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*Jan Woleński**

https://orcid.org/0000-0001-7676-7839

ADOLF REINACH, NEGATIVE STATES OF AFFAIRS AND THE CONCEPT OF OMISSION

Abstract. This paper examines Adolf Reinach's views about negative states of affairs. The author briefly presents the history of the issue from the Middle Ages to the 20th century. The views of Reinach and Roman Ingarden are compared. A special focus is ascribed to the problem of omissions in the legal sense. According to the author, a proper solution to the problem of negative states of affairs locates negation at the level of language, not in reality.

Keywords: negation, omissions, truth, semantics.

Adolf Reinach was not the first philosopher who observed troubles related to nelative states of affairs and tried to solve them (Reinach 1911). Roughly speaking, if *A* is a negative sentence (proposition, statement, etc.), saying that *A* refers to something ontologically negative appears to be a tempting idea. The issue bothered Aristotle and the Schoolmen, particularly with the respect to the concept of being. Here is a simplified argument (due mostly to medieval philosophers). Every general concept can be negated. Thus, if *C* is a genus, non-*C* arises by negation as a negative concept, for instance, we have ANIMAL and NON-ANIMAL (capitals without articles are used for making the further considerations more transparent). Moreover, if *C* and non-*C* are generic concepts, there exists a concept *D* such that *C* and non-*C* are its species, for instance, both ANIMAL as well as NON-ANIMAL belong to the species ORGANIC CREATURE. The process from *D* to *C* and non-*C* proceeds via determination, but generalization leads from *C* and non-*C* to *D.* So far, so good. However, consider the concept of being. If BEING is a concept, it has to have its negative counterpart, that is, NON-BEING, and, according to previous explanations, we should obtain a concept *D* (BEING-NON-BEING) by generalization. However, it is impossible, because BEING acts as the most general concept which, as such, does not admit any generalization. The Schoolmen distinguished *negatio* and *privatio* as two different kinds of denial. The *privation* refers to a lack of something. Leaving aside, *privations* at the lower levels, NON-BEING does not refer to something existing, but expresses the lack of being something. The Schoolmen distinguished so-called transcendentalia, that is, the most general concepts. Their concrete

* University of Information, Technology and Management in Rzeszow, jan.wolenski@uj.edu.pl

lists varied from one author to another, but BEING, TRUTH and GOODNESS populated every register of transcendentals. Thus, NON-BEING, NON-TRUTH (FALSEHOOD) and NON-GOODNESS (EVIL) consisted in lack of being, truth or goodness. Disregarding lower levels, for instance, illness as a lack of being healthy, at the top of the entire ontological hierarchy of genera (eventually with individuals as the lowest level), we have just *privationes*, not negative states of affairs. Yet it is a controversial issue whether the former have an objective being (existence) or belong to the mental realm.

Brentano pointed out another problem (see Brentano 1930, Chapter 1). Assume that we intend to elaborate the correspondence theory of truth as defined by the famous *dictum* (of Thomas Aquinus) *veritas est adequatio rei et intellectus* (I do not enter in the history of this idea going back to Aristotle; see Woleński 2019 for historical remarks). Thus, a sentence (or other bearer of truth, if chosen for a particular analysis, instance proposition, judgement, statement, thought, etc.) is true if and only if it corresponds with the reality. Consider the sentence

(1) London is not the capital of France.

This sentence is true. So it corresponds to reality, according to the main idea of the correspondence theory of truth. However, the reality (actuality) is a collection of positive facts (objects, states of affairs, situations, etc.) and, if so, there exists no fact consisting in London as not being the capital of France. Consequently, the correspondence theory of truth appears as essentially defective unless we accept negative states of affairs (perhaps as truth-makers, but I do not enter into this fairly complicated story). According to Brentano's philosophical views, any reasonable ontology should skip negative states of affairs from the ontological (or metaphysical) inventory.

The next example comes from jurisprudence. Criminal law distinguishes crimes of omission (see Clarke 2014 for an extensive analysis). Assume that *X* working as a lineman did not close (omitted closing, abstaining from closing) the barrier at the crossroads of rail and a road. This situation resulted in a collision of a car and a train. The ordinary way of speaking admits to say that the collision in question became an effect of the omission in given circumstances. In other words, the fact that the lineman did not close the barrier caused the collision. However, it is an incorrect statement because omissions considered as negative states of affairs cannot stand in causal connections. The collision should be rather seen as an effect of the overcrossing of two physical processes, the movement of the train and the movement of the car. This argument was formulated by Professor Władysław Wolter, the professor of penal law at the Jagiellonian University – I heard this reasoning when I attended his course in the academic year 1959/1960. Some day in 1965, I travelled from Warszawa to Kraków by train. Because I was hungry, I went to the restaurant car, in which I joined Wolter and Roman Ingarden, my professor of philosophy. The former explained to the latter

the problem of crimes of omission. Ingarden agreed that Wolter's account was correct. Ingarden formulated the issue in a very simple and impressive statement: "negative states of affairs have no causal powers, so omissions cannot be causes of anything". Wolter's argued that the lineman is responsible for a crime of omission not because of his abstaining from closing the barrier produced the collision as its effect, but according to the existence of a special legal obligation requiring a concrete action.

The previous discussion shows that the problem of negative states of affairs has not only historical aspects, but should be of interest for contemporary philosophers. Clearly, it has linguistic as well ontological dimension. The former concerns negative propositions, that is, having a form in which negation is explicitly or implicitly involved. Propositional calculus is the simplest logical theory in which negation as a connective occurs (I consider the classical system). Let A be a sentence. So $\neg A$ is also sentence. Thus, the sign $\neg$ refers to a monadic propositional sentential functor having the truth-table: (a) if A is true, $\neg A$ is false; (b) if A is false, $\neg A$ is true. Clearly, $\neg A$ is more complex than A, because the former contains an additional symbol, assuming that no equivalent of negation occurs inside A. It is an interesting logical fact that typical logical sets of primitive logical notions in propositional calculus contain negation and something else, for example, implication, disjunction or conjunction (but not equivalence). Is it possible to define negation by a single different functor? The answer is "Yes". There are such functors, namely so-called the Sheffer constants. One of them has the table: (a) A/B is false, if A and B are true; (b) A/B is true in other cases. The negation can be defined by the formula $\neg A =^{df} A/A$. We can say that $\neg$ occurs implicitly in A/A. The treatment of predicate negation is more complicated, because, for instance, the conditions for the equivalence of '*a* is not *P*' and $\neg$(*a* is *P*) or $\neg \exists x A$ and $\forall x \neg A$ are more complex than in the propositional case, but proceed via exact syntactic and semantic rules. However, negation at the level of language is associated with regular linguistic structures.

The situation at the ontological level is different and dependent on an ontological theory. If one insists that no negative items occur in reality, he or she will try to eliminate negation, even implicit, from the ontological inventory. In other, words, everything that looks to be ontologically negative, must be replaced by positive properties, facts, states of affairs, etc. Admitting the ontological negation as something real, constitutes a serious philosophical decision, independently of its logical environment. Let me illustrate the interaction of logic and ontology by an example. Nothingness is a favourite metaphysical topic, even if we leave aside Heidegger's speculations on *Das Nichts nichtet*). Consider (I follow analysis in Twardowski 1894, 20; page-reference to English translation) the sentence

(2) Nothing is eternal.

Apparently, (2) says something about the reference of the word "nothing" – this item is a good candidate of a negative state of affairs). However, we can replace (2) by

(3) There is no such x, such that x is eternal.

The word "Nothing" was eliminated from (2) by the quantifier. More precisely (and using standard symbols, (3) can be written as

(4) $\neg\exists x(x$ is eternal).

Twardowski's analysis shows that "Nothing" is not a name. On the other hand, the problem of the existence of negative states of affairs remains open. Although (4) can be considered as an assertion that no object is eternal, this analysis does not apply to all cases. Consider the sentence (i) "*a* is not red", assuming that *a* is yellow. Clearly, the sentence (ii) "*a* is yellow" refers to a positive state of affairs and implies (i). Yet since (i) does not imply (ii), both these sentences are not equivalent. Accordingly, one can argue that (i) refers to a negative state of affairs, not reducible to a positive one. If the universe of properties is finite, let say, represented by the set $\{P_1, P_2, \ldots, P_n\}$, one should claim that the required equivalence is obtainable, but it essentially depends on a metaphysical assumption, perhaps correct in the case of colours, but not generally.

Although Reinach had predecessors in analysing negative states of affairs, his work (Reinach 1911; see historical comments in Smith 1982; Mulligan 1987; Dubois 1995; Reinach 1989, Teil 2) on this issue is perhaps the most complete attempt to copy with the problem. My task is to dress Reinach's proposals in more contemporary clothes (the previous discussion can be viewed as a background for my further remarks). Reinach considered the two dimensions related to the *negative* (this term is auxiliary), namely the linguistic and the ontological. The former concerns negative propositions, but the latter – negative states of affairs. These two dimensions are associated by Reinach according to the following preliminary thesis

(5) A proposition is an assertion (or denial) related to an objectual state of affairs.

Some comments on (5) are in order. Reinach as a faithful student of Husserl shared the anti-psychologism of his master. Thus, we can say that his propositions (*Urteile* in German) were conceived as qualified by the phrase "in the logical sense" and contrasted with propositions in the psychological understanding.

On the other hand, Reinach, similarly to other members of the phenomenological school, including Husserl himself, were bound (not uncritically, of course) by Brentano's philosophical horizon. The latter distinguished allogenic and idiogenic theories of propositions (judgments in the older terminology). The

allogenic theory sees propositions as combinations of presentations or names, if we speak about linguistic entities (sentences, but the idiogenic conception considers propositions as *sui generis* entities. Reinach observed a problem associated with (2) consisting in how to answer whether assertion or denial are elements of propositions or their elements. Reinach explains the issue by the following example. Is a given flower red? We go to see the flower in question. If it is red, we are convinced that it is red (we believe in this – positive case, if not, e. g. if it is yellow, we disbelieve it (a negative); in this reasoning belief and disbelief are psychological entities. So, beliefs can be positive or negative (disbeliefs), and it depends on a position consisting in a relation to something else. This analysis of beliefs and disbeliefs analogically applies to propositions, particularly negative ones. Reinach maintains that the essence of negative propositions consists in their relation to negative states of affairs as their objectual correlates. This view is obviously contrary to Brentano's account of the correspondence theory.

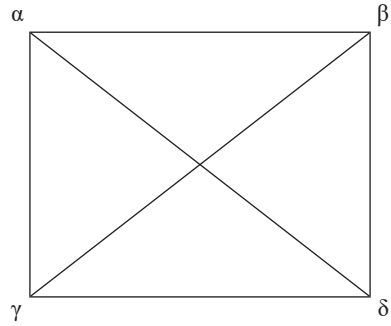
Reinach's further analysis intends to explain why negative states of affairs are necessary for explaining the nature of negative judgments. One of his arguments consists in pointing out that relations between states of affairs are parallel to logical relations between propositions. Clearly, if negative propositions are not reducible to positive ones, the same concerns states of affairs. Consequently, according to Reinach, the propositions „*a* is *b*" and „*a* is not *b*" have similar character (both are affirmative) and have similar truth-conditions, that is, related to objective states of affairs (commands and questions are different). In the light of modern model-theoretic semantics, if *A* and ¬*A* are sentences, their truth-conditions are recursively given. Let me change notation somehow and write +*A* for assertion of *A* and –*A* for denial of *A*. Clearly, the + and – express *modi* of *A*, as is required by the idiogenic theory of propositions. Frege's approach to sentences is perhaps the simplest account of the idea in question. Sentences have truth-values as their semantic references. All true sentences refer to **the True** and all false sentences – to **the False**. We have the only positive state of affairs, namely **the True** as well as the only negative state of affairs – **the False**. Yet we can correctly assert positive as well negative sentences – Frege's assertion sign ⊢ applies to both kinds of propositions. Reinach did not agree (he did not cite Frege in this context) that we have the only two "big" states of affairs, because he intended that the sentences "this flower is red" and "this flower is yellow" refer, assuming that both are true, to different ontological correlates, similarly as false sentences "London is not the capital of UK" and "Paris not the capital of France", and similarly, as true negative, for example "London is not the capital of France" and "Paris is not the capital of UK".

It will be instructive to compare Reinach and Ingarden. According to Ingarden (2016, §53), positive and negative states of affairs do not exist in the same way (note that Ingarden distinguished various kinds of existence, but I skip this issue). Take the sentence (*) "*a* is *b*" as true. The object *a* exists autonomically and has

a property *b*, but in the case of (**) "*a* is not *b*", although *a* really exists, *b* is only in thought. Moreover, assume that (**) is true. If so, there is an unlimited number of states of affairs such of the type (***) "*a* is *c*" such that (****) "*b* is not *c*". And our initial statement, that (**) is true, if *a* is *c.* This is essentially the argument outlined above, but take notice that the number of states of affairs falling under (***) is unlimited. Ingarden (1925) employed in his analysis a distinction between the material and formal object of propositions going back to the Schoolmen. The former exist in reality, the latter are determined by the content (or sense) of propositions – they exist intentionally (I do not enter into details of Ingarden's theory of intentionality). Every proposition has a formal object, but material objects are associated with true propositions, In other words, both objects agree in the case of true propositions. According to Ingarden, only positive true propositions have states of affairs as their autonomous correlates – they have also formal objects generated by their senses, negative propositions have formal objects only. Incidentally, it is interesting to see that Reinach and Ingarden, both representing realistic phenomenology, differed so much in their ontology, particularly in their approach to negative states of affairs.

Now I return to the problem of omission. Once again, Wolter pointed out (see above) that the lineman is responsible not for causing the collision, but because he omitted an obligatory action, because negative states of affairs have no causal powers. Wolter argued that a great number of people did not close the barrier but he denied that they committed a crime of omission. I simplify, because I disregard the situation in which a "neutral" person should react confronted with a danger, for instance, a person can see that a train approaches, but the barrier is not closed. The lineman can also be excused in some circumstances, for example, if he cannot act as is excused in some circumstances, for example, because he limited physical ability to act in the required manner. Anyway, we have a clear message that omission is something more than not-doing. For Wolter, omission is a directional not-doing. How are we to analyse this category in a more formal (logical) way?

In order elaborate t at least partially the last question, I will employ a simple device, that is, the logical square (**LS**, for brevity) for action sentences (see Woleński, 2008 for a detailed presentation) for a more detailed account:



Interpret α as "*X* did so that *A*", β as "*X* did so that ¬*A* (*X* did not-*A*), γ as "It is not so that *X* did not-*A*, δ as "It is not so, that *X* did *A*. We have well known relations summarized in the following list:

(6) (a) $\alpha \rightarrow \gamma$;
(b) $\beta \rightarrow \delta$;
(c) $\neg(\gamma \rightarrow \alpha)$;
(d) $\neg(\delta \rightarrow \beta)$;
(e) $\neg(\alpha \wedge \beta)$ (α and β are contrary; both cannot be true);
(f) $\gamma \vee \delta$ (γ and δ are subcontrary); both cannot be false);
(g) $\neg(\alpha \leftrightarrow \delta)$ (α and δ are contradictory);
(h) $\neg(\gamma \leftrightarrow \beta)$ (γ and β are contradictory).

The points (6b) and (6d) are the most essential for our topic. Since (see (6d) doing not implies not doing, but not conversely (see (6d), the former (doing not) is essentially stronger than the latter (not doing). Hence, doing not is something more than not doing. Unfortunately, the qualification "more" functions here as a metaphor. Since this linguistic figure apparently goes beyond logic, it requires further explanations.

At first glance, it is tempting to identify "it is so that *X* omits that *A* (abstains from doing *A*" with "it is so that *X* does not-*A*". However, adopting this equivalence does not adequately reproduces Wolter's position, because it ignores the factor of being directed involved in doing that not-*A* (this factor is just responsible that doing not-*A* is "more" than not-doing *A*; see the last paragraph). Since the intention (as behaving purposively in a way) of the lineman in his course of his action is not relevant for omission, we cannot say that his desire of not-doing is enough for omission. In fact, crimes of omission can be performed by so-called *dolus eventualis*, that is, in such a way that *X* should act in a prescribed way, but he or she abstained from the action in question. Thus, the lineman cannot excuse himself by saying "I am sorry, but I did not desire to cause the catastrophe in question". It is not inconsistent with Brentano's thesis that every mental is intentional in the sense that it is directed to some object. Even if the lineman is conscious that the train approaches and this state of affairs is the intentional object of his thinking (I skip the difficult problem of the nature of intentional objects), this fact does not matter in his abstaining of the required action. Consequently, "directed" understood in Wolter's sense is at last partially different from being directed as intentional. Reinach would perhaps say that the negative statement not-*A* refers to a negative state of affairs as its ontological (objectual) correlates. On his analysis, accepting that such entities exist appears as indispensable for a reasonable theory of truth conditions for action sentences asserting abstaining from doing something as well as other negative propositional utterances. However, ontology as such cannot offer a complete theory of omissions, even if we agree with Ingarden that negative states of affairs have no causal powers. Wolter's approach offers a hint, but it is

still unclear of how "more" in omissions should be interpreted, psychologically or in some other way.

The idiogenic theory of propositions, shared by Reinach, offers some prospects for a general account of action sentences. It is convenient to combine Reinach's ideas with some of Twardowski's views. According to the latter (see Twardowski 1894), every propositions has a moment, content and object. Twardowski identified moment and the character of an act, for instance asserting is a moment of an act of making an assertion. But this idea can be generalized in a way. If we consider a concrete propositional content expressed by *A*, it might have various moments also in the case of propositions related to actions. Take the proposition that the lineman did not close the barrier. It has a hidden moment (modus) "he did so", but also the normative moment qualifying the action in question as obligatory – moments of permission or prohibition occur in other normative contents. Reinach developed the idea of performatives (social acts; Reinach 1913) that is utterances creating something by using of words. He applied this idea mostly to promises arguing that a promise creates a special (normative?) state of affairs. Generalizing this ides, it is possible to say that issuing a norm "the lineman has the obligation to close the barrier" creates an explicit duty directed to the lineman, not to other persons, unless other legal provisos exist and impose obligation of other agents. Consequently, we can say that this norm creates a duty of performing an action and prohibits violating this obligation.

We have two possibilities to interpret this situation:

(A) Not doing something which is obligatory constitutes a negative state of affairs; a problem is that we need to enrich ontology by negative normative states of affairs – so we have normative negative states of affairs and non-normative ones;

(B) We have only positive states of affairs, but omission is a conscious (directional in Wolter's sense); note comments above) non-doing, consisting in doing something what excludes fulfilment of duty.

Adopting (B) can be motivated by the claim that doing and doing not should be considered in a symmetric way. Hence, assuming that doing contains an intention (with noticing the problem of *dolus eventualis*), the same concerns doing not expressed by the locution "*X* did so that not-*A*". As far as the issue concerns the latter, the moment indicated by the phrase "did so that" imposes an intentional (as well as semantic) factor on a state of affairs as somehow derivative of doing something else than *A*. Although there are several philosophical problems of this way of speaking, we have a route to dispense with negative states of affairs as existing in the same way as positive ones. In other words, semantics via possible worlds as objects in which propositions are true or false does not require negative states of affairs. On the other hand, these classes are derivative of social acts, at least in the case of normative regulations. Semantically speaking, Reinach's theory

of social acts (similarly as Austin's conceptions of performatives) is to be applied without approving negative states of affairs as independent ontological items.

On my part, I am inclined to reject negative states of affairs as actual. This view can be supported by model-theoretic semantics. If we state truth-conditions for negative sentences (see above), any appeal to ontological negative is redundant. This means that negation is in language, not in reality. Although logical semantics does not solve the controversy over negative states of affairs, it provides a hint seeing the issue in a perspective. Returning to the points (6b) and (6d) as logical dependencies generated by **LS**, they can be regarded as formulations of necessary formal conditions for a correct analysis of omission, but, and it should be stressed, they do not form a sufficient condition. In general, a full analysis of omissions exceeds the scope of logic. On the other hand, the analysis of such items via logical tools (in this case provided by **LS**) constitutes a good example of considerations deserved to be called formal ontology. In others words, I consider formal logical ontology as a particularly promising fragment of philosophical reflection. To be modest, it is only the first word, not the last one.

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*Paolo Di Lucia**

DEVIATION WITHOUT CONTRADICTION IN ADOLF REINACH'S ONTOLOGY

Abstract. Is it possible to affirm the existence of eidetic *a priori* laws, if these laws can be contradicted by positive law propositions? How is it possible a deviation from *a priori* juridical propositions? These are the two questions to which the present paper "Deviation without contradiction in Adolf Reinach's ontology" is devoted. The aim of the paper is to analyse the relations between *a priori* juridical propositions and propositions of positive law as investigated by Adolf Reinach. The Author presents and illustrates Adolf Reinach's conception of *conditioned a priori connections*.

Keywords: *A priori* juridical structures, positive law propositions, ontology, deviation, contradiction.

INTRODUCTION

The aim of this paper is to analyse the relations between propositions of positive law and *apriori* juridical propositions as investigated by one of the founders of the phenomenological movement – Adolf Reinach (1883–1917). In my paper I will first present Reinach's conception of *apriori* juridical propositions and his distinction between *apriori* juridical propositions and propositions of positive law (§ 1). Secondly, I will consider and make explicit his three arguments against the thesis according to which there could be a contradiction [*Widerspruch*] between apriori *juridical* propositions and propositions of positive law (§ 2). Thirdly, I will focus on Reinach's thesis according to which between apriori juridical propositions and propositions of positive law is only possibile a deviation [*Abweichung*] without contradiction (§ 3).

1. *A PRIORI* JURIDICAL PROPOSITIONS IN ADOLF REINACH

1.1. The concept of apriori juridical proposition

I will start with a brief introduction to clarify what Adolf Reinach means by "*a priori* juridical proposition" in his work *Die apriorischen Grundlagen des bürgerlichen Rechtes* [The Apriori Foundations of the Civil Law], 1913.[1]

* University of Milan, paolo.dilucia@unimi.it

[1] On the life and work of Adolf [Adolf Bernhard Philipp] Reinach [Mainz, 23 December 1883 – Diksmuide, 16 November 1917]: Husserl 1919; Schuhmann, Smith 1987. I mention three recent Italian works on this subject: De Vecchi 2014; Simonelli 2015; Tedeschini 2015.

Let us consider the following two juridical propositions [*Rechtssätze*]:

[1] Credits may be transferred to third parties by the creditor without the debtor's knowledge.

[2] A claim is extinguished by an act of waiver.

According to Reinach, the first juridical proposition, proposition [1], expresses a *contingent* truth.

The truth of juridical proposition [1] is based on the validity of a rule in the German civil code of Reinach's time (the *Bürgerliches Gesetzbuch* (*BGB*), which entered into force on January 1, 1900). According to this rule, credit can be transferred to third parties without the debtor knowing (Reinach 1989, 141).

The second proposition [2] also expresses a truth, but according to Reinach, it does not express a contingent truth.

According to Reinach, this is a proposition that is *universally and necessarily* true *by virtue of the essence (eîdos) or the concept of claim*.

The truth of proposition [2], according to which, "a claim is extinguished by an act of waiver," Reinach states:

> is grounded on the essence of the claim [*im Wesen des Anspruchs*] as such, and consequently applies necessarily and universally [*notwendig und allgemein*].[2]

According to Reinach, juridical proposition [2] expresses or describes an *a priori* law of *essence* [*apriorisches Wesensgesetz*], an *eidetic a priori law,* which can be intuited by anyone, without any prior knowledge of positive law.[3]

If we can penetrate the essence [*Wesen*] of juridical entities [*rechtliche Gebilde*]:

> We see what in them is strictly according to laws; *we catch connections* [*Zusammenhänge*] similarly to what happens if we penetrate the essence of numbers [*Zahlen*] or geometrical figures [*geometrische Gebilde*]: being-like [*So-Sein*] is based here in the essence of the being-so [*im Wesen des So-Seienden* – my italics; Reinach 1989, 141].

The role of the *a priori* doctrine of law [*apriorische Rechtslehre*] outlined by Adolf Reinach is, as pointed out by Edmund Husserl, bringing to light "the many *a priori* truths which are at the base of every right currently in existence and merely possible" (Husserl 1919, 54–55).

Edmund Husserl goes on to say:

> These truths are (as Reinach shows) *a priori* exactly in the sense in which the primitive axioms arithmetic or logical axioms are *a priori*; therefore, just like the axioms, these truths can be clearly grasped as valid truths without exceptions, prior to any experience [*Erfahrung*] (Husserl 1919, 54–55).

[2] "Ein Anspruch erlischt durch einen Akt des Verzichtes" (Reinach 1989, 144).

[3] In the language of Edmund Husserl and Adolf Reinach's phenomenology, *eîdos* or *essence* [*Wesen*] is the name of the invariant structure of the objects of experience.

1.2. Two problems

Having introduced the concept of *a priori* juridical proposition we can tackle two problems:

(i) the problem of the contradiction [*Widerspruch*] between *a priori* juridical propositions and propositions of positive law (§ 2);

(ii) the problem of the deviation [*Abweichung*] of the positive law propositions from *a priori* juridical propositions (§. 3).

2. THE PROBLEM OF "CONTRADICTION" BETWEEN POSITIVE LAW PROPOSITIONS AND *A PRIORI* JURIDICAL PROPOSITIONS IN ADOLF REINACH

2.1. Reinach's question: "Is it possible to state the existence of *a priori* eidetic laws if these laws can be contradicted by positive propositions of law?"

According to Reinach, *a priori* eidetic laws [*apriorische Wesensgesetze*] described by *a priori* juridical propositions (*juridical propositions that are true by virtue of the recurring concepts inherent in them*) can be clearly observed, even without prior knowledge of positive law (Reinach 1989, 149).

Reinach notes, however, that there are *a priori* juridical propositions [*apriorische Rechtssätze*] that seem to be contradicted by positive law propositions [*Sätze des positiven Rechts*] established by the lawmaker.

Now, Reinach wonders if it is possible to qualify laws which can be contradicted by positive law propositions as *a priori* eidetic laws.

Before explaining Reinach's answer (§ 1.2.), let us see three examples of positive law propositions that seem to contradict *a priori* propositions.

2.1.1. First example of a positive law proposition that "contradicts" an *a priori* juridical proposition

Consider the example of an *a priori* juridical proposition relating to the following:

[3] From a promise, a claim and an obligation arise.

The birth of claim and obligation from the act of promising is, as we have seen, as evident as a logical-mathematical axiom.

Yet, German positive law (the German Civil Code in force during Reinach's lifetime) states, in apparent contradiction with the *a priori* juridical proposition [3] that:

[4] A claim and an obligation shall not arise from the promise of a minor.

Reinach writes that:

> Whoever makes a promise, with it assumes an obligation [*Verbindlichkeit*]. The twenty-year-old can, of course, make promises of all kinds: however, a fully valid legal-positive obligation does not always arise from them [*vollgültige positiv-rechtliche Verbindlichkeit*] (Reinach 1989, 239).[4]

2.1.2. Second example of a positive law proposition that "contradicts" an *a priori* juridical proposition

Here is the second example. Consider an *a priori* juridical proposition concerning the claim:

[5] A claim is extinguished by fulfilment.

The extinction of the claim through fulfilment is, as we have seen, as obvious as a logical or mathematical axiom [*logisches oder mathematisches Axiom*].

Yet, a rule of positive law can declare that fulfilment is a necessary, yet not sufficient condition for the termination of the claim. A second necessary condition of the extinction of this claim can be the fact that fulfilment is ascertained by the judicial authority:

[6] A claim is extinguished when fulfilment is established by the judicial authority.

Reinach writes that:

> a positive law [*ein positives Recht*], where appropriate [*zweckmäßig*], can establish that some claims are only extinguished when their fulfilment has been officially approved by the local judicial office (Reinach 1989, 239).

2.1.3. Third example of a positive law proposition that "contradicts" an *a priori* juridical proposition

Here is the third, and last, of the three examples.

Consider an *a priori* juridical proposition relating to property:

[7] It is impossible for a relation of ownership to arise from an act of promise.[5]

The impossibility of a relation of ownership being born from an act of promise is as obvious as a logical-mathematical axiom.

Yet, positive law can establish, just as the *Code Napoléon* did, in apparent contradiction with the proposition [7], that a promise to sell a certain asset has the sale value of that asset (Art. 1589: "*Promesse de vente vaut vente*").[6]

[8] A promise of sale is equivalent to a sale.

---

[4] In addition to the minor's promise, Reinach makes four other examples of German civil law arrangements that appear to "contradict" *a priori* juridical propositions: (i) the promise of a loan; (ii) the promise to donate real estate property; (iii) a promise to the public; (iv) a promise in favour of a third party.

[5] On the normative dimensions of impossibility, see Conte, Di Lucia 2012.

[6] See also: Di Lucia 2013.

For each of the *a priori* juridical propositions – Reinach warns – one can contrast a positive law proposition that seems to "contradict" the *a priori* juridical proposition.

But can one affirm the existence of eidetic *a priori* laws if these eidetic *a priori* laws can be "contradicted" by positive law propositions (Reinach 1989, 239)?

It appears to be an insurmountable aporia, but for Reinach, it is not.

2.2. Reinach's answer: the thesis of deviation [*Abweichung*] without contradiction [*ohne Widerspruch*].

To the question "Is it possible to affirm the existence of *a priori* eidetic laws if these *a priori* eidetic laws can be "contradicted" by propositions of positive law?" (§ 2.1.), Reinach answers affirmatively.

It is possible because, according to Reinach,

> between our eidetic laws and the propositions of positive law we cannot speak of a true contradiction [*ein echter Widersrpuch*] (Reinach 1989, 241).[7]

According to Reinach, the positive law propositions cannot in any way contradict [*widersprechen*] *a priori* juridical propositions, but they can nonetheless deviate [*abweichen*] from *a priori* juridical propositions.[8]

To substantiate this thesis, which I will call the thesis of "deviation without contradiction", Reinach formulates three increasingly radical topics: a *syntactic argument* (§ 2.2.1.), a *semantic* argument (§ 2.2.2.), a *pragmatic argument* (§ 2.2.3.).

2.2.1. First argument: the *syntactic argument*

Firstly, Reinach puts forward an argument supporting his own theory (the theory of deviation without contradiction), a *syntactic argument*.

According to Reinach, between the positive law propositions and *a priori* juridical propositions, no real contradiction is possible because the condition for the existence of a contradiction between propositions is that the propositions that contradict each other, besides having the same content, are *homogeneous*, i.e. have the same *structure* (Reinach 1989, 240).[9]

However, the positive law propositions law and *a priori* juridical propositions are not homogeneous: they do not have the same structure, *they are not isomorphic*.

---

[7] The regulation [*Bestimmung*] presupposes a person who issues it (Reinach 1989, 242).

[8] The distinction between contradiction [*Widerspruch*] and deviation [*Abweichung*] in Reinach is already reported in 1960 (Schambeck 2014, 9).

[9] Reinach recognizes the existence of various types of propositions: assertive propositions, normative propositions, interrogative propositions, imperative propositions, propositions of promise, *etc*.

The structure of a positive law proposition (for example, a proposition of the BGB) is typically the structure of a regulation [*Bestimmung*], which is expressed in terms of *shall*: "*A* shall be *B*" ["*A soll B sein*"].

The structure of an *a priori* juridical proposition, on the contrary, is typically the structure of a judgment [*Urteil*], which is expressed in terms of *being*: "A is *B*" ["*A ist B*"].

Regulation [*Bestimmung*] and judgment [*Urteil*] are two entities that *do not* have a homogeneous structure.

Let's now return to the example of the *promise*.

The German Civil Code (*BGB*) from Reinach's time states that:

[4] A claim and an obligation shall not arise from the promise of a minor.

The positive law proposition [4] expresses a regulation [*Bestimmung*] (a negative regulation) in *deontic terms*, a *Bestimmung* in terms of shall [*sollen*], whose structure is *not homogeneous* to the structure of the *a priori* juridical proposition in *adeontic* terms:

[3] From a promise, a claim and an obligation arise.

Indeed, this last proposition, the *a priori* juridical proposition [3] expresses a judgment [*Urteil*] in terms of being [*Sein*]: it is in *adeontic terms*.

Therefore, according to Reinach there cannot be a true contradiction between the positive law proposition (in *deontic terms*) [4], and the *a priori* juridical proposition (in *adeontic terms*) [3].

2.2.2. Second argument: the *semantic argument*

Secondly, Reinach supports his thesis by advancing an argument that is no longer syntactic but *semantic* (the thesis of deviation without contradiction).

According to Reinach, between the propositions of positive law and *a priori* juridical propositions, a real contradiction is not possible because the condition of possibility of the contradiction between two propositions is that the two propositions, besides having the same content and the same structure, are also subject to being true or false.

2.2.2.1. Propositions of positive law are not apophantic

For Reinach, *a priori* juridical propositions [*apriorische Rechtssätze*] are theoretical judgments [*Urteile*], which describe an existing reality, and as such they are susceptible to being true or false (*a priori* propositions are apophantic propositions).

This does not happen with the positive law propositions. The positive law proposition [*Sätze des positiven Rechts*] are not judgments [*Urteile*], which describe a reality that is existent in itself (Reinach 1989, 244).

According to Reinach, the positive law propositions belong to the category of propositions [*Sätze*] that Reinach calls regulations [*Bestimmungen*].

Bestimmungen do not adapt to the real existent in itself, but (thetically) *establish their* content [*Inhalt*] as having to be [*als seinsollend*] with the aim of adapting a previously non-existent reality to themselves (Reinach 1989, 24).

As such, the positive law propositions are not liable to be true or false (the positive law propositions are *non-apophantic propositions*, *anapophantic propositions*). Unlike *a priori* juridical propositions, they are beyond true and false [*jenseits des Gegensatzes von wahr und falsch*].

