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SILENT LEGES INTER ARMA? WAR AND THE EXPERIENCE OF LAWLESSNESS**

In what follows, I would like to enter into dialogue with Oleksiy Stovba and Nataliia Satokhina – two Ukrainian phenomenologists and philosophers of law – regarding an issue that lies at the center of their philosophical writings since the start of the war in Ukraine, viz., the experience of lawlessness during wartime.[1] My question, just as theirs, is phenomenological: What can be said, phenomenologically, about lawlessness as experience? As Oleksiy Stovba puts it, "despite all the norms and guarantees of international law, the living experience of human beings during war is an experience of lawlessness."[2] What, then, is lawlessness as experience? And why is it important to speak of experiences of such a nature?

By raising these questions, we find ourselves in the same situation as Socrates' interlocutors in Plato's dialogues. Confronted with principal questions, such as "what is justice?," "what is truth?," or "what is love?," they would make the mistake of offering direct answers. This was the central reason behind their downfall, as such a skilled dialectician as Plato's Socrates repeatedly showed. What Socrates taught us in Plato's dialogues is that philosophical questions of such paramount importance should never be answered directly. Rather, one should engage in them by first asking other questions, viz., operational questions. This is how Socrates himself used to proceed in Plato's Dialogues: provoked by others to offer an answer, he would proceed to raise further questions.

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[1] See Oleksiy Stovba, "Is Law Possible during the War? Specificity of the Corporal Experience," *Phenomenology and Mind* 25 (2023): 216–25; Oleksiy Stovba, "What Law 'Is' Possible in Wartime?" *Filosofiia prava i zahalna teoriia prava* 1 (2023): 23–31; Natalia Satokhina, "Law and Gift: Phenomenology of Legal Experience," *Filosofiia prava i zahalna teoriia prava* 1 (2022): 14–26; Nataliia Satokhina, "Phenomenology of Peace and War: Experience of Law and Experience of Lawlessness," *Filosofiia prava i zahalna teoriia prava* 2 (2023): 13–18.

[2] Stovba, "Is Law Possible during the War?" 1.

These general observations are methodologically important in the present context because they allow us to see the following: before anything is said about lawlessness, it is important first to clarify how one understands law. Clearly, one can rely on different conceptions of law, no matter how inarticulate they might be, and depending on the exact nature of these conceptions, one's understanding of lawlessness will turn out to be significantly different. Thus, before inquiring about lawlessness, we need to raise a more basic question: what are we to understand by law? This is, then, the question with which I would like to begin before I turn back to the other question raised above, viz, the question concerning the relation between war and the experience of lawlessness.

Law as Event, or Happening

Since my chief goal here is to pursue a dialogue with Oleksiy Stovba and Nataliia Satokhina, in the present context I will rely on as well as further elaborate those conceptions of law that we find in their writings. Despite important differences between their views, both authors share a common ambition, viz., to develop post-metaphysical conceptions of law. Law should not be understood as the normative sphere of the Ought that is opposed to Being, but as a concrete event (Stovba).[3] Law should not be understood as an object, but as something that happens to us (Satokhina).[4] With the aim of thinking through the line of thought their research opens up, let us ask: what could it possibly mean to think of law as an event and as a happening?

By engaging in this question, I will in some ways depart from the line of thought developed by these two thinkers, first and foremost because the approach that I will take is neither Heideggerian (Stovba) nor Levinasian (Satokhina).[5] While Stovba emphasizes the

[3] In his book, *The Temporal Ontology of Law* (Oleksiy Stovba, *The Temporal Ontology of Law* (Sankt-Petersburg: Alef-press, 2017)), Stovba maintains that the Being of law is localized in the temporal relation between deeds and their legal consequences. More precisely, Stovba's proposed ontology of law consists of three levels: 1) the legal being (*das Seiende*) understood as the existence of concrete laws, legal representatives, pieces of evidence, contracts, parties, etc. 2) legal Being (*das Sein vom rechtlichen Seiende*) i.e. the Being of such beings, which makes them legally relevant, and 3) the pure Being of law (the Heideggerian *Sein*) as the traction between the legally relevant deeds and their legal consequences. Law as such exists as an event (*Ereignis*), as the unity of the pure Being of law and legal time, understood as the three-directional structured gap between legally relevant deeds and their legal consequences. This means that law does not exist either as "legal substance" such as norms of legislation, or as a normative field of the Ought, but rather, its existence is to be found in the discrete multiplicity of legal events.

