

Special Workshop No. 27

## **The Experience of Law**

Tuesday 9 July, 08.30-13.00 & 14.00-18.30, HS 2

**Convenors:** Natalia Satokhina, Oleksiy Stovba

**Language:** English

**Contact:** nataliasatokhina@gmail.com

### **Abstract:**

One of the key motifs of modern philosophy is the desire to view the world not as an object of our cognition or our technical domination, but as something that happens to us. However, what does this mean for law? Is it possible to reflect on the basic question of the philosophy of law in a completely new way?

The workshop intends to consider law not as a system of norms or a normative order, but primarily as a certain experience, or a way of our engagement with the world. Such an approach can be designated as phenomenological if by phenomenology we mean considering experience in the widest sense, and as hermeneutical, to the extent that hermeneutic philosophy is a natural stage in the development of phenomenological thought, which deals with understanding as experience of meaning. At the same time, a dialogue with other possible perspectives of legal experience can be very fruitful. In what way is legal experience thought of within psychoanalysis, existentialism, communicative-discursive philosophy, legal positivism, legal realism, postmodern legal theory, etc.?

Possible directions of questioning are:

1. Epistemological: How is comprehension of legal experience possible at all? What the phenomenology of law is? What trends exist within it? What the phenomenological hermeneutics of law is? What other approaches can contribute?
2. Ontological: What an experience of law is? Can it be reduced to a normative experience? And is it possible outside the experience of normativity? Who is experiencing? What are the conditions for the possibility of legal experience?
3. Anthropological: How is experience of law rooted in experience as such? At what level of experience is law experiencing: psychophysical, transcendental, hermeneutical or some other? What is the specificity of legal experience proper, in contrast, for example, to political or moral experience? Is there a relationship between experience of law and experience of gift, recognition, promise, forgiveness, etc.?

### **Programme:**

Bjarne Melkevik (University Laval, Quebec): “An Epistemology of Experience in the Legal Field”

Michael Antonov (HSE University – Saint Petersburg, Russia): “Conceptual Experiences of Law”

Ricardo Evandro Santos Martins (Federal University of Pará – UFPA, Brazil): “Law as Mimetic Experience”

Oleksiy Stovba (Yaroslav Mudryi National Law University, Ukraine): “Experience of Law and Legal Experience”

Natalia Satokhina (Yaroslav Mudryi National Law University, Ukraine): “Experience of Law and Experience of Lawlessness: Hermeneutic Perspective”

Roberto Redaelli (Friedrich-Alexander University Erlangen-Nürnberg, Germany): “The Experience of Normativity and the Normativity of Experience. Towards a Genealogy of Legal Experience between Anthropology and Neo-Kantianism”

- Igor Nevvazhay (Saratov State Academy of Law, Russia): “On Genesis of Normativity”
- Lorenzo Passerini Glazel (Università degli Studi di Milano-Bicocca, Italy): “Deontic Noema. A Contribution to a Theoretical Analysis of Normative Experiences”
- Edoardo Fittipaldi (The University of Milan, Italy): “Psychology and Leon Petrażycki’s Concept of Legal Experience”
- Natalia Vasilyeva, Elena Timoshina (Saint Petersburg State University, Russia): “Continental Legal Realism: Legal Validity as a Psychological Experience”
- Dmitrii Tonkov (Institute of State and Law of the Russian Academy of Sciences): “Experience and Reason in American Legal Realism”
- Kostiantyn Gorobets (University of Groningen, Netherlands): “Who’s Reasons? Experience of Authority of International Law”
- Sergiy Maksymov (Yaroslav Mudryi National Law University, Ukraine): “The Experience of Human Dignity”
- Miaofen Chen (National Taiwan University College of Law): “The Aesthetics of Law: Interpreting Memory and Restorative Justice”
- Paulo Sérgio Weyl Albuquerque Costa, Lívia Teixeira Moura Lobo (Federal University of Pará – UFPA, Brazil): “The Law in the Philosophy of Liberation: Between Recognition and Responsibility”
- Evgenii Tonkov (Barristers’ Firm “Tonkov & Partners”, Institute for Advocacy, Saint Petersburg, Russia): “Individual Experience as a Source of Law”

*Bjarne Melkevik (University Laval, Quebec)*

### **An Epistemology of Experience in the Legal Field**

This paper asks whether we can acquire experience in the legal field and what is the meaning of any such experience. What exactly can we experience and how can we acquire experience in the legal field? It additionally questions the role of legal theorists and legal philosophers who discuss the law and the legal field without necessarily having any experience in that said field. What then is their role and how authoritative should they be?

