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THE EXPERIENTIAL PARADOX OF LAW IN WAR

In this short contribution, I would like to reflect on what I call "the experiential paradox of law in war." What is this experiential paradox? On the one hand, war is recognized as a legal category. It has a place in law, with its legal rules and norms. Or one could also say: In the situation of war, a special legal situation applies: *ius in bello*. On the other hand, this kind of law is not experienced *as* law – at least not as law in the everyday sense. This I gather from both Nataliia Satokhina's and Oleksiy Stovba's texts – which each draw different consequences from this experiential description. The *experience* of law in war is one of lawlessness, of being left alone in the face of violence. In the face of war, the experience of law is an absence and not a presence, although, legally, law itself is still intact.

This is not meant to be an abstract thesis, but the *description of an experience.* And the paradox lies in the fact that one knows that a legal regime applies but that it is not experienced as such. What does this mean and imply? Is law the opposite of war? Or is law just discerning that which is legal in war, and which is not? This description thus makes us reflect about what law is; what the meaning of law is in our everyday lives.

I would like to make clear that this is not a legal or juridical reflection. From the legal-positivist standpoint it is clear that *ius in bello is* law. And lawyers and legal experts sure are the professionals we turn to when we want to know what exactly is legal now, what counts as legally valid, as international or domestic law and what kinds of legal regimes there are: the human rights regime, the Geneva conventions etc.

Yet, these are purely legal aspects of law. There are, in addition and not in contradiction to this, sociological aspects of law, psychological ones, maybe also psychoanalytical ones, etc. What I try to aim at here is that there is yet another perspective: law can be regarded from a phenomenological viewpoint. And this happens when it is regarded in the way how it builds a world and how it realizes itself and appears in a situation; and last but not least: how it is experienced. This is what both Satokhina and Stovba are aiming at in their texts, and this is what I would like to reflect on by presenting three models that seem to be at play here.

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I

The first model is the classic legal model of *law as a norm* which Stovba criticizes: you can split it up in the normative perspective from a positivistic background (Kelsen[1]) and the normative perspective from a moral background (Kant, Alexy[2]). Let me focus on Kelsen, because it nicely illustrates how law can be viewed like a "garb of ideas"[3] *(Ideenkleid)* that is thrown over the world. This is the terminology that Edmund Husserl uses in the *Crisis,* describing the mathematization of nature through modern science. Modern legal science similarly uses a "normative scheme of interpretation" *(normatives Deutungsschema)*[4] which makes the world appear in legal forms and terms.

Stovba criticizes that this is not how law can or will ever be experienced. Satokhina takes a slightly different view: she regards it as crucially important that the normative garb of ideas allows us to "name things," to say: this is wrong, or illegal. It allows us to employ a normative language from the ideal viewpoint of law. This is important in a situation of war. Or to put it differently: It is always important, but it remains important *even* and *especially* in a situation of war. What it implies on a more structural level is that war and peace are on the same ontological level, that of "reality" or "being," over or above which the normative dimension is located – the garb of ideas thrown over peace and war equally.

II

The second model, which Satokhina favors,[5] is one where law and war are on two *different* ontological levels or spheres. Law and war are opposites here in the sense that law gives *humans* a garb of ideas and thus of protection. It gives them a place in the world and tries to guarantee a net of recognition (in the twilight zone of recognition and non-recognition) – while war takes all of this away.

War is thus a different ontological dimension. And this insight would allow for a first answer to the experiential paradox: Why do we experience war as the absence of law while law remains intact in a legal sense? It is not because the law is broken. It is rather because war "does" the opposite of law: it strips people from their protection, it creates a "totality"

[1] Hans Kelsen, *Reine Rechtslehre. Zweite, vollständig neu bearbeitete und erweiterte Auflage 1960* (Vienna: Verlag Österreich, 2000).
[2] Robert Alexy, "Law's Dual Nature," *Ordines* 1 (2019): 42–51.
[3] Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology* (Evanston: Northwestern University Press, 1970), 51. Edmund Husserl, *Die Krisis der europäischen Wissenschaften und die transzendentale Phänomenologie. Eine Einleitung in die phänomenologische Philosophie* (Den Haag: Nijhoff, 1954).
[4] Kelsen, *Reine Rechtslehre*, 3.
[5] Nataliia Satokhina, "Experience of law and Experience of Lawlessness: Hermeneutic Perspective," in *The Experience of Law. Collection of Articles and Essays* (Kharkiv: IVR Library, 2019), 18–30 ; Nataliia Satokhina, "Phenomenology of Peace and War: Experience of Law and Experience of Lawlessness," Filosofiia prava i zahalna teoriia prava 2 (2023): 13–18.

