9

Adolf Reinach and Gerhart Husserl on the Foundations of Legal Phenomenology and the Temporality of Law

Stephan Kirste

9.1 INTRODUCTION

Edmund Husserl's work has been studied with regard to his phenomenology of the state, less so his phenomenology of law – probably because the scattered reflections on it did not seem to yield rich results.[1] However, A. Reinach, G. Husserl as well as A. Troller and others adopted phenomenological methods in their works on the philosophy of law[2] which were particularly fruitful concerning the concept of time and law.

For legal phenomenologists, time is not a structure external to law, as it belongs to the social world and thus also to the realm of law.[3] Drawing on Edmund Husserl's phenomenology, Adolf Reinach and Husserl's son Gerhart emphasized the importance of time for the understanding of the nature of law. To reveal the temporality of law, both begin with a qualitative time based on the temporal dimensions of present, future and past. They then distinguished this time from an objective and external

[1] Sophie Loidolt, *Einführung in die Rechtsphänomenologie: Eine historisch-systematische Darstellung* (Mohr Siebeck 2010); Karl Schumann, *Husserls Staatsphilosophie*, vol 29 (Praktische Philosophie 1988); Nils Brandenburg, 'Phenomenology of Law' in Stephan Kirste and Mortimer Sellers (eds), *Encyclopedia for the Philosophy of Law and Social Philosophy*, vol 4 (Springer International 2024). However, Husserl did exert an influence on Felix Kaufmann and other legal philosophers, cf. Genki Uemara, 'Husserl, Edmund' in Stephan Kirste and Mortimer Sellers (eds), *Encyclopedia for the Philosophy of Law and Social Philosophy*, vol 2 (Springer International 2024) 1383, 1385: In fact, Husserl later received and expanded Reinach's concept of the social act and also gave the concept of the norm a stronger meaning.

[2] Alois Troller, 'Das Bewußtseinsbild im Rechtsdenken' (1980) 13 ARSP Supplement 243; Alois Troller, 'Erkenntnistheoretische Parallele von Widerspiegelungstheorie und Phänomenologie im praktischen Rechtsdenken' (1983) I/3 *ARSP Supplement* 51.

[3] Schütz: 'The question of social meaning is a problem of time', 'das Sinnproblem [ist] ein Zeitproblem', Alfred Schütz, *Der sinnhafte Aufbau der sozialen Welt* (Springer 1932) 9, 10, 55 ff. repeatedly referring to Husserl and emphasizing the concept of duration as important for social meaning.

time series of 'earlier-than/later-than'.[4] Duration or extended present thus becomes the central temporal event for this qualitative time. In this way, both legal phenomenologists opened up conceptual possibilities for the understanding of the temporality of law that is distinct from natural and other social times. However, while Gerhart Husserl was able to work with his father's lectures on the 'Phenomenology of Internal Time Consciousness' published in 1928,[5] Reinach's approaches were devised independently and, in many ways, represent pioneering work for the exploration of the temporality of law based on the earlier Realistic Phenomenology. Reinach's early death, at the age of thirty-three, meant he only managed to deal with the temporality of law in a fragmentary way in his 'Die apriorischen Grundlagen des bürgerlichen Rechtes' ('The Apriori Foundations of Civil Law'), determining it as an essential structural element of the special existence of law. Gerhart Husserl, on several occasions, analyzed questions of law and time from the perspective of transcendental phenomenology and even Heidegger's 'Fundamental Ontology'.[6] Even if the presented elements of a theory of time and law remain very abstract, both succeed in determining time – far more than space – as a basic dimension of law. Considering the procedural character of modern law as well as the necessary temporality and historicity of legal discourses, both Reinach and Husserl thus throw a new light on an essential aspect of the structure of law. This alone is reason enough to take a closer look at some of the key points in the writing of both.

9.2 ADOLF REINACH'S APPROACHES TO A THEORY OF LAW AND TIME

Reinach accomplished for the structure of law what Rudolf Stammler worked on for its ethical content: the determination of an essential a priori.[7] Reinach focused on an 'ontology of law' or an 'apriorische Gegenstandslehre' ('a priori theory of objects'). What, for Stammler, was the 'correct law' ('Richtiges Recht') in the sense

[4] John M. Ellis McTaggart, 'The Unreality of Time' (1908) 17 Mind 457ff; John M. Ellis McTaggart, *The Nature of Existence*, vol 2 (Cambridge University Press 1927) 9 – 10; Neither Brentano, Reinach nor Husserl refer to him. However, Brentano deals with the same distinction between time series A consisting of present, future and past and series B comprised of 'earlier-than'/'later-than', insisting that series B holds primacy over series A because in 'earlier-than'/'later-than' would entail the determination of future and past would be present. Franz Brentano, *Philosophische Untersuchungen zu Raum, Zeit und Kontinuum* (Meiner 1976) 154.

[5] Edmund Husserl, *The Phenomenology of Internal Time-Consciousness* (Indiana University Press 1964).

[6] Although he did not refer to him much.

[7] However, Stammler criticizes Reinach for his theory, stating that 'legal will is not a phenomenon which could be recognized in its essence by direct observation'. Rudolf Stammler, *Lehrbuch der Rechtsphilosophie* (2nd edn, De Gruyter 1923) 48 and n 2.

of a 'natural law with changing content'[8] or an unconditional ideal for all changing content of natural law.[9] was for Reinach the 'social act' of law.[10] Reinach took into account the changeability of the living conditions of law but maintained that the content of positive law has its origin in a priori structures of legal social acts.[11] While Stammler's ideal form allows for changing natural law content as a measure of positive law, Reinach viewed every social act that produces positive law as having an a priori nature.[12] This essence is not normative for positive law but contains its substantial characteristics. At the same time, this essence gives the ontological foundation of contingent positive law. Reinach's approach distinguishes him from both legal positivists and natural law theorists: He is not looking for essential *normative* foundations of positive law or of right principles in a *moral* sense of natural law theory but for the essence of concrete legal rules. Reinach saw the temporality between the timelessness of logical and mathematical objects on the one hand and the simple being in time of physical and psychological objects on the other as belonging to the a priori structures of law.

For Reinach, the neglected study of the specific temporal structure of legal objects by his contemporaries was a major reason for his phenomenological analysis of the a priori foundations of law.[13] Legal ontology is supposed to lead us to new kinds of objects, which differ in structure from nature, namely the objects of psychology and ideal things. While temporality is an important element of their structure,[14] Reinach did not elaborate on his phenomenology of the temporality of law systematically. It is almost like Augustine, whom Reinach quoted with a statement from the 'Confessiones': 'If you do not ask me what it is, I believe that

[8] Rudolf Stammler, *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung: Eine sozialphilosophische Untersuchung* (Veit 1896) 184–188; although he rejects the idea of an a priori law, this notion of natural law comes close to it.

[9] Rudolf Stammler, *Die Lehre von dem richtigen Rechte* (Wissenschaftliche Buchgesellschaft 1964) 81–90.

[10] Carl A Emge, 'Über den Charakter der Geltungsprobleme in der Rechtswissenschaft' (1920/21) 14 ARWP 146, 148: 'Reinachs Verdienste geben ihm seinen Platz bald nach Stammler. Was dieser für die Rechtsphilosophie bedeutet, bedeutet Reinach für die positive Rechtswissenschaft', cf. also 161 ff.

[11] It is interesting to note that Reinach misinterprets Stammler here by insinuating that the latter was concerned with an 'ideal law with immutable content', Adolf Reinach, 'The Apriori Foundations of the Civil Law' (John F Crosby tr, 1983) 3 Aletheia 1, reprinted in Adolf Reinach, *The Apriori Foundations of the Civil Law Along with the Lecture 'Concerning Phenomenology'* (John F Crosby ed, Ontos Verlag 2012), originally published as Adolf Reinach, Die apriorischen Grundlagen des bürgerlichen Rechtes, 1(2) *Jahrbuch für Philosophie und phänomenologische Forschung* (Max Niemeyer 1913) 685–847. Cf. also Neil Duxbury, 'The Apriori and the Legal' (1990) 21 Rechtstheorie 297, 309.

[12] Reinach (n 11) 133; Duxbury (n 11) 308 f.; Neil Duxbury, 'The Legal Philosophy of Adolf Reinach' (1991) 77 ARSP 314–347, 466–492, at 316 and 491.

[13] Reinach (n 11) 9: 'Claims and obligations, by contrast, arise, last a definite length of time, and then disappear again. Thus, they seem to be temporal objects of a special kind of which one has not yet taken notice'.

[14] ibid 6.

I know. But if you ask me, then I no longer know it'.[15] Augustine then developed his theory of time from this question. Reinach leaves us with many ideas regarding a phenomenology of time in his works,[16] although in them he criticizes sciences that are only concerned with proving the existence of certain phenomena 'at some point of objective time'.[17] He deemed that just as it would be wrong to describe the essence of red in physical terms of wavelength oscillations, it is also wrong to base the temporality resulting from the essence of law on an objective time.[18] The mistake here lies in trying to explain a color by using something else, in this case, a limited metric like the wavelength of light. As such, Reinach's phenomenology sought to avoid this problem by leading to the essence of the experienced phenomenon itself. To do this, he claimed that we have to 'put ourselves in the place' ('hineinversetzen') of law and its temporality and not try to explain it through something else.[19] Therefore, both the timelessness of the a priori foundations of law and the temporality of positive law tell us something important about Reinach's view of the nature of law. Both aspects are grounded in the structures of this essence ('Sein'/'Being') of law, which constitutes the legal a priori.

9.2.1 *The Timelessness of the Legal A Priori*

If one were to analyze law exclusively in terms of positivist legal theories, then, according to Reinach, one could only observe the constant changes in its enactment and expiration over time – where time means natural (astronomical or atomic) time.[20] One could neither demonstrate the generalizable structures of law nor do justice to legal temporality.[21] However, law does not neatly fall into a seemingly given and objective time and history but has its specific temporality which only becomes clear once its a priori structures are revealed.

[15] In Reinach's words, Adolf Reinach 'Concerning Phenomenology', in John F Crosby (ed), *The Apriori Foundations of the Civil Law Along With the Lecture, 'Concerning Phenomenology'* (Ontos Verlag 2012) 143–167; Augustine Confessions, XI, XIV, 17, 162, 'What, then, is time? If no one asks me, I know what it is. If I wish to explain it to him who asks me, I do not know. Yet I say with confidence that I know that if nothing passed away, there would be no past time; and if nothing were still coming, there would be no future time; and if there were nothing at all, there would be no present time'.

[16] Reinach (n 15) 145.

[17] ibid 145.

[18] ibid 147.

[19] Adolf Reinach, 'Die Überlegung; ihre ethische und rechtliche Bedeutung (1912/13)' in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 279–312, 282.

[20] Positivists assume this, as did Reinach (n 11) 2, 'that there is simply no such thing as legal principles which stand in themselves and are timelessly valid, such as we find for instance in mathematics'.

[21] Criticizing the legal positivisms of his time that ignored the timeless structures of a priori law, Reinach (n 11) 1.