In the case of positive law propositions, Reinach writes that:

> what we have is *not* a state of being [*Setzung eines Seins*] which (depending on the existence or the absence of this being) may be true or false, but a regulation [*Bestimmung*] that is beyond the contrast between true and false [*jenseits des Gegensatzes von wahr und falsch*] (Reinach 1989, 240).[10]

2.2.2.2. Propositions of positive law do not express judgments

The possibility of clearly distinguishing between propositions that express thetic regulations [*Bestimmungen*] (like the positive law propositions) and propositions that express theoretical judgments [*Urteile*] (like *a priori* juridical propositions) is not, according to Reinach, disproved by the fact that sometimes the positive law proposition of can have a linguistic formulation that is *identical* to that of propositions that express judgments [*Urteile*]. There is an irreducible semiotic difference (a difference that is both semantic and pragmatic).

Reinach writes:

> The proposition [*der Satz*] "Man's legal capacity is acquired from the moment of birth" [*Die Rechtsfähigkeit des Menschen beginnt der der Vollendung der Geburt*] […] cannot be considered a judgment [*Urteil*]. […]
>
> The proposition "Man's legal capacity is acquired from the moment of birth" can be found in a textbook of civil law. The words are the same, but the content [*Gehalt*] of the proposition [*Satz*] is obviously different [from the content of the proposition-of-regulation [*Bestimmungssatz*] contained in the German Civil Code].
>
> With the civil law textbook, one really is faced with a judgment [*Urteil*], one can state that, at present, man's legal capacity in Germany begins with birth; this statement refers to article 1 of the German Civil Code, which is where it is established.
>
> However, this article does not contain a claim [*Behauptung*] (it would be difficult to establish a judgment by means of an identical judgment), but a regulation [*Bestimmung*]. Since the Civil Code states that the people's legal capacity is acquired at birth, *on the basis of this judgment* [*auf Grund dieser Bestimmung*], the lawmaker can say that things are like this in Germany (Reinach 1989, 240–241).

[10] On judgments and norms in Reinach, see Alves 2015.

With the distinction between (anapophantic) positive law propositions that express regulations established by lawmakers and *homonym (apophantic)* legal propositions expressing judgments established by jurists, Reinach envisages a distinction that is of great importance for the philosophy of law: the Kelsenian distinction between *Sollnorm* and *Sollsatz*.[11]

2.2.3. Third argument: *pragmatic argument*

Thirdly, Reinach puts forth a third argument to support his theory (the theory of deviation without contradiction) that is non-syntactic, non-semantic, but pragmatic.

According to Reinach, between the positive law propositions of and *a priori* juridical propositions, a true contradiction is not possible because a condition of possibility of the contradiction between propositions is that the propositions that contradict each other are pragmatically equivalent.

But the positive law propositions (which are the objectification of regulations [*Bestimmungen*]) and *a priori* juridical propositions (which are the objectification of claims [*Behauptungen*]) are not pragmatically equivalent.

The pragmatic function of the regulation [*Bestimmung*] is clearly distinguished, according to Reinach, from the pragmatic function of judgment [*Urteil*].

Reinach writes:

> A regulation [*der Bestimmung*] is one […] of those acts, those efficacious acts [*wirksame Akte*], which with their enforcement [*Vollzug*] intend to bring about [*beWirken*] change [*Veränderung*] in the world and potentially do indeed provoke it. Each judgment is aimed at the realisation [*Realization*] of what it presents as having to be [*als seinsollend*]. The content of a judgment can never be something that is necessary *a priori* [*a priori notwendig*], or impossible *a priori* [*a priori unmöglich*].[12]

3. THE PROBLEM OF THE "DEVIATION" OF THE POSITIVE LAW PROPOSITIONS FROM *A PRIORI* JURIDICAL PROPOSITIONS IN ADOLF REINACH

3.1. Reinach's question: "How is a deviation of the positive law propositions from *a priori* juridical propositions possible?"

Having denied the possibility of there being a contradiction between the positive law propositions and *a priori* juridical propositions [*Widerspruch*],

[11] On the distinction between *Sollsatz* and *Sollnorm* in Hans Kelsen, see Kelsen 1960.

[12] A systematic investigation of the theory of regulation [*Bestimmung*] by Adolf Reinach was carried out by the Alsatian-born and naturalised U.S. citizen philosopher Herbert Spiegelberg [1904–1992], in: Spiegelberg 1935. See Paulson 1990, Di Lucia 2008.

Reinach asks himself about the deviation [*Abweichung*] of the positive law propositions from *a priori* juridical propositions.

Let us once again consider the positive law proposition [*der Satz des positives Rechts*] regarding the promise made by a minor.

[4] A claim and an obligation shall not arise from a promise made by a minor.

Between the proposition [4] and the proposition [3]

[3] From a promise, a claim and an obligation arise.

there cannot be a genuine contradiction [*Widerspruch*] for the reasons we have seen in § 2 eidetic connections.

However, the positive law proposition [4] constitutes an open deviation [*Abweichung*] from the *a priori* proposition [3].

On the one hand, Reinach observes, it is perfectly sensible [*sinnvoll*] for the lawmaker to deviate from the *a priori* proposition [3], establishing the positive law proposition [4].

Indeed, Reinach writes:

> Just as there would be no sense [*sinnlos*] in saying that a claim, which arises out of a necessity of essence [*wesensnotwendig*] from the promise, should not be born [*erwachsen*], on the other hand, the proposition [*der Satz*] according to which it is not right, and should not be, that the carelessness or inexperience of a young person is exploited by others [*daß es nicht recht sei und nicht sein solle daß der Leichtsinn oder die Unerfahrenheit eines jungen Menschen durch andere ausgenützt wird*] would be more than sensible [*sinnvoll*]: his rash promise *should not be* [*soll nicht sein*] and therefore, likewise the claims and obligations that such a rash promise derive from *should do not have to be* out of necessity [*notwendig*] (Reinach 1989, 248).

On the other hand, Reinach points out that the juridical proposition [3] "From a promise a claim and an obligation arise" is an *a priori* proposition, universally and necessarily valid just as much as a mathematical proposition is (e.g. 2 x 2 = 4).

Therefore, a positive law proposition (a legal ruling) deviating from the *a priori* juridical proposition [3] would in principle be impossible [*unmöglich*], just as much as a positive law proposition (a legislative regulation) would be if it stated that 2 x 2 = 5 (Reinach 1989, 241).

How is it possible – Reinach then asks himself – that the lawmaker could establish the proposition [4] "A claim and an obligation shall not arise from the promise of a minor"?

More generally: How is the deviation [*Abweichung*] of *a priori* juridical propositions possible (Reinach 1989, 241)?

In order to answer this question Reinach introduces a fundamental distinction that I will make explicit in § 3.2.: the phenomenological distinction between two kinds of eidetic connections.

3.2. Reinach's answer: the theory of the conditioned nature of all *a priori* juridical connections

Reinach's answer to the question "How is deviation [*Abweichung*] of the positive law propositions law from *a priori* juridical propositions possible?" is as follows: the deviation [*Abweichung*] from *a priori* juridical propositions is possible because all valid eidetic connections *within the juridical framework* belong to a particular species of eidetic connections whose validity [*Gültigkeit*] is *conditioned* (Reinach 1989, 250).

Paragraph 3.2.1. is dedicated to the *genus* and the two *species* of conditioned eidetic connections.

3.2.1. Two species of eidetic connections: *unconditional eidetic connections vs. conditioned eidetic connections*

According to Reinach, *two* species of eidetic connections [*Wesenszusammenhänge*] are given:

(i) *unconditioned eidetic connections*;

(ii) *conditioned eidetic connections*.

The distinction between the two types of eidetic connection (formulated by Reinach in the third chapter of his book *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913), is also valid *beyond the juridical domain*.

According to Reinach:

> In general, we can distinguish two types [*zwei Typen*] of eidetic connections [*Wesenszusammenhänge*]: the eidetic connections that are valid [*gelten*] indiscriminately in all circumstances [*unter allen Umständen*], and the eidetic connections that are valid only on the condition [*unter der Voraussetzung*] that certain facts are not involved [*Tatbestände*] (Reinach 1989, 250.

According to Reinach, the *first type of* eidetic connection has *unconditioned* validity. It is illustrated by the following example:

[9] There is no color without extension.

There are strictly no circumstances in which a color can exist without extension.

On the other hand, according to Reinach, the *second type* of eidetic connection has a *conditioned validity*. It is illustrated by the following example:

[10] The fulfilment of a desire provides pleasure.

Let us speculate, Reinach remarks, that the fruit we have wanted to try has an extremely bitter taste. It is therefore possible that the satisfaction of a desire does not cause that pleasure which that experience tends to provide.

Here is Reinach's complete passage:

> The proposition according to which the fulfilment of a desire [*Strebenserfüllung*] provides pleasure [*Lust*] is to be linked to the second class [the class of conditioned *eidetic connections*].

> Indeed, *this proposition* it is not achieved through prolonged observation, but rather it serves as a guide to our observations (as a proposition based on the very essence of the fulfilment of desire [*im Wesen der Strebenserfüllung*]). The validity [*Gültigkeit*] of the proposition "The fulfilment of a desire procures pleasure", which in itself is without exception, may however be eliminated [*ausgeschaltet*] in certain circumstances. It is possible, for example, that if the fruit we wanted to taste is extremely bitter, then that fruit will not cause any pleasure (Reinach 1989, 250).[13]

Thus far, Reinach makes a general distinction between two types of eidetic connections, only the second of which can be excluded in certain circumstances, if certain facts occur.

But the general distinction between two types of eidetic connection is the premise for one of Reinach's important theories: the theory of the *conditioned nature* of *all* the valid eidetic connections within the juridical framework.

3.2.2. *A priori* juridical connections *as conditioned connections*

Having introduced the general distinction between two types of eidetic connections, Reinach states that the valid eidetic connections *within the juridical framework* are *all* conditioned eidetic connections.

Indeed, according to Reinach, although the eidetic connections that are valid within the juridical framework are, insofar as they are *a priori,* universal and necessary connections and, as such, do not admit exceptions, however, their validity [*Gültigkeit*] is likely to be excluded, suspended, from the validity [*Geltung*] *in* and *for* an order of positive law propositions established by a lawmaker.[14]

Let us return to the example of the minor's promise.

In the case of the minor's promise, according to Reinach, the *a priori* juridical proposition [3] "From a promise, a claim and an obligation arise" remains valid without exception even if the lawmaker states that [4] "A claim and an obligation shall not arise from the promise of a minor".

However, the validity of the eidetic connection described by the proposition [3] is suspended (excluded) due to the effect of the regulation [*Bestimmung*].

Reinach writes:

> The universal eidetic connection [*der allgemeine Wesenszusammenhang*] is suspended [*ist außer Kraft gesetzt*] by means of the regulation [*durch die Bestimmung*], not in the sense that it no longer exists [*nicht mehr besteht*], but in the sense that that universal eidetic

[13] On the nature of the "Reinachian synthetic *a priori*" see: Zełaniec 1992, Zełaniec 2012.

[14] In the third chapter of the book *Die apriorischen Grundlagen des bürgerlichen Rechtes* [*The Apriori Foundations of the Civil Law*], 1913, Reinach distinguishes the conditions of validity [*Gültigkeit*] of *a priori* juridical propositions [*apriorische Rechtssätze*] from the conditions of validity [*Geltung*] *in* and *for* a system of positive law propositions [*Sätze des positiven Rechts*]. See: Di Lucia 1997, 121–122. On the relationships between logical validity and legal validity, see: Kelsen 1965; Conte 1998.

connection (connection [*Zusammenhang*] which exists in itself and for itself [*an und für sich*] and whose validity [*Gültigkeit*] is in fact assumed [*vorausgesetzt*] from the deviant regulation [*abweichende Bestimmung*]) is excluded [*ausgeschaltet*] from the regulation itself (Reinach 1989, 250).

CONCLUSION

The possibility that an eidetic connection, a universal and necessary eidetic connection, that is grounded on an essence [*Wesen*], may be excluded [*ausgeschaltet*] by a legislative regulation, is far from being an *accidental* possibility; according to Reinach, it is an eidetic possibility, inscribed in the nature of *juridical* connections, and constitutes a specific and differential feature of the ontology of the "law" region (within the ontology *of law*), an ontology that runs alongside other regional ontologies (e.g. the ontology of numbers), see: Di Lucia, forthcoming.

(Translation from Italian language by Gaea Vilage).

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Lorenzo Passerini Glazel[*]
https://orcid.org/0000-0002-1607-8203

GRASPING AN OUGHT. ADOLF REINACH'S ONTOLOGY AND EPISTEMOLOGY OF LEGAL AND MORAL OUGHTS

Abstract. We almost every day direct our actions with reference to social, moral or legal norms and oughts. However, oughts and norms cannot be perceived through the senses: how can we "grasp" them, then? Adolf Reinach distinguishes enacted norms and oughts created through a social act of enactment, from moral norms and oughts existing in themselves independently of any act, knowledge or experience. I argue that this distinction is not a distinction between two species of oughts within a common genus: it is rather a deeper ontological distinction between two modes of existence that are quite different, even though both are objective, according to Reinach. This ontological distinction is reflected in the way in which enacted oughts and moral oughts can be grasped, respectively: in the former case, the enacted ought is grasped by going back to the underlying social act from which it springs; in the latter, a "grasping through feeling" (*fühlende Erfassen*) of the moral values is implied.

Keywords: Adolf Reinach, ontology of ought, epistemology of ought, social acts, feeling a norm.

1. INTRODUCTION: AN EPISTEMOLOGICAL QUESTION ABOUT OUGHTS AND NORMS

Oughts and norms are ordinary elements of the "landscape" in which we live. Almost every day we act with reference to a plurality of social, moral or legal oughts and norms, and we accordingly make choices that often collide with our own desires.[1] However, oughts and norms are not physical entities that can be perceived through the senses. This raises an epistemological question: How can we "perceive" or "grasp" the oughts and norms with reference to which we direct our actions? In other words, how can we recognize the existence of an ought or a norm in order to act with reference to it?

[*] Università degli Studi di Milano – Bicocca, Dipartimento di Giurisprudenza (School of Law) and CISEPS – Center for Interdisciplinary Studies in Economics, Psychology and Social Sciences, lorenzo.passerini@unimib.it

[1] The capacity to act with-reference-to, or "in light of", rules and norms has recently been dubbed by Lorini (2018) "nomic capacity". Lorini suggests that such a nomic capacity is not exclusive to human beings and is shared by other animals. On the notion of "acting with reference to norms", or "nomotropism", see Conte (2000).

This epistemological question is obviously connected with the ontology of oughts and norms. The way in which an ought or a norm can be "perceived" or "grasped" is indeed strictly related to the specific ontological status of norms and oughts, that is to say, to their specific mode of existence. In Adolf Reinach's works on law and on ethics, two different answers to this epistemological question can be found, one involving going back to the specific act which constitutes the source of the ought, the other implying a "grasping through feeling" of a value. These two answers reflect the different ontological status respectively pertaining to legal and moral oughts and norms in Reinach's philosophy.

In section 2., I will examine Reinach's differential ontologies of *enacted* oughts and norms on the one hand, and *moral* oughts and norms on the other. I will then examine, in section 3., Reinach's two different answers to the epistemological question of how we can perceive oughts and norms: two different answers which are respectively implied in the modes of existence of enacted and moral oughts and norms.

2. TWO ONTOLOGIES OF NORMS AND OUGHTS

In *The A Priori Foundations of the Civil Law*, Reinach (1983) distinguishes norms that are issued through an act of enactment (*Bestimmungsakt*),[2] from norms that are "grounded in the moral rightness of a state-of-affairs":

> There are "norms" which are grounded in [*fundiert sind in*] the moral rightness of states of affairs. Because something is morally right, it *ought to be*, and if certain further conditions are fulfilled, *I ought to do it*. This oughtness of being [*Seinsollen*] and of doing [*Tunsollen*] exists by its nature in itself and apart from the knowing or the positing of any consciousness. An *enactment* [*Bestimmung*], by contrast, necessarily presupposes a person who issues it (Reinach 1983, 105).

This distinction is not a mere distinction between two species of entities within a common genus: it is a more profound ontological distinction. Despite the fact that the term 'norm' may apply to both moral norms and enacted norms, they are not congeneric in Reinach's account, because they have two different – even though both objective – modes of existence.

[2] Reinach highlights the fact that the German word '*Bestimmung*' (enactment) is ambiguous, because it may refer to five different (though related) entities: (i) the *Bestimmungssatz*, i.e. the sentence that is uttered in an act of enactment; (ii) the *Bestimmungsinhalt*, i.e. the content of the enactment; (iii) the *Bestimmungsakt*, i.e. the act of enactment; (iv) the *Bestimmungserlebnis*, i.e. the experience of the *Bestimmungsakt* in one's consciousness; (v) the *Bestimmungswirkung*, i.e. the effect that is produced by the *Bestimmungsakt*.

2.1. The objective ontology of enacted oughts

Enacted norms – a typical example of which are the statutory norms of positive law[3] – are norms that are issued through an enactment. An enacted norm and the corresponding ought (*Sollen*) come to exist only in virtue of the act of enactment.

An enactment is a specific type of *social act*, according to Reinanch. In Reinach's account, social acts are a type of *spontaneous* acts (*spontane Akte*)[4] that "cannot unfold purely within the person," because they have three distinctive characters:

(i) social acts always *address* themselves to (*sich wenden an*) another person: they are "heterotropic";[5]

(ii) social acts are "*in need of being heard*" (*vernehmungsbedürftig*): they must necessarily "penetrate" the other person to whom they are addressed, and they necessarily have to be "grasped" by him or her;

(iii) social acts consequently need to be *externally expressed* in order to be grasped by the other person to whom they are addressed (Reinach 1983, 19–20).

Along with the act of enactment, other examples of social acts are the act of questioning, the act of informing, the act of promising, and the act of commanding. However, within the genus of social acts, the act of enactment – like other social acts, such as commanding or promising, but in contrast to other social acts, such as questioning or informing – belongs to a peculiar subset, the subset of the "efficacious" (*wirksam*) social acts. Efficacious social acts are acts "which by being performed intend to effect a change in the world and sometimes do effect it" (Reinach 1983, 108). When an enactment or a command or a promise is made,

[3] Positive law does not obviously consist uniquely of enacted norms: also unwritten customary norms of positive law exist. Reinach (1983) mentions unwritten positive law – defined as "legal rules which have gradually established themselves without ever being posited in an expressed enactment" – only once, and he does not take a stance on it; he merely suggests that the efficacy (*Wirksamkeit*) of unwritten positive law could possibly be understood in terms of *recognition* (*Anerkennung*) of the established norms (141, note 10).

[4] Spontaneous acts are a peculiar kind of intentional experiences (*Erlebnisse*) in which the self is not merely active (*aktiv*) but specifically "factive" (*tätig*): in spontaneous acts, in contrast both to passive experiences and to merely active experiences, there is "a doing [*Tun*] of the self", and "the self shows itself as the phenomenal originator of the act" (Reinach 1983, 18). An analogous distinction between the "operativity" (*sprawczość*) of human acts as opposed to a mere "activation" (*uczynnienie*) of the self can be found in Karol Wojtyła's (1994) phenomenology of the act and of the person. For a specific analysis of spontaneous acts in Reinach's typology of experiences (*Erlebnisse*), see De Vecchi and Passerini Glazel 2012.

[5] The adjective 'heterotropic' has been suggested by Amedeo G. Conte and Paolo Di Lucia (see De Vecchi, Passerini Glazel 2012, 273). As De Vecchi and Passerini Glazel (2012) highlight, the property of social acts of being heterotropic (i.e. addressed to others) is not the same as the property of being *fremdpersonal* (i.e. directed to others), because there are also non-social acts (such as envying somebody) that are directed to others without being addressed to others.

"something is thereby changed in the world" (22). In the case of commanding, an obligation is created; in the case of promising, a claim and a corresponding obligation are created; in the case of an act of enactment, a norm and an ought (an ought-to-do or an ought-to-be) are created.

This efficacy (*Wirksamkeit*), that is specific to social acts like commanding, promising and enacting, presupposes, but is not the same as, what Reinach calls the positing character (*Setzungscharakter*) of these acts. It is true that through an act of enactment something "is being posited as enacted", "as something that ought to be";[6] but this is similar to what happens, for instance, in the act of questioning, which is not an efficacious act in Reinach's sense and through which something is posited as questioned, as put into doubt. In the case of the enactment, "far *more* is at stake", says Reinach (1983, 109): "whoever enacts something not only wants to bring it about that the content now exists as enacted by him; […] it rather belongs to the meaning of an enactment that it intends to 'be valid' [*gelten*] for a larger or smaller group of persons" (108).[7]

If an enactment – such as the enactment of the director of a company that a bridge should be built – is valid for a certain group, and if it is consequently efficacious for the members of that group, then the corresponding state of affairs "*exists as one which ought to be*", and "the action realizing that state of affairs is consequently required" (Reinach 1983, 108).

It is important to remark that, in Reinach's account, the ought created through an enactment is not a mere psychological content existing in the consciousness of the subject issuing the enactment. An efficacious enactment creates an objective legal entity (*rechtliches Gebilde*) similar to the claim and obligation that are created by a promise. The new entities (*Gebilde*) that enter the world through efficacious social acts, like promising or enacting, possess a peculiar ontological status, a peculiar mode of existence, the investigation of which is one of the main contributions given by Reinach's a priori theory of law to the development of social ontology.

According to Reinach, these legal entities "are surely not *nothing*", since they can be eliminated by waiving, retracting, repealing or fulfillment. However,

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[6] Reinach underlines that, in contrast to acts of judgment, the content of the enactment is posited as something that ought to be in the very act itself: "there is no independently existing being to which it has to correspond" (Reinach 1983, 108).

[7] According to Reinach, the validity or efficacy for a group of persons of the enactments of an arbitrator presupposes and depends on an explicit act of submission (*Unterwerfungsakt*). He remarks, though, that "some reference to a person is intrinsic to the act of submission"; consequently, the act of submission does not seem to fit in the case of the enactments of the state (except maybe for the case of an absolute monarch). Reinach thus takes then into consideration the hypothesis that the validity or efficacy of the enactments of a state is explained by a different act: the act of recognition (*Anerkennung*). However, he does not take a stance in this regards, and merely asserts that it is not a problem of the a priori theory of law, only of the philosophy of positive law, to determine what grounds the efficacy of positive enactments (Reinach 1983, 116–117).

they are neither physical, nor psychical, nor ideal entities. They are not *physical*, since they cannot be perceived through the senses, nor through any physical instrument. They are not *psychical*, since they can last in time for years without any change, which is not possible for psychical entities (which should even vanish during sleep and loss of consciousness). And since these legal entities, in contrast to ideal entities such as numbers, concepts and propositions (*Sätze*), are temporal entities – they "arise, last a definite length of time, and then disappear again" – they are not even *ideal* entities, like numbers or propositions (Reinach 1983, 8–9). Legal entities have an ontological status of their own.

With regard to the ought created through an enactment, Reinach underlines that "a distinct kind of objectivity of oughtness [*Objektivität des Sollens*] shows itself here", a kind of objectivity that is valid "only for the persons for whom the enacting act is efficacious" (Reinach 1983, 109). The source (*Quelle*) of this objective ought is the act of enactment. The act of enactment is the necessary and sufficient condition for the emerging (the beginning to exist) of the enacted ought in its objectivity. However, the act of enactment is not the "cause" of the emerging of the ought. Between the act of enactment and the enacted ought, there is not a causal relation, according to Reinach; the relation between the act of enactment and the enacted ought is "an immediate self-evident and necessary relation of essence [*Wesenszusammenhang*]" (1983, 15).[8]

I can now summarize the distinctive characters of a legal ought created through an act of enactment. An enacted ought

(i) is created through a social act of enactment as its source in virtue of an immediate, self-evident and necessary relation of essence;

(ii) it consequently presupposes a person who issues it as "its origin and bearer" (*Ursprung und Träger*);

(iii) it can be eliminated, abolished or repealed through a social act;

(iv) it is an objective ought, whose objectivity is nevertheless restricted to the persons for whom the enacting act is efficacious.

2.2. The objective ontology of moral oughts

I have examined, so far, Reinach's objective ontology of enacted oughts; I will now turn to his objective ontology of moral oughts.

The moral ought (*sittliches Sollen*), in contrast to the enacted ought, does not presuppose a person issuing it: it is instead directly "grounded [*fundiert*] in the moral rightness of a state of affairs [*in der sittlichen Rechtheit von Sachverhalten*]" (Reinach 1983, 105). But what does this mean, exactly?

[8] The investigation of such immediate self-evident and necessary relations of essence is the main aim of Reinach's a priori theory of law.

Reinach – whose reflections on ethics show obvious connections to Max Scheler's theory of values (see Scheler 1973) – is an ethical objectivist. According to Reinach, moral values *objectively* pertain to objects, and never pertain to states of affairs (Reinach 1989b, 336). The kind of objects that can be morally valuable – that can be the "bearers" (*Trägern*) of value – are persons, personal qualities or actions.

Moral rightness, on the contrary, pertains to states of affairs (*Sachverhalten*), or indirectly to the actions aiming at realizing a state of affairs.[9] The moral rightness of a state of affairs is deduced from "formal moral principles" in connection to moral values. One fundamental principle is that the existence of a morally valuable object is morally right:

> If one says: 'It is right that this object exists, because it is morally valuable', *and: 'Because the object is valuable, [its existence is right', so] an overarching statement [is] presupposed*: 'It is right that every *morally* valuable object exists'. Further, [the statements apply: 'It is right that an immoral object does not exist';] *'it is wrong that an immoral object exists'*; 'it is wrong that a moral object, which is valuable, does not exist' (Reinach 1989b, 337).

If, as in Reinach's objectivist conception of ethics, values objectively pertain to objects, and objects are thus objectively valuable, then certain states of affairs are objectively right or wrong. And since Reinach (1983), as we have seen above, expressly states that "because something is morally right, it *ought to be*, and if certain further conditions are fulfilled, *I ought to do it*" (105), then moral oughts have an objective existence.

However, the objectivity of a moral ought is radically different from the objectivity of an enacted ought. The objectivity of a moral ought depends neither on the positing character nor on the efficacy of any social act: the moral ought exists in itself, and it is independent of any knowledge (*Erkenntnis*) and of the positing (*Setzung*) of any consciousness, according to Reinach. Moral oughts and obligations (*Verpflichtungen*) "can never spring [*entspringen*] directly from" free social acts (Reinach 1983, 13). Every moral obligation "has as its necessary, even if not sufficient, condition, the moral rightness (*Rechtheit*) of states of affairs: in particular it presupposes that the existence of a person's *action*, which forms the content of his obligation, is either in itself morally right or right in virtue of the rightness of other related states of affairs" (13–14).

Since a moral ought, according to Reinach, exists in itself independently of any social act, it is valid (*gilt*), on the one hand, in all circumstances – whereas an enacted ought is valid only in the circumstances where the enacting act is efficacious – and, on the other hand, it is valid in general – whereas an enacted

[9] As Smith explains, "an action is right insofar as it aims towards the realization of a morally right state of affairs" (Smith 2013, 28).

ought is valid only for the persons for whom the enactment is efficacious (see Reinach 1983, 109).

Furthermore, just like it can never spring from a social act, a moral ought can never be abolished through any social act.

I can now summarize the distinctive characters of a moral ought:

(i) a moral ought can never be created through a social act: it is rather grounded (*gründende*) in moral values and in moral rightness;

(ii) it is independent of any knowledge (*Erkenntnis*) or positing (*Setzung*) of any consciousness;

(iii) it can never be eliminated, abolished or repealed through a social act;

(iv) it is an objective ought existing in itself, and it is valid, as such, in general and under all circumstances, and not only in relation to the efficacy of a presupposed social acts.

3. TWO EPISTEMOLOGIES OF NORMS AND OUGHTS

So far, I have clarified the main differences between the respective modes of existence of enacted oughts and moral oughts in Reinach's account. I will now return to the epistemological question: given that both enacted and moral oughts and norms are neither physical entities that can be perceived through the senses, nor psychical or ideal entities, how can we "perceive" or "grasp" them? How can we recognize the existence of an ought or norm in order to act with-reference-to it? Do the different ontologies of enacted and moral oughts have any repercussion on the epistemology of these kinds of oughts?

3.1. The epistemology of enacted oughts: going back to the act of enactment

In *The Apriori Foundations of the Civil Law*, Reinach (1983) underlines that the existential connection between an efficacious social act and the legal entities that spring from it is not a causal connection, but rather an immediate self-evident and necessary relation of essence (Reinach 1983, 14–16). According to Reinach, there is a fundamental difference between the causal connections occurring in physical external events of nature and the relations of essence occurring among a social act and the legal entities springing from it: in causal external events one can perceive the effect – such as for instance the movement of a ball – by itself, without having to go back to its cause; by contrast a claim, or an obligation, cannot be grasped (*erfassen*) through itself. Reinach explains:

> If I want to convince myself of the existence of the movement, I have only to open my eyes. But with claims and obligations there is no way to avoid always going back to their "ground" [*Grund*]. Only by once again establishing the existence of an act of promising can I establish

> the existence of that which follows from it. There is here no act which, comparable to an act of inner or outer perception, can by itself establish its existence (Reinach 1983, 15–16).

In other words, whereas in the case of an external causal connection "the act [of consciousness] in which the effect is given need not be grounded in an act of apprehending the cause", no independent apprehension of a legal entity in itself is possible: in order to establish the existence of a claim or an obligation, one has always to "go back to the underlying act" that is its ground (Reinach 1983, 15–16). Only in this way, and through the eidetic intuition of the essential relation connecting the act and the corresponding legal entities, one can "apprehend" the objective existence of a claim and an obligation.[10] These considerations obviously apply also to the enacted norm or ought in its essential relation to an act of enactment: the *objective* existence of an enacted norm or ought can only be grasped by going back to the act.

The objectivity of the existence of legal entities is highlighted by a further remark: Reinach remarks indeed, on the one hand, that it is possible to have a "cold knowledge" of such legal entities as claims and obligations; on the other hand, one can experience specific feelings connected to these legal entities, such as feeling oneself to be entitled or to be bound. While in the latter case the feeling is possible only with regard to one's own claims and obligations, in the former the knowledge may regard one's own claims and obligations as well as someone else's ones (Reinach 1983, 10). However, Reinach stresses that in both cases the legal entities are separate from the respective experiences of knowledge or of feeling: they may exist independently of any such experience. He observes that legal entities last in time in a way that is not possible for the experiences of consciousness, and that one can well feel oneself to be obliged without there really being any obligation, as well as an obligation may well exist for someone without her or him feeling herself or himself obliged in any way. Furthermore, Reinach remarks that one's feeling oneself obliged is not an apprehension or "grasping" (*Erfassen*) of the obligation; on the contrary, the grasping of the obligation is presupposed for the determination of the validity (*Gültigkeit*) of such a feeling (Reinach 1983, 11). And the grasping of the obligation is only possible by going back to the underlying act.

3.2. The epistemology of moral oughts: grasping a value through feeling

If enacted oughts can only be grasped or apprehended by going back to the act they spring from, how can moral oughts be grasped, given that they can never spring from a social act?

In his work on *Reflection: Its Ethical and Legal Significance* (1989a), Reinach expressly examines the possibility of an "insight into an ought-to-do" (*Einsicht*

[10] I owe the suggestion to translate the German '*vernehmen*' with 'apprehend' to Wojciech Żełaniec.

in ein Tunsollen) with reference to moral values. It is, indeed, in practical, or volitional, reflection (*voluntative Überlegung*) that the question of how a moral ought can be grasped typically arises.

In volitional reflection, one takes into consideration a project and asks himself: "Should I do that?". Reinach observes that in volitional reflection, "the subject 'opens himself' in the questioning attitude, […] to the insight into an ought-to-do, to the apprehension of the 'demand' [*Vernehmen der* '*Forderung*'] for a specific behavior" (Reinach 1989a, 291). In volitional reflection, in contrast to intellectual reflection, "it is not the being or non-being of a state of affairs that should be contemplated […], but rather the demand for and prohibition against realization [*die Realisierungsforderung oder das Realisierungsverbot*], which arises from a project, that should be apprehended [*vernommen werden*]" (Reinach 1989a, 291–292).

When volitional reflection involves moral evaluations, "it is necessary to grasp [*erfassen*] the value- and disvalue-characters pertaining to it [the project] clearly" (Reinach 1989a, 292), since according to Reinach the demand for or prohibition against the realization of a project are based (*gründen*) in its value or disvalue. If the value- or disvalue-character of the project is apprehended, then corresponding demanding or forbidding experiences (*Forderungs- und Verbotserlebnisse*) arise (Reinach 1989a, 292).

However, how can the value- and disvalue-characters actually be grasped? Reinach remarks that values, just like oughts, "are not sensorily perceived [*wahrgenommen*] like things, not seen and heard like colors and sounds, not thought like numbers"; he asserts that values are rather *felt* (*gefühlt*) through a specific kind of *grasping feeling* (*erfassende Fühlen*) (Reinach 1989a, 295). Reinach clarifies the nature of this grasping feeling through a parallelism with the aesthetical feeling of beauty: a landscape, he observes, is perceived, but its beauty – its aesthetical value – is *felt* (Reinach 1989a, 295).

Reinach stresses, however, that the *feeling* (*Fühlen*) of beauty or of a moral value is not an emotion (*Gefühle*), and that the *grasping feeling* of a value must be separated from the emotional states (*zuständliche Gefühle*) that may be founded on it as an emotional reaction. When a value is felt, it is possible that an emotional reaction occurs, that an emotion (*Gefühle*) of joy, for instance, is founded on the feeling (*Fühlen*) of the value; however, since the emotion is founded in the feeling, it presupposes such feeling and thus does not coincide with it (Reinach 1989a, 295).

