

Why laws aren't laws, internationally and at home



by Lev Tsitrin

Among a myriad aspects of the Russian invasion of Ukraine – the military, the humanitarian, the economic, the political – its legal aspect is, admittedly, not the most viscerally-felt, but is fascinating nonetheless.

The question of the legality of the war against Ukrainian independence was exhaustively addressed by Professor of International Law of Fletcher School of Law and Diplomacy of Tufts University Hurst Hannum in a fine explainer titled [*“International Law Says Putin’s War Against Ukraine is Illegal. Does That Matter?”*](#)

The rhetorical question with which the title ends strongly hints at the answer of “no,” and the author states the reason right upfront: “Both international law and the United Nations

Charter say that countries should not invade each other. But who has the ability to enforce those rules?"

The rest of the article is a legal gloss on La Fontaine's famous fable of the Wolf and the Lamb that explains realpolitik to the naive: "The stronger reasons always yield | to reasons of the stronger," to quote the translation by Elizur Wright that became a classic; or, per the equally fine, earlier translation by Robert Thomson, "Strength upon right with ease can trample." The reference here is to the natural law, to the law of the jungle in which, proverbially, "might makes right." Presumably, by now the humanity has tempered its aggressive impulse by developing the civilized values of humane conduct – but those restraints are self-imposed, at least by the stronger countries whose actions it is impossible to police. Only the high-minded self-restraint is a guarantee of international law – and the unfolding Russian invasion of Ukraine shows the limits of that self-restraint.

"There is probably no law, international or domestic, that enjoys universal compliance," Professor Hannum observes in conclusion of his piece. That's a correct observation, but one can reasonably ask: why at least the domestic law can't be enforced? Clearly, the world is a jungle – and when Putin bares teeth to show his thermonuclear fangs, we naturally step back; no policing can withstand those. This has nothing to do with domestic law, though.

So what is the root of non-compliance with the domestic law? The problem is not the inability to police the domestic scene. Rather, it seems to me, the lack of compliance has to do with our inability to police the arbiters of the domestic law – the inability that is deliberately embedded into the structure of the law itself.

Consider how judging is done in the federal courts. Every step is spelled out. There are clear-cut rules of the procedure, there are things judges *must* do while evaluating parties'

opposing claims, and things judges must *not* do. For instance, when the defendant requests right upfront that the case be dismissed, the judge *must* consider plaintiff's argument as true, and derive all reasonable inferences in plaintiff's favor while deciding whether to toss the case. This of course makes perfect sense: if plaintiff's argument at its strongest is too weak to overcome the defendant's, no amount of further hearings will help; the plaintiff will lose the case no matter what, so further proceedings would be a mere waste of time, and pointless. The case should be dismissed. On the other hand, if plaintiff's initial argument prevails, then it is necessary to delve further, checking whether it is indeed factually right and legally valid; the case must proceed. Obviously, this is a very good rule – but it is routinely violated by judges, and is unenforceable. I sued a bunch of judges when they did what they mustn't do, by considering my lawyer's argument as false right upfront – and learned from the DAs' argument that in *Pierson v Ray* judges gave themselves the right to act from the bench "maliciously and corruptly." This defense proved highly effective. Judge Garaufis ruled that both abiding by the rules *and* violating them constitutes "classic exercise of the judicial function;" violating that rule was "paradigmatic" judicial activity, per Judge Buchwald's decision.

So, while a federal court should be – to borrow Judge Buchwald' word – "paradigmatic" for observing rules, in fact it is anything but; judging is arbitrary. This explains why, as Professor Hannum noted, "no [domestic] law [...] enjoys universal compliance." Since judging can be legally "corrupt and malicious," no law can be enforced by going to court; in effect, there is no law because there is no "the rule of law" in a federal court – only the rule of judges. To be sure, there are laws on the books – but given that the existence of the overriding law of "corrupt and malicious" judging obviates those laws, they matter no more to a federal judge than international law matters to Putin – that is to say, they

don't matter at all.

Admittedly, nothing can be done about powerful states' non-compliance with international law. The threat of nuclear weapons is the argument that is so strong that it annihilates all other argument standing in its way. But why should federal judges enjoy the right to act "maliciously and corruptly"? We cannot defang Russia of its nuclear arsenal, ensuring that international law is universally obeyed – but why can't we deny one third of US government that is the federal judiciary its prime tool of depriving us of justice in courts– their self-declared right to be "corrupt and malicious," and to bend rules this way and that? Why can't we stand up for our Constitutionally-guaranteed right to the "due process of the law"?

Putin is authoritarian and there is nothing we can do about it. Yet we are, presumably, a democracy and a republic, boasting of our rights, and our free press. Yet our "free press" is as mum when it comes to federal judges' "corruption and malice" as the Russian press is about Putin's. Why does the judiciary hypnotize us into not saying a cross word about its nefarious, illegal workings? Why are we spooked by judges? Why can't we make sure that at least "domestic laws" "enjoy universal compliance" – not just by citizens, but by judges, too?

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