



# The Status and Role of Law and Regulation in the 21<sup>st</sup>-Century Hybrid Security Environment<sup>1</sup>

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**Abstract.** The author examines in detail the notion of ‘lawfare’, and its various interpretations, which lead to the use of the regulatory environment by some actors in order to achieve strategic objectives, including during geopolitical competition and armed conflict. The author finds that through lawfare, hybrid warfare may be conducted by using (and as the case may be, even abusing) the rule of law to the advantage of one of the actors. The author concludes that it is necessary to consider ‘lawfare’ in its various forms as an element of the legal environment, for the purpose of ensuring national security.

**Keywords:** lawfare, hybrid threat, legitimacy, legal resilience, defence and security law

## 1. Introductory Remarks

In respect of maintaining security, setting security objectives, and defence as a set of security activities, law plays an outstanding role in the Transatlantic zone though there were major shortfalls and objectives failed to be met in this area in the past decades. A constitutional state, in which the exercise of governmental power is constrained by the law and which guarantees the exercise, evolution, and development of the rights of individuals and society as a solid foundation, is inconceivable without proper and modern legal bases.

In other words, it follows from the very rule of law that the law also has a prominent role to play in terms of security and defence. Nevertheless, it is worth establishing a general connection between this and the extremely broad concept of complex security and the hybrid threats that have become dominant in the early 21<sup>st</sup> century. By establishing this connection, we can also highlight in connection with the foregoing that the shared horizon of security and regulation is much broader

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than we have thought it is while identifying defence as a totality of activities guaranteeing active security and typically linked to the monopoly of the state to exercise legitimate coercion. A regulatory framework for safety in the broadest sense includes all the rules that must be complied with in the course of the various activities such as transport, industrial production, farming, healthcare, research, etc. in a manner that the performance of the activity concerned does not have an effect that threatens or erodes security. However, the horizon of security and justice is still far broader than what we would normally – *prima facie* – associate it with in the context of policing, national defence, and national security. In line with the foregoing, there may be a number of potential security hazards or threats in the various sectors of security that are, upon reaching a certain level, connected to security-related activities and may require specific sectoral actions, regulations, and cross-sectoral coordination both below and above this level in order for significant losses to be avoided. On the one hand, this is precisely the core of the hybrid threat, as it relies on the growing weight of non-military factors in the competition for power, which has historically been traditionally military. This equally builds on the development of technology, the exposure of affluent and consumer societies to technology, and the multiple exploitability of a highly differentiated technological environment.

The use of non-military factors in power struggles cannot be considered a completely new phenomenon in history, as the illegitimate use of various acts of sabotage or of natural resources and the related structures has long shown that critical infrastructures of society can be used for warlike purposes without any traditional armed resistance with an openly offensive intent. However, the multi-stage revolutionary development of industrial societies and subsequently technology has led to a significant rise in demand for comfort and heightened expectations in mainstream Transatlantic societies through welfare and consumer lifestyles. This kind of development has made many dependent on innovations granting a higher level of comfort and has also significantly increased society's exposure to increasingly technology-based services. In addition to the proliferation of everyday necessities, it is important to highlight the explosion and global spread of information technologies. They have also made it possible to access information and, where appropriate, to influence individuals and societies with false or distorted information, which can clearly be used to prepare the way for or even to increase the effectiveness of hard-power measures. This can be identified as an extremely significant change in the hybrid environment in which military and non-military elements have operated in recent decades, just as the legal aspects of this development, on the effectiveness and modernity of which social legitimacy in modern states is also based to a considerable extent. Accordingly, as the technology, research, production and services provision become increasingly

differentiated, the scope and differentiation of state and social regulation increase, which has a similar effect on the content, regulation, and guarantee of security.

Thus, security and defence must be interpreted in the same context as the legal system and the functioning of the state as a whole: they have to converge with the dynamic changes of the environment in the broadest sense. Following clearly from the essence of the rule of law, it is not only a development competition but also a new kind of security vulnerability if potential regulatory gaps can be exploited by adversaries for their own ends. From a different perspective, however, regulation also has a key role to play in maintaining and strengthening security and, in this context, in defence as an activity for historical and functional reasons. Security and defence systems must be established as a coherent whole of subsystems capable of rapid, efficient, and drillable responses. Regulation has played a historically prominent role in this. It is no coincidence that in the history of the armed forces, various regulations and rules trace their history back to the dawn of organized societies. They are also a yardstick of development regarding their importance for defence, social functioning, and the state. According to Niccoló Machiavelli:

But if they should consider the ancient institutions, they would not find matter more united, more in conformity, and which, of necessity, should be like to each other as much as these (civilian and military); for in all the arts that are established in a society for the sake of the common good of men, all those institutions created to (make people) live in fear of the laws and of God would be in vain, if their defence had not been provided for and which, if well arranged, will maintain not only these, but also those that are not well established. And so (on the contrary), good institutions without the help of the military are not much differently disordered than the habitation of a superb and regal palace, which, even though adorned with jewels and gold, if it is not roofed over will not have anything to protect it from the rain.<sup>2</sup>

Naturally, the concept of reliance solely and predominantly on military force has become obsolete, but not so the essence of the message: the state and its rules as well as individual and social security cannot stand the test of time without defence.