Another important remark made by Reinach is that the grasping through feeling admits "manifold gradations of clarity and distinctness, up to absolute, indubitable self-givenness", and there are "innumerable degrees of ethical sensitivity", from the finest human ethical receptivity to "absolute ethical

obliviousness" (Reinach 1989a, 296). A person affected by absolute ethical obliviousness would never be able to grasp a moral ought.[11]

The grasping of a moral ought – that is, the apprehension of the moral demand for or prohibition against the realization of a project – implies, in contrast to the grasping of enacted oughts, the apprehension of moral values; and this apprehension, which cannot be based on going back to an underlying social act, is based on a *grasping feeling* (*erfassende Fühlen*), which is not a mere emotional reaction, but rather a receptive feeling that solely can grant the epistemological access to moral values, and thus indirectly to moral oughts. Such moral values and oughts, however, do objectively exist in themselves independently of the grasping of any consciousness.

Therefore, in Reinach's objectivist perspective on moral values, feeling is not the constitutive source of values, since values objectively exist and pertain to objects independently of any consciousness; on the contrary, feeling is the sole epistemological means of access to moral values objectively pertaining to objects, and it is thus a necessary condition for the grasping of moral oughts, in contrast to enacted ones.

It is now clear, in conclusion, that both in his philosophy of law and in his philosophy of ethics, Reinach defends an objectivistic ontology of oughts: both enacted and moral oughts and norms objectively exist. I have clarified, however, that the respective objective modes of existence of enacted oughts and norms on the one hand, and of moral oughts and norms on the other, are not the same: in other words, enacted and moral oughts – though both objectively existing – do not belong to the same ontological genus. Such an ontological difference is reflected, at the epistemological level, in the respective ways in which enacted and moral oughts can be grasped: the former can be the object of a "cold knowledge", and can only be grasped by going back to the social act from which they spring; the latter can only be grasped through a "grasping feeling" of (objective) moral values (a grasping feeling which is not an emotional experience, though).

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[11] This remark may be interestingly compared to a similar remark made in the same years as Reinach by the Polish philosopher of law Leon Petrażycki (1867–1931). In his psychologistic theory of law, Petrażycki (2011, 15) speaks of an "absolute legal idiotism" with reference to a subject who is unable to grasp *legal* norms due to the lack of the capacity to have "normative experiences", which consist of emotions rejecting or encouraging a certain conduct. On the analysis of normative experience in Petrażycki, see also Fittipaldi (2012), Passerini Glazel (2017; 2019; forthcoming).

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Maria Gołębiewska[*]
https://orcid.org/0000-0002-2371-9232

NORMATIVITY OF PRESCRIPTIONS IN ADOLF REINACH'S APRIORISTIC THEORY OF RIGHT

Abstract. In the *Logical Investigations*, Edmund Husserl defines that which is normative as the objectively regular with its rules of regularity, which can be recognised rationally – normativity concerns the being itself and the rational cognition of the being (logic as a normative discipline establishing the rules of scientific knowledge, as the science of science). Instead, Adolf Reinach in *The Apriori Foundations of the Civil Law* defines the notion of norm as polysemantic and distinguishes the legal provisions (the prescriptive sentences), formulated within a given community, from the basic norms which are grounded in the objective (including moral) justness of the states of affairs. The obligation of the being and the obligation of acting exist in themselves, independently from cognition. In turn, "enactments and the propositions which express enactments" as a kind of normative sentences have the character of normalisation, but they require a person to pronounce them. The prescriptions realise and refer to what is objectively being and to the objectivity of what is being and obligatory. In my text, I present Reinach's position on the relations between norms and provisions (as prescriptive propositions "which express enactments") referring his theories to the Husserlian concept of normativity.

Keywords: description, prescription, law, norm, ideality, ideation.

INTRODUCTION

The aim of the text is to present Adolf Reinach's position on the relations between norms and enactments (as prescriptive propositions "which express enactments") referring his theses to the Husserlian concept of normativity. In *Logische Untersuchungen* (1900–1901), Edmund Husserl defines that which is normative as the objectively regular with its rules of regularity, which can be recognised rationally – normativity concerns the being itself and the rational cognition of the being (logic as a normative discipline establishing the rules of scientific knowledge, as the science of science). Instead, in *Die apriorischen Grundlagen des bürgerlichen Rechtes* (1913), Adolf Reinach defines the notion of norm as polysemantic and distinguishes the legal provisions, i.e. enactments (the prescriptive propositions) formulated within a given community, from the basic norms which are grounded in the objective (including moral) justness of the

[*] Associate Professor, Polish Academy of Sciences, Institute of Philosophy and Sociology, mgolebiewska@ifispan.edu.pl.

states of affairs. Reinach argues that: "One should not confuse our apriori theory of right with what has been called 'general legal theory' or 'theory of juristic principles.' Here one cannot speak of an independence from the positive law; the systems of positive law rather form the object of a generalizing and inductive approach" (Reinach 1983, 133; cf. Reinach 1913, 839). The obligation of the being and the obligation of acting exist in themselves, independently from cognition. In turn, provisions, i.e. "enactments and the propositions which express enactments" ("*Bestimmungen und Bestimmungssätze*") as a kind of normative sentences have the character of normalisation, but they require a person to pronounce them (resp. Reinach 1983, 102; Reinach 1913, 801). The prescriptions realise and refer to what is objectively being and to the objectivity of what is being and obligatory. Reinach writes that: "One has objected to natural law philosophers that they fill out the gaps in the positive law with the 'ideal law' or 'rational law' which beckons to them from a distance, and that they even want to replace explicit positive enactments by this 'higher' law in the event of a contradiction between them. Such an objection would of course not even apply to us. We do not speak of a higher law, but of simple laws of being. As we know, positive legal provisions can deviate from them; but precisely from our point of view it would be meaningless to want to replace the content of efficacious enactments with the essential relations from which the enactments deviate precisely because within the whole context of social interaction they appear to be such that they ought not to be" (Reinach 1983, 135; cf. Reinach 1913, 842).

It must be highlighted that within Reinach's apriori theory of right, one may find a number of elements – assumptions and investigative theses of Husserl's early phenomenology. It is primarily a reference to the normative aspects of logic, to the concept of ideality and the assumptions of essentialism, as present within the *Logical Investigations*, as well as, to the Husserlian grasp of ideas, with its source being not Platonism but Kantianism – the Kantian concept of regulative ideas. In his article concerning the philosophical assumptions and theses of Reinach, Philipp Mayrhofer argues that: "Far from being a simple return to Plato's universe of ideas, Reinach's project shows through the deduction of a specific phenomenality of essences the limits of the idea of constitution and *a fortiori* of the ontological foundation" (Mayrhofer 2005, the English abstract of text; cf. Cantegreil 2005).

1. HUSSERL AND THE NORMATIVE ASPECTS OF LOGIC

Already in *Logische Untersuchungen* Edmund Husserl indicated logical necessities as the basis of normativity (e.g. chapters "Logic as a normative and, in particular, as a practical discipline", "Theoretical disciplines as the foundation of normative disciplines", particularly "The concept of a normative science", and

"Normative disciplines and technologies"; Husserl 2001, resp. 15, 28, 33, 37; [*Die Logik als normative und speziell als praktische Disziplin*; *Theoretische Disziplinen als Fundamente normativer*; *Der Begriff der normativen Wissenschaft*; *Normative Disziplin und Kunstlehre*]). Furthermore, according to Husserl, normativity, including legal norms, is connected with some subjective need for rules that derive from and are conditional upon transcendental subjectivity – the transcendental function of consciousness. Simultaneously, this subjective need for rules would constitute the basis for establishment of and respect for other people's rights within the borders of one common social and cultural world called intersubjectivity (*die Intersubjektivität*, *die Lebenswelt*).

As mentioned, in his work titled *Logische Untersuchungen*, Edmund Husserl referred to the contemporary conclusions in logic, as well as, proposed his own conclusions regarding mathematical logic, logical propositions, as well as propositions of colloquial language. One of the most important issues touched by Husserl was the matter of meaning – the general assortment of semantic matters pertaining to the very theory of meaning, the semantic function, the semantic (signitive) intention and its fulfilment, and finally – the meaning of mental representation in its relations to the verbal representation and the semiotic representation in general (cf. Simmons 1995). The semantic function is fulfilled in discursive reasoning, in the correlations between propositions. The "presumption" apparent in two propositions does not "denote", that they represent the same object, or that they have identical meaning. Additionally, the inclusion of an object [of cognition] within representations, is not real, but functional and may be comprehended discursively, due to appropriate other identity propositions. Husserl argued: "Universal likeness of content, and constant functional laws of nature which regulate the production of such content, do not constitute a genuine universal validity, which rather rests upon ideality. If all creatures of a genus are constitutionally compelled to judge alike, they are in empirical agreement, but, in the ideal sense demanded by a supra-empirical logic, there might as well have been disagreement as agreement. To define truth in terms of a community of nature is to abandon its notion" (Husserl 2001, 87). Therefore, Husserl makes a distinction between: real, psychological contents of a proposition (comprising of the representing act and the representational content), as well as ideal logical contents, i.e. the meaning and the proper object of a logical proposition. The logical content is fulfilled psychologically within two strings of possible experiences (the act and the contents of the act).

In volume I of his work, Husserl defines meaning in the context of the tasks of pure logic (establishing pure semantic categories, as well as pure objective categories – i.e. the categorial and the reduction to types). In volume II, Husserl disputes with the associative ("psychological") semantic theory, establishes a distinction between expression, pronouncement and naming, discusses the differences between expression and meaning as "ideal unities", between the

commonly taken meaning of words (the "fluctuation in meaning") and the "ideality of unities of meaning" taken logically, as well as, characterises the ideal unity of semantic experiences and the acts that ascribe meaning (Husserl 2001, 216). Here, Husserl highlights that the ideality of meanings is not an ideality in a normative sense.

The "theory of science" postulated by Husserl, considers ideas, theory and science within its formal regularities (particularly the "methodical modes of procedure", including validations and procedures that require validation). Husserl explains the above as follows: "From our discussions up to this point logic – in the sense of the theory of science here in question – emerges as a *normative discipline*. Sciences are creations of the spirit, which are directed to a certain end, and which are for that reason to be judged in accordance with that end. […] Logic seeks to search into what pertains to genuine, valid science as such, what constitutes the Idea of Science, so as to be able to use the latter to measure the empirically given sciences as to their agreement with this Idea, the degree to which they approach it, and where they offend against it. In this logic shows itself to be a normative science, and separates itself off from the comparative mode of treatment which tries to conceive of the sciences, according to their *typical* communities and peculiarities, as concrete cultural products of their era, and to explain them through the relationships which obtain in their time. For it is of the essence of a normative science that it establishes general propositions in which, with an eye to a normative standard, an Idea or highest goal, certain features are mentioned…" (Husserl 2001, 25). Such is the context – of a pure logic as an apriori, formal and at the same time normative discipline of a "theory of science" – in which the concept of a norm regarded as a certain acknowledged measure of evaluation, is being discussed by Husserl. Husserl emphasises that the ideality of meanings is not an ideality in a normative sense, however, in the first volume, he begins with normativity as the base for the logical proposition and the logical procedures. One must remind that, according to Husserl, norm as a certain measure of a logical proposition refers to its truth or falsehood.

Husserl considers the possibility of the ideality of meanings as a matter of normativity, and admits, that the ideality of meanings is a particular case of the "*species* ideality in general" – an ideality of internal images in a generalised character. However, it has "not the sense of a *normative ideality*, as if we were here dealing with an ideal of perfection, an ideal limiting value, over against particular cases which realized it more or less approximately. No doubt the 'logical concept', i.e. the term in the sense of *normative logic*, is an ideal in respect of its meaning" (*Bedeutung*) (Husserl 2001, 231). Here, Husserl refers to the logical postulate of absolute strictness, precision and univocalness of logical propositions, however, it can only relate to "what is regulated by prescriptions", to "the formation of meaningful terms, to care in the subjective sifting out and expression of one's thoughts" (Husserl 2001, 231). Meanings "in themselves" however, despite the

"fluctuation of the act of meaning", are "specific unities", and "they themselves are not ideals. Ideality in the ordinary, normative sense does not exclude reality. An ideal is a concrete original that may exist, and that may confront one in reality" and "even where an ideal is not realizable, it is at least an individual in our presentative intention. The ideality of what is specific is, contrariwise, the complete opposite of reality or individuality; it represents no end of possible endeavour, its ideality lies in a 'unity in multiplicity'. Not the *species* itself, but the individual falling under it, can be a practical ideal" (Husserl 2001, 231).

Husserl, for the sake of the phenomenological semantic theory, concludes with regard to the argument between realists and nominalists. He debates John Locke's nominalism, once again highlighting the difference between the psychological and the logical grasping of the meaning of expressions, in which the apriori possibility of formulating clauses (logical propositions) is related to a certain necessity (of the unity of meaning) instead of a contingent characteristic for psychological acts ("psychologically contingent acts"; Husserl 2001, 265). The "generality of psychological function", assumed by the nominalists is not a "generality which belongs to the intentional content of the logical experiences themselves", or which "described objectively and ideally, belongs to our meanings and our meaning-fulfilments" (Husserl 2001, 264), because this generality is not psychological but essential.

2. IDEATION, IDEALITY AND IDEA AS CONDITIONS OF MEANING

2.1. Edmund Husserl and Roman Ingarden

According to Edmund Husserl, logic is dedicated to the regularities of the appearance, in the subjective acts of consciousness, of that which surpasses, transcends beyond the individual act of consciousness, and which is grasped as that which is general and ideal, therefore, submitted to "ideation" (a thesis proposed in the *Logical Investigations*). Husserl acknowledges the meaning of an utterance (a sign) as a certain intentional content of a verbal act and argues that in each verbal act, we can see an element of truth, and that the logical clauses apprehend this truth directly – truth as the accordance of mental content located within a logical proposition (the intentional content of a verbal act, i.e. meaning) with a certain reality. According to Husserl, based on such argument, a certain reality and a specific domain of reality would belong to the meaning of a verbal act, and particularly, to the meaning of a logical proposition. Contrary to the assumptions regarding intentionality and meaning as an intentional content of a verbal act, it would not be a real intentional (psychical) domain, nor – as in terms of the classical definition of truth as presented by Aristotle – a physical reality. Husserl considers a different possibility: a third domain of the ideal objects, i.e. a certain

"ideal" reality which would be the proper domain of semiotic and semantic references of a language sign and its meaning. These objects are "neither empirical singulars nor classes of singulars: they are ideal objects ideationally apprehended in the correlates of our acts of counting, of inwardly evident judging etc." (Husserl 2001, 119). In the *Logical Investigations*, which stood as a starting point of Adolf Reinach's phenomenological theses, Husserl indicates the semantic "functional" aspects. After Husserl, they affect the meaning of particular utterances as elements of a logical proposition, and so, references to function and functionality appear alongside the notion of essence. Additionally, the concept of ideation is defined, the theses of which – as noted by Roman Ingarden (cf. Ingarden 1992, lecture 7, 189–190) – would later lose their strength in the *Ideas*.

In his *Logical Investigations*, Husserl argued that: "we are dealing with nothing but concepts, whose notion makes clear that they are independent of the particularity of any material of knowledge, and under which all the concepts, propositions and states of affairs that specially appear in thought, must be ordered" (Husserl 2001, 153, § 67 [*Begriffe*, *Sätze*, *Sachverhalte*]). Therefore, notions would be related to certain functions, that Husserl calls the "thought-functions", additionally, connecting them to the functions of particular elements of a logical proposition: "they [the concepts] arise therefore solely in relation to our varying thought-functions: their concrete basis is solely to be found in possible acts of thought, as such, or in the correlates which can be grasped in these" (Husserl 2001, 153). One may say that in the *Logical Investigations* Husserl closely connected the semantics of the particular elements of a logical proposition with the function that they accomplish, instead of the "material" conceived as the content of a concrete proposition, of a given logical clause referring to a definite object of cognition. Husserl highlights that the semantics of a logical proposition assumes a certain "material", i.e. content indeterminacy, whereas meaning is reduced to that which – as indeterminate – would be possible to think and which may be grasped as "empty". Such argumentation is related to the well known Husserlian thesis concerning the empty semantic intention – the signitive intention of a logical clause as given to be filled by particular subjects. The aim of phenomenological researches would be, i.a. to appoint these notions, their mutual relations and the regularities of their location within a logical proposition, probably functional, and linked with their semantics: "we are concerned with *insight into the essence* of the concepts involved, looking methodologically to the fixation of unambiguous, sharply distinct verbal meanings. We can achieve such an end only by *intuitive representation* of the essence in adequate Ideation, or, in the case of complicated concepts, through knowledge of the essentiality of the elementary concepts present in them, and of the concepts of their forms of combination" (Husserl 2001, 153–154).

Here, Husserl is referring to the issues of ideation and essentiality, however, he is discarding the content basis of meaning and, simultaneously, adopts the

assumption pertaining to the empty semantic intention to be filled. Therefore, the point of reference of the semantic theses is not the assumption concerning the essence conceived in a consequently substantial manner (despite the stance of notional realism), but a conception of ideation related to the functional character of notions in a logical proposition and their functional relationships within a logical proposition. Husserl argues for a certain general unity of meaning that should be pursued by a phenomenological investigator. Husserl defines the general unity of meaning – as that, which is semantically possible and simultaneously necessary, therefore, as that to which one may apply the transcendental argument determining the conditions of the possibility of meaning. The general unity of meaning would be submitted to ideation, i.e. it may be considered that, which is essential in the logical proposition and, simultaneously, "adequate" in terms of any given, determined content of a logical proposition. "But as long as concepts are not distinguished and made clear to ideational intuition, by going back to their essence, further effort is hopeless" (Husserl 2001, 154).

While commenting the theses of *Ideas*, in his *Lectures*, Roman Ingarden wrote about Husserl's later departure from the term "ideation": "In the *Logical Investigations,* it was spoken subsequently, in accordance with *species*, also about its grasping which was then referred to as 'Ideation'. Ideation was this particular act in which one was able to grasp *species*, relatively in which it was actually grasped. In the *Ideas*, the term 'Ideation' vanishes, appearing but a few times in brackets, however, a new enunciation appears: the intuition of essence or the insight of essences (or, the object in its essence perchance) (*Wesensschau*, *Wesenserschauung*)" (Ingarden 1992, lecture 7, 189–190). Ingarden stresses many times the changes in Husserl's standpoint and defines his investigative assumptions, as adopted in the *Ideas*, as "transcendental idealism" (cf. Husserl 1983, 114–117, 365–370). One must add that Husserl's commentaries on Immanuel Kant's conception of ideas are a certain reinterpretation, whereas transcendentalism appears earlier in the *Logical Investigations* – it concerns the conception of the meaning of a logical proposition and its particular components as a certain "unity of meaning", formal and functional, appointing the conditions of the possibility of appearance of a content-determined ("material") meaning, i.e. that, which is linked with the content of a given, singular logical proposition. Ingarden wrote: "The only thing, which ties the *Logical Investigations* period Husserl with Plato, is the statement: there are two aspects of being – the real and the ideal". In the *Ideas I*, the ideal is still treated as ontologically autonomous, however, the real world is interpreted in the sense of transcendental idealism. In the *Formal and Transcendental Logic* however, both these aspects of being are grasped as being constituted in experience. They are both 'established'. Therefore, the *Ideas I* idealism is limited to the aspect of the reality of the world, there is no 'idealism' in reference to ideality or the ontological autonomy of ideal objects" (Ingarden 1992, lecture 9, 263–264), i.e. – according to Ingarden – it is an

epistemological standpoint linked with the assumptions of transcendentalism, with subjective conditions of cognition and the objects thereof. It would simultaneously be a continuation of the Kantian considerations of ideas in the epistemological context.

2.2. Immanuel Kant and Edmund Husserl

One should underline that in his *Critique of Pure Reason* (*Kritik der reinen Vernunft*, 1781, 1787), Kant uses among others the term "*prototypon*" to describe the "ideal", as distinguished from the "idea" ("The transcendental ideal", "*prototypon transcendentale*"; Kant 1998, 553). In the *Critique of Judgment* (*Kritik der Urteilskraft*, 1790), beauty is the Kantian example of an idea as well as an ideal, that is, the result of the idealisation process (Kant 1987, § 17 *On the Ideal of Beauty*). Beauty as an idea conditions a subjective judgment of taste, while as an ideal (*prototypon*) it is not considered a presumed, formal, transcendental idea enabling valuation, but rather as a certain temporal, accomplished norm. It allows the characterisation of that which is beautiful not only due to reference to the universal rules of the subjective judgment of taste, but also in reference to a norm established socially for the present. The norm consists of idealisation, therefore it is evaluated as that which is valuable – it becomes socially obligatory and combines the idea of beauty with particular qualities of objects, impressions, images experienced by means of the senses. These qualities are submitted to idealisation; they make it possible to qualify beauty as an ideal accomplished empirically in the creation and reception of works of art. The link between the Kantian concepts of "ideal" and "idealisation" and the Husserlian concept of "ideation" might be subject-matter for another text.

Therefore, conception of meaning, postulated prescriptively by Husserl in his *Logical Investigations,* assumes a guessed ideal unity of meaning in general, that should be considered by the user of a colloquial language, and he/she would be – by the power of a different, anthropological assumption – a rational subject, i.e. a subject referring to the logical argumentation, and to the calculus of logical propositions. Husserl admits that the unity of meaning is accomplished within the logical proposition which should be "unequivocal", while unequivocality is a result of the idealisation of meaning. Therefore, in the *Logical Investigations*, the "ideality" of meaning goes beyond the real, individual cognitive and verbal acts, beyond their meanings as intentional content; it is related to the general, transcendent regularities of the appearance and the exposure of meaning (particularly in the acts of expression) and therefore, to a degree, passes beyond the immanence of a concrete, individual subjectivity.

Numerous investigators highlight that ideality in Husserl's phenomenology is apprehended and interpreted in reference to Kant's transcendentalism, allowing

– both Husserl and his commentators – to make an explicit distinction between the objective and the noematic, as indicated in the *Ideas*. "Each time that this value of presence is threatened, Husserl will awaken it, will recall it, will make it return to itself in the form of the *telos*, that is, in the form of the Idea in the Kantian sense. There is no *ideality* unless an Idea in the Kantian sense is at work, opening the possibility of an indefinite, the infinity of a prescribed progress, or the infinity of permitted repetitions. This ideality is the very form in which the presence of an object in general can be indefinitely repeated as the *same*. […] [T]he presence to consciousness will be able to be repeated indefinitely: ideal presence to an ideal or transcendental consciousness. Ideality is the salvation or the mastery of presence in repetition. In its purity, this presence is the presence of nothing that *exists* in the world; it is in correlation with acts of repetition which are themselves ideal" (Derrida 2011, 8). Ideality is connected with objectivity, however – as it is known – the rational and conscious subjectivity remains the initial point of its definition, both in the *Logical Investigations* and in the *Ideas.* The Husserlian thesis concerning an ideal, third domain of reference, of the meaning of verbal acts, may be applied – as noted by Jacques Derrida – exclusively to logical clauses, to logical propositions (cf. Derrida 2011, 86). One must underline that in its generality deriving from a subjective source, Husserl's semantics does not explain the differentiation of meanings of particular utterance, synonymous or unequivocal by definition, provides no aid in characterising the differentiation of semantic intentions related to particular verbal acts. In defence of Husserl's theses and their consistency, one may argue that not every utterance and verbal act aim to be true, however, their truth as a reference to a certain domain of reality is assumed by, always rational, language users.

2.3. Edmund Husserl and Adolf Reinach

Similar assumptions appear in the apriori theory of right by Adolf Reinach who – however distinguishing between logical propositions and legal prescriptive provisions – premises the actual existence of the world and the possibility of true predicating upon it. Reinach makes a clear distinction between the descriptive logical propositions, that serve the purpose of considering the two basic possibilities of predication – truth and falsehood, and the prescriptive laws that are duty-imposing and indicate the positive, model-creating norm of action and conduct. (As is known, it is one of Reinach's theses that may later be found in John L. Austin's speech act theory – cf. Mulligan 1987; Smith 1990; Ambroise 2005; Laugier 2005). One may say that the prescriptive clauses define a certain normative, necessary possibility of action, which remains to be a possibility due to the acknowledgement of the free will and of the free actions of particular subjects. Simultaneously, it is a certain possibility concerning

the contents of legal provisions (that, which is "material" in legal prescriptive clauses) – contents that change, depending on the social and historical context. Reinach writes that: "If one formulates the essential laws of right in such a way that the possibility of their being suspended is taken into their content, then they hold unconditionally. Otherwise their validity depends on those possibilities not being realized. But in either case it remains true that the validity of these laws, considered *in themselves,* is free from any exception" (Reinach 1983, 114; cf. Reinach 1913, 815).

And normativity as a formal requirement of legal provisions remains a necessity that precedes and transcends history – a necessity, one may add following Husserl, "ideating" the particular given prescriptions along with their content. „What is decisive for the development of law are the given moral convictions and even more the constantly changing economic conditions and needs. And so the propositions found in the positive law are quite essentially different from the propositions proper to science (*Wissenschaft*)" (Reinach 1983, 2; cf. Reinach 1913, 685). „Just as we sharply stress the independence of the positive law with respect to the apriori theory of right, so we have to stress the independence of the latter with respect to the positive law. There are after all vast areas of social life which are untouched by any positive legal norms [*positiv-rechtlichen Normierung*]. Here too we find those specifically legal (as they are usually called) entities and structures, whose independence from the positive law we assert, and here too of course those apriori laws also hold" (Reinach 1983, 6; cf. Reinach 1913, 691).

Ultimately, the Husserlian guessed, "alleged" object of the act of consciousness would be general and ideal, however, the issue of this ideality divides the commentators of the *Logical Investigations* and the *Ideas*. According to some investigators, the thesis leads from transcendental idealism to subjective idealism and solipsism (Roman Ingarden), while according to other commentators – it primarily indicates the varying inspirations with Kant's transcendentalism (Jacques Derrida). Other interpretations referring to the Husserlian concept of "ideation", mention the Kantian conception of "ideal" and the neo-Kantian issue of idealisation, widely discussed at the turn of the 19th and the 20th century, i.a. present in works of Ernst Cassirer concerning "symbolic forms" in the twenties, and earlier, in Georg Simmel's theses regarding the idealisation of values (*Philosophie des Geldes*, 1900), therefore, in a period when Husserl's *Logical Investigations* and Reinach's aprioristic theory of law were being accomplished. Reinach wrote that: „For we deny emphatically that positive legal norms can be taken as judgments [*Urteile*] in any sense. The difference between apriori and empirical has no application to them" (Reinach 1983, 5; cf. Reinach 1913, 690). „Together with pure mathematics and pure natural science there is also a pure science of right (*reine Rechtswissenschaft*), which also consists in strictly apriori and synthetic propositions" (Reinach 1983, 6; cf. Reinach 1913, 691).

One must stress that according to Reinach originative "laws" are aprioristically presumed and taken in an essentialist manner – they are present in all the beings, observed in nature and described by exact sciences. „[T]here are eternal laws governing these legal entities and structures, laws which are independent of our grasp of them, just as are the laws of mathematics" (Reinach 1983, 6; cf. Reinach 1913, 690). These originative, aprioristic "laws" would be the basis of the legitimacy of law. In his text *Über Phänomenologie* (cf. Reinach 1989), Reinach argued that: "Essence intuition is also required in other disciplines. Not only the essence of that which can be realized arbitrarily many times, but also the essence of what is by nature singular and uniquely occurring, requires illumination and analysis" (Reinach 1969). He added: "As there is required an essence theory of the psychical, so also an essence theory of the natural is required. To get such a theory one certainly has to abandon the attitude peculiar to the natural sciences, which of course pursues quite determinate purposes and goals that also are ones especially hard for us to abandon. But here too we must succeed in grasping the phenomena purely, in working out its essence without preconceptions and prejudgments – the essence of color, extension and matter, light and dark, tones, and so on. We must also investigate the constitution of the phenomenal *thing*, purely in itself and according to its essential structure. In that structure color, for example, certainly plays another role than does extension or matter. Everywhere it is essence laws that are at issue" (Reinach 1969).

3. REINACH AND THE NORMATIVE ASPECTS OF PROPOSITIONS, PRESCRIPTIONS AND PROVISIONS

It is well known that Aristotle considered the aim of a logical proposition to be the consideration of the possibilities pertaining to the actual, real being, therefore, a statement regarding the status of an actual, real being is a result of the consideration of the possibilities of predicating on the above-mentioned by means of affirmative and negative propositions. Aristotle (i.a. in *Rhetoric*) apposes dialectic, i.e. logic pertaining to the contradictory contents, included in two propositions, with rhetoric as a common way of speaking, which main aim is ethically validated influence on the actual, real being, and the appropriate domains of rhetoric are: law (rhetoric pertaining to the matters of the past) and politics (rhetoric pertaining to the matters of the future). Additionally, as is well known, the ontology of the actual, real being (that which is ontic), is supplemented by Duns Scotus with the "proper" ontology of the possible being. Therefore, this possibility regards to the state of a being, and not the knowledge about it as in the Kantian theory that defines the conditions of possibility of subjective reasoning and knowing. According to Edmund Husserl, the normativity of a logical proposition is determined by this possibility of predicating on the state

of matters in a twofold, true and false, manner. Adolf Reinach however, considers this possibility in reference to legal propositions, simultaneously distinguishing between: a logical proposition as a statement concerning the facts (description) and normative propositions which, regarding his vocabulary, are defined as provisions, therefore, as a kind of prescriptive propositions. As emphasised by Reinach, it is customary for prescriptions to additionally include commands and imperatives – imperative clauses or other language formulas which act as imperatives (e.g. verbless sentences). "The propositions of the apriori theory of right [*Die Sätze der apriorischen Rechtslehre*] undoubtedly are, insofar as they posit being, asserting propositions, or statements. But this is now our question – is this also true of the propositions of the positive law? One has often claimed that it is; one has more exactly designated legal propositions (*Rechtssätze*) as *hypothetical judgments*. A glance at the very first paragraph of our Civil Code shows this view to be untenable. […] We do not have here a positing of being which, according as this being is really there or not, could be judged as true or false; we rather have an *enactment* (*Bestimmung*), which stands beyond the alternative of true or false. […] The proposition of the jurist [*Der Satz des Juristen*] can be true or false; quite different predications are appropriate for the enactment of the Civil Code: it can – in the teleological sense – be 'right' or 'wrong,' it can be 'valid' law or 'invalid' law, but never true or false in the logical sense" (Reinach 1983, 103–104; cf. Reinach 1913, 803).

The descriptive logical propositions as statements regarding the facts, refer directly to an actual, real being and to its "state of affairs" (*Sachverhalt*) – taken solely, they do not posses normative characteristics (the well known argument that the factual state cannot be considered as a model state of the object of predication, is just one of the proposed arguments). However, the provision clauses (formulas) consider proceeding and action in a normative manner, norming the above-mentioned with the an indication of the measure of proceeding, and not only with a measure pertaining to the sole proposition. "Let us now try to go more deeply into the essence of enactments [*in das Wesen der Bestimmungen*]. The first distinction which comes up here – as by the way also in analogous cases – is the one between the experience of enacting, the act of enacting, the proposition expressing the enactment, the content of the enactment, and the effect of the enactment. If we begin with the individual experiences in which persons enact, we must of course distinguish the experience or the performance of the enactment from the performed enactment itself. […] This *act* of enacting [*der **Akt** der Bestimmung*] is distinct from the individual experiences of performing the enactment; it is realized in them. The act of enacting has also to be distinguished from the proposition expressing the enactment, which represents a distinct kind of objectivation of the act. It goes without saying that the proposition in this sense does not coincide with the grammatical formulation which we can give it. […] The proposition, 'Do this' is undoubtedly not a judgment; it is rather related to the act

of commanding as a judgment is to an assertion. And the enacting proposition, 'A ought to be b,' is related to the act of enacting in exactly the same way. It stands of course in sharp contrast to the judgment, 'A ought to be b,' which expresses the existence of an objective ought-to-be which is grounded in the rightness of A being b. The moralist may perform such acts of judging; the law-giver performs acts of enacting. In the works of ethics we find such asserting or judging propositions; we encounter enacting propositions in the legal codes. There is the general distinction between acts (and propositions [*den Sätzen*]), and the content to which they refer; between the act of judging (and the judgment [*dem Urteilssatze*]), and the judged state of affairs; between the command (and the imperative proposition), and what is commanded, etc. Strict relations of essence obtain between these two spheres, and these determine which objects go with which acts. A judgment [*Jedes Urteil*] – even a false and absurd one – can as judgment refer only to states of affairs. Every command can by its very nature refer only to the action of another person. But an enactment can have both as its object: just as the judgment posits states of affairs as existing, so the enactment can posit that states of affairs ought to exist. But an enactment is also like a command in that its object can be an action; indeed, not only the action of other persons but even one's own action can function as the content of an enactment" (Reinach 1983, 106–107; cf. Reinach 1913, 806–807).

How should norming be described? It is an indication of not the material model of proceeding, but of the formal model – the course of proceeding. One should stress that Reinach used the term "law" (resp. "*recht*") in a varied, however, not ambiguous manner (logical laws, laws of being, positive law). The author writes about the "theory of right", i.e. "law of rights", therefore, of the rules and principles pertaining to the law itself and the science of law, about the regularities that are eventually to be indicated by an apriori, formal theory of law, postulated in apposition with, i.a. the theory of law based on the history of legal acts and the theories of natural law.

Reinach emphasises on the ontological character of legal provisions repeatedly, because law always remains in certain relations with being and with what is essential in it, as well as with the being admitted as obligatory – the first is assumed by legal provisions, while the second one – as a state of affairs – is assumed within the legal provisions as a model state of being (ontological phenomenology versus transcendental phenomenology – cf. Conrad-Martius 1959; cf. Husserl 1983, 369). „If there are legal entities and structures which in this way exist in themselves, then a new realm opens up here for philosophy. Insofar as philosophy is ontology or the apriori theory of objects, it has to do with the analysis of all possible kinds of object as such. We shall see that philosophy here comes across objects of quite a new kind, objects which do not belong to nature in the proper sense, which are neither physical nor psychical and which are at the same time different from all ideal objects in virtue of their temporality. The laws, too, which hold for these objects are of the greatest philosophical interest. They

are apriori laws, and in fact, as we can add, synthetic apriori laws" (Reinach 1983, 6; cf. Reinach 1913, 690–691).

