

LAW AND GIFT: PHENOMENOLOGY OF LEGAL EXPERIENCE

Introduction

At first glance, law has little in common with the phenomenon of a gift, since justice is often thought of in terms of equivalent exchange: first in the form of a material talion, and then in the form of its symbolic counterparts. However, is law capable of restoring justice where the irretrievable happened, which excludes any equivalence? What is such a situation in relation to law – a rule or an exception? Isn't justice then just law's dream? And if law does not guarantee justice, then what can we yet count on by appealing to it?

The questions posed reveal the main question of the philosophy of law in its phenomenological version: "What is it the experience of law?" At the same time, the comprehension of the latter in the proposed vein is also motivated by the modern tendency to blur the boundaries of law, as a result of which the corresponding aspect of our experience becomes almost indistinguishable from the political or economic experience. 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 unprecedented political violence during 20th century that Paul Ricoeur explains the current crisis in the philosophy of law.¹ 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.² In the philosophy of law, the first of these tendencies is manifested in the rapidly growing popularity of the theory of the state

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

² Marcel Hénaff, *The Price of Truth: Gift, Money, and Philosophy*, trans. Jean-Louis Morhange and Anne-Marie Feenberg-Dibon (Stanford: Stanford University Press, 2010).

of exception, and the second one – in the strengthening of the positions of the economic analysis of law.³ Both conceptions prioritize fact over norm and proceed from the logic of the equivalent, since they imply the establishment of an equilibrium on the basis of a balance of forces or fungible goods, and not on the basis of ought. In this sense, the discovery of the legal as such deals with the clarification of the anti-authoritarian and anti-utilitarian nature of legal experience, which is rather subject to the logic of excess, or gift, than the logic of the equivalent. Indeed, the maintenance of those sentenced to life imprisonment is associated with significant material costs, respect for human rights greatly reduces the profits of transnational corporations, and the obligations of prosperous countries in relation to refugees are extremely difficult to justify utilitarianly. All this is the “price” that we pay for fundamentally invaluable goods, the “price” of law and justice. Finally, the clarification of the anti-utilitarian nature of law will, it seems, enable us not only to distinguish it from other aspects of experience, but also to shed light on the place of law in experience as such, in other words, on the anthropological foundations of law.

However, before turning directly to law, one should ask whether a gift is inherent in a human being at all, whether it has grounds in our fundamental experience, or, on the contrary, is rather an exception to the rule. The first part of article (I) detects the place of gift in human experience. Further, the place of law in fundamental experience and the relationship between the experience of law and the experience of gift will be discussed (II). Finally, in the third part of the article, the question of the transformation of human experience and the corresponding perspectives of law will be raised (III).

I

Against the backdrop of the triumph of the market economy since modern times, but especially in the 20th century, and the corresponding anthropological premise, according to which man is by nature an egoistic being, any grand gesture, like any reasoning about a gift, becomes suspicious. On the other hand, as Marcel Hénaff rightly points out, it was the tragic experience of dehumanization of the last century that stimulated the turn of thinkers to the gesture of gift – “the first gesture that connects us with life and the last testimony to our humanness.”⁴

In many ways, it is this motive that drives the thought of Emmanuel Levinas, who argues that generosity is not only inherent in man, but lies at the heart of human existence. While Jacques Derrida declares the gift impossible because every gesture of giving actually creates a debt and thus becomes the opposite of what it claims to be, Levinas, on the contrary,

³ The 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).

⁴ Marcel Hénaff, *The Philosophers' Gift: Reexamining Reciprocity*, trans. Jean-Louis Morhange (New York: Fordham University Press, 2020), 462, Epub.

