

A HERMENEUTIC ACCOUNT OF NORMATIVITY OF LAW

NATALIA SATOKHINA

Department of Theory and Philosophy of Law

Yaroslav Mudryi National Law University (Ukraine)

nataliasatokhina@gmail.com

ABSTRACT

The essay addresses the problem of normativity of law from the point of view of phenomenological hermeneutics. First, the author briefly reconstructs the theory of hermeneutic experience as an experience of understanding or an experience of meaning, highlights the inherent normative dimension in the structure of hermeneutic experience and describes its aspects. Then, the essay traces the connection between this initial normativity and the formalized normative systems that largely mediate our lives in the modern world. In particular, using the concept of human dignity as an example, the author shows that hermeneutic optics enables us to see the foundations of legal norms in the very mode of our being in the world. Finally, the essay explains the modern crisis of law as an integral part of the general crisis of meaning, which is associated with the destruction of public realm and a radical transformation of our fundamental experience.

KEYWORDS

hermeneutic experience, mutual recognition, public realm, normativity of law, crisis of normativity

1 INTRODUCTION

Along with the numerous crises of our time, one can state a large-scale crisis of law, which in practice manifests itself in manifold phenomena of de facto rightlessness, absolute domination of violence and the inability of law to oppose anything to it. In philosophy, in its turn, it is a widespread attitude to ignore legal issues and disregard for the specific status of the juridical, as if it did not exist at all. As Paul Ricoeur points out, this neglect is all the more striking because it is a very recent phenomenon, although throughout the history of Western intellectual tradition, right up to the 20th century, law remained one of the central themes in philosophers' reflections.¹

¹Paul Ricoeur, *The Just*, trans. David Pellauer (Chicago: The University of Chicago Press, 2000), VII-VIII.

This oblivion of law seems to be part of the general crisis of normativity as a crisis of meaning, or, as Hannah Arendt aptly puts it, the bankruptcy of common sense in the modern world, where the most commonly accepted ideas have been attacked, refuted, surprised and dissolved by facts.² However, law that is by definition characterized by a claim to significance is particularly sensitive to such a tyranny of facts, which leads to no less than the lack of ‘the possibility of ascribing a meaning to the law’.³

On the one hand, the legal, based on the idea of norm, is supplanted by the political, based on power, which subordinates the ought and actually replaces it. It is the shock produced by the outbreaks of violence during horrifying 20th century that, Ricoeur argues, explains in large part the current crisis of law.⁴ On the other hand, legal experience is being replaced by economic one based on the idea of benefit, which in fact is now the only norm. In this regard, Marcel Hénaff speaks of the gradual colonization by the market of those spheres of life that are initially non-market in nature, including justice.⁵ In the philosophy of law, the first of these tendencies is manifested in the rapidly growing popularity of the theory of the state of exception, and the second one - in the strengthening of the positions of the economic analysis of law.⁶ Both conceptions prioritize fact over norm, ignoring the meaning component of our experience and thus contributing to the crisis of legal normativity.

In this sense, philosophical hermeneutics focused on the concept of meaning can help clarify the origins of legal normativity or the ontological foundations of law and, thus, restore the lost normative force of law. At the same time, comprehending the normativity of law at the level of hermeneutic experience can highlight the anti-authoritarian and anti-utilitarian nature of law and, thus, turn our eyes to the legal as such.

²Hannah Arendt, “Understanding and Politics (The Difficulties of Understanding),” in *Hannah Arendt: Essays in Understanding, 1930-1954*, ed. Jerome Kohn (New York: Harcourt, Brace, 1994), 314.

³Sebastian Cercel Cosmin, “Law’s Disappearance. The State of Exception and the Destruction of Experience,” in *Law’s Hermeneutics: Other Investigations*, ed. Simone Glanert and Fabien Girard (London and New York: Routledge, 2017), 186.

⁴Ricoeur, *The Just*, VIII.

⁵Marcel Hénaff, *The Price of Truth: Gift, Money, and Philosophy*, trans. Jean-Louis Morhange and Anne-Marie Feenberg-Dibon (Stanford: Stanford University Press, 2010).

⁶The most famous contemporary interpretation of the Schmittian concept of the state of exception is Giorgio Agamben’s. See: Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago & London: The University of Chicago Press, 2005). On economic analysis of law see first of all: Richard A. Posner, *Economic Analysis of Law* (Boston: Little Brown, 1973).