One may easily notice that the ontological and the essential in being is a starting point (and a point of argumentation) in establishing the norming legal provisions. The final point (and an aim) of legal provisions is to establish a certain ontological-obligatory status, which now pertains not to what is essential in being, but to the existential – to a specific mode of existence of being, a modus of existence strictly related to the mode of acting, assumed as a model one. "We have here an antithesis (*Gegensatz*) which runs through the whole world of right. Thus the question at what moment a social act is effective, whether when it is declared, or when its physical embodiment is sent to the other, or when it reaches the other, or only when it is heard by him, has been variously answered by the expression–, the transmission–, the reception–, and the hearing-theory. All of these theories have their basis in pure considerations of practicality […]. The apriori theory of right must come to understand the essence of legal structures and bring out the strict apriori laws which are grounded in them. Every theory which does not investigate *essential being* (*wesenhaftes Sein*) but rather the content of *useful norms* [*zweckmässiger Normen*] is absolutely independent of these apriori laws. […] [W]e also have to insist that one not obscure the purity of the apriori knowledge of being (*apriorische Seinserkenntnis*) by bringing in practical political points of view. There is in particular no justification at all for introducing any deviating principles which have been established in the development of the positive law, as supposed refutations of self-evident essential laws" (Reinach 1983, 95–96; cf. Reinach 1913, 798).

According to Reinach, obligation is comprehended not in relation to the *praxis* category, but – as repeatedly emphasised by Reinach – ontologically, i.e. as an obligation resulting from what is essential in being. It is a mode of existence of being, normed by enactments, standing as an accomplishment of its essential features, primarily *anthropos* as a being, who originally has obligations with regard to own anthropological equipment, first of all to the rationality, and in regard to the fact that it is a "social" being, constructing a community and law as "social acts". The ontological status of norms is defined by Reinach, in reference to values, but also, by acknowledging the norm-constructing and legislative aspects of the human being, as essential features. "If one does not speak of legal propositions as hypothetical judgments, then of course one usually speaks of them as *norms* [*Normen*]. But this concept has extraordinarily many meanings […]. But which one of all of these does one have in mind here? We can make a fundamental demarcation if we reflect on the necessary origin of every enactment. There are norms which are grounded in the moral rightness of states of affairs. Because something is morally right, it *ought to be,* and if certain further conditions are fulfilled, I *ought to do it.* This oughtness of being and of doing exists by its nature in itself and apart from the knowing or the positing of any consciousness. An

enactment, by contrast, necessarily presupposes a person who issues it. Of course even an enactment can have its 'ground' in the rightness of states of affairs. But 'ground' does not mean here that from which the objective ought-to-be derives; it rather designates the motive which moves a person to make an enactment. If one wants to call an enactment a norm, we have here norms which presuppose a person as their origin and bearer. But even after we have marked off our sphere in this way, confusions are still possible. The most usual and most disastrous confusion seems to us to be the one between command and enactment. After all, it seems to be plausible at first glance: legal propositions are norms [*Rechtssätze und Normen*] which the law-giver issues; and to say that he issues norms is to say that he gives *commands*, *prescriptions*, and *prohibitions* [*Befehle*, *Gebote*, *Verbote*] which are addressed to the citizens or to the executive organs of the legal order" (Reinach 1983, 104–105; cf. Reinach 1913, 804–805).

For the "significance of the norming act" consists in the fact that it is the "primary source" of numerous conventional acts, and they in combination with the former, constitute, e.g. the realm of positive law. The act of norming is a social act, and similar to a promise and a command, it is of an apriori nature, i.e. it includes the apriori aspects, the formal rule-making, however, it does not refer in detail to the contents of law – they are not determined by the inherent, general and common anthropological context, but by the historical and social context. Therefore, positive law in its variety is present and is in force in various societies. "An enactment which tends to conform to that which is, instead of acting out of its own power does indeed come across something here which it can absolutely not do. Of course our position is not that one was conscious of a law of being or even formulated it, and then deduced from this the impossibility of such contracts. The law of being need have had no other influence than the logical laws have, which after all can direct and have directed the thinking of men without becoming fully conscious or even being formulated. And one should not think that when the positive law develops in an 'ontologistic' way, that is, in such a way that its enactments more or less depend on the laws of being, all these laws of being have to be completely recognized. The fact that that which is impossible is not made the object of an enactment, does not imply that all laws of being must be made the objects of enactments" (Reinach 1983, 125; cf. Reinach 1913, 829).

Reinach's polemics with the adherents of natural law (cf. Reinach 1983, 135–136), are simultaneously polemics with theories that grasp the human "nature" broadly, because, according to Reinach, many different possibilities of self-determination in the world, are included within human essence. At the same time, the afore-mentioned are numerous possibilities of existing in the world and that is exactly why they should be normed by legal acts which serve not only as indications but also obligations. One could mention the legal theory of Carlos Cossio, who undertook the task of indicating some model modes of human existence, related to the apriori conditions of rule-making, of law's proclaiming.

4. NORMING, NORMALISATION AND STANDARDISATION

Adolf Reinach admits legal provisions as utterances, that in themselves, contain a possibility of application in situations, thematically differentiated, to norming the conducts of the acting and engaged subjects. Commands and imperatives however, directly indicate the content of a particular, concrete proceeding in a given, specified situation (regarding the apparent facts). "There are neither commands nor enactments which unfold purely within the person; they always address themselves to others, and the need of being heard is intrinsic to them. But whereas commanding is at the same time necessarily an other-directed act, the act of enacting is not. By its very nature every command presupposes a person or group of persons who are commanded, just as with the act of promising or of granting. But enacting does not have this necessary relation to other person, just as little as do acts like waiving or revoking. Although these acts are addressed to other persons in being performed, their substance (*Gehalt*) lacks any personal moment (*personales Moment*)" (Reinach 1983, 105; cf. Reinach 1913, 805).

One could ask, whether Reinach apprehended norming as a normalisation of the factual state. It is a certain type of norming, which is in force for everyone, however, what are the possible exceptions? Such exceptions are assumed, due to the freedom postulate and to correlating the freedom of rule-making with the coercive character of commands (imperatives). Normalisation is related to the orders (commands and prohibitions), rather than obligations, i.e. the obligation of a subject in regard to law – to social acts, intersubjective and co-determined by free subjects (social acts and a legal-social act – cf. Reinach 1983, 90; cf. Reinach 1913, 791–792). Positive law is founded due to contracts and conventions, but its source lies in ontological essentialities. However, one may ask Reinach, whether such law serves the standardisation of social life. Positive law is a construction based on essential assumptions, and the relation of law fulfilment – of law that norms our behaviour – is by itself essential for the norm-creating being which is human being. Simultaneously essential, is the freedom of accomplishing law (obligations, duties), as well as, fulfilling orders (imperatives) – this leads to an obvious statement, that the normative standardisation of behaviour (proceeding and acting) would be closer to fulfilling orders (imperatives). One must add that Reinach distinguished between the realistic character of the applied positive law, and the idealisation of its enactments and the act of norming based on them – enactments that may be the basis for orders (imperatives), their legitimacy and legitimisation. "[E]verywhere we encounter this three-fold distinction: the ought-to-be which, existing in itself, makes enactments grounded insofar as they posit it; the ought-to-be which is constituted in the enactment and is valid for a certain group of persons, and which derives from all efficacious enactments, whether grounded or not; and finally, the merely being posited as ought to be, which exists

relative to *all* enactments [*relativ zu **allen** Bestimmungen*], whether grounded or ungrounded, whether efficacious or inefficacious" (Reinach 1983, 109; cf. Reinach 1913, 809–810).

As is known, descriptive logical propositions have strictly defined formulas of logical clauses. Orders (imperatives) however – within the framework of colloquial language and also specialised languages (e.g. in the case of military orders) – refer to particular grammar formulas and, particularly, occur as imperative clauses (the imperative mood). Reinach considered legal acts (as acts of a specialised language) as social acts, similarly to the acts of fulfilling legal provisions. "We encounter among enactments all the differences which are grounded in the essence of social acts in general. Thus they can issue from several persons, and can be addressed to several persons. In the latter case there is *one* action which confronts the collective addressees as required and is to be realized by them in common" (Reinach 1983, 109; cf. Reinach 1913, 810).

Reinach considered, i.a. the status of interrogative clauses, in the context of establishing legal provisions and the discussion regarding these provisions. Particularly here, an unstandardised and unfamiliar – logically and grammatically – status of legal provisions, is visible, in comparison to the status of logical prescriptions and imperatives. For the latter are – according to Reinach – submitted to a standardising norming, which possesses essential sources in being, i.e. a strong essential argument, as its legitimisation. He argued that: "If we separate that which essentially is from that which from a moral or from a practical point of view – objectively ought to be, the second does not under all circumstances have to be joined to the first" (Reinach 1983, 111; cf. Reinach 1913, 812). "So we see how the existence of relations of right which result by essential necessity can from another point of view be such that they ought not to be, just as the existence of relations of right which do not result by essential necessity can from another point of view be such that they ought to be. It goes without saying that such an ought-to-be cannot touch apriori being. New factors which eliminate or create existence have to enter the picture, and *this is where an enactment comes in*. Enactments are conceivable which are made with a view to realizing that which is objectively the case. It may be disputed which social acts were performed by two parties and which effects have resulted from the acts which have been performed" (Reinach 1983, 112; cf. Reinach 1913, 812–813).

5. THE STATUS OF THE NORM – LEGISLATIVE NORM AND NORM-CREATING LAW

As mentioned, Adolf Reinach is referring to the essentialist argument, which appears explicitly – in the concept of a primary "law" taken in essentialist terms, as an originative normativity that is binding to all beings. Particularly,

he refers to anthropological essentialism, the theses of which were present in many conceptions of the times (e.g. Georg Simmel, Ernst Cassirer). Normativity conceived in such an essentialist manner – as a normative source of law socially established by people and for the needs of a given moment in history – would be legislative. Simultaneously, the sole positive law as the source of social normalisation of the actions and conducts, is norm-creating – it defines the content of a norm and the spectrum of its model-creating application. "If one considers rights with regard to the apriori essential laws on the one hand, and with regard to efficacious enactments on the other, one finds very different and in a sense opposed relations. Because certain rights are necessarily grounded in certain social acts, the assertion 'rendering' this state of affairs is correct. Because on the other hand an enactment is efficacious, there exist the rights posited by it. The well-known question as to the priority or posteriority of the 'subjective rights' [*subjektiven Rechte*] is therefore to be answered differently according as one is thinking of their relation to the essential laws of right or to enactments. When subjective rights exist under certain circumstances with apriori necessity, the corresponding assertions are true. The efficacy of the enactments which posit these rights makes them necessarily exist" (Reinach 1983, 115; cf. Reinach 1913, 816).

Reinach grasps the model-creating aspect of law as "duty imposing", binding to all legal subjects. Therefore, the norm of positive law is historically and socially relative, and as such, is to be examined by history of law. Reinach highlights the separateness of the theory of law in relation to its historical, "genetic" researches, however, he mentions the historical continuity of legal provisions which have – in a given moment –legal sources in the former codifications and are their certain continuation. One may notice that Reinach, while presenting the theses of the apriori theory of right, stresses not its ahistorical but rather its proto-historical aspect. The apriori theory of right comes from essentionalist assumptions concerning the human being as simultaneously rational, norm-creating and legislative (legislative for the needs of social life, of individual existence and conduct), but in order to validate cultural and social relativism of positive law along with its normativity – the sphere of norms apprehended as certain model-creating meanings.

As is known, Reinach is following the path of Immanuel Kant, defining the apriori conditions of the possibility of positive law. However, simultaneously, in this neo-Kantian investigative procedure, he follows the pointers of Edmund Husserl who – as I already mentioned – proposes the concept of ideas in reference to Kantian regulative ideas anew. Simultaneously, in his investigative procedure, Reinach makes an *implicite* distinction, typical of the Husserlian phenomenology – a distinction between the formal, static, structural (in Reinach's theory) and the genetic, involved historically. His aprioristic theory of law surpasses the former theory of law, in which one may notice historical aspects, therefore – which would be a structural-genetic theory. Reinach however, proposes a theory that

is consequently structural and this structural aspect is highlighted on numerous occasions. One must add that during the forming of this theory, the concept of structure (internal build and the external relations between beings, beings and their representations, as well as, representations – mental and cultural, to which legal provisions belong) was widely commented on and specified by numerous investigators and philosophers (i.a. Roman Ingarden and the neo-Kantists, e.g. Ernst Cassirer).

As mentioned, according to Reinach, source-apprehended normativity – originative "laws", aprioristically presumed and taken in an essentialist manner (present in beings and described by exact sciences), would be the basis of the legitimacy of law. These aprioristic and essentialist assumptions finds, in some measure, its continuation in Robert Brandom's theses concerning primarily a normative attitude of human being towards the world, others and oneself (cf. Brandom 1998). As is known, after Brandom, normativity conditions the reference – of not only the ethical subject, but also the subject of cognition – to objects of action and recognition. Not only action, but also cognition would be characterised normatively, with an evaluative aspect.

On the other side however, Jürgen Habermas who would argue i.a. against Brandom, proposed the concept of normativity and legitimacy of law, based on its social "validity" (cf. Habermas 1992, 1996), a contract pertaining to the social hierarchy and the scale of norms that would be the basis for valuation. As already mentioned, Reinach underlined the obligatory character of legal provisions, which may also be defined as their "validity". Nevertheless, it is a validity considered not in the context of social and historical relativism, but rather in the context of anthropological essentialism. Habermas too (similar to Reinach and other phenomenologists of law, e.g. Simone Goyard-Fabre, Paul Amselek; cf. resp. Goyard-Fabre 1972; Amselek 2014; Chérot 2013) assumes the primary rooting of normativity in the sphere of values. He indicates two spheres or domains of valuation and this differentiation would consist of a basic distinction between the positive and the negative. Such two vectors of valuation may be recognised in numerous axiological conceptions, and particularly, in the axiology of Max Scheler (cf. Scheler 1973), who confer an independent status on the negativity, and not the status of that which contradicts positivity. In his aprioristic theory of right, Reinach apprehends the normative, i.e. postulated, model-creating state of the world and of particular beings (in their existence, action and conduct; cf. Gardies 1972) as obligatory, not as much valid but obligating and as such – positive. Breaking the law as a breach of the normativity of legal provisions would not be a confirmation of the alleged negativity. (One may say that Reinach apprehended a disvalue not in the sense of negative value as such, but rather in the meaning of disregard, disesteem of value; cf. Reinach 1912–1913). It would be a confirmation of the positivity of legal provisions in their obligatory character, because they are valid and still obligate all members of a given community.

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*Tomasz Bekrycht**

https://orcid.org/0000-0002-8944-6257

THE QUESTION OF LEGITIMIZING LAW IN ADOLF REINACH'S PHENOMENOLOGY

Abstract. When speaking about legitimizing law we can mainly mean analysis which concerns metaphysical justification for what is called the phenomenon of law. From the metaphysical point of view, the justification of law means indicating the foundation of its existence. It is about seeking (indicating) an *esse* (essence) basis of law, in line with the task set by the metaphysical analysis, namely seeking an answer to the question: Why does object X exist? And in the answer, there will appear a formula indicating the final reasons for its existence (*ratio essendi*). The same ideas that we can find in Adolf Reinach's principal work, *The Apriori Foundations of the Civil Law*, provide a possibility of better understanding this important issue of legal philosophy, namely the question of legitimizing law (justifying law). The aim of this article is to present that argument.

Keywords: legal phenomenology, legitimizing law, positive law, speech acts theory, *soziale Akte.*

INTRODUCTION

The same ideas that we can find in Adolf Reinach's principal work, *The Apriori Foundations of the Civil Law*, provide a possibility of better understanding an important issue of legal philosophy, namely the question of legitimizing law (justifying law). If we enrich and complete these ideas with similar remarks from Roman Ingarden's ontology, we can, in my opinion, give quite a coherent and convincing argument on this issue.

In the introduction to his main work, Reinach stated "[…] we may hope that the apriori theory of right (*die apriorische Rechtslehre*) can here and there make a clarifying contribution even to the history of law. But it seems to us quite indispensable for the positive law as such. As long as one thinks that the positive law produces all concepts of right itself, one can only encounter a perplexity here. The structure of the positive law can only become intelligible through the structure of the non-positive sphere of law" (Reinach 1983, 7).[1]

* The University of Lodz, tomaszbekrycht@wpia.uni.lodz.pl

[1] In the original version: "So dürfen wir hoffen, daß die apriorische Rechtslehre auch der Rechtsgeschichte hier und da einen klärenden Beitrag zu liefern vermag. Ganz unentbehrlich aber scheint sie uns zu sein für das Verständnis des positiven Rechtes als solchen. Solange man daran glaubt, daß dieses alle rechtlichen Begriffe selbst erzeugt, muß man hier vor einem Rätsel stehen.

We see that in spite of strictly separating these two spheres, i.e., positive law and non-positive normativity, as Reinach strongly outlined in many places of his book, he perversely noticed that we are able to understand the structure of positive law only through the structure of non-positive law. I think that this includes the question of its legitimation.

1. TWO TRADITIONS OF LEGITIMIZING LAW

When speaking about legitimizing law, I mainly mean analysis that concerns metaphysical justification for what is called the phenomenon of law. From the metaphysical point of view, the justification of law means indicating the foundation of its existence. It is about seeking (indicating) an *esse* (essence) basis of law, in line with the task set by the metaphysical analysis, namely seeking an answer to the question: Why does object X exist? And in the answer, there will appear a formula indicating the final reasons for its existence (*ratio essendi*).[2]

It could be said that legitimizing law, understood as justifying the existence of law, can be treated as a transcendental issue, because a question arises here about the conditions of the existence of law. This problem concerns both the structure of positive law and the structure of non-positive normativity.

The philosophical process of legitimizing law has two characteristic cores. Historically, the first of these is the legitimizing based on the concept of transcendence, and a transcendent being that is located spatially and temporally 'outside' the subject. In other words – metaphorically speaking – the law comes from the outside, meaning that in terms of the source of its existence (onto-genesis) it is based on some being that is, or has always been, beyond or above the subject in the sense of spatiotemporal or in the phenomenological sense as material apriori (opposed to formal apriori).

The scholarly literature of the subject (e.g. Welte, 1985; van der Leeuw 1970; Strauss 1999; Barbour 1976) reveals that two such transcendent sources were identified as externally legitimizing the law.

The first one was identified with God; the second with nature (conceived of in naturalism or non-naturalism terms). This can be expressed in the following way: the transcendental argument legitimizing the law is premised on transcendence in the form of God (religious tradition or philosophy of religion) or nature.[3]

Die Struktur des positiven Rechtes kann erst durch die Struktur der außerpositiv-rechtlichen Sphäre verständlich werden" (Reinach 1989, 146–147).

[2] Whereas I do not mean legitimizing as explanations concerning motivation to observe the law (these can be diverse and are often determined by the content of law).

[3] *Nota bene* there is a rather complicated relationship between them, i.e. between the understanding of God and nature. Added to this is the issue of natural law (of course, usually

The second core for legitimizing law is the subject itself (as law-giver), its immanence, i.e. consciousness, rationality, intelligence and reason as the source of law, which is external to and separate from law itself. Here, the ontological basis of law is human beings, understood as creatures endowed with rationality, not necessarily idealized – but in their rationality they are able to actively constitute principles and laws, as a transcendental I 'from the inside', as it were.

The issue here is an understanding of humanity which is completely anti-naturalistic (even though rationality is an innate quality of the human being, the quintessence of their humanity). In other words, it is a desubstantialized (noumenal) self, having its centre and its ontic nature grounded in purely intelligible subjectivity, a pure self, which we can only posit and think of as a source of self-acting, unconditioned activity (*agency*), devoid of substance and elusive in experience. In this and exactly this sense, one can speak of the transcendental (and immanently human) justification for the existence of law.[4]

2. LEGITIMIZING LAW AND POSITIVE LAW IN ADOLF REINACH'S THEORY OF SOCIAL ACTS

Phenomenology, and particularly Adolf Reinach himself, has made significant contributions to the issue of legitimizing law, thus understood i.e., indication of its ontological grounds. The method of a phenomenological analysis, especially eidetic reduction, has allowed, firstly:

– precise separation from one another of such phenomena as the phenomenon of law as such, the phenomenon of positive law, the phenomenon of a legal norm, and the phenomenon of a moral norm; secondly:

– eidetic reduction does not allow for their (the phenomena) mutual reduction (i.e. for equivocation); thirdly:

– eidetic reduction should reveal to us the essence of an object, i.e. it should describe relations between 'ideal qualities' in the framework of a given ideal object.[5]

In the third case, it should be observed that these relations are not, however, intellectually recognized in a straightforward manner, because they comprise areas of existence (more precisely, a mode of existence), of matter (more precisely, quality contents) and of form (more precisely, attributes of the entity).

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understood in an anti-naturalism way), which is often derived from the concept of God, or a concept that 'absorbs' this concept.

[4] Comprehensive and detailed analysis of this problem can be found in my book (Bekrycht 2015).

[5] Details about this can be found in several works written by the philosophers of early phenomenology and in a lot of studies concerning these works (e.g. Husserl 1901; Reinach 1912–1913; Lipps 1929; Conrad-Martius 1929).

"Every object (any something whatsoever) – writes Roman Ingarden – can be regarded from three different points of view: first, with respect to its existence and mode of existence; second, with respect to its form; third, with respect to its material endowment" (Ingarden 2013, 87).

Thus, in the process of obtaining knowledge of the object, we have three types of ontological problems: 1) existential-ontological questions, 2) formal-ontological questions, and 3) material-ontological questions. The first requires us to answer the question about the proper mode of existence and the reason for existence, the second – which form the object takes, and the third – which variables and constants figure in the idea of the given subject, in other words the relations between the qualities in the content of the idea of this object.

Thus, the essence of the object is not a bundle of properties that appear with the greatest statistical frequency in the characteristics of a given object, but is rather part of a very complex picture that we often seek to reduce to a formula, by means of a (real) definition; yet this is simply impossible with many objects.

In his analyses, Reinach begins from an analysis of the phenomenon of law as law, and then moves on to the analysis of the phenomenon of positive law in the line with his assumption given in the introduction to *The Apriori Foundations of the Civil Law,* which is quoted above.

2.1. Primal phenomenon of law

According to the phenomenological analysis, we must reduce our knowledge to original phenomena and to the original moment at which we start perceiving law,[6] for whose nature we intuitively search. And we can say that the relation with another entity (person, subject) is this primary moment. The concept of law, which constitutes a specific phenomenon of the relations between entities, we could say because of nature (apriori) itself, always assumes the existence of the second subject, but apart from this, something else, namely an empathetic attitude to it. It is the attitude of demanding something from the other entity or necessity of behaving in a certain way towards it. This is the original phenomenon which we call law. In jurisprudence, it assumes the form of a linguistic expression: 'a claim', 'an obligation' and 'a right'.

Of course, in jurisprudence, the expression 'a right' (*Recht*) is, however, understood and used in a broader sense than the concept of 'a claim' (*Anspruch*), as indicated by Reinach. In jurisprudence, we speak about the right to property and rights in rem or about the individual (legal) rights. However, each of these concepts is always secondary to the concept of a claim and is tied up with many assumptions, *inter alia* the assumption of the existence of positive law, the contents

[6] See also Lorenzo Passerini Glazel "Grasping an Ought. Adolf Reinach's Ontology and Epistemology of Legal and Moral Oughts", in this issue.

of which, for example, grant a given subject the right to property, or is inextricable from the assumption of the existence of a metaphysical source from which the claim is derived, such as the right to life.

Reinach indicates these assumptions when he describes the two spheres (the concept of positive law and his apriori theory of right) and warns us not to mix these concepts.

A claim and obligation will, however, always remain an original phenomenon, i.e., the possibility of demanding something from someone, or the necessity of performing certain conduct towards someone. Such an original phenomenon of the intersubjective relation is characteristic of the areas which are generally determined as the social activity of a human being. However, there are numerous areas of mutual claims and obligations. These are traditionally called:

a) Morality,
b) Enacted law (positive law),
c) Customs.

The idea of law (as a connection and relation between a claim and an obligation) and thus described may now be subject to an ontological analysis in accordance with the areas distinguished above, namely of material and ontological, formal and ontological, existential and ontological research, according to Roman Ingarden's analysis (2013, 95–160).[7]

Reinach performs his analyses with respect to existential and ontological, material and ontological issues, while at the same time writing nothing about formal and ontological issues.

In a very general way, it could be said here that the idea of law assumes two inseparable moments, namely the claim and the obligation. For example, Ernst Tugendhat, like Reinach, accepts that speaking formally about rights (understood as claims) can be structured only by speaking about obligations (Tugendhat 1993, 336–363). These two moments constituting the original phenomenon are the starting point for the analysis of the qualitative contents of its idea. The claim and obligation require bearers (*die Träger*). It is a certain relationship of necessity, because the claim is always someone's claim towards someone else, and the obligation is the possibility of demanding satisfaction of the claim from its bearers.

Further on, a question arises about the form of law, i.e. the necessity of investigating the idea of law in the formal and ontological dimension. According to ontology, there is a close relationship between the form and material aspects of the entity, as pointed out by Roman Ingarden (1987, 291–314).

From the analysis of the qualitative contents of the idea of law, the *stricte* relative, correlative (comparative) nature of law as law is derived. The counterpart

[7] "No one before Ingarden revealed and clarified such a wealth of existential moments and no one before him carried out such compelling analysis of modes of being" (Stróżewski 2005, 285–286).

of a right (understood as a claim) is the obligation and necessity-based existence of bearers: 'A is obliged to B' and 'B has a claim against A'. This indicates that law assumes the form of a relationship and bearers as "[t]he objects forming the elements of the relationship not only materially determine the «core» of the relationship but are also a purely ontological foundation of the existence of the relationship core and thereby also the relationship itself" (Ingarden 1987, 299). As Roman Ingarden indicates, the form of the relationship is characterised by the fact that at least two objects (subjects) occur in it, bearers of the relationship which, together with this special relation attributable to them, constitute one whole of a higher order.

Moving on, Reinach asks, firstly, what decides that someone (something) becomes an element of the relation? Then, secondly, when is it formed, so that law is in fact (I mean in reality) created (in other words what makes that law appears in reality)? Thereby, the question about the justification for law, apart from the *strictly* metaphysical issue, also comprises causal issues.

Thus, the first question, namely about the qualitative contents of the bearers of the law relationship is firstly an ontological (eidetic) question[8] and then a metaphysical one. Thereby in the first and second case it has the task of indicating the source of law as its ontological foundation (firstly as an opportunity, and then factual). The second one is a causal question.

Answering the first question (that is, what decides that someone/something becomes an element of the relation), we can say that the necessary condition for the existence of the law relations is the situation where a communicative relation appears, which indicates that the bearers of the law relations can only be such entities which can communicate with one another, i.e. can understand the meaning of stated words or, speaking more generally, they must possess and use the same meanings irrespective of who (or what) are the bearers of a relationship.

Reinach determined the necessary condition as the need to be heard (*die Vernehmungsbedürftigkeit*) which means a requirement to acknowledge the contents of the statement (Reinach 1983, 19; Reinach 1989, 159–160). In other words, the bearer of the law relation can be any type of essence as long as it meets this requirement. Thereby, from the point of view of ontology we can speak about two sources i.e. the ontological bases of the existence of law. The first source is the occurrence of a communicative situation, the other source is that there is an entity, and more precisely entities, that can take part in the communication. What is important here is the fact that in the ontological analyses we have reached the possibility of setting conditions for the existence of law.

[8] "Ontological deliberation consists in the *apriori* analysis of the contents of ideas. It has its ultimate foundation in the pure apprehension of the most primitive ideal qualities (of 'pure *Wesenheiten*') and of the necessary interconnections binding them (Ingarden 2013, 61–62). This needs eidetic reduction.

Summing up, we can say that its ontological condition is the existence of at least two entities/subjects i.e. bearers and the communicative situation, which from the formal and ontological points of view gives us the relation as a form of law.

The second question, the most important for us here, is the question of what the source of law creation (understood as relation between a claim and an obligation) is, i.e. how it happens that the communicative situation creates law, i.e. a claim-obligation relation.

It is, however, a question not only about the source of law creation but mainly about the possibility of the communicative situation occurring. In these terms, it is a transcendental question about the conditions of communicative opportunities.

Reinach's answer to this question is the concept of social acts (*soziale Akte*).[9] The introduction of this concept and its analysis have considerable significance for the process of legitimizing law because it indicates the existence of the communicative *Apriori*, which, it can be said, constitutes the final reason in the metaphysical justification for law, as it is the final i.e. transcendental element of the process.

Reinach emphasizes the primordiality of some social acts, especially the act of a promise (*das Versprechen*) and stresses the impossibility of their cognitive reduction to more elementary elements, thereby accepting their transcendental character. Only a few social acts may have an apriori structure, *inter alia*: promises, statements (assertions), questioning, commanding, requesting (Reinach 1983, 18–49; Reinach 1989, 158–189).

Summing up the past research results, we may accept that eidetic analyses of the phenomenon of law as indicating that the law as law is a relation with two fundamental constants as ideal qualities i.e. a claim (right) and an obligation, and their bearers. This relation is created apriori, as the result of communicative action by the fulfilment of a promise as a social act.

2.2. Positive law

And now the question of positive law and its legitimizing arises.

The above conclusions apply to positive law, with some modifications, in accordance with the quotation from the introduction to *The Apriori Foundations*

[9] In Anglo-Saxon philosophy (analytical philosophy and analytical jurisprudence) attribute the theory of speech acts to John Langshaw Austin (and then John Rogers Searle). Historically, the relationship between these two concepts raises a paradox, because as the creator of the theory is normally be considered to be Austin, not Reinach. But Austin created it in the 1950s (Austin 1962), decades after the publication Reinach's work *Die apriorischen Grundlagen des bürgerlichen Rechtes* (Reinach 1913). Unfortunately, for a number of historical reasons the theory of social acts was forgotten – Reinach's premature death, Husserl's deviating from ideas of early phenomenology, the political situation after 1933, problems with understanding the method of phenomenological (eidetic) reduction, or phenomenological analysis in general. For these reasons, it is likely that Austin did not know about this theory.

of the Civil Law (the structure of positive law can only become intelligible through the structure of the non-positive sphere of law). The distinction between law as law and positive law, in terms of the problem of legitimizing, lies not in other ontological grounds – these are the same: the bearers of relationship and apriori in the sphere of social acts. The difference is founded on other kinds of social acts.

Reinach points out that to legitimize positive law we can find other acts that create its structure. A promise is not enough to create positive law, because we would only have a claim on the side of the law-maker and an obligation on the side of the addressee.

The structure of positive law cannot be built on the grounds of a promise, i.e., on a claim and an obligation, since it is too weak. We must find something stronger. Why? Because a phenomenon of positive law should contain a potential element of coercion to enforce its norm and not a claim in the content of which there is such enforcement. It is not an act of promise that built the structure of positive law.

Reinach indicates that it is the act of enacting (*Bestimmungsakt*)[10] that creates normativity as positive law (Reinach 1983, 106; Reinach 1989, 243). However, in my view the act of enacting (*Bestimmungsakt*) must be completed by another act which is accomplishment by the addressee. However, Reinach did not write about this. It is my contention that if the normativity given by the law-maker is to have a result in sphere of the addressee, they have to grant that capability.

This act can be called the act of granting the general legislation provision or the act of granting validity-specifying provisions (*Geltungsanordnungen* – following Karl Larenz and his paper *Rechtssatz als Bestimmungssatz*), (1969, 154). That act is addressed to the law-maker and, in view of causal arguments justifying positive law, legitimizes its existence (the existence of the relationship between addressee/subjects of positive law and the law-maker).

This leads us to the analysis of three important concepts in the question of the legitimacy of positive law, i.e. the notions of the lawmaker, the sovereign and power. These concepts can be reconstructed with the help of Reinach's theory.

The sovereign is a subject (in the broadest sense of this word) who has power (P1), but in the sense of the ability to be empowered, so as to define itself, on the one hand, as a unified political entity, and, on the other hand, as the entity that decides on the form and type of given political existence in which the legislator is designated (legitimized). The sovereign can only be a subject who is an addressee of the law – the addressee of acts of enactment (*Bestimmungsakte*), because it is the sovereign who constitutes itself as a political unity, i.e. agrees to be the addressee of norms and constitutes an internal – as Herbert Hart said – attitude of acceptance of the law and the reason for its observance (1961, 86–88). Regardless of how we

[10] Stanley L. Paulson translates the term *Bestimmungsakt* as 'the act of issuance' and the term *Bestimmung* as 'the legally issued norm' (Paulson 1987, 149–152).

refer to this subject – whether as a nation, a community, a community, a people, or a state – it is this subject (as sovereign) that determines the effectiveness of enacting (as the addressee of the law). If there is no such acceptance (inner attitude), the only remaining recourse is force.

