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Phenomenology and Human Rights

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Abstract: In this article, I present the phenomenological tradition as a new grounding for human rights as universal rights. The hypothesis defended is to conciliate Husserl's phenomenological method, and Reinach's *a priori* law in order to offer a new grounding to human rights. Combining Husserl and Reinach's ideas, I propose to expand the comprehension of *a priori*. It would be present as *eidos* of each object, and I name it as material *a priori*; it also be present in the *eidetic relations* and I name it as formal *a priori*. Yet the object would have an essence, a necessary content, a material *a priori*, and necessary states of affairs, necessary relations and connections, a formal *a priori*. Reinach, in *The A priori Foundations of the Civil Law*, describes eidetic relations, such as the relation between promise, claim, and obligation. I propose three eidetic universalities to ground law; these are what I will call human rights. I also face a few difficulties presented by DuBois and De Vecchi derived from the amoral approach of *a priori* laws. Then, I highlight the difference between this proposition and Albert's. Finally, I defend the proposition that *a priori* laws are beyond natural and positive laws.

Keywords: Husserl, Reinach, Phenomenology, Human Rights, Universal Rights.

The object of this paper is to offer a new ground for human rights as universal rights by combining Husserl's phenomenological method with Reinach's *a priori* law. The argument is presented as follows. First, I will explain the phenomenological method proposed by Husserl in *Ideas I* and highlight his comprehension of *a priori*. Second, I will present Reinach's description of necessary relations between states of affairs that are grounded in civil law and his idea of *a priori* laws. Third, I will explain the different comprehensions of *a priori* and combine Husserl's phenomenological method with Reinach's *a priori* laws. In the fourth section, I will present a new phenomenological grounding to human rights. Then I will try to anticipate a few difficulties that might rise from the assumption of human rights as a criterion for the evaluation of civil law. In the sixth section, I will face some critiques raised by James DuBois and Francesca De Vecchi derived from the amoral approach of *a priori* law. Then, I will highlight the difference

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between this proposition and the one presented by Marta Albert. Finally, I conclude that *a priori* laws are not a version of natural law, but they are beyond natural and positive laws.

1. Husserl

The phenomenological method, as proposed in *Ideas I* (HUA III, 93), has two main moments. First, *epoché*, then, eidetic reduction. *Epoché* is described in *Ideas I* as a phenomenological attitude in opposition to a natural attitude. The natural attitude is to judge or to make a decision over an object, situation, or person without much reflection, without comprehending it. It is not appropriate behavior for philosophical investigation. The *epoché* is the attempt to convert natural attitude into philosophical attitude by parenthesizing the world, that is to say, suspending judgment universally with the objective of being perfectly free of convictions. Therefore, the knowing subject is free of suppositions, expectations, or preconceptions, including science-related propositions. The subject looks at the object as it appears, as it shows itself.

Therefore, there is a difference between the apperception of the object in natural attitude and *epoché.* In natural attitude, the knowing subject is before an intended object *simpliciter*. The subject fits the object under his preconceptions, categories, and hypothesis. Something useful to everyday life and natural science. However, in *epoché*, the knowing subject has suspended his judgment; he is before an intentional object without previous judgment with the intention of unveiling it, trying to figure out the noema (HUA III, 182).

The eidetic reduction follows *epoché,* and it is based on eidetic intuition. Eidetic intuition takes place when a subject is before an object and immediately captures its essence. Initially apprehended in natural attitude, in *epoché*, the purpose is to describe the essence once intuited, to reduce it to term.

This intuition of the essence is direct, as Husserl does not admit any kind of representationalism (Zahavi, 2008: 361). In Husserl's words,

> [i]n immediately intuitive acts we intuit an 'itself;' on their apprehendings, no mediate apprehendings are built up at a higher level; thus there is no consciousness of anything

> *for which* the intuited might function as a 'sign' or 'picture.' And just on that account, it is said to be immediately intuited as 'itself.' (HUA III, 79)

Eidetic reduction initiates when the subject varies the characteristics of an intentional object until he reaches a 'core' of characteristics that cannot vary anymore. The subject has to ask if each of the characteristics is necessary mentally. If the characteristic is taken away and the object becomes something else, then it is a necessary characteristic. This core of characteristics is the essence of the object. It is important to highlight that, in the first moment, the essence is intuited, but it is not yet possible to describe it. It is only in the second moment that the subject will be able to describe the essence of the intentional object. The essence, or the *eidos*, does not vary in time or space; it is necessary and universal – it is *a priori*.

The phenomenological method allows the subject to realize that there are two inseparable dimensions, subjective and objective. The former consists of consciousness acts, acts performed by the subject of knowledge, such as thinking, remembering, judging, etc., which Husserl calls 'noesis.' The latter dimension comprises the contents of those acts, the objects of consciousness acts, 'what' you think, 'what' you remember, 'what' you judge, etc. Husserl calls this 'noema'. The noema has two dimensions, its essential and its accidental characteristics. The end of the phenomenological method is to reach the essence of noema. In Husserl's words, "a universal noematic structure played its continuous role, designated by separation of a certain noematic 'core' from the changing 'characteristics' belonging to it ‹and› with which the noematic concretion appears involved in the flow of different sorts of modifications." (HUA III, 267) This core, or the essence, once again, is necessary and universal – *a priori*. Accordingly, "[e]ach noema has a 'content,' that is to say, its 'sense,' and is related through it to 'its' object." (HUA III, 267)

The discussion that may arise at this point is whether the phenomenological method only describes the essence of the phenomenon or the essence of the object. The first interpretation is idealist, and the second one is realist. I will assume a realistic interpretation since Husserl rejects representationalism and admits a direct intuition of the object. Assuming this interpretation, the phenomenological method would make it possible to reach the essence of any object[1]. Although this does not mean that we cannot

[1] This does not mean that Husserl admits to knowing the thing itself. For the realistic interpretation, Husserl admits knowing the manifestation of an eidetic universality in an empirical object.

commit a mistake in the process of the description of essence or that we are describing all possible essential characteristics of the object, something might be missing. For this reason, a constant critical attitude is always necessary. This is how it is possible to reach the realm of essences from the phenomenon; it is an eidetic science or ontology.

