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The Phenomenological Critique of Law according to Simone Goyard-Fabre

ABSTRACT: Simone Goyard-Fabre is the author of many books on the philosophy of law. The publication that deserves special attention is her book concerning the phenomenological assumptions of law and normativity in general – *Essai de critique phénoménologique du droit*. She provides arguments for anthropological conditions of every normativity, including the order of legal norms. The point of reference for her theses about the phenomenology of law is Husserl's concept of the transcendental subjectivity, in which she finds the validation of the rational and necessary character of normativity that is both found and established by people. In her concept, law is presented as a structured regular product of consciousness (of the transcendental subjectivity) that constitutes the meaning of "legal experience" in accordance with some internal aprioristic necessity. Goyard-Fabre combines references to Husserl's phenomenology and to Kant's legalism – i.e., the concepts that largely elevate rational and anthropological qualities of human achievements – with a critique of legal voluntarism. She disputes with legal positivism and legal constructivism, according to which legal reality is entirely ideal, because it is *constructum*, fiction. Goyard-Fabre emphasises the double "mixed" nature of every law, where the normative rational rule and the existing fact meet. She refers to Husserlian concept of *Lebenswelt*, describing this intersubjective "lifeworld of experience" as a permanent horizon of legal consciousness. Legal intentionality is one of many kinds of intentionality – the "reflexive consciousness of life". Law is the "modality of human life" and belongs to it essentially, disclosing its essential source thanks to the revelation of the "transcendental constitution of what is legal", i.e., the anthropological and spiritual source of any normativity that is available to us and recognised by us.
KEYWORDS: phenomenology of law • transcendental subject • transcendental function of consciousness • world of law • legal experience • normativity • normativeness

Introduction

Simone Goyard-Fabre is the author of many books on the philosophy of law[1]. The publication that deserves special attention is her book concerning the phenomenological assumptions of law and normativity in general –

[1] Cf. S. Goyard-Fabre, *Pufendorf et le Droit naturel*, Paris, PUF, 1994; S. Goyard-Fabre, *Les Embarras philosophiques du droit naturel*, Paris, Vrin, 2002; S. Goyard-Fabre, *Philosophie critique et Raison juridique*, Paris, PUF, 2004; S. Goyard-Fabre, *Re-penser la pensée du droit*, Paris, Vrin, 2007.

Essai de critique phénoménologique du droit[2]. In order to provide arguments for anthropological conditions of every normativity, including the order of legal norms insisted upon, established and fulfilled by the human being, Goyard-Fabre refers to the theses of Edmund Husserl. The point of reference for her theses about the phenomenology of law is Husserl's concept of the transcendental subjectivity, in which she finds the validation of the rational and necessary character of normativity that is both found and established by people. In her concept, law is presented as a structured regular product of consciousness (of the transcendental subjectivity) that constitutes the meaning of "legal experience" in accordance with some internal aprioristic necessity. Already in *Logische Untersuchungen* Husserl indicated logical necessities as the basis of normativity (e.g. chapters *Logic as a Normative and, in particular, as a Practical Discipline*[3], *Theoretical Disciplines as the Foundation of Normative Disciplines*[4], particularly *The concept of a normative science*[5], and *Normative disciplines and technologies*[6]). Furthermore, according to Husserl and Goyard-Fabre, 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. At the same time 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 (*Lebenswelt*). Goyard-Fabre stresses that Husserl's phenomenology is something in which we find the need for rules and respect for human dignity as some aprioristic structures of consciousness that are also essential for law – for what is intersubjective and experienced. Thus, being experienced and fulfilled, "legal experience" would have transcendental subjectivity as its necessary and aprioristic condition. The constitutive activity of the transcendental ego would be fulfilled in practice – in social life with its norms, in the constitution of its meanings and senses[7]. Thus, Goyard-Fabre derives relative and variable legal practices from non-relative transcendental determinants – from aprioristic structures of consciousness, from the original transcendental ego. It is worth to examine its argumentation which makes it possible to connect, in accordance with Husserl's theses, necessary