However, analysis at the conceptual level – in accordance with the assumptions of the method of phenomenological analysis – must also take into account the actual idea of sovereignty. Unfortunately, at the level of factuality we are not able to empirically pinpoint this subject or its normative actions. Habermas, one of the leading contemporary social philosophers, stresses that "popular sovereignty is no longer embodied in a visibly identifiable gathering of autonomous citizens. It pulls back into the, as it were, 'subjectless' forms of communication circulating through forums and legislative bodies" (Habermas 1996a, 135–136). Sovereignty is thus the highest institutional abstraction, belonging to one of the notions of the symbolic universe, which justifies (legitimizing) positive law. Therefore, in order for the sovereign to make normative decisions and to actually shape the content of social relations, an organizational principle must appear which is founded on an act of granting validity-specifying provisions, which determine the institution of power, but not understood as 'possibility' ('power), but as 'submission' to the will of the legislator and its vision of social relations, and in particular its requirements with regard to conduct. This principle is the idea of positive law – the rule of law (P2). "Political power – writes Habermas – is not externally juxtaposed to law but rather *presupposed* by law and itself established in the form of law" (Habermas 1996a, 134). The fact that we usually wrest the notion of positive law away from the notions of power and the State is an error that has its foundation in empiricism (Loidolt 2009, 21–22). Habermas points out that law is perceived and often functions as an instrument of power, but at the same time stresses that this is a distortion resulting from the fact that in such cases we are actually dealing with the phenomenon of illegitimate power. Power and law mutually constitute each other, hence the notion of power at issue here can be termed 'legitimate power'. However, the contemporary complexity of social relations has overshadowed the phenomenon of positive law, which – according to Habermas – can be correctly reconstructed using examples of abstractly conceived primitive communities, in which one can see the phenomenon of the transformation of power as authority into power as a legitimized institution. According to Habermas, there are two processes that occur simultaneously, *uno acto*, i.e. power is authorized by an essential value, usually sacred law, and at the same time law is sanctioned by this power. Therefore, we must therefore distinguish, as Habermas stresses, the functions that power and law perform for each other, from the functions of law and power in their own right (Habermas 1996a, 137–144). In other words, if power is legitimized, then we are dealing with a proper relationship of law (legitimate power).

Habermas argues that positive law is a remedy for the complexity of social relationships in increasingly diverse and complex communities, where

the processes of reaching agreement are very likely to end in divergence and disagreement. Positive law – according to Habermas – derives its justification from the "alliance" of two elements, i.e. the normative decision of the legislator and the expectations of the sovereign, meaning the addressee of this normativity. Hence "[t]his ideal tension reappears in the law. Specifically, it appears in the relation between the coercive force of law, which secures average rule acceptance, and the idea of self-legislation (or the supposition of the political autonomy of the united citizens), which first vindicates the legitimacy claim of the rules themselves, that is, makes this claim rationally acceptable" (Habermas 1996a, 39).

He reconstructs the whole idea as follows: the construction of positive law begins with the principle of discourse, which gives this principle a legal form, in order to ensure, on the one hand, freedom of action and, on the other, the discursive realization of political autonomy. Thus, a given community of law is defined legally, both as a political unity and an axiological unity. And, in this sense, we give law (rights) unto ourselves, that is, we 'keep power alive', as a tool for realizing this idea. Thus, the content of the law "[…] does not exist in transcendental purity" (Habermas 1996a, 129).[11]

Thus, we can say that the theory of social acts is the foundation for justifying law beyond concepts referring to transcendent entities and the philosophical-legal concepts based on them, such as theological concepts or natural law concepts.

CONCLUSION

The analysis of the problem of legitimizing positive law from the perspective of Adolf Reinach's transcendental theory of social acts demonstrates the necessity of the joint existence (fulfilment) of two such acts – the act of granting validity-specifying provisions and act of enactment. This led us to the analysis of three important concepts in the question of the legitimacy of positive law, i.e. the notions of the law-maker, the sovereign and power. These concepts I synthetically tried to reconstruct with the help of Reinach's theory.

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[11] Habermas sees the legitimization of contemporary legal systems as residing in the idea of the self-determination of the legal community, which reaches this agreement in discourse.

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C O P E
Member since 2018
JM13714

*Manuela Massa**

https://orcid.org/0000-0001-6968-3979

PROPERTY AND *NUDA POTESTAS* AS CONSTITUTIONS OF REINACH'S PHILOSOPHY OF LAW

Abstract. This contribution centers on the notions of *property* and *nuda potestas* in Reinach's philosophy of law. I aim to demonstrate how both terms ground an important part of Reinach's understanding of a priori condition for civil rights. Consequently, I assess the principle of property with a comparison to Luis de Molina, since he shows in his *De Iustitia et Iure* how *dominium* and rights justify some forms of property (lay and ecclesiastical) and political power (Molina 1659, disp2 n1; Kaufmann 2014, 129). Hence, the right of the person is discussed by following the *potestas*. In *Die apriorischen Grundlagen des bürgerlichen Rechtes*, Reinach implicitly refers to the *nuda potestas*, which is a kind of power that can be applied only formally and not in fact to something else and for that reason, it can only be caught a priori, since acts are performed by another person within it. This is the reason why the rights of a person can be divided between more people, and it is at first just a kind of property, which can be exercised upon the individual. Consequently, I divide my contribution as follows. First, in considering the social act, I show how its characteristics of *Anspruch* and *Verbindlichkeit* result from the commitment that human beings make to one another. In doing this, I discuss the particular condition of slavery through which it is possible to find the property and the *nuda potestas* since there is no enjoyment of the good to which it refers. Second, I apply both concepts by showing a parallel with Luis de Molina. This comes about in consideration of the case of *dominium*, in which absolute rights can be ascribed to their *relative* claim. Third and finally, I offer a critique of Reinach, in which I show how absolute rights and relative claims cannot be assimilated.

Keywords: dominium, nuda potestas, property, law, slavery.

1. INTRODUCTION

An example of a theory of right that can be interpreted according to a framework other than that required by the theory of positive law can be found in Reinach's work *The Apriori Foundations of the Civil Law*. One may reflect upon the fact that Reinach completely rejects the principles of jurisprudence based on positive law. An explanation for this denial can be found in Reinach's admission of the existence of legal entities and structures, independent from positive law, which considers positive law as capable of grasping the meaning of the ontological categories of the things themselves, which according to Reinach permits the

* Martin Luther University Halle-Wittenberg, manuela.massa@phil.uni-halle.de

existence of law.[1] At the same time, the accusation that Reinach makes against positive law obliges him to introduce a new instrument, "the phenomenological a priori," which is capable of overriding the difficulties afflicting the theories of the legal positivists, and which confirms the being of legal entities as independent from positive law.

But are we sure that Reinach achieves his goal? Namely, is he able to demonstrate that this a priori foundation, which follows the phenomenological principle, belongs to civil rights? On the one hand, as Dubois observes in "Adolf Reinach: Metaethics and philosophy of law," his a priori phenomenological account differs from positive law in two respects (Cf. DuBois 2002): a) Reinach's a priori laws are *states of affairs* grounded in the essences of legal entities, such as promise, property, obligation, etc. Consequently, they are not a result of divine or human law; b) Reinach's a priori law has nothing to do with prescription in the sense of norms or principles to follow. On the other hand, we might admit that even if the framework of Reinach's project is clear for all his researchers, it should be equally clear that several theoretical problems arise from his arguments concerning the concept of property [*Eigentum*], which represents for the jurist – to use Reinach's own words – "the foundational right." Reinach's method of analysis – which is based on the *ius destruendi*,[2] namely, the disposal powers of the thing itself [*Verfügungsgewalt*] – brings his principle up against an ecological ethics, since human beings cannot own nature, and for that reason do not have any right to destroy it (Burkhardt 1987).

These considerations arise from three theses deriving from Reinach's legal system, which can be detailed as follows:

A. Social acts have an a priori structure. This concerns the broad range of human experiences which do not belong to the self, but in which the self shows itself as active. Reinach defines these as spontaneous acts: they are experiences which refer to the "inner activity" of the subject. If several people perform "the act," give commands, and express the performance, this results in an act "together with the other." In this kind of participation, in which everyone is conscious of the participation of the others, there is one single act which is performed

[1] "The positive law can deviate as it likes from the essential necessities which hold for legal entities and structures – though it is of course a problem for itself to make understandable how such deviations are possible. We only assert one thing, though on this we lay great stress: the basic concepts of right have a being which is independent of the positive law, just as numbers have a being independent of mathematical science. The positive law can develop and transform them as it will: they are themselves found by it and not produced by it. And further: there are eternal laws governing these legal entities and structures, laws which are independent of our grasp of them, just as are the laws of mathematics. The positive law can incorporate them into its sphere, it can also deviate from them. But even when it enacts the very opposite of them, it cannot touch their own proper being" (Reinach 1983, 6).

[2] Within this juridical concept is the right to destroy your own. Luis de Molina, for example, recognized this right with physical things (Cf. Molina 1602; Kaufmann 2013).

by two or three people together, and its effect changes accordingly. A kind of command structures it, and this produces an *Anspruch* (claim) and *Verbindlichkeit* (obligation) connected to the idea of a social act performed and directed together by several people.

B. The promise is a reason for obligation. Recognizable in this kind of "obligation" – which Reinach does not define as something moral – is a kind of property [*Eigentum*] between a person and a thing. This brings me to my second thesis. Obviously, the sense of belonging clarifies this connection: A belongs to B. Nevertheless, it might be asked if property can be considered something that includes the sum of all rights. The answer to this question can only be negative. Reinach rejects the idea that properties are the *sum* or unity of *all* rights. How then should property be understood? If property in itself has no right over a thing, and is rather a *relation* toward a thing, a connection according to which all rights are grounded, then this relation cannot be broken. And this means that it remains intact even if all those rights are grounded by another person. Perhaps, the property's right is characterized by some restriction on the relation of belonging; this is not always the powerful relation and is not always characterized by a right to use. In that sense, the meaning that Luis de Molina gives in his *De Iustitia et Iure* to the *dominium iurisdictionis,* which is fundamental for political power, further clarifies the answer to this question, since it points out its meaning on the basis of the commutative right.

C. The absolute rights of the owner and relative claims cannot be assimilated. By the right over a thing, Reinach assumes that only if this right is grounded in property can it be divided up by dividing the rights. This is the reason why the division of owning in itself is not admitted. Nevertheless, it might also be pointed out that positive law excludes the possibility of a *protected* power relation between owner and thing because the right over a thing is always limited. Reinach indicates the relation of transferred right as *nuda proprietas*. I argue that the power to which Reinach is referring has to be understood as *nuda potestas*, because the legal use of naked power is characterized by a certain "indefiniteness" that characterized Reinach's understanding of natural power. Thus, as Reinach observes, "a person's sphere of power is enlarged to an extraordinary extent as culture develops, does not *modify* the concept of power, but only the *range of things* which falls under it" (Reinach 1983, 53). Because of this assertion, it is possible to argue that the power on which Reinach focuses is naked. The legal definition of this concept clarifies that the *nuda potestas* does not have any corresponding interest in the well-being or continuation of that person or thing. Rather, it only *modifies the range of the thing* to which it is referring (Reinach 1983).

In the following sections, I aim to show the results of these three theses in Reinach's phenomenological analysis. First, I analyze the reason why claim and obligation ground social acts like promises.

2. THE A PRIORI EXISTENCE OF PURE RIGHTS

2.1. *Anspruch* and *Verbindlichkeit* as part of the constitution of social acts

The first task that we must complete in order to determine the meaning of social acts is to understand the difference between a command, as an order of ordinance [*Befehl*], and a regulation [*Bestimmung*]. According to Reinach, both of these are social acts (Reinach 1905, 54): a state has the right to command and issue orders, but these acts have a regulative form, since a command refers to a particular situation and a particular object. A state can command that a certain neighbourhood respect a new-waste removal protocol and in this case the structure of the act assumes the form of a prescription that has to be followed. As Antonio Calcagno remarks in "A place for the role of community in the structure of the state – Edith Stein and Edmund Husserl," the act on which Reinach and Stein develop their legal argumentation obtains its completion in its being performed by the follower of the command (Calcagno 2016). Regarding this, it is important to distinguish between *having* a resolution and *making* a resolution, because it is only by *making* a resolution that we have a doing of the self and a spontaneous act. This is why Reinach understands commanding as follows: "Commanding is rather an experience all its own, a doing of the subject which according to its nature has in addition to its spontaneity, its intentionality, and its other directedness, also the need of being heard" (Reinach 1905, 19). Social acts that are performed by human beings form an inner unity of voluntary act and voluntary utterance: their prerequisite is the turning to another subject and the need for being heard. Something different happens in the internal act: this requires one subject, the actor, and a second subject within the acting person. In her essay "Ein Beitrag zur Ontologie der sozialen Gemeinschaft," Gerda Walther clarifies how, in the habitual experience of community, there exists a temporal gap between one's actions in the moment and the repeated memories that give rise to such actions (Walther 1922). In other words, one may perform certain acts or repeatedly live through certain experiences like community while the original source of such acts or experiences is not present. When one is no longer conscious of the object of intentional experience or when one object replaces another in the flow of experience, a distance arises between the I and its subject. In the case of community, the union – that one important element of Walther's constitution of community – understood as the intentional object, may no longer be conscious. It may, however, re-emerge though memory or in association with another act, person, or event (Walther 1922, 40).

Reinach understands the social act in a similar way by claiming that experiences [*Erlebnisse*] do not belong to the "I", but instead the self shows itself as active through them (Walther 1922, 9). In this regard, Alessandro Salice, in his

essay "Obbligazione e pretesa in Adolf Reinach: due relazioni sociali," remarks that psychical (i.e., connected to the experiences) and social acts have to refer to the psychical object (Salice 2008). But, as Reinach clarifies, "while it is always a person whom I make a promise to or command, I simply waive a claim or I simply issue a legal norm to the effect that something ought to be so" (Reinach 1983, 106). Then obligation and claims depend on the social act of promise and not *tout court* on the social act as such. Thus, the meaning that Reinach gives to promising presupposes an inner experience as the content of the promising self as its intentional object. Reinach connects promising and will, which is directed toward the action itself. For that reason, promises and intention are also connected, if the declaration of promises and declaration of intent do not always correspond (Duxbur 1991, 324). To clarify this kind of assumption, we might examine the example of promising to call someone named Ferdinand. This expression is as follows: "I will call Ferdinand tomorrow." This kind of statement, in which a subject asserts something – in this case their will to make a call – could be interpreted in two ways: namely, as a declaration of a promise or as a declaration of intention. The meaning changes according to the way in which it is expressed and depending on the person to whom this kind of phrase is addressed.

Reinach ascribes the same kind of structure to the promise and to the social act. Accordingly, he observes,

Like all social acts, promising presupposes an inner experience which has the content of the promise as its intentional object. As with commanding, this inner experience is that of intending that something occur, not of course through the addressee but through the promisor himself. Every promising to do this or that, presupposes that one's will is directed to this action (Reinach 1983, 26).

Nevertheless, intention and will remain on two different levels, because Reinach considers promising a spontaneous social act, whose expression has to be made in terms of the promise itself. Reinach establishes that social acts can be performed by a number of people: this admits the possibility of commanding two or more people together (Reinach 1983, 24). But what happens if several people perform one social act together? The answer to this question is twofold. On one side, each of the people will be oriented to perform this act. On the other, because each person performs the act together with others (togetherness), a kind of consciousness emerges that is characterized by the commonality of the participants in the action. For this reason, promising follows this kind of criterion, since it can be directed or performed by several people together. Moreover, promises can be conditional, so that unconditional promises and conditional content can be distinguished through their understanding (Duxbur 1991, 324). Reinach demonstrates that another aspect emerges from making a promise: this regards *Anspruch* (claim) and *Verbindlichkeit* (obligation), both of which emerge only through the realization of the act of promising. Because the promise is to be recognized as a social act, the question moves to the addressee of the promise

itself. It is sure that their answers can be different: it can be accepted or rejected. Reinach advances the problem of the inner capacity of the individual, which he describes as *Zurückweisen* in the case of the act declining, and as *inner* accepting in the case of an act of acceptance,[3] that is interpreted as a confirmation. The center of this procedure is the social act, which has the function of completing the act of promising. The content of the promise is certainly intentional, if its realization assumes the form of the completion of the promise. Even if the promise and its realization have parts that are ontologically independent, they intentionally maintain an internal relationship of initiation/compliance, which integrates them in the same structure of the social act in which the declaration of the promise was inserted, that underlying the state of mind and its apprehension by the other who is acting (Ferrer 2015). As a result, and as Reinach suggests, this corresponds to the "I will" and "I accept" (Reinach 1983, 29). This means that there is a deviation from the plan, since the question moves from an internal experience to an external social act. The question is also interesting from a linguistic perspective,[4] since for Reinach the *expression* of acceptance has to be interpreted as an act of informing. Unlike the social act of accepting, promising has a strictly prescriptive reference point, since it refers to the person who makes the promise. Indeed, by making a promise, someone has to carry out an obligation from which she cannot be exempted, so that the social act of promising presupposes the intent to follow that is expressed through the promise, and the effective performance of the promise means that this has been accepted (Smith 2017, 52). Perhaps the will and the correlating intention are together not enough to create something like promise

[3] Reinach distinguishes between five types of acceptance: "Acceptance can first of all be taken as the positive response to a proposition, to an "offer" of some kind or other. In this very formal sense the most various kinds of social acts can function as acceptances, for instance a promise just as well as its being accepted. If A responds with "yes" to the request of B to promise him something, we have in this "yes" just as much an acceptance in the formal sense, as when A responds to the promise of B with "good." But materialise the "yes" contains a promise and the "good" the acceptance of a promise in a quite new sense. This material acceptance refers only to promises. With regard to it we still have various things to distinguish. There is first of all acceptance as a purely inner experience, an inner "saying yes," an inner assent to the promise which is heard. From this we distinguish acceptance in the sense of the expression of the acceptance, as it can occur in actions but also in words. Something new is added when the expression of acceptance takes on an informing function, when it is directed to a person. Finally, as the fifth and most important concept we point to acceptance as a social act in its own right which is not reducible to an informing" (Reinach 1983, 29).

[4] In Husserl's unpublished manuscript A I 3 "Noetik als noethische Rechtslehre. Begründungen. Auch zur Wahrscheinlichkeitslehre" from 1906–1910, the question concerning evidence and the a priori can be found. Husserl writes the following, "Der Evidenzcharackter verbürgt die Wahrheit. Wie sollen wir, wenn wir nicht direkt Evidenz haben und sie nichts ohne weiteres uns erschaffen können, bzw. wenn wir noch kein Wissen haben, das ist, wenn nicht akt. Evidenz, so schon etwas uns indirekt die Evidenzmöglichkeit verbürgendes, indirekte Evidenzkriterien gewinnen" (Cf. Husserl, Manuscript A I 3, 4).

and obligation. It is rather "a distinctive psychic acting which is grounded in the will and which must be externally expressed for the sake of announcing itself to another. In this act, and only in it, are claim and obligations grounded" (Reinach 1983, 41).

With this assumption, Reinach describes the logical structure in which the physical capacity grounds the promise and becomes the expression of will. For this reason, will requires the promise of an a priori structure about the content of the promise itself (Duxbur 1991, 331). This opens the circuit (and therefore counts as a command act), without assuring that the circuit will be completed. In this respect, we must ask how a social act of legal issuance is intended: it must be communicated and understood (Paulson 1987, 40). The more important distinction concerns the personal command and legally issued norms. Reinach writes "While it is always a person whom I make a promise to or command, I simply waive a claim or I simply issue a legal norm to the effect that something ought to be so" (Reinach 1983, 106). This assumption brings me to my second thesis, which considers the promise as a reason for obligation.

2.2. The promise as a reason for obligation

According to Reinach, the obligatory force of the promise cannot depend on the will alone, because this kind of act has an a priori structure that exists without the necessity of a corresponding experience. However, there can be no promise without an obligation. So, it might be argued that it belongs to the essence of promise to produce a claim and obligation once the act is successfully realized. In contrast, the mere assertion that I am willing to do something does not put me under an obligation to act accordingly (Salice, Schmid 2016, 7). Hence, somebody can feel obliged or entitled to do something without actually doing it. Reinach develops the question concerning obligation and promise in such a way as to position them against the principle of natural law. For example, Hugo Grotius (1583–1645), who can be considered "the father of natural law," established the connection between obligation and natural law as necessary, insofar as "no other natural method can be imagined" (Grotius 2012, 5). Reinach, as has been clarified, switches his analysis concerning civil rights to the a priori structure of promising as a social act.

But how might we consider this correlation between promise and obligation if this kind of schema cannot follow the principle of natural law? Wojciech Zelaniec suggests an answer to this question. According to him, this correlation will "single out promise-generated an obligation from others (Zelaniec 1992, 162). Kant solves this problem concerning natural law and a priori in his *Philosophy of Law*, and his solution influenced Reinach's thesis of the a priori foundation of civil law. By clarifying the difference between ethics and jurisprudence, Kant establishes not

only that "the promise made and accepted must be kept," and therefore the binding nature of promises in jurisprudence (Kant 1887, 22), but also that the acquisition of personal right is influenced by this structure, because the acquisition of the law of right is "always derived from that which the other has on his own" (Kant 1887, 1). For this reason, the juridical act determines that the personal right can be acquired by positive transference or conveyance. However, this kind of right presupposes a common will, in which the act grounds what Kant recognized as the contract.[5] Hence, the acquisition of a contract is possible through the philosophical transcendental deduction, which removes all difficulties regarding the possession of the free will of another, because, as Daniela Falcioni remarks in "Immanuel Kant und Adolf Reinach: Zwei Linien des Widerstandes," it guarantees the legal character of the acquisition as a right to exclude the arbitrariness of the contractual partner (Falcioni 2002, 358). In §30 of *Philosophy of Law*, Kant defines this as "private right." Such a right is explained by considering the relation between master and servant. In this relationship, "another mode of obligation" exists, given that the *societas herilis* is determined by both the *possession* and the *contract* of the servant in his household. Because property and reason are connected for Kant (Simmermacher 2018, 97; Kant 1887, 64), we must distinguish between the *meum iuris* and the external *thine*, since from a juridical point of view the *subjective condition* of the use of something is strictly connected to me, insofar as if somebody else uses this thing without my consent it would injure me.[6] Kant also extends this postulation through the case of the criminal remanded for life, which is the result of the injury he has committed on an instrument of the will of another, whereby the legal institution is represented by the state or embodied by a particular citizen. Through the juridical judgment, the criminal is practically a *dominium proprietatis* of his owner (Kant 1887, 193). This distinction that Kant makes between the physical (empirical) and intelligible forms of possession is akin to the owner of something saying, "I am the owner of this apple." Possessing the will of somebody is something that can also be found in the work of Luis de

[5] Kant found the existence of four juridical acts of will: two of them being preparatory acts and two of them constitutive acts. The two preparatory acts, as forms of treating in the transaction, are offer (*oblatio*) and approval (*approbatio*), and the two constitutive acts taking the form of concluding the transaction, are promise (promising) and acceptance (*acceptatio*) (Kant 1887, 101).

[6] Kant further develops his argumentation in observing that by the exposition of the external "mine" and "thine," it is possible to distinguish only three external objects of the own will. While the first regards a corporal thing external to me (which cannot be possessed in a physical way), the second focuses the possession of the will on another. Kant demonstrates that only by asserting, "I am in possession of the will of another," the promise belongs to the nature of things possessed, and because it is possible to distinguish in it a kind of active obligation, then this thing can be recognized as something mine. Consequently, the third case regards the domination of a member of a family or slave as something that is in my possession. In that case, Kant asserts that the "purely juridical possession" is also possible if this person is not possessed empirically, since they can be possessed by the mere will of the owner (Kant 1887, 63–64).

Molina. As Danaë Simmermacher notes in her book *Eigentum als ein subjektives Recht bei Luis de Molina (1535–1600)*, Kant's physical form of possession can be compared to Molina's analysis of natural possession (Simmermacher 2018, 98), which for him corresponds to civic property. A possible hypothesis for this kind of parallel between Kant and Molina is Molina's influence on Kant's philosophy of law (Simmermacher 2018; Kaufmann 2005, 73–88). Perhaps indirectly Molina's *De Iustitia et Iure* can be considered a crucial oeuvre through which to grasp the meaning of this juridical aspect concerning property. In this work, Molina justifies the possession of one man by another in legal terms, which he does not clarify as a kind of natural relation between human beings. In distinguishing between two kinds of *dominium*, namely property and jurisdiction, Molina remarks that natural *dominium* is grounded in the possession that the human being has – namely, his free will – even if this context remains the ordinance of God. Something different happens in his development of *dominium iurisdictionis*, in which a kind of *potestas* is present. While jurisdiction implies its understanding in terms of rights, it cannot be infringed by third parties (Molina 1602, 33). Thus, the same power is ascribed to authority and eminence over others according to its rules and government. What does Molina think about the question of slavery? Is it something that exists according to the laws of nature? The answer to this question is negative. In the 33rd Disputation of *De Iustitia et Iure*, Molina focuses on the condition of freedom for a human being as the owner thereof. According to the conditions of natural law, man sells his freedom and negotiates his condition as a slave. This explains why a slave's *potestas* can be legally transferred in every form.

Both Molina and Kant's arguments concerning slavery might be helpful to understand what Reinach means by property [*Eigentum*] in the 5th chapter of *The Apriori Foundations of the Civil Law*, entitled "Basic themes of the A-priori theory of Right." According to Reinach, "moral entitlements and moral duties are not correlated to each other as positive and negative, rather both are positives which completely differ in kind from each other" (Reinach 1983, 51). Following Molina and Kant's theoretical assumptions concerning the question of *dominium*, Reinach distinguishes between *absolute right* and *right over* something. While absolute right entails that its content refers to one's own actions and produces an immediate effect in relation to right [*Gestaltungsrechte*], the right over this thing indicates the right to use a thing, to enjoy its fruits (*usus fructus*) and to cultivate or make something of it. There is a coincidence between thing and bodily object, even if "positive enactments would restrict to it" (Reinach 1983, 53), so everything is considered usable. Reinach points out that among the rights over a thing, the most important is property. This kind of a priori relationship can be distinguished in two different ways: a physical power over the thing reflected in the ability to manipulate it and a legal power reflected in the ability to revoke and waive the thing itself. At least, "a thing can be in my power without belonging to me. It can belong to me without being in my power" (Reinach 1983, 4). This unnecessary

simplification of the juridical meaning of property based on the relational aspect of owner toward his thing that Reinach makes, follows the principle of Kant's *Metaphysics of Morals* of Lockean tradition (Flikschuh, Ypi 2014). Notoriously, Kant grounds his analysis of the property of a thing on the difference between the intelligible possession [*possession noumenon*] and the empirical possession [*possession phenomenon*]. While the *possession noumenon* regards an external thing, which does not result from its physical link, but rather from the a priori connection between the object and the understanding of any spatial-temporal condition (Kant 1991, 245–312), the *possession phenomenon* provides the "protective" and "actual" way to possess a thing. Reinach uses Kant's intelligible possession for his analysis, because it represents the "practischen Categorie habere" – to use Kant's words (Kant 1991, 326–327) – of this relation. Otherwise, as Hruschka and Sharon explain in "The natural law duty to recognise private property ownership," in considering the connection of property and natural law in Kant's thought, Reinach also shows that we all have a *natural* duty to choose our ownership of private property, if we are committed to the individual right of freedom (Byrd, Hruschka 2006). In the next section, I analyze the question of *dominium* by considering the difference between a relative claim and absolute right. As Di Pierro points out in "The Influence of Adolf Reinach on Edith Stein's Concept of the State: Similarities and Differences," the a priori rules of civil law are not simply within those who structure a society and even less in those who interpret it, but are already in the objects as their property, before they are in the subjects that grasp them (González-Di Pierro 2016).

In what follows, I show why *dominium proprietatis* and *nuda potestas* can be considered the constitutive elements of Reinach phenomenological analysis.

3. *DOMINIUM PROPRIETATIS* AND *NUDA POTESTAS* AS THE FUNDAMENTAL ELEMENTS OF REINACH'S PHENOMENOLOGY OF LAW

The question of *dominium* and *nuda potestas* forms an important part of the juridical and political debates that began in antiquity, but which are still important today. The reason for this issue's longevity derives from the double connotation that the word *dominium* has in the juridical debate, namely, that it means both "power" and "property." A comparison with the official theological and legal dispute between Pope John XXII and the Franciscan order concerning poverty further clarifies the related use that Church authorities have made of this word in juridical contexts. An exemplar, in this sense, is Pope John XXII's bull *Quia vir reprobus* from 1329, wherein he uses religious justification to challenge the Franciscan perspective that Jesus and the apostles had been poor. In fact, through God, property existed before all human legislation (Brunner 2014).

In defining the word *dominium* as "property and power" according to its two meanings, John argues that *property* belonged to Adam before Eve's creation so that *dominium* loses its significance as common ownership based on power, and becomes individual property (Kaufmann 2016, 2). Continued in the legal debate, the *nuda potestas* designated a kind of power which can be applied only formally and not in fact to something else. An exemplification of this concept is offered by Huguccio Pisanus in his *Summa Decretorum* of 1188. In considering the powers of the emperor and of the pope, Pisanus argues that a superior authority in temporal matters belongs to the emperor, in which the interference of pope is allowed only with the prince's permission. So, in fact, the power the pope wishes to exercise belongs to him only formally, because he owns only bare power, the *nuda potestas.*

The double significance of the word *dominium* as "power and property" and the meaning of *nuda potestas* is found in §5 of Reinach's *The Apriori Foundations of Civil Law* entitled "Right and obligations. Property." Both concepts can be considered fundamental aspects of Reinach's a priori legal analysis. The reason for this arises from the assumption that Reinach makes in considering the "right over a thing" "as an ultimate, irreducible relation, which cannot be further resolved into elements" (Reinach 1983, 55). With Reinach's own words, it can be concluded that in the relation between the owner and a thing, the subject *dominates* the thing he possesses absolutely. However, in this bond between owner and possessed thing, it is possible to perceive a kind of closeness and *potestas*, arising from the power that an owner can exercise upon the thing that belongs to him, whose relation is defined by Reinach as the "powerful one." So that it might be argued that the word *dominium* as *Eigentum* in its double significance as "property and power" characterized Reinach's property rights. Reinach's investigation establishes that "a priori statements are valid for legal entities and structures" (Reinach 1983, 5). For this reason, property rights derive from his a priori – namely, *das Faktum* – possession, whose right to possession [*Recht auf den Besitz*] as "owning" or "belonging" is independent from possession itself: so that, at least, these two terms remain different (Reinach 1983, 52–54). Nevertheless, in Reinach's understanding of property, the *potestas* preserves its naked character. This is because if it is emptied of its contents, it is impossible to gain any benefits from it, since it belongs to another subject, given that it also does not regard a physical thing. As an example of this, let us suppose two factors, A and B. Some right belongs to A which he transfers to B. B can later transfer this right back to A. B can also waive his right, in which case it disappears from the world for good. This is all quite different in the case of an absolute right over a thing belonging to A. According to this principle, Reinach rejects the idea that property is the *sum* or unity of *all* rights. How should it then be understood? If property in itself does not have any right over a thing and is rather a *relation* toward a thing – a connection according to which all rights are grounded – then this relation cannot be broken. This means that it remains

intact even if all those rights are grounded by another person. Reinach indicates that this relation has to be understood as *nuda proprietas*, which means that the "thing […] belongs to the owner in the interval in exactly the same sense as before and after" (Reinach 1983, 52–54). And because property is itself no right over a thing, its essence is given in the character that Reinach ascribes to this relation. This relation cannot be broken, even if all those rights have been granted to other person. For this reason, Reinach's formulation of *nuda proprietas* can be translated in the juridical formulation of *nuda potestas*, because property belongs to the human being, insofar as we understand it. This thesis contained *in nuce* by Reinach can be further developed by considering the example of Robinson Crusoe. Crusoe establishes a particular relationship with the things that he produces for himself on his island. Hereby, claims and obligations arise from social and similar promises, completely apart from any positive law. So, it might be supposed that this relation of belonging to the things exists through what Reinach recognizes as "*rechtsleere Raum*." Moreover, in reporting the case of Crusoe, Reinach aims to demonstrate that assigning the belongings-sphere to positive law, as some jurists and philosophers have done, has to be considered groundless, because these are structured, as he affirms in the a priori laws. Property is not considered a right over a thing, but is instead a relation to the thing in which all the rights over things are grounded. This relation exists according to its own identity, if it grounds the right. But how should this be understood in the case of divided property? Reinach answers this question by asserting that "property in itself, the relation of belonging, cannot be divided: thing and its whole value can never at the same time be owned by two different persons in two different *relations* of owning" (Reinach 1983, 56). So, as Reinach argues, it can be understood according to the traditional definition of *dominium*, the juridical definition of which appears in the middle of the first century and corresponds to principles deriving from Roman law. In this is recognizable an absolute and exclusive right to possession and control of a thing, in which the mastery of a thing and the *iura praediorum*, the servitude or usufruct of a thing have to be differentiated (Carron 2018, 92). Property rights can be divided differently, insofar as it is admitted that a thing belongs to several people together, in the sense that every person belongs to a determinate value and owns part of this divided thing. This is because the "division of the owning itself is impossible" and the reason for this is derived from the relation between the person and thing, which always has to be a priori, so that it can be assumed that the property as *dominium* and *nuda potestas* constitutes an important part of Reinach's a priorical system based on the civil German code.

Nevertheless, as Alejandro Tellkamp observes in "Rights and dominium," the lawful and just contract is one of the most important instruments used to establish property. For this reason, political power has to be based on contracts of this sort (Tellkamp 2014). Reinach focuses on this point by considering the contract

of a loan. He tries again to demonstrate that positive law needs the a priori philosophy of right, since only phenomenology is able to show the correspondence between the intention of the owner, who is loaning his thing, and the will of the beneficiaries who will receive the good that they will use (Falcioni 2002, 364). Nevertheless, starting in the Middle Ages, a loan under court law obliged the borrowing person not only to pay for the good, but also to pay taxes from personal dependency (Planitz 1949, 49). So, if as Reinach observes, positive law generates juridical concepts, in absolutely no way do legal entities depend upon it. They have their own independent being just as physical objects do.

4. CONCLUDING REMARKS

Reinach's theory of the a priori foundation of civil law also includes penal and administrative law. The following demonstrates this consideration: "Whilst we have limited ourselves here to the setting forth of some of the a priori foundations of the civil law, we are convinced that the other legal disciplines – especially the penal law and constitutional and administrative law – are capable of and require such a foundation also."