*Michael Antonov (HSE University – Saint Petersburg, Russia)*

### **Conceptual Experiences of Law**

According to the sociology of Georges Gurvitch, legal sphere can be represented as consisting of several levels. These levels go upside down from legal texts, institutions and their activities, down to the most profound levels which disclose individual and collective experiences of law and their frameworks. These profound levels reflect deep societal conventions (collective mind, in Gurvitch's terms). These latter express themselves in styles of legal thinking and in conceptual frameworks that disclose meanings of legal concepts and connect these meanings with respective texts, their interpretations and applications by lawyers. This Gurvitch's “sociologie en profondeur” can be illustrated by the example of two paired concepts in Russian law: state/sovereignty and law/human rights. The conceptual background of Russian law is characterized by statist conception of law, which justifies unchecked power of exception and strong statehood as a political ideal. This background had been formed historically in the tsarist Russia; its contours have been ideologically reshaped but not changed in the Soviet era. The “Great Retreat” (N. Timasheff) in the 1930s symbolized a return to statism in legal thinking. This style presupposes that legal rights are derived from the state and its will, while the state is identified with the person of supreme political ruler. In

the Soviet period, human rights did not find their place in the conceptual body of Soviet law, except for their ideological use in international law. Neither was the nature of state problematized, which always was a difficult topic in the Marxist social philosophy. When the ideological constraints fell away in the 1990s, introducing new legal conceptions and political ideals seemed to be an easy matter, human rights became parts of the Russian Constitution. As well did the term of sovereignty, which became a new tool for conceptualization of state. However, over the years the conceptual background of the post-Soviet Russian law resisted Western transplants, including “human rights” and “sovereignty”. This resistance did not involve an open rejection, but rather their essential reinterpretation in line with the prevailing legal thinking. Furthermore, it helps to reveal profound levels of Russian law which are reflected in legal education and scholarship, in legal practice and mind-sets. In its terms, sovereignty was thought not so much as a feature of the state, but rather as the underived and unlimited power of political rulers (*samoderzhavie*). This power, in its turn, was taken to represent the source of validity of legal norms – these latter would be effective insofar as they rely on the political will and are supported by it. In this light, human rights are legal permissions granted by the state to its citizens, and cannot be conceived as “rights against the state” (M. Moyn). Such interpretations illustrate the differences of intellectual frameworks of Russian law and of Western legal systems from which Russian law borrows respective concepts and conceptions. This perspective problematizes the extent of possible Westernization of Russian law.

*Ricardo Evandro Santos Martins (Federal University of Pará – UFPA, Brazil)*

### **Law as Mimetic Experience**

Since the phenomenological opening by Husserl and since the Critical phenomenology of the early Heidegger, the Neo-Kantian project to give autonomy to the Cultural science lost place after the “ontological turn” drawn up by *Sein und Zeit* (1927). Heidegger “discovered” that the understanding cannot be faced as a “general technic” or as “Human science method” (Dilthey), but as the way of being of *Dasein* in-the-world. Thus, assuming that the interpretative understanding is not a matter of method, but something that derives from the *Dasein*, Gadamer developed Heidegger’s philosophy with his own Hermeneutic philosophy. And between the tasks of “destroying” the modern aesthetic and building the notion of “linguisticity” (*Sprachlichkeit*), in this abstract I aim to know the consequences of this “hermeneutical turn” in humanities, specifically in Legal science. Thus, I ask: In his *Wahrheit und Methode* (1960) and others late texts, how could Gadamer cause impacts on the “experience of Law” as Legal science and its object of research? My hypothesis is: Law can be faced as a (linguistic) “game” that could be understood by *mimesis* as a possible “experience of “Law”. Therefore, my objective is to sustain how could be possible to improve the experience of Law beyond the descriptive attitude from Legal positivism (*question facti*).