exaggerates the gift as a structure of our experience, describing the primary ethical and at the same time metaphysical gesture as an initial gift of a world hitherto only mine to the Other. However, the Other is not subject to inclusion in this world, but remains absolutely transcendent for it, which is expressed in the concept of the infinity.⁵ Thus, the relation to the Other is carried out as hospitality and as such is “an absolute adventure, in a primal imprudence.”⁶ It is about a radical moral asymmetry, a curvature of the intersubjective space, an initial unconditional recognition of the infinite otherness of the Other – a recognition that does not expect mutuality. In contrast to the Hegelian model of the struggle for recognition, in which each of the fighters demands recognition without offering it in advance, and, being closed in his subjectivity, sees in the other only an *alter ego* – a reflection of himself (“Hegel’s opponents face each other with nothing else than weapons”⁷), Levinas’ concept presupposes not just an offer of recognition, but initial recognition of the Other without any demand on his part (“No face can be approached with empty hands”⁸). The logic of the equivalent is contrasted here with the logic of excess or gift, and exactingness towards the Other – with an infinite exigency with regard to oneself. At the same time, according to Levinas, only such a generous gesture makes possible both freedom and society, and with them normativity: “this infinite exigency with regard to oneself, precisely because it puts freedom in question, places me and maintains me in a situation in which I am not alone, in which I am judged.”⁹

Thus, according to Levinas, the most authentic mode of human existence, experience as such, is transcendence, or the original gift of a world to the Other, and in this sense our fundamental experience is moral experience. At the same time, to the extent that the Other binds me to someone else, moral experience becomes a political experience in which all unique is subject to universalization, the meaning of interchangeable individuals is derived from the totality, and they are invisible outside of it. The quintessence of this totality is war that “does not manifest exteriority and the other as other” and reduces individuals “to being bearers of forces that command them unbeknown to themselves.”¹⁰ Thus, Levinas contrasts infinity, morality, generosity and peace, respectively, with totality, politics, selfishness and war. The latter, on the one hand, constitute a cruel reality, but on the other hand, they are not our original and genuine experience, and therefore “the certitude of peace dominates the evidence of war.”¹¹

At the same time, which is primarily interesting for us, Levinas places law in the space of the political as a space of totality, opposing moral justice as respect for the individual and

⁵ Emmanuel Levinas, *Totality and Infinity. An Essay on Interiority*, 20th ed., trans. Alphonso Lingis (Pittsburgh: Duquesne University Press, 2007), 168–74.

⁶ *Ibid.*, 305.

⁷ Hénaff, *The Philosophers’ Gift*, 116, note 44.

⁸ Levinas, *Totality and Infinity*, 172.

⁹ *Ibid.*, 304.

¹⁰ *Ibid.*, 21.

¹¹ *Ibid.*, 22.

unique to the impersonal justice of law as a source of universality.¹² From the realm of the gift, we enter the realm of the equivalent, where there is nothing that cannot be evaluated, and hence cannot be compensated. However, this approach leaves no room for the philosophy of law, since the very question of the specific nature of the legal, which is completely reduced to the nature of the political, becomes irrelevant.

A different point of view is presented in the work of Marcel Hénaff, who connects law not with the renunciation of genuine experience based on the gift, but, on the contrary, with the affirmation of this experience. It is no coincidence that he concludes the first of his two fundamental works devoted directly to the problem of gift with reflections on dignity – an idea that, in our opinion, is the normative basis not only for the concept of human rights, but also for modern law as a whole. In the recognition of the absolute otherness of the Other, which Levinas speaks of, Hénaff sees nothing other than the recognition of person's absolute dignity, which does not depend on any conditions.¹³ Indeed, today, isn't that how we call "possibility of the breach of the totality, the possibility of a signification without a context?"¹⁴

It seems that it is the idea of dignity – this "portal" through which morality is imported into law¹⁵ – that can become the key to clarifying the fundamentally anti-authoritarian and anti-utilitarian nature of the latter.

II

Rehabilitation of Reciprocity

It can be assumed that it is impossible to think of law as an aspect of genuine experience in the language of Levinas, since in his interpretation of the relationship "I – the Other" there is no place for reciprocal recognition. Unlike the entire previous tradition from Descartes to Husserl, which tried to overcome the initial asymmetry between the Self and the Other, proceeding from the Self, Levinas proceeds from the opposite perspective, giving unconditional ethical-ontological priority to the Other, which the Self recognizes without expecting reciprocity. However, as Hénaff rightly notes, not to wait for an answer from the Other, to reckon only with one's unconditional duty towards him, means not to recognize that part of him which constitutes him as the Other. This would lead to the elimination of differences, to the fact that the Other would become only the Other in general, the figure of the Law, and not the specific Other that I recognize here and now.¹⁶ Hénaff, in turn, is trying to rehabilitate the concept of reciprocity and return it to the realm of the fundamental human experience or the original way of human existence. Reciprocity, according to Hénaff, does not equal equivalence, and the Other's response does not send my gesture back to the

¹² Ibid, 300–01.