This realistic interpretation of Husserl's phenomenology can be controversial[1]; however, Husserl himself opens this possibility in *Ideas I* (HUA III, 85), *Cartesian Meditations* (HUA I, 65 and 123), and *Ideas II* (HUA IV, 41 and 77). This reading is also supported by some commentators, including Karl Ameriks (1977) and Dan Zahavi's (2008) interpretations of Husserl. Moreover, Husserl claims that there is no separation between knowing subject and object of knowledge, or between the act of thinking and 'what' you think, in Husserlian language, between noesis and noema, the structure is always 'noetic-noematic' (HUA III, 201/202).

2. Reinach

Adolf Bernhard Philipp Reinach was born in Mainz on December 23, 1883, to a Jewish family. In the autumn of 1901, he entered the University of Munich. Where he studied law, philosophy, and psychology with Theodor Lipps. On December 20, 1904, Reinach earned his doctorate in philosophy under Lipps with a work on the concept of cause in the penal law.

During this period, he met Johannes Daubert, who introduced him to phenomenology. In 1905, after reading the *Logical Investigations*, Reinach decided to go to Göttingen. He went back to Munich to continue his studies. One in particular had great impact, Beling's *Die Lehre vom Verbrechen* (Theory of Crime) of 1906, which brought an ontology of criminal actions.

In 1907, Reinach met Dietrich von Hildebrand, and the next year he met Max Scheler. In September, he finished the first draft of *The Nature and Systematic Theory of Judgement* and presented it to Husserl for habilitation. In the summer of 1909, Reinach was in Göttingen. Daubert oriented him to the problem of impersonal sentences when he developed the idea of a *state of affairs*. He offered courses on Plato and Kant.

[1] There are philosophers that have an idealistic interpretation of Husserl's phenomenology such as Eugen Fink.

In 1911, Reinach contribute to a *Festschrift* in honor of Lipps with *On the Theory of Negative Judgement*. In the summer, he and other phenomenologists planed the *Jahrbuch für Philosophie und phänomenologische Forschung*. In 1913, after a seminar with the same theme, Reinach published in the first edition of the *Jahrbuch The A Priori Foundations of Civil Law*. In the winter, he married Anna Stettenheimer. He gave several seminars and a lecture under the title *Introduction to Philosophy.* In the same year, Husserl published *Ideas Pertaining to a Pure Phenomenology and a Phenomenological Philosophy* (*Ideas I*). Edith Stein arrived in Göttingen, and Reinach gave a seminar on *The Theory of Categories*. In 1914, he gave a lecture *On Phenomenology* in Marburg and published *Allgemeine Psychologie*.

After the declaration of war, Reinach volunteered for the army. In 1916, he was baptized in the Protestant Church. On the 16th of November, 1917, Reinach fell outside Diksmuide in Flanders (Schummann and Smith, 1987: 31)

There is a different interpretation about the influence of *Ideias I* on the Göttingen Circle[1]. On the one hand, Schumann and Smith (1987: 26) argue that Reinach adopted Husserl's terminology of the natural attitude.

> Thus it is something of an exaggeration to suggest that, after the publication of the *Ideas*, 'Reinach and, following him, the others broke away from the new developments' as Husserl had said to Dorion Cairns in 1931.89 Rather, as ever, the Munich phenomenologists adopted a cautious, critical attitude to what was taking place around them. (Schummann and Smith, 1987: 26/27)

On the other hand, James DuBois stresses: "[i]n Reinach's entire collected works, the words 'epoché' and 'noema' appear nowhere. He belonged to the early group of phenomenologists who believed that phenomenology was a distinctive and promising approach to philosophy but who felt no sympathy for idealism." (Dubois, 2002, p. 329)

Despite these different interpretations, Reinach remains faithful to the central idea of phenomenology as a science of essence. In *The A priori Foundations of the Civil Law*, Reinach (1983) presents a new category of objects that were not considered by Husserl in the *Logical Investigations* (Hua XIX). They are not physical or psychical; they could be ideal, a value, for instance, but one of the characteristics of ideal objects is timelessness, and the objects in question are temporal objects. Reinach defines them as

[1] Adolf Reinach, Edith Stein, Dietrich von Hildebrand and Roman Ingarden.

temporal objects of a special kind. The example given is the promise. To study this kind of object, Reinach analyses different acts performed by beings and comes up with the idea of 'social acts.'

There are various kinds of acts, such as passive acts, e.g., listening, spontaneous acts, e.g., feeling joy; and active acts, e.g., making a decision. The difference between a spontaneous act and an active act is that in the former, the subject is not the author of the act, it is an internal act, but he does not control it. An example would be when hearing a beautiful song, I cannot avoid the relief or joy that arises in me. In contrast, an active act comes from a resolution; it depends on a conscious decision of the subject; in Max Scheler's (1970) language, it is a free and motivated act, e.g., forgiving or commanding. In addition, there are acts that presuppose a second subject at whom the act of the first subject is aimed, e.g., envying.

Among these acts, there are important differences. Some acts have to be manifested externally, e.g., crying or laughing. Some acts have to be manifested externally and must be perceived as such, e.g., commanding and begging. Lastly, some acts have to be manifested externally, must be perceived as such, and await feedback, e.g., proclaiming or asking a question. All acts that have to be manifested externally and presuppose a second subject at whom the act of the first subject is aimed are 'social acts.' The most significant example of a social act given by Reinach is the promise.