*Oleksiy Stovba (Yaroslav Mudryi National Law University, Ukraine)*

### **Experience of Law and Legal Experience**

It seems that during past 20 years the gap between analytical and hermeneutical trends in the philosophy of law is growing. The reason for such a situation is the lack of the common conceptual dimension and language as the ground of the dialogue between them. Otherwise, instead of the discussing the reason of law, its essence, modes of Being or some others fundamental issues, philosophy of law turns into the endless debates about the concept of law, its connection with morality or racial, gender or some other kind of the politically correct discourse.

So, to avoid the scholastic debates, contemporary philosophy of law has to find its original dimension, where the analytical and hermeneutical researchers both would be able to speak with

one another reasonably. Such a dimension as the common field of legal discussing is human experience, when the law encounters the man and man encounters the law.

This experience is the starting point, where the legal researcher, whether the analytical or hermeneutical, begins to think toward the reasoning of law. The difference between the two trends of the legal philosophy is rooted in the way, in which the legal relevant experience becomes the focal point of its attention.

In the analytical tradition this experience is necessarily connected with the legal institutions, such as norms of legislation, decisions of courts and some other legal bodies, relations with the state officials and many other situations, when the human being encounters itself among the various legal entities. The experience of Being among the legal entities could be named “legal experience”.

In the hermeneutical legal philosophy the human experience of law is quite different. There is no necessary connection with the legal institutions. Instead of that, human being experiences law as the part of its ordinary Being-with-one-another, which is more originally than any contact with the legal norms or officials. The focal point of this experience is the reason of the Being-with-one-another, which is always unique and concrete. This kind of experience could be named “experience of law”.

But, despite the difference, both kinds of experience have the common starting point – human being, who is concerned about what’s going on in his life, what reason/meaning have these legal/law events and occurrences and so on. In any case, even if the ways of the hermeneutical and analytical traditions lead in the opposite directions, they have the common beginning, which could serve as the field of the dialogue between them.

*Natalia Satokhina (Yaroslav Mudryi National Law University, Ukraine)*

### **Experience of Law and Experience of Lawlessness: Hermeneutic Perspective**

In the modern world with its widespread outbursts of violence and the multiple phenomena of actual lawlessness (which is equal to rightlessness) that dissolve law in politics, is it still appropriate to talk about law? Apparently, if it is still possible to think of the specifics of the legal itself, then it will be about the experience of law. In other words, what is law not as the object of our cognition or our technical domination, but as what happens to us? What is it that happens to us in general? What is the place of law in our experience? And how is the experience of lawlessness possible? In the end, are we not dealing with the described by Hannah Arendt the bankruptcy of common sense, or bankruptcy of understanding, in the modern world, where ideas are being dissolved by facts?

Phenomenological hermeneutics (Martin Heidegger, Hans-Georg Gadamer, Paul Ricoeur) thinks our fundamental experience as an experience of understanding, or an experience of meaning, which is not one of our abilities, but the original way of our being in the world by which we come to terms with reality. At the same time, there is no meaning as such, either in the world or in a man himself; meaning is always a meeting, and the condition for the possibility of any experience is a fundamental openness and readiness to recognize the Other in his claim to truth, i.e. to recognize he to be equal to myself in freedom and dignity. The expression of this mutual recognition is norms, which guarantee everyone the minimum public recognition of his equal freedom and equal dignity, i.e. guarantee the possibility of movement from non-recognition to mutual recognition through the institutions. Thus, experience of law is an inherent aspect of our being in the world. However, being immanent to experience, the possibility of recognition is always accompanied, like a shadow, by the risk of non-recognition. In this risky zone, halfway from non-recognition to the state of peace, we are dealing with law.

My assumption is that taken hermeneutically, experience of law is a movement from non-recognition to mutual recognition by people of each other in their freedom and dignity. The latter are not simply postulated conventionally, but are assumed by the very structure of fundamental experience. In turn, radical non-recognition experienced by people in situations that are

conceptualized in modern philosophy as a “state of exception” (for instance, war or dictatorship), cannot be inscribed in legal reality either as an Agambenian “inclusive exclusion” or in any other capacity, since, as an experience of political violence, it is essentially antithetic to legal experience as an experience of recognition inspired by the utopia of peace.

It seems that reflection on law not from the point of view of its institutional side, but of experience is the only perspective that allows thinking of law as such (as opposed to politics) in its non-violent specificity.