The aim of this essay is to reveal the foundations of the normativity of law in the structure of hermeneutic experience and, thus, clarify the nature of the current crisis of law as a crisis of meaning.

2 NORMATIVE DIMENSION OF HERMENEUTIC EXPERIENCE

Philosophical hermeneutics is part of a large-scale philosophical project of phenomenology aimed at rethinking the world in terms of experience. Phenomenology thinks of experience in an extremely broad way: ‘everything we live through, be it the perception of an airplane crossing the sky, an abstract thought, or concrete interaction with others, is *something we experience*’. So, the famous modern phenomenologist Sophie Loidolt sums up, ‘for phenomenologists, there is no faculty “beyond” experience’.⁷ In turn, the hermeneutic line of phenomenology, outlined by Martin Heidegger and developed by Hans-Georg Gadamer, emphasizes the meaningful dimension of experience, where meaning appears as an event of the meeting of man with the world, and experience – as ‘*the medium which opens up a “world”*’ to us, in which we live on an everyday basis and develop *understandings* of ourselves, others, and the world’.⁸ Here understanding is not one of human abilities, but the original way of our being in the world, the fundamental ontological structure of experience, ‘potentiality of being’,⁹ ‘original characteristic of the being of human life itself’.¹⁰ In other words, hermeneutics views any experience as an experience of understanding or an experience of meaning.

Phenomenology shows that experience carries normative structures within itself thanks to its intrinsic feature of intentionality or focusing on something as an object, which implies responsiveness.¹¹ In turn, hermeneutics reveals responsiveness to the other as an attribute of the circular structure of the experience of understanding. Understanding, on the one hand, is always conditioned by past experience, because we are always immersed in the world and, consequently, in history, and therefore we cannot take an impartial position as an observer (what Heidegger defines as

⁷Sophie Loidolt, “Experience and Normativity: The Phenomenological Approach,” in *Phenomenology and Experience: New Perspectives*, ed. Antonio Cimino and Cees Leijenhorst (Leiden and Boston: Brill, 2019), 152.

⁸Sophie Loidolt, “Order, Experience, and Critique. The Phenomenological Method in Political and Legal Theory,” *Continental Philosophy Review* (01 March 2021), <https://rdu.be/cjPXg>.

⁹Martin Heidegger, *Being and Time*, trans. Joan Stambaugh (New York: State University of New York Press, 1996), 135.

¹⁰Hans-Georg Gadamer, *Truth and Method*, 2nd ed., trans. Joel Weinsheimer and Donald G. Marshall (London and New York: Continuum, 2004), 250.

¹¹For more on phenomenological account of normativity see: William H. Smith, *The Phenomenology of Moral Normativity* (London: Routledge, 2012); Steven Crowell, *Normativity and Phenomenology in Husserl and Heidegger* (New York: Cambridge University Press, 2013); Loidolt, “Experience and Normativity”.

‘thrownness’). At the same time, it is always directed to the future, because it is not something actual, but its own possibility, which may not be fulfilled (‘project’). As Heidegger points out, we are always more than we are, but at the same time never more than we are, because this facticity essentially includes our possibilities.¹² Thus, hermeneutics demonstrates the universal predetermination of any experience, which, however, does not interfere with understanding, but only makes it possible. As Gadamer notes in this regard: ‘Everything that makes possible and limits Dasein’s projection ineluctably precedes it’.¹³ A meaningful whole, which we are always already embedded in, sets the initial normativity. And it is not about the dictatorship of the world, and not about the free-floating creativity of a man, but rather about the dialogue between them, changing both of its participants.

In this sense, hermeneutic experience is not a theoretical experience as the comprehension of immutable truth, and not the experience of art as unlimited freedom of creativity, but the experience of meaning as a meeting. This experience Gadamer, following Heidegger, denotes with the Aristotle’s concept of *phronesis*, which is understood as moral and practical wisdom as for which actions are right in a particular situation.¹⁴ Unlike monologue *episteme* (scientific knowledge) and *techne* (skill, or knowledge of how to create things), phronetic knowledge is obtained only in dialogue, because the one who possesses it ‘does not know and judge as one who stands apart and unaffected but rather he thinks along with the other from the perspective of a specific bond of belonging, as if he too were affected’.¹⁵ According to Gadamer, it is *phronesis* that is the original human experience: ‘this is perhaps the fundamental form of experience (Erfahrung), compared with which all other experience represents an alienation, not to say a denaturing’.¹⁶ In such a way, in Gadamer’s theory of hermeneutic experience, ontology is essentially combined with ethics, since *phronesis* as a fundamental form of experience always presupposes the experience of the other as a co-author of common meaning.