The characteristics described for each act are the very essence of that act. Nobody envies himself. Nobody announces something inside his own head. To command and to beg have to be understood as such. The sentence can be the same one, e.g., 'Don't,' but if I say it to my daughter with a low tone of voice, she will understand it as a command; if I say it crying, to a thug, it will be a plea. The act of asking is only complete if an answer is received; otherwise, the person who asked the question will be waiting for an answer indefinitely.

Civil laws, defined by Reinach as 'enactments,' are another kind of social act not yet mentioned. It may sound a little strange since we are talking about actions. You might ask about the verb that would designate the social act related to 'enactments.' I will return to this point later. For now, I ask you to accept that 'enactments' have to be manifested externally and presuppose a second subject at whom the act of the first subject is aimed. There is no civil law for someone alone. An individual comes up with a decision and even observes it every day, but to have a civil act, such as an agreement, or a contract, or a law, at least two persons are needed.

What Reinach intended to do was an ontology of civil law, an eidetic investigation of law, to reach its essence, its universal, its *a priori*. That is what he calls *a priori* laws. When he writes about civil law, there are two dimensions to consider: one is *a priori*, and the other is contingent, namely positive laws, written and non-written laws, judicial decisions, common laws, contracts, and treatises; all these variations of positive law can fall under the concept of civil laws, what Reinach calls 'enactments.' He is not interested in the efficacy of positive enactments; this is an object of the philosophy of positive law. The '*A priori* Theory of Rights' should study the ontological region of civil law, reach its eidetic universality, find out its necessary and universal bonds, to describe its corresponding *a priori* laws.

The most important example Reinach offers of *a priori* law is the necessary relation between promise, obligation, and claim. It can be written like this: 'whoever makes a promise incurs an obligation; one who receives a promise bears a claim.' Reinach offers a few other necessary relations, but what he aims to reveal is that there are necessary relations that make civil law possible and comprehensible. He does not describe much of those relations, but it is enough for his purpose to demonstrate that such necessary relations exist.

3. Reinach and Husserl

Reinach believed that, in describing necessary relations, he had described a material *a priori* simply because those relations were not only laws of thought but ontological propositions that describe how reality works, including the relations and connections inherent to states of affairs, and their contents. For example, the necessary relation between promise, obligation, and claim is valid not only for legal relations. He believed that, in describing its necessary relation, he had described the very essence of promise, and it was valid not only for legal promises but for any sphere of human life – religious, moral, cultural, political, and so on. Reinach (1989: 538) believed that this necessary relation was a material *a priori*, and in doing so, he was rejecting an "'impoverishment' of the a priori."

It is worth mentioning that, for phenomenology, *a priori* is not transcendental – it is transcendent. In other words, the place of *a priori* is not reason, mind, or consciousness, as it is in Kant (KrV, B64/A47). The place of *a priori* is the surrounding world (Hua III:

52) since universals are manifested in every object in its eidetic dimension; put differently, the eidetic universalities embody eidetic necessities (Hua III: 15); in this case, eidetic universalities would be *a priori* laws, and eidetic necessities would be the essence of civil laws. In addition, the *a priori* is intuited directly by the conscience without signal or picture mediation. As Zahavi (2008) highlights, Husserl rejects representationalism, as does phenomenological realism. For both, under no circumstances is *a priori* created by conscience or dependent upon it. Reality remains independent of consciousness but accessible and knowable through phenomenological method. The work of consciousness is to constitute the intentional object with its universal and accidental aspects, and to constitute, for phenomenology, means to evidence (Ameriks, 1977: 500).

That said, in order to combine Husserl and Reinach's ideas. First, I will expand the comprehension of *a priori*. It would be present as *eidos* of each object, and I will name it as material *a priori*; it also be present in the *eidetic relations,* and I will name it as formal *a priori*. Yet the object would have an essence, a necessary content, a material *a priori*, and necessary states of affairs, necessary relations and connections, a formal *a priori*. This is a definition much more like the one given by Reinach: "[i]n truth, the realm of a priori is incalculably large. Whatever objects we know, they all have their 'what,' their 'essence'; and of all essences there hold essence-laws." (Reinach, 1989: 539)

Second, I will assume a realistic interpretation of Husserl's phenomenological method. I will admit that it can reach the essence of an intentional object; not only the essence of the phenomenon, but the *a priori* eidetic universality manifested on the object, its essence, and its necessary relations. In Husserl's words:

> [t]hus the noema too is related to an object and possesses a 'content' by 'means' of which it relates to the object; in which case the object is the same as that of the noesis; as then the 'parallelism' again completely confirms itself. (Hua III: 269)

Accordingly, what Reinach provides in *The A priori Foundations of the Civil Law* is a description of necessary relations and connections of civil law, that is to say, a description of the formal *a priori* of civil law, such as the necessary relation between promise, obligation, and claim. Nevertheless, he does not describe the essence of civil law, he says nothing about its content, that is to say, he does not offer a description of what I am naming material *a priori* of civil law.

Now, we are ready to return to the point mentioned previously. Because Reinach does not make a precise distinction between the act and the content of the act, or between the essential and relational dimensions of civil law, or in his language, between social acts and the object of social acts, or yet, in Husserlian language, between noesis and noema, he does not make a clear distinction between the action, for example, 'to enact' or 'to promise' and their content, 'enactments' and 'promises.' I believe that this is the reason he defines civil law as a kind of social act, as enactment. In fact, 'enactments' are the content of the social act 'to enact,' the same way 'promises' are the content of the social act 'to promise.' Another way to put this is that Reinach describes a formal *a priori* of civil law but still lacks a material *a priori* of civil law.