Like the classical theories of law and time, Reinach also began with the timeless structures of law. However, unlike ancient and medieval metaphysics and their natural law theories,[22] he did not presuppose the existence of eternal laws. Nevertheless, Reinach shared their goal: the search for eternal truths that underlie the law:[23] 'We are concerned with descending down to the ultimate elements of right, which that authority cannot "create", and to the essential laws, to which it is indeed not bound but which have an eternal being which it cannot touch'.[24] Neither induction and abstraction from positive law nor new legal principles are sufficient to demonstrate the existence of prepositive legal principles as the latter exist independently and have timeless validity. Here, Reinach follows Edmund Husserl's concept of the 'material apriori'[25] in the early phase of his eidetic-realistic approach.[26] Any new period of history will likely negate these abstractions, and new legal principles will have to change with new moral convictions and economic developments. Law and jurisprudence gain their principles from the 'constantly changing content from the content of the times'.[27] However, this does not mean that the a priori legal structures change with positive law. Rather, every sentence of positive law is necessarily preceded by an a priori structure: '[T]hese structures and relations subsist antecedent to law; they are not defined by reference to it', as Duxbury puts it.[28]

Like other German legal theorists at the end of the nineteenth century, Reinach wanted to base jurisprudence as a scientific discipline on principles that were timeless as in other sciences.[29] What stood in the way, in his view, was the positivist assumption that all law – in form and substance – was produced by social action and that no legal foundations can be found prior to this production: 'We really do find what one has so emphatically denied: the positive law *finds* the legal concepts which enter into it; *in absolutely no way does it produce them*'.[30] Reinach argued that the foundations of law are not exhausted in their positive form and only positivism

[22] Stephan Kirste, *Die Zeitlichkeit des positiven Rechts und die Geschichtlichkeit des Rechtsbewußtseins* (Duncker & Humblot 1998) 26 ff. and 116 ff.

[23] Reinach (n 11) 137. However, as much as the search for natural law was justified and even 'finds its fulfillment in the apriori doctrine of law', the a priori foundations of every law are not law itself, but its essence.

[24] ibid 66.

[25] Edmund Husserl, *Erfahrung und Urteil. Untersuchungen zur Genealogie der Logik* (7th edn, Meiner 1999) 409 ff.; Brandenburg (n 1). Husserl considered this path from phenomenology to material a priori truths to be open to all sciences, including legal theory, ibid 428).

[26] Loidolt (n 1) 76.

[27] Reinach (n 11) 2.

[28] Duxbury (n 11) 305.

[29] For this endeavor see Stephan Kirste, 'The German Tradition of Legal Positivism' in P Mindus and T Spaak (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021).

[30] Reinach (n 11) 4. This is not to say that positive law raises a claim to correctness, ibid 51.

dwells on the laws of ought created by the legislator himself, while legal ontology goes back to the laws of being.[31] Furthermore, he noted that the search for non-positive foundations of law does not have to resort to purely formal, logical or methodological principles nor does law find its independent foundation merely in eternal material principles alone, as the doctrine of natural law asserts. Rather, for him all law is based on structures which it does not create, but which it must presuppose. Reinach laid great stress on the assumption that there are principles of all positive law that 'are independent of our grasp of them, just as are the laws of mathematics'.[32] These constitute the being or essence of law.[33] Thereby Reinach wanted to establish law as an independent sphere between physics or psychology and logic.[34] Ontology is supposed to give us insights into the essential structures of independent objects. It is to teach us about the essential foundations of law 'which stand in themselves and are timelessly valid'.[35] Thus, unlike Immanuel Kant's approach, Reinach held that the a priori foundations are not transcendental conditions of the possibility of knowledge, but of being itself.

The whole purpose of his 'Apriori Foundations of Civil Law' is to analyze these 'essential laws' with an 'eternal being'.[36] Positive law can depart from them and even ignore them but is still based on them. They subsist in positive law and are already there when it formulates its propositions.[37] For Reinach, positive law is therefore neither cognitively nor normatively conditioned by the a priori structures but rather by social fact. Positive law can indeed deviate from such structures, although it can never change them. If the connection is true, then positive law is the embodiment of these a priori structures. The temporal legal acts then temporalize the timeless a priori structures: Whenever an event occurs at moment M, a certain consequence F (e.g., a claim) must occur. This 'clear determination of temporal existence' by the

[31] ibid 124.

[32] ibid 5 f.

[33] ibid 161, 'In truth, the realm of the apriori is incalculably large. Whatever objects we know, they all have their "what," their "essence"; and of all essences there hold essence-laws. There is no reason at all for restricting the apriori to that which is in some sense "formal". Apriori laws also hold true of the material—in fact, of the sensible, of tones and colors'.

[34] Adolf Reinach 'Einleitung in die Philosophie' (1913) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 369–514, 424.

[35] Reinach (n 11) 2.

[36] These a priori principles, however, are 'eternal truths'. Even if it is not the main task of the a priori doctrine of law to prove them, it nevertheless finds them and, in this respect, shares a concern with the doctrine of natural law, ibid 137. The difference with the doctrine of natural law, however, is that the a priori doctrine of law only proves that these principles are not bound to historical circumstances, concrete human actions and positive law. Strictly speaking, it proves only their timelessness, but not their eternity. Also, ibid 66: 'We are concerned with descending down to the ultimate elements of right, which that authority cannot "create", and to the essential laws, to which it is indeed not bound but which have an eternal being which it cannot touch'.

[37] Duxbury (n 12) 327, 334, 336.

a priori legal structures creates a certainty of orientation.[38] The pure concepts of law are embedded in these structures[39] and the search for them is also a legitimate concern of natural law doctrines.[40] These doctrines were wrong not to take into account the changeable conditions of life on which the validity of such permanent principles is based. Despite this critique of natural law, however, Reinach tried to avoid falling into the trap of positivist theories. While some natural law theories assume timeless or even variable but not arbitrarily changeable principles of good, correct positive law, the a priori structures necessarily underlie all law – morally good as well as bad. The a priori foundations of law do not denote a higher or better law but simply the essence of law as it is.[41]

9.2.2 *The Temporality of Law*

As with his consideration of many other aspects of law, Reinach did not develop a full theory of its temporality. However, he emphasized the temporality of law as an important structure and gave many examples of it. The following traces these examples and brings them together within the framework of some common principles.

According to Reinach, when one looks at legal entities and structures from a phenomenological perspective, one can recognize a separate group of objects with their own mode of existence. These objects 'do not belong to nature in the proper sense, which are neither physical nor psychical and which are at the same time different from all ideal objects in virtue of their temporality'.[42] Their temporality is a crucial factor in understanding the nature of legal objects. As such, the following begins by looking at Reinach's notions of temporality and then presents his theoretical approaches to social and legal time.

9.2.2.1 Time and Space

Reinach developed a conception of the temporality of legal objects between the timelessness of the essential foundations of law and the temporality of natural objects. The a priori foundations of law have an atemporal nature: They exist without relation to a specific time. While we have seen that Reinach calls them 'eternal', this timelessness of the a priori foundations of law tells us little about the temporality of law itself. Reinach wanted to show that in addition to natural things which are, of course, 'in' time, there are also objects of knowledge in the form of

[38] Reinach (n 11) 14: 'principle of the definite determination of temporal existents'.
[39] ibid 98: His analysis was focused on 'the eternal laws of being which are grounded in the most basic pure categories of right'.
[40] ibid 137.
[41] ibid 135.
[42] ibid 6.

social acts which exist in their own temporal world.[43] In addition to their characteristic need to be consciously perceived ('Vernehmungsbedürftigkeit') and the presence of other characteristics common to social acts, namely intentionality, spontaneity and other-directedness, their temporality is an essential feature.[44] Social acts exist in their 'own world of temporal … objects' (in German: 'eigene Welt zeitlicher … Gegenständlichkeiten').[45] However, we already know that Reinach assumed that all law is based on a timeless foundation of the being or essence of its principles. This must also include the ontological foundations of the temporal structures of law itself. Just as law has an independent being that distinguishes it from all other objects, it also has a time structure that is not simply absorbed into the time structure of logical, natural things or the psyche. As little can be determined of the necessary properties of law from an examination of positive law alone, similarly, little can be determined about law's temporal structure by examining only its historical emergence and passing away or from dates, periods, deadlines and so forth. As such, Reinach sought the foundations of the temporality of law in its a priori foundation.

For Reinach, the concept of temporality ('Zeitlichkeit') is logically ambiguous. The diagnosed ambivalence lies in the fact that processes 'constitute themselves in time … but a thing *is* in time'.[46] Here, the preposition 'in' is used for both processes and things. For clarity's sake, instead of 'constitute' and 'are', one could probably be allowed to say that processes bring themselves forth in time and things fall into time.

[43] For his theory of social acts and its influence on Speech Act Theory, cf. Armin Burkhardt, *Soziale Akte, Sprechakte und Texillokutionen. A. Reinachs Rechtsphilosophie und die moderne Linguistik* (De Gruyter 1986) 46 ff.

[44] Reinach (n 11) 18–20; Loidolt (n 1) 85.

[45] Reinach (n 11) 109. The English translation is inaccurate in this important point: 'We have in this work shown that in addition to the well-known sphere of natural objects, that is, of the physical and the mental, there is a world of its own consisting of entities and structures which are in time, though they do not belong to nature in the usual sense, and which derive from the social acts.' The full German text is, 'Wir haben neben der allbekannten Sphäre der Naturgegenstände, d. h. des Physischen und Psychischen, eine eigene Welt zeitlicher, aber nicht zur Natur im üblichen Sinne gehöriger, aus sozialen Akten erwachsender Gegenständlichkeiten herausgehoben', Adolf Reinach, 'Die apriorischen Grundlagen des bürgerlichen Rechts (1913)' in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 141–279, 246.

[46] Adolf Reinach, 'Notwendigkeit und Allgemeinheit im Sachverhalt' in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 352. My translation, 'The concept of temporality is ambiguous. Processes, e.g. thunder, constitute themselves in time, things not, but a thing *is* in time. In the same way, facts are not constituted in time, but they are in time because they are provided with temporal predications. It is a different matter when temporal elements are incorporated into the facts themselves'. In German, 'Der Begriff Zeitlichkeit ist zweideutig. Vorgänge, z. B. Donner, konstituieren sich in der Zeit, Dinge tun es nicht, aber ein Ding i s t in der Zeit. So konstituieren sich auch Sachverhalte nicht in der Zeit, aber sie sind in der Zeit, so weil mit zeitlichen Prädikationen versehen. Etwas anderes ist es, wenn zeitliche Elemente in den Sachverhalt selbst aufgenommen werden'.

Thus, by virtue of 'constituting', processes have a more active relation to time than things. It will soon become apparent that this difference between an active 'bringing forth' and a passive 'falling into time' is important for the temporality of social acts and law. Furthermore, Reinach held that processes are built up over time: they come into being, last for a while and then come to an end.[47] In contrast, states ('Zustände') lack this dynamic: they are in a certain sense complete and exist for a while, so they last. Whether one agrees with this or not, it is clear how Reinach tried to identify essential temporal differences between the phenomena of 'process' and 'state'.[48] From an ontological perspective, this is precisely where ideal, natural and social or legal objects differ: Ideal objects are timeless – like the a priori foundations of law; natural objects fall into a time that is external to them while social and especially legal objects bring forth a particular characteristic of time. This is true even if they, in a certain respect, also fall into a natural time and may refer to natural time. Nevertheless, this relation to natural time remains external to them. With the foregoing in mind, it seems appropriate to provide a closer analysis of Reinach's approach.

Reinach distinguished space, time and duration as different forms of continuity.[49] One finds continuity in both a line that is spatially continuous and a duration that is temporally continuous. What such a line and duration have in common is that their continuity is not composed of their parts. That is to say that many points do not result in a continuous line, nor do many moments result in a continuous time. They can only limit the continuum, not create it: Just as the beginning and end points limit a straight line, moments can limit time. However, this does not change the fact

[47] Reinach (n 34) 406, in German, 'beginnt, dauert, endet'.