*Roberto Redaelli (Friedrich-Alexander University Erlangen-Nürnberg, Germany)*

### **The Experience of Normativity and the Normativity of Experience. Towards a Genealogy of Legal Experience between Anthropology and Neo-Kantianism**

This paper aims at identifying the anthropological conditions in which the normative sphere emerges. As such, the scope is to trace a veritable genealogy of the normative experience, whereas “genealogy” is intended as a conceptual reconstruction of the constitutive thresholds, of the structures of legality set forth by this kind of experience. In this perspective, at first sight, the goal may seem contradictory: we aim to determine the rules, the principles, which underlie and structure the human experience of the sphere of norms, i.e. the actual sphere of legality. The apparent contradiction, the paradox of law is resolved when we assume a double research scope embracing the *normativity of human experience* as much as *the human experience of normativity*, whereby we refer the two idioms respectively to the intrinsically normative nature of the anthropic world and, at the same time, the experience man has of the prescriptive domain, specifically in the field of law.

In order to pursue our goal the first tool of inquiry is provided by the evolutionary anthropology advanced by Michael Tomasello; the second is offered by the social philosophy proposed by Heinrich Rickert.

*Igor Nevvazhay (Saratov State Academy of Law, Russia)*

### **On Genesis of Normativity**

The humanities study not actual human behaviour, but normative behaviour corresponding to deontological modalities. Thus, the notion of norm is the base of any humanitarian knowledge, in particular, philosophy of law. In the report semiotics approach to definition of norms is discussed. Using results of investigations of norms by P. Pagin (1), R. Wedgwood (2), and A. Wikforss (3) we define a norm as unity, link designating and designated. Offered approach allows solving a problem of construction of the synthetic or integrative theory of law (Petrazhitsky L., Berman J., Hall J., etc.). We prove the thesis that synthesis of various legal concepts demands an exit out of limits of competence of legal beliefs. In this regard we offer the general concept of norms, which would allow describing norms in three fundamental law concepts such as natural, normative and sociological one.

The semiotics theory of norms allows us to give the original classification of norms based on different relations of a subject to itself, to the Other as an object, and to the Other as a subject. These norms, respectively, are designated as norms “for itself”, norms “for the Other” and norms “with the Other”. Accordingly different kinds of norms are connected with different types of human activity. Creativity is a process of birth of a subject of knowledge as a unity of existing and due. In the process of creativity a person generates norms “for itself”, and one generates itself as normative being. Here a norm is characterized by coincidence, identity of designating and designated (that is peculiar to a symbol). Human rights are such kind of norms. In situations when a person attitudes to the Other as to an object of management, regulations, it generates norms “for the Other”. In this kind of norms a designating determines a designated. Finally in communicative acts their agents are independent individuals who in communicative activity on

the basis of processes of an equivalent exchange by services give rise to common norms “with the Other”. In this type of norms a designated determines a designating. Offered classification of norms allows showing ontological independence of three fundamental concepts of law – natural, positivistic and sociological one. These concepts are “coordinates” of modern law. And the semiotics concept of norms allows to see common features of process of formation of various norms and to prove idea about existence of uniform generative structure of a human normativity.

*Lorenzo Passerini Glazel (Università degli Studi di Milano-Bicocca, Italy)*

### **Deontic Noema. A Contribution to a Theoretical Analysis of Normative Experiences**

Many theories of law tend to consider legal norms mainly as, or in strict connection to, linguistic entities, such as normative sentences, normative propositions or normative speech acts. The focus of these kinds of theories is generally laid on norm-creating acts: they almost completely disregard the other side of normative phenomena, that of normative experience. While this approach may be legitimate in a dogmatic perspective, it appears inadequate to give a complete account of what law is in its entirety as a human and social phenomenon, and it falls short of explaining many aspects of the actual operating of norms on behaviour, as well as the emergence of customary legal norms independently of any norm-creating speech act.

