Eidos volume 6 no. 3 (2022)
A JOURNAL FOR PHILOSOPHY OF CULTURE

DOI: 10.14394/eidos.jpc.2022.0026

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The Concept of Cultural Normativity in the Context of Phenomenology of Law

Abstract:
The goal of the text is to reconstruct the concept of cultural normativity found in the phenomenological philosophy of law. The starting point of the text is the distinction between cultural normativity and normativity in culture. This distinction is based on reference to an extra-cultural, but not non-human instance – transcendent to the creations of humanity and its world, but in relations with the human equipment, with the characteristics of a specific human being and its existence. The specific relations between cultural and legal normativity can be found in phenomenological concepts of law, which draw on the Husserlian transcendentalism and essentialism. The phenomenology of law attempts to answer the question of the sources, and the ontological and epistemological status of normativity as such. Normativity as a written and unwritten set of norms is characterized by phenomenologists with reference to value and axiology. The values are assumed by them as certain fixed reference points ("horizon of values" given to be recognized), because norms make it possible to establish rules for various individual and collective practices within a particular community and culture on the basis of values.

Keywords:
normativity, norm, value, phenomenology, law, culturalism

Preliminary Questions – Normativity and Normativeness

The aim of this text is to reconstruct the concept of cultural normativity found in the phenomenological philosophy of law. The issue of cultural normativity has been discussed since the end of the nineteenth century, and turns out to be very current in present day. The starting point of this text is to distinguish between cultural normativity and normativity in culture. This distinction is based on reference to an extra-cultural, but not non-human instance – transcendent to the creations of humanity and its world, but in relations with the human equipment, with the characteristics of a specific human being, and their existence. Sources for transcendent concepts of culture and the normativity specific to it, can be found in the philosophy of culture of Georg W. F. Hegel, Wilhelm Dilthey and Ernst Cassirer, as well as in the phenomenology of Edmund Husserl. It is a cultural normativity as such, closely connected with the normativity of the mind and logic, but applied in practice. Cultural normativity understood in this way finds its essentialist sources – transcendent to the world of culture created by humans, but also present in the essentially understood equipment of human beings – mainly in rationality. Cultural normativity is thus immanent to humans as specific beings. It is an *a priori* condition for establishing particular rules of human conduct within a specific culture. The particular rules of human conduct, established and applied in a specific culture, in turn, constitute "normativity in culture." The "normativity in culture" is often reduced to a certain state of norms – "normativeness" created, declared and realized by the participants of a culture. However, these internalized norms are often not declared directly because they are recognized as "obvious" or – though realized – they require the exposure or reconstruction by the participants of a culture because they are frequently not conscious of the norms of their own practices.

Cultural normativity is primarily understood as a set of certain cultural norms, implicitly inscribed in cultural practices, of which the social actors and participants of culture are not always aware. In such a case, cultural normativity is submitted to reconstruction through research. The term "cultural normativity" was defined and redefined in the second half of the twentieth century in various culturalist – but also naturalist – settings, with reference to extensive literature on the matter and the state of research on the status of norms, values, and meanings. The research concerning "cultural normativity" requires the characterization of three types of relation: those between different types of norms (social, moral, legal, and cultural), relations between norms and values (comprehended as ideal or idealized), and relations between norms, values, and meanings (values and norms as having specific meanings within culture).

However, the links between cultural normativity and other types of norms refer to the broader and more generally understood normativity as such. As we know, cultural norms are a kind of cultural conditioning for many practices, as well as other types of norms. The semantic proximity of cultural and customary norms is often pointed out – analogies concerning their unwritten status, their presence outside of codes, the ease of introducing changes and uses, but also, paradoxically, their durability resulting from the lack of discussion. It is precisely the paradox of the changing and at the same time well-established character of cultural norms that distinguishes them from other normativities. The conditioning of social and individual practices by cultural normativity is sometimes considered to be a kind of authorization to realize these actions *ante rem* (linked with a certain obligation) or as a now-certain *post rem* legitimization of them (which can sometimes be a justification). Nevertheless, the legitimization itself is already inscribed in cultural norms and particularly in the codified legal norms. It should be remembered that the links between cultural and legal norms have been described by Georg Simmel, among others. However, consideration of cultural norms in relation to moral norms and their mutual entanglements dominates in reflections.

Cultural normativity has a much broader scope of application and validity than moral and legal normativity, with which it is mutually connected. Cultural normativity cannot be reduced to them due to the norms regarding individual conduct and action being rooted in the common, intersubjective world created and co-created as a social world of culture. The specific relations between cultural and legal normativity can be found in phenomenological concepts of law, which draw on the Husserlian transcendentalism and essentialism. The phenomenology of law[1] attempts to answer the question of the sources, the ontological and epistemological status of normativity as such. Nowadays, the question of cultural normativity confronts essentialist assumptions with the factual cultural relativization of norms and values (in other words: normativity in culture, for example, the normativity of law considered as a normativeness of established legal provisions). At the same time, culture is recognized as the source and basis of norms and values. In my text, I refer to three phenomenological concepts of law, which use the theses of Husserl's phenomenology as a starting point: 1) Carlos Cossio's egological concept of law (culture as a sphere of experiencing values, contrasted with sensual experience, and as the basis for establishment of laws); 2) Simone Goyard-Fabre: establishment of laws as a consequence of the disclosure of essential normativity by the subject of the law – transcendental and at the same time empirical, which is also the source of culture; 3) Paul Amselek: phenomenological references supplemented by references to the concept of legal normativism of Hans Kelsen and its transcendental assumptions concerning the basic norm as a condition for the system of norms and the constitution of the hierarchy of norms.

Normativity and Idealization Processes – Phenomenology of Law

At the beginning of the phenomenological movement, the phenomenology of law was developed thanks to the studies of Adolf Reinach,[2] who – as is well known – proposed the concept of realistic phenomenology that is polemical against Edmund Husserl's theses. However, Husserl's idealistic and egological theses found some continuation, primarily of eidetic character, in realistic phenomenology. Husserl postulated the application of the phenomenological method in studying the diverse phenomena of consciousness and experience of the subject, as well as in studying various subjective manners of appearance of the perceived and experienced objects given to us in the world horizon.