and "worldlessness" like described in the works of Hannah Arendt[6] and Emmanuel Levinas.[7] Therefore, trying to regulate war is trying to keep and uphold a world as well as worldliness in an ontological zone that does the opposite and thus is wholly different from that project. This implies that it is doomed to fail. In war, the rules of war are always broken; of course, in peace, laws are violated too. But war already *is* a state of violation. This is why war seems to stand for total rule and no rule (anarchy) at the same time. *"Inter arma silent leges" (while in arms, laws are silent):* this was once a legal proposition which was supposed to *justify* and *explain* that laws would be broken during times of war. Today, however, we have a legal framework that prohibits aggression; we live in a more Kantian world, one could say. A garb of ideas has been thrown over the state of war to tame or at least condemn it.

Yet: The essence of war, or its ontological truth seems to be that it stands against law – or at least: against the promise of law. This brings me to the dimension of the *transcendence of law* we find in Satokhina's proposal. Law is not just applied "in war" or "in peace" but it is *meant to end war* (civil war as well as war between nations) and to bring as well as guarantee peace. In this sense, it does not matter if law was first, or if a legal peaceful status was first. It is no sign of existential truth or authenticity that there has always been war, or that this should be our alleged state of nature. Neither would it say anything if peace was our state of nature. In a world of war, law is the first sign of peace; in a world of peace, aggression is the first crime.

III

Finally, let me turn to the model Stovba proposes.[8] Also, in his paper we find a description of the experience of lawlessness, because human beings are harmed without being recognized. This experience of radical non-recognition differs from being the victim of a crime in the state of peace, because this victim is at least recognized by the law and its institutions. Now, as I read it, Stovba sees law not as a stable dimension of "ought" but as a discrete event, in the situation. "The law demands a personal involvement, a risk, a responsibility."[9] The dimension of an abstract ought therefore at best brings about an abstract and alienated "experience of law" which Stovba contrasts with an existential and "bodily legal experience."[10] The latter often happens as bodily suffering; in fact, as an experience of injustice. This bodily suffering is usually concealed in the normative legal discourse.

Now: Stovba's argumentation continues that this bodily experience of law is different in war and in peace. Why? First of all, it seems to be a suffering *with* and, on the other hand, *without* recognition and institutional framing. But then Stovba also says that "[w]ar reduces

[6] Hannah Arendt, *Origins of Totalitarianism* (New York: Hartcourt, Brace & Company, 1973).
[7] Emmanuel Levinas, *Totalité et infini. Essai sur l›extériorité* (Paris: Livre de Poche, 1990).
[8] Oleksiy Stovba, "Is Law Possible during the War? Specificity of the Corporeal Experience," *Phenomenology and Mind* 25 (2023): 216–25.
[9] Ibid, 221.
[10] Ibid, 222.

all kinds of legal beings to their original mode" and "ideal core;" and that, therefore, it functions a kind of "phenomenological reduction."[11] My question here would be: is this understood as an "ideality/essence" or "original mode" that reveals some truth? If yes, this would remind of the classical thesis that *polemos* shows the things as they really are. However, one could also regard the "naked core" or "naked truth" of war already as a violation (as Levinas does, for example).

In war "the body is an object of *anonymous unmotivated aggression from the enemy state.*"[12] It seems that the only criteria that are left then, are not the ones installed in peace, which are the limits of my external agency towards the body of others and the limits of my bodily integrity. Instead, this intersubjective logic *between* bodies is replaced by overall suffering and violation, something *coming down on* bodies, where only the *where*, the *how*, and the *who* introduces a differentiation: civilians vs. combatants and their respective places; so-called conventional weapons vs. weapons of mass destruction or ABC weapons, etc. We can recognize the classical differentiations of the Geneva conventions here.