[2] Cf. S. Goyard-Fabre, *Essai de critique phénoménologique du droit*, Paris, Klincksieck, 1972.
[3] E. Husserl, *Logical Investigations*, vol. I, trans. J. N. Findlay, London, Routledge and Kegan Paul – New York, The Humanities Press, 1970, p. 58.
[4] *Ibidem*, p. 74.
[5] *Ibidem*, p. 81.
[6] *Ibidem*, p. 86.
[7] Cf. *ibidem*, p. 323.

non-relative subjective determinants with the establishment of law that is a set of rules and conventional norms as such. How can culturally, socially and politically relative characteristics of normativity be reconciled with supracultural anthropological determinants? In many modern concepts of law and morality, philosophers have referred to mutual relations of freedom and necessity – to free or necessary choices of the subject having free will. Following Husserl, Goyard-Fabre indicates the communal social establishment of law as a condition for an agreement that is relative and changeable. The variability and relativity of legal rules is, therefore, connected with their conventionality – with the ongoing establishment of the common sphere of intersubjectivity and its meanings. And the anthropological need and necessity of normativity (including legal normativeness as a state of legal norms) is the foundation of the act itself of establishing and fulfilling norms, including the said "legal experience". The need for normativity also concerns social agreement as such – i.e., acting in accordance with certain rules of communication[8]. Before discussing Goyard-Fabre's concept, we will present once again Husserl's basic theses concerning intersubjectivity, because they are the basis of her phenomenological philosophy of law.

In his *Cartesian Meditations*, Husserl assumed the constitution of intersubjectivity as something secondary to the constitution of individual subjectivity. The constitution of intersubjectivity supplements and follows the constitution of "I" – it refers to the constitution of another consciousness available to the cognition of "I" *per analogiam* to the self-consciousness of "I". This is possible due to the assumption of objective supraindividual structures of transcendental consciousness and the constitution of sense that ensure and validate the relevance of the analogy between "I" and "You" and are original towards the "natural attitude" of everyday life. In the *Fifth Cartesian Meditation* Husserl delivers his analyses concerning the constitution of Other, which is analogical to the constitution of Ego presented in the preceding four meditations. His term of "monadological intersubjectivity" is defined there as "transcendental being" and concerns the supraindividual regularities which are found in subjectivity when we ask about the possibilities of creating and co-creating the common human world of life. The conception of intersubjectivity is here considered transcendentally and

[8] Cf. E. Husserl, *Die Frage nach dem Ursprung der Geometrie als intentional-historisches Problem* – the appendix to *Die Krisis der europäischen Wissenschaften und die transzendentale Phänomenologie: Eine Einleitung in die phänomenologische Philosophie* (1936), Hamburg, Felix Meiner Verlag, 2012. The Polish translation: E. Husserl, *O pochodzeniu geometrii*, trans. Z. Krasnodębski, [in:] *Wokół fundamentalizmu epistemologicznego*, ed. S. Czerniak, J. Rolewski, Warszawa, Wydawnictwo IFiS PAN, 1991, pp. 9–37.

linked with the concept of transcendental subjectivity. This "transcendental intersubjectivity"[9] allows us to explain the accordance between common activities and individual projects, the sense of the subject's affiliation to concrete society, but also to the universal human community. Later, in his text *Origin of Geometry*, Husserl wrote:

> Living wakefully in the world, we are constantly conscious of the world, whether we pay attention to it or not, conscious of it as the horizon of our life, as a horizon of 'things' (real objects), of our actual and possible interests and activities. […] Before even taking notice of it at all, we are conscious of the open horizon of our fellow men with its limited nucleus of our neighbours, those known to us. We are thereby conscious of the men on our external horizon in each case as 'others': in each case 'I' am conscious of them as 'my' others, as those with whom I can enter into […] immediate and mediate relations of empathy; […] a reciprocal 'getting along' with others; and on the basis of these relations I can deal with them, enter into particular forms of community with them, and then know, in a habitual way, of my being so related. Like me, every human being […] has his fellow men and, always counting himself, civilization in general, in which he knows himself to be living. It is precisely to this horizon of civilization that common language belongs. One is conscious of civilization from the start as an immediate and mediate linguistic community. Clearly it is only through language and its far-reaching documentations, as possible communications, that the horizon of civilization can be an open and endless one[10].