Nonetheless, particular varieties of phenomenology focused on selected issues of this general postulated phenomenological method. Reinach's realistic phenomenology has opened many possibilities for research in the philosophy and theory of law, but the assumption concerning a primordial egological perspective remains common to both currents of phenomenology (i.e., the focus on the personal subject of lawmaking, legal actions, and assessments). This is because the phenomenology of law is an "applied" philosophy in the sense that Dan Zahavi has given to this term,[3] at the same time still being a set of eidetic postulates that find stronger or weaker confirmation in the study of human experience and its objects. In its theses, the "applied" phenomenology of law departs from Husserl's originative research postulate of a necessary no-assumptions approach, because it is directly presuppositional and engaged, but without exclusion of its idealizing aspects.

Therefore, the contemporary phenomenology of law takes over some assumptions from the initial phenomenological concept including, among others: 1) apriorism combined with reflection on the rules of the legal language

1) The contemporary phenomenologists of law and their exemplary works: Husserl, Gerhart, *Recht und Welt;* Kaufmann, *Logik und Rechtswissenschaft;* Luijpen, *Phenomenology of Natural Law*; Gardies, *Essai sur les fondements*; Hamrick, *An Existential Phenomenology;* Pallard, "La Phénoménologie et le droit."

2) Reinach, "Die apriorischen," 685–847; Luijpen, *Phenomenology of Natural Law*, 1–142; Cf. Reinach, "Concerning Phenomenology."

3) Zahavi, "Applied Phenomenology," 259–73.

and its logic (Reinach's theory of legal speech acts), 2) transcendentalism and essentialism in reflection on norms and values (after Husserl), 3) existential and anthropological essentialism (after Husserl and Heidegger). Nevertheless, for the needs of their field of research, the phenomenologists of law go beyond these common assumptions, for example, by trying to agree upon realistic and idealistic premises present in early phenomenology. This is evident in Carlos Cossio's conception of regional ontology, in Simone Goyard-Fabre's theses distinguishing between the realistic character of norms and the idealistic character of values, in recognizing the process of idealization as a certain anthropological necessity (Simon Goyard-Fabre and Paul Amselek). Despite the diversity of research of Cossio's existential phenomenology, Goyard-Fabre's transcendental phenomenology, and Amselek's hermeneutic phenomenology, some axiological assumptions and theses may be considered as common in these approaches.

As mentioned, the starting points of the contemporary phenomenology of law are the theses of "realistic" phenomenology by Adolf Reinach, which polemicize against the idealism of Edmund Husserl. At the same time, the phenomenologists of law including Reinach, referred to Husserl's concept of normativity and considered the status of a legal norm in relation to other norms, and valued the status of what was and is defined in a nuanced way. As is known, Husserl's position was described as idealistic and essentialist, which was problematized and detailed, *inter alia*, in the later books *Idea of Phenomenology*[4] and *Ideas*.[5] However, normativity issues are discussed in two volumes of Husserl's *Logical Investigations*[6] that constitute, in the philosophy of law, the phenomenological basis for reflections on the status of values and norms.

It is well known that in *Logical Investigations* Husserl examined semantic concepts in the context of logic: the concept of meaning plus concepts of norm and value, which may be described as essentialist and functionalist at the same time.[7] In this work, Husserl indicated logical necessities as the basis of normativity (e.g., the chapters *Logic as a Normative and, in Particular, as a Practical Discipline,*[8] *Theoretical Disciplines as the Foundation of Normative Disciplines,*[9] particularly *The Concept of a Normative Science,*[10] and *Normative Disciplines and Technologies*[11]). According to Husserl, the need for normativity also concerns social agreement as such (i.e., acting in accordance with certain rules of communication.)[12]

The reference point for the Husserlian semantic theses is the assumption of an essence comprehended in a consistently substantive manner (according to the theory of conceptual realism), but also the conception of ideation linked to the functional character of notions in a logical judgment and the functional relationships of notions within a logical judgment. Therefore, Husserl refers to the questions of ideation and essentiality, highlighting the substantive basis of meaning (the "unity of meaning")[13] that would be alleged, adopting the assumption of an "empty meaning-intention"[14] that would be individually fulfilled by the user of a language. Husserl

4) Husserl, *The Idea of Phenomenology*.

5) Husserl, *Ideas Pertaining*.

6) Husserl, *Logical Investigations*.

7) See, for example, ibid., 153; "all the concepts, propositions and states of affairs that specially appear in thought, must be ordered. They 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."

8) Ibid., 15.

9) Ibid., 28.

10) Ibid., 33.

11) Ibid., 37.

12) Cf. Husserl, *Die Frage nach dem Ursprung*.

13) Husserl, *Logical Investigations*, 225.

14) Ibid., 192.

argues for some general unity of meaning that a phenomenological researcher should seek. The general unity of meaning is defined by him as semantically possible and at the same time necessary, and therefore, strictly connected to transcendental argumentation specifying the conditions for the possibility of meaning. The general unity of meaning would be submitted to ideation, (i.e., it may be considered as essential in the logical judgment in general and at the same time as "adequate" in the case of every particular content of the logical judgment). In the context of pure logic as an apriorical, formal, and normative discipline of a "theory of science,"[15] Husserl examines the issue of a norm comprehended as a certain adopted measure of assessment. It should be recalled that, according to Husserl, the norm as a measure of logical judgment concerns its truth or falsehood.

In his main theses on the transcendental foundations of norms, Husserl defined – as we know – the eidetic and at the same time logical foundations of all normativities. However, in his theses concerning intersubjectivity, he identified its sources in transcendental "monadological intersubjectivity." In the *Fifth Cartesian Meditation*, Husserl proposes his analyses pertaining to the constitution of Other, which would be analogical to the constitution of the ego, described in the preceding four meditations. The term "monadological intersubjectivity" is there determined as "transcendental being"[16] and deals with the supra-individual regularities which would be found in subjectivity when we ask about the possibilities of creating and co-creating the common human world of life (*Lebenswelt*). According to Husserl and in the phenomenology of law, the concept of intersubjectivity is considered transcendentally and linked with the concept of transcendental subjectivity. The "transcendental intersubjectivity"[17] explains the accord between individual projects and common, social activities (the sense of the subject's affiliation to concrete society), but also to the universal human community. Husserl considered intersubjectivity to be a sphere of objectivization of the subjective, and as a kind of task that is fulfilled in the common "world of life," in the *Lebenswelt*, distinguished from the "obvious" world of the "natural attitude." It is the task of forming a community of senses and meanings – culturally relative and distinct from the ideal and non-relative meaning (*Bedeutung*). In Husserl's opinion, the normativity of laws and institutions established in the area of intersubjectivity is doubly entangled – it is based on subjective transcendentality and its realization is submitted to transformations taking place thanks to transcendentally understood intersubjectivity. This transcendentally comprehended intersubjectivity (as the basis for what is social and communal,[18] as an "open community of monads"[19]) is the means of the objectivization of what originally comes from subjectivity (i.e., what has individual sources).