[4] Satokhina, "Phenomenology of Peace and War," 14.

[5] As my comments above show, Stovba's ambition is to develop a Heideggerian ontology of law, while Satokhina's position could be qualified as Levinasian, even though she does not do qualify it in these terms herself, and even though she provides reasons to contend that a Levinasian philosophy of law is a contradiction in terms. However, following Marcel Henaff, Satokhina sees in the recognition of the otherness of the Other the recognition of the Other's dignity and she maintains that the central issue in law is precisely that of respecting the Other's dignity. More precisely, Satokhina rethinks reciprocity as alternating dissymmetry, understood as an alternating exchange of gifts. In such a fashion, by rehabilitating reciprocity, one obtains the means to ground philosophy of law in philosophy of alterity.

importance of liminality and corporal experience,[6] and while Satokhina emphasizes the link that binds law to the excess and gift, in the following reflections I will focus on *judgment*. My working hypothesis runs as follows: We can think of law as an event, or a happening, insofar as its concrete existence calls for acts of judgment, so much so that in the absence of such acts, law could not exist.

At first glance, the view I am presenting appears counterintuitive. Shouldn't we identify legal documents with law? Yet such an objection does not sound convincing. Legal documents of diverse nature do not present us with law, but with what one could call *law in a dormant state*. It is judgment that awakens law from such sedimented existence.

Stovba contends that law should not be understood as the normative sphere of the Ought. We can take this to mean that law is not reducible to the established rules and regulations. I say, "not reducible," for I take it to be uncontroversial that without rules and regulations, there is no law. One could further single out the following characteristics of legal rules and regulations: 1) they are stated in the form of negative imperatives (i.e., prohibitions); 2) they make a claim to universality in the sense that everyone who falls under the jurisdiction of the law must obey them; 3) they order human plurality, by which I mean that they regulate over interhuman relations. Nonetheless, the genuine meaning of these regulations needs to be established, and this can happen only in the concrete acts of judgment. One therefore needs to stress: it is judgment that breathes life into legal documents.

What is judgment? In pre-Kantian philosophy, judgment was equated with predication: to judge is to give a predicate to a subject. We can call this the logical definition of judgment. The great innovation of Kant's First *Critique* lay in the replacement of predication with the idea of subsumption: for Kant of the *Critique of Pure Reason,* to judge is to place the particular under a universal. Such is the essential structure of what Kant called *determinative* judgment. The novelty of Kant's Third Critique lay in the discovery that alongside determinative judgments, there is a whole other group of judgments, viz., *reflective* judgments. While determinative judgments proceed from top to bottom, reflective judgments proceed in the opposite trajectory, from bottom upwards. In a reflective judgment, one begins with a particular case and one cannot find a pregiven universal under which one could subsume it; one is thereby compelled to shape new universals.

I have already presented my working hypothesis: law is an event, or a happening, in the sense that its concrete existence relies on the acts of judgment. But now we need to ask: what kind of judgment is in question here – predicative, determinative, or reflective? It is of crucial importance not to limit one's answer to any of these options. Whichever answer one would choose, one would end up excluding various kinds of legal judgments. It is therefore important to leave the space open for various kinds of judgments in law. Some legal judgments are predicative, others – determinative, yet others – reflective. This is of

[6] According to Stovba, during war, one can speak of the existence of law only on the level of embodied experience. Precisely because war destroys the common world as the intersubjective horizon, the existence of law can only be localized at the level of corporeality.

importance, for if one accepts such a view – and I cannot see any strong reasons to oppose it – one could further identify rules and regulations as *legal schemas* that call for acts of judgment. Borrowing a metaphor from Paul Ricoeur, one could then say that legal rules and regulations are like the rules of chess: one must be familiar with them if one is to play chess, yet each time one plays, one does not know how the game will unfold and how it will end. The true significance of legal schemas can only be ascertained in concrete situations, while attending to the relevant circumstances. Thus, on the one hand, one needs to apply the law in a particular case (determinative judgment); yet on the other hand, application often proves to be an extraordinarily complex affair and it often requires that one interprets the law in light of concrete circumstances (reflective judgment). To return to the metaphors used above, one must be always ready to proceed downwards and upwards. This means that we find ourselves here in a hermeneutical circle: while aiming to legally evaluate the situation on the basis of preestablished rules, one at the same time catches a glimpse of the true meaning of rules while attending to concrete circumstances. Against such a background, one can claim that law is a happening (Satokhina) or an event (Stovba) because it "happens" or "occurs" in the acts of judgment. It is the act of judgment that enables the law to exist in concrete circumstances.