And further: "civilization is, for every man whose we-horizon it is, a community of those who can reciprocally express themselves, normally, in fully understandable fashion"[11]. Thus, men as men, fellow men – the world understood as *Lebenswelt*, of which men talk, and, on the other hand, language, "are inseparably intertwined"[12]. Also, they are always united inseparably in their mutual relations as the horizon of our thoughts and actions. Thus, Husserl characterises *Lebenswelt* – the world experienced as a sphere of intersubjectivity and considered in its concrete entirety – as a social world available in its ordinary form (prior to the entire science) that is also a certain community of meanings provided together with language – including the language of law.

[9] Cf. A. Schnell, *Intersubjectivity in Husserl's Work*, "META. Research in Hermeneutics, Phenomenology, and Practical Philosophy", 2010, II (1), pp. 10–11.
[10] Cf. E. Husserl, *O pochodzeniu geometrii*, *op. cit.*, pp. 15–16.
[11] *Ibidem*, p. 16.
[12] *Ibidem*.

Law as a normative order

Simone Goyard-Fabre emphasises the radicalism of Husserl's phenomenology because she asks about the formal *a priori* to which every necessity, including the assumed "internal logic of law"[13], would be subordinated. However, research cannot be limited to a description of the situation of law and its subjects, because the phenomenology of law requires the "critical perspective" to be taken over from Husserlian phenomenology. The description of the legal situation should lead from the existence of this situation to the essence of legal issues (*juridique*) – the research of law as such. Goyard-Fabre combines such research with a certain "intuition" concerning what is juridical – legal issues and jurisdictional issues (*juridicité*) at once, which can be found in basis and structures of each legal doctrine[14]. Thus, it is necessary to go beyond the description of a given case of statutory (positive) law that should be regarded as a certain "derivative" form of law towards the sought "essence" of law as such. Goyard-Fabre combines her considerations concerning the essence of law with Husserl's project of pure logic (*Logische Untersuchungen*) – with the rational search for and revelation of some absolute necessity. It must be emphasised that Goyard-Fabre uses phenomenological terminology consistently, characterising a certain situation of positive law as some kind of phenomenon, or "phenomenality"[15]. In other words, current legal acts are certain expressions of this essence of law – the logical, rational and anthropological normative necessity. The situation of statutory law along with individual regulations is defined as legal "facts", but Goyard-Fabre adds another anthropological – cultural aspect to this definition. She calls law a "cultural phenomenon"[16], emphasising the difference between statutory (positive) law, which is submitted to intersubjective objectivisation, and the objective laws of nature concerning "physical facts". Providing arguments for the difference of direct immediate nature and the order of culture that has been built for centuries, Goyard-Fabre uses the term "human nature", which is responsible for the consideration and transformation of natural aspects within the scope of cultural aspects. The task is to provide a bridge between the rationality of the human being and the essential order of being discovered in nature[17] – eventually: between science and empirical data. Husserl's answer to this question was: it is impossible to divide empirical cognition

[13] S. Goyard-Fabre, *Essai de critique phénoménologique du droit*, *op. cit.*, p. 39.
[14] *Ibidem*, p. 41.
[15] *Ibidem*, p. 46.
[16] *Ibidem*, p. 31, p. 299.
[17] *Ibidem*, p. 45.