But is it possible for legal disciplines to get this kind of a priori constitution? This a priori legal system could be objected to, according to Reinach's construction. Namely, the information or being thankful in the name of the other does not imply the essential necessity of his act, which means any effect in the world of right (Reinach 1983, 85). Yet it may be argued that there are some differences, not only between revoking a claim and a proxy action, but also between social legal acts and performed acts. These differences show that there is prima facie a case to answer against the view that prior empowerment is always necessary for representative acts. This condition is grounded on presupposing that it was shown one prevents one making promises in the name of other people, rather that this may not be what sets limits to my performing legally indifferent representative acts (Paulson 1987, 129). My acts, in the absence of prior empowerment, will simply be rejected by my audience as performances of certain act types, and there are limits to the acts I can reasonably expect to get retrospective empowerment for.

But, to show that these factors merely limit – and do not rule out – the possibility of representative acts with only retrospective empowerment, what we need now is a clear example of such an act itself. Thus, my represented act cannot be a priori, since it has not yet happened. The same can be seen in a legal system. I suspect that penal and administrative law cannot have this kind of constitution, because it is not possible to have an a priori representation of what will happen. Moreover, the social act, which Reinach refers to as a variety of acts like requests, communication, and order. This is why claims and absolute rights are to be considered on the same level.

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*Kimberly Baltzer-Jaray**

REINACH AND KANTOROWICZ: JUSTICE, PHENOMENOLOGICAL REALISM AND THE FREE LAW MOVEMENT

Abstract. Adolf Reinach met and befriended Hermann Kantorowicz in one of Lujo Brentano's political economy seminars during the 1901/1902 academic year at the University of Munich. After Munich, Kantorowicz would go on to be a major contributor to the Free Law Movement (*Freirechtsbewegung*) in Germany and play an important role in the development of the sociology of law in the 20th century. Reinach encountered the work of Edmund Husserl while studying with Lipps and later became central to the phenomenological movement in Göttingen. But all the while he remained interested in and focused on issues related to justice. His last scholarly publication before leaving for battle in WWI, *Die apriorischen Grundlagen des bürgerlichen Rechtes* (*The a priori Foundations of Civil Law*, 1913) published in the very first edition of the *Jahrbuch für Philosophie und phänomenologische Forschung* (*Yearbook for Philosophy and Phenomenological Research*) is a testament to this. Here we see Reinach taking his phenomenological education and applying it to entities of justice. I believe Kantorowicz inspired this lasting interest in matters of justice.

This essay will focus on the influence of Kantorowicz on Reinach, and while doing so attempt to flesh out and contrast the ways in which these two men sought to overcome the problems of justice (*Recht*) of their time. Many of these problems still continue to be relevant today.

Keywords: Reinach, Kantorowicz, Justice, Free Law, Phenomenology.

In 1901, at the age of 17, Adolf Reinach entered the University of Munich. His main areas of study at that time included psychology and philosophy under Theodor Lipps, and then jurisprudence, which he studied with Lujo Brentano and Ernst Beling, and where he befriended Hermann Kantorowicz.[1] Although Reinach encountered the work of Edmund Husserl while studying with Lipps, and later became central to the phenomenological movement in Göttingen, he remained interested in and focused on issues related to justice until he left to fight in WWI. When we look at the small body of work he left behind, the

* Sessional Instructor for Philosophy, Women's Studies, and Social Justice & Peace Studies @ King's University College (Western); Associate Editor for Journal of Camus Studies; Treasurer, The North American Society For Early Phenomenology (NASEP), kbaltzer@uwo.ca

[1] Both Adolf and his younger brother, Heinrich, pursued law studies. Heinrich survived WWI and practiced law until the late 1930s, when the rise of National Socialism forced him to flee Germany.

largest works are on law: The doctoral dissertation *Über den Ursachenbegriff im geltenden Strafrecht* (*On the Concept of Cause in the Prevailing Penal Law*, 1905) and the essay *Die apriorischen Grundlagen des bürgerlichen Rechtes* (*The a priori Foundations of Civil Law*, 1913), published in the second part of the first volume of the *Jahrbuch für Philosophie und phänomenologische Forschung* (*Yearbook for Philosophy and Phenomenological Research*). The latter work is one of his most important, and here we see the exploration of concepts such as essence, state of affairs, and the *a priori* – all in relation to legal entities. I believe that what interested him first and foremost was the essence of justice (*Recht*), its ontological status and grounding, and how we as humans apprehend it and its laws. Secondary to this, but necessarily connected with it, was his interest in how the system of codified law (*Gesetz*) participates with justice.[2] His training in philosophy, phenomenology, and psychology enabled him to explore jurisprudence in novel ways: he was truly a phenomenologist of law.

In this essay, I will turn my focus to the influence of Kantorowicz on the jurisprudential ideas of Reinach, as this relationship has received very little attention despite its direct relevance to contemporary discussions of law. Both Reinach and Kantorowicz leveled powerful critiques at the legal science of the early 20th century, specifically the *Bürgerliches Gesetzbuch* (BGB; German Civil Law Code) of 1900, and the dominance of legal positivism. While their critical views about the new law code and positive law have a great deal in common, differences do become apparent when we analyze the approach each takes to discussing entities of justice and the resolutions each proposes of the current issues in law. These differences, I believe, are a result of their academic training, inclinations, and perception of the nature of justice. Reinach, the phenomenological realist and admirer of Aristotle and Husserl, attempts to ground *Recht* ontologically, so that it can be seen as an essence that ontologically supersedes codification, and is yet still in the world; and in doing so he provides the solid foundation for its practice (similarly to how Husserl had conceived phenomenology as providing a foundation for the sciences). By revealing the ontological status of *Recht*, Reinach could restore to it its authority and glory – something Leibniz sought to do – and then delve into its essence in ways not attempted previously. In contrast, Kantorowicz is speaking to procedure and seeks to liberate *Recht* in social-political ways related directly

[2] The choice of preposition here – 'participate *with*' – is a deliberate one and is intended to reflect the idea that an individual thing or being is not static, but rather is engaged in essential activity: "the activity in and through which its matter was being informed" (Mitscherling 2010, 83). This should more clearly capture the sense of Aristotle's Formal Causality and Plato's notion of Participation. My hope is to avoid the confusion or conflation of participation with imitation, which happens when phrasing like 'participate *in*' is used. To subsist or obtain at all, essence and entities like justice must do so *through* participation.

to the process of adjudication: the role of judges should be to create new law and find justice. Law, he says, should not be purely state-decreed. Both Reinach and Kantorowicz seek to free justice (*Recht*) from the legal scientists; however, their points of view on where the essence of justice resides are very distinct. Still, that is not to say that ultimately we cannot find some complementary aspects between the two approaches.

In what follows, I will discuss the influence of Kantorowicz on Reinach and while doing so attempt to flesh out and contrast the ways in which these two men seek to overcome the problems of justice (*Recht*) in their time. Many of these problems continue to be alive today.

1. THE FRIENDSHIP OF REINACH & KANTOROWICZ

Kantorowicz was roughly 6 years older than Reinach, and obtained his doctorate in 1904 at Heidelberg with a dissertation on the history of criminal law. Reinach met Kantorowicz at the University of Munich in one of Lujo Brentano's political economy seminars during the 1901/1902 academic year (Schuhmann, Smith 1987, 6). It can be easily surmised that the two hit it off: Reinach followed Kantorowicz to Berlin for the summer semester of 1903, studying primarily jurisprudence, and Kantorowicz told Gustav Radbruch in a letter how impressed he was with Reinach's considerable talents and aspirations (Schuhmann, Smith 1987, 6). It may be of interest to note here that after Reinach defended and published his doctoral dissertation, Radbruch wrote a scathing review of it. He accused Reinach of espousing a method of interpreting the concept of law solely through the intentions of the law-giver. In response to this accusation and harsh review, Kantorowicz sent a strongly worded letter to Radbruch: "Now I must really read you the riot act! How could you go down on poor Reinach in that way? … Someone like him deserves to be encouraged, not intimidated. And what's more important is that he is someone who belongs with us with his every inclination" (Schuhmann, Smith 1987, 7). I mention this because it shows how impressed Kantorowicz was with Reinach's intellectual spirit and capabilities. I believe that Kantorowicz played a crucial role in the development of Reinach's ideas on the nature of justice through their fruitful dialogue about the problems with Germany's new BGB and its implementation. Evidence for this is found in *Die apriorischen Grundlagen des bürgerlichen Rechtes* (1913), which on the whole serves as a phenomenological critique of the BGB.

2. ON GERMAN LAW: RECHT VS. GESETZ

It is necessary to elaborate on an important distinction that we find in the German language of law, one that lacks an English equivalent.[3] As students of jurisprudence in Germany, Reinach and Kantorowicz would be well versed on two different senses of justice: *Recht* (i.e., *ius*, *droit*) and *Gesetz* (i.e., *lex*, *loi*). The former sense of justice is understood as a transcendent unity or harmony subsisting in the universe, one that humans can access through using insight that is rational – thus linking it to an activity of thinking. The latter sense is understood as something achieved exclusively through codification – that is, through adhering to written laws constructed by humans. The difference boils down to origin and source of power: with *Recht*, humans can have insight into it, but they do not create it and its power is beyond their reach; whereas *Gesetz* is created by humans and derives its power from the state. In a perfect situation, *Gesetz* should be derived from and actively participate with *Recht*. However, the tie between the two became looser with each new law code proposed in Germany (Baltzer-Jaray 2016). Furthermore, the growing dominance of scientific method and the accompanying perception that it was the only way to obtain truth and certainty (i.e., to be considered legitimate, justice had to be grounded in scientific principles) resulted in more attention and credence being given to *Gesetz*. Jurisprudence as 'Legal Science' was born, and even though two distinct traditions evolved, both rely heavily on science in their approach and/or valuing of method, reasoning and truth.[4]

The result of this loosening of the ties between *Recht* and *Gesetz* that took place over a century and a half in Germany was the BGB of 1900, where the law became the servant for the achievement of ends, those ends being the economic good of society, and hence – now a political project. Law was a technical instrument for the pursuit and achievement of social, economic, and political aims. It required judges to apply the laws as written and interpret them to suit concrete cases: a trained judge would abstract and reduce a case to its basic legal concepts, then find a resolution by aligning those concepts with the rules in the code. In the system of positive law, justice is achieved with the logical subsumption of any particular case under that code: "Everything a judge needed to know about the civil law was contained in the BGB or could be deduced from it directly or from the concepts that its terms implied. The law was autonomous, deductive, authoritative, positive, and, through its organic unity, provided the answer to every possible case that could come before a judge" (Herget, Wallace 1987, 407). Thus, the BGB presented law as a logically closed system, one with its own interrelated

[3] This distinction exists also in French, Latin, and Greek, and several others. In English the word 'law' is used interchangeably to mean both codified law and justice.

[4] For more discussion on this topic, see: Coyle, Pavlakos (2005).

principles, rules and concepts (Herget, Wallace 1987, 407). It is also important to note that BGB as a positive law project sought to end any existing confusion or conflation of law with morality. This divorce of law from morality was also intended to extinguish in politics and jurisprudence schools any remaining traces or power of natural law (i.e., those unchanging moral principles, usually set by God, that govern the universe and serve as the foundation for our conduct and understanding of right and wrong).

An important function of a law code like the BGB was to serve as a standardized and authoritative approach for overcoming legal gap problems. While there are numerous kinds of gaps that can arise in law, a few of them are relevant to the discussion here. First, there is the case of *non liquet*, which is a legal gap situation where there is no applicable law (also known as *extra legem gap*) – in other words, when a case or legal issue comes to light that is not explicitly dealt with in the law code. Another type of legal gap occurs when the language of the legislator creates loopholes due to inadequate, equivocal, or vague wording. These are also referred to as indeterminacy or interpretational gaps (i.e., *intra legem gap*). In the late 19th century, during the drafting of the BGB, the resolution of these sorts of gap problems was rooted in the question of what the legitimate source of the law was: "From what authority can a judge draw the rules or principles that justify his decision? More specifically, it might be termed the 'gap' problem: when positive law is unclear or does not appear to address a question presented by a case, where can the judge go for guidance?" (Herget, Wallace 1987, 403). Now, the answer to this question was different for each of the law schools, which complicated matters immensely. Judges' decisions of how to interpret a law for a case where a legal gap occurred were the result of which school of law they were educated in or supported, and thus there was little consistency. Natural law supported the idea that God or Nature was the source for the law, and this view was associated with the church and morality, while the Positivist School saw no gap problems at all – the issues that arose pertained largely to the meaning of words and logic, and thus a legal scholar could explain the proper meanings and resolve all the issues (Herget, Wallace 1987, 404). Then there was the Historical School, which perceived law as connected to the culture of the people (*Volksgeist*), and it would evolve organically with the change of time and progress of society. The Historical School, just like the Positivist School, did not recognize any universal precepts of law. In the 19th century, reason came to have a special role, especially as society grew in complexity and came to require jurists for the drafting and interpretation of its laws. Reason would also solve the gap problem by offering a more extensive and penetrating analysis through the invocation of more general concepts and more careful use of logic and terminology (Herget, Wallace 1987, 406). However, when such gaps still surfaced, judges would turn to the 'organic meaning of the law as a whole' – which included a careful examination of the nation's legal system and the culture of the people (Herget, Wallace 1987, 406).

After 1870, Germany was politically unified and there was some pressure to establish unity across the once independent states, each with its own distinct culture, customs, and slight variations of Roman law traditions (in their medieval version). This unification was a major impetus for selecting a committee to draft a new general law code for the country. The Positivist and Historical Schools came to dominate the legal landscape, since the legal scientists who drafted the BGB showed allegiance to these schools of law. Hence, the code is a fusion of the two schools, as are the adopted solutions to gap problems.

The first paragraph of the first draft of the BGB stated that if there were an instance where the law book contains no rule to apply (*non liquet* or *extra legem gap*), then a judge should look to precedent, and if that does not exist, then 'the spirit of the legal order' (*Rechtsordnung*) should determine the ruling. It is worth noting that this paragraph was eventually cut from the final version of the BGB. This 'legal order' – according to Bernhard Winscheid, the highly influential 19th century author of the Textbook of Pandect Law (*Lehrbuch des Pandektenrechts*) and inspirational source for the BGB – was the higher source of law upon which any application of a legal code must depend. But that legal order was not the traditional understanding of *Recht*; rather, it was constructed and willed by the people, and was situated between the transcendent, unknowable, ideal of justice and the posited law. Importantly, the legal order was also to be understood as separate from the moral order of society. Law and morality should never be confused; the civil law brandished the full and only stamp of authority.

In much of the sociology of law literature, the very field that Kantorowicz would come to heavily influence, the 'Gap Problem' is a particular focus on or concern with the problem of disjunctions between promises or claims intended by laws and the actual effects of those laws; or, in other words, on the problem of the discrepancies between the law in books and the law in action with its real-world consequences (Nelken 1981, 41). This concern looked at the effects of the law on the social environment, and research would later extend this focus to understanding how legal decisions in developed countries affect those in the developing ones (e.g., how Supreme Court decisions in the USA on race or gender might penetrate into the legal structure of developing nations and lead to social change).

Reinach, Kantorowicz, and many other legal scholars of the early 20th century were very critical of and angered by the BGB, with its overreliance on and preference for *Gesetz*, and of the concept of the legal order that served as its underpinnings – which was divorced from the old and traditional sense of *Recht*.

3. KANTOROWICZ & FREE LAW

As mentioned, Kantorowicz was a major contributor to the modern Free Law Movement (*Freirechtsbewegung*) in Germany around 1906/1907, and he played a crucial role in the development of the sociology of law in the 20th century. 'Legal skepticism' is the best way to sum up the wide array of ideas central to it. The central period of the movement is usually held to be from 1899 until 1912, but no clear demarcations really exist. For example, as early as 1861, skeptical views are expressed by legal scholars, such as the statements made by Rudolf von Jhering about drafts of the BGB and the approach to the 'Gap Problem,' and we see continued advocation for Free Law positions as late as 1929 – in essays by the writer Ernst Fuchs (Herget, Wallace 1987, 402). Although the Free Law Movement never attained the status of a school of thought, its intellectual consequences are still visible today in both Germany and the USA.

In a 1906 pamphlet titled "The Battle for Legal Science" (*Der Kampf um die Rechtswissenschaft*), published under the pseudonym *Gnaeus Flavius*, Kantorowicz sought to unify the growing number of legal scholars critical of the legislative aspect of judicial decisions in the BGB. He argued that judges should not simply apply the law but they should create it whenever there is a gap or issue in a statute.[5] He felt that a major consequence of positivist legal theory was that a judge became merely a 'subsumption automaton' practicing 'analytical jurisprudence' that failed to take important factors into account, like emotions. Free law, for Kantorowicz, consisted of custom and usage, but also judicial opinions and authoritative statements of legal scholars. The administration of law, he argued, should be placed in the hands of judges who are willing to invoke free law and possess the education befitting such a task, which would include political science, economics, psychology, philosophy and criminology. His was a resurrection of natural law, but in a renewed form – understood as a type of law liberated from the strictures of state decree. He writes,

> As much as our free law corresponds with natural law at this central point, it is worth stressing again that our movement's conception of law is forever separate from natural law's. Because we can see the valuable judicial insights of the thinkers of the seventeenth and eighteenth centuries without needing to assume their metaphysical fallacies; for us sons of the nineteenth century, the world is eternally transforming and developing, and our free law is as transient and frail as the stars themselves. In fact, in a secondary respect, our conception of law is opposed to natural law's. The Historical School has taught us to acknowledge all law, and therefore all free law, as such only when it is 'positive.' We were taught that law exists not in nature, but

[5] The choice of his pseudonym was intentional since Gnaeus Flavius was a Roman legal writer and politician who made public the rules of legal procedures (actions in law) which had previously been kept secret by the Patricians. Making these rules public knowledge ended the advantage the Patricians had over the citizenry/plebeians and led to the publication of law codices.

> if and only if a power, a will, an acknowledgement supports it. Our free law is, however, also a natural law–the natural law of the twentieth century (Flavius 2011, 6).

He reinforces this point, adding the following:

> And this free law, so unexpectedly returning from its disappearance in legal theory, proves itself to be at least equal to statutory law in power and influence. It has the great advantage over statutory law that people are familiar with it. People hardly know statutory law, or more specifically, as M. E. Mayer noted, know it only when it agrees with them, but that is luckily often the case… Who could imagine a traveler in a strange land making himself familiar with the language, history, art, folk traditions, simply by opening his civil statutory code? No one! They all live according to free law, according to what strikes the bylaws of their particular domain or their individual judgment not as arbitrary, not as convenient, but as law. Thus, free law cultivates its powerful domains and lives independently from the statutory. But not the other way around. Free law is the basis from which statutory law proceeds (Flavius 2006, 5–6).

This free law that Kantorowicz pursues has justice moving away from the strict language of statues and into the domain of what he calls the 'science of values' (to be distinguished from the science of facts and the science of meaning), and it does so in ways that can be described as relativistic. Free law is a resurrection of natural law but in a changed form, one that emanates from the natural relationships of individuals in society, and hence it can be perceived in the norm-consciousness of people interacting in concrete situations (Flavius 2006, 4). However, with that there are some rather unsettling consequences: In addition to the obvious issues connected to relativism and justice, he and the *Freirechtsbewegung* have been described as also providing a sustainable legal foundation that is capable of meeting the political demands of socialism. It should be mentioned that Kantorowicz joined the Social Democratic Party while a student at the University of Berlin and, though he resigned in 1904, he admitted to retaining a kind of "Platonic love" for socialism. He was also an admirer of the sociology of Max Weber. While Reinach shares Kantorowicz criticisms of legal positivism, he would no doubt disagree with where he takes justice once he frees it. Relativism doesn't restore authority to *Recht* nor does it describe its essence.

4. A PRIORI FOUNDATIONS OF RECHT – REINACH'S CONTRIBUTION

I argue that Reinach's essay "The a priori Foundations of Civil Law", in addition to serving as a response to the BGB, is also a reply to Kantorowicz. In this article, there are two avenues that Reinach pursues regarding justice as *Recht*: the psychological and, most importantly, the ontological. The former works as an elaboration of what Kantorowicz says, but utilizes the training in descriptive psychology and phenomenology that Reinach received as a student of Lipps and Husserl. The latter, the ontological, speaks specifically to the ontological foundation of *Recht* (as justice) that should ground codes like the BGB and the

contractual relationships of individuals in society, and thus serves as a critical response to Kantorowicz' sociological conception of law.

First, what I think inspires Reinach about Kantorowicz' notion of free law is that it describes justice (*Recht*) as something people naturally understand, prior to any reading of statutes. Hence his title and discussion of 'a priori foundations', and his delving into entities like speech acts – which clearly show how people understand justice in their daily lives without consulting books of positive law or legal scholars. Further to this point, and again in line with Kantorowicz, Reinach would also support judges creating new law when legal gaps arise, rather than being 'subsumption automatons' practicing a purely analytical approach. Justice in the creation of a new law or a creative ruling can be achieved when jurists and judges employ their insight into that transcendent unity of *Recht* that subsists in the universe.

The purpose of the first section of Reinach's journal article is not only to discuss the ontology of speech acts and their objects, but also epistemology – since he will demonstrate that they have their basis in the *a priori* theory of *Recht*: speech acts and their objects are not simply social constructs, given that their self-evidence allows them *to be known* with certainty, clarity, and by everyone. (Reinach as a phenomenological realist does epistemology at the same time as metaphysics.) Social acts have a natural binding power outside of the positive law. Many instances of social relations do not enter into the realm of law, and many do not need a legal contract at all – such as the relation exhibited in the statement, 'I promise I will buy you a lollypop'. Everyone knows what a promise entails and what it 'means' in so far as it imposes a claim and obligation between people. Reinach also wants to prove that the positive law itself must assume the very idea of an *a priori* theory of *Recht* in order to enact codes in the first place. In fact, he says that the *a priori* theory of *Recht* underpins all forms of law. He writes, "In what follows, we limit ourselves to presenting some a priori foundations of civil justice. We are convinced, however, that the other legal disciplines – particularly criminal justice, public and administrative law – are also capable and in need of such a founding" (Reinach 1989, 145 fn.). Just like Kantorowicz, Reinach is opposing the stance of positive law (also the BGB), one that amounts to saying that there are no such things as justice or legal principles (*rechtliche Gesetze*) that remain independently and timelessly valid – like the principles of mathematics. Further, one also cannot encounter these simply by looking at a psychology operative in the everyday interactions of people.

We arrive at an analysis of claim and obligation, at Reinach's famous argument. Like trees and grass, claim and obligation also have an independent being; what makes them different is that when something is predicated of a particular legal entity, the predication refers to any entity of this kind, not just a specific individual. He writes, "That a claim is settled by a waiver is grounded in the essence of the claim as such and thus holds necessarily and universally.

A priori propositions hold for juridical structures [*rechtlichen Gebilden*]" (Reinach 1989, 144).[6] Thus, *Recht* as an entity and structure has an *a priori* character owing to this universality and necessity, and it is one of many in a vast realm, which Reinach says can be 'strictly formulated' according to evidence that enables them to be known clearly by insight. Entities like *Recht* are independent of any mind that perceives them and, most importantly, independent of any positive law code. Reinach uses mathematics and numbers as an analogy: numbers have an existence independent from the calculations, equations, etc. of mathematicians. Just as mathematicians can manipulate and use numbers in various ways, so too can the positive law manipulate and transform *Recht* as it requires. However, "The positive law can appropriate them [*ewige Gesetze*] into its sphere, it can also deviate from them. But even when it perverts them into their contrary, it cannot affect their own intrinsic content [*Eigenbestand*]" (Reinach 1989, 145). Once again, *Recht* is something positive laws can participate with, but those laws cannot affect or create it.

He continues this line of argument in a discussion of property rights and obligations – power, right, ownership, lien, transfer, multiple owning parties, economic value, and the nature of representation by proxy. As before, he utilizes the same procedure with each of the above: first, he demonstrates how it is actually part of the *a priori* theory of *Recht* and how it has power or meaning outside the positive law, and then shows how the positive law actually assumes or relies on the *a priori* theory.

This leads to the second and critical part of Reinach's reply to Kantorowicz – the greater ontology of *Recht*. In his pamphlet, Kantorowicz states that the figures of the 17th and 18th centuries committed metaphysical mistakes. While this comment is not false by any means, I think Reinach saw this comment as an opportunity to prove that an ontology of *Recht* can be revealed: using his training in phenomenological realism, Reinach will demonstrate that *Recht* and entities of jurisprudence can have proper metaphysical foundations. Reinach argues that the scientific approach is not appropriate for this task; rather, a philosophical approach like the phenomenological method is necessary for a clear understanding and apprehension of the special character of *Recht*. He writes that his intention is to demonstrate, "…that the structures which are commonly designated as specifically juridical possess a being no less than numbers, trees or houses do; that this being is independent of whether or not it is grasped by humans, that it

[6] Reinach's denotation for the word 'claim' [*Anspruch*] is not the conventional one. It takes on a legal significance for him when it is linked to promise: it is a demand or request for something considered one's due, a right to something as part of an oral or written contract. It is a bond formed between two parties where, "the one can demand something and the other is obliged to fulfill it or grant it. This bond shows up as *consequence* or *product* (as it were) of the promising" (Reinach 1989, 147). Claim and obligation are causally linked when a promise is made. Once the promise is fulfilled, the claim is waived and the obligation is cancelled by being satisfied.

is independent, in particular, of all positive laws. It is not only false but, for all intents and purposes, meaningless to designate juridical structures as inventions of positive law – just as meaningless as it would be to call the establishment of the German Reich, or some other historical event, a fabrication of Historical Science. We really do have before us what is so fervently denied: positive law finds *already there* [or *encounters*] [*findet v o r*] the juridical concepts that enter into it; it *in no way produces* them (Reinach 1989, 143). Reinach stresses that the positive law *encounters* legal concepts: "*it in no way produces them*." Legal entities have irrefutable evidence that enables them to be known with insight, since they subsist independently of the mind that grasps them and the positive law code that employs them. He adds:

> If there are juridical structures and entities that in themselves subsist [*seiende*] in this manner, a new domain opens up here for philosophy. As ontology or *a priori* theory of objects, philosophy has to be concerned with the analysis of all possible kinds of objects as such. We will see that here [juridical structures] philosophy encounters a whole new kind of objects – objects that do not belong to nature in the authentic sense, that are neither physical nor psychical, and that at the same time, owing to their temporality, also differ from all ideal objects. The laws that apply to these objects [juridical structures] are also of the highest philosophical interest (Reinach 1989, 145).

With the mention of philosophy as ontology and this new kind of object – one that is not physical, psychical or ideal – what remains, I have argued elsewhere, can be labeled an intentional entity (Baltzer-Jaray 2016, 65–76). *Recht* subsists in the world independently of the mind and we become conscious of it when we engage with its intentional structure. It subsists independently of all created laws and theories of ethics; if anything, it is the foundation of these. *Recht*, subsisting through time as part of the unity of our universe and as intentional structure, makes the concretization of justice and any legal principle possible. The intentional structure of *Recht* informs or guides our experience of justice, and thus also our behavior. He therefore describes a metaphysical footing for justice (*Recht*) with no need for God as the source – as was necessary for Leibniz and many other metaphysical thinkers of the 17th and 18th centuries – and with the added bonus of a phenomenological analysis and descriptive psychology dedicated to exactness. Most importantly though, justice (*Recht*) as described here cannot be relativistic; it cannot *just* be present in the relationships of individuals, but rather it must be the foundation for these encounters – and for the universe where we find ourselves.

Ontology is the biggest difference between the approaches of Reinach and Kantorowicz. Reinach's accomplishment in this essay was to show how the ontology of phenomenological realism can underpin social relationships, and to demonstrate clearly at the same time that justice is an entity subsisting independently from statutes. Kantorowicz wanted to show that law (as free law) lives independently from the written code, that it cultivates powerful domains, and thus provides the basis from which the statutory proceeds. I would argue that

Reinach proved this as well, and even more successfully: he was able to restore authority to justice (as *Recht*) as well as account for psychological/epistemological, metaphysical, and logical aspects of that entity. He gave us the complete package – essence and participation – and made it such that every person can access it with insight. The other avenue available for a rich comparison between Reinach and Kantorowicz concerns natural law. Reinach had a great deal to say about this as well – but that is for another day.

5. CONCLUSION

The friendship of Reinach and Kantorowicz was one based on a mutual dislike for the BGB, the dominance of Positivism in law schools and thought, and a deep concern about the growing abyss opening up before their very eyes between *Recht* and *Gesetz*. This relationship and the influence of Kantorowicz had a lasting impact on Reinach, as evidenced by his continued interest in matters of *Recht* after graduating from the University of Munich, and long after he became a central figure in the phenomenological movement. While the style and terminology of *Die apriorischen Grundlagen des bürgerlichen Rechtes* bears the stamp of his time in Tübingen with legal theorist Ernst Beling (1906/1907), the critical comments about Positivism and the attempt to restore *Recht* to its former glory as an entity independent of the written law, I believe, show the imprint of Kantorowicz.[7]

I close this essay with a quote from Reinach, the lines that conclude his '*a priori* foundations' work: "It is necessary to turn our gaze in a completely different direction in order to gain access to the realm of the purely juridical lawful regularities [*Gesetzmäßigkeiten*], which are in every sense independent of 'nature': independent of human knowledge, independent of human organization [*Organisation*] and independent, above all, of the factual evolution of the world" (Reinach 1989, 277–278).

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[7] For more detail on the influence of Beling on Reinach's essay, see: Schuhmann, Smith (1987, 10–13).

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*Daniel Roland Sobota**

https://orcid.org/0000-0002-4603-6346

THE LAW AND QUESTION. THE PHENOMENON OF QUESTION AS A POSSIBLE POINT OF DEPARTURE FOR THE PHENOMENOLOGICO-GENETIC THEORY OF LAW

Abstract. In his original phenomenology of law Adolf Reinach distinguishes among experiences the so-called "social acts". These include acts directed towards other persons that require that the latter acknowledge the communicated contents and assume certain attitudes. Among these acts Reinach mentions there are promises, orders, requests and questions. He argues the promise is the special act that creates the a priori grounds of law. It is to be noted that Reinach's phenomenology of law is of static character (in the Husserlian sense of the word) and therefore it shares all its advantages and disadvantages.

In my paper I would like to draw attention to another social act, which can also be attributed to certain law-making activities, especially from the perspective of the genetic phenomenology. It is questioning. At the same time when Reinach was working on his theory of law, his Munich friend, Johannes Daubert (1877–1947), also a student of Theodor Lipps and a friend of Edmund Husserl, who together with Reinach made an "invasion of the Munichs at Göttingen", worked on the first phenomenology of the question. Although he did not refer his research to the phenomenon of law, we can ask whether, like Reinach's deliberations about promises and obligation, it cannot be done. That this is possible to some extent, for example, is evinced by the Hannah Arendt and Klaus Held's phenomenology of the political world. He points out that the public world as such arises from the primordial openness of man, understood as "zoon politikon". This openness might be interpreted as the question which is not so much a single act as it is an attitude.

The purpose of the paper is to outline how, while starting with the phenomenological reflection over various types of utterances, one can specify their certain forms and the acts constituting them as well as the attitudes which allow for a priori grounding the phenomenon of law from the perspective of static and genetic phenomenology.

Keywords: Adolf Reinach, phenomenology of law, question.

1. INTRODUCTION

The work of Adolf Reinach entitled *Die apriorischen Grundlagen des bürgerlichen Rechtes* is subsumed under a wide array of phenomenological works, the influence of which were further reaching than the school of phenomenology itself. The a priori theory of law presented therein counts as the "regional ontology". What is meant precisely thereby is a phenomenological theory of

* Polish Academy of Sciences, dsobota@ifispan.waw.pl

law – that is, pure jurisprudence. In Reinach's opinion, legal entities are granted the same sort of independent existence as "numbers, houses and trees"; and principles that regulate the order and interdependencies of the said laws are of a priori and essential nature (Reinach 1913, 68–689).[1] The phenomenology of law investigates the so-called primary concepts, which delineate the extension and the essence of what is known from the experience in the form of a positive law, laws of nature and human rights etc. Both the realm of positive law and some extra-positive-law realities assume and make ample use of the said primary concepts. Still, it does not entail that between said legal entities, the essence of which was examined by Reinach by virtue of intuitive insight, and positive law, the historical heterogeneity of which is evidenced by numerous historical codes, there is a direct 'bearing'. Such a relation between ideal entities (and a priori laws describing them) and real entities holds only in mathematical natural science, logic and mathematics. Between legal entities and positive law, there indeed holds a significant relationship; however, it is not the case that only positive law may be referred to as law in a paradigm sense, the contents of which corresponding with the contents of ideal legal entities. The historical variety of legal reality evidences something quite the opposite. Reinach speaks of 'the independence of positive law with respect to the apriori theory of right' (Reinach 1913, 691; Reinach 1983, 6), and of the 'freedom' of positive law (Reinach 1913, 692; Reinach 1983, 67). He explains that "only this (…) makes understandable why certain legal institutions have developed so slowly and with such difficulty" (Reinach 1913, 692; Reinach 1983, 67). Between the actually binding law, which may be posited without making any effort to take into consideration an essential content of ideal legal entities, and the latter, that is ideal legal entities, there is a difference that is much more glaring than the difference between the ideal content of mathematical states of affairs and the mathematical entities resorted to while doing a particular exercise of calculating. Existence as such further specifies what is essential, adding to it not only accidental elements, being enabled by what is essential. However, in case of positive law, an actually positive law may stand in "opposition" to what is essential (Reinach 1913, 690; Reinach 1983, 6).[2] The occurrence of positive law gives rise to such a disparity between an a priori order and an empirical one that is unknown in the realm of natural-science or mathematical entities. What is this "existence" in case of legal reality?

We can say that it is the existence of a human, the said existence being characterized by freedom. It is precisely the condition of freedom that makes a man in his or her individual existence be indeterminate, unpredictable. Existing in this mode, a human being creates his own reality, is referred to as history. In the

[1] In the forthcoming part of the paper, we shall quote the particular pages of the German edition, while indicating the pages of the corresponding English edition.