We can trace specifically phenomenological analyses of judgment back to Brentano, who suggests that judgment is a kind of "yes saying" or "no saying:" it is a matter of expressing one's assent or dissent to a presentation. Judging is a matter of naming states of affairs. This is the view that Husserl criticized starting with his *Logical Investigations*. According to Husserl, the Brentanian view ignores important differences between judgments and presentations. They are characterized by different kinds of intentionality and we can glimpse this difference in the fact that, in contrast to presentations (*Gegenwärtigungen*), judgments assert that something is the case. While presentations are directed at objects, judgments are directed at states of affairs, and with this in mind, Husserl maintains that in judging something irreal (state of affairs) is constituted. Moreover, while presentations are given in the form of certainty, judgments entail at least some uncertainty, for they require that one weigh different motives and different possibilities. While presentations belong to receptivity, judgments belong to higher order activity: they require active appropriation on the part of consciousness. Moreover, in contrast to presentations, judgments are concerned with conceptualization. While being essentially different from presentations, judgements can be founded on presentations. So also, they can be founded on different kinds of presentifications (*Vergegenwärtigungen*) as well as on feelings of various kind. In all cases, according to Husserl, judgments are founded upon pre-predicative experience. As Husserl further argued in his later works, and especially *Formal and Transcendental Logic* and *Experience and Judgment*, judgment is a matter of position taking. This means that, as Descartes had already maintained, judgments bring into unity understanding and the will. To judge is to decide and once one has decided, in some form or another, one follows one's decision. This can take different shapes and forms: according to Husserl, there are

different levels, or kinds, of conviction. Judgments shape the subject's believes and convictions, which in his later works, Husserl conceptualizes under the heading of the modalities of judgment.

To this rich phenomenology of judgment, let us further add four further characteristics, deriving them from Paul Ricoeur's works: to judge is to 1) opine, 2) assess; 3) take as true or false, and 4) take a stand. In a legal context, judgment is meant to bring quarrels and litigations to an end, and thereby to offer an alternative to violence. Negatively put, the goal of legal judgment is to dissolve conflicts; positively put, the goal is to establish social peace. Moreover, the sphere of judgment is deeply paradoxical: on the one hand, as the German term, *Urteil*, suggests, judgment is a matter of dividing (*teilen*), i.e., of drawing distinctions between what is mine and what is Other's. Yet on the other hand, judgment is also a matter of bringing different parties into unison and making them realize that all of them have a share in the same society. Legal judgment manifests a fragile equilibrium between these two elements.[7]

As mentioned, legal judgments do not let themselves be easily qualified as either predicative, or determinative, or reflective. In some cases, legal judgment is a matter of straightforwardly applying the universal to the particular. In other cases, careful attention to the circumstances proves necessary, one has to weigh alternatives carefully and choose between them. Yet in other circumstances, one needs to choose between a good alternative and a worse alternative; still in other cases, between a good alternative and a better alternative. In his writings on ethics, Husserl had addressed such conflicts of values and in such instances when lower values come into conflict with higher values, he spoke of the law of absorption: the higher values must absorb the lower values. This means that when higher values come into conflict with lower values, we must follow the higher values: the better is the enemy of the good. Yet as Husserl further emphasized, the law of absorption does not apply in all instances. When two absolute values come into conflict with each other, instead of absorption, we can only speak of sacrifice. This is especially the case when it comes to tragic circumstances: Husserl's own example concerns the choice that the mother faces during war between protecting her son's life and protecting her fatherland. As one commentator remarks, "there are no logical 'rules' that can guide choices in such cases."[8] Nonetheless, even though formal rules are missing, sacrifice is not a matter of throwing a die and seeing where it lands. Rather, as Ricoeur remarks, "this tragic dimension of action calls for what Sophocles calls *to phronein*, the act of 'judging wisely'."[9] In such tragic circumstances, it is no longer a matter of deciding