and essential cognition, but they can – and must – be separated as accidental and as necessary. Goyard-Fabre states that positive law established by people as a cultural fact cannot be treated analogously to reductive and causal laws of nature[18]. However, this has already been stated by Kant in the distinction he made between metaphysical ideas of theoretical reason and ideas of practical reason as certain moral and legal postulates (Goyard-Fabre juxtaposes Husserl's research concerning normativity as a whole on "transcendental eidetics"[19] with Kant's theories concerning the phenomenal nature of human cognition and the need to supplement it with essential aspects. She points out similarities between both of these concepts, although she does this in a relatively questionable manner). Goyard-Fabre expands Kant's conclusion with the premises of Husserl's phenomenology by distinguishing between the "world experience" of what is legal – i.e., "legal experience" within the borders of the specifically human world – from other forms of our experiences[20] and, primarily, indicates the common goal of phenomenological research: the revelation of essentiality in all phenomena available to human cognition, the object of which is nature and products made by the human being. Thus, the aim of the phenomenology of law is to reveal the essentiality of law in its particular indications and phenomena that are available to our cognition in our "legal experiences" and in our individual subjective judgement. As a matter of fact, the question about the essentiality of law refers to the necessity of the rule as such – normativity[21]. Husserl characterised such necessity also as a logical necessity – as the apophantic origin of the rational, logical and anthropological necessary rule. Goyard-Fabre refers this conclusion to specific normativeness – to a norms state of statutory law, thereby adopting her own position in discussions about the status of statutory law – its relativity and necessity. Opting for the essential position – i.e. the revelation of the essentiality of law as such[22] in legal phenomena, Goyard-Fabre objects to legal idealism. She distinguishes between "legal reality" and normative necessity as such. This distinction is an argument against the treatment of the current "legal reality" being observed as the basis of normativity in general, against its consideration as an exemplary

[18] *Ibidem*, p. 28, p. 37: "le droit, qui impose objectivement par ses textes et applique effectivement dans ses jugements un ordre normatif, se présente comme une réalité porteuse de sens".

[19] *Ibidem*, p. 151.

[20] *Ibidem*, p. 46, p. 153: "la vie sociale", "la vie juridique" and "la perception de l'objet physique".

[21] *Ibidem*, p. 46, p. 49.

[22] Cf. *ibidem*, pp. 152–153.

"legal reality", as an illustration of a specific Idea of law[23]. Even though "legal reality" is submitted to description, critique and evaluation, we should treat it as an indication or phenomenon of some hidden essentiality – normativity as something that is necessary. "The legal phenomenon is an externalisation of its internality", and such characterisation of "*de lege lata*"[24] (the law as it exists) results in arriving at this internality, in revealing what is essential in the existence of law as such.

Goyard-Fabre emphasises that we will not find any analyses or deliberations concerning the science of law in Husserl's own phenomenological research that he conducted in his numerous works. "However, phenomenology is such an open philosophical attitude that it can be practiced in most diversified fields"[25], and such "boldness" is typical of phenomenology in general. Legal experiences and facts of "legal reality" that are available as phenomena to us would form an "intentional history"[26] of what is legal in a phenomenal manner. Arriving at the legal phenomenon as such – the essence of legal normativity – would be possible thanks to the examination of this history. According to Goyard-Fabre, phenomenological analyses of existing legal orders should give an answer, among others, to the question about the unity and coherence of legal systems. Thus, the task of a phenomenological analysis should be to reveal the basic structures of what is legal[27] – this would serve as the foundation of the systems of statutory, positive law.