The phenomenology of law, developed in reference to Husserl's and Reinach's theses, paradoxically reconciles the divergence of their considerations, and emphasizes convergence, because it refers not so much to the concept of "idea" as to the phenomenologically understood "ideality" resulting from the process of idealization and to the concept of an ideal as a result of such a process. It should be noted that we find theses relating to the processes of "idealization" in works of contemporary thinkers following Immanuel Kant and his reflections on the "ideal," or *prototypon transcendentale* (*Urbild*, *Ideal der reinen Vernunft*[20]), presented in the works *Critique of Pure Reason* and *Critique of Judgment*.[21] Nonetheless, as is well known, Husserl directly argued with the nominalists (John Locke, John Stuart Mill).

15) Ibid., 16, 21, 25.

16) Husserl, *Cartesian Meditations,* 89.

17) Ibid., 30–31, 84, 136, 154–56. Cf. Schnell, "Intersubjectivity in Husserl's Work," 10–11.

18) Husserl, *Cartesian Meditations*, 78, 107.

19) Ibid., 130.

20) Kant, *Critique of Pure Reason*, 553.

21) See, for example, Kant, *Critique of Judgment*, 195, 224–25, 231, 252, 306.

It should be added that the normativity of law considered as a normativeness of established legal provisions would give us (i.e., participants in their establishment), access to idealization processes taking place socially and culturally. This access seems to be possible thanks to the communal agreements, but above all, thanks to the mental activities of individual subjects. At the same time, the established legal provisions include or assume a certain axiological domain which is primary with respect to norms – the domain of values that may be envisaged as objectively valid, supra-cultural and supra-unit values.

Normativity as a written and unwritten set of norms is, therefore, defined by phenomenologists in reference to value and axiology. The values are assumed by them as certain fixed reference points ("horizon of values" given to be recognized), because norms make it possible to establish rules for various individual and collective practices within a particular community and culture on the basis of values. In the semantic context, norms as well as values are considered as some meanings orienting behavior and actions, binding, constituting more or less coherent set (codices). Codes of law are regarded as a set of norms, which should be mutually consistent, systematic, should take into account values subjectively recognizable and at the same time regarded as universal. At the same time, lawmaking is immersed in a given moral and customary context, which is socially and culturally relative. It is easy to notice that this approach to law and its establishment goes beyond a simple division into the universal and the relative: into the objective and the subjective. In the phenomenological philosophy of law, we may simultaneously find references to the essentialist and transcendental recognition of values and to normativeness considered as a social and cultural product, in other words – to relative and variable normativity of a given culture. One would say that phenomenologists of law envisage the normativeness of legislation – legal acts, interpretations of legal acts and verdicts issued on the basis of heteronomous and autonomous norms – in this complicated and not fully consistent context of cultural normativity.

Carlos Cossio and Existential Phenomenology

The Argentinian legal philosopher Carlos Cossio[22] developed his concepts from the 1930s while being an academic lecturer and actively participating in social life. In assumptions, theses, and postulates, his theory of law examines the social role of law (primarily the role of judges and judicial institutions). In his phenomenology of law, Carlos Cossio refers above all to Edmund Husserl's phenomenologist theses, but also to Immanuel Kant's ethics and to the philosophy of existence – to the concepts of Miguel de Unamuno and Martin Heidegger. "In most Latin-American countries, the influence of Austro-Germanic philosophy on indigenous intellectual traditions was basically imported, as many scholars, including legal philosophers … went to and subsequently returned from Europe having studied under figures such as Heidegger, Scheler, Hartmann, Kelsen."[23]

Like other legal phenomenologists, Cossio pondered law as a cultural product,[24] confirming the anthropological rational "equipment" of its creators and enforcers. Comprehended in this manner, with regulations, norms and legal institutions, law depends on the eidetic "equipment" of subjectivity, as well as on the intersubjective cultural and social sphere, which is still constructed and reconstructed, in other words submitted to changes relating to the social and political situation. Therefore, not only according to the phenomenology

22) The most important works by Cossio: *La teoría egológica del derecho y el concepto*; *Panorama de la teoría egológica*; *Teoría de la verdad jurídica*; "La polemica anti-egológica,"; *Su problema y sus problemas*; "Jurisprudence and the Sociology of Law I"; "Jurisprudence and the Sociology of Law II"; and "Phenomenology of the Decision."

23) Duxbury, "Carlos Cossio," 274.

24) Cf. Dimitrov, *Cultural Phenomenology of Law.*

of law, but also according to other legal theories, the lawyer's involvement and engagement should deal with aspects of the real situation in which law and lawyers operate.