[7] See Paul Ricoeur, *The Just*, trans. David Pellauer (Chicago and London: Chicago University Press, 2003),127–32.
[8] John Drummond, "Self-responsibility and Eudaimonia," in *Philosophy, Phenomenology, Sciences: Essays in Commemoration of Edmund Husserl*, eds. Carlo Ierna, Hanne Jacobs, and Filip Mattens (Dordrecht: Springer, 2010), 54.
[9] Ricoeur, *The Just*, 154.

between black and white, but rather "between gray and gray, or, in the highly tragic case, between bad and worse."[10]

In the present context, it is not possible to provide an account of the hermeneutical revival of *phronesis* that we come across in phenomenological hermeneutics of the second half of the twentieth century. For our purposes, this brief exposition of the philosophical problematic of judgment will have to suffice. While many of the themes here mentioned could be further expanded, in the present context, this is neither possible, nor necessary. To repeat: my goal here is to show that there is indeed a way to think of law as a happening, as an event. So as to exist, law must be "awakened," i.e., enacted, and it is enacted in an act of judgment. As seen from such a standpoint, the history of any legal community is a history of such enactments: law exists as a series of events, by which I mean: as a series of judgments.

One would be right to note that something is missing in the account here offered. The presence of legal documents identified here as legal schemas, and of the acts of judgment, which awaken law from a dormant state, do not by themselves ensure the presence of law and lawfulness in any social framework. What is still missing in the picture here offered is the acceptance of the law by the community as authoritative. For law to exist, besides the availability of the legal documents and their enactment in judgment, the members of the legal community must accept these judgments as binding: they must be ready to subject themselves to the law. Recall Husserl's insistence that judgment gives rise to decisions and convictions. In the case of legal judgments, the convictions no longer refer just to the subject of the acts of judgment, but to all the members of the legal community. Otherwise put: besides being passed, legal judgment must also reach its audience and be accepted as binding. The presence of legal documents (legal schemas), their enactments in the acts of legal judgments, and their acceptance as authoritative by the legal community – these are the three essential components of law understood as a happening or an event.

War and Lawlessness

Against such a background, let us turn back to the question with which we started: in Stovba's words, is law possible during war,[11] or are we to say that war signals the transformation of lawfulness into lawlessness? One would be right to remark that this question is posed too broadly: there are different kinds of wars and the ongoing presence of law in a country at war largely depends on the intensity and extensiveness of violence. Moreover, alongside hot wars, there are also cold wars, and there is little question about the presence of law in countries engaged in cold wars. Let us therefore make this question more precise. Might Cicero not have been right when he claimed: *silent enim leges inter arma*? What is in question, then, is the possibility of law in a country that is shattered by violence caused by an occupying force. Is law possible under such circumstances? The foregoing analysis provides us with the means to address this question in some detail.

[10] Ibid.

[11] Stovba, "Is Law Possible during the War?" 1.

Let us begin with a formal answer: lawlessness is triggered by the absence of any of the three components of law that were singled out at the end of the last section. Suppose there are no legal documents to rely on; or suppose circumstances do not permit for a legal judgment to be passed; or suppose someone in relative power does not accept a legal judgment as authoritative: all instances of such nature would give rise to lawlessness. Let us not overlook that we can find ourselves in a situation which we could qualify as both lawful and lawless at the same time, insofar as we understand these terms in different senses of the term. For instance, the legal documents might be there at our disposal, yet legal judgment would be neither reached nor obeyed; so also, both the legal documents might be at our disposal and the legal judgments might be reached, yet they could be blatantly disobeyed. We would qualify such situations as both lawful and lawless, in different senses of the term. I can therefore only agree with Satokhina, when she claims that law is not quiet in times of war,[12] even though war destroys the fundamental human experience and the common world turns out to be destroyed, i.e., that very world that was made possible by law.[13] So also, I can only agree with Stovba when he contends that "our answer to the question of whether law can exist during war is both affirmative and negative."[14]

Yet the answer I have offered so far is only formal, for it does not provide a phenomenological description of lawlessness as experience. The remaining part of this paper is concerned with this issue.