The phenomenological project of law

Simone Goyard-Fabre combines references to Husserl's phenomenology and to Kant's legalism – i.e., the concepts that largely elevate rational and anthropological qualities of human achievements – with a critique of legal voluntarism[28]. The will of people is not a "living source of law". According to her, law is a "program of operation – i.e., a more or less extensive and complex operating scheme aimed at fulfilling a project, an intention. Thus, in constitutive terms, law is always a certain project or purpose". – "There is always some legislative 'intention'". Neutrality and indifference "are impossible – law responds to tendencies, inclinations" and "is always 'oriented'"[29]. Law is not only a "rule giving direction to activity", but it corresponds to

[23] *Ibidem*, p. 46.
[24] *Ibidem*, p. 47.
[25] *Ibidem*, p. 153.
[26] *Ibidem*, p. 154.
[27] *Ibidem*, p. 157.
[28] *Ibidem*, p. 163.
[29] *Ibidem*, p. 167.

a certain direction in thinking and has a certain "tendency" and attitude – "a quasi-vector structure [*quasi-vectorielle*]"[30]. As Goyard-Fabre notices, everything is interrelated in the universe of law, and the legislative and constitutional intention already contains the project of law – a legal project as such – in itself[31]. Goyard-Fabre arguments that this is the reason for which this project does not simply express the hope or finality of positive law.

It is a project of law founded originally on this transcendental, subjective and rational necessity of every normativity. Thus, the project of law derives from cognitive (also experimental) structures of subjectivity and, primarily, from the rationality of the transcendental ego. Perceived in terms of phenomenology, together with the legal intention and the essentiality of legal normativity, this project of law would be a unity "phenomenologically immanent to every notion", every rule or every legal operation. For this reason, in terms of phenomenology, the project of law can be regarded as a "constitutive" principle of applied law that cannot be separated from law as such[32]. Thus, Goyard-Fabre believes there is no need to search for any alleged "living source" of positive law outside this law – for instance, in the assumed transcendence of natural Law[33]. Goyard-Fabre emphasises that "from the phenomenological viewpoint, there is no difference between the 'project of law' and 'law': being the same in nature, both of them are projects – an anticipation of action"[34].

In phenomenological research on law, it is necessary to analyse the normativity and factuality of what is legal [*juridique*]. "Concepts, regulations and operations of law reveal also the deep essence of what is legal"[35]; it is the process of both ideation and fulfilment of the intention. However, the "process of formation of what is legal"[36] cannot be considered associatively, because association is a kind of "mental automatism" focused on relations that are perceived thanks to experience, but do not go beyond it towards what is originally necessary. And "eidetic structures of law express [*exprimment*] some kind of necessity – law is inconceivable and impossible without this guiding motif of essentiality"[37], without the idea of equality and order, without a just balance of parties and reasons. "This necessary requirement

[30] *Ibidem*.
[31] *Ibidem*.
[32] *Ibidem*.
[33] *Ibidem*.
[34] *Ibidem*, note 26.
[35] *Ibidem*, p. 174.
[36] *Ibidem*, p. 175.
[37] *Ibidem*.

of law […] is a formal and pure principle of everything that is legal, so no entirely empirical process – i.e., according to Husserl, relevant to psychologism or naturalism – can explain the constitution of law"[38]. According to the premises of phenomenology, law must be examined – starting with a search for its essence and its structural principles – "as the synthesising activity of judgement [*jugement*]. In other words, positive law is constituted thanks to interconnections [*chaîne*] of synthetic judgements"[39]. Referring to Kant's rather than Husserl's theses, Goyard-Fabre concludes that there are actually "two kinds of legal acts: some of them are analytic (*praedicatum inest subjecto*), whereas others are synthetic, that is constitutive, because the relation established by them is a sort of composition"[40], or a complex system. Goyard-Fabre postulates phenomenological research on law that would combine the descriptive attitude and the reflexive attitude – the one that requires an insight into subjectivity, in consciousness and its structures. This plan would avoid "illusions of dogmatic metaphysics"[41], but also scepticism – it would remain critical in its search for "*ultima ratio* of the legal being"[42], the indication of which would be its main purposes. Goyard-Fabre tries to consider law "from a new viewpoint typical of transcendental logic"[43] and not to ask about law in its obvious social, communal objectivity. Instead, she asks about the fundamental intention that founds what is legal, because this intention is the carrier of the sense that we find in the essence of law[44]. It is easy to notice that research postulated by Goyard-Fabre refers to Husserl's phenomenology, as well as Kant's philosophy, the theses of which are often indicated; for instance, the criticism of the phenomenology of law is based on "critical consciousness". Goyard-Fabre postulates also a sort of "intentional epistemology of law"[45], the aim of which is to indicate and characterise the transcendental phenomenology of what is legal. It would examine the intentions that would have to be found in legal acts and explain the finality of law by indicating these intentions as the fundamental beginning of what is legal[46]. The epistemology of law would also explain the regulative function of law as well as the criterion of regularity of its rules, principles and