¹³ Hénaff, *The Price of Truth*, 398–401.

¹⁴ Levinas, *Totality and Infinity*, 23.

¹⁵ This metaphor belongs to Jürgen Habermas, although he uses it in a different context. See Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," *Metaphilosophy* 41, no. 4 (2010): 464–80.

¹⁶ Hénaff, *The Philosophers' Gift*, 171–76.

starting point, but leads me further: “When Others reply to us, they have already been turned into others by what they have received, just as we become others through their reply.”¹⁷ Thus, the relation “I – the Other” is an alternating dissymmetry: the reply of the Other does not turn the gift into an equivalent exchange, but is itself a new gift, an offer of recognition, which, however, expects reciprocity, although it cannot demand it. Moreover, as Ricœur notes, it is the initial gift, the risky step towards the absolute otherness of the Other, that opens the way to genuine mutual recognition. Following Hénaff, Ricoeur considers the practices of ceremonial gift exchange known from ethnographic studies as a model of this kind of reciprocity, based on a gift as an alternative to the struggle for recognition. It is in the experience of the ritual exchange of gifts, symbolizing public mutual recognition, that Ricoeur sees the initial form of a peaceful state, when the circle of revenge is opposed by the circle of gift.¹⁸

Such a rethinking of reciprocity, when the latter is not opposed to the gift, but, on the contrary, presupposes it, allows us to think about the anthropological foundations of both community in general and law, to move these foundations from the sphere of totality (external to the genuine experience) into the space of this experience itself. It is noteworthy in this regard that it was Ricœur and Hénaff, whose entire work was aimed at the rehabilitation of reciprocity, that returned law to philosophy as one of the central themes.

Law in the Structure of Fundamental Experience

The alternation of mutual, but not equivalent gifts can be regarded not only as the structure of any ethical relationship, but also as a universal structure of experience. Just as any genuine connection between people is possible only with the initial recognition of the Other, so any experience of the world is based on a preliminary openness to it. In the hermeneutic philosophy of Hans-Georg Gadamer, this idea is revealed through the analysis of questioning as the original way of our being in the world: “Recognizing that an object is different, and not as we first thought, obviously presupposes the question whether it was this or that. From a logical point of view, the openness essential to experience is precisely the openness of being either this or that.”¹⁹ The openness of the question consists in the assumption of the possibility of various answers to it. Thus, experience consists in readiness for the unexpected and in this sense is always associated with risk. Moreover, “every experience worthy of the name thwarts an expectation.”²⁰ In relations between people, we are talking about the initial unconditional recognition of the Other’s claim to the truth and the readiness to reconsider one’s own beliefs.

¹⁷ Ibid, 175.

¹⁸ Поля Рикёр, *Путь признания. Три очерка*, пер. Ирины Блауберг и Ирины Вдовиной (Москва: Российская политическая энциклопедия, 2010), 219–32.

¹⁹ Hans-Georg Gadamer, *Truth and Method*, 2nd ed., trans. Joel Weinsheimer and Donald G. Marshall (London and New York: Continuum, 2004), 356.

²⁰ Ibid, 350.

At the same time, the described structure of experience is not reducible to pure facticity, since experience is not an existing fact, always remaining a possible experience. In the words of Martin Heidegger, experience is always “more” than it actually is “if one wanted to and if one could register it as something objectively present in its content of being.”²¹ The point is that the possibilities inherent in experience, including the possibility of recognition, may not be actualized. This duality of experience is also pointed out by Levinas: on the one hand, the idea of infinity as the idea of the Other

is produced in the improbable feat whereby a separated being fixed in its identity, the same, the I, nonetheless contains in itself what it can neither contain nor receive solely by virtue of its own identity. Subjectivity realizes these impossible exigencies – the astonishing feat of containing more than it is possible to contain <... > subjectivity as welcoming the Other, as hospitality.²²