It is clear why civil law cannot simply be defined as a social act and, at the same time, as enactment. 'Enactments' are the content of the social act 'to enact.' 'Enactments' are the essential dimension, and 'to enact' is the relational dimension. Reinach revealed the *a priori* relations of civil law, but what about the *a priori* essence of civil law? Strictly speaking, analyzing Reinach's *a priori* law under the light of Husserl's phenomenological method can reveal that his explanation of civil law is missing a very important part. This opens up the possibility for a combination of both theories and an improvement of the comprehension of civil law.

4. **Phenomenology and Human Rights**

The question I would like to answer is, aside from formal *a priori* of civil law, if there is any material *a priori* of civil law? Is there any 'core' of civil law that cannot be dismissed, hat, without it, would not be law at all?

In Husserl's words:

> But the sense of this contingency, which is called factualness, is limited in that it is correlative to a *necessity* that does not signify the mere *de facto* existence of an obtaining rule of coordination among spatiotemporal matters of fact but rather has the character of *eidetic necessity* and with this relation to *eidetic universality*. When we said that any matter of fact, "in respect of its own essence," could be otherwise, we were already saying that *it belongs to the sense of anything contingent to have an essence and therefore an*

> *Eidos which can be apprehended purely;* and this Eidos comes under *eidetic truths belonging to different levels of universality*. (Hua III: 9).

In Husserl's terms, my proposal is that human rights are this material *a priori* of civil law, the *eidetic necessity* that manifests an *eidetic universality* and grounds law. The idea is to investigate civil law essence and, in bringing it to light, make evident how it should guide civil laws.

Reinach made evident the necessity of an eidetic investigation in mathematics and also pointed to the necessity of a civil law investigation:

> On the other hand, only from philosophy can mathematics receive its ultimate clarification [*Aufklärung*]. It was from the philosophy that there first issued the investigation of the fundamental mathematical essences and the ultimate laws grounded in them. Also, philosophy alone can make completely intelligible the way in which mathematics is to proceed onward from those elements by repeatedly leading it back to the intuitive essence-content from which it is so far removed. Here our first task must surely be to learn to see the problems once again, to penetrate through the thicket of signs and rules which operate so admirably to get at the material content. […] This is similar to the way jurists are about the technicalities of civil rights. (Reinach, 1969: 538)

In Reinach terms, my proposal is to penetrate through signs, definitions and rules and see beyond the facts themselves, unveiling the material content of civil laws, what I call material *a priori* of civil law, human rights.

In the same sense that there are eidetic relations or formal *a priori*, such as a promise being necessarily followed by an obligation and a claim, civil law has at least three material *a priori* laws:

(1) All civil laws (or enactments) come from rational and free beings. All enactments are contents of social acts, and social acts are active acts; all active acts must be performed by rational and free beings, they arise from a decision, and they have to be motivated. Otherwise, they are not free but determined or undetermined acts, as Scheler (1970: 2) describes. Determined acts are caused by external factors, for example, another person, and undetermined acts are caused by internal causes, for example, a disease. Both are non-motivated acts, in other words, human beings are free because they can be agents of non-determined acts, that is to say, active or motivated acts.

Likewise, there is no civil law in a society of ants or bees simply because they are neither rational nor free. They cannot motivate their doings or change their behavior based on judgment or decision. At best, they can adapt to changes in their environment, but they cannot consciously cause changes in it; the changes they provoke are involuntary, and they simply adapt to adverse consequences.

On the other hand, human beings consciously organize their societies, institutions, and civil laws. That is possible because the sources of enactments are rational and free beings. That is why there is so many differences in human societies, including different political regimes, different forms of government, different systems of representation, etc.

(2) All civil laws (or enactments) arise from intersubjectivity between rational and free beings. There is no civil law of one alone. If someone is by himself on an island, there is no civil law. He can come up with a decision and observe it every day, but to enact a civil law, there must be at least two persons.

Even a thing such as animal rights depends on this, simply because it regulates human behavior, and if someone is absolutely alone, under the strict point of view of civil law (not moral), he can be as cruel as he wants with any animal, after all, there would be no civil law to be imposed, and no one to enforce it.

These two materials *a priori* laws are also conditions of possibility of any civil law. Civil laws (or enactments) are simply not possible if any one of these conditions is not met. Besides these two conditions of possibility, there is one more material *a priori* law:

(3) All civil laws (or enactments) regulate only free and external behaviors. Inspired by Edith Stein (2006: 64), we could say that the domain of civil law includes neither biological inevitabilities nor intellectual activity, but only possible actions. There is no sense in making a civil law that forbids people to breathe, to age or to die. These are inexorable behaviors that cannot be changed and do not have to be motivated. Likewise, civil laws should not regulate mental decisions, spiritual beliefs, or intellectual activity. They should focus only on possible actions – free behaviors, those that have to be motivated, depend on someone's decision, can be changed, and are external. For example, it should not impose forced conversion. To believe, to have faith, is an internal behaviour, depending on persuasion and conviction; those are "beyond the reach of any arbitrary intervention at all" (2006: 64). Civil laws do not have the power to change people's minds or beliefs. Such a law would be as absurd as a law that forbids people to miss their parents, to feel sorrow for those in pain, to think about the future, or to worry about their kids.

These are internal acts, and civil laws cannot reach them. A person can even sign a document saying that he does not believe anymore or stop practicing the rituals of his religion, but this does not change his conviction; in fact, it can even make it stronger.

It is possible to exist a positive law that imposes religious conversion. However, this law is incompatible with the essence of a law. It can exist, it can be a spatiotemporal fact, but it does not affect the *a priori* law. That is what Reinach insists on in his argument. The realm of *a priori* essences is not damaged by the existence of an improper positive law.