It is uncontroversial to suggest that there are different kinds of laws and that some laws retain their legitimacy during war. To stick to trivial examples: one can still get a speeding ticket if one drives too fast just as one still has to pay for bread at the shop or for soup at the restaurant, and if one does not do these things, one runs the risk of being fined, for one has broken the law. Stovba rightly argues that "during the peaceful time a law is silent"[15] for it functions as a "silent background," i.e., "like the air or light." To this one can add that law continues to function in such a fashion during wartime as well, even though the field of its legitimacy is significantly constrained. Much more commonly than in the times of peace, laws of this nature are not obeyed during wartime. This is, then, the first sense in which we can speak of the experience of lawlessness that is caused by war.

Second, although international conventions do not permit one sovereign country to start a war against other countries without legitimate cause, these conventions do not deter everyone from doing that. Here we are confronted with lawlessness that is specific to wartimes. The breach in law is what makes war possible. This is the second sense in which one can speak of lawlessness in war. Lawlessness configures the very horizon of the ongoing wartime existence.

[12] Satokhina, "Phenomenology of Peace and War," 17.
[13] See Satokhina, "Phenomenology of Peace and War," 15.
[14] Stovba, "Is Law Possible during the War?" 10.
[15] Stovba, "What Law 'Is' Possible in Wartime?" 1.

One would be right to observe that while the first sense is too basic, the second sense is too general. There is, however, a third sense in which we can speak of the experience of lawlessness in war. This experience refers to the lack of certainty and to the absence of assurance that basic human rights will retain their legitimacy during war. I have in mind basic rights whose legitimacy is for the most part presumed without any questioning: the right to safety, the right to life, the right to protection from violence, etc. These basic rights rely on mutual recognition of human beings as subjects of basic rights. Law is needed precisely because we do not have any guarantees that we will be recognized as subjects of basic rights: law is meant to give us what nature as such does not provide. To recognize oneself as a member of a certain community is to know that one is being protected by the existing laws within the community. As Satokhina has it, the common world is constituted by mutual recognition, and this is very much what collapses during war.[16] More broadly, to recognize oneself as a human being is to know that one is protected by basic human rights.

Does the claim that war brings about a lawless state amount to the admission that war returns us to what Hobbes had called the natural state? Recall Hobbes' classical account in the *Leviathan*, where he spoke of the state of nature, which he identified as a natural state. Hobbes maintained that the state of nature is prior to the existence of laws. In the absence of laws, there is no safety, no security. Hobbes describes how humanity competes for the means that enable survival and the stronger one prevails. To this state, which one would be right to qualify as unbearable, there is only one solution, which is offered by political organization and law. These references to Hobbes are meant to serve one purpose only: one should avoid the tendency of equating lawlessness triggered by war with such a natural state. Even if one commits oneself to the Hobbesian framework, one still needs to draw a phenomenological distinction between pre-lawful and lawless states. Hobbes doesn't describe a lawless, but a pre-lawful state. In a pre-lawful condition, one is still unaware of the contrast between law and lawlessness. By contrast, in a lawless state one is painfully conscious of this distinction. Let me further note that Hobbes himself is quite clear on this point. As he writes, "the notions of right and wrong, justice and injustice, have there (in the natural state – *S. G.*) no place. Where there is no common power, there is no law; where no law, no injustice."[17] One needs to further stress that the state of which Hobbes speaks is something we have never experienced. Again, this is something Hobbes himself acknowledges: "there had never been any time wherein particular men were in a condition of war one against another."[18] By contrast, in the present context, we are concerned with the *experience* of lawlessness.

Lawlessness is experienced as a modification, which means that an essential feature of lawlessness is that it is a non-original experience: it refers to the lack of what used to be and is no more, although hopefully, just for the time being. Lawlessness is especially

[16] Satokhina, "Law and Gift," 21.
[17] Thomas Hobbes, *Leviathan* (Oxford/New York: Oxford University Press, 1998), 85.
[18] Ibid.

forcefully lived through in war, for, as Satokhina remarks, with reference to Levinas, war destroys the fundamental human experience as experience of the Other and, consequently, the common world turns out to be destroyed.[19] This disintegration of the common world is what, following Hannah Arendt, Satokhina calls "worldlessness." The world no longer unites, it no longer gathers; rather, the enemies feel separated.