At the same time “The possibility for the home to open to the Other is as essential to the essence of the home as closed doors and windows <... > [it] is the very condition of man, the possibility of injustice and radical egoism, the possibility of accepting the rules of the game, but cheating.”²³

Finally, it is precisely this non-guaranteedness of experience that leads Ricoeur to conclude that mutual recognition can only be spoken of in a mode of desirability that is neither descriptive nor normative.²⁴ As part of his concept of man as a being endowed with capabilities, Ricoeur emphasizes that every capability has a specific incapability as its opposite. That’s why the possibility of recognition, being intrinsic to experience, is nevertheless always accompanied, like a shadow, by the risk of non-recognition.²⁵

One can assume that it is with this shaky status of mutual recognition – between fact and norm – that this aspect of our experience, which we call the experience of law, is connected. Indeed, it is the refusal to recognize or the threat of such a refusal that creates the claim for justice, and with that the legal mechanisms for establishing the latter. In this sense, legal institutions represent an attestation of mutual recognition and are called upon to promote precisely this choice. In the same vein, Levinas says that the essence of reason is in calling man in question and in inviting him to justice.²⁶ However, while Levinas takes law beyond the framework of this experience of justice, placing it in the sphere of totality, where the state, as an intermediary, levels the infinity of the Other, opposing it to cruelty of impersonal justice, Ricoeur, on the contrary, sees in law an alternative to political violence, allowing one to think of justice rather as of an integral part of genuine experience than its denial: “But

²¹ Martin Heidegger, *Being and Time*, trans. Joan Stambaugh (New York: State University of New York Press, 1996), 136.

²² Levinas, *Totality and Infinity*, 26–27.

²³ *Ibid.*, 173.

²⁴ Рикёр, *Путь признания*, 231.

²⁵ *Ibid.*, 242–43.

²⁶ Levinas, *Totality and Infinity*, 88.

who is this third? Another of another? Another than another? Or, as it seems to me, rather a place of truth than a place of the State? <...> A place where people talk about kindness?"²⁷

Institutions of Law

The consistent clarification of the genetic connection between the universal structures of experience and institutions that function in society can be found in works of Marcel Hénaff. He complements phenomenology with anthropology and social philosophy, thereby building a bridge between fundamental experience, or the mode of human being in the world, social mutual recognition and the established legal order.

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 mentioned above, which initiate a continuous circulation of gifts, thus producing a new debt with every round. Contrary to popular interpretations, 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.²⁸ 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.²⁹

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.³⁰

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 towards 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.³¹

²⁷ Рикёр, *Путь признания*, 155.

²⁸ Hénaff, *The Philosophers' Gift*, 84–109.

²⁹ Ibid, 100–03.

³⁰ Ibid, 110–21.

³¹ Hénaff, *The Price of Truth*, 401.

Thus, legal institutions, like ceremonial gift practices, reflect the structures of fundamental experience based on the logic of excess and attest the mutual recognition of people. In contrast to commercial exchange, here we are dealing with invaluable goods, primarily with human dignity, which has value, but not a price, which indicates the fundamentally non-market nature of law. In this regard, the assertion that law arose as a result of the collapse of the system of gifts and the appearance of money, which made equivalent exchanges possible, looks rather controversial. On the contrary, it was the replacement of the logic of equivalence in the circle of talion by the logic of excess in the circle of gift that opened the way to replacing revenge with justice.³²

Experience of Law beyond Institutions

Any legal experience in one way or another, at least in the long run, is an experience of justice. It is in the phenomenon of the court that the specificity of the legal itself is most clearly manifested, equidistant from both the political, based on the balance of forces, and from the economic, driven by the idea of profit. And at the same time, one of the symbols of justice is the scales – a mechanism for establishing equivalence. Is this enough to achieve justice, the demand for which arises as a demand for the recognition of dignity? In other words, when can we consider ourselves recognized?