[38] *Ibidem*.
[39] *Ibidem*.
[40] *Ibidem*, pp. 175–176.
[41] *Ibidem*, p. 199.
[42] *Ibidem*, p. 200.
[43] *Ibidem*.
[44] *Ibidem*.
[45] *Ibidem*, p. 203.
[46] Cf. *ibidem*, p. 206.

adopted norms[47]. Goyard-Fabre indicates here the necessity of considering both general rules (regarded as objective) and individual rules[48] giving legal prerogatives to persons. Goyard-Fabre indicates that the issue of individual rules, particularly "subjective rights"[49], remains both legal and political, being closely intertwined with current legal practice.

Legal consciousness and intentionality

Simone Goyard-Fabre proposes phenomenological research on law and disputes with legal positivism and also constructivism, according to which legal reality is entirely ideal, because it is *constructum*, fiction[50]. According to Goyard-Fabre, concepts used for constructing law mean and have a meaning only in a close relation – in the meeting of what is legal and what is material, i.e. factual[51]. She gives the example of commercial law as a law in which the concept of agreement prevails – the law being established and the existing fact[52] are visibly intertwined in the agreement, and both of these elements are interdependent and influence each other in stipulations of positive law. The interdependence of law and fact is always provided within a certain social world and its culture, and law always carries some content[53]. This is why Goyard-Fabre distinguishes between the phenomenological intention of the search for the original essentiality of law as a sort of normative necessity and the formal abstraction of law and what is legal. Husserl's phenomenology, which combines research on subjective experience with research on consciousness, and Kant's assumptions concerning two "roots" of cognition constitute relevant points of reference in Goyard-Fabre's concept of law, as Goyard-Fabre emphasises the double "mixed"[54] nature of every law, where the normative rational rule and the existing fact – or the fact that is about to exist – meet. Husserl considered the status of scientific concepts as strictly connected with human experience and factuality – with the real object of research towards which the subject of cognition and action is oriented thanks to its intentional consciousness. Goyard-Fabre argues that this intentional nature of the object-subject relation is stricter in the case of concepts of law, because the latter reveal an intentional relation – the intentionality

[47] *Ibidem*, p. 210.
[48] *Ibidem*, pp. 210–211, p. 219.
[49] *Ibidem*, p. 220.
[50] *Ibidem*, p. 265.
[51] *Ibidem*, p. 267.
[52] *Ibidem*, p. 268.
[53] *Ibidem*, p. 270.
[54] *Ibidem*, p. 271.

that attaches human thought to a real object – more distinctly than concepts of science do. According to Goyard-Fabre, "legal thought is a concrete thought"[55], an intense effort oriented towards human experience; it does not take any purely formal act into account, and what we eventually find in it, is the essence of consciousness – the essence that transcends outside in the subject's acts, particularly in the fulfilment of semantic intentions and the constitution of the objective sense. "Without these 'intentions', legal thought would remain – as Husserl says – 'anonymous', that is, not only empty, but devoid of sense"[56]. Goyard-Fabre refers to Husserlian concept of *Lebenswelt*, describing this "lifeworld of experience"[57] more specifically as "a permanent horizon of legal consciousness that finds – exactly there – its content, its fulfilment and its 'obviousness'"[58]. Legal intentionality turns out to be one of many kinds of intentionality – the "reflexive consciousness of life"[59]. On the other hand, legal synthesis is an oriented thought thanks to which human experience can be reconstructed or constructed in a structured manner. It is this synthesis that reveals some kind of teleology immanent to law as a whole, because the legal and juridical world is a part of the lifeworld, similarly to order being a part of spontaneity[60]. According to Goyard-Fabre, law remains "always in motion"[61], and legal consciousness is always oriented towards what is yet to occur – towards the future.