Material *a priori* laws are the essence of civil laws defined as enactments. They are universal and necessary. They are independent of any subjectivity and timeless. These are what I call human rights. They simply describe a state of affairs. They are descriptions, not prescriptions, in themselves, human rights do not bring any moral, religious, political, economic, or ideological content or assume these as their grounding. Being pure descriptions of the essence of civil law, human rights can be evaluated as correct or incorrect but cannot be considered fair or unfair, just or unjust. In addition, as descriptions of the essence of civil law, they can help the subject to comprehend better its object and its relations.

Human rights, though, can be taken as a criterion to evaluate civil laws. But, for this, we must not confuse the three different spheres of analyses of law, namely, the ontological, epistemological, and practical spheres. In the ontological sphere, *a priori* laws are descriptions of the essence of civil law defined as enactments. Since the relation between eidetic universalities (*a priori* laws) and eidetic necessities (the essence of civil law) is a relation of dependence, civil laws depend on *a priori* laws to exist. It does not matter if the subject agrees with this or not, the lack of agreement of the subject does not change the being of civil law, its essence, or its necessary relations.

In the epistemological sphere, *a priori* laws are important because they can help the subject to comprehend better his object of study, in this case, enactments. Even to think about enactments is to think from the grounding of *a priori* laws. Thus, if the subject wants to comprehend his object properly, he will have to identify the eidetic universalities that correspond to its eidetic necessities. It means to evidence *a priori* laws and to describe how they show up in civil laws. In other words, comprehending *a priori* laws can help to understand enactments.

In the practical sphere, things get a little more complicated because the choice of the criterion that will be adopted depends on the subjects' assent. Put another way, the

criterion that will be adopted to evaluate enactments depend on the decision of the subjects. Since we have left the ontological and epistemological sphere, it is not an objective criterion anymore. Now, beliefs and cultural issues might influence this choice. Thus, to evaluate the content of enactments, first, it is necessary to choose a criterion of evaluation. More precisely, in this sphere, the relation between *a priori* laws and enactments is not necessary and is not evident. That is why, first, *a priori* laws have to be assumed as a criterion to evaluate the content of enactments and to assume *a priori* laws as a criterion to evaluate the content of enactments is a social act that relies on a decision of social agents, particularly the citizens and legal professionals of a society. As human beings, we choose the criterion we will adopt to evaluate our actions, to evaluate not only their coherence but also their fairness and justice. What I propose is that human rights should be adopted as the criterion by which the content of enactments is evaluated.

From the practical point of view, if material *a priori* laws (human rights) were taken as a criterion to evaluate civil laws (enactments), they could be judged as incoherent or incompatible, and thus be considered invalid. More accurately, if an enactment does not have a logical or meaningful connection with human rights, it can be considered invalid and abrogated, and its effects can be annulled.

It is important to stress that this evaluation is not moral, religious, political, economic, or ideological. By it, when the civil law is incompatible with any particular material *a priori* law, it means that this enactment is violating certain human rights and, therefore, should be considered invalid. It should be considered invalid not because it is morally reprehensible but because it is incoherent with its fundament. To adopt human rights as a criterion of evaluation of the content of enactments is to evaluate the coherence between them and human rights. The enactments cannot be inconsistent with human rights. If an enactment were evaluated as incompatible with human rights, that would be reason enough to declare it invalid; and if the enactment were evaluated as compatible, it could remain part of the legal system and produce its effects.

In this sense, human rights would be a limit to enactments working in a negative way. They would not be assumed as a set of commands or an imposition of values but would become a rational and logical criterion. Legislators would have full freedom to come up with different solutions to social problems as long as they were not contrary to human rights.

That is so because human rights and enactments lie in different dimensions. Human rights are part of *a priori* law, which means that they are eidetic universalities,

descriptions of the essence of civil law, and for this reason, they are the object of study of *a priori* theory of rights, which is an ontology of law. On the other hand, enactments are singularities that are subordinated to eidetic universalities, they have a core that is a positing of these, and still, they are factual, temporal, only promulgations derived from social acts. So, enactments are the object of study of the positive philosophy of law, which investigates their origin, competence, and effectiveness.

Thus, the relation between human rights and enactments is not causal. Enactments do not have to be a reflection of human rights to be considered laws or to be considered valid, as *iusnaturalism* advocates (Reinach, 1983: 136). Moreover, to phenomenology, enactments are not deduced from natural laws. The relation between them is grounding, in the same way as Reinach (1983: 134) establishes the relation between *a priori* laws and enactments. That is why enactments can deviate from human rights. Yet, if this happens, it will not be well grounded; in other words, it will be incoherent.

More accurately, human rights are the necessary ontological and epistemological grounding of enactments. Without *a priori* laws, enactments would not exist and would not be comprehensible. However, from this, it does not follow that *a priori* laws will become a practical grounding of enactments. That is because, when we are talking about the practical dimension, we have to consider that we are dealing with rational and free beings who can assume *a priori* laws as a criterion to evaluate their enactments or not. Some societies may choose to ignore human rights as their practical criterion for the evaluation of enactments. They cannot, however, avoid the fact that enactments come from rational and free beings, arise from intersubjectivity, and regulate only free and external behaviors.

From a strictly practical point of view, the fact that an enactment is incompatible with human rights does not mean that it will be necessarily invalid or ineffective. It will only be considered invalid if legal professionals and citizens decide to assume *a priori* laws as a criterion to evaluate an enactment. Then, after a judgment, the incoherent enactment will be declared invalid, and its effects will be reversed when possible. If human rights were assumed as proposed, they would become a limit to enactments, and boundaries to protect the essence of civil law.

5. Deviations

The comprehension of *a priori* law as the ground of enactments allows us to understand that this relation is only necessary on the ontological and epistemological dimensions. In the practical dimension, enactments can be incompatible with *a priori* laws. That is what Reinach (1983, p. 115) calls 'deviations.'