To qualify lawlessness as a modification and as a non-original experience is to contend that the experience of lawlessness emerges against a sedimented background, which is established by law. Without presupposing such a background, there would be no sense in qualifying lawlessness as a disintegration of a common world. This sedimented background allows us to qualify the experience of lawlessness as the experience of broken anticipations. To obtain a better grasp of such a sedimented background, it is helpful to recall the phenomenological distinction that Jean-Paul Sartre draws between absence and being elsewhere.[20] Imagination is concerned with nothing, Sartre maintains, and nothing can be spoken of in four fundamental ways: either as absence, or existence elsewhere, or non-existence, or neutralization. Absence and existence elsewhere are phenomenologically distinct. While such expressions as "she is not here" illustrate absence, "she is in Berlin" illustrate being elsewhere. When I claim that someone is absent, I feel the other's absence: she should be here, but she is not. In an extreme case, I recognize her absence in every corner in my surroundings. By contrast, "being elsewhere" does not carry such phenomenological weight: it is just that, being somewhere else, that is disconnected from being here.

Hobbes's state of nature and the lawlessness of which he speaks is analogous to being elsewhere. One is still "on the other side" of all laws. Laws are still absent from this state, but those in the state do not know what they are missing. They cannot know, for they have never experienced what it means to live under laws. They have never been identified as legal subjects; they have never identified themselves as such. In short, they are still unaware of the very distinction between lawfulness and lawlessness. By contrast, the lawlessness that is brought about by war resembles absence rather than being there. To find oneself in a lawless state, or more precisely, to experience how war brings about lawlessness, is to realize that something that is not, must be there. It is a matter of painfully living through the absence of laws, of nostalgically sensing their impotence.

"Law is not localized in the abstract dimension of norms and rules, but in a *concrete situation.*"[21] As I argued above, this concretization of law is to be understood in terms of its dependence on judgment. To this one must further add that in order to exist, laws must not only be interpreted, but also enforced. Insofar as they are not enforceable, they no longer exist. Yet under such circumstances, they do not turn into nothing. They are there, put

[19] Satokhina, "Phenomenology of Peace and War," 15–16.
[20] See Jean-Paul Sartre, *L'Imaginaire: Psychologie phénoménologique de l›imagination* (Paris: Éditions Galimard, 2005), 30–35.
[21] Stovba, "Is Law Possible during the War?" 6.

on hold and held in suspense. This putting of laws out of action is what brings about lawlessness that one experiences in the state of war. In such a state, one senses that one must be a legal subject, while simultaneously realizing that one is not. One has been robbed of something fundamental: laws should, yet they do not apply.

In the present context, it is helpful to recall Elaine Scarry's description of the logic of torture that she masterfully developed in her book, *The Body in Pain*.[22] Torture is, argued Scarry, powerfully dehumanizing. The whole idea of torture is to rob the victims or their humanity. This is done not only by inflicting pain, not only by deforming and destroying the victim's body, but also by making sure that the victim *experiences* this deformation and this destruction. This is the very idea of torture: not just to rob persons of their humanity, but to make sure that they *experience* this dehumanization. Such an *experience* of dehumanization is made possible against the sedimented background of lawfulness. Hence, the highly creative modes of pain infliction and various forms of deprivation (of food and water, of others, of their own voice). A victim is thereby deprived of what is rightfully his or hers. Fundamentally, victims of torture are brought to the realize that they are no longer legal subjects: no laws are there to protect them and therefore, anything can be done to them.

Scarry's description of the logic of torture sheds some light on the dehumanizing nature of lawlessness. Victims can be deprived of everything that is theirs: their family members, food, voice, shelter, even of parts of their bodies, etc., and they are there, to experience this deprivation, although without any guarantee that they will experience it to the end.

Against such a background, one could further qualify the experience of lawlessness as the experience of evil in the sense in which Viktor von Weizsäcker[23] spoke of it: it is an experience of what should not be. For this reason, Weizsäcker further maintained that confronted with evil, one cannot help but must search for ways to respond to it. How will one respond? One cannot help, but must choose a way, and the response chosen will form the person one will be. The sedimented background against which the experience of lawlessness emerges further implicates, that the the experience of lawlessness is not just depersonalizing, but also coupled with the normative demand to search for new foundations of personhood. Or as Pascal Delhom has put it more recently in his phenomenological reflections on violence, the "rejection of or insurgency against the lived experience of suffered violence is a constitutive part of this very experience."[24] These standpoints corroborate the position that Satokhina presents in her paper with reference to the closing lines of Hannah Arendt's *The Origins*

[22] Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985).