It is therefore worthwhile to make its legal role in this 21<sup>st</sup>-century hybrid security environment a priority issue for investigation, beyond the question of exploitability of legal gaps and conflicts, in a more complex dimension. In this respect, a number of valuable works and findings have been produced in the last decade on hybrid threats, but I believe that it is important to draw even more attention to a theoretical, systemic approach to the issue, thus strengthening the

2 Machiavelli 2001. 6.

reception of a novel – security-driven – approach to law in general legislative, legal, and jurisprudential thinking. To this end, in this paper I would like to emphasize three aspects: (1) the importance of defence regulation in the rule of law, adapting to a changing environment; (2) the role of regulation in the functioning of defence and security organizations; (3) the question of the strategic applicability of law as an instrument of influence and warfare.

## **2. The Place and Role of Modern and Adaptive Defence Regulation in the Dimension of the Rule of Law**

First of all, it should be noted that defence regulation tracking changes and development in the world is also of key importance from the perspective of the rule of law because it is not the principle of ‘everything is allowed that is not forbidden’<sup>3</sup> that is applied by state organizations and, in particular, law enforcement organizations<sup>4</sup> but rather the need for operation that the powers granted by law allow, i.e. the requirement of constitutional defence. This is one aspect of the state’s self-restraint. Based on the predictable, efficient, and foreseeable operation of organizations of defence and security, which is also expected by the civil society, this is also the basis of order, stability, and, hence, the ability to exercise individual rights, social development, and economic growth. Regulation, especially efficient regulation, is, therefore, a fundamental guarantee from the perspective of the functioning, controllability, and, ultimately, reliability of the state. It is, therefore, no mere coincidence that this approach looks back on impressive history in respect of civilian and military relationships as well as the relationship between law enforcement and public administration.

Given that, despite the difficulty of its definition in detail, the rule of law is a set of minimum requirements whose main components, the states in the Transatlantic region, are familiar with it and accept it, it is easy to realize that an appropriate regulation is also important in an international context. However, it is worth supplementing this topic with a brief proposition, namely one that focuses on real globalization and its real-time interactions with the states outside the Transatlantic area. The systemic foundations of globalization based on physical and real-time interactions have been laid by global capitalism, and its structure has been made complete by technological development. However, due to its nature, capitalism assumes the existence of a multitude of contractual relationships, whether or not the parties concerned are advocates of the Western concept of law, i.e. those tenets that insist on the guarantees the rule of law provides. As a result, it is safe

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3 Patyi 2015.

4 Patyi 2016, Farkas–Till 2016, Farkas 2018b.

to say that even in states that do not (or do not fully) agree to the rule of law in its Transatlantic sense, regulation complying with Western requirements has strengthened as it serves as a basis for trust in business. Furthermore, formally, mechanisms of legal protection are undergoing development in various parts of the world because such development is a guarantee needed for business relations and ensuring labour mobility. This necessarily affects the functioning of the defence and security organizations of the individual states, i.e. certain predictability and guarantee minimums, albeit at a varying level of authorization, are emerging worldwide, with the exception of autocracies, pseudo-states, and failed states.

Conversely, if the regulation of defence and security functions are not sufficiently up to date, consistent, stable, and predictable, trust in the state can erode. Such loss of confidence can also be interpreted in relation to individuals and groups constituting a nation, other states in federal association or partnership with the state, and actors with business interests or plans in connection with the state.

Outdated, inconsistent, and inadequately enforced regulations may:

- a) weaken the state's ability to adequately respond to newer and more complex threats and crises or even lead to the lack of such ability,
- b) make the state's responses to various contingencies unpredictable or at least uncertain,
- c) and ultimately provide for a reasonable possibility of abuse by the state or its institutions.

The existence of any one of these uncertainties can weaken the sovereignty of the state concerned and undermine its stability as well as economic and social attractiveness, and ultimately lead to a crisis in that state if they materialize and get out of control.

However, unusual as it may be, at a European level, currently, the impact on economic confidence should be highlighted in connection with the importance of the modernity, consistency, and predictability of defence and security regulation. The underlying reason for such focus is that economic prosperity including the growth in investments and innovation and their establishment and operation is hard to envisage in a state where there are embarrassing questions about fundamental security issues or uncertain solutions to specific crises.