Cossio proposed his own conception of the "existential phenomenology of culture"[25] following the culturalist theses of Wilhelm Dilthey. Roberto Vichot writes:

> In an endeavour to understand the relation between the individual and law, Carlos Cossio and Luis Recaséns Siches turned to existential phenomenology to derive support for their investigations into legal reality, and to guide their formulations of the theories and concepts needed to describe the attributes and essences of legal phenomena. However, though they shared the same object of interest and study, namely, law, and embraced existential phenomenology as their analytic method and general philosophical premise, Cossio and Recaséns espouse different and, perhaps, incompatible conceptions of legal experience, and conclude with discordant interpretations of law, each of which is dependent upon its own epistemological background and is supported by contrasting uses of the phenomenological method. Cossio interpreted phenomenology as a method for elucidating law in its 'objectal' essence, leading him to a formalistic phenomenological conception of law. This formalistic legal ontology treats law as a self-sustained and independently existing positive-legal reality. Recaséns, on the other hand, saw phenomenology as a means for deciphering the human element in law.[26]

So what is the specificity of Cossio's phenomenology of law? First of all, it would be placing legal reflection on legal subjects (experiencing and transcendental ego) at the centre of legal reflection, and indicating that the acting subjects refer to the transcendent sphere of sense, going beyond the immanence of subjectivity. This specificity consists in agreeing what is eidetic and postulated as common to all human subjects, with a changing horizon of the world in which law should effectively act and which it should influence. Eidetism concerns the subjective, anthropological, supra-unit "equipment" (the ego of experience and transcendental ego), as well as the objective sphere of senses, meanings and values, that is the intersubjective sphere of *Lebenswelt* (intersubjective transcendental monadology that should not be confused with the world of natural attitude, which is described in Husserl's early works).

In his phenomenology, Cossio systematically emphasizes the first-person (i.e., egological and individualistic), perspective of knowledge, decisions and actions. Such a perspective allows us to recognize law as acting toward and for human individuals, taking into account their specific biographical situation and their conduct – law defined and gaining importance in a concrete social world. At the same time, the position of the subject in the world is determined by the intersubjective context of culture, which is identical to the specifically human "world of life" (Cossio was inspired by Wilhelm Dilthey). Cossio considers law as a certain "object of culture" and points to the multiplicity of "regional ontologies" of four kinds of objects: ideal, natural, cultural and metaphysical.[27] With the assumptions of "regional ontologies," taken from Husserl and developed,[28] Cossio's egological theory of law explicitly places law in the world of culture. He directs our attention toward anthropological theses (the anthropological need for rules and normativity) and toward the language and other sign systems presumed to be specific human products and giving meanings to cultural objects, that is toward intersubjectivity (*Lebenswelt*) broadly understood as a symbolic, semiotic, and semantic sphere.

25) Cossio, "Teoria egológica y teoria pura," 207.

26) Vichot, "On some Contributions," 539.

27) Cossio, "Phenomenology of the Decision," 351.

28) Ibid., 350.

The egological theory of law concerns five basic domains of research: Ontology of Law, Formal Logic of Law, Transcendental Logic of Law, Pure Axiology of Law and Gnoseology (concerned with errors and deviations from legal norms). By adopting the egological perspective, it can be assumed that the human cognition is primarily the self-cognition of the individual and the recognition of the conditions of his/her own relationship with the social world. In this case, the point of reference would be the assumptions of Martin Heidegger's existential phenomenology, regarding the *Dasein* as a subject of existence and understanding (self-understanding) plus the conditions for recognizing one's own being-in-the-world. Thus, another important phenomenological context of Cossio's reflections remains Heidegger's philosophy,[29] particularly his argument about the rights of being (primarily, it would be the *Daseins*' right to existence and self-knowledge), which should be considered in the contexts of human rights and laws of nature as the rights of human individuals (this should not be confused with traditionally understood natural law). Additionally, Cossio combines the egological perspective with the recognition of ethical conditions and with individual responsibility, held in the concrete social context (primarily by lawyers).

Like other phenomenologists of law (including Paul Amselek and Simone Goyard-Fabre), Cossio objects to the solutions of legal positivism, which strongly separates the spheres of morality and law. Cossio became concerned with positive law, but he argued with legal positivism of Hans Kelsen[30] and emphasized the human aspects of law, referring to the culturalist philosophy of life, proposed by Dilthey. Nevertheless, he recognized that the differentiation between legal normativity and moral norms is justified because of their different character.[31] "As Cossio pointed out several times, the great danger of the system of Hans Kelsen is the complete separation from human standards and human applicability."[32] However, according to Cossio all normativities are interconnected in many ways. First of all, the incorporation of a rule in individual conducts is justified by the egological basis of rule itself (ET, 98), including the normativity of statutory law. Such a rule has its foundations in the structure of the transcendental ego and as such – according to Cossio – is necessary. At the same time, normativity is inscribed – as a rule of "conduct," of individual behavior – in conduct itself: it would be an internalized, intersubjective normativity, which may be defined as cultural normativity [the Restriction as Existential Plurality of conducts (ET, 77), and "Legal Conduct as Intersubjective Restriction" (ET, 77)].

Nevertheless, incorporating a rule into conduct is not the same as legal realism, which recognizes real conducts as a measure of the rule. On the contrary, it is a motivation of conducts by normativity as such, which does not yet have a defined content. Cossio considers the conduct of the subject as a certain possibility, based on an egological need for rules in general. The context of this normativity, along with specific content, is defined by the broad set of rules inscribed into the sphere of intersubjectivity, into the *Lebenswelt*, and this is the aforementioned cultural normativity. The rules allow the subject to act, but they do not specify in detail the regularity of individual conduct. How does this happen? Cossio considers the dynamic and temporal character of the ego (the actual and practical character of the ego)[33] – it is a cognitive and acting subject, but above all one who exists, whose existence is shared with Others. "The co-existential possibility of conduct shared as a resulting and actuating intersubjective act is the key to the further understanding of legal problems. It is a participation wholly perceived and wholly connected" (ET, 77) It is therefore a coexistence in the common

29) Cf. Ben-Dor, *Thinking about Law;* especially chapter 3: "What is Called Thinking Reflectively about Law?"

30) Cf. Kelsen, *Pure Theory of Law*; and Kelsen, *General Theory of Norms*.

31) Cossio, *Teoria egológica y teoria pura*, *passim*; Kelsen, *Carlos Cossio.*

32) Diniz, *The Egological Theory*, 62. Hereafter this will be cited parenthetically in text as ET.

33) Cossio, *La teoría egológica del derecho*, 26; Pirela, *Cuatro notas introductorías*, 324.

world of the *Lebenswelt*, that is in a world of shared Life (references to Aristotle's category of *zoon politikon*) (ET, 73). Such mutual involvement of the individual and community existence is defined normatively – morally and legally as a relationship between duty – "Ought" (ET, 72) and "the Liberty of Conduct" (ET, 87). Cossio emphasizes that the subject is always a certain temporal possibility. According to the principle of "Ought," the subjects must take into account the necessity for rules, while according to the principle of Liberty, they choose a specific conduct, which they implement in practice. At the same time, it would be a transition from the theoretically understood rule to its practical manifestation, from the phenomenon of consciousness to the phenomenon understood as a manifestation.