[23] Viktor von Weizsäcker, "Die Schmerzen," in *Die Schmerzen*, eds. Marcus Schiltenwolf and Wolfgang Herzog (Würzburg: Königshausen & Neumann, 2011), 263–79.

[24] Pascal Delhom, "The Normative Force of Suffered Violence," in *Political Phenomenology: Experience, Ontology, Episteme*, eds. Thomas Bedorf and Steffen Herrmann (New York and London: Routledge, 2020), 32.

of Totalitarianism, and her view concerning "the beginning."[25] For as Viktor von Weizsäcker maintains, when it comes to evil, one cannot help but search for ways to respond to it; and this response will give rise to the formation of a human world.[26] What is at stake here is indeed, as Satokhina puts it, "the possibility of human dignity which law is meant to protect."[27]

Before bringing this phenomenological description of lawlessness to its end, let me single out three fundamental constitutive components of the lived experience of lawlessness: *hyletic*, *intentional*, *normative*. The hyletic level refers to the infliction of pain and, more broadly, to suffering that affects one's whole body. The intentional level refers to the transformation of one's relation to the world, Others, oneself and one's own body. The normative level concerns the realization that what one is experiencing is something that should not be happening. I am referring to the negative normativity inscribed in the experience of lawlessness.

But one can also put it more broadly, for as mentioned above, even if one is lucky enough to escape direct suffering caused by war, nonetheless, one can still be affected by it indirectly. From a broader perspective, the hyletic level corresponds to physical destruction, which need not be limited to the destruction of one's own body. The intentional level corresponds to social self-relation, to the relation to Others and the world at large. Lastly, the normative dimension in this broader framework concerns not only the personal, but also the intersubjective experience of evil, understood according to the line of thought sketched above, viz., as the experience of what should not be.

There is thus something deeply depersonalizing about the experience of lawlessness, and this forces us to ask: why does the experience of lawlessness go against human nature? We can answer this question as follows: Lawlessness is experienced as dehumanizing because we are born into social and historical communities in which we are from the start recognized as legal subjects. With reference to Hobbes's account of the natural state, one could say that a human being is an artificial animal, which means: a human being is a natural being whose nature is to be unnatural.

It is here, one could argue, that we discover the sources of true dignity of human life, of which Satokhina speaks in her writings. Human life is not reducible either to its mere existence, or to the diverse pleasures that it can experience. I belong to something more than myself, I am part of something larger than my own life: this is entailed in the sociality and historicity of human existence.

Concluding Remarks

Phenomenologists like to argue that we understand self-evident phenomena when we come to confront their absence. We can think here of Heidegger's classical analysis

[25] See Hannah Arendt, *The Origins of Totalitarianism* (San Diego/New York/London: A Harvest Book, 1973), 478–79.
[26] See Weizsäcker, "Die Schmerzen," 273.
[27] Satokhina, "Phenomenology of Peace and War," 16.

of tools: we recognize a hammer as a hammer and on this basis can understand what a tool is when it breaks down. Analogously, we could also say that we understand law when it breaks down. As Satokhina has it, "when all institutions are powerless and all conventions are destroyed, the aspect of human experience that we call the experience of law finally becomes visible."[28] Or as Stovba puts it, with reference to Cohn, "only the one who suffers or suffered wrong knows what right is."[29] In the state of lawlessness, we come to confront the very foundations of law, which lie in the recognition of a subject as a legal subject. The very meaning of law lies in the prescription of rights and prohibitions, in the delimitation of permissible and non-permissible actions, which in their own turn rely on the recognition of a subject as a recognized subject of rights and obligations. What makes us distinctly human is the very fact that we ourselves prescribe the rules that we follow.