Starting from the consideration that normative and legal phenomena generally intersect different orders of phenomena, such as those of linguistic, social, logical, psychological, practical, behavioural and ethical phenomena, I will first distinguish, in an ontological perspective, seven different kinds of entities that in different contexts can be called “norms”: deontic sentences, deontic utterances, deontic propositions, deontic states-of-affairs, deontic behaviours, deontic objects, and deontic noemata. I will then focus on the phenomenological notion of a deontic noema – of a norm as an intentional object – and I will suggest that this notion can be fruitful for the analysis of normative experience – and of the experience of law in particular – by briefly focusing on the analysis of normative experience in Leon Petrażycki.

However, since a subject can act in consideration of a norm without complying, or feeling obliged to comply, with that norm (when stealthily stealing something, for instance, as Max Weber suggests), I will argue that a deontic noema is not necessarily the correlate of a genuine deontic noesis – of a truly normative experience: it can also be the correlate of a non-deontic noesis, of a mere knowledge of the norm, as Ota Weinberger seems to suggest. This dual dimension of the experience of norms can explain many aspects of law; but every reference to a norm, be it a deontic sentence, a deontic proposition, a deontic utterance, a deontic state-of-affairs, a deontic object, a deontic behaviour or a deontic noema, presupposes at least the possibility of having a correlated normative experience. One last step of my presentation consists in the analysis of the possible emergence of a legal norm from the reaction to the violation of a norm that is the mere mental object of a spontaneous normative experience (nomotrophic behaviour *am Phantasma*).

*Edoardo Fittipaldi (The University of Milan, Italy)*

### **Psychology and Leon Petrażycki’s Concept of Legal Experience**

As is known, Petrażycki conceptualized law as the class of imperative-attributive experiences (*pereživanija*), which he also called legal, or jural experiences. In this paper the author explores the relationship between Petrażycki’s concept of a jural experience and the modern concepts of anger and sense of entitlement. The author contends that (1) Petrażycki’s jural experiences should be understood as entitlement experiences, that (2) entitlement experiences, in turn, should be understood as anger experiences, and that (3) contemporary psychologists specialized in those emotions could greatly benefit from Petrażycki’s insights on law.

*Natalia Vasilyeva, Elena Timoshina (Saint Petersburg State University, Russia)*

### **Continental Legal Realism: Legal Validity as a Psychological Experience**

Ideas of law as a certain – to be more specific, psychological – experience form the basis for the teachings of such legal philosophers as Leon Petrażycki (and some of his pupils), Alf Ross (as well as Axel Hägerström and his prominent followers) and Enrico Pattaro – who could be considered representatives of so called Continental, or psychological, legal realism.

The main tenets of psychological legal realism are identified by its modern representatives as following: (1) strict realism denying that law exists in any unique reality of “ought” different from the physical or psychological one; (2) careful legal reductionism; (3) immediate irreducibility of law as a psychological phenomenon to physical phenomena, behavioural actions; (4) indirect reducibility of norms to unique legal emotions; (5) law’s objective nature experienced by an individual arises from the rationalization of his mental experiences; (6) distinction between the internal psychological (validity) and external behavioural (effectiveness) aspects of norms’ existence; (7) the hypothesis about the existence of unobservable psychological phenomena underpinning law is used to explain observable legal phenomena; (8) distinction between truth and correctness.

This school of thought analyzes ontological questions related to the specifics of legal experiences, nature of normativity and legal validity and so on. The latter may in a way be seen as a basic problem of legal ontology, which embraces all other relevant interrelated questions, such as the normativity of law, its efficacy, legitimacy, justice, the relationship of law and coercion, law and morality, etc. In psychological legal realism legal validity is considered to be an impulse in human brains, a psychological (or mental) experience.

It is possible to trace the common line of reasoning on the problem of legal validity within psychological realism from Petrażycki to Ross to Pattaro. 1) Legal validity is based on psychologically experienced self-binding: Petrażycki’s self-sufficing motivation, Ross’s disinterested motive and Pattaro’s perception of norms as “binding per se.” 2) Internal existence of a norm (in psychological reality) is considered a motive of behaviour. A norm appears to consist of two parts: an intellectual representation of behaviour (Petrażycki’s action idea, Ross’s intellectual representation of certain patterns of behaviour or abstract idea content and Pattaro’s image of a certain type of action or deontic propositional content) and specific emotions, connected to it. External existence of a norm is a behavioural aspect in the observable physical reality of human behaviour, which allows hypothesizing about the existence of unobservable psychological phenomena underpinning law. 3) The idea of a unique non-empirical “mystical and authoritative” binding force of law is explained through a psychological objectification of validity experiences: Petrażycki’s naive projection, Ross’s conceptual rationalization and Pattaro’s catholodoxia.