Cossio writes that conducts contain the Law and the Law is Human Life (contrary to the biological life) (ET, 73). An individual subject acting in a shared, common world must take into account established rules and consequences of his/her own conduct, so one must recognize the Law as a Phenomenon in the world and the specific determinations of legal codes as manifestations, that is the phenomena of the underlying necessity for rules in general. The Law in the world, comprehended in this way, sets a horizon of the intersubjectively possible – by virtue of being acceptable – actions. The individual subject would internalize moral and legal norms thanks to "normative understanding" (ET, 107). However, legal rules are above all submitted to the influence of the personal subject, while moral normativity is a sphere of obligations that are difficult to negotiate. On the other hand, codified regulations of law are more easily interfered with by individual subjects and are "ontically" visible or "perceivable." Cossio writes about establishment of rules, which should always take into account co-existence with the Other, because an egological attitude, focused on the transcendental ego as a certain subjective possibility, is not an egocentric attitude – the composition of Husserl's phenomenology and Unamuno's philosophy of existence is clearly visible in this conclusion. Cossio writes that the presence of the Other should be seen in the personal existence and in the "biographical dimension" (ET, 82) as coexistence. "Such conception of an 'Alter' must be found in everything surrounding us. It is present in the meaning of Tradition, Education, Social Environment, Art, Culture, Religion, as well as in the language we speak, our Creed, our common Beliefs, Political Institutions," (ET, 82) that is in institutions established in accordance with social, customary norms and codes. "It is part of our coexistential world" (ET, 82).

Cossio points out the difference between Nature and Culture, referring among others to the predictability of the Rule (ET, 96–97). He highlights the objective and predictable character of the laws of Nature, recognized through science. On the other hand, a subject endowed with free will appears unpredictable, but thanks to the necessity of a rule, which the transcendental ego discovers as its possibility, the conduct of the individual becomes predictable and at the same time marked by responsibility – conduct as the manifestation of the ego is endowed with meaning, and the ontic immediacy of Being and existence is defined in ontological terms. Statutory, positive law turns out to be not only a project of individual and community conduct, but also as a project of existence and co-existence with a specific ontology and axiology proposed by Cossio.

The problem that continues to recur in various concepts of the phenomenology of law refers to the reconciliation of essentialist assumptions with the position of cultural relativism. Like other phenomenologists of law, Cossio proposes to resolve this issue by means of essential anthropological assumptions, according to which the human being originally possesses rational, meaningful and sense-forming "equipment" (including norm-forming "equipment" within a given community and its culture). The human individual is therefore a stable and essential rational being who becomes familiar with and shapes the changing social and cultural reality through normative arrangements, and especially legal norms and institutions for enforcing their implementation.

Therefore, the phenomenologists of law argue for the anthropological conditions of all normativity, including the order of legal norms, the source and the reference point of which is and remains a transcendent

horizon of values. They also mark connections between law and morality, which among other things, distinguishes their conceptions from Hans Kelsen's theses of legal normativism – the creator of the "pure science of law" adopting some assumptions of legal positivism. The interdependence of law and fact is always set within a specific social world and its culture, and law always possesses some content and interpretation carried out within a specific cultural context.[34] Phenomenologists envisage positive law, established by humans, as a cultural fact. What distinguishes Cossio's egological conception of norms and values? He does not comprehend values as a transcendent horizon of the factual world, but admits that values are given for recognizing it within this objective factuality and are submitted to subjective recognition, to intentional, motivational, and emotional reference and evaluation.

Simone Goyard-Fabre and Transcendental Phenomenology

The phenomenology of law is often defined in reference the works of Adolf Reinach, who is considered to be the creator of this variant of phenomenological reflection and Simone Goyard-Fabre's theses[35] contain links to Reinach's research tradition. A particular publication is her book on phenomenological assumptions of the law, as well as normativity in general.[36] In the work, she debates the theses of Hans Kelsen's legal normativism, but also other contemporary concepts of the phenomenology of law (e.g., Paul Amselek). Above all, however, she refers to the theses of Edmund Husserl and to Immanuel Kant's legalism, that is to concepts that nobilitate the rational and anthropological features of human achievements. Goyard-Fabre argues in favor of the anthropological conditions of all normativity, including the order of legal norms whose source and point of reference would be a certain transcendent horizon of values. She also emphasizes the relations between law and morality, which among other things, distinguishes her concept from the theses of legal normativism developed by Kelsen – the creator of the "pure theory of law" based on the assumptions of legal positivism.[37]

However, the French philosopher combines her deliberations on the essence of law with a Husserlian project of pure logic, that is with a rational search for and revealing a certain absolute necessity (ECP, 281). Goyard-Fabre consistently uses phenomenological terminology and therefore treats a specific situation of positive law as a phenomenon or even "phenomenality" (ECP, 46), that is the phenomenon and its manifestation at the same time. That is why current legal acts would be considered as a kind of manifestation of the essence of law, that is a normative necessity: logical, rational and anthropological. Positive law as a normative order is a kind of "realisation of sense," it is a fulfilment and execution of values – it allows us to go beyond the opposition of realism and idealism, because it is based on the ideality of values, and the purpose of law is to implement them in the established and applied order of norms. In her construal, law appears as a sort of ordered, regular product of consciousness (the transcendental subject), which constitutes the meaning of the "legal experience" according to some internal *a priori* necessity, which one may find and reveal in the "internal logic of law" (ECP, 39). Goyard-Fabre derives relative and changing legal practices from non-relative, transcendental conditions – from aprioric structures of consciousness, from the originative transcendental ego. She recognizes and emphasizes that Husserl, and after him the phenomenology of law, was able to reconcile: 1) eidetic, essential normativity conceived by logic, and 2) socially and culturally relative normativity, a mani-

34) Cf. Filippi, Bobbio y Cossio, "La Filosofía Jurídica"; Arteta, *La interpretacíon de las normas*.

35) The selected works by Goyard-Fabre: *Pufendorf et le Droit naturel*; *Les Embarras philosophiques*; *Philosophie critique et Raison*; *Re-penser la pensée*.