According to Gadamer, *phronesis* is a universal model for all experience. We seem to constantly ask the world an open question, which makes it possible to get answers that are unexpected for us. Recognizing that the situation is different, and

¹²Heidegger, *Being and Time*, 136.

¹³Gadamer, *Truth and Method*, 254.

¹⁴For more on the concept of *phronesis* and its interpretation in philosophical hermeneutics see: Aristotle, *The Nicomachean Ethics*, trans. David Ross (New York: Oxford University Press, 2009), 102–17; Martin Heidegger, *Phenomenological Interpretations of Aristotle (Initiation into Phenomenological Research)*, trans. Richard Rojcewicz (Bloomington: Indiana University Press, 2001); Gadamer, *Truth and Method*, 310–21.

¹⁵Gadamer, *Truth and Method*, 320.

¹⁶*Ibid.*, 319.

not as we thought initially, presupposes the question whether it was this or that. This hermeneutical openness of being either this or that presupposes the recognition of the interlocutor in his claim to be heard, not in the sense of simply acknowledging his otherness, but in such a way that he ‘has something to say to me’.¹⁷ It is a matter of a principled openness to various answers to the question posed and readiness for the experience understood as the readiness to reconsider one’s prejudices, for ‘every experience worthy of the name thwarts an expectation’.¹⁸

Thus, the condition for the possibility of any experience is the initial recognition of the other, always risky step forward, which never guarantees mutuality, but on the other hand, only such a step makes meaning as a meeting possible. This vision of recognition is fundamentally different from the Hobbesian–Hegelian model of the original state of non-recognition, overcoming which is an impossible task, as recognition fighters face each other empty-handed, starting only from their own subjectivity and demanding recognition without first offering it to the other. Rather, it is about a model proposed by Paul Ricoeur, who contrasts the idea of a struggle for recognition with the search for a peacekeeping experience of recognition and shifts the starting point from the demand for recognition to proposal.¹⁹ However, the possibility of recognition, being intrinsic to experience, is nevertheless always accompanied, like a shadow, by the risk of non-recognition. One can assume that it is this risky area, halfway from non-recognition to understanding, that is the original locus of legal normativity. It is the refusal to recognize or the threat of such a refusal that creates the claim for justice, and with that the experience that we usually consider legal experience. Thus, our being in the world appears to be a ‘being-through-law’ not only because our life today is largely mediated by formalized legal structures,²⁰ but also because the latter are rooted (at least partly) in our fundamental experience as a hermeneutic experience, always risky and uncertain.

This uncertainty gives rise to law as a movement to mutual recognition of people, which task, however, can never be accomplished. In this regard, Ricoeur notes that although it is possible to talk about mutual recognition only in the mode of desirability, which is neither descriptive nor normative, it, at the same time, is rooted in the essence of law and forms its basis.²¹

It seems that it is this shaky status of mutual recognition between facticity and normativity that generates the existence of institutions designed to increase the

¹⁷Ibid, 355.

¹⁸Ibid, 350.

¹⁹Paul Ricoeur, *The Course of Recognition*, trans. David Pellauer (Cambridge, Massachusetts; London, England: Harvard University Press, 2005), chapter 3.

²⁰Loidolt, “Order, Experience, and Critique.”

²¹Поль Рикёр, “Торжество языка над насилием. Герменевтический подход к философии права,” *Вопросы философии* 4 (1996): 33.

weight of the latter one. These are institutions that we call legal and in which we attest each other's recognition.

3 ATTESTATION OF PUBLIC MUTUAL RECOGNITION

In contrast to the unique act of recognition of the other, the norms in which people attest mutual recognition of each other belong to the public realm in the sense of Hannah Arendt, i. e. to the common world that is located between us and, like every in-between, simultaneously relates and separates those who share it, like a table between those sitting around it.²² In this sense, the public realm makes any experience of meaning as a meeting possible. At the same time, it is in this experience that the common world is constituted.