[48] ibid 396: 'Every process has a temporal expansion (analogous to the spatial expansion), arises in it and is completed in it . . . [In contrast, a] state enters the world complete [and] can last. States do not have temporal expansion in the sense that they build up in time in the sense of constitution and completion in time'. In German, 'Jeder Vorgang hat zeitliche Ausbreitung (analog der räumlichen), entsteht darin und vollendet sich darin . . . [Dagegen ein] Zustand tritt fertig in die Welt [und] kann dauern. Zustände haben keine zeitliche Ausbreitung in dem Sinne, daß sie sich in der Zeit aufbauen im Sinne von Konstitution und Vollenden in der Zeit'.

[49] It would be very interesting to compare Reinach's 1914 theory of continuity with Franz Brentano's work 'Philosophische Untersuchungen zu Raum, Zeit und Kontinuum' from the same year. This is because Reinach's empirical approach to continuity and time is much closer to Brentano's than to Husserl's concept of the inner time consciousness, which departs from the empirical approach in phenomenology, Husserl (n 5) 29–40 (mostly referring to Brentano's early concept of time). Brentano also bases his theory of time on a discussion of continuity where the temporal is a relative quality in Brentano's concept of time: It is only in continuity with past and future. Brentano (n 4) 210. Edmund Husserl again criticizes Brentano's concept of time and continuity by assuming that the 'point of now' in continuity of past and future would merely be fictitious, Edmund Husserl, *Zur Phänomenologie des inneren Zeitbewußtseins*. Mit den Texten aus der Erstausgabe und dem Nachlaß. 1. Auflage. Hg. v. Rudolf Bernet. (Felix Meiner Verlag, Philosophische Bibliothek, 649, 2013) 328. For Brentano's concept of a plurality of times, cf. Brentano (n 4) 193 ff.: 'es gibt kein Individuum "der Raum" und kein Individuum "die Zeit" weder an sich noch als Phänomen'.

that time remains a continuum and even its smallest part does not become a moment. The parts of time always remain time and do not become something else, namely noncontinuous moments. Duration is a temporal continuum, however, according to Reinach, it can be interrupted. Thus, he argued that when it is divided, there is no duration between the two 'pieces' of duration, only time. This is because duration refers to a process that starts, goes on for a while and then stops. It is, therefore, characterized by the process and the process takes time. Duration is that which has a beginning and an end in time.[50] Because the process consumes something of time, it presupposes time. Although the process produces its duration, it leaves the primary time unchanged and can therefore be measured by it. This is why Reinach also speaks of time as the 'primary' and duration as the 'secondary' continuum. Duration, however, is peculiar to the process, 'Every process has its duration, which belongs to it alone, while several processes can take place in the same time'.[51] One could say, then, that duration is time that is determined by a process, in that this process begins, has a certain course and ends. The consideration provided here will, therefore, call the temporality of duration based on the nature of social acts as processes 'qualitative time'. In contrast, following Reinach's terminology, time as a 'primary continuum' is not characterized by processes and, it is therefore referred to here as 'objective time'.[52]

Not all temporal phenomena are continua, for example, moments.[53] The beginning and end of the durations are moments that are not continuous, although they

[50] Adolf Reinach, 'Die obersten Regeln der Vernunftschlüsse bei Kant' (1911), in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 57.

[51] Adolf Reinach, 'Über das Wesen der Bewegung' in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 577: My translation, 'Duration is – or rises and grows – only if something happens. There is no analogy for this in the line. The line is more independent than duration. Accordingly, one cannot distinguish moments of duration from moments of time like points of the line from the places of the space they fill'. In German, 'Die Dauer ist—bzw. hebt an und wächst—nur, sofern etwas geschieht. Dafür gibt es bei der Linie kein Analogon. Sie hat eine größere Selbständigkeit als die Dauer. Entsprechend kann man auch nicht Momente der Dauer von den Momenten der Zeit unterscheiden wie Punkte der Linie von den Orten des Raumes, den sie einnehmen.'

[52] Above note 17.

[53] Reinach was also interested in the temporal structure of his research subjects in other studies and gave examples of continuous and punctual temporal phenomena. In his short treatise on the 'Theory of Negative Judgment', for example, he writes 'Überzeugung sowohl als Behauptung, realisieren sich in der Zeit; es läßt sich der Zeitpunkt angeben, in welchem sie ins Dasein treten. Aber während wir von einer beliebigen Dauer der Überzeugung reden können, läßt die Behauptung ihrem Wesen nach eine zeitliche Ausbreitung nicht zu; sie verläuft nicht in der Zeit, sondern hat ein gleichsam p u n k t u e l l e s Sein'. (Adolf Reinach, 'Zur Theorie des negativen Urteils' (1911) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 99 f.; Author's translation, 'Both belief and assertion realize themselves in time; the point in time at which they come into existence can be specified. However, while we can speak of a shorter or

are still temporal. They have a different temporal structure than the duration that they limit and the time to which they refer. They depend on the process whose beginning and end they mark. Moments do not become, they simply are. Similarly, a state ('Zustand') does not become, it just is. Processes, however, become. Additionally, if this becoming has the temporality of duration, then Reinach can say that moments and states are nontemporal,[54] however, they still refer to objective time.

The difference between the line as a space continuum and the duration as a time continuum lies in their genesis. Reinach did not seem to accept Kant's view that the unity of such a line can be explained by the temporal activity of drawing it.[55] It is not subjective consciousness or activity that creates the distance or the duration, it is the particular quality of the process. What is important for an understanding of the temporality of law, however, is the duration. Social acts are the processes that create duration and, correspondingly, legal acts such as a promise or a determination produce legal duration. This duration of legal processes as a temporal phenomenon can then also be related to the time they take. Thus, social time is not constituted by a line of independently fixed points in time that are earlier or later in the sense of an

longer duration of belief, assertion, by its very nature, does not allow for temporal expansion; it does not pass in time but has, as it were, a punctual existence'. Conceptions have a duration, whereas the verbal expression of opinions would have a similar 'punctual temporal natural' ibid 102. Finally, a conviction detaches itself from the perceived objects and also outlasts their perception. Its longer duration is therefore part of the nature of conviction ibid 107, 125; Adolf Reinach 'Zur Phänomenolgie der Ahnungen' (1916/17) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 589–591, 591. Furthermore, in his manuscripts from 1916/17, Reinach dealt with 'Ahnungen' (perhaps: presentiments or anticipations). He notes that the presentiment of a future event would not be a simple emotion. Rather, 'the presentiment adds something new to the overall store of knowledge – in the broadest sense of knowledge; the subject seems here, rightly or wrongly it remains to be seen, to grasp something from the flow of future occurrences by means of the presentiment that was not accessible to him before'. In German: 'Vielmehr fügt die Ahnung dem Gesamtwissensschatze – im weitesten Sinne des Wissens gesprochen – etwas Neues hinzu'. It is neither certain knowledge about the future nor a vague feeling about it but a sense of something new approaching, ibid 590–591. Reinach even considered how a praying person, in his concentration, can get out of temporality and into contact with the absolute presence or eternity of God also: Monica Adamczyk, 'Zwischen Endlichkeit und Ewigkeit. Adolf Reinachs Konzept des religiösen Erlebnisses' (2014) 28 *Poznanskie Studia Teologiczne* 115–130, 123. Furthermore, another aspect of time interested Reinach in 'Reflection: Its Ethical and Legal Significance Introduction'. On p. 81 he summarized his analysis of reflexions, 'reflectively we present to ourselves the reflective behavior itself. Here it becomes clear how differently the presentification can manifest itself in individual instances . . . We posit as the first type of reflection the inner behavior of the subject who is in the questioning stance, which leads from sheer understanding or the sudden appearing ['Aufblitzen'] of a thought, through presentification of the content, to insight and conviction'.

[54] Reinach (n 51) 580.

[55] Immanuel Kant, *Critique of Pure Reason* (Paul Guyer and Allen W Wood eds, Cambridge University Press 1998) 258.

arrow of time but by the relative social acts that shape the present and, in relation to it, the future and the past. Social time – and with it legal time – is relative to the associated acts. The fact that social acts and law have their own temporality does not mean that they cannot be related to natural time, which can be measured by clocks. However, for Reinach, it was something else to examine the particular kind of present – instantaneous or extended in time – and to answer this question in the essence of the act or to relate it to measurable time.[56]

If one accepts the validity of Reinach's approach, he can help to understand that, firstly, the qualitative time of duration becomes an expression of the essence of processes, secondly, that these processes are social acts, and, therefore, thirdly, that unlike a spatialized time of 'earlier than' or 'later than', this concept of time is relative and not absolute.

9.2.2.2 Legal Temporality Based on Social Acts

For Reinach, the general ability to endure is a prerequisite for becoming a subject of law.[57] Mathematical objects do not have this ability. They do not participate in the coming into being and passing away of judged and measured natural things as, among other things, they are extratemporal.[58] Feelings and other mental events arise and pass away with a corresponding mental agitation. Legal entities such as a right or obligation are neither extratemporal nor do they arise or pass away with a psychical impulse or as a result of simple natural events. They continue even after the psychic impulse has ceased and independently of natural events unless the law explicitly refers to them.[59] This duration is necessarily part of the essence of the claim, as Reinach pointed out: Legal objects 'seem to be temporal objects of a special kind of which one has not yet taken notice'.[60] This temporal structure – that they are neither merely natural-temporal nor extratemporal – is essential to legal objects.[61]

[56] Cf. again, the quote in n 14 above.

[57] However, Reinach also acknowledges other entities, 'which are in time without having a duration. Such an event also exists, for example, when something lights up for me: it happens at a certain moment'. In German, 'die in der Zeit sind, ohne Dauer zu haben. Ein solches Geschehen liegt z.B. auch vor, wenn mir etwas aufleuchtet: das geschieht in einem bestimmten Moment', Reinach (n 51) 578. Reinach (n 11) 109.

[58] Reinach (n 11) 108.

[59] ibid 9, 11: 'claim and obligation can last for years without change, but there are no experiences which last like this'. J Dubois and B Smith, 'Adolf Reinach', in *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/reinach/, at 3.4.

[60] Reinach (n 11) 9.

[61] Adolf Reinach, 'Nichtsoziale und soziale Akte' in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 358: 'Anspruch und Verbindlichkeiten [sind] nichts Physisches, auch nichts Psychisches, keine Erlebnisse … Vielleicht [sind sie dann] ideelle Gegenstände [im Sinne Husserls]? Aber [sie sind] keineswegs außerzeitlich wie Zahlen u. dgl. Anspruch und Verbindlichkeit haben Dauer, fangen an [usw.]. [Sie sind also ein] eigenartige Art, [eine] neue Klasse von Gegenständen' ('Claims and liabilities [are] nothing physical, also nothing psychological, no experiences …

First of all, it is noticeable that Reinach did not base his analysis of the a priori foundations of law on the concept of norms as, for example, Hans Kelsen does, but on social acts that can bring about 'determinations' ('Bestimmungen') as 'normations' ('Normierungen').[62] Not only does he criticize the polysemy of the term 'norm'[63] but his starting point is different. Following Reinach, in contrast to natural law theories, not even the a priori foundations of law produce normative permissions or prohibitions.[64] They are 'eternal laws of being', not normative propositions.[65] If one adds the a priori structures, one can say that eternal a priori laws of being lay the foundation for the temporal social acts that produce 'being-ought' ('Sein-Sollen') through 'determinations'. This is an essential preliminary decision for the temporality of law: whereas norms, as propositions, ought to aim at binding the future, the primary time dimension of acts is the present. Reinach even admitted that the ought-to-be[66] set by a legislator cannot be realized immediately. He distinguishes this from a provision in private law, which – like the waiver of a right – has immediate effect.[67] However, he avoids the consequence that in a legal system these legislative provisions – and thus norms – are the normal case that only provide the framework for the directly effective 'determinations'. In other words, the legislator's binding of the future only creates the legal precondition for the immediate effectiveness of civil law provisions.