36) Goyard-Fabre, *Essai de critique phénoménologique*. Hereafter cited parenthetically in text as ECP with page numbers.

37) Cf. Kelsen, *Pure Theory of Law*, *passim*.

festation of which is the order of established law. In other words, current legal acts are certain manifestations of an essence of law, that is normative (logical, rational, essentially anthropological) necessity.

According to Goyard-Fabre, as in Husserl's opinion, normativity and legal norms entail a certain subjective need for rules whose source and condition is transcendental subjectivity – a transcendental function of consciousness. At the same time, this subjective need for rules would form the basis for establishing and respecting the rights of other people in a common social and cultural world, known as intersubjectivity (*Lebenswelt*). Goyard-Fabre highlights that in Husserl's phenomenology, we find the need for rules and respect for human dignity as certain *a priori* structures of consciousness, which are at the same time constitutive of the law, that is, of what is intersubjective and experienced. Therefore, she proposes a distinction between the "world experience" of what is legal: "legal experience" within the borders of the specifically human world, from other forms of our experiences (ECP, 46, 60–61, 64). This "legal experience as such" (*l'expérience juridique*) (ECP, 29) that is experienced and implemented would have a necessary and *a priori* condition – transcendental subjectivity. At the same time, the norm-creating activity of the transcendental ego would find its fulfilment in practice, that is in social life, in constituting its meanings and senses (ECP, 323). Goyard-Fabre distinguishes between: 1) the phenomenological intent to search for the source essentiality of law as a kind of normative necessity, and 2) the carrying out of a formal abstraction of the law and what is legal. The normative character – not only of law – has as its only source the "normative unity of thought" (ECP, 274), the essential normativity, revealed in transcendental consciousness. A project of law, understood phenomenologically, together with the legal intention and the essentiality of legal normativity, would be any rule or any legal operation, and therefore a phenomenologically understood project of law can be regarded as a "constitutive" principle of applied law (ECP, 167).

Goyard-Fabre postulates phenomenological research on law that would combine descriptive and reflective attitudes, that is, those that require insight into subjectivity, into consciousness and its structure. She asks about a fundamental and establishing intention of what is legal, because this intention is a carrier of sense, which we find in an essence of law (ECP, 323). She defines the transcendental bases of "every system of positive law" as "transcendental legislation" (*La législation transcendantale de tout système de droit positif*) (ECP, 289). The order of law cannot be envisaged as simply constituted or even given in the constitution, because its obviousness is prior to its formulation. Moreover, the order of law belongs to "the constituting activity of the spirit who attributes a formal aspect" (ECP, 290) to this order (some references to the Hegelian concepts of law) (ECP, 18–22, 264–65). The establishing principle would be a hierarchical idea or hierarchy as such, which would have its source in the "transcendental function of the spirit" (ECP, 290), which at the same time makes law possible.

The situation of the statutory law, along with particular regulations is defined as legal "facts," but Goyard-Fabre adds another anthropological aspect to this definition – the cultural one. She calls the law a "cultural phenomenon" (ECP, 31, 299), emphasizing the difference between: 1) statutory, positive law, submitted to intersubjective objectivization, and 2) the objective laws of nature, concerning "physical facts" ECP, 50, 53). Arguing for the distinctness of direct, immediate nature and the cultural order created over the centuries, Goyard-Fabre uses the term "human nature" – it is to what we would owe our understanding and transformation of what is natural within the framework of what is cultural. However, the task of research would be to provide a link between the rationality of the human being and the essential order being discovered in nature (ECP, 45). It should be stressed that Goyard-Fabre is the author of a book on the history of natural law,[38] in which she devoted a lot of attention to the modern concept of natural law as the law of reason.

38) Cf. Goyard-Fabre, *Les Embarras philosophiques*, *passim*.

The interdependence of law and fact is always given within a specific social world and its culture, and law always has a certain content and interpretation within a specific cultural context. Goyard-Fabre claims that positive law established by people as a cultural fact cannot be treated analogously to reductive and causal laws of nature (ECP, 28, 37). This however, has already been stated by Immanuel Kant in his differentiation between metaphysical ideas of theoretical reason and ideas of practical reason as certain moral and legal postulates. The goal of phenomenology of law is thus to reveal the essentiality of law in its specific manifestations and phenomena cognitively available to us in our "legal experiences" (ECP, 46) and in our individual, subjective judgment. Ultimately, the issue of the essentiality of law concerns the necessity for a principle, a rule as such, that is to say normativity (ECP, 46, 49). Arguing in favor of an essentialist position would be revealing the essentiality of law as such in legal phenomena (ECP 152–53), Goyard-Fabre speaks out both against legal idealism and legal realism and she characterizes the distinction between "legal reality" (ECP, 46) and normative necessity as such. This distinction would be an argument against treating the existing and observed "legal reality" as the basis for normativity in general, against accepting it as both an exemplary model "legal reality" and an illustration of a specific Idea of law (ECP, 46). The phenomenological project of law thus is founded on this transcendental – subjective and rational necessity of normativity itself, because "the legal phenomenon is an externalization of its internality" (ECP, 47), which is essentially subjective and anthropocentric.

Therefore, the project of law has its sources in the assumed structures of subjectivity, and above all in the rationality of the transcendental ego – this is an extra-cultural thesis, assuming a certain anthropological universality. "The eidetic structures of law express a certain necessity" (ECP, 175), and at the same time, the law is impossible, unthinkable without the ideas of equality and order, without a just balance of the sides and rationales. As is easy to note, this postulate, in turn, assumes a culturally conditioned anthropological concept. However, Goyard-Fabre juxtaposes Husserl's research concerning normativity as a whole on "transcendental eidetics" (ECP, 151) with Kant's theories concerning the phenomenal nature of human cognition and the need to supplement it with essential aspects. In this way, the universal, norm-creating postulate of phenomenological anthropology would intertwine with the cultural (socially, historically) relative context of its implementation.