While the psychological approach to legal phenomena and legal experience roots back to the beginning of the 20th century to the works of Leon Petrażycki, it developed over time, staying relevant, and has even more potential to thrive in the 21st century, when humanity is ready to drastically expand its knowledge of the human brain and psyche.

*Dmitrii Tonkov (Institute of State and Law of the Russian Academy of Sciences)*

### **Experience and Reason in American Legal Realism**

American legal realists condemned the formalism, abstraction and conservatism of traditional jurisprudence. One of their main research directions was the problem of legal certainty. Realists sought for methods different from the traditional doctrine for a more accurate prediction of judicial decision while arguing that rules of law or precedents are quite often abstract from the factual situation of their creation. They also were interested in search for social and psychological factors that affect the judge.

The famous formula of the “oracle of the common law”, Sir Edward Coke, is that reason is the life of the law and the common law itself is nothing else but reason. The great predecessor of legal realists, Oliver Wendell Holmes, said that the life of the law was experience and not logic. The founder of the movement for “sociological jurisprudence”, Roscoe Pound, observed that Coke and Holmes did not differ so much as might be supposed, if we look into the matter more critically: what Coke called reason was a reasoned treatment of experience (hence, the law is experience developed by reason). The American legal realists argued that logic and analogical reasoning can lead to several possible results in a given case. Thus, doctrinal rules must be more empirically based and narrow in application.

It is noticed by Aristotle that young man can become good mathematicians but they are not suitable for the practice of politics: mathematics is concerned with universals, its objects exist by abstraction and apply without regard to context; politics, in contrast, concerns itself with particulars and its judgments vary according to context. This observation is offered as an example of the distinction between science and art. Realists proposed that law is more art than science: law follows the empirical rules and pays attention to the circumstances of the case.

Moreover, law should be learned primarily through experience. Both wings of the movement, moderate “rule-sceptics” and radical “fact-sceptics”, with Karl Llewellyn and Jerome Frank as leading representatives, insisted on educational reform suggesting, *inter alia*, apprenticeship, legal clinics, regular court visits, experienced law teachers with actual practice of law, integration with psychology, economics and other social sciences. Realists’ argument that legal learning should be primarily experiential sounds as radical today as when it was first stated in 1930s.

Law is bound to be a matter of words to a very considerable degree. In law as logic we use words as elements of mathematics: if they are ambiguous, our equations will be inexact. In law as experience the terms are less important: as Max Radin quoted, the words are “the daughters of earth” and things are “the sons of heaven”. American legal realism tried to focus their attention on the “law as experience” but without forgetting the “law as logic”. Legal realism’s central concept that the rules of law alone do not decide the case had an important impact on all subsequent legal movements of the American legal thought and could be useful in the present day.

*Kostiantyn Gorobets (University of Groningen, Netherlands)*

### **Who’s Reasons? Experience of Authority of International Law**

The conventional scheme of relations of authority assumes that those in the position of authority may provide those subjected to authority with a special type of reasons for action – protected reasons. Domestic law reflects this general conceptual framework. State officials mediate the formation, application, interpretation, etc. of legal norms attaching to them weight as to reasons. Individuals under the authority of a state, in their turn, are believed to regard these norms as reasons that exclude other relevant (and potentially conflicting) considerations from the process of decision-making. From this perspective, legal norms are reasons, which are in a way imposed on individuals and may be external to their experience. This scheme entails an opposition of reasons that apply to individuals as parts of their existence and reasons that are uttered by authorities. Even though the latter may get internalised and become in such way elements of individual existence, this does not erase the phenomenological differentiation of these two classes of reasons.

The situation differs in customary law. Its authority and normative force do not link to any kind of hierarchical structures with a functional separation between officials and individuals. Norms of customary law, too, are protected reasons, but they are not externally imposed or necessarily relate to some institutions or individuals in power. The authority of customary law builds on its rootedness in the direct experience of individuals. These norms are initially parts of the cosmos of reasons that apply to individuals and represent his or her existence.