The most obvious difficulties connected with this question are in those cases when something irreparable occurs, excluding any equivalence. For example, in the case of murder, we are talking about an irreparable loss that cannot be assessed, and therefore cannot be compensated. But isn't this situation a rule rather than an exception? After all, crime is not only and not so much an encroachment on some good that has a price, but, above all, the non-recognition of the Other in his dignity and the collapse of the common world, constituted by mutual recognition. Mette Lebech expressed this idea very accurately: "the human being must be more valuable to us than the whole world, given that it co-originate 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."³³ In this sense, in every crime there always remains an element of the irreparable. This irreparable, which constitutes a truly legal (rather than economic) problem, eludes any equivalence and requires a fundamentally different logic – the logic of excess, or gift.

According to Ricoeur, the tension between the logic of excess, inherent in the gift, and the logic of equivalence, inherent in the structure of justice, arises due to the almost complete identification of the latter with distributive justice. The concept of distribution goes beyond the economy, and the whole society is regarded as a system of roles, tasks, rights and duties, advantages and disadvantages, benefits and difficulties that are distributed among individuals. In turn, justice is seen as a virtue inherent in all institutions of distribution and consisting

³² For more details see Ricoeur, *The Just*, 133–45; Hénaff, *The Price of Truth*, 214–25.

³³ Mette Lebech, "On the Problem of Human Dignity," *Bioethics Outlook* 21 (4) (2010), <https://mural.maynoothuniversity.ie/2374/>.

in giving to everyone what is due to him. As Ricoeur writes, the highest point to which this ideal of justice aspires is a society in which the feeling of interdependence is subordinated to the feeling of mutual disinterest: the opposition of interests does not allow the idea of justice to rise to the level of genuine recognition, possible only thanks to the gift.³⁴

At the level of society as a whole these gaps of equivalent justice are filled by charity, but in the sphere of justice there is practically no room for the logic of a gift, with the exception of certain institutions related to the reconciliation of the parties. Moreover, as Ricoeur notes, the distance between judgment and mutual recognition tends in a certain sense to increase when the verdict breaks the contest of arguments, leaving the victim on one side and the perpetrator on the other: “The dispute is over, but this only saves from revenge, not brings us closer to a peaceful state.”³⁵ Therefore, the immediate goal of the judicial decision – the cessation of violence – Ricoeur considers subordinate to the ultimate goal of justice – mutual recognition and the state of peace. In this sense, any sanction is only the beginning of the path that continues in the project of restoration of rights and ends with reconciliation. Thus, recognition goes a long way from the recognition by society of the victim as the victim, and the guilty as guilty and establishing a fair distance between them, to reconciliation of the parties through forgiveness.³⁶ And although reconciliation can only be spoken of in the mode of desirability, it, according to Ricoeur, is rooted in the nature of law as its beyond-institutional horizon. The latter is based on the logic of the gift and has a secondary effect on legal institutions – insofar as it rises above them.³⁷

III

Comprehending law as experience allows us to discover the limits of equivalent justice. On the one hand, we are dealing with a classic philosophical and legal dispute about the nature of justice as such. At the same time, in the modern world, this problem turns out to be primarily a problem of limits of market.

Thus, Michael Sandel, in the last chapter of his bestselling book on justice, states that “one of the most striking tendencies of our time is the expansion of markets and market-oriented reasoning into spheres of life traditionally governed by non-market norms.”³⁸ He means mercenary army, surrogacy, human organ trafficking, and more, and invites the reader to ask “what non-market norms we want to protect from market intrusion.”³⁹

To answer this question, Hénaff introduces the concept of “priceless,” or, as the author himself clarifies, “incommensurable,” and therefore, not amenable to the transformation into a commodity. It is in the nature of the good in question that the difference between

³⁴ Paul Ricoeur, “Love and Justice,” *Philosophy and Social Criticism* 21, no. 5/6 (1995): 23–39.

³⁵ Рикёр, *Путь признания*, 211.

³⁶ Ricoeur, *The Just*, 133–45.

³⁷ *Ibid.*, IX–X, 145.

³⁸ Michael J. Sandel, *Justice: What's the Right Thing to Do?* (New York: Farrar, Straus and Giroux, 2010), 137, pdf.