Reinach admits that deviations are quite common and that legislators, for reasons of opportunity and convenience, might legislate in disagreement with *a priori* laws. Considering only Reinachian comprehension of *a priori* law, that is not very challenging. However, when an enactment is inconsistent with material *a priori* laws, it means that its content is incompatible with human rights, and that is not a simple problem to solve.

My proposal is that human rights should be assumed as a criterion for the evaluation of the content of enactments. The consequence is that *a priori* laws would become highly important for enactments and, to the question formulated by Seifert (1983) – "[i]s Reinach's '*Apriorische Rechtslehre*' more important for Positive Law than Reinach himself thinks?" – the answer would be a resounding 'yes,' and I add three more reasons for this.

First, because phenomenology commences from the observation of lifeworld, it cannot deny that there are deviations from formal *a priori* laws that are entirely justifiable. We cannot simply deny that there are civil laws that are frankly incompatible with *a priori* laws. Let us consider this example, 'whoever makes a promise incurs an obligation; one who receives a promise bears a claim' is an *a priori* law, but it is very easy to find an enactment that determines that a promise made by a person lacking mental capacity is not valid. This is an obvious deviation from formal *a priori* law, yet there is a reason. Because the normal expectation is that a promise is followed by an obligation and a claim, if the legislator wants to fix different relations and consequences for a promise, he has to enact a law specifying it. Imagine that a prodigal promises to give his computer to someone else. The promisee, unaware of the condition of the promisor, accepts it in good faith. Then the parent of the promisor explains that he is prodigal and incapable of managing his affairs. This promise is not valid, but there must be an enactment establishing so. This enactment is an important deviation from a formal *a priori* law, and it is justifiable to preserve a human being, his physical, psychological, and patrimonial integrity. This deviation is acceptable because its purpose is to protect a material *a priori* law, namely, the first condition of possibility of civil law, the source of any enactment, rational and free beings.

Second, this example also serves to highlight that there is a hierarchy between formal *a priori* laws and material *a priori* laws. Material *a priori* laws – human rights – are superior because they are the conditions of possibility of any enactment. In plain English, formal *a priori* laws can be observed as long as their application does not imply a violation of human rights.

Third, if the deviation is unjustifiable, there will be enough reason to consider the enactment that is incoherent with human rights invalid and to punish its authors and executors. It is no solution to deny that the enactments incompatible with human rights are laws. Unfortunately, they are laws and produce effects. What we have here is a criterion to evaluate the content of enactments that are incompatible or incoherent with human rights.

For example, it is plausible that the Igbo tribe (Ezenweke, 2016: 25) separates boys and girls for a few weeks to teach them some lessons about life and their culture as a coming-of-age ritual. Besides the fact that they might get a little bored, no damage will be caused. On the other hand, female genital mutilation (FGM), which takes place mostly in Central Africa and the Middle East, is incompatible with the first material *a priori* law. The reason is that, according to the World Health Organization, FGM intentionally alters or causes injury to the female genital organs for non-medical reasons; it has no health benefits and causes only harm. The motives are social convention, cultural tradition, and beliefs about what is considered proper sexual behavior. To that end, a girl between infancy and 15 years old has her humanity denied. This girl might not have the actual capacity to express her will, but this does not mean that she is not rational and free. Even if she cannot express it at that moment, a human being is what she is. So, she must have her physical integrity guaranteed until she is capable of considering all its reasons and implications, and only then to express her will.

It is possible to argue that the intersubjectivity constituted in that region came up with this tradition, and it has to be respected. However, material *a priori* laws have to coexist; the protection of one cannot imply the elimination of the other. Traditions, cultures, religions, ideologies, and enactments must be respected as a result of intersubjectivity, but with the limit of the other two material *a priori* laws. When a rational and free being is treated like a beast or like an object, the first material *a priori* law is infringed, and human rights are violated.

Therefore, this interpretation raises the importance of human rights over enactments and makes their application plausible without getting into moral, religious, political, economic, or ideological issues.

6. Morals and *a priori* Laws

James DuBois and Francesca De Vecchi present a few difficulties derived from the amoral approach of Reinach's *a priori* law theory. In *Adolf Reinach: Metaethics and Philosophy of Law*, DuBois argues that:

> Reinach's claim that the nature of legal institutions such as promising and property can be grasped through insight, without reference to human nature or morality, gives rise to at least three difficulties:
> 1. An amoral approach to legal institutions such as property does not permit us to answer even very basic legal questions in a trustworthy manner,
> 2. The possibility exists that an 'a priori law' could be unjust, yet necessarily and self-evidently true,
> 3. Some of his 'self-evident' insights are controversial and seem to depend upon the assumption of controversial metaphysical truths. (DuBois, 2002: 341)

I intend to answer those objections as follows. The first objection is about the amoral approach of legal institutions. To answer this, we have to consider that *a priori* laws describe the essence of law and its necessary relations, and that is the reason they are amoral. As descriptions, they can only be correct or incorrect. In turn, enactments can confirm these necessary relations or deviate from them, and the reasons for those deviations can be moral, religious, political, economic or ideological, and so on – even Reinach (1983: 55) admits this. Specifically, in the case of property, Reinach presents the essence of what is an original property and defines it as an *a priori* relation between subject and object when "someone produces [*schaffen*] a thing out of materials which have never belonged to anyone. Here it seems quite obvious that the thing from its very beginning belongs to the one who produced it." (Reinach, 1983: 73) Despite this *a priori* law about the original property, the origin for legal property can be quite different, such as adverse possession. The *a priori* relations described are not sufficient to solve all problems that arise in our complex societies; there is not an *a priori* law for each problem that might

occur. That is why enactments establish different origins and cause for property, sometimes in accordance with *a priori* relations, sometimes not.