Reinach, in contrast, started from the social act that is effective now and looks from there to the future binding of the ought-to-be. Social acts are intentional and spontaneous actions that are directed at another person and must be consciously perceived by that person.[68] The norm is, therefore, simply something that social acts

Perhaps [they are then] ideal objects [in Husserl's sense]? But [they are] by no means non-temporal like numbers and the like. Claim and connection have duration, begin [etc.]. [They are therefore a] particular kind, [a] new class of objects').

[62] Reinach (n 11) 4, 105, 133. He apparently understands norm strongly in the context of positive legal standardization: 'Normierung' – 'norming'. Here he speaks of Enactment of norms, not merely of the result of that act, the norm itself. He contrasts this with the ontological being of the social acts that establish law. His criticism of the concept of the norm does not mean that Reinach does not know the 'ought to be' ('Seinsollen'); he only wants to trace it back to its moral (Reinach (n 11) 105) and social (Reinach (n 11) 137) essence. And distinguishes three forms of it (Reinach (n 11) 109). On the linguistic aspects of his concept of norm as normal cf. Maria Gołębiewska, 'Normativity of Prescriptions in Adolf Reinach's Aprioristic Theory of Right' (2020) 90 *Acta Universitas Lodziensis* 41. Also, Stanley Paulson, 'Demystifying Reinach's Legal Theory' in Kevin Mulligan (ed), *Speech Act and Sachverhalt. Reinach and the Foundations of Realist Phenomenology* (Martinus Nijhoff Publishers 1987) 133–154, 145 f.

[63] Reinach (n 11) 104 f. Gołębiewska (n 62) 54 f.

[64] Rather, it they produce an impossibility, let's say, to transfer something which does not belong to a person (Reinach (n 11) 111). The essential being is at the same time, what ought to be (Reinach (n 11) 124).

[65] Reinach (n 11) 98.

[66] About the 'ought-to-be' in Reinach, cf. Duxbury (n 12) 480 f.

[67] Reinach (n 11) 115 f.

[68] Reinach gives several examples of social acts, cf. also Marta María Albert Márquez, 'Reinach, Adolf' in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia for the Philosophy of Law and Social Philosophy* (Springer Nature 2023) 3040, 3042. Dubois and Smith (n 59) 4.

can produce. In any case, in this way, he fails to conceptualize the structural principle of the hierarchical construction of norms as future obligations, which is characteristic of differentiated modern legal systems. Therefore, he misses a characteristic element of differentiated modern legal systems, according to which the determination of norms takes place in a tiered system of competences and procedures ('Stufenbau der Rechtsordnung'). What is crucial to understand here is that by focusing on the social act as the foundation of law rather than the norm, the present becomes the defining dimension of the law rather than the future obligation.

The temporality of social acts is thus the basis for the temporality of law. In this sense, for example, conviction and assertion differ essentially in their temporality: While a conviction lasts, an assertion has no temporal extension.[69] As was the case for Franz Brentano, the present is also the central temporal dimension for Reinach. When a social act is performed, 'something new enters the world'[70] and 'something is thereby changed in the world'.[71] The social world of 'other-directedness' is not as it was before. Therefore, the social act is historical. In contrast, the past only generates 'cold knowledge'.[72] Moreover, social acts have a teleological structure, namely they are aimed at a future event.[73] The minimal future event is that social acts become effective only when they are consciously perceived ('vernommen') or the addressee becomes aware of them ('innewerden').[74] Such a social act can be aimed at or produce a certain future, just as a question may be phrased in a manner that elicits a particular response. In the case of the social act of questioning, an extended present is simultaneously created in which the questioner waits for the answer.[75] Much natural time may pass during the waiting period, which can be measured with a watch, however, the question lasts until it is answered or until an answer can no

[69] Again, see the quote in n 53.

[70] Reinach (n 11) 9.

[71] ibid 22.

[72] ibid 38.

[73] 'An obligatory relationship strives towards its end, towards fulfillment', in German, 'Ein obligatorisches Verhältnis strebt seinem Ende zu, der Erfüllung' (Reinach (n 61) 360).

[74] Reinach (n 11) 37, 91, 102, 19: 'We designate the spontaneous acts which are in need of being consciously perceived, social acts'. As far as I can see, Reinach uses the terms 'vernehmen' and 'innewerden' interchangeably, although 'innewerden' refers more to the internal aspect of perceiving, which can mean a certain awareness. 'The effect of social acts always comes about only when they are perceived', in German 'die Wirkung sozialer Akte stets erst dann eintritt, wenn ich ihrer innewerde', and for this, simply 'hearing' – as a minimal form of perception – is not enough (Reinach (n 11) 28). Hearing – as Crosby translates it – captures only one aspect of 'vernehmen' and in doing so omits the aspect of consciousness (Duxbury (n 12) 321, n. 27). Crosby's translation that 'if the promise is simply heard (vernommen) there arises a claim in the one who hears and an obligation in the promisor' contradicts Reinach's explicit observation – and his own translation – 'It is also not enough that the promisee perceive the external signs, for instance hear the words, without understanding them'. 'Vernehmen' and 'Innewerden' mean 'a certain conscious perception', for which hearing is necessary, but not in itself sufficient.

[75] The act of questioning is itself a temporally punctual act that emerges from the questioning attitude as the basic phenomenon and itself a permanent attitude, Reinach, 'Reflection: Its Ethical and Legal Significance – Introduction', 69.

longer be expected. The expression of the answer is a responding act that closes the future opened up by the question.[76] Successful communication requires the simultaneity of speaking and listening.[77] The fact that this time is also measurable in a natural time is not essential to communication, but only an external circumstance. If one follows Reinach to this point, one must distinguish duration, which is an expression of the subject, from this external relation to a time.

However, for Reinach not all social actions have the present as their characteristic temporal dimension as many may have a nature that is related to the past. When one apologizes, congratulates, thanks, praises and so forth, such acts necessarily refer to the past.[78] Other social actions cannot refer to the past, such as obligation and demand, which refer to the future.[79]

9.2.2.3 The Temporality of Legal Acts

As noted above, for Reinach many social acts refer specifically to the temporal dimensions of the future, present and past. However, within these categories, acts can be distinguished between, such as with a command from a request: A command opens a social present that can only be closed by a future act – the fulfillment of the command. In this scenario, as with a question and answer, the first social act requires a future responding act.[80] Commands and questions are social acts that open a future that remains until the intended act – fulfillment, response – occurs.[81] Here, an intended future opens an extended present.[82]

Reinach shows that an offer and acceptance also have a specific temporal structure, resulting from their nature. One cannot accept an offer through information or a communication, but only through a specific utterance of a presentistic nature. One should, therefore, temporally distinguish the 'rigid' legal act of acceptance of 'I hereby accept' from the narrative 'I have already inwardly agreed' and a declaration of intent, namely 'I will agree'.[83] Like the 'I do' of the bridal couple in a church or before the registrar, acceptance is a performative act that can only take place and fulfill its meaning in the present. The groom, who holds out the prospect of saying 'I do' to his bride and does not actually say 'I do' is signaling to her that he is

[76] Baeyer (n 82) 60.
[77] Reinach (n 11) 21.
[78] Burkhardt (n 43) 328 f. calls these acts 'expressive'.
[79] Reinach (n 61) 358.
[80] In the sense of Speech Act Theories, one could mention other 'directives' with a similar temporal nature like requests, permissions, prohibitions, warnings, Burkhardt (n 43) 327 f.
[81] Reinach (n 11) 21.
[82] For this explanation of social temporality constituted by social acts cf. Alexander von Baeyer, 'Adolf Reinachs Phänomenologie' (doctoral thesis, University of Heidelberg 1969) 86.
[83] Burkhardt (n 43) 46 and 329: Other examples for such 'declarative' acts that have a present nature would be declaring war, sentencing somebody to prison, a coach removing a player from the sports field or appointing somebody to a position.

not serious about his intention and wants to think it over. The same is true for any potential contracting partner who only indicates acceptance. If the potential partner does not give any reasons for this, the delay in making his or her intention known is a reason to doubt if an intention to enter into the contract exists.[84]

As is well known, for Reinach, the basic legal act is the promise. Promises have a particular temporal structure because, as social acts, promises are processes with a specific temporal duration.[85] While a message can refer to the present, the future and/or past, a promise, like a command or request, 'always refers to a future time'.[86] However, while the behavior of others is central to commands and requests, a promise is centered on the person making the promise.[87] For Reinach, the promisor irrevocably binds his or her future in the presence of the promisee, even without the other's acceptance, when the promise is consciously perceived ('vernommen'). In this way, the promisor initiates 'a train of events'.[88] The claim and obligating nature of a promise arises immediately when it is made.[89] Unlike experiences, a claim or an obligation arising from a promise 'can last for years'.[90] Reinach can show that a promise has a teleological structure, 'an inherent tendency to an end and to dissolve'.[91] Unlike the transfer of property, for example, which exhausts itself in its efficacy,[92] a promise refers to future action.[93] With Franz Brentano one could say that the still unreal future only becomes reality through the binding nature of the promise because it is made present.[94] The temporal structure of promises, claims and obligations is thus an important distinguishing feature from other phenomena such as experiences. From this structure, Reinach concluded that claim and obligation 'seem to be temporal objects of a special kind'.[95]

In his discussion with Wilhelm Schuppe, Reinach returned to this temporal structure. Whereas Schuppe believed that the immutability of the obligation results from the trust of the recipient rather than from the promise, Reinach countered that the obligation follows from the nature of the promise itself. Irrespective of whether the promisor has granted the promisee a right of revocation or has made a

[84] Reinach (n 11) 22 f.
[85] 'It can, according to its essence, last ever so long, but on the other hand it seems to have an inherent tendency towards meeting an end and a dissolution' (Reinach (n 11) 8).
[86] ibid 35.
[87] ibid 27.
[88] ibid 25.
[89] ibid 27, even if the promisor ties the content of the obligation already entered into to certain conditions, namely a 'promise with conditional content'.
[90] ibid 9, 11: 'claim and obligation can last for years without change'.
[91] ibid 8.
[92] ibid 67.
[93] ibid 11.
[94] Brentano (n 4) 107, summarizing 'I believe I recognize that the real as real must be extended in time' and at 210, 'Thus it is certain that nothing exists except what is temporal or present' and at 214, 'that real that is that is present'.
[95] Reinach (n 11) 9.

conditional promise, the promise is irrevocable 'from the outset'. This means that a promise creates its future obligation and the extended present the moment it is made and consciously received.[96]

The declaration of a promise establishes the present of the future obligation of that promise even without the acceptance of the addressee of the promisee. The promisor may, of course, make his promise conditional on the acceptance of the addressee.[97] In this case, if the addressee does not accept the promise or rejects it, no claim or obligation arises. This acceptance of the promise has a different time structure than the promise itself and, as has already been explained, it can only take place in the present.[98] Neither the person who indicates acceptance nor the person who promises to accept has actually accepted. An acceptor must accept by stating, for example, 'I hereby accept'. This 'I hereby accept' establishes the present necessary for acceptance. Acceptance can only take place as a performative, present declaration[99] – or as Reinach would later say, 'determination'. With Reinach we can conclude that, while a promise necessarily has a temporal structure of the future, an acceptance necessarily has a temporal structure of the present.