> Thus, law is an expression of logos that is located in the experience of people – not because their behaviours are amorphous, but because this natural structure of life is insignificant for legal consciousness. […] The area of human individuality is an area of intersubjectivity, where people […] find it very difficult to communicate and connect with one another very rarely. Intersubjectivity is not the opposite of subjectivity; living together is not a limitation of individual life and it is more difficult to introduce a legal change concerning the entire group than a legal change relating to its individual, particular members[62].

For this reason, private law turns out to be the most developed type of law today. Goyard-Fabre emphasises that "the foundations of legal phenomenon hide human ontology and the metaphysics of culture". – "The need for order,

[55] *Ibidem*.
[56] *Ibidem*.
[57] *Ibidem*.
[58] *Ibidem*.
[59] *Ibidem*.
[60] *Ibidem*.
[61] *Ibidem*, p. 272.
[62] *Ibidem*.

which gives rise to society and culture at the same time, is, therefore, a certain obligation and testifies to the future efficacy of reason"[63]. Thus, the logic of law is a kind of logic that expresses and explains the aforementioned meeting of fact and law. This means that it cannot be formal logic (for example, in Husserl's sense), but it would be, according to Goyard-Fabre, ontological logic that recognizes "the invincible structure of rationality as a guide to human conduct"[64]. It is because of this logic that the normativity of what is legal is revealed and explained, with its normative and legal regulations being imposed on facts, whereas the only source of normativity – not only the normativeness of law – is the "normative unity of thought"[65], i.e., essential normativity being revealed in transcendental consciousness.

Transcendental legislation

Transcendental legislation is characterised by Simone Goyard-Fabre as transcendental fundamentals of "every system of positive law"[66]. She recognises the hierarchy of norms as the basic directive principle of law and all rules of law. The hierarchy of rules or competent bodies and institutions is synonymous to the order of law in all legal systems. And the intentional epistemology of law reveals that law is an act or accomplishment thanks to which the "intention of the order of the spirit is revealed"[67]. Thus, the fact of establishment of legal organisations being considered with regard to its principles is submitted to a certain apriority of thinking. Goyard-Fabre notices that the order of law can be characterised in the same way in which Husserl wrote about the axioms of geometry: that it is principally [*principiellement*] the result of the formation of the source sense (*Sinnbildung*) and, at the same time, this formation is always prior to the order of law[68]. For this reason, the order of law cannot be considered as simply constituted or even as available for constitution, because its obviousness is prior to its formulation. Furthermore, the order of law is a part of "activity constituting of the spirit that gives its formal aspect to it"[69]. As has already been mentioned, the founding principle of law is the hierarchical idea, or hierarchicality as such, which would have its source in the "transcendental function of the

[63] *Ibidem*, p. 273.
[64] *Ibidem*, pp. 273–274.
[65] *Ibidem*, p. 274.
[66] *Ibidem*, p. 289.
[67] *Ibidem*, p. 290.
[68] *Ibidem*.
[69] *Ibidem*.