The second objection is that if you bracket from moral considerations, you can consider unjust laws necessary and self-evident truths. The answer to this objection is quite similar to the first one: *a priori* laws cannot be evaluated as just or unjust simply because they are descriptions of essences and their relations. However, when *a priori* laws are adopted as a criterion of evaluation, they can have consequences and might be used as justification for behaviors that are not just. Consider DuBois (2002: 342) example: Peter grows far more food than his neighbor Paul, who is starving to death. Can Paul take Peter's food "without stealing"?

It is true that if we consider only formal *a priori* law, the description of the *a priori* relation that describes the original property, the answer will be that Paul cannot take food from Peter without stealing. In fact, that is what he will be doing if he takes the food. It would be peckish theft, which can be considered an exclusionary of unlawfulness, but still stealing. Here indeed, there is a misunderstanding. The question is not about the action – the action is to steal since it follows the definition of stealing, i.e., removing someone's property without permission or right, especially secretly or by force. The question is whether the action is condemnable or not. This will depend on the criterion adopted. In this case, if only the formal *a priori* law is adopted, the action will be condemnable.

However, the proposition defended here is to adopt material *a priori* law – human rights – as a criterion. Thus, to come up with the right decision, it would be necessary to prefer human rights and postpone the formal *a priori* law about the property. More precisely, in this case, the *a priori* description of the original property is in conflict with the first human right. If a formal *a priori* is in conflict with a material *a priori*, the latter must prevail. The reason is simple: without rational and free beings, there is no law, there is no society, and there is no property to be protected. Therefore, if the existence of a human being is in conflict with property, human rights must be preferred, and property has to be postponed.[1] The property still exists and has importance, but its protection will be postponed. It is possible to argue that if only one person dies of starvation, humankind still exists. Yes, but this is not a coherent argument. Because what is true for all has to be true

[1] A procedure similar to what Max Scheler proposes on the application of the hierarchy of values presented in the *Formalism in Ethics and Non-Formal Ethics of Values: A new attempt toward the foundation of an ethical personalism*. The consulted book was the translation into Spanish. Max Scheler, Ética – Nuevo ensayo de fundamentación de un personalismo ético (Madrid: Caparrós Editores, 2001), p.127 and p.178.

for only one; otherwise, it is not true. Another example is if all humankind was facing a risk of vanishing because of a virus, and a pharmaceutical laboratory discovered the cure, its property would have to be postponed, and all labs should be allowed to produce the vaccine and distribute it to all people. After humankind was safe, we could find a way to recognize this property and reward the pharmaceutical laboratory that invented the cure. Of course, the state could legislate in different ways and find different solutions, but no solution would be coherent if it preferred property instead of humankind.

The third objection is that some of Reinach's "self-evident" (DuBois, 2002: 341) insights are controversial and seem to depend upon the assumption of controversial metaphysical, teleological, and moral convictions. The only Reinachian metaphysical assumption is the existence of a mind-independent world. It is an assumption that many other philosophers accept, such as Kant (*KrV*, A368-A370) and Husserl (Hua III: 87 and Hua XIX: 430-431). However, Reinach does not presuppose any teleological or moral conviction. On contrary, he intends to reach the essence of his object and for this he suspends judgment. The charge of being controversial or lacking understanding or acceptance does not affect *a priori* laws or metaphysical truths. Reinach (1983, 4-5) states that not all *a priori* laws are understood, but this does not change the fact that they are *a priori*, and necessary, and truths. In this sense, the formal *a priori* law about promise does not depend on recognition of anyone in order to exist.

DuBois (2002: 341) insists on affirming that the *a priori* law about promising is a controversial metaphysical truth. He remembers that Reinach maintains that a promisor does not have the right to waive the claims of the promisee, whereas the promisee does have such right, and raises questions about the reason the promisee can waive the claim and the promisor cannot. Indeed, there is no contradiction. The promisee can waive the claim because the claim is his: the claim is based on the promise, but the claim cannot be confused with the promise. The promisor cannot waive something that is not his. Besides, the reason the promisee may waive the promise does not interfere with the *a priori* law described.

De Vecchi, in *A Priori of the Law and Values in the Social Ontology of Wilhelm Schapp and Adolf Reinach*, presents a completely different perspective of the issue. She agrees that the values do not have any role in Reinach's theory of *a priori* law, and that values and *a priori* laws are entities from different ontological regions. However, she asks if it is possible to identify a relation between an *a priori* law and values, which is not a constituting relation, but just an extrinsic relation. Her answer is affirmative since "The

idea of the just law is plainly connected with the issue of the evaluation of norms" (De Vecchi, 2016: 312).

I have to agree that it is compatible with Reinach's theory to establish a relation between *a priori* laws and values, but it needs an explanation. First, values and *a priori* laws are in different and independent ontological regions, they are variations of eidetic universalities and the relation between them is horizontal, meaning that it is neither necessary nor universal. Second, the relation between *a priori* laws and civil laws is vertical, the latter is dependent on the former, it is a necessary and universal relation. Now, the relation between values and civil laws can be established *a posteriori*, that is to say, values can be assumed as a criterion to evaluate civil laws, but this is neither a necessary nor a universal relation. In fact, it is perfectly possible to assume different criterions for evaluation of civil laws, such as moral, religious, ideological, political and so on. As mentioned before, even Reinach admits this possibility when he considers the causes of deviations from *a priori* laws.