It seems appropriate at this point to follow an interesting modification that Reinach made when he introduced 'conditional promises' and 'promises with conditional content'.[100] In both cases, a promisor modifies the extended present, albeit in different ways. With both modifications, one may ask: How are we to understand the time between the act of promising and the occurrence of the condition? In a 'conditional promise', the promisor makes the efficacy of the resultant obligation dependent on a possible future event.[101] For example, at time t, a promisor says: 'I will only commit myself to action X when (time t') I know that you will commit yourself to action Y'. Only when the condition is fulfilled is the promisor obliged to do X, without any further acts being required from either the promisor or the promisee.[102] For the act at time t, it is essential that the occurrence of the future event of the condition is open. In other words: by its very nature ('essentially required', according to Reinach), the condition has the character of an open future. If the future event were already certain when the promise is made, the effectiveness of the obligation could, at best, be limited in time.[103] In contrast, in a case involving a 'promise with conditional content', the promisor enters into an obligation immediately but ties its content to certain conditions that must be

[96] As a duration, the extended present only exists if something happens that can produce it (Reinach (n 51) 577).
[97] Reinach (n 11) 28 f.
[98] ibid 44.
[99] ibid 29 f.
[100] ibid 22 ff.
[101] It is necessary that the occurrence of this event is possible and not necessary, 'their efficacy is tied to something which may occur later' (Reinach (n 11) 23).
[102] ibid 27.
[103] ibid 23.

fulfilled: 'I promise now (time t) to start doing X until Y happens (time t')'. This obligation arises immediately when the promise is made, and thus represents the normal case of a promise.

What is interesting about both modifications of a promise is how to understand the time between the making of the promise and the fulfillment of the condition (t – t'). In the case of a 'conditional promise', this extended present has an 'at first' or provisional character, that is, it is oriented toward the occurrence of the condition and ends with the corresponding event. If the promisor makes a conditional promise, then the claim and obligation arise with the occurrence of the event specified in the condition ('conditional promise') and expire as if the promise had never been made the moment it becomes clear that the specified event will not occur.[104] In the meantime, the obligation does not exist and, therefore, it is not yet possible to waive the performance of the promise. Here, 'initially' means that the promisee's waiver only becomes effective when the condition occurs, namely, in the period of time limited by the occurrence of the condition set by the promisor when the promisee can waive the claim just as conditionally. The same moment t' becomes the condition for the emergence of the claim and the condition for the waiver: 'The coming into existence of the claim is here the immediate cause of its death'.[105] The period of time t – t' has the character of the provisional. In the case of conditional renunciation, the period lasts until the moment t', which acquires the character of a common present through the condition of its obligation set by the promisor and the condition of its renunciation set by the promisee. Conversely, in the case of a 'promise with conditional content', the obligation is created immediately. Following Reinach, therefore a promisee may waive the relevant obligation during the entire period. This possibility to waive does not arise with the occurrence of the substantive condition but ends then. It is only in this respect that it is provisional: It is not a promisor's obligation that is provisional, but rather only the performance of that obligation. In the time span t – t' everything is related: the promise and the possibility of renunciation. Thus, by modifying the promise, a promisor has the power to make the extended present t – t' temporally as provisional toward a future event ('conditional promise') or already as fully realized ('promise with conditional content').[106] At any moment of the extended present t – t', the promisee can react with a renunciation. In both cases, the character of this time span t – t' does not result from natural time sequences, rather, it is characterized by the promise and the possibilities of the promisee to react to it; whether it has the character of the provisional or is the present depends on them. According to Reinach, this entire structure of a promise is based on the timeless a priori of law

[104] ibid 23.
[105] ibid 27.
[106] Reinach further distinguishes the promises with a conditional content – but only these – into acts with 'future conditions which put an end to an obligation and those which let the obligation come into being' (Reinach (n 11) 23).

('wesensgesetzlich gefordert', 'essentially required'). No matter how manifold the acts of a promise and its acceptance are, no matter how inadequate the legal regulations of this, 'their pure ideas are based on secure and immutable laws'.[107]

Therefore, one can agree with Reinach stating that promises and acceptances are 'temporal objects that have a character of their own and are neither physical nor psychological',[108] as long as one adheres to their ontological properties and distinguishes them from the experiences in which they appear to us. However, they are neither timeless nor out of time like the a priori structures. Rather, the declaration of a promise and its perception simultaneously generate a duration that is essential for social acts, and both acts only relate to each other because they constitute an extended present.[109] This duration is opened by the declaration of a promise and closed by its fulfillment. Acceptance – if necessary – falls into this present as a point in time constituted by the acceptor.

Taken together we can see with Reinach that a promise is a social act and as a social act, it is a process with a beginning of a certain permanence and an end, that is, it has a duration. However, a particular character of this duration follows from the nature of promises: The duration is directed toward a future realization of the promise in question. The beginning, continuation and end of this duration can be modified as continuous or provisional by conditions. The temporally structured present in this way is not an arbitrary construction of a promisor but follows from the nature of the promise given and the conditions or time limit set. This duration takes place based on objective time, which makes it possible to measure the moments of the social act of the promise in question, of the entry into the condition and of the time limit. However, what is measured – the social act of the promise – does not derive its duration from this time but from the essential process. As with a movement, the measurable moments do not define the duration of the process but are its expression, namely, its beginning and its end.

Reinach did not examine other legal acts with the same level of detail as he did the promise as a basic legal act. However, the examples below show how he anchored temporality in the nature of the respective social legal: Although Reinach did not explicitly speak of future commitment, he did say that the obligatory relationship tends toward its realization and it has a purpose. An obligation is related to 'the time at which it should be fulfilled'.[110] Correspondingly, a claim is directed toward its fulfillment. Such terms signal the teleological and thus future-oriented character of the relationship between the promisor and the promisee. At the moment when a claim is either fulfilled or a waiver becomes effective, that claim expires. Reinach also made a temporal distinction between relative rights,

[107] ibid 33.
[108] ibid 10.
[109] Baeyer (n 82) 90 f.
[110] Reinach (n 11) 32.

such as claims, and absolute rights that, for example, relate to property. While claims have a provisional temporal structure because they are ordered toward an end, absolute rights have something finite about them.[111] If a claim is fulfilled by the conduct of another party, it ends. However, rights arising from property can be exercised at any time. As such, both claims and absolute rights can have time-bound content.[112]

In addition, for Reinach a contract also has a specific, a priori existing temporality which results from the connection of the temporality of the mutual declarations: In the extended present, the contracting parties instantiate a future structure. This binds the future of the obligor and opens the future of the obligee.[113] In the case of reciprocal obligations, therefore, there are mutual future commitments, and the resultant extended present is not closed until all the contractual obligations have been fulfilled. For Reinach, this necessary temporal structure of contracts results from the necessary temporality of the social acts underlying contracts.[114]

Finally, there are social acts, such as judgments, that directly change something in the world. Reinach called them 'determinations' ('Bestimmungen') and these are relatively commonplace as they arise with an acceptance of an offer and the enactment of laws and statutes. 'Determinations' are not rooted in previous structures – although they may be shaped by them – but bring something new.[115] 'Determinations' are not future-oriented but have an immediate effect – which is the existence of a claim or property.[116] In contrast to a command, which is realized only if it is obeyed in the future, a 'determination' is realized immediately. Take § 1 of the German Civil Code (BGB): 'The legal capacity of a human being begins with the completion of birth'.[117] The indicative of the formulation shows that this effect occurs when its precondition is fulfilled. The legislator 'enacts that claim and property ought to be, and presently something is changed in the world. What is posited by the enactment is not merely something which ought to be and is waiting to be realized, rather it becomes real at the moment of the positing and through the positing: property and claim exist in virtue of the enactment'.[118] Transfer would be another example.[119] The present here has a very different character from the

[111] ibid 58.
[112] ibid 61.
[113] Baeyer (n 82) 94.
[114] ibid 89.
[115] Reinach (n 11) 108.
[116] ibid 52, 'There are rights to actions with an immediate efficacy in the world of right – we already encountered some of them: the right to waive, to revoke, and the like. These are social acts the exercise of which produces an immediate effect in relations of right, such as ending them or modifying them'.
[117] Paulson (n 62) 149.
[118] Reinach (n 11) 110.
[119] ibid 66 f., 'Both promising and transferring are social acts with immediate legal efficacy. But only transferring reaches its final goal with this efficacy'.

teleological present of a promise:[120] The act of transfer exhausts itself in the present. However, in the case of enacting laws, this does not mean that a legislator establishes a norm that contains an obligation. In its application, the law then becomes a command from the user to the person subject to the norm to do this or that. 'Determinations' and commands remain distinct social acts. This command then – like other commands – has a reference to the future and is not exhausted in the present of its utterance.[121] While a promise creates a claim and an obligation with its conscious perception, it only becomes effective with the fulfillment of its resultant obligation where the transfer of rights is a social act that is realized in the presence of the transfer. It closes the future that was opened, for example, by the establishment of the obligation. Furthermore, these direct social acts can do this because their meaning does not refer to a future and there is, therefore, a certain freedom in the 'determinations'.[122] As Reinach states, 'Only that which can be and can also not be, which can have a beginning, duration, and an end in time, is the possible content of "determinations"'.[123] That, which is in itself timeless and necessary – like the a priori structures – cannot be included in the content of 'determinations'.[124]

Just as social acts are not phenomena of consciousness, such as emotions or cognitions, this temporality does not arise from consciousness, as in Husserl's transcendental second phase, but for Reinach is objectively grounded in the nature of the corresponding acts.[125] Admittedly, the past plays a subordinate role in legal relations and, perhaps as a consequence, Reinach hardly mentioned it. Nevertheless, it is clear that the past becomes important around the time of the acceptance of a promise: A promise made in the past must still exist at the time of the conscious perception or, if necessary, its acceptance. Reinach shows that the

[120] ibid 111, 'The promise is by its very nature incapable of generating an immediate efficacy for the enactment'.

[121] Paulson (n 62) 150.

[122] Duxbury (n 12) 475 ff. translates 'Bestimmungen' as 'Enactments', whereas Paulson translates them as 'legally issued norms' or 'issuances' (Paulson (n 62) 148). 'Bestimmungen' seems broader to me and also encompasses concretizations: it is an act which precedes the enactment and its possible result, the norm (Reinach (n 11) 111).

[123] Reinach (n 11) 108 f.

[124] How about the morally right then? Is it also not a possible content of a 'determination'? It is the present author's view that what Reinach tries to avoid here is to make the morally right a matter of a 'determination'. As such, the morally right is not a matter for a 'determination'; however, 'determinations' can reflect the morally right (Duxbury (n 12) 482).

[125] As far as the present author can see, there is only one example of the significance of the inner consciousness of time in Reinach's 1916/17 notes: 'There is no measure of duration in itself, any more than there is a measure of extension in itself. Cf. Malebranche I, p.71: God can cause – by allowing us to experience a great deal in a very short time – that a single hour appears to us like several centuries. (Of course, even these experiences, however rapid, would pass one after the other)', Adolf Reinach, 'Notizen auf losen Zetteln' (1916/17) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 592–604, 595, my translation. However, this had no significant influence on his philosophy.

interaction of the a priori temporally structured social acts then results in a specific present: A question opens up a present that is closed by its answer. A promise opens up a present that extends as far as its hearing and can be closed by the fulfillment of that promise or its renunciation and can be structured in time by the promisor through conditions. Absolute rights grant their holders an unchangeable, permanent present in which they are authorized to make use of these rights. By their very nature, provisions are temporally punctual social acts, however, they open up an extended present in which new rights or obligations exist for the person concerned: The transfer of a right now allows the recipient to make use of it. An enacted law is valid for a certain or indefinite period. When an acceptance of an offer is required, an extended present of contractual obligations is also required. Through these social acts, an extended present or duration is brought forth which can have a future-oriented, teleological character toward their fulfillment or take on a more static, unchanging character.