These reflections provide further evidence to maintain that, as I have argued above, lawlessness is a modification that arises against the sedimented background of lawfulness: one can only make sense of it phenomenologically by taking into account how it transfigures the common world. At a fundamental level, the experience of lawlessness is the experience of the breakdown of the common world. This allows one to maintain that one of the fundamental functions of law lies in the establishment of a common world as the sphere of shared values. Insofar as lawlessness marks the breakdown of a common world, it is an agonizing and intolerable modification, which calls for further readjustments: it is a state from which one cannot help but try to escape. In a lawless state, one cannot help but retain a faint echo of a possibility of a different mode of existence, which one can then strive to realize. What is more – and this is crucial not to overlook – it is a state that enables us to realize the importance of what we otherwise take for granted. I leave the last words to the Ukranian phenomenologists: "Only the one who suffers or suffered wrong knows what right is;"[30] "When all institutions are powerless and all conventions are destroyed, the aspect of human experience that we call the experience of law finally become visible."[31]

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[28] Satokhina, "Phenomenology of Peace and War," 13.
[29] Stovba, "Is Law Possible during the War?" 6.
[30] Ibid, 6.
[31] Satokhina, "Phenomenology of Peace and War," 13.

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Саулюс Генюшас. *Silent leges inter arma?* Війна та досвід безправ'я

Анотація. У цій статті я розпочинаю діалог з двома українськими феноменологами, Олексієм Стовбою та Наталією Сатохіною, щодо двох фундаментальних питань, які стосуються співвідношення права і війни. По-перше, що ми можемо сказати феноменологічно про безправ'я як досвід? По-друге, чи приносить війна досвід безправ'я? У першому розділі цієї статті, продовжуючи діалог зі Стовбою та Сатохіною, я пропоную пояснення того, як можна розуміти право як подію чи хепенінг. Мій підхід значною мірою спирається на ресурси феноменологій Гуссерля та Рікьора. У другому розділі я розглядаю питання про те, чи можливе право під час війни. Аналіз цього питання вимагає розрізнення між різними видами воєн і різними видами права. Моя точка зору полягає в тому, що в усіх випадках безправ'я є модифікацією права, а це означає, що різні форми безправ'я можуть виникнути лише на седиментованому тлі права. Спираючись на роботи Віктора фон Вайцзекера, я далі кваліфікую безправ'я як досвід зла. Пояснення цієї кваліфікації веде до подальшого визнання знеособлюючої природи безправ'я та вимагає подальшого запитування про те, чому і в якому сенсі безправ'я протистоїть людській природі та що становить справжню гідність людського життя. З'ясування цього питання вимагає проведення низки додаткових розрізнень, найважливіші з яких стосуються гілетичного, інтенціонального та нормативного вимірів безправ'я. На закінчення я припускаю, що одна з фундаментальних функцій права полягає у створенні спільного світу як сфери спільних цінностей.

Ключові слова: феноменологія; герменевтика; право; безправ'я; війна; судження; седиментація.

Saulius Geniusas. *Silent leges inter arma?* War and the Experience of Lawlessness

Abstract. In this paper, I open a dialogue with two Ukrainian phenomenologists, Oleksiy Stovba and Natalia Satokhina, over two fundamental questions, which concern the relation between war and law. First, what can be said, phenomenologically, about lawlessness as experience? Second, does war

bring about the experience of lawlessness? In the first section of this paper, while pursuing a dialogue with Stovba and Satokhina, I offer an account of how law can be understood as an event, or a happening. My account heavily relies on the resources of Husserl's and Ricoeur's phenomenologies. In the second section, I address the question whether law is possible during war. The analysis of this question requires that one draw distinctions between different kinds of wars and different kinds of laws. I defend the view that, in all cases, lawlessness is a modification of lawfulness, which means that different modes of lawlessness can only be experienced against the sedimented background of lawfulness. With reference to Viktor von Weizsäcker's works, I further qualify lawlessness as the experience of evil. The clarification of this qualification leads to the further recognition of the depersonalizing nature of lawlessness and requires that one further ask why, and in which sense, lawlessness is set against human nature and wherein lies the true dignity of human life. The clarification of this matter requires that one introduce a number of further distinctions, the most important of which concerns the hyletic, intentional and normative dimensions of lawlessness. I conclude with a suggestion that one of the fundamental functions of law lies in the establishment of a common world as the sphere of shared values.

Keywords: phenomenology; hermeneutics; law; lawlessness; war; judgment; sedimentation.

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