7. *A priori* Law is not a Version of Natural Law

In *Natural Law and the Phenomenological Given*, Marta Albert analyses Reinach's theory of right, and offers a new grounding for human rights. She argues that "just as the legal regime of promise is connected to the essence of promising and its a priori structure, the legal regime of personhood is connected to the essence of the person and its a priori structure." (Albert, 2013b: 119)

Albert (2013a) grounds human rights in the essence of personhood. Distinctively, what I am trying to do is to apply the phenomenological method and reach the essence of civil law, defined by Reinach as enactment. My starting point is civil law (i.e. enactments), not the person. Nonetheless, Reinach has most of the work once he describes *a priori* relations between states of affairs – enactments. I have tried to complement his thought by applying the eidetic reduction to reveal the noematic dimension of civil law, its material *a priori*. Even more specifically, Albert (2013a) ultimately grounds human rights in the essence and structure of personhood, while I have tried to ground them in the essence of civil law. Our starting point is quite different, and the method is also different since I apply Husserl's phenomenological method, while Albert stands firm with the idea of direct intuition presented by Reinach.

Consequently, my approach leads to a different comprehension of what *a priori* laws are. Albert (2013b: 151) defends the proposition that they are a version of natural law. In this sense, she argues that Reinach's theory and natural law tradition have characteristics in common: first, both are meta-empirical; second, *is* and *ought* are not dissociated; and, third, the material content of what is right and wrong is a matter of neither taste nor agreement. In order to refute this interpretation, first, it is important to consider that the fact that Reinach's theory is meta-empirical is not enough to classify it as a version of natural law. It is true that *iusnaturalistic* theories are based on meta-empirical premises, but there are *iuspositivist* theories that also appeal to non-empirical statements, such as Kelsen's (1967) Basic Norm, Rawls's (1971) veil of ignorance, Habermas's (2001) ideal speech situation and Dworkin's (2000) theory of equality, and they are not classified as *iusnaturalistic* theories because of these ideas. Second, *is* and *ought* are not dissociated in the ontological and epistemological spheres, but this is not enough to relate them in the practical sphere. In this sphere, they are dissociated: to adopt *is* as a criterion of evaluation of *ought* depends on social acts. Third, and most importantly, right and wrong can be applied neither to *a priori* laws nor to enactments in relation to *a priori* laws. The description of an *a priori* is either correct or incorrect, and enactments compared to *a priori* laws are either coherent or incoherent. This is so because *a priori* laws do not give any commands or impose any behaviour; they are just descriptions. However, the result of the application of *a priori* laws over enactments can be right or wrong when compared to values, as shown through the example about property given above.

In *A priori law vs. natural law? Adolf Reinach's contribution*, Mariano Crespo (2008: 598) argues that Reinach's *a priori* law theory would be a new way to evidence certain underlying elements of positive law. This is true, but it is not enough to put *a priori* law theory among natural law theories. There is no incompatibility between *a priori* law and natural law, but *a priori* law goes beyond natural law. *A priori* law theory evidences the ontological and the epistemological grounding of positive law, understood as enactments. In addition, it can become a practical grounding for enactments if assumed as a criterion of evaluation. The relation between them is not a causal; it is a grounding relation which can be recognized and applied, or not.

In *Adolf Reinach's Discovery of the Social Acts,* John Crosby (1983: 178) writes: "Reinach's apriori sphere becomes thematic in considerations of justice, even if one has to go beyond it in order to reach a decision as to what is just." Slightly later, he writes:

> "[o]ne wonders, for example, whether Reinach's sphere of right really distinguishes itself, as Reinach thinks, from the natural law in that only the latter has a normative function with respect to the positive law. Is Reinach's apriori sphere of right really so lacking in normative importance for positive law as he claims (p.135)?" (Crosby, 1983: 178)

First, we have to consider that Crosby does not classify Reinach as an *iusnaturalist*, despite the fact that he seems to point in this direction; he leaves the debate for further discussions. Second, I agree that the application of *a priori* law over enactments can have moral consequences, and bring to light an idea of justice. However, what I have deliberately tried to do is to propose a grounding for human rights that does not depend on a specific idea of justice, morals or religion, etc. The reason for this is that to ground human rights in those values does not work in favour of their effectiveness. Third, answering Crosby's question, yes, *a priori* law is important for positive law. Nonetheless, an observation that has to be made is that *a priori* law is inevitably important for positive law ontologically and epistemologically, but can only become important to civil law practically, if legal professionals and citizens decide to assume human rights as a criterion to evaluate enactments.

In *Is Reinach's "Apriorische Rechtlehre" more important for Positive Law than Reinach himself thinks?*, Josef Seifert (1983: 197) does not take a position on *a priori* law theory classification. He also mentions Dietrich von Hilbebrand who considers

> that 'natural rights' which are linked to the essence and dignity of the human person and his vocation, are always related to values and partly founded in them, while apriori law proceeds more from the immanent structure of certain acts than from values. (Seifert, 1983: 229)

Seifert (1983: 229), though, would later warn that he does not "agree with the implication that *a priori* law is wholly lacking the character of 'judge' of positive law." I have to agree with Hildebrand and with Seifert. The fact that *a priori* laws proceed from immanent structure, that is, are descriptions of essences, does not prevent them becoming a criterion of judgment of positive law. They only have to be assumed as such.

Those are a few reasons to consider *a priori* law not a version of natural law. Instead, it is beyond natural law and positive law; it is a theory that combines both of

them and explains in what spheres they are necessarily related, and in what sphere they can be related.

8. Conclusion

What is presented here is a new comprehension of human rights. To reach human rights, the starting point is the phenomenological reduction of civil law defined as enactments. In a search for its essence, I have reached material *a priori* laws, which I have called human rights. Human rights are the ontological and epistemological grounds of enactments and can become, by a decision of legal professionals and citizens, a practical grounding and criterion to evaluate the content of enactments. Enactments coherent with their grounds are valid and can have legal consequences in the lifeworld. Enactments inconsistent with their grounds should be declared invalid, their effects should be reversed when possible, and their authors and executors judged. This idea of human rights sets them apart from moral, political, religious and ideological issues; therefore, they might have more chance of becoming effective and not be lost in endless discussions.

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