Let me wrap up my comments by trying to give a focus to the discussion that combines what I have called the "experiential paradox" of law in war with one of the most prominent questions in phenomenology of law: that of the "sources of law." What are the classical answers to the sources of law? Let me name just two: In Adolf Reinach's work,[13] it is human interaction, social acts (e.g., promising) from which eidetical structures are extracted, as well as persons who can entertain social acts. In Gerhart Husserl's theory,[14] it is intersubjective recognition that brings life and "being" to law.

In times of war, this question seems to pose itself from a different angle than in peace. As we've seen in Satokhina's text, I would claim that the source of law roots in its transcendence, its promise, its alienness maybe; in Stovba's text the source of law seems to root in an intersubjective bodily experience of liminality and integrity – an intersubjectivity that is crossed out by the new categories of war. Law then would root in the promise of peace or in the possible destruction of living bodies.

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[11] Ibid, 223.

[12] Ibid, 223.

[13] Adolf Reinach, "Die apriorischen Grundlagen des bürgerlichen Rechts," in *Sämtliche Werke.* Textkritische Ausgabe in 2 Bänden, ed. Karl Schuhmann & Barry Smith (Munich/Vienna: Philosophia 1989), 141–278.

[14] Gerhart Husserl, *Rechtskraft und Rechtsgeltung. Eine rechtsdogmatische Untersuchung.* Band 1: Genesis und Grenzen der Rechtsgeltung (Berlin/Vienna: Springer, 1925).

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Sophie Loidolt. The Experiential Paradox of Law in War

Abstract. This contribution reflects on two texts by Ukrainian phenomenologists of law Nataliia Satokhina and Oleksiy Stovba, dealing with the experience of law in war. This experience entails a paradox: While we know that there is something like *ius in bello*, the *experience* of law in war is one of lawlessness, of being left alone in the face of violence. To elucidate this paradox, I extract three models of law from Satokhina's and Stovba's texts which illustrate different conceptions of the ontological relations between law and war: First, the classic normative model (Kelsen, Alexy) which throws a "garb of ideas" (Husserl) over the world and where war just as any other situation can be grasped in legal terms. Second, the oppositional model (Satokhina), where law and war are conceptualized as two different ontological spheres: while law protects human beings with the normative garb of ideas and grants recognition, war tears it away and creates a sphere of totality and worldlessness. Third, a model where law is bodily experienced as a discrete event (Stovba): in peace, law is then experienced as an intersubjective relation between bodies while in war, bodies are exposed to violence coming down on them. Differentiations do not happen in terms of relations or in-between but rather in terms of the where, how, and who. Finally, I link these proposed models to the classic question of sources of law in the phenomenology of law.

Keywords: experience of law; war; *ius in bello;* phenomenology; world; transcendence; body.

Софі Лойдольт. Парадокс досвіду права на війні

Анотація. У цій статті розглядаються два тексти українських феноменологів права Наталії Сатохіної та Олексія Стовби, які стосуються досвіду права на війні. Цей досвід парадоксальний:

хоча ми знаємо, що існує *ius in bello*, досвід права під час війни є досвідом безправ'я, коли ми залишаємося на самоті перед обличчям насильства. Щоб прояснити цей парадокс, я виділяю три моделі права з текстів Сатохіної та Стовби, які ілюструють різні концепції онтологічного відношення між правом і війною. Перша – класична нормативна модель (Кельзен, Алексі), яка покриває світ "одягом ідей" (Гусерль) і в якій війну, як і будь-яку іншу ситуацію, можна зрозуміти в правових термінах. Друга – протилежна модель (Сатохіна), у якій право і війна концептуалізуються як дві різні онтологічні сфери: у той час як право захищає людей нормативним одягом ідей і гарантує визнання, війна знищує це і створює сферу тотальності та безсвітовості. Третя – модель, у якій право тілесно переживається як окрема подія (Стовба): під час миру право переживається як інтерсуб'єктивний зв'язок між тілами, тоді як під час війни тіла піддаються насильству, яке чиниться над ними. Відмінності проводяться не в термінах відносин або між ними, а радше в термінах де, як і хто. Нарешті, я пов'язую ці запропоновані моделі з класичним питанням про джерела права у феноменології права.

Ключові слова: досвід права; війна; *ius in bello;* феноменологія; світ; трансценденція; тіло.

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