[2] The nature of this opposition is elucidated by Reinach in the concluding parts of his work: Reinach (1913, 802; 1983, 102 and others).

said work, Reinach does not take up this broad context of human life, within which a phenomenon of law does appear. Still, it does not mean that it is absent from his considerations. Unlike Husserl, who focused his investigations on phenomena from the area of logic, formal ontology or epistemology, the investigations being conducted either in a "lonely life of soul" or as a process of constitution in transcendental subjecthood, Reinach studies the essence of experience related to the actual world and people (the evidence of which are – among others – numerous references made to the German law being operative at that time). Whereas Husserl in his writings demanded that the thesis of the existence of the world (and of himself and other people) be bracketed, the investigations conducted by Reinach, though oriented at the study of essence, still operate in the realm of actual reality, the tangible existence thereof sort of permeates through the eidetic description. Husserl was from the very beginning focused upon the realization of such a phenomenology that would first stand up to the problems of logic, formal ontology and epistemology. It is precisely these problems that Husserl dedicated almost all of his published works to.

It was only as time went by and only in his 'private' investigations (perhaps he was motivated by what was going around him at that time) that he devoted more attention to these phenomena that were not directly related to his searching for the solutions to theoretical epistemological problems. Reinach recorded the attempts at facing the problems pertaining to logic (a theory of proposition), see: Reinach (1989, 339–345, 347–350), and to natural science (the problem of motion), see: Reinach (1989, 551–588). However, in the spirit of realist phenomenology, he was – as many other phenomenologists – particularly interested in those phenomena which are closer to a human being inhabiting the world of natural attitude. In comparison with Husserl's phenomenology, being oriented at seeking for absolute truth and constructing a system of sciences and saving humanity, at incessantly searching for "proper" phenomenology – this sort of comprehensive and fundamental considerations I should like to label as macrophenomenology – Reinach's considerations, like other followers of Husserl from Munich and Göttingen, were concentrated on more modest and more local issues – without the need to ceaselessly redefine what phenomenology is as such within the context of the fundamental problems of philosophy. This in turn rather constitutes microphenomenology, which is far from pompous overtones of Husserl and Heidegger.[3] Still, it does not imply that Reinach's phenomenology resigns in its scope from maximalist ambitions of phenomenology as such. Although the determinations phenomenologists arrived at while conducting their respective research have all far-reaching, oftentimes revolutionary, consequences for the understanding of elementary philosophical and phenomenological problems

[3] The distinction between micro- and macrophenomenology resembles the difference between micro- and macroeconomics. Still, we should treat this analogy with caution.

such as being, cognition, human being, consciousness, truth or language, with the determinations not going thus far and not explicitly announcing the reached general conclusions, they do not seem to overburden or call into question the Husserlian methodological framework adopted. Still, it transpires that the 'anomalies' accumulating over time at the level of regional investigations finally cause the collapse of the Husserlian vision of epistemological phenomenology. Therefore, for the reason of the attitude towards the phenomena studied and for the reason of the very choice of the problems of law, with law being one of the most significant elements of historical reality of man, Reinach's phenomenology may be regarded as an introduction to a direction the entire phenomenological movement will head for in the near future, with the said direction to be interpreted in terms of further dissociation with the "original" Husserlian phenomenology. What is thereby meant is hermeneutic phenomenology.

2. THE PHENOMENOLOGY OF NON-PROPOSITIONAL STATEMENTS AND ITS PHILOSOPHICAL CONSEQUENCES

It is no accident that the shaping of hermeneutic phenomenology is connected with the study of experience not belonging to the realm of pure logic or epistemology. Reinach's investigations of a priori foundations of law constitute a cornerstone of the XX-century theory of speech acts. They revolve around the phenomenon of promise, which he regards as the social act. Let us bear in mind that Reinach is one of the first thinkers who distinguished within phenomenological investigations a group of acts of characteristic – social – nature (Smith 1990, 29–61). Namely, these are active, spontaneous intentional experience which not only has a referential function, but also – in the form of physical act of communication (by dint of language, mimics or gesture) addresses the other person in order to make the latter understand what is being communicated and to invoke in him or her an appropriate reaction. What Reinach subsumes under this category are promises, commands, requests and questions. They all transcend the narrow scope of monological consciousness and assume a wide array of various phenomena among which only a small fraction yield itself to being studied by virtue of acts of cognition. In line with the Aristotelian division – present in his *De interpretatione* (17a) – of meaningful statements (*semantikos*) into affirmatives (the ones having truth value) (*apophantikos*) and those which cannot be ascribed truth value, the speech acts expressing social acts belong to the latter category. Aristotle himself thought that the latter statements cannot constitute a subject matter of logic, which by definition abstracts from specific content, situations and persons making up the process of reasoning. This category of statements rather belongs to the realm of rhetoric and poetics, which must take into consideration both what is talked about (theme), the one who does the talking (rhetorician) as well as the

persons being talked to (auditorium). In Husserl's *Logical Investigations,* what is dedicated to studying the justifiability of the said division of speech acts is *Investigation VI.* According to Husserl, such speech acts as requests, commands or questions neither have truth value, nor do they possess any independent meaning. The latter is ensured to them due to the so-called meaning-granting acts, which in the case of mentioned speech acts – through the process of reflection – refer to respective experiences of requesting, wishing, doubting and consecutively represent these in the form of sentences (Husserl 2009, 749–750). That is why, it is only propositions at the basis of which there are objectifying acts that are of interest to logic and epistemology.

The above-presented Husserlian solution shortly met with criticism. From the very beginning of the phenomenological movement, among Husserl's students what seemed to be of great interest to them were also other experiences than those strictly connected with logic or epistemology. In his theory of law, Reinach paid special attention to the acts of promises. Still, what is worth mentioning is his theory of negative judgments. Reinach's friend, Johannes Daubert, studied the phenomenon of question (Schuhmann, Smith 353–384; Sobota 2018), while Alexander Pfänder studied commands (Pfänder 1982, 287 and others). Apart from that, what was of special interest in phenomenological circles were those forms of speech acts that were related to religious life. Early Heidegger, for example, paid special attention to the phenomenon of foretelling (Heidegger 1995, § 30), whereas Reinach studied the structure of negative statements, premonition and prayer etc. (Reinach 1989, 95–140, 589–593). What comes next are the studies within the scope of literary language, which after all – as any language – resorts to affirmatives; however, they do not express ordinary propositions in a logical sense (Ingarden 1988, § 25).

The said great interest among phenomenologists taken in the problematics of non- and quasi-propositional expressions corresponded with the study over the phenomena which were outside Husserl's interest, and to which the said expressions refer. Reinach's theory of collective acts amounted to – *ex hypothesi* – the foundation of his phenomenology of law. Pfänder, on the other hand, spoke of a theory of imperative as "*Grundwissenschaft* for ethics, philosophy of law and pedagogy" (Pfänder 1982, 287). A similarly adventurous early Heidegger's interpretation of Aristotelian *Rhetoric* served as a foundation of his phenomenological hermeneutics of factual life (Heidegger 2002), while the analysis of the phenomenon of question as such delineated the framework to work out his *Seinsfrage* (Heidegger 2006, § 2; Sobota 2012; Sobota 2013). On the other hand, Ingarden's theory of quasi-propositions was a point of departure for his ontology of a literary work (Ingarden 1988).

This great interest taken in linguistic phenomena on the verge (or outside of it) of modern logic and epistemology resulted not only in the extension of the phenomenon under scrutiny but also indirectly influenced the reinterpretation of

the issues within the remit of logic, ontology and epistemology. Allowing for such phenomena as reality, life, intersubjectivity, history, law, feelings, bodiliness, morality, art or religion, what was called into question was the apparent primacy of epistemology in phenomenology, as proclaimed by Husserl himself. What was also altered was the very understanding of phenomenology and its tasks. In the context of the said issues, it transpired that idealistic transcendental phenomenology is unable to do justice to those phenomena; or, to put it bluntly, being oriented at other goals – that is epistemological ones – it is harassed by falsities and disfigurements.

3. INVESTIGATING THE A PRIORI FOUNDATIONS OF LAW VS THE QUESTION ABOUT ITS A PRIORI ORIGINS THE STATIC AND GENETIC PHENOMENOLOGY OF LAW

That is why Reinach's phenomenology may be regarded as one of the expressions of the tendency for phenomenology to hermeneutize itself, the tendency being present since the emergence of the phenomenological movement in Munich. The very choice of the subject matter, that is the phenomenon of law, suggests to us that Reinach was visibly departing, being at the same time applauded by his promotor, from the scholarly interests manifested in Husserl. When Reinach states that at the basis of law there are no objectifying acts but only social acts and that law does not consist in judgements but rather in precepts which do not have truth value, he is thus situating his area of study beyond the remit of logic and makes it thereby closer to rhetoric and hermeneutics. There is nothing surprising about it, since for a very long time now these two realms have been closely connected with the phenomenon of law. The first ancient rhetoric principles emerged as the principles related to judicial speeches. Greek *rhetón* denoted a strictly and clearly formulated legal norm (Korolko 1990, 34). Also hermeneutics, which carries the legacy of rhetoric, regards the domain of law as a paradigm model of hermeneutic experience (Gadamer 1990, 333–334).

Among the above-mentioned phenomena of social acts, Reinach, for his a priori theory of law, picks up promises as a subject of scrutiny. According to him, what counts as the essence of promise is both a claim and an obligation, with this combination constituting the substance of legal entities. And it holds true regardless of who makes a promise. Says Reinach, "in whatever person a promise is realized, whether it is angels, or devils, or gods who promise to each other, claims and obligations arise in the angels, devils, and gods – as long as they can really promise and can hear promises. (…) The nature of the performing subject is evidently irrelevant for the essential relations" (Reinach 1913, 741–742; Reinach 1983, 47). At this point, one may ask if it really is the case that *whoever* promises or obligates himself really does not matter for the law to be constituted. Moreover, is it the case that various modes of existence and of conduct that we

attribute to persons are insignificant when it comes to the law being constituted? Is it possible to totally skip the existential perspective (who?) without doing any harm to the understanding of what law is? What Reinach fails to address in his considerations is an issue why and how law emerges from the acts of promises which *human persons* make. Instead, he studies law as an already existing entity. Just as Husserl in his *Logical Investigations* dealt with the descriptions of the essence of experience lying at the foundation of logical entities, so does Reinach describe the nature of promise, transfer and conferral as a basis of legal entities. Their ultimate source – according to Reinach – is a "fundamental legal capacity or power (*Grundkönnen*) of the person. This fundamental power cannot be transferred. Insofar as it is grounded in the nature of the person as such, it is inseparable from the person; it forms the ultimate underground (*Untergrund*), which allows for the constitution of (*Konstitution*) legal-social relationships" (Reinach 1913, 780; Reinach 1983, 81 – the English translation was slightly modified). However, by virtue of what does law emerge on the basis of this *potentia* and these acts – this Reinach's phenomenology does not explain. Neither does it explain what a person is, what is his mode of existence and what it means to act. At this point, we encounter the clear limitations of Reinach's theory of law (Crosby 1983, 173). He shares the weaknesses – recognized by late Husserl – of the approach which is labelled as the static phenomenology.

Let us recall some concepts. The static phenomenology is this sort of phenomenology which "normally takes as its starting point a certain universe of objects" – for example, Reinach's phenomenology is centred around the objects of law – "and only then investigates intentional acts with which the former are correlated and by which they are constituted" (Zahavi 2012, 124–125). The static phenomenology studies the modes of constitutions of a certain ontological universe according to the latter's "essential forms". On the other hand, the genetic phenomenology, which complements and specifies the former phenomenology, studies the genesis of the constitution of the awareness of objects, "the constitution of this constitution", the constitution of habituality, and thus of the very capacity or power, which the above-cited excerpt from Reinach refers to. The field of study encompasses passive syntheses and the history of sense-sedimentation. The genetic analysis, unlike the static one, takes heed of time dimension (Płotka 2012, 34–36). At the centre of attention of the former analysis, there appears life-world (*Lebenswelt*) and history (*Geschichte*). It must be conceded that the time perspective is in Reinach's phenomenology of law, similarly to Husserl's *Logical Investigations*, virtually absent. It seems rather peculiar, in particular in connection with promises which are clearly of temporal nature (Nietzsche 1904, 57–61; Ricoeur 2003).

In the meantime, while supplementing Reinach's considerations, it is worthwhile to ask how the process of positing law looks like from the point of view of the genetic phenomenology. Certainly, what is at stake now is not at this moment a complex phenomenological theory of *positing* law but what is intended

instead is to pay attention to these most fundamental acts that participate in the emergence of law. What is thereby meant is the question of how law emerges from the dynamics of the lifeworld and human existence. Is there promise among them anymore? Certainly – as demonstrated by Reinach – promise plays the most vital role in the context of *what* is supposed to get posited. Since it is precisely a promise that delineates the characteristic realm of what is meant by the very process of positing law. Yet, facing the question about this process, what seems to be of greater importance are other acts. Says Chaïm Perelman – "law is shaped by disputes, dialectical contradictions and opposing argumentations" (Perelman 1984, 36). Therefore, it takes place not wherein the essence of particular social acts is respected, especially of a promise, but rather where there is a smaller or bigger discrepancy between efficacy of a duty flowing from the essence of given acts and the factual discharging of a duty in question. The need to positive law does not after all stem from the fact that promises are kept; but on the contrary, that they are broken. And they are broken because man can respect the essence of the acts embarked upon him or her, but by no means must he or she do so.

Man is an animal which is able to make promises (Nietzsche 1904, 57). Yet, if man keeps his promises once a promise has been made, the law would not have emerged in the first place. And this is – among others – what the difference between man and God consists in; that is, when it comes to the latter, "his will is his law"; in the case of man with all his finitude, there is a clear discrepancy between his will and what he actually does or what he ought to do. The basis – or rather: the chasm (*Ungrund*) – which opens up at the foundations of the very discrepancy in question is human freedom. This, in turn – as Kant said – is marked by a certain sort of weakness; namely, what inheres in it is "a natural tendency to evil" (Kant 2011, 32–45). Evil consists in the reversal of a moral order relative to impulses of free will (*Willkür*). What the said reversal involves is that the impulses stemming from the moral law are valued less than others (non-moral ones), see: (Kant 2011, 33). In Kant's view, the origins of this tendency is impossible to study (*unerforschbar*), which implies that such a study would transcend the capacities of Reason. At this point, theology speaks of satan, temptation and the fall of man (Kant 2011, 44–46). Abstracting from mythical ways of understanding human nature and its history, one should rather pursue the path of phenomenologico-genetic illuminations and thus demonstrate the mode of existence of human subjecthood as a free, albeit finite, entity which is internally divided and uncertain. And most characteristically, what inheres in our human nature is the fact that sometimes persons do not keep the promises they make and it is precisely why we need law in the first place. Although, ideally speaking, the law appears to be founded upon the act of a promise; in reality, the reverse seems to be the case: it is the law which somehow forces an act of commitment. Although the life-world (*Lebenswelt*) is characterized by some peculiar familiarity, it is also marked by immanent uncertainty – a sort of primordial "may be"

(Husserl 1929, 112–114) . This, in turn, is due to time, the flow of which makes human life transient. Law is a transcendent being which, in the face of freedom and unpredictability of human acts, constitutes a supra-individual and timeless guarantee of the common life-world. It is a manifestation of the common will, which sets limits to arbitrary will.

4. QUESTIONING AS A PRIMORDIAL SITUATION OF POSITING LAW IN THE PUBLIC SPACE

Then, the motive for positing law, but also the sense of judicial practice, derives from the discrepancy between the essence of what ought to be and what is in reality. Is there such a type of utterances and of the acts expressed therewith that would be located within the above-specified discrepancy, would express the uncertainty of man's being-in-the-world and at the same time would constitute the behaviour giving rise to law? In Husserl's *Ideas I,* the description of this discrepancy between an essence and a fact is an overture to the introduction of the mechanism of phenomenological reduction, which he understands in a similar vein as he understands question (Płotka 2012, 311–329). This reduction enables a phenomenologist to discover essential laws. They constitute answers to an essential question "what is it?". This question differentiates (as well as refers to itself) between the essence in question and the entities participating in that essence (Heidegger 2006, § 2). Is it indeed the question that is this distinguished act that participates in creating and respecting law?

Abstracting from these strictly philosophical contexts, it is rather easy to demonstrate great significance and large share of questions in daily judicial practice (Brożek 2007, chapter XVI). But the relation between law and question is ambivalent. It must be granted that Reinach does show that between law in the sense of precepts/enactments (*Bestimmung*) and the question there are many analogies. However, the ultimate disanalogy is that a precepts/enactments has an utterly distinct (if not contradictory) nature from the one of question. The precepts/enactments is more of an answer to a question than it is a question itself. Law determines how it is and/or should be, it is a basis for such determinations.

In order to fully answer the query of what is the role of the question in creating and respecting law, one should conduct an analysis of what is the question as such and how it functions in the context of a legal order. Certainly, this cannot be achieved within the limits of one short publication.[4] That is why, instead of in-depth studies over the question one would be well-advised to turn attention to certain historical circumstances. It happened to be the case that the theme of

[4] The selected works on the phenomenology of the question: Schuhmann, Smith 1987, 353–384; Sobota 2018; Ingarden 1972, 327–482; Fales 1943, 60–75; Bruin 2001; Płotka 2012, 69–92.

the question became a great problem in the early phenomenology due to Reinach's friend Johannes Daubert. Daubert started his studies over the phenomenology of question exactly at the moment when Reinach was working on his theory of negative judgement (1911). As follows from the correspondence between them, Daubert originally reserved the subject matter of negative judgements to himself; however, upon Reinach's request, he returned this topic to the latter, choosing the topic of question to work on instead. The pioneering description made by Daubert can be found in his unpublished legacy, in the folder called *Frage,* originating from 1911–1912.[5] The analysis of these notes were conducted by Karl Schuhmann, Barry Smith and recently – by the author of the current presentation (Schuhmann, Smith 1987, 353–384; Sobota 2018). Despite the fact that Daubert is the first one to thoroughly investigate the issue of the question, it is Reinach who first used the phrase *Phänomenologie der Frage*. In his short essay on reflection, he not only resorts to the phrase *Phänomenologie der Frage*, but also – in a sort-of implicit discussion with Daubert – he presents his own analysis of the question or rather – a questioning attitude (*Fragestellung*).[6] In Reinach's opinion, reflection plays a vital role when it comes both to cognition and to ethics and law. Reflection is constituted by questioning attitude, which aims at finding a solution to the spotted problem. In the said essay, Reinach deals with the phenomenon of reflection in the same way as it takes place in 'lonely life of a soul'. He only mentions the situation of a lecture, in which the reflection is carried out in the presence of other people. The audience then accompanies the lecturer in his questioning attitude, with the audience trying to do the same as the lecturer but in their respective inner selves. Although a lecture may be of an interactive nature, it is normally a monologue. The audience plays a passive role of recipients or of a witness of what is happening. However, in the situation of positing law, the conditions are just the opposite. Abstracting from those historical situations in which law was posited by one person and was promulgated by his subjects, positing law normally takes place during public discussions. And these in turn are a certain interplay of questions and answers.

Putting it that way, the contribution of the phenomenon of question in constituting law shifts our considerations from the narrowly understood phenomenology of law into the phenomenology of the political world. After all, positing law is a political act *par excellence*. Perhaps, regarding dialogue as a principle of the political world, we narrow the scope of the phenomenon of politics far too much. Still, doing so we follow the footsteps – and rather justifiably

[5] Written mainly by a stenographic method, Daubert's manuscripts and their respective translations into German are to be found in Bayerische Staatsbibliothek in Munich. The file dedicated to the question bear the following signature: Daubertiana A I 2.

[6] See: Reinach (1989, 282). The analyses of the question as a social act are also to be found in: Reinach (1913, 709–710; 1983, 21–22).

so – of Hannah Arendt and Klaus Held, both of whom claim that what constitutes the domain of politics is reflection, receptiveness and questioning.

Let us only recall that in her considerations over human condition, Arendt distinguishes between action which takes place in the public realm from other forms of man's activities which man partly shares with non-human animals. Action constitutes a domain of free and equal individuals who bravely step out of their home-bound privacy only to compete with each other for everlasting glory via "big words" or deeds. The public realm is a place wherein we can witness the tension between contradictory standpoints. Furthermore, the law is also posited there. In Arendt's view, historically speaking, law is operative mainly in the public realm; and only derivatively and to a limited extent – that is due to the nature of the following – it is effectuated in the private sphere. This latter sphere is rather a sphere regulated by daily needs and the arbitrary will of the mighty man (Arendt 1998, subchapter 4–5).[7]

In the same spirit speaks Klaus Held, being inspired by the works of Husserl, Heidegger and Arendt. He attracts our attention to the link between politics, law and question, thereby referring to what was once labelled as *res publica*. The last phrase connotes a public affair, that is something one is debating and settles conclusively (Held 2010, 15–16). Ceasing to make use of the means being necessary for daily survival, man reflects upon the future possibilities of action. The said reflection, which Reinach also talked about, takes place not in lonely life of a soul but as a public debate, the collision of attitudes and reasons. It is in the process of a discussion that law is created, the shape thereof – rather similarly to a discussion – never being ultimate, but always provisional. Thus, at the basis of positing law in the public sphere there is the question, which can be understood – after Reinach – as a receptive questioning attitude realized in social acts and shared by all the participants of the political world.

5. CONCLUSION

The above-presented considerations do not call into question the conclusions reached by Reinach. Rather, the former appears to complement the latter. After all, it may be the case that among social acts that Reinach spoke about, it is not only promises and questions that are these acts that enable us to grasp the essence and genesis of law. Pfänder mentions the role of a command. However, on this basis, one should recognize that Reinach's theory is incomplete and still requires additional philosophical reflections which, while not resigning from the eidetic approach, are supposed to illuminate the phenomenon of law in its genuine daily functioning. Furthermore, Reinach's theory presupposes the whole spectrum of

[7] On Arendt's philosophy of law, see: Torre (2013, 400–416).

ontological, anthropological and ethical issues which – due to the requirements of the topic of his monograph dating back to 1913 – were only hinted at by the author. However, they did not get elaborated upon and neither were they further specified. What is thereby meant is the issue of the relation between the ideal and factual, the issue of the existence of a legal and political community, the problem of the existence of the Other, theory of time as well as a theory of personal identity etc.

What craves for getting further specified is undoubtedly also the proposal presented herein. The proposal is that, while not resigning from a priori investigations, one ought to search for the foundations of law not only in the static but also in the genetic order. The question is a phenomenon founded in a multi-fold way, and being also highly dependent on the context in which it appears (who asks?; why does he ask?; whom does he ask? etc.) it cries out for further comprehensive studies engaging many disciplines of philosophy (Sobota 2018). In the context of philosophy of law, what would be the most important is, however, the elucidation of the relation between law and the question. In the above considerations, we paid attention to the role of questioning in creating law. However, the question performs a very important function also when the law has been enacted and must be applied within a given legal reality (Husserl 1929, 129 and others). Therefore, the question relates to the actual existence of law. The problem of application entered philosophical hermeneutics from the realm of law, with philosophical hermeneutics relating the problem of application to the problem of the question (which is done by jurisprudence but even more by philosophical hermeneutics, see: Gadamer 1990, 333–334). So, it transpires that what is commonly regarded as unquestionable and certain – oftentimes even as sacred because stamped with a divine authority – is grounded in a eroteric[8] context.

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[8] Greek *erotesis* means ‘question’.

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Krzysztof Goździalski[*]

PHENOMENOLOGICAL CONCEPT OF LAW FROM THE PERSPECTIVE OF CARLOS COSSIO

Abstract. The originality of Cossio's works is expressed by a strong relationship between philosophy of law and his philosophical assumptions. The starting point for deliberating on law are widely recognized ontological and epistemological contentions. Cossio justifies his legal theses basing them on his philosophical views. Egology derives from Edmund Husserl's phenomenology which is related to some elements of William Dilthey's philosophy of culture. Martin Heiddeger's and Immanuel Kant's philosophies are the basis too.

The first part describes Cossio's ontologies of subjects otherwise known as regional ontologies. Methods for examining the above subjects and gnoseological acts are presented here too.

The second part presents the characteristics of law as a cultural subject.

The article is not only a report. Its aim is also to show that Carlos Cossio's legal philosophy is semantic in character.

Keywords: phenomenology, egology, legal philosophy, hermeneutics, axiology.

INTRODUCTION

Carlos Cossio based the egological theory of law on the grounds of the sets of philosophical theses accepted by him. Egology is an example of a philosophical attitude (Wróblewski 1966b) toward the study of law. The originality of its work is represented by the fact that he sees a strong relationship between the philosophy of law and the assumed philosophical premises. As widely recognised ontological and epistemological claims are the starting point for deliberating on law. Moreover, on the ground of assumed philosophical beliefs, Cossio justifies his claims concerning law.

Egology is based on the Edmund Husserl's phenomenology combined with the elements of Wilhelm Dilthey's philosophy of culture and the early period of Martin Heidegger's philosophy, while, in terms of certain concepts, he expressly refers to Immanuel Kant's philosophy. The discussed philosophy of law attempts to understand the place of legal duty in the holistic picture of the reality created mainly on the basis of the phenomenological method.

In the first part, the ontologies of objects (regional ontologies), distinguished by the author of egology, have been described, along with research methods

[*] The University of Lodz, krzysztof@gozdzialski.com

and gnoseological acts corresponding with these objects, which those methods comprise. In the second part, I have presented the characteristic of law as a cultural object.

The aim of the presented text is not only to report, but also to demonstrate that Cossio's philosophy of law is of semantic nature.

1. REGIONAL ONTOLOGIES

The egological theory derives from the phenomenological description of the "essence" of law. This is due to the fact that the phenomenological method comes down to the study of quintessences. The starting point for Cossio was a specific cognition of *essence* through the "intuition of essence" which is the intellectual intuition (Cossio 1948, 353). This act is not intuition as such, but a sheer look through reason. Looking through reason we perceive the essence, not the existence of objects (Wróblewski 1957, 1186–1187). The subject of this intuition are "essences", where the egological philosophy of law based on the concept of Husserl's "regional ontologies" classifies objects in several domains which constitute separate regions of being.

Husserl criticised positivists for the fact that while maintaining the attitude inherent in natural sciences, they did not acknowledge the existence of objects different from real objects of external or internal world. In other words, he claimed that a naturalist assumes without research that no matter what type the object of his cognition is, such direct cognition is constantly of the same type – a sensory experience. Phenomenologists questioned such unjustified conviction, indicating that a researcher faced a priori with an opportunity that "…there are numerous basically different objects and that such objects may be directly cognised solely as a result of relevantly different acts of cognition" (Ingarden 1963, 293). Such possibility arises from the existence of sciences different from natural sciences which do not study individual real objects. In the course of research, those kinds of sciences do not apply sensory experience to their practice, however they constitute the pinnacle of accuracy and cognitive confidence. This applies to mathematical sciences and logic.

Therefore, Husserl developed a concept of regional ontologies. He claimed that there was no need for only one category of objects to exist and respectively – only one type of cognition. According to his concept, a defined group of closely related facts creates one domain, one region of a being. Such domain is "subjugated" to one essence constituting the subject of the relevant eidetic science, known as regional ontology. Each facts-related science has its foundations in a relevant regional ontology. Husserl distinguishes material ontologies and formal ontology. Material ontology concerns the essence of objects within one region, in contrast to formal ontology which regards the object as such and includes "common

formal legislation" for all material ontologies. Each material ontology comprises several most general axioms obtained through the "insight into the being" and applicable to all *eidoi* and facts of a given region of being. Each domain of a being has a set of such axioms called by Husserl the "entirety of synthetic cognitions *a priori*" (Martel 1967, 69–70). Thus, the objective of the eidetic phenomenology is to describe various regions of a being, to capture their specific structure, for the specifics of individual sciences and the meaning of their basic notions will be defined. Eidetic laws determine the conditions of the possibility of empirical knowledge, whereby they vary in different regions of a being. They give the sense to the existence of empirical facts constituting the subject of various sciences (Martel 1967, 71).

The characteristic feature of Cossio's philosophy of law is the recognition of law as a cultural object. He claims that culture is a paramount notion against the notion of law; law is in a way "immersed" in culture (Zirk-Sadowski 1977), being its subset. Egology focuses on the general theory of values. Cossio attempts to escape the phenomenological description of the given "essence" of law directly. He studies law mainly in view of axiology (Wróblewski 1969), as he believes that the essence of both law and culture is the realisation of value. The author of the egological theory is therefore an essentialist, for he seeks the characteristic features of law. It originates from the fact that Cossio applies the phenomenological methodology which boils down to the study of the essence of various objects.

Egology determines law based on a specified philosophical foundation, namely the concepts of Husserl's regional ontologies, which, after an essential expansion by Cossio, led to the consideration of law as a cultural object.

Cossio distinguishes four types of objects: ideal, natural, cultural, and metaphysical. He characterises them by means of a triad of features – depending whether they are real or unreal; whether they are given in experience or not; whether they are valuable or neutral to value. I will present below the regional ontologies developed by Cossio, whereby the regional ontology of cultural objects will be presented most broadly, for it is amongst them that egology locates law (Cossio 1948).

Ideal objects are unreal, they do not exist, have no being, and moreover, they are not given in experience, they are beyond time and, ultimately, they are neutral to value, which means that their composition assumes no axiological qualification. There are objects between them that logic and mathematics refer to. For example, an object – a "triangle", which geometry deals with, consists simply in a pure space encapsulated within three lines. The triangle does not exist anywhere, it is not empirically grounded, as triangle of the geometry is not the one which can be drawn in books or on a blackboard. And finally, it is neutral against the value, as the properties of this object, which may only be the geometrical ones, lack any quality such as beauty, health, justice, etc.

Natural objects, studied by various natural sciences, are real, exist, have a being, are given in experience, are located in time, and neutral to value. Their existence as such is neither good nor bad, neither just nor unjust, neither pretty nor ugly, neither useful nor useless. If one shall consider a stone or a bird, one can freely verify all these features.

Cultural objects or goods created in a way by a human are in turn real, they have a being, exist, are given in experience and located in time. However, they are enriched with a positive or negative sing: right or wrong, pretty or ugly, useful or useless. These are the properties which may define their existence, and such being must always have at least one determination of this class. A charter, instrument or decision, they all fully hold such properties.

Eventually, metaphysical objects are real, they have existence, they exist; they are not given in experience, but may be judged. For example God, recognised as truly material reality and the supreme good, is not given in experience, as He can be neither seen anywhere nor reached with our senses.

The below table presents a synthetic perspective on regional ontologies:

Regional Ontologies

Types of objects	Characteristics No 1	Characteristics No 2	Characteristics No 3
ideal	unreal (irreal), do not exist	not given in experience	neutral to value
natural	real, have existence – exist	given in experience	neutral to value
cultural	real, have existence – exist	given in experience	have positive or negative value
metaphysical	real, have existence – exist	not given in experience	have positive or negative value

Metaphysical objects will be left aside, for their characteristic will not be of any help for the purposes of this article.

Owing to Husserl, we know that an object must be studied with the use of a method which is compatible with its nature (essence). Therefore, the next steps of Cossio on the path of building the regional ontologies are:

1) explanation of various **research methodologies** related to each of the regions which correspond to ideal, natural, and cultural objects, and
2) exploration and explanation of relevant **gnoseological acts**, which those methods comprise.

Both of the steps are fundamental. The first step is to show the method of examining, as without the correlation between an object and the method, a research

work lacks efficient perspective and as ontological differences between them are so enormous and so obvious that they have no common method. The second step is to show the gnoseological act which the method comprises, as such act is the meaning which is translated into each of the methods so that if we do not know it, we will not know what we can get if we apply such method.

1.1. Ideal Objects

The truths about ideal objects which logic and mathematics deal with, are, according to Cossio, obtained by application of rational-deductive method (Cossio 1948, 352).

To deduct means to start from one or more of general truths and to draw from them some detailed truth as a conclusion. Transitioning from the general to the detailed is rationally legitimate, as is it based on a reason as a compliance with reason. Therefore, a conclusion cannot be contrary to the premises. Thus, if the deductive method is applied to rational truths, it is entirely relevant for getting the truths. Leibniz's distinction between rational and factual truths is significant. The rational truths are apodictic. It means that they are not only as they are, but must be such, as it is impossible for them to be different. For example, we know that 1 + 1 = 2. It is always like this and cannot be otherwise. On the other hand, factual truth is declaratory; this a truth only because of the fact that things are as they are, happen in this way, but there is no contradiction in the reasoning that it could have been otherwise. For example, when I claim that "the heated metal expands", I tell the truth, as this is what in fact happens, but there is nothing impossible in the assumption that metals could shrink while heated. It is the experience which speaks in the factual truth. If I do not refer to it, I am not able to know what the truth is composed of. On the other hand, a thought speaks in the rational truth. To know that 1 + 1 = 2, I do not have to take two material spheres and calculate them. I only have to think about the issue making no reference to experience.

Cossio concludes that the deductive method is a complete instrument of truth when it is applied to rational truths. But if deduction requires a general principle as a starting point, it means that the method requires a rational truth as its starting point. We have axioms in mathematics, and in logic, the so called paramount logical principles such as equality and non-contradiction. In turn, axiomatic truths do not require proving, as we explore them directly (they are self-evident).

Further, Cossio proceeds to explain what an act of knowledge or gnoseological act is, which constitutes the rational-deductive method, out of which it gets its meaning. He calls this act an "intellection" or an "intellectual intuition" (Cossio 1948, 353).

Intuition, in general, is a direct contact of the cognising subject with the object being cognised. This is a non-conceptual comprehension of an object in a way which happens not because it is thought about or as the thought mentions it or directs toward the object, but because the object is "in front of us" and because we have it in our direct presence. By means of intuition, we learn about colours, thus one cannot explain to the person blind from birth what in fact the blue colour is. Intuition enables us to cognise things which we see or touch. In general, all organs of our senses are the sources of intuition, but this is a sensory intuition; it should be noted that it is different from the cognition itself as it proves the existence of something which generates experience. We do not experience the existence of a thing, but the existence, in general and with no exceptions, recognises the sensations through sensory intuition and only through it. Existence is also "in front of us" in a direct form and merely because of this fits into the sensory intuition.