Taken phenomenologically, reasons are elements of individual experience of life. They are ‘facts that matter’ (Raz), and since facts can only matter to someone, reasons cannot exist beyond or before experience. This also holds true for norms, including legal norms; they are reasons only

inasmuch as they matter for those to whom they apply. But how does this image of reasons and norms work if we shift focus from individuals to collective subjects, such as states? The authority of international law generally replicates the one of customary law; its norms reflect reasons that comprise the direct experience of subjects, and in such a way typically are not imposed. What changes, though, is the way these reasons and norms are experienced. A commonly adopted strategy of conceiving reasons and norms in the international realm is use of anthropological analogy between states with individuals. It is thus believed that states may have their reasons and motives, desires and wills. However, this analogy does not hold reliable from a phenomenological perspective since states as collective subjects do not have a unique existence that would differ from the existence of officials comprising them. Yet it is also dubious to claim that states' reasons are officials' reasons only or that they fully overlap. This article will examine the ways of overcoming this conceptual dead-end by adopting a perspective of intersubjective nature of reasons as discursive practices that may diverge and multiply depending on the stances adopted by officials and individuals. Authority of international law is thus experienced through including norms of international law into a general network of reasons that comprise public domain.

*Sergiy Maksymov (Yaroslav Mudryi National Law University, Ukraine)*

### **The Experience of Human Dignity**

The experience of human dignity as a normative source of human rights in the modern world (Jurgen Habermas) will be considered in three main aspects: 1) in a positive aspect, as a self-esteem of the subject of law as a starting point, or as a condition of the possibility of law as such (axiom of consciousness of law according to Ivan Ilyin); 2) in a negative aspect, as an experience of human dignity humiliation, which reached an incredible size during the Second World War and underlies the recognition of human dignity as a key value; 3) in the ontological-existential aspect – through the experience of discovering the existence of human dignity as an inalienable basis of human existence, its fundamental core (on the example of experiencing the value of human dignity and its inviolability in the “border situation” in the best examples of world cinema).

*Miaofen Chen (National Taiwan University College of Law)*

### **The Aesthetics of Law: Interpreting Memory and Restorative Justice**

The “Aesthetics” of law is primarily understood as the philosophical discipline of exploring human sensibility as to affecting normative judgment in legal practices. It has pertinent influence on hermeneutics of law, especially concerned with interpretation of legal facts in hard cases. Such cases, as we saw and still see in most post-conflict societies since 1990s, include those particularly investigated under the rubric of “transitional justice”, or in other words “retroactive justice”.

Though those cases are incredibly complicate and diverse, they have seemingly common problematic of interpreting relevant historical events in the past authoritarian regimes. The aesthetics of law, in contrast to deductive logic and syllogism in traditional methodology of judicial argumentation, deems sensible experiences to be sources of knowledge in respect of legal reasoning. Experiences are so called “sensible” insofar as being ascribed to personal, i.e. individual or collective, imagination and memory of happenings. One of the most striking questions about those experiences would be the following: whether and how could they convey meaningful testimony as solemn attestation to the truth of matter?

Before considering about the meaning and legitimacy of testimony as proof of truth, we need to ask at the first step: of what a testimony does consist? To answer this question, we shall differentiate between spoken testimony from written one. Even if archives (documentary proof) are often regarded by historiography as similar to “spoken words”, there are two significant features of “telling” the truth in speech act: the principle of fidelity, and certainty of one’s belief. In one of his

representative works, “La mémoire, l’histoire, l’oubli” (2000), the French philosopher Paul Ricoeur (1913-2005) probed into “hermeneutics of testimony” of wide scope as to correlate it with “hermeneutics of self” already invented in his early works.

The present paper will focus on Ricoeur’s argumentation about this correlation, and try to clarify some difficulties concerned with interpreting collective memory toward restoring justice in post-conflict societies after transition from authoritarianism to democracy.