This duration – or extended present in the Bergsonian sense – is an essential characteristic of legal time.[126] It is precisely demonstrated by the fact that essentially founded legal institutions can exist independently of fluctuating sentiments and interests. For Reinach, it is an essential characteristic that claims, obligations and other legal forms 'arise, last a definite length of time, and then disappear again'.[127] They 'can last for years without change', because they are independent of emotions or other experiences. Rights over things ('Sachenrechte') 'survive a change in the owner of the thing … without any respect of the person of the owner at a given time'.[128] These rights can 'survive the change in the owner'.[129] It is in the nature of these rights to endure and not to be limited by temporal events that the law does not consider relevant, as in the case of deeply personal rights ('höchstpersönliche Rechte').[130] These enduring phenomena are the basic social phenomena, from which temporally punctual acts, such as the attitude of questioning and the explicit question, can be explained.[131] Again, this extended present of duration can be measured and quantified in natural time even though it arises from the nature of rights, claims and obligations.

Reinach thus showed that acts, especially social acts, have their own temporality which distinguishes them from natural time on the one hand and from the extra-temporality of a priori structures on the other. While intentionally future-oriented, presently effective or permanent acts and legal structures can certainly be measured

[126] Reinach (n 51) 557 ff.; on Bergson see also Stephan Kirste, 'Longue Durée de la Loi' in George Kadige (ed), *De La Pérennité et de la Temporalité du Droit* (Publications de l'USJ 2015) 67.
[127] Reinach (n 11) 9.
[128] ibid 71; Reinach (n 34) 424.
[129] Reinach (n 11) 123.
[130] ibid 82.
[131] ibid 282.

in natural time, their temporality is not determined by it.[132] Reinach's phenomenology of legal time is realistic, not because it adheres to the superficial temporality of natural events, but because it takes social legal acts as its starting point and examines their nature in terms of their own temporal structures. For this reason, he also distinguished between natural objects, which simply fall into time, ideal objects, which are extratemporal or even eternal, and social acts, which must be temporal but whose temporality is to be substantiated concretely from their essence and not from their natural appearance. However, precisely because this time is essential time, it is not a subjective time of a time consciousness or even a social construction.[133] In these social, and especially legal, acts one finds those events that produce duration and thus time in the sense shown above. Social and legal times for Reinach thus arose from social acts, although not from their arbitrariness but from their essential structure. Accordingly, it is not surprising that this structure of time does not consist of an external quantitative 'earlier-than'–'later than' or 'before-after'. Rather, this legal time is a qualitative time that emerges from the specific temporality of social acts. It exists as a shared social present where the future emerges from the meaning of a promise and its declaration. Intentionality is the structural aspect of the social act that characterizes the future. It is opened as another possibility for a promisee and closed as an obligation for the promisor. In this way, the future is also a social future that emerges from the actions of those involved.

9.2.3 *To Sum Up*

All in all, Reinach took the first steps toward the recognition of a legal time as a distinct form of time, which one can distinguish from other times, but which can also serve as the basis for the synchronization of the other social times.[134] However, one can also find problematic aspects both in his theory of time and his theory of law.

Although Reinach said that the temporality of legal acts is one of their essential characteristics, distinguishing them from both ideal and purely empirical objects of knowledge, his theory of time is nevertheless fragmentary. It had to be reconstructed

[132] This is not to say that Reinach does not recognize natural time. He deals with it in his discussion of the Zenonian paradox of movement (Reinach (n 51) 574), although even here he is always concerned with qualitative differences: For example, he distinguishes a pause within a piece of music from an interval between two pieces of music. If both are measured in terms of natural time, they may be the same length and, in this respect, there is no difference. However, in terms of their quality, a pause and an interval are two completely different presences.

[133] This becomes clear if one looks at Reinach's critique of Kant's theory of space and time as mere forms of perception (Reinach (n 34) 444 f.).

[134] Stephan Kirste, 'The Temporality of Law and the Plurality of Social Times: The Problem of Synchronizing Different Time Concepts through Law' in M Troper and A Verza (eds), *Legal Philosophy: General Aspects. Concepts, Rights and Doctrines* (ARSP-Beiheft 2002) 23–44.

here from very different passages of his works. Many aspects of the temporality of law have already been decided by essential a priori structures. This may be one reason why for Reinach, as it does for Brentano, the present plays a prominent role. In contrast, both the openness of the future, which makes free action possible, and questions concerning the past, play only a subordinate role. Throughout his writing, it becomes clear how Reinach's pioneering work on a theory of the temporality of law did not draw on the groundbreaking insights of Edmund Husserl's investigations into the phenomenology of inner time consciousness and Heidegger's fundamental ontological foundation of 'Being and Time'. However, while for both Husserl and Heidegger the social dimension is not very important, from the outset, Reinach constructed his theory of the temporality of law from the a priori foundations of social acts, thus revealing a worthwhile path for later attempts.

By their social acts and especially by determining the law through its positivization, people can deviate from the a priori structures.[135] In this respect, they have a negative freedom but lack the positive freedom to create new essential structures. The inherent justification of discourses that produce something genuinely new from the convictions of the participants thus is outside Reinach's understanding of the temporality of law. Whenever a legal discourse produces new values, principles or rules, the a priori doctrine of law will claim that their essence already exists. However, since values differ, discourse and normative guidance are needed to agree on what is produced. For this reason, the concept of the norm would also have to be placed at the center of the analysis of the temporal structure of law, which Reinach does not do.

Process and norm come together when one considers the importance of the futurity of social action, something also emphasized by Reinach. Law, by virtue of its norms, implies a commitment to the future because human action is shaped by the awareness of an open future of options. Norms should guide human actions and correct them where necessary. Since this freedom also refers to the process of norm-setting in, for example, contracts, laws and criminal norm assertions, there is a need for a reflexive structure of law. Law subjects the open future horizon of norm-setting, norm interpretation and norm enforcement to norms in turn. These are norms that relate, for example, to the conclusion of contracts, the legislative process, and enforcement. A working theory of the temporality of law would have to take into account both a qualitative understanding of the dimensions of time and the normativity of law, something Reinach failed to do but that he did, arguably, open the door toward.

9.3 GERHART HUSSERL

To better appreciate Adolf Reinach's pioneering work on a theory of law and time and, at the same time, to gain some perspective on the direction in which a

[135] Reinach (n 11) 5 f.

phenomenological theory of legal time may develop, it is helpful to take a look at Gerhart Husserl's work. This is because the latter's theory has an advantage over Reinach's work by having a more detailed legal basis and by assuming a greater plurality of temporal experiences.

In the context of his phenomenological investigations of the relationship between law and time, Gerhart Husserl[136] did not explicitly refer to his father's 'Lectures on the Phenomenology of the Internal Consciousness of Time'.[137] However, it is likely that when he published an article entitled 'Recht und Welt' ('Law and World') in the Festschrift for his father in 1929, Gerhart was aware of the lectures held in 1905 and that were edited in 1928 by Martin Heidegger and published in volume XI of the 'Jahrbuch für Philosophie und phänomenologische Forschung'. Husserl had already committed himself to a phenomenological approach in his graduation thesis of 1925, which he dedicated to his father.[138] He did not thematize it but applied the method of phenomenological reduction. In the years that followed he returned to phenomenological considerations and, in 'Time and Law', he went into explicit detail and, among other things, provided a vivid example using the 'shoe' to explain the nature of functional objects and then also of the law.[139] Besides applying his approach, the completely different 'Eigenart' (specific character) of Martin Heidegger left some traces in Husserl's work.[140] Heidegger's first main work on

[136] On him cf. Britta Böhler, 'Gerhart Husserl: Leben und Werk' (doctoral thesis, University of Freiburg 1992).

[137] Husserl thanks his father in the preface to his essay on 'Rechtskraft und Rechtsgeltung' and admits that 'the example of the phenomenological method of research had a lasting influence' on his own work. However, it is not a work 'of the phenomenological school' because it is a legal-dogmatic and not a philosophical work; Gerhart Husserl, *Rechtskraft und Rechtsgeltung: Eine rechtsdogmatische Untersuchung*, vol 1 (Springer 1925) VII. However, he agrees with Reinach that the search for the 'essential prerequisites of law' is one of the tasks of jurisprudence. He sees himself connected to Reinach in the application of an intuitive method that has enabled a fruitful problem orientation.

[138] He has stronger transcendental phenomenological roots that he himself reveals, Loidolt (n 1) 187.

[139] Gerhart Husserl, *'Recht und Zeit': Fünf rechtsphilosophische Essays* (Klostermann 1955) 14–17, 17, 'We wanted to use the example of a shoe to make it clear that general statements can be made about things in our practical environment. Our explanations moved in the region of the a priori of physical things. Neither did we speak of the thing (which has the purpose of a shoe) as we encounter it in a certain historical reality, nor of a fictitious thing of this kind imagined in the imagination, but rather of the thing "shoe", reduced to its idea: the purpose of the thing that wants to be a shoe' (as with all quotes from Husserl: my translation). In German, 'Es kam uns darauf an, an dem Beispiel eines Schuhes andeutungsweise klar zu machen, daß über Dinge unserer praktischen Umwelt allgemeingültige Aussagen gemacht werden können. Unsere Darlegungen bewegten sich in der Region des Apriori physischer Dinge. Wir sprachen nicht von dem Ding (das den Zwecksinn eines Schuhes hat), wie es uns in einer bestimmten geschichtlichen Wirklichkeit begegnet, aber auch nicht von irgendeinem, in der Phantasie vorgestellten Ding dieser Art, vielmehr von dem Ding "Schuh" reduzieren auf seine Idee: den Zwecksinn des Dinges, das ein Schuh sein will'.

[140] Manfred Sommer, *Lebenswelt und Zeitbewußtsein* (Suhrkamp 1990) 200.

fundamental ontology 'Being and Time' was published in 1927 in Volume VIII of the aforementioned yearbook.

9.3.1 *Abstract and Concrete Time of Law*

9.3.1.1 The Abstract Time of the Works of Art and Law

Husserl's analysis of the relationship between law and the world is based on the principle of experience. A priori propositions have a legal meaning but are not valid law; they must first be transformed into social reality to attain legal validity.[141] Here, Husserl is thus distancing himself from Reinach.[142] He starts by viewing a human being as 'being in the world'. This being in the world can be naive, immediate or ecstatic.[143] In the experience of nature there is doubt, everything is uncertain, and everything is as transitory or temporary as man himself. Indeed, in natural attitudes, Gerhart Husserl emphasized the omnipresence of a death consciousness even more strongly than Edmund Husserl. This did not yet lead the former to the preeminent position of the future for Dasein ('existence'), as Heidegger did in 'Being and Time'.[144] Thus, one finds only echoes of fundamental ontology in Husserl's works.

By turning to transcendental ideas, people overcome these doubts and uncertainties in, what Husserl calls, 'an ecstatic attitude'. This attitude does not mean escaping from the world, even if it entails alienation from the world, but taking the situation of doubt seriously and fully investing one's own person in this world. The ecstatic attitude then becomes the conscious assumption of the world in which a naive person simply finds themself and it seeks to provide an affirmative attitude toward this world. In this transgression of the consciousness, a transcendent time

[141] Husserl (n 137) 9: 'Law, however it is developed in detail, derives its legal content to an essential (and determinable) part from such conceptual material of an a priori social and legal doctrine. But it is only possible to speak of "law" in our sense when the facts have been given the value of legal validity. What is not cast in the form of legal validity is a pre-legal fact'. 'Das Recht, wie immer es im einzelnen ausgestaltet wird, gewinnt seinen Rechtsinhalt zu einem wesentlichen (und bestimmbaren) Teile aus solchem Begriffsmateriale einer apriorischen Sozial und Rechtslehre. Aber von "Recht" in unserem Sinne kann erst dann gesprochen werden, wenn dem Sachverhalte der Seinswert der Rechtsgeltung zuteil geworden ist. Was nicht in die Form der Rechtsgeltung gegossen ist, ist vorrechtlicher Sachverhalt.'