Nevertheless, how can the culturally, socially and politically relative character of normativity be reconciled with extra-cultural anthropological conditions? In many modern concepts of law and morality, philosophers referred to the mutual relation of freedom and necessity – to the free or necessary choices of the subject having free will. As mentioned, Goyard-Fabre recognizes and emphasizes that Husserl is thus able to reconcile essential eidetic normativity, expressed thanks to logic, as well as socially and culturally relative normativity (ECP, 275), which would be manifested in the order of established law. However, Goyard-Fabre, following Husserl, indicates common, social establishment of laws as a condition of the contract – relative and submitted to change. The variability and relativity of legal rules is therefore connected with their contractuality, that is, with the constant creation of a common sphere of intersubjectivity, its meanings. On the other hand, the anthropological need and necessity for normativity (ECP, 272) – including legal normativity – is at the basis of the act itself of establishing and implementing norms, among others of the "legal experience." Because the need for normativity would be internally present in the social contract itself, first and foremost as following certain principles in actions and in communications (ECP, 270)[39] – this argument has its source in the Husserlian late works.

39) Cf. Husserl, *Origin of Geometry*, *passim*.

Paul Amselek and Hermeneutic Phenomenology

In his works on the theory and philosophy of law,[40] Paul Amselek refers to four research traditions: 1) to the analyses of legal language, legal provisions, and accompanying regulations, 2) to the theses of legal normativism and formalism, 3) to legal hermeneutics, dealing with the interpretation of the provisions of law,[41] as well as 4) to phenomenology and its research tradition (this was the thesis of his doctoral dissertation *Méthode phénoménologique et théorie du droit*). "The phenomenological method, thanks to the process of eidetic reduction, invites us to frame and consider exactly this structure, characteristic of things, this very essence – the *eidos* – in all its purity."[42] Amselek emphasizes here the essential character of phenomenological assumptions and studies, particularly the invariable character of essence in relation to the diversity of objects encountered in the world, especially in relation to "imaginary variations" – the goal would be to identify what is essential in various aspects of things, given to the consciousness in their view. "The *eidos* of an observed thing is revealed due to the elements that remain unchanged during all variations."[43] Emphasizing the invariable character of the essence may bring up yet another research tradition – structuralist studies, which, however, focus not on the issue of the essence but on the question of convention. It should be noted that establishing a law would be at the same time establishing a certain normative convention; it is its sources, its essential legitimization, that Amselek searches for in his phenomenology of law.

Amselek asks about the ontological foundations of lawmaking and calls for law to be linked anew with the sphere of values, for laws to be established in reference to values (*mettre en valeurs*).[44] In his research, he also deals with the issue of normativity in general and its variations – his analyses concern, among others, the normative character of colloquial language, not only legal formulas. It was these studies that were inspired by the theory of speech acts of John L. Austin's (e.g., the normative character of description and modal sentences). It should be stressed that Amselek considers law in its relations with morality and ethics as a normative domain of moral findings and deontic postulates.[45] He proposes the following theses on the intersubjective construction of law and its constitution from rules,[46] which always takes place in the normative context of a given culture (*Lebenswelt* as an intersubjective, social and cultural "world of life"): 1) the law is constituted from rules; 2) rules are a type of mental tools (*outils mentaux*); 3) rules appear as placed in the field of metrology, because their main function is to define measures (in the legal experience, one speaks of both "recognition of rules" and "recognition as a measure"); 4) modal categories, particularly deontic modalities, should be applied to ethical and legal rules; 5) legal rules have the character of rules of conduct or ethical rules (people's creative and productive actions – *créatrice, fabricatrice*); 6) ethical rules are assumed to be rational and practical rules of action, constructed intersubjectively; 7) rules of conduct in general fall within the category of rules of law and define in certain ways the legal character (*juridicité*) of the law (normativity constructed rationally and subjectively in the context of a given culture).[47] In his methodological propositions, Amselek assumes an ontology concerning specific existence

40) The selected publications by Amselek: *Méthode phénoménologique*; (ed.) *Théorie du droit et science*; (ed.) *Interprétation et droit*; *Cheminements philosophiques*.

41) Amselek, *Cheminements philosophiques*, 499. Cf. Amselek, *L'interprétation à tort* 11–25;

42) Amselek, *Pour une phénoménologie*.

43) Ibid.

44) Amselek, *Mettre le droit en valeurs, passim*.

45) Amselek, *Ontologie du droit*.

46) Ibid., 19.

47) Amselek, *Mes cheminements philosophiques*.

of "general rules" and "particular legal rules" – they are a type of "mental tools."[48] He especially criticizes "the realist ontologies of values, defended in the name of a phenomenological axiological method which recognises – apart from the world of being – the world of values constituted as a mental reality of rules,"[49] taking into account "values' relativism."[50] At the same time, Amselek restores "a method of linguistic phenomenology," distinguished from "every axiological dimension" and concerning "language of normative utterances."[51]

Where should one look for the bases of the ontology of law, of the ontological status of values and norms? Amselek, like Simone Goyard-Fabre and Carlos Cossio, speaks against the solutions of legal positivism, separating the spheres of morality and law, but directs his attention not only toward anthropological theses (the anthropological need for rules and normativity), but also toward language as a specific product of humanity – toward broadly understood intersubjectivity (*Lebenswelt*) as a symbolic, semiotic, and semantic sphere. In his analyses of normativity and language, Amselek assumes the arguments from Edmund Husserl's later works on intersubjectivity as the world of culture (*Lebenswelt*), as a sphere of meanings and senses created together by people. However, Amselek does not focus on essential sources of the created and discovered meanings, but on the rules for their establishing and change. It is this normativity of people creating and establishing rules, and particularly rules of law, that is of interest to Amselek. At the same time, he recalls the theses of hermeneutics of law, as well as John L. Austin's method of linguistic phenomenology. Amselek admits that semiotic systems, signs – mainly language, are still a necessary instrument for mediation in the objectification process, because the rules of law are given to us in speech acts and language texts, in the provisions of law and their interpretation, and, ultimately, the rules and norms are "signs"[52] in the linguistic dimension and their social and cultural impact.