The consistent clarification of the decisive role played by mutual recognition in shaping the common world had been the main area explored by Marcel Hénaff. He complements phenomenology with anthropology and social philosophy, thereby building a bridge between the original normativity of experience and the formalized normative systems that function in society.

According to Hénaff, in traditional societies, public recognition of each other is attested by ritual practices, well-known from ethnographic sources, including ceremonial exchanges of gifts, which initiate a continuous circulation of gifts, thus producing a new debt with every round. Hénaff explains that the nature of this mysterious commitment to give something in return is neither economic, nor moral, nor legal. Instead, he gives the ceremonial gift a meaning of community building, mutual social recognition, and attestation of a desire to live together, and sees the gifts as symbols of such a uniting. This fundamental relationship of mutual recognition differs from social ties in an animal society, which is subject to spontaneous regulation, and is political, because it is a meeting of two autonomies, where there is a decision (albeit a hidden one) to establish rules for oneself.

While in traditional societies mutual public recognition is confirmed by the ritual exchange of gifts, in state-type societies it is guaranteed by law and a set of legal institutions that confirm the dignity and unconditional respect of each person. Today, the direct expression of this gesture is human rights, which confirm the minimum public recognition of everyone.²³

Thus, recognizing the norm, we simultaneously recognize the generalized Other, and vice versa. Moreover, the recognition of the other is always an inevitable tripartite relationship, including the recognition of some impersonal third party –

²²Hannah Arendt, *The Human Condition*, 2nd ed. (Chicago and London: The University of Chicago Press, 1998), 52.

²³Marcel Hénaff, *The Philosophers' Gift: Reexamining Reciprocity*, trans. Jean-Louis Morhange (New York: Fordham University Press, 2019), chapter 2.

the common world, institutions, norms.²⁴ Thereby, in fact, what is behind the norm is neither a sovereign's will, nor an arbitrary convention, but every particular other as a carrier of unconditional value, which we denote as human dignity.

The importance of the idea of human dignity in today's jurisprudence is an evidence of the fundamentally anti-authoritarian and anti-utilitarian nature of law. Unlike a relationship of domination based on the struggle for recognition, where each of the fighters demands recognition but does not offer it in advance, and in contrast to market relations, where it is a matter of mutual recognition of community members on the basis of equivalent exchange, law is connected to the initial excessive recognition of any other, an unconditional and always risky step forward, which is rooted in the structure of our fundamental experience. What is expressed in traditional cultures in a ceremonial gift, and later in the tradition of hospitality, is embodied in the modern world in the ideas of universal human rights and responsibilities for refugees. So, what, beyond any unions between people, determines the demand of recognition before we know each other? As Hénaff points out in this regard, beyond ceremonial procedures and local communities, there is no other justification for demanding the recognition of radical otherness of the other than his absolute dignity.²⁵

In turn, hermeneutic optics shows that human dignity is neither an artificial construction that humanity was forced to resort to for self-preservation, nor an empty political declaration. Instead, it is the fundamental importance of other people, due to the peculiarity of our experience as an experience of meaning, which is possible only through dialogue. As Mette Lebech notes in this respect, 'the human being must be more valuable to us than the whole world, given that it co-origines its constitution. It is for this reason that we feel the whole world disturbed by disregard for the human being: it turns the world upside down and institutes chaos in our perception of the world'.²⁶

Thus, the combination of phenomenological hermeneutics with anthropology and social philosophy enables us to discover an essential connection between fundamental experience or mode of our being in the world, public mutual recognition and established legal order. Accordingly, the roots of the current crisis of normativity should be sought in the area of radical transformations of fundamental experience and public realm.

²⁴Ibid, chapter 8.

²⁵Hénaff, *The Price of Truth*, 401.

²⁶ Mette Lebech, *On the Problem of Human Dignity*, http://mural.maynoothuniversity.ie/2374/1/ML_human_dignity.pdf.