[142] ibid 46, emphasizing the autonomy of the legislator with respect to a priori structures. He emphasizes the contingency of the law with respect to these structures (Husserl (n 139) 22). They are truths about law but not themselves normative legal provisions (Husserl (n 139) 14).

[143] Gerhart Husserl, 'Recht und Welt' in Gerhart Husserl (ed), *Recht und Welt: Rechtsphilosophische Abhandlungen* (Klostermann 1964) 67.

[144] Husserl (n 143) 69: 'The world made comprehensible to the naturally behaving human being is rooted in his historical existence, in which the experienced past lives on in a decisive way' ('Die dem natürlich sich verhaltenden Menschen erschlossene Welt wurzelt in seinem geschichtlichen Dasein, in dem erlebte Vergangenheit bestimmend fortlebt').

structure is also experienced: in religion, eternity, and also in pictorial works of art, we hold to our present against the current of experience.[145]

The time of a work of art is essentially negatively determined – a nonnatural, 'illusory time'. First of all, a musical composition has an 'abstract time', which only enters into concrete time-being through its 'temporalization' in the performance. The composition is only a 'norm' for its repeated reproduction, which can and must then be concretely experienced and kept in consciousness ('retendiert')[146] if it is to be perceived as an experience in the natural world. The determination of the composition as a norm and its being in time as 'abstract time' is also to be kept in mind for an analysis of law. Husserl does not understand the 'ecstatic transcendence' of naturally naive world behavior as a transition into a fully valid temporality of one's own; rather, he sees it only as an abstraction into an illusory time. The composition receives its concrete reality only through its reentry into the natural-bodily world. Only in this way does the norm become the object of time consciousness.[147]

In a subsequent step, Husserl compared the creation of art to the realization of law.[148] In doing so, law is also put into a state of 'abstract time' and must then be 'temporalized'. While Reinach distinguishes between the timeless form of the a priori foundations of law and legal temporality, Husserl moves from the 'abstract time' of norms in books to the more concrete temporality of the realization of legal norms. This approach will be examined in more detail below.

9.3.1.2 Detemporalization of Law

For Gerhart Husserl, law was a 'work of will' of the legal community ('Rechtsgemeinschaft').[149] He believed that like a work of art, law has its own being in time, although not in natural time. Law is not eternal nor is it designed for a temporal end and, while it is valid, it is not regarded as coming from the past and being carried out to a future end.[150] It is not an object of memory or expectation and it exists beyond our experienced present.[151] Just as law is valid in an abstract way, it also has an 'abstract time'. Law has this abstract temporality because it does not refer

[145] Husserl (n 143) 71 f.

[146] Edmund Husserl distinguishes 'Retention' and 'Protention'. By 'retention' the consciousness keeps an impression alive, like a sound that has faded but is still in our ears. So, we have not forgotten it and remember it, we hold it in our consciousness, so to speak. Husserl (n 49) S. 26/ English 44. However, while I hear the first note within a melody that I know, I can complete the rest of the melody in my consciousness. Husserl calls this 'protention'. It is not an expectation of something to come, but the start of something beginning, Husserl (n 49) 39/ English 58.

[147] Husserl (n 143) 77.

[148] Husserl (n 137) 21.

[149] Husserl (n 143) 77 and 89. This brings him close to the concept of law espoused by his father, Loidolt (n 1) 186.

[150] Husserl (n 143) 79.

[151] ibid 78.

to a singular social fact or 'spatio-temporal reality'.[152] In this 'abstract validity', it has not yet reached either legal reality or legal temporality. The abstract time of a legal norm is produced by an abstract formulation of the facts. Here, possible courses of action are recorded against a developing future and, once created, a law becomes a product of will ('Willenswerk') that exists as a norm detached from legal consciousness, 'even if all subjects of law under its spell sleep dreamlessly'.[153] Like Reinach, Husserl viewed legal validity as abstract in terms of the psychological attitudes that may or may not realize it, but while Reinach ties this abstraction to the a priori structures of law, Husserl referred to the abstract legal norms in books.

Essentially, this abstract time means 'timelessness' because no temporal element can be named for law in this form. Thus, law has lost its temporal reality and has been transformed into a potentiality. From there it must be transformed into legal reality by the deliberate acts of 'legal comrades'. Here, in Husserl's theory, legal comrades are persons and legal orders that mutually support each other; however, man would lose his legal personhood and a legal order its validity if the attitudes of the community toward the law were to change. They would thus leave the world of law and fall back into a natural world. This inaccessible 'will'-attitude guarantees permanence in that the individual cannot dispose of it and therefore cannot 'reject' it.[154] At the same time, however, law depends on every human being for its validity.[155]

Husserl's desire to hold on to consciousness as the basis for the temporality of law seems to require an objective consciousness of the legal community in the case of laws. The duration of law as the basis of its abstract time is dependent on the duration of a permanent collective will of the people. For this, he relied on the constant expression of this will. However, there are some doubts about this aspect of his concept: On the one hand, this attitude is supposed to lift the individual out of the naively experienced world into a legal world to justify and support him; on the other hand, however, this will is not supposed to be available to him. This raises the question: Why should our (collective) will and the law not be changed for good

[152] Husserl (n 137) 17.

[153] ibid 7. It is remarkable that Husserl refers here to the remarks by Reinach.

[154] Husserl (n 143) 80: It is the attitude of will 'which awakens and maintains the community of law to its selfhood; it consequently carries the legal order … A collapse of this sense of will in the members of the legal community suspends the law (in a revolutionary way). At the same time, however, this would entail a collapse of the person himself, who gave away his sense of right. Because in legal connectedness the - right-want is not a today-and-tomorrow-want but a permanent attitude of will, which constitutes an essential element of existence'. It is this 'Willensgesinnung', 'welche die Rechtsgemeinschaft zu ihrem Selbstsein erweckt und aufrechterhält; sie trägt folgeweise die Rechtsordnung … Ein Zusammenbruch dieser Willensgesinnung bei den Gliedern der Rechtsgemeinschaft setzt das Recht (auf revolutionäre Weise) außer Kraft. Es würde das aber zugleich einen Zusammenbruch der Person selbst, die ihre Rechtsgesinnung preisgab, nach sich ziehen'.

[155] Husserl (n 143) 100.

reasons? Another concern here is that this 'attitude of will' seems to be a mere fiction. However, if law is to be moved from existing in abstract time into concrete and perceptible time, the permanent attitude of will also needs to be empirically proven. It remains unclear in Husserl's work what this will is. In a defense of a psychological justification of law, Husserl objects to calling it somehow emotional, just as Reinach did not want to rely on psychological facts for the construction of law. The reason for both men having this somewhat common perspective is that the 'abstract' being of law should not be the object of a feeling, which, if it were, would lose its objectivity.[156]

9.3.1.3 Putting Law into Time

Husserl's second step in the constitution of experiential law further concretized law by placing it in time ('Verzeitung' ~ temporalization). In this regard, he noted: 'In fact, it is a matter of crossing over from the other side of the timeless world of law to this side of the reality of the will, which lies in the natural flow of time, to which the legal proposition, as one affected by norms, is concretely related'.[157] This is the task of the judge in particular as in the legal force of his judgment, the law acquires concrete validity and 'world-shaping power'.[158] This fixes law in time and, as long as it is determined in this way, it can be the object of personal feelings and the like and has become evident.

Therefore, Husserl makes an important exception to the necessity of 'temporalization', namely, constitutions. For him, constitutions represent 'the legal being of the legal community' with a particular temporality. They do not require an explicit application to be concrete because they are – again – 'supported and held by the permanent will of the legal community, which is beyond the experience of today, but at the same time has its roots in the living personhood of the respective existing human beings'.[159] In fact, a constitution represents the will of the relevant legal community.[160] It is not clear here whether Husserl now introduces another tempor-

[156] Husserl (n 143) 104.
[157] ibid 82.
[158] ibid 88.
[159] ibid 93.
[160] ibid 93: 'The constitution, which represents the legal being of the legal community (not necessarily verbally formulated), applies itself, so to speak: it is sustained and held by the permanent will of the members of the legal community, which stands beyond the experiential present, but at the same time has its essential roots in the living personhood of the people who exist in each case. The Constitution is the beginning and the end of the law'. 'Die Verfassung, die ja das rechtliche Sein der Rechtsgemeinschaft (nicht notwendig verbal formuliert) darstellt, wendet sich sozusagen selbst an: Sie wird von der permanenten Willensgesinnung der Rechtsgenossen, die jenseits des erlebnishaften Heute steht, zugleich aber im lebeniligen Personsein der jeweils daseienden Menschen ihre Wesenswurzeln hat, getragen und gehalten. Die Verfassung ist des Rechtes Anfang und Ende'.

ality besides the natural and the abstract one; however, doing so seems to be necessary: Constitutions certainly cannot have natural temporality because they are based on a certain will-intent with its own temporal structure that is different from the natural temporality of emotional acts. What was needed here was not an 'ideation' involving the natural time-transcending commitment of the 'legal comrades' but only an 'awakening of the constitutional will-intent'.[161] However, this entails constitutions being either transferred into a world of psychic experience, resulting in their temporalization ('Verzeitung'), or them remaining as they are, awakened in the mind itself. This means they cannot be natural-temporal because a will attitude that brings a constitution into being, according to Husserl, only brings about abstract temporality. A constitution should not be, however, in abstract time because it already has reality in the common will of the people. Here, too, Husserl's theory of the attitude of will ('Willensgesinnung') does not lead to a clarification of the question of temporality.

At the next level of concretization, Husserl argued that administrative action should not seek temporization or the creation of new law but the abstract normative facts should be given a concrete and adequate form. An official simply makes use of his or her authority and performs an act of will which is then legally evaluated. He 'moves in the sphere of action of natural experience. He places his work in the flowing time in which social things come into being and pass away. His effort is to create the permanent, not the once and for all'.[162] The contact with the interests of the natural social world makes the other decisions uncertain. Their actions are all still legally open and thus in the natural realm of doubt. Judges are tasked with freeing the law and its concretization from this doubt and determining the law. Only the judge's decision represents a real, certain, 'Verzeitung' of the abstract law. More specifically than Reinach, Husserl shows here that the extended present with an open future of a legal process of concretization can only be closed by certain legal acts, namely judgments.

With this subjective approach, Husserl certainly contributes to a foundation of the temporality of law on the consciousness of law and time. However, it does not do justice to the manifold possibilities of acts applying the law. One need only think of the force of validity ('Bestandskraft') of administrative acts and with the rules of limitation or *res judicata*. How can the acts of judges do so if they do not put law into time? The failure of natural acts to obey temporal constraints clearly has legal consequences. Yet, this did not have a place in Husserl's theory of the temporality of law. This already shows that the limitation of the temporalization to the courts is too narrow and does not sufficiently take into account other forms of transforming temporally abstract laws into concrete legal time.

[161] ibid 95.
[162] ibid 106 f.

9.3.2 *Doubts and Revisions of the Temporality of Law Based on Legal Consciousness*

From the above brief reconstruction of Husserl's theory,[163] one can conclude that two aspects are decisive for the temporality of law: on the one hand, the 'de-temporalization' of the content of law to a legal order that is in a form supported by an individually unavailable will and where law is in abstract, nonexperiential time. On the other hand, law must be 'temporalized' to be able to have a world-shaping effect. This happens in court decisions which definitively establish the law and make it capable of experience in space-time as only in this form is the law accessible to the consciousness of time. As plausible as these two steps are, problematic aspects remain: first, the foundation of the permanence of 'abstract law' on the attitude of will and, in general, its closer determination and, second, the limitation of the temporalization to the activity of the judge. Despite all the differences that have become apparent with regard to the conception of the 'phenomenology of inner time consciousness', the insufficiency of a foundation of time on this subjective time remains with respect to objective structures such as law.