spirit"[70] that also makes law possible. This does not mean that this spiritual requirement of order is fulfilled in the hierarchical order of the legal system, but that teleology – purposefulness [*fin*] immanent to law – can be understood only when it is oriented towards its origin[71]. To supplement Goyard-Fabre's argumentation, we could say: when the final cause of what is legal is discovered. As can easily be noticed, Goyard-Fabre refers also to the phenomenology of Hegel's spirit[72] in her concept of the phenomenology of law (the "transcendental legislation of the spirit" as the basis for all legal accomplishments – the status of legal institutions). And the concept of ontological logic and presuppositions concerning the final cause refer the reader of Goyard-Fabre's works to Aristotle's philosophy. Still, however, the basic point of reference is Husserl's phenomenology and transcendentalism. For this reason, this "fundamental normativity" that we discover in each legal system as its "immanent requirement"[73] finds its subjective sources in transcendental subjectivity and its cognitive structures – in the apriority of reason. However, "law is formed by a necessary combination of *a priori* and *a posteriori* – law needs fact"[74], and aprioristically essential and subjectively available normative hierarchicality needs confirmation and fulfilment, i.e., the factuality of what is communal and intersubjective; because law is the "modality of human life" and belongs to it essentially[75], disclosing its essential source thanks to the revelation of the "transcendental constitution of what is legal"[76], i.e., the anthropological and spiritual source[77] of any normativity that is available to us and recognised by us.

Conclusion

It must be stressed that Simone Goyard-Fabre refers to Husserl's theses concerning normativity and normative fundamentals of law – the theses that we find at the beginning of the 1st volume of *Logische Untersuchungen*. However, it also refers to Husserlian subsequent definitions of intersubjectivity as a field of establishment and realisation of norms. As we know – in his primary theses concerning transcendental fundamentals of norms – Husserl

[70] *Ibidem*.
[71] *Ibidem*.
[72] Cf. G. W. F. Hegel, *Phenomenology of Spirit*, trans. by A. V. Miller with analysis of the text and foreword by J. N. Findlay, Oxford, Clarendon Press, 1977, *passim*.
[73] S. Goyard-Fabre, *Essai de critique phénoménologique du droit*, *op. cit.*, p. 296.
[74] *Ibidem*.
[75] *Ibidem*, p. 317.
[76] *Ibidem*, p. 300.
[77] Cf. *ibidem*, p. 323.

indicated eidetic and logical foundations of every possible normativity. On the other hand – in his theses concerning intersubjectivity – he considered the sphere of intersubjectivity (*Lebenswelt* as something distinct from the world of natural attitude) as a sort of task. This is the task of forming a community of senses and meanings that are culturally relative and distinct from ideal and non-relative meaning (*Bedeutung*). In Husserl's opinion, the normativity of law and institutions established in the field of intersubjectivity is entangled in a twofold manner – it is based on what is transcendental, but its fulfilment is submitted to changes occurring in intersubjectivity. What occurs in intersubjectivity, is the objectivisation of what originally derives from subjectivity, i.e., what has transcendental sources. Goyard-Fabre recognises and emphasises that, by acting in this manner, Husserl can reconcile: 1) eidetic, essential normativity considered by means of logic, and 2) socially and culturally relative normativity that manifests itself in the order of statutory law (as a legal normativeness). It must be remembered that Husserlian theses concerning intersubjectivity evolved from theses concerning the corporal determinant of interpersonal relations[78], through theses concerning intersubjectivity as related to emotions (*Einfühlung*) and imagination (*Phantasie*)[79], to the late theses concerning intersubjectivity as a jointly created community of senses and meanings[80]. The review of complicated relations between legal normativity (including normativeness as a state of legal norms) and Husserl's concept of intersubjectivity – so complicated and diversified – must be left as a separate task and the issue of a separate, different text.

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[78] E. Husserl, *Zur Phänomenologie der Intersubjektivität*. Texte aus dem Nachlass, I Teil, 1905–1920, hrsg. I. Kern, Den Haag, Martinus Nijhoff, 1973, among others *Der Leib konstituiert sich als Körper unter Körpern* (1916), p. 331.

[79] *Idem*, *Zur Phänomenologie der Intersubjektivität*. Texte aus dem Nachlass, II Teil, 1921–1928, hrsg. I. Kern, Den Haag, Martinus Nijhoff , 1973, among others pp. 185–190, p. 484, p. 516.

[80] Cf. *idem*, *Die Frage nach dem Ursprung der Geometrie als intentional-historisches Problem*, *op. cit.*, *passim*.

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