*Paulo Sérgio Weyl Albuquerque Costa, Livia Teixeira Moura Lobo (Federal University of Pará – UFPA, Brazil)*

### **The Law in the Philosophy of Liberation: Between Recognition and Responsibility**

The modern foundation of law and its individualist pattern lead to the philosophical problem of the unfulfilled universality of fundamental rights protection, and it is necessary to think about law differently of the European modernity, considering the experience of the social-historical world, the man into the world and the dialogue with tradition, which is tried as inheritance and an effect still projected (Gadamer, 1999). The situated experience of Latin American tradition, thought by Enrique Dussel’s philosophy of liberation, legitimates itself like reflection on Modernity, because of the relation between the European modernity and the violent process of colonization in Latin America. This critical article will analyze the law described by the philosophy of liberation as part of the political system, which finality is the pretension of justice and how this purpose is subsumed to the pretension of goodness, the objective of ethics (Dussel, 2001). First, will be clarified the view of law as a formal procedural guarantee of popular sovereignty and obedience to public norms. The current law is reference to legal actions, but its liberating base directs it to justice and to the correction of injustices, rectifying the structures of unintentional political contingencies that victimize groups of citizens. If the individuals belong to a liberating political system, it is possible to affirm that, when they become aware of their role as victims, they will have the legal environment as an entity capable of reforming the scenario. The political pretension for justice would thus be obtained through struggles for recognition of new rights in order to correct the problems of self-reference of the old law. It remains clear that Dussel is influenced by the theories of recognition, especially by Charles Taylor (Dussel, 2011), in which thought is recognized the universality of difference and the imperative emergence of dialogue with other signifiers. Dussel, however, opposes to what he calls Taylor’s ontological ethics, since the author would not offer enough criteria for the struggle for recognition within a culture or world of life or even tools to correct a ethical/political system in which there is always oppressed groups, while the philosophy of liberation is founded on ethics of alterity, inaugurated by Emmanuel Levinas, in which the Other, as a non-formal alterity inapprehensible by any attempt at totalitarian understanding, is a central figure, so that individuals without rights are Others wronged. The Other is, therefore, the basis of ethics and its claim to goodness. What intrigues, however, is the fact that Levinasian alterity is that of the “absolutely Other”, whose presence convenes to respond, not as a duty or obligation on which you make a decision, but as a responsibility from which you cannot omit yourself. The closure of the work will result from the discussion about the relational (in) congruence between the responsibility that demands of the individual an act of self-denial, just as faith or love, and recognition, that is practical and based in struggles and its institutionalization in law, what could imply the impossibility of this almost religious responsibility.

### **Individual Experience as a Source of Law**

A person creates individual rules based on the experience of the study of social norms from the moment of birth. Sanitary-hygienic, technical, moral, religious, legal and other regulations are grouped into a certain normative system of the adult. While growing up a person begins to form (adjust to his norms) the surrounding reality under the influence of his own acts of will. The person is able to determine independently the measure of proper behaviour. The Man-for-Himself becomes a supreme legislator; his mental and intellectual activity is the main source of intuitive law. The conflict of interpretations of conduct rules, disagreements of the person with society and state are overcome by elaboration of individual rules, which the person prefers to follow even in case of their discrepancy with the legislation and rules of society. Personal norms of a person will always be essentially different from the norms of society in favour of the individual, as the person is inclined to interpret broadly his rights and restrictively – his duties. While execution of a personal will within his intuitive law, the person is aware of the presence of public prohibition. He obeys or ignores the prohibition in favour of his own interests.

The conflict of interpretations of individual normative systems is inevitable, the state legislation can be considered as a universal procedural normative system. Religion, moral, legal tradition as universal normative systems is significantly inferior to legislation because of their existence in different forms and interpretations. In case of discrepancy between the individual interpretation of the norm and the official or doctrinal interpretations a person is inclined to insist on his own normative system, which is not always ontologically justified but psychologically comfortable for application.

The individual normative system of the person regularly conflicts with the normative systems of the society. Law and statutes do not exist in material nature; they are connections that invented by people. And any new rule reflects, first of all, the position of its creator. Legislative activity is the establishment of a new legal order that is extrapolation of the personal norms of the legislator to the normative systems of other people by authoritative means. The notion that the population performs as a legislator is not confirmed by the public practice.

Not everyone is able to create an individual normative system. For doing this he should be matured as individuality – he should get systematic notions of the surrounding reality, about his place in it, about his rights and duties. If others have no internal reason to observe it, the norm of another person is obligatory only for himself. Nevertheless, a charismatic person is also able to force others to accept his normative system. In authoritarian political regimes, the individual normative system of the leader is imposed on the majority of population both in public areas of life and private matters.