerable, contested concept, open-ended, meaning different things to different people, and serving a wide spectrum of political agendas, "from Hayekian libertarianism to Rawlsian social welfare liberalism to Lee Kuan Yew's soft authoritarianism to Jiang

Zemin's statist socialism" (Peerenboom, 2004, p. 1). Despite the threat of it turning into a rhetorical formula that serves everyone, this diversity and variety of possible value fillings of the rule of law constitute at the same time the main virtue of this doctrine with the capacity to adapt to the particularities of different societies without losing thereby its meaning (the very essence, manifest in its formal guarantees). In Kelsenian terms, one fundamentally political argument, the opposing of which by those same arguments is always possible, should never be lent the appearance of an irrefutable logical argument.

Lukić (1995) agreeably notes that the essential condition for peace is a certain degree of social homogeneity. When he says that peace and order are the values best pursued by the law, as it can ultimately use coercion to that end, Lukić (like Kelsen, one of his greatest idols) (Avramović, 2015) refuses to determine what that law should be like. This view takes account of the fact of multiculturalism and non-imposition by force of one-in the Western world prevailing - value system as universal. Finally, Radbruch (1998), too, points out that the highest cultural values cannot be expressed in figures of military power. "Culture is not a comparable quantity but an incomparable quality; and the one who is able to percept the nations only as competing or even fighting masses of cultures of different size has excluded the cultural nation altogether from his field of vision" (Radbruch, 1998, p. 205).

It is quite self-evident that the existence of causality between peace and the rule of law is absolutely necessary. But not of the rule of law that entails merely one set of social and cultural values. To ensure a relatively longer-term peace, it is necessary to genuinely (not just formally) observe the fact of social and cultural heterogeneity. Every society has its inherent dominant, often also specific, values that differ significantly in different parts of the world. However, what connects all, or at least most people, is the striving for peace, which can be achieved through a legal order that will be open to different value models of the rule of law. Just like Walzer (2010b) sees the beginning of peace in the restriction of war as a military struggle (which leads to the transformation of war into a political battle), so is possible to conclude that the world's openness to different ideological (value) models of the rule of law could signify the beginning of perpetual peace. As a message for the future, let us recall Kelsen's prophetic words from the end of the World War II, which must be repeated over and over: "war is mass murder, the greatest disgrace of our culture, and that to secure world peace is our foremost task, a task much more important than the decision between democracy and autocracy, or capitalism and socialism" (Kelsen, 1944, p. viii).

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Graphical abstract



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