Appropriate regulation reflects, in addition to trust, the state's readiness and professionalism related to security, which is key to development and the trust needed for it in all respects. Creating such trust is not a prerogative of large and medium-sized powers, as even small states have solid defence and security systems capable of inspiring trust. A European and an Asian example is Switzerland and Singapore respectively, where a broad interpretation of security is combined with a corresponding complex defence system.

### **3. The Importance of Regulation for the Effective Functioning of Security and Defence Organizations**

Furthermore, it should be stressed that regulation is essential for all well-structured and well-prepared defence organizations, i.e. optimal regulation is a precondition for efficiency in the performance of tasks, a guarantee for the observance of the rule of law. Without predefined protocols, there is no hierarchy or authority, i.e. no system of command and control can be built. Without proper regulation, the performance of specific tasks cannot be planned, as the proper structuring and the subsequent definition of and the accountability for tasks is also based on regulation. Ultimately, without effective regulation, military forces cannot be prepared either, as its precondition is a well-defined order of operation to be followed in certain cases that can only take its final, fathomable, and required form in regulation due to the complexity of the systems in question. In other words, only a well-regulated and modern defence system can be a good and effective defence system. Consequently, an incomplete, outdated, and inconsistent regulation can have a direct negative impact on the effectiveness of defence forces, and thus on individual and societal security.

However, this principle is not of legal origin, as the regulation of armed forces, which is historically the institutional basis of defence, preceded legal regulation in the modern sense and was typically below the level of legal regulation until the development of civil (rule of) law. However, this did not mean the under-regulation of functions. The importance and fundamental significance of regulation stems from the nature of the organization of defence. This is well reflected in the fact that one of the cornerstones of military science was the analysis of military history and, as part of it, the organization, regulation, and management of armies and defence systems, which served as a basis for outstanding theoretical summaries, i.e. military theory in analysing the works of thinkers laying down principles and a series of related analyses by representatives of related sciences.<sup>5</sup> This is a tradition in the historically dominant military dimension of defence, which was adopted by law enforcement science and then by research dealing with national security functions.

Therefore, the fundamental role of regulation in relation to defence stems from the need for organization during defence itself, which forms its inherent nature. Thus, in this respect, the fact that in the Europe of the 17<sup>th</sup>–19<sup>th</sup> centuries one of the main impacts of the development of defence infrastructure and armies was exerted by regulation through military orders did not follow primarily from the development of the state and regulation but rather from the traditions of military organization and the sciences that assisted it. From this point of view, the fact that as a result of the evolution of the civil (rule of) law increasingly important legal

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5 Szendy 2017; Forgács 2017, 2020; Bellamy 2016.

frameworks and bases have been created to regulate the armed forces and national defence is not a new phenomenon; this, however, does not mean that the law relying on optimal legislation and assisting professionals restricts defence measures by regulation but rather that the need of military organization for being regulated and the rule of law have created rules representing various levels of hierarchy and synergy. An excellent example of this in Hungary was the multi-stage process of national defence regulation and development at the turn of the 20<sup>th</sup> century,<sup>6</sup> which encouraged the development of law enforcement and the independence and, later, regulation of national security functions even if statutory regulation was rather delayed due to the vicissitudes of Hungary's history.

#### **4. The Strategic Possibility of Using Law as an Instrument of Influence and Warfare**

Thirdly, in the security environment of the 21<sup>st</sup> century, the use by state and non-state actors of what is called lawfare,<sup>7</sup> i.e. law as a tool of warfare, as a tool of strategic influence, is also a serious challenge to the rule of law and security. Although this phenomenon is not new, it has become a tool of strategic importance and easier to prepare due to the availability of rules through new threats and the digitalization of state functions and – within that – regulation. Growing importance is best reflected by the legal implications of drone warfare<sup>8</sup> and hybrid threats<sup>9</sup> that have emerged in recent years. In his study on the topic, Orde F. Kittrie considers the public opinion that links the concept of lawfare to the work of Charles Dunlap Jr. in 2001 as an overture; nevertheless, he attributes lawfare to Grotius. He also points out that the application of the law as a strategic tool is also present in the concept of ‘warfare without barriers’ published in China at the turn of the millennium, well before the Gerasimov doctrine,<sup>10</sup> and in various approaches before that. However, based on the semantic origin of the concept of lawfare, i.e. the combination of law and warfare, Orde F. Kittrie's invaluable analysis relies heavily on the war/military approach and provides its typology and case studies. However, this approach links the use of law as a tool to military strategies rather than a large strategic vision that fits into the diversity of complex security. This approach is also reflected in the author's typology, which sees lawfare as a means intending and able to replace military force and, in the context of acts of war, as a