It should be highlighted that Amselek argues with critics who question the legitimacy of legal references to phenomenology. Nevertheless, he notes that the Husserlian reduction of particular things to the objective essence impoverishes the object of evaluation and deprives it of its individual characteristics, so important in a legal assessment of fact. At the same time, he is interested in Husserlian typology – the possibility of classifying facts and events (human actions) with reference to the accepted normative criteria. In the search for sources of normativity, he follows Husserl and turns to values, considering the possibility of an "axiological phenomenology" (*phénoménologie axiologique*).[53] The Husserlian concept of "phenomenological axiology" was the starting point for Amselek's inquiries, beyond which he polemically went – a conception that assumed the objective existence of values, and objectively given consciousness to be recognized in things and in human activities, primarily thanks to affective experiences.[54] However, according to Amselek, value exists in relation to a certain rule contained in words of language, which does not belong to the same world as a thing in itself. "Rules are reference terms"[55] – they have no autonomous existence, but would be "real phenomena, mental objects" and more precisely, "mental tools" (Karl Popper's World 3).[56] Amselek "particularly criticizes realistic ontologies of values, defended in the name of the phenomenological axiological

48) Chérot, *Paul Amselek et la normativité*. Cf. Duxbury, *Normativity and Technique*.

49) Chérot, *Paul Amselek et la normativité*, 1998.

50) Amselek, *Mettre le droit,* 4.

51) Chérot, *Paul Amselek et la normativité* 1998.

52) Cf. Amselek, *Mes cheminements philosophiques*, 6.

53) Amselek, *Pour une phénoménologie*, 8.

54) Chérot, *Paul Amselek et la normativité,* 1998.

55) Ibid.

56) Amselek, *Mes cheminements philosophiques*, 8.

method, which recognises, next to the world of being – the world of values" which would be a condition of the "mental reality of rules."[57]

He returns to Husserl's definition of value as "normative form."[58] In his axiological reflection, like other philosophers of law, Amselek considers the entanglements of three elements that consist of normative and axiological findings within law. Thus, he asks about the ontological status of: 1) legal rules, 2) legal norms, and 3) values which – according to him – are the condition of rights and are implicitly included in law, thanks to the anthropological need for solid foundations that results, *inter alia*, in idealization processes (Kant, Simmel, Reinach). He argues that humans – as an uncertain being thrown into the world – seek certainty and, along with this, a primary rule which would serve as a stable reference and which would be rationally recognized as a value in the context of changing norms and regulations.

Amselek deals primarily with the normativeness of law and moral normativity, referring polemically to essentially comprehended values. As mentioned, he consistently considers the issues of value, evaluation, and normativity in a cultural-centric context. He admits that values would be a stable, permanent reference point for the social and cultural establishment of variable norms. It may be said that Amselek finds values in the rules and norms of law because he believes that values are given to people through normative regulations, as a consequence of familiarization with them as well as with ethical normativity. By compiling and comparing the status of ethical and legal norms, he shows that the Husserlian conception of ethics and ethical judgment – based on subjective effectiveness, as well as on the objectivistic concept of values revealed through affects – removes the rational character of human judgment. At the same time, after Husserl, he assumes the primacy of a subjective perspective concerning an act of assessment itself, combined with the necessary intersubjective agreement of individual perspectives.

Amselek looks for regularity in things and facts that allow for the use of a similar, analogous rule of law, based on the presumed and alleged objective "essentiality" in application to things, facts, and events of the same kind. This is the arena of detailed sciences and it is also the task of legal sciences. In other words, Amselek bases the legitimacy of using law and establishing its rules (i.e., normativity), on the objective, stable regularities of the different, particular objects of evaluation, that is, on what is submitted to observation and description. Language allows for moving from description to evaluation, from establishing the factual state to its assessment, and it is colloquial language and the language of law that are specific tools for translating what is subjective and objective – the objectivity of the fact and the objectivity of the norm. Amselek emphasizes the primary role of ethical norms and their primacy in relation to legal norms, whereas cultural norms would be here a certain phenomenologically understood horizon of the creation and application of normative regulations in practice.

In these discussed phenomenological concepts, including Amselek's phenomenology of law, we find common assumptions and theses, especially phenomenological theses and assumptions of culturalism. First of all, they regard consciousness and its structures as a basis for normativity in general, including cultural, moral, and legal normativity. Consciousness and its structures, as well as monadologically comprehended, transcendental intersubjectivity, are sources not only of normativity, but above all, of axiology (of value and valuation). At the same time, it is the consideration of both laws and cultural objects as intersubjective manifestations of individual subjects' activities. The adoption of culturalistic assumptions by phenomenologists of law would also be the particular recognition of culture as a proper universe of human activities and their products. Therefore, law and its provisions, regulations and verdicts are envisaged as specific objects of culture,

57) Chérot, *Paul Amselek et la normativité*, 1998.

58) Amselek, *Pour une phénoménologie,* 9.

while the normativity of law is considered as a specific form of normativity in general and set in the context of a particular culture. It is easy to notice that this research standpoint is a combination of the anthropocentric universalizing position and the position of cultural relativism.

Conclusion

Within the discussion we can find some shared assumptions and theses – they are primarily assumptions of culturalism and phenomenological theses, present in many ways. First of all, there is the consideration of consciousness and its structures as the basis of normativity in general, including cultural, moral, and legal normativities. Consciousness and its structures, as well as the transcendental intersubjectivity understood from a monadological perspective are sources of not only normativity, but also axiology (values and valuation). At the same time, it is the consideration of both law and cultural objects as intersubjective manifestations of the activity of individual subject. The acceptance of culturalist assumptions by legal phenomenologists is also a recognition of culture as the proper universe of human actions and works. That is why law, that is, its provisions, regulations and verdicts are considered as specific cultural objects, while the normativity of law is defined as a specific type of normativity in general of a given culture (cultural normativity). Nonetheless, particular concepts differ in accepting other assumptions about the sources of norms and values. The three construals are, in a way, complementary in this respect – from Simone Goyard-Fabre's essentialist assumptions, taken over from Edmund Husserl; through Carlos Cossio's existential assumptions, concerning the human active subject, variable in its conduct; to Paul Amselek's concept, emphasizing rationalism and the agency of the conscious subject, striving to achieve rational intents within the framework of the established cultural and legal normativity. Studies concerning cultural normativity lead here to the consideration of cultural normativity in legal categories, such as cultural authorizations, cultural legitimizations, and cultural obligations; however, this is a topic that would be best discussed in another text.

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