4 DESTRUCTION OF PUBLIC REALM AND THE CRISIS OF NORMATIVITY

Describing public realm as a common world that ‘gathers us together and yet prevents our falling over each other’, Arendt notes the world’s gradual loss of this ability to unite, that is, to gather and separate: ‘Situation here resembles a spiritualistic seance where a number of people gathered around a table might suddenly, through some magic trick, see the table vanish from their midst, so that two persons sitting opposite each other were no longer separated but also would be entirely unrelated to each other by anything tangible’.²⁷

Arendt associates the destruction of public realm with a radical transformation of the structure of our experience, during which thinking and action, impossible in isolation and occurring while interacting with others, are supplanted first by work, where a person is connected at least with the world of things, and then by labor – a process aimed at satisfying biological needs, when people are thrown back to their own bodies.²⁸ According to Arendt, the modern age, with its interest in maximum productivity and profit, as well as technological advances providing the means to achieve these goals, have further intensified the age-old temptation of man to get rid of the complexities of action: the unpredictability of its outcome, the irreversibility of the process that once began, and the anonymity of its authors.²⁹ As a result, the intrinsic human experience of creating meanings, which is possible only in public space, has been replaced by ‘situation when men have become entirely private, that is, they have been deprived of seeing and hearing others, of being seen and being heard by them’.³⁰

Thus, the destruction of public realm is inevitably accompanied by the destruction of experience as such as an experience of worldliness that makes meaningful human existence possible.³¹ What is it about here is more than loss of common sense; it is ‘the loss of the quest for meaning and need for understanding’ and in this sense the loss of experience, for understanding ‘is the specifically human way of being alive’.³²

It is no coincidence that Ricoeur considers the public realm, as Arendt thought of it, as a realm of responsibility and, in this sense, a legal realm,³³ and the erosion of the concept of responsibility (and, therefore, law) in today’s world associates with the gradual elimination of the *phronesis* from the structure of our experience and

²⁷ Arendt, *The Human Condition*, 53.

²⁸ *Ibid*, 320–25.

²⁹ *Ibid*, 220.

³⁰ *Ibid*, 58.

³¹ *Ibid*, 320–25.

³² Arendt, “Understanding and Politics,” 308, 317.

³³ Рикёр, “Торжество языка над насилием,” 30.

the transition from individual fault management to a socialized management of risk.³⁴ ‘At the limit, however,’ Ricoeur writes, ‘we might ask whether there remains, at the end of an evolution where the idea of risk would have conquered the whole space of the law of responsibility, only a single obligation, that of insuring oneself against every risk!’³⁵ However, this rejection of risk is also a rejection of fundamental hermeneutic openness. As a result, mutual recognition turns out to be impossible, but also no longer needed. As well as law turns out to be needless, since justice is replaced by a comprehensive risk insurance system. Market relations based on the logic of equivalence negate any risk: they require not recognition of the other, but consent to the exchange of substitutable things, while behind the idea of justice there is a priceless or unmeasurable human dignity. And this transformation of justice – a good that has no price – into a commodity is a consequence of the destruction of public realm and the associated loss of experience, when the fundamental relationship of people – the relationship of mutual recognition that underlies normativity of law – tends to become secondary.³⁶

In its turn, the question of the normativity of law just loses its relevance, since the relations of mutual recognition based on the logic of excesses, constituting the common world and norms as part of this world, are replaced by market relations based on the logic of equivalent. These relations no longer necessitate any generation of meanings, but they cannot constitute a community either.

5 CONCLUSION

To summarize, the modern crisis of law turns out to be an integral part of the general crisis of meaning, which is associated with the destruction of public realm and a radical transformation of our fundamental experience.

Again, hermeneutic optics enables us to reveal the foundations of the normativity of law in the very structure of experience and to see in legal institutions an attestation of mutual recognition of each other as holders of unconditional value, which we call human dignity. Law, in turn, is not just a component of our fundamental experience as an experience of understanding, but a condition enabling this experience, maintaining an unstable space of meaning or, like Hénaff said, ‘a space of encounter opens up in which we recognize each other... a space where we meet to experience together *the honor of existing*’.³⁷

³⁴Ricoeur, *The Just*, 24–26.

³⁵*Ibid*, 28.

³⁶This key idea was formulated and developed by Marcel Hénaff in *The Price of Truth*, where he traces the genesis of mutual recognition as a fundamental relationship in any society, and shows how in the modern world this relationship is supplanted by the market with its unacceptable claim to become a holistic project of society.

³⁷Hénaff, *The Price of Truth*, 402.

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