6 Farkas 2018a, 2019; Kelemen 2017.

7 Dunlap 2001; Bachmann–Munoz Mosquera 2015; Ansah 2010; Kearney 2010; Sari 2017, 2019; Hódos 2021.

8 Hasian 2016; Spitzer 2019, 2020; Kis Kelemen 2018a–b.

9 Sari 2018, 2019; Hódos 2020; Vikman 2021; Farkas–Resperger 2020; Farkas 2020; Kelemen 2021.

10 Kittrie 2016. 4–8.

means of exerting pressures through publishing and promoting violations of the law, typically of military law.<sup>11</sup>

However, due to the complexity of security and the various state and non-state modes of hybrid threats regarding the new comprehensive 21<sup>st</sup>-century pressure–influence–attack concept, it is important to pay closer attention to and analyse in detail the idea that gaps, deficiencies, contradictions, or inconsistencies of security relevance in legal regulation can pose an extreme risk not only in the case of specific confrontations or in military strategy but also in a larger strategic framework that uses a much wider range of military tools.<sup>12</sup> This is an excellent tool for amplifying various acts of pressure, influence, and destabilization against modern states and for delegitimizing state actions. Thus, in addition to the fact that the legal and military aspects of the issue of lawfare should continue to be the subject-matter of in-depth analyses from a military and strategic perspective, the interpretation of legal vulnerabilities as security risks should also be fine-tuned.

In this respect, it should also be noted that as regards the identification of regulatory failures as a security risk, attention should not be limited to the regulation of defence and security functions but rather a boarder interpretation is needed, including the security aspects of different strategic regulatory areas. It is, therefore, essential that the regulation of the defence and security functions of a state be coherent, up to date, and effective; in addition, in order for the number of channels of influencing and covert operation to be reduced, gaps in the regulation of transport, communications, financial markets, food, pharmaceutical safety, data protection, and migration must be identified, analysed, and bridged. Defective regulation can provide a possibility of making preparations for external interventions, a kind of infiltration that may be disguised by business transactions, acts of organized crime, or lax or circumventable requirements of settlement or setting up businesses. For these reasons, a shift from the concept of lawfare (a combination of law and warfare) linked notionally to warfare towards the concept of legal vulnerability or law as security vulnerability should occur.

With the conceptual issues discussed, revisiting the importance of the modernity and effectiveness of defence and security regulations, we cannot but realize that the operation of the state is extremely widely regulated in its internal and international relations, and this legislation is in the public domain. This serves both law enforcement and legal certainty and also provides an opportunity for specific protective measures to be called into doubt openly if our rules are inadequate. Thus, a specific protective measure combined with an outdated rule can be easily subverted in respect of both the domestic and the international public, for which the World Wide Web is an excellent platform, as it can reach the population directly. There are many examples of this phenomenon, including

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11 Id. 11–24.

12 Sari 2017.



cyber attacks, targeted drone strikes, the annexation of Crimea, or disputes in the Far East affecting certain maritime areas.

## **5. Concluding Remarks**

In the foregoing, I have sought to highlight some aspects of the role of law in the 21<sup>st</sup>-century hybrid security environment by considering the socio-state-regulatory dimensions together. In my view, the idea of lawfare, which arises from the intersection of the concepts of warfare and law, needs to be further developed in a complex and security-oriented analysis of state and law. Just as the concept of security has transcended the dominance of the military, so too should this issue be further developed towards a complex approach and a concept of complex security. It is clear that the exploitation of possible conflicts, gaps, and uncertainties in national and international law can play a prominent role even in the non-military preparatory phase, which is more typical of hybrid threats. It could be said that the information age has also made it much easier to assess and, where appropriate, challenge the law for purposes of influence. And this is an excellent tool for a hybrid narrative since, as I have discussed in relation to the three aspects, the exploitation of such vulnerabilities in the law has a negative impact on the rule of law and the social legitimacy of the rule of law, on the effectiveness of defence organizations, and, where appropriate, on the outcome of a conflict involving hard power through lawfare.

Taken together, the role of the rule of law in maintaining and strengthening security is therefore crucial. It can be analysed, developed, and applied in a modern way if it is able to develop a continuous interaction between security and defence expertise, legal thinking on security and defence issues, and the broad or traditional legal discipline. However, this cooperation is ‘only’ the professional basis for effective defence against the strategic use of law in a hybrid environment.

Building on these professional foundations, it is also necessary to ensure that society as the legitimacy base for state action and, with it, for the provision of defence, is able to make proper sense of this issue by means of appropriate, balanced, credible, and realistic information and training programmes. It is equally important that, in addition to the social element, political decision-makers, as the determinants of legislation and state decision-making, recognize the hybrid security aspects of the law and show openness to addressing shortcomings, independent of day-to-day political battles, on the one hand, and to establishing and strengthening a defence and security approach in the preparation of various regulations, on the other, in order to prevent future shortcomings and entry points.

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