Husserl himself may have had doubts about his conception, a notion borne out by his later considerations where he shifted the focus and wrote more intently about the temporalizing moments in the action of the legislator.[164] In 1955, in 'Law and Time', he emphasized more strongly the relationship of the legal order to the concrete historical situation and linked the fate of the norm to the legal community. This was a notable shift from both the first part of his work on the validity of law in 1925 and in 'Law and the World' from 1929.[165] In 'Law and Time', he argued that the application of norms now affects their temporal structure and they reach back into the past, whereas in his earlier works, legal norms seemed to have no past. The legislative act becomes the keystone of this past. In the act of reception of this prehistory of laws, Husserl presents this keystone initially as an act of 'de-timing' ('Entzeitlichung'), which here means a reduction of the legal propositions to their 'core of meaning'. As long as they are 'untimed' ('entzeitet'), they have no normative force and must first be incorporated into a legal order. In this respect the act of the legislator is the keystone of prehistory. However, the arm with which he reaches into the future is of finite length and the ongoing actualization of the law is a matter of its application, with the latter remaining the focus of his concept. Thus, while in his earlier works Husserl emphasized the abstract temporality of norms that are lifted out of the flow of temporal events, he eventually took into account the fact they change and that they are dependent on historical time as a time filled with historical content. Indeed, he noted that abstract time in this

[163] For a more thorough analysis cf. Kirste (n 22) 254–256.
[164] Husserl (n 139) 10 f.
[165] ibid 23; he also gives up his comparison with works of art (Husserl (n 139) 26).

context means objective, measurable time.[166] In his later works, historicity began to play a more important role in Husserl's work and fundamental ontological thinking gained greater traction. One can almost perceive Heidegger's influence when Husserl speaks of the temporal structure of the legal claim, which has the nature of a tool and is directed toward an end.[167] This is then distinguished from the temporal structure of continuing obligations, which are not directed toward their end but are carried by the ongoing fulfillment of meaning.[168]

Husserl's clarifications lead to a more differentiated view of the temporality of legal objects. The abstract comparison of subjective and objective time has receded somewhat, giving way to a broader view of the multiple temporalities of legal content.

9.4 CONCLUSION

In conclusion, the foregoing has briefly contrasted Reinach's approaches to a theory of the temporality of law with Gerhart Husserl's theory of the temporality of legal consciousness. This was done to show the different conceptions of the temporal structure of law arrived at by the various approaches of phenomenology. While Reinach made his observations based on realist phenomenology, Gerhart Husserl worked with the transcendental and, to some extent, the fundamental ontological method. This led Reinach to anchor the temporality of law in the timeless a priori structures of fundamental legal acts and an objective temporality of law. Husserl, in contrast, excludes this sphere and understands timelessness itself as a social structure, namely the abstract time of the laws, borne by a permanent attitude of will. He is interested in the temporality of positive law as it results from the temporalization by the users of law. Both philosophers arrived at a point where they saw a specific temporality of law; for Reinach, this resulted from essentially structured legal acts while for Husserl it was born from legal consciousness.

Ultimately, for Reinach, the temporality of law rested in the unchangeable a priori temporal structures of legal acts in which everything seems to have already been decided. For him, everything rests on their realization, even though a legislator can deviate from this in its 'determinations'. However, the fact that concrete law is also an expression of deliberations, evaluations, optimizations and considerations, while not excluded by Reinach, was not sufficiently included in his theory of the temporality of law. After World War I, the emergence of democratic, administrative and judicial procedures with their different temporal structures and novel ideas about a newly anticipated future, presenting the past and a will to maintain the legal state, played a greater role than at the end of Germany's constitutional monarchy

[166] Husserl (n 139) 31 f.
[167] ibid 32 f.
[168] ibid 37.

when Reinach developed his theory. In his writings during the Weimar Republic and later on, Gerhart Husserl was able to incorporate these historical legal developments into his theory of the realization of law as temporalizing. In contrast to Reinach, he does not distinguish between a timeless a priori sphere and a temporal one but between an abstract time of the enacted law and its realization in concrete legal acts.

Both Reinach and Husserl broke new ground, each in his own way, laying the foundations for a theory of the temporality of law. However, the positive law of the present is more than determining timeless a priori structures or expressing a temporal consciousness of law. This is because it produces its own temporality, one grounded in the extended present of the law's validity, which opens up a future horizon in which legal persons can rely on predictable meanings of their legal acts. Law regulates its own present, future and past and herein lies its temporality. Adolf Reinach and Gerhart Husserl, as legal phenomenologists, opened the door to approaches to a theory of law's temporality that can be further developed. Finally, and despite the incompleteness of their respective works, they have shown that contrary to the ancient idea of a possible approximation of positive law to an immutable natural law, law has its own temporality.[169]

BIBLIOGRAPHY

Adamczyk M, 'Zwischen Endlichkeit und Ewigkeit. Adolf Reinachs Konzept des religiösen Erlebnisses' (2014) 28 Poznanskie Studia Teologiczne 115–130

Augustine A, *Confessions* (AC Outler tr and ed, Hendrickson Publishers 2004)

Baeyer A v, 'Adolf Reinachs Phänomenologie' (doctoral thesis, University of Heidelberg 1969)

Böhler B, 'Gerhart Husserl: Leben und Werk' (doctoral thesis, University of Freiburg 1992)

Brandenburg N, 'Phenomenology of Law' in Stephan Kirste and Mortimer Sellers (eds), *Encyclopedia for the Philosophy of Law and Social Philosophy*, vol 4 (Springer International 2024) 2659

Brentano F, *Philosophische Untersuchungen zu Raum, Zeit und Kontinuum*' (Meiner Philosophische Bibliothek, Bd. 293, 1976)

Burkhardt A, *Soziale Akte, Sprechakte und Texillokutionen. A. Reinachs Rechtsphilosophie und die moderne Linguistik* (DeGruyter 1986)

Dubois J and Smith B, 'Adolf Reinach', in *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/reinach/

Duxbury N, 'The Apriori and the Legal' (1990) 21 Rechtstheorie 297

'The Legal Philosophy of Adolf Reinach' (1991) 77 ARSP 314–347, 466–492

Emge C, 'Über den Charakter der Geltungsprobleme in der Rechtswissenschaft' (1920/21) 14 ARWP 146

Gołębiewska M, 'Normativity of Prescriptions in Adolf Reinach's Aprioristic Theory of Right' (2020) 90 *Acta Universitas Lodziensis* 41

Husserl E, *The Phenomenology of Internal Time-Consciousness* (Indiana University Press 1964)

[169] Some aspects can be found here: Kirste (n 134) 23–44.

Zur Phänomenologie des inneren Zeitbewußtseins. Mit den Texten aus der Erstausgabe und dem Nachlaß. 1. Auflage. Hg. v. Rudolf Bernet. (Felix Meiner Verlag, Philosophische Bibliothek 2013) 649

Husserl G, *Rechtskraft und Rechtsgeltung: Eine rechtsdogmatische Untersuchung*, vol 1 (Springer 1925)

Recht und Zeit: Fünf rechtsphilosophische Essays (Klostermann 1955)

'Recht und Welt' in Gerhart Husserl (ed), *Recht und Welt: Rechtsphilosophische Abhandlungen* (Klostermann 1964) 67

Kant I, *Critique of Pure Reason* (Paul Guyer and Allen W. Wood (eds), Cambridge University Press 1998)

Kirste S, *Die Zeitlichkeit des positiven Rechts und die Geschichtlichkeit des Rechtsbewußtseins* (Duncker & Humblot 1998)

'The Temporality of Law and the Plurality of Social Times – The Problem of Synchronizing different Time Concepts through Law' in M. Troper and A. Verza (eds), *Legal Philosophy: General Aspects. Concepts, Rights and Doctrines. Proceedings of the 19th World Congress of the IVR, New York* (ARSP-Beiheft Nr. 82 2002) 23–44

'Longue Durée de la Loi' in George Kadige (ed), *De La Pérennité et de la Temporalité du Droit* (Publications de l'USJ 2015) 67

'The German Tradition of Legal Positivism' in P Mindus and T Spaak (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021)

Loidolt S, *Einführung in die Rechtsphänomenologie: Eine historisch-systematische Darstellung* (Mohr Siebeck 2010)

Márquez MMA, 'Reinach, Adolf' in Mortimer Sellers and Stephan Kirste (ed), *Encyclopedia for the Philosophy of Law and Social Philosophy* (Springer Nature 2023) 3040

McTaggart JME, '*The Unreality of Time*' (1908) 17 Mind 457

The Nature of Existence, vol 2 (Cambridge University Press 1927)

Paulson S, 'Demystifying Reinach's Legal Theory' in Kevin Mulligan (ed), *Speech Act and Sachverhalt. Reinach and the Foundations of Realist Phenomenology* (Martinus Nijhoff Publishers 1987) 133–154

Reinach A, 'The Apriori Foundations of the Civil Law' (John F Crosby tr, 1983) 3 Aletheia 1–142, reprinted in Adolf Reinach, *The Apriori Foundations of the Civil Law Along with the Lecture 'Concerning Phenomenology'* (John F Crosby ed, Ontos Verlag 2012), originally published as Adolf Reinach, Die apriorischen Grundlagen des bürgerlichen Rechtes, 1(2) *Jahrbuch für Philosophie und phänomenologische Forschung* (Max Niemeyer 1913), 685–847.

'Notwendigkeit und Allgemeinheit im Sachverhalt' (1910) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 351–354

'Die obersten Regeln der Vernunftschlüsse bei Kant' (1911), in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 51–66

'Nichtsoziale und soziale Akte' (1911) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 355–360

'Zur Theorie des negativen Urteils' (1911) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 95–140

'Die Überlegung; ihre ethische und rechtliche Bedeutung' (1912/13) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 279–312

'Die apriorischen Grundlagen des bürgerlichen Rechtes' (1913) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 141–279

'Einleitung in die Philosophie' (1913) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 369–514

'Über das Wesen der Bewegung' (1914) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 551–588

'Notizen auf losen Zetteln' (1916/17) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (Philosophia Verlag 1989) 592–604

'Zur Phänomenolgie der Ahnungen' (1916/17) in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach: Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* (München Philosophia Verlag 1989) 589–591

'Concerning Phenomenology' in Adolf Reinach and John F Crosby (eds), *The Apriori Foundations of the Civil Law*, vol 8 (Ontos Verlag 2012) 143

Schütz A, *Der sinnhafte Aufbau der sozialen Welt* (Verlag von Julius Springer 1932)

Sommer M, *Lebenswelt und Zeitbewußtsein* (Suhrkamp 1990)

Stammler R, *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung: Eine sozialphilosophische Untersuchung* (Veit 1896)

Lehrbuch der Rechtsphilosophie (2nd edn, De Gruyter 1923)

Die Lehre von dem richtigen Rechte (Wissenschaftliche Buchgesellschaft 1964)

Schumann K, *Husserls Staatsphilosophie*, vol 29 (Praktische Philosophie 1988)

Troller A, 'Das Bewußtseinsbild im Rechtsdenken' (1980) 13 ARSP Supplement 243

'Erkenntnistheoretische Parallele von Widerspiegelungstheorie und Phänomenologie im praktischen Rechtsdenken' (1983) I/3 ARSP Supplement 51

Uemara G, 'Husserl, Edmund' in Stephan Kirste and Mortimer Sellers (eds), *Encyclopedia for the Philosophy of Law and Social Philosophy*, vol 2 (Springer International 2024) 1383