Intellectual intuition (intellection) is another type of intuition which we use when the object of cognition is an ideal object. Let us consider the following example:

$1 + 1 = 2$ $12396 + 15983 + 17740 = 46119$

These two totals are equally rational truths, and in this sense, they are equally apodictic and both may be presented – or proven – in the same manner. But one can deduce that the first one presents itself to us with its internal directness and fullness of thought as far as we think conceptually, while we capture the second one as if it was seeing the total with our intelligence. The total and its components are in front of our intelligence in their all clarity, in direct and internal form. This is a feature characteristic for mathematical axioms so as such they do not have to be proven. This is what the rational-deductive method is all about; a method which always assumes intellection at the starting point to give us complete truths. This is also a method relevant for all logical principles so the logical intellection is always in compliance with any type of truth as whatever the act of knowledge may be that our reason makes, a logical principle is always used.

The above comments allow Cossio to identify intellection as seeing through reason, by not doing anything else but looking at. The starting point here is a specific act of cognising the "essence" during an act of intellection (Cossio 1948, 353). It is not about intuition here in as commonly understood sense. It consists in "looking through reason", not doing anything more than looking at. One sees an object not through one's eyes, but through one's reason. The object of knowledge is then directly present in front of the intellect. While seeing through one's reason, one does not recognise the existence of the objects, but their essence.

As Cossio states, "being" which allows for blindness of reason to ideas, is equal to the blindness of senses to things.

The whole intuition, sensory or intellectual one, is characterised by having something personal in it, and thus its course and outcomes may neither be transferred to nor communicated to other cognising objects. In this respect, it is different from the concept or meanings, which are to be the same for all minds.

For example, the concepts of a mammal or a 90-degree triangle are the same for us all. However, intuitive verification of what one has in mind, must be seen by a particular person or invoked by the intelligence of a subject. Thus, what is intuitive is not proven, but simply shown. One cannot prove that a given board is black, but one can show that it is in fact the case. Therefore, we can see that intuition is an instrument allowing us to describe an object which we try to cognise, whereas it is obvious that the description of the object is the stage preceding any further conceptual elaboration in a research work.

Thus, intellection is seeing through one's reason of an ideal object or essence without doing anything more than looking at. Seeing without doing anything else than looking at is common to all intellectual and sensory intuitions. This is a matter of a neutral act where "I, the cogniser" am a passive spectator. Intellectual intuition is an act of comprehending as such, where the subject takes, in a passive way, what the object gives to it, without taking a stand toward it. Thus, intellection is the power of judging of our reason thanks to which we can reach the necessary and self-obvious truths, present, for instance, in mathematic axioms. Cossio exploits here the achievements of ancient philosophers who distinguished two fundamental functions and two levels of our reason. One can mention here the distinction of Plato, namely the **intuitive thinking** (*nous*) – at the primary level of our reason, and the **discursive thinking** (*dianoia*) – at the secondary level; but also, respectively, the distinction of Aristotle, namely the **direct and non-demonstrative knowledge** as well as the **direct and demonstrative knowledge** (Arystoteles 2003; Dębowski 2000, 101 note 102, and 132 note 43).

1.2. Natural Objects

Characterising the specifics of natural objects' cognition, Cossio concludes that the method of their examining is the empirical-inductive method (Cossio 1948, 355). Natural sciences demonstrate that.

To induce means to start from facts and get out from them, by abstraction and generalisation, a principle which is conceptual and general. Such approach starts from that what is detailed and leads to that what is general and from what is exact to notions. Such approach is important in its factuality as it is based on a natural experience in compliance with the experience as such. It is something given and created once and for all, as all changes and transformations which we can observe

in phenomena are the symptoms of such identity, known as a function in a steady, cause-effect correlated constancy. The conclusion is the declaration and not the apodictic truth, as facts are the starting point here. And we already know what characterises factual truths. Basing on this staring point, the empirical-inductive method is a complete instrument of truth. This way the truth about nature is cognised.

Analysing the act of knowledge or gnoseological act, which the empirical-inductive method includes, and from which it gets its meaning, Cossio calls it an act of explaining. To explain something is to break it down into elements for analysis. Its immanent feature is that we refer to something as an effect of something else constituting a cause. In both instances, Pucciarelli says with great concision that "we focus our attention beyond the object as such in the direction of the cause or its components. Therefore, explanation means to refer the fact to something external and to reconstruct it as a synthesis of factors unfamiliar to the fact itself" (Cossio 1938, 320). Moreover, an explanation is a neutral act. The subject cognising does not introduce oneself to the object or does not make any personal stand toward the object. In the course of explaining, the object is cognised through reference to that what is "different" from it. Thus, we move from its intuition to some other kind of intuition and get to know it as a function of the other intuition. To illustrate the process, we may consider the knowledge about what it means to give birth to a child, so different from the point of a mother and a physician assisting her with his conceptual wisdom.

Kant demonstrated that in the natural experiment, we always find two classes of heterogenic elements. On the one hand, we have a conceptual structure which is intelligible in itself, and at the same time rational, provided that the notions are thought about by an intellect. On the other hand, we have an empirical content which our sensory intuition comprehends.

Let us consider any physical law, for example, such which talks about metal expansion when heated. The conceptual structure of our example would consist in the following scheme or form of reasoning: for a given A, B is a real given factor to challenge the law. I have a piece of metal and flame in front of me. Referring to this particular case, I should have therefore said: with a given piece of metal and flame which approaches it, the expansion of the metal is a necessity.

Kant applied a two-fold order of characteristics to label the differences, dividing those applying to structure from those applying to the content of a natural experiment, as it is presented in the table below:

Characteristics No 1	**Elements of natural experiment**	**Characteristics No 2**
formal	logical structure	necessary
material	empirical content	potential

According to the first characteristic, the structure is formal and the content is material. The structure of experience consists of its form and nothing more, constituting the "as is" of the experiment. The structure in itself is a matter of a maximum emptiness in its unreality. On the other hand, the content of experience is a part of our knowledge, i.e. "what it is" in the experience. The content in itself is blind as an amorphous mass. Natural experiment which science reveals to us in its authenticity and entirety is a synthesis of both elements as a relationship of form and matter.

According to the second characteristic, logical structure is imperative and universal, as well as constant. However, the content is random and we can consider it as effective, solely if the intuition has communicated its existence to us by means of present action.

Such analysis of experience related to natural science as a physical science, breaking it down into logical structure and empirical content, offers us some distinctive features. First of all, we must conclude that the analysis is comprehensive. There is nothing more in the existing experience than such imperative form and such potential content. However, if we eliminate the logical structure, nothing remains of what the experience offered to us from the start in real unity.

Second of all, the analysis describes intuitive experience, which we know, as it is given to knowledge without making reference to any other explaining notions. In fact, we find in it the formal structure and material content. For Kant, the concept of form is solely for descriptive use, widely proven by modern science. In this Kantian and scientific sense, purely descriptive, the concept of form is widely used as we find it everywhere – in geometric forms of bodies, forms of movement, either slow or fast, etc. As Kant remarks, perception also has to have its forms (in this case, a logical form). Kant's interest was focused on the basics of science. This way, he made a distinction between the forms of knowledge and the forms known by knowledge. The forms of knowledge appear to be the logical forms of experience, in general, always thought about in the same manner and thus such forms are equal for all experiences as their structure *a priori*. On the other hand, the geometric, kinetic, thermal, and other forms, being integral elements of things, are the forms known in the experience of things as such and similarly to them are the potential content of experience. However, they are not the forms of the same experience taken as an object of reflection. It is not feasible to talk about form, except for logical or conceptual form of experience expressed in knowledge. The distinction between the form of cognition and the form as is known, mean therefore means in the first place the scope and function of logic in the description of a scientific work. The forms of cognition are conceived, the forms known are intuitive. The problem was differently presented in the scholastic philosophy originating from Aristotelian philosophy in which the concepts of matter and form are connected with the

concepts of potency and act, while the concept of act is connected with the concept of purpose. The form which the things we see have, gives them an inherent purpose provided that this constitutes an achievement of a certain level of being. It is apparent that we discuss here the metaphysical interpretation of what is known in experience and not the positive description, the only starting point for scientific knowledge.

The bottom line is that the two characteristics of experience related to natural science are perfectly overlapping each other: what is formal is necessary and what is material is potential. As the former refers to the conceptual structure, is declared in the truths of reason, namely the truths which exist *a priori* and are independent from the experience as such. On the other hand, what is material or potential, is expressed in the truths of facts which are *a posteriori* truths with regard to the experience on which they are based. Thus, the equivalence of the formal, necessary and *a priori* is systematically applied by Kant in his work *Critique of Pure Reason* (Kant 1996, 10, 46, 93, 147–149, 162, 228, 265–266). The reasoning of the philosopher concerns the problems arising in the Euclid's mathematics, Newton's physics or rational metaphysics, whereby it is true that the knowledge about nature, as to the form or structure of experience related to natural science, bears these three features.

1.3. Cultural Objects

Cultural objects are characterised by the following features: they are real, given in experience, and subject to evaluation.

Cultural objects comprise two elements: a substratum and its meaning. The example given by Cossio to demonstrate their mutual relations is the classic Venus de Milo statue. The substratum of the statue is marble shaped by a sculptor. Therefore, it is a material object, a real one, perceived by us in the sensory intuition. Simultaneously, however, the block of marble as a cultural object has a defined meaning which penetrates the marble and thus, we can say about the sculpture that it is beautiful. The meaning of a cultural object is an "objectifying intention incorporated in the substratum", recognised as "the cognition of what is expressed by the substratum" (Wróblewski 1966a, 7). However, the meaning can exist solely based on a value with which it is united, thus, cultural cognition is the cognition of value. Therefore, "the meaning as an objectifying intention, which is the cognition of what is expressed by the substratum, unites with values and comprises the evaluation of the cognising subject." Thus, we can talk about the meaning "(…) as a synonym for a specific positive and negative value, expressed by the substratum" (Wróblewski 1966a, 7).

Therefore, in one act of cognition inherent in cultural objects, a twofold intuition occurs. To cognise the substratum, we apply "sensory intuition", while,

to cognise the meaning, we apply the "emotional intuition of value" (Wróblewski 1966a, 7).

What does it mean that cultural objects have value? Cultural objects are not values as these are not the reality. Value fits into or presents itself as a feature in goods. The Venus de Milo statue is not a beauty as a value. It only bears the value inside, and we say that it is beautiful. Likewise, we do not say that "this is whiteness", but "this is white", as this is the colour of the marble that the statue is made of.

Here we see the difference related to the world of nature which is neutral to value. Beauty which we see in the Venus de Milo statue, being a cultural object, assumes the existence of the meaning which we call beauty. All cultural objects exist as attributing meaning in some aspect. If this is a sculpture, it will be beautiful or ugly, to a greater or lesser extent. If this is a tool, it will be useful or useless. If this is law, it will be just or unjust. Neutrality or indifference against such values is not feasible. Without such axiological meaning, a cultural object does not exist as such, its substratum exists solely as nature. Besides its meaning, the Venus de Milo statue is solely a certain number of pounds of marble which has the same features in a laboratory as any piece of marble.

Cossio believes that meaning exists solely if it emerges in the psychological conscience of a subject. It means that to experience a meaning, it requires the participation of a human – "live phase of meaning" (Cossio 1948, 355). Therefore, the subject cognising cultural objects must be involved in what it cognises, as its experiences are imperative for the meaning to exist (Wróblewski 1966a, 7).

The result of the hitherto considerations is astounding. They have demonstrated that the existence of a cultural object not only requires the existence of a substratum, but also the existence of a live phase of meaning, which is, out of necessity, the psychological and personal existence. The conclusion will be proven when we see that each truth which declares something neutral about an object, may be expressed in an independent judgement, without the necessity to make reference to the object. For example, if I say that the Earth travels around the Sun, such truth, in no way, depends on me and in order to understand it, it does not have to be supplemented with any reference to a person who articulates it. On the other hand, when I say that the Venus de Milo is beautiful or that a fur coat is useful as it protects from cold, the full understanding of such judgements requires making reference to the subject. The Venus de Milo sculpture is beautiful, the fur is useful as it protects from cold, but it is not useful for a stone or a polar bear. Therefore, we see that in the cognition of cultural objects, the subject cognising is not the spectator who only notices a fact, but, in a certain form, presents the fact to revive the meaning as such revival is imperative for their existence. The existence of meaning is characteristic for cultural objects. One may say that this gnoseological act requires personal stand from the subject cognising, as it penetrates the object

cognised and always sees it from inside – from this or other perspective, from this or that position. A human sees the cultural object and its meaning.

An act of knowledge owing to which a method is created, allowing us to understand cultural objects, is called cognition (Cossio 1948, 350–362). Dilthey believed that we explain nature and understand culture (mental life), (Kuderowicz 1967, 144). We can now say that understanding means seeing a meaning in something – it does not exist without the participation of a human. The subject cognising inserts meaning into reality which it understands. Hence, it looks as understanding is something similar to intellection. It is also seeing by means of intelligence, but this is not the seeing which assumes nothing more than seeing. Such seeing refers to I. Something like this does not occur in intellection, where the seen one is seen as it is, but with a seen quality, as the quality does not create the "being" of the (ideal) object. On the other hand, in the meaning of what is seen, the quality creates the "being" of the (cultural) object.

If we love someone, we love with the quality of such loved one. It is feasible, as being loved creates the object loved. This example is particularly illustrative, as it is undeniable that being loved is a quality which the lover inserts and which creates the object as he loves it as something which is loved. We should say that this is not only loved as he loves it, but at the same time, that he loves it as it is loved. Thereby, the understanding of the phenomenon of love may not be seen solely as a result of associational psychology, as if the loved object was the cause foreign to the feeling of loving which creates such feeling as an effect in the loving one. This way, understanding the phenomenon of love may not be seen solely as a result of associative psychology as if the loved object was the cause foreign to the feeling of loving which makes such feeling as an effect in the loving one. It is clear then that the feeling defines the object and the one being loved acts as the loved one. The same way, when we characterise law as right or wrong, while thinking about actions which it shapes, such characteristic is not the effect of the influence of law on the cognising subject, but is the meaning of conduct assigned by law and as such, the quality of such conduct; what's more, such meaning is attributed by the consciousness of the cognising subject, and exists solely as a consciousness of someone. Here as well, to be right or wrong makes an existence of conduct attributed by law and in it, we evaluate it as right, so the judgement that the subject cognising makes is a part of what he or she sees in the object evaluated. Therefore, it seems that we admire the Venus de Milo not only because it is beautiful, but as the same time because it is a beauty in itself. The same is true for a judicial decision and its fairness, but in case of the first and the second example, we may express ourselves better, separating unity from both dialectic moments. We should say that we approve a judicial decision as it is fair; understanding that it is fair in itself and we judge it correspondingly. We achieve it owing to the act of knowledge called understanding which is an act similar to ontological nature of cultural objects. Thus, "to judge" means "to know".

This gnoseological act of understanding somewhat resembles explaining. In fact, understating refers something to another thing which is not the same as the thing. We have already seen that a cultural object requires the existence of a substratum in which its meaning is shown and the existence of the reality of the meaning. It is not essential whether a substratum may be a fragment of a physical world as it is exhibited in objects (canvas and colours of a painting, sound vibrations in music or poetry, etc.), or that a substratum may be sole acts of human behaviour as it is exhibited in egological objects. Therefore, in the gnoseological act of understanding, we relate one of the events to the other one. We can either raise from the materiality of the substratum to its meaning, as this is the case of objects already created, or go from the meaning to the substratum, as this is the case in the process of creating, called inspiration.

Whereas, the act of explaining progresses without reversing in the same direction, indicated on exit (e.g., from cause to effect), the act of understanding, on the contrary, returns, after the first reference, to its staring point where it, again, returns to the previous reference and so, gradually, in an endless circular motion which follows from the substratum to its meaning and vice-versa. Knowledge attained through understanding is being created and completed with an exit at a certain point which selects an explanation in a way that what it summarises in a synthesis, is always a known object and something which is not. On the other hand, knowledge through understanding which is created and completed also by exit from this circular motion at a certain moment, is done without coming outside. In case of knowledge attained through explanation, when one reverses toward a direction selected by a cognising mind, the knowledge does not grow as what has been already explained, remains entirely known. On the other hand, we are to learn that each time one goes back to the previous stage, one extends knowledge through understanding.

According to Cossio, a method relevant to cognise cultural objects is the empirical-dialectic method (Cossio 1948, 350–362), which is a reference to a construction of the hermeneutic circle of Martin Heidegger. It is about the fact that cognition through understanding moves in a "circular motion" between a substratum and a meaning, as we cognise the substratum through meaning, and meaning through substratum. Thus, we dialectically reach the final cognition which is "a simple, but open entirety". One cannot distinguish here individual stages. As we deal here with a continuous stream of cognition which finally leads us to consistency between the substratum and its sense (Wróblewski 1966a, 8).

In general, dialectic is a synthesis made by a spirit through own spontaneous activity of a thesis and an alternative thesis (antithesis), in the function jointly summing up the implication of a hidden meaning. Thus, we have access to cultural objects. Their understanding circles around from the substratum to the meaning and vice-versa, making one to become a thesis and the other one, an alternative

thesis. Such understanding is not feasible through induction, as nothing is generalised in their knowledge. To base on induction, a human who has always seen ugly sculptures would conclude that the Venus de Milo statue is also ugly. Such cognition is also not feasible through deduction, as we lack an intellectual proof for it, which would have to serve as a starting point for deductive reasoning. Unless, we would agree, after Plato, that knowledge originates from a metaphysical reminiscence of what the soul had seen prior to our birth. Cultural objects are cognised in dialectic form which transits from materiality of a substratum to the reality of its spiritual meaning and *vice versa*.

If we observe mathematical knowledge and the process of its attainment, we can notice that it is attained as a "simple and closed entirety", without going through various stages or individual parts. Whoever knows the principles of adding and must add a value, starts an operation and continues it without transitions and breaks till the end. Then, he or she may find whatever he or she was looking for. Such knowledge does not grow bigger, if someone proves it through repeating the operation. It is as full and comprehensive for a mathematical specialist, as for a young student.

While observing nature related knowledge and the process of its cognition, we note that it is attained as a "complex, but open entirety", going through separate stages or various parts, e.g. when one attempts to determine the forces which caused a movement. The determination of each factor entering as a cause or a component of an effect is accomplished by a separate step which reveals nothing in relation to them and which may be continued separately. As soon as one gets a result, namely just after the cause of movement is established, one may still continue establishing the causes. Such knowledge increases toward the direction of an open horizon.

On the other hand, if we observe the knowledge about culture and the process of its cognition, we note that it is obtained as a "simple, but open entirety" without going through separate stages or parts, but with continuous and fluent increment in knowledge. We have already seen the simplicity of a cultural object, as the substratum and its meaning are not two alien and external things, but two components which, after mixing, form a unity. Despite this fact, each time such cultural knowledge transits from substratum to its meaning in its circular movement, and further from the last one to the previous one, etc., the cultural knowledge increases and cognises the object better and better. Let us think about a player who keeps improving his sports skills; this is not just the automatism of muscles or the improvement of the organic substratum, but also greater understanding of the essence of the sport. Let us think about music which we understand better the more we listen to it. Let us think about nuances which we find in philosophical works each time when we read them again. Such nuances reveal along with further reading. In all this, we see how the knowledge gets deeper and becomes confirmed by understanding

each time when it returns according to the specifics of the hermeneutic circle movement. This is the case of a judge who intends to declare the decision made. The judge considers a given case in all its complexity and further its legal relevance which will be reflected in the decision. Further, the judge goes back to the case to see whether it truly suits its meaning. In turn, the judge goes back to formulating the decision, possibly emphasising a given circumstance which went unnoticed upon the first investigation of the case. Again, the judge goes back to the case and its circumstances, possibly, underlying what an article of the code states or maybe solely with a greater sophistication of the legal meaning of the case. And thus, the judge continues the circular movement which goes from one activity to another, while the judge's knowledge grows in strength and clarity. This is knowledge through understanding. When the judge is finally convinced, he or she makes the decision which is a result of such understanding of the case as should be, and at the same time presents the decision in a conceptual form.

The question is whether one can talk about any objectivity of such cognition, in the light of such perspective on the gnoseological act of cultural objects cognition, which, after all, is of evaluative nature. This is not only about objectivity consisting in the existence of material substratum and the existence of sense in experiences which are objective as possible in experience ("plausible objects of experience" as Cossio formulates referring to Husserl).

The issue concerning the objectivity of evaluating as emotional recognition of valuable objects is more complex, which, by definition, all cultural objects are. Here, Cossio gets the answer confirming the objectivity by reference to Husserl's understanding of objectivity as intersubjectivity. Therefore, the objectivity of individual evaluation may be determined by comparing it with social evaluation, which is the source of objectivity. The products being compared are two concepts of sense, being at the same time its emotional experience – the concept is to serve here as a part of the experience. Eventually, the objectivity of evaluation will be to determine the relevance between the substratum and the socially determined sense. Understanding, which we utilise in law, is the "conceptual-emotional" understanding – which is described by the phenomenology of legal cognition beside such as "unconstrained emotional understanding" (present in arts) or "intimately emotional understanding" (present in morality) (Wróblewski 1966a, 9).

In the conclusion of the above considerations, it should be stated that for egology it is appropriate to refer to the concept of cultural object being the effect of human activity. From the perspective which is of our interest, the cultural object is a certain unit of sense, a certain type of meaning which we give to substrata. It is claimed here that the relationship between the meaning of cultural objects and reality is of no causative nature. The conclusion from such reasoning is the epistemological thesis boiling down to the claim that interpretation is the manner of cognition of cultural reality.

Below, I present the schematic classification of objects and gnoseological methods attributed to them as well as the acts of knowledge specific for the cognition of such objects.

Types of objects	Gnoseological methods	An act of knowledge utilised by a relevant method
ideal	rational-deductive method	intellectual intuition (intellection)
natural	empirical-inductive method	explanation
cultural	empirical-dialectic method	understanding

This is how the major cognitive issues are, related to the regions of ideal, natural and, particularly, cultural objects. In relation to the concepts of regional ontologies which has been only outlined by Husserl in his "Ideas I", Cossio developed it considerably and created the original phenomenology of cultural cognition.

2. LAW AS A CULTURAL OBJECT

The Philosophy of law by Cossio stands in a radical opposition toward the traditional legal thinking. As it assumes that the legal dogma is a science about reality and the knowledge of experience. However, egology is all about human or cultural experience, and not about nature-related experience. And this is what differentiates it from the legal (dogmatic) rationalism, as well as from legal empiricism, predominating law.

The representatives of rationalism believe that objects which a lawyer cognises, are the regulations and standards and that the positive law does not present them and they cannot be achieved through senses. According to this, the legal dogma is a knowledge about ideal objects as the rules are cognised by a thought as objects in mathematics, for they are neither seen nor touched.

On the contrary, the representatives of empiricism object to such idealism in law, accept the realism of regulations and standards, claiming that the legal knowledge is based on what legal experience reveals. However, it does not acknowledge any other contact with experience as through sensory intuition only, which enables us to cognise nature so the legal knowledge acquires knowledge through reference to other real events. For example in the instances when law is interpreted through reference to possibly exact intent of persons who passed it, taking into consideration the relationship between the fact and law (Cossio 1948, 345–348).

In contrary to legal rationalism, egology anticipates that the objects which should be known to the lawyer are not the rules, but human behaviour at which

we look from a certain perspective. In the same way as stars are the objects of astronomy and not the Kepler's and Newton's laws, as they are concepts solely, on which we base our knowledge of stars, thus in dogma, the objects of the lawyer's knowledge are not the rules, but human behaviour in its intersubjective impact. The rules are just the concepts with the help of which we think about such behaviour. As such, the concepts are the ideal objects of logical type as all other concepts. Therefore, considering rules as such is a concern of formal legal logic and Hans Kelsen's research – known as a pure theory of law – comprise its outlines and fundamentals. But dogma, as far as it is the knowledge of reality, includes something more than legal logic, which comes directly from human experience, like natural experiment brings to physics something which does not originate from the sole logical structure of knowledge about nature. It can be illustrated by the following example: with the same logical structure and not compromising the formal rights of thoughts (which *ipso facto* would invalidate knowledge), we may imagine that if the distance between two objects "A" and "B" is reduced, this is because "A" moved closer to "B" or because "B" moved closer to "A". The two possibilities of moving closer seem to be equal in logical rights of thoughts. And if this is the fact that "A" moved closer to "B", and not the other way around, there is something more in the knowledge which is added by intuition to the logical structure as a cause which supports experience.

In contrast to legal empiricism, egology assumes that human behaviour is the subject of experience which is entirely different from the experience of natural objects as they constitute an imperative experience managed by the similarity of causes and effects, while human behaviour constitutes the subject of experiencing freedom which imperative feature is to create, each and every time, something unique. This is the reason why we cannot think about behaviour as of a being, for human behaviour, as the experience of freedom, is a constant opportunity. In legal terms, it thus exists solely as something which should be (Cossio 1948, 348).

Thus, Cossio claims that only through the philosophy of law, presenting human behaviour as it should be, we may have dogma which, only then, would be a science dealing with legal reality. Therefore, egology adopts the normative logic of pure theory of law which has shown that legal rules are only concepts with the use of which we think about behaviour. If, however, legal dogma is to be the science dealing with reality, it must also study the special intuition of law which is the intuition of freedom possessed by everyone based on human experience. Thus, only when we take into consideration this axiological intuition, as well as logical and legal structure, which, according to Cossio, the normative logic of pure theory of law is, we can get a bigger picture of a legal phenomenon.

As we can see, Cossio believes that the relevant object of law is human behaviour while legal standards are solely concepts by means of which we can qualify such behaviour as forbidden, permitted or legally neutral. Thus, egology

recognises law, inter alia, as a fact. Therefore, the fundamental aim of egology becomes the aim to examine behaving as the relevant object of law.

I will now proceed to trace the role of cultural cognition phenomenology in terms of the concept of law and legal cognition. Egological philosophy of law derives from the phenomenological description of a given **essence** of law, directly. The reason for this is that the phenomenological method boils down to the examination of the essence of objects. The starting point here is a special cognition of the essence in the act of intuition of essence, namely the intellectual intuition. *Eidoi* are the subjects of the intuition, while egology describes cultural objects building on the concept of regional ontologies.

Cossio divides cultural objects into two major groups. The division is held at the ontic level and its criteria is the type of substrata making up cultural objects. If a product of human behaviour is the substratum, then, according to the Heidegger's terminology adopted by Cossio, we will deal with the **objects of the world**; on the other hand, if the human behaviour itself is the substratum of a cultural object, then we will deal with **egological objects** (Wróblewski 1966a, 9). The first type of the cultural objects constitutes the "world" of human existence, in other words, they are the objectified life of a human. The second type of objects is the human behaviour, the behaviour of ***ego***; Cossio defines it also as a **living human life** (Cossio 1948, 368).

Cossio emphasises that cognitive intuition related to each and every cultural object is of dual nature. On the one hand, at the ontic level, we deal with the intuition of a substratum, which is the sensory intuition; on the other hand, at the ontological level, we deal with the intuition of sense, which is the emotional intuition. Although, the critical factor on which the existence of a cultural object depends, is the experience of its meaning, however such object is "physically located" where the substratum already exists, so – in the instance of egological objects – in the individual (*ego*) (Wróblewski 1966a, 9). The last remark explains why the discussed theory is called "egological" by its creator.

Egological objects (cultural) are of a unique status of being, entirely different from any other objects. Egological objects are neither natural objects, nor metaphysical ones, and moreover they differ from ideal objects. Adolf Reinach presented a similar view (Bekrycht 2009, 74).

Law is an **egological object**, as Cossio concludes, based on the intuition connected with ontic existence of law, that law belongs to culture and is intuitively recognised as a behaviour. However, such behaviour must be considered according to the Heidegger's thesis that the characteristic feature of human presence is co-existence in the world. It concerns the behaving considered in relation to any other behaving of various people who may disturb such given behaving (Wróblewski 1966a, 10). Such statement leads us to the determination of law at the ontic level as "a behaviour of a human considered from a certain perspective – in its intersubjective interaction" (Cossio 1948, 348). Therefore, it seems that

to determine what in fact law is, we do not need any legal standard. "As for egology, the subject of legal knowledge is human behaviour considered in its intersubjective interference, while standards constitute solely imputable concepts to which the behaviour refers (…)" (Cossio 1948, 369).

In turn, from the ontological perspective, law constitutes values which are inherent in behaviour. The relationship between values and behaviour is very close as "from ontological perspective, behaving without value may not exist" (Wróblewski 1966a, 10). From ontic perspective, behaving presents as an **existential duty**, while from ontological perspective, as **axiological duty.**

The philosophy of value originating from phenomenology, does not attribute any real being to values. However, it does not believe that, at the same time, values lack any being, so we would be forced to boil them down to the acts of evaluation (to judgement). Axiological phenomenology argues that values are something in between of what is real and the act of evaluation. They are not real, some of them only call for realisation, like justice, for example. However, values are not solely subjective in this perspective. They are given as objects which attract us or repel. Therefore, phenomenologists say that values are objective (Tischner 1982, 271). Applying the terminology of Cossio, one may say that values do not float above the surface of life as timeless creations, but remain full of temporary freedom in the existential future, which exhibits them, depending on the radical structure of its own presence as a metaphysical presence (Cossio 1964, 564–565).

The relationship between behaving and values results from the fact that behaviour is a way of human existence, thus occurs in the existential time which varies from the natural time. Egology derived the concept of time from Husserl's philosophy (Husserl 1989, 32–108), while the concept of existential time – from Heidegger. According to it, the core of all metaphysics shall be the metaphysics of time, as human is a being deeply penetrated by time. There are specific relationships between past, presence, and future in the existential time.

Heidegger claims that the circular nature of thoughts is not its lack – on the contrary, owing to this a thought reveals reality. The hermeneutic circle is a dialectic unity of going back and ahead; accordingly, the basis of the future is what has already been and the past depends on projecting. Thus, interpretation is of timely nature. What is subject to interpretation, always belongs to the past and the present interpretation gives it a new meaning, influencing at the same time its future understanding. Each interpretation links the past with the future and is, at the same time, the product of its time. The described time-related relationships enable us to go from being to duty, which is related to the assumption that values are connected with the future considered from ontological perspective.

It is impossible not to notice that the above presented assumption made by Cossio in terms of ontological possibility of going from being to duty is

characteristic for the advocates of the concept of natural law. Therefore, it could appear that egology investigates law from ontological perspective.

For egology, assuming that law is each and every common behaving consisting in subjective interference, the legal value is each dual value. Thus, Cossio created a "pure axiology of law", setting out from Heidegger's claim that human life is coexistence. The scope of the mentioned dual values determines the "legal axiological tangle" including three pairs of legal values:

– order and security, characterised in the context of "human coexistence as a situation";

– power and peace, characterised in the context of "coexistence in relation to persons"; and

– cooperation and solidarity, characterised in the context of "coexistence depending on society".

Justice wins a special position amongst legal values. Pure axiology of law analysed the social character of justice as an overriding legal value. Its specific character is that it harmonises the remaining legal values. Justice is described by Cossio in the context of "coexistence depending on sufficient rationale". Besides, justice is the value which the law serves, realising the existential freedom of a human (Cossio 1964, 563).

Thus, egology finally reaches the determination of law as behaving in intersubjective interference at ontic level which is a value on the ontological plane.

3. CONCLUSION

To conclude the above considerations, I will try to situate egology in the disputes regarding **what in fact law is** or **what is it that we call law**. The reference plane here will be the dispute between the advocates of the concept of the natural law and the legal positivism.

At first, it could seem that Cossio in his views is closer to the advocates of the theory of the natural law. The evidence for that could be the fact of originating the essence of law from ontological perspective. This applies to treating law as a cultural object. The second aspect which could suggest affiliation of Cossio beliefs with the advocates of the natural law is assuming the possibility of transition from being to legal duty, connected with the M. Heidegger concept of existential time.

In my opinion the conviction that egology belongs to the theories related to the group of natural law is not correct. It results from a false, common-sense interpretation of Cossio's theory. Because egology does not fall within the frames of dispute concerning the essence of law. We must remember about the fact that Cossio uses the phenomenological method, while phenomenologists use the term "ontology" in the meaning of a **phenomenon.** Thus, in the case of egological

theory, we may not use the term ontology in the meaning of metaphysics, in the *arche* meaning, i.e. the explanation of the **beginning** and the search of what is the principle of all things and their aim. Using the methodology developed by Husserl, Cossio seeks the concept of law as a semantic category. He poses neither ontological nor metaphysical questions concerning law; he does not ask **what in fact law is** or **what it is that we call law** (Stróżewski 2006, 94). Cossio studies the content of the concept of law, he does not attempt to reveal the designate of the concept of law owing to which the said concept gets on its meaning (Stróżewski 2006, 59). Thus, the philosophy of law by Cossio is of semantic nature.

Adolf Reinach presented similar stance as to the way of understanding its own philosophy of law. He, similar to Cossio, studied law with the application of phenomenological methodology. His dissertations on the foundations of civil law were frequently interpreted as an attempt of going back to the old concept of natural law, which Reinach himself strongly opposed (Spiegelberg 1960, 202).

In the conclusion of the article, it should be also stated that the distinctive feature of the egological theory is the belief that the philosophy of law may not be developed the same way as natural sciences. Adopting such stance in the dispute between the naturalistic and antinaturalistic approach, Cossio touches presently significant issue of both the philosophy of law and the philosophy in general. Essentially, the point is whether they may reach the reliable and objective knowledge which may be obtained through the application of natural science principles or whether one should adopt the hermeneutic attitude. Such attitude enables posing questions about the sense of human life, about the foundations of knowledge studied on the basis of the attitude comprehending the reality of the senses created by human (Zirk-Sadowski 1982, 7). The choice made has weighty implications relating to the manner of philosophical practice, in particular, methodological and axiological implications, hence, also philosophical and legal ones.

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