³⁹ *Ibid.*

trade exchanges, based on the logic of equivalent, and symbolic “exchanges” of gifts, based on the logic of excess and bearing the meaning of mutual recognition that constitutes the community, is based. Hénaff shows that an equivalent exchange and a gift are not two alternatives that replace each other historically, but two fundamentally different ways of thinking, each of which is in demand in a particular area and is an integral part of our experience. The problem is that today the market tends to become total and replaces the relations of mutual recognition, fundamental for any community, based on the logic of excess.⁴⁰

The philosopher reveals the ontological structures that underlie the spread of the market to the sphere of the priceless. It is about the gap between being and truth, embodied in the image of a sophist: the latter is no longer revealed, but established, for the sophist – the teacher who sells his knowledge for money – like any merchant, does not need to know the nature of his goods; it is enough for him to convince another to buy this product, and this means indifference to the truth.⁴¹

With regard to law, we are talking about indifference to justice as mutual recognition and its transformation into a commodity, which by and large leads to the disappearance of law as such due to its displacement by relations of a completely different nature. One aspect of this process of market expansion into the realm of law is described by Ricoeur as the gradual replacement of individual responsibility for guilt by a system of collective risk insurance.⁴² He writes: “At the limit, however, 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!”⁴³ Let’s add on our own: the risk that invariably accompanies action in the unknown space of the Other. Market relations based on the logic of equivalence nullify this risk: they require not the recognition of the Other, but consent to the exchange of interchangeable goods, whereas behind the relationship of gift there is always an invaluable human dignity. The idea of dignity as an immeasurable good is supplanted by ideas of security and benefit. However, as Hénaff points out, “It is possible for a world to be entirely proper, quiet, protected, enclosed within its own comfort yet entirely despicable.”⁴⁴

It is important to note that this is not about denying the market as a whole, but about realizing its limits, separating the legitimate function of trade exchange from the unacceptable claim of the market to become an integral project of society, which would mean reducing all the diversity of our experience into one structure – equivalent. Paraphrasing Hénaff, it would be unbearable to understand all experience in terms of the gift, but it would be

⁴⁰ Hénaff, *The Price of Truth*; Hénaff, *The Philosophers’ Gift*.

⁴¹ Hénaff, *The Price of Truth*, 9–10.

⁴² Ricoeur, *The Just*, 11–35.

⁴³ *Ibid*, 28.

⁴⁴ Hénaff, *The Price of Truth*, 402.

impossible to live if we did not understand any aspect of experience in this way.⁴⁵ One such aspect of experience that, being based on the logic of the gift, has been put at risk is law.

Conclusion

The phenomenological view of law presented here, that is, the understanding of the latter not as an object, but as something that happens to us, allows us to identify the specifics of the legal as such in its difference from the political or economic. While the latter are based on the logic of an equivalent, which implies the establishment of a balance based on a balance of power or fungible goods, the experience of law is fundamentally anti-utilitarian and subject rather to the logic of excess, or gift.

The structure of the gift is most clearly manifested in the experience of justice when it comes to an irreparable loss that cannot be made up for. At the same time, from the point of view of experience, such a situation is rather the rule than the exception, since any crime is not only and not so much an encroachment on some good that has a price, but, above all, non-recognition of the Other in his dignity and the collapse of the common world constituted by mutual recognition. When restoring the latter, equivalent justice can only be an auxiliary means, which, however, will never be enough.

The deeply anti-utilitarian meaning of law is also revealed at the level of the genesis of legal institutions, which, like the practices of the ceremonial gift, confirm the mutual social recognition of people. The latter, sequentially, turns out to be possible only under the condition of an initial excessive recognition of the Other, or recognition of his absolute dignity.

Thus, legal institutions are rooted in the structure of our fundamental experience or way of being in the world. This experience consists in the openness to the infinite otherness of the Other and, in this sense, is subject to the logic of the gift, but it also always carries the risk of being unrecognized and, due to this lack of guarantee, gives rise to the experience that we call the experience of law. Aimed at maintaining the logic of excess, law turns out to be not just one of the aspects of experience, but a condition of experience as such.

At the same time, today, in the conditions of the spread of the market and its inherent logic of equivalence to all spheres of life, the experience of law, subject to the logic of the gift, is also gradually being replaced by relations of a completely different nature. It can be assumed that it is the fundamental role of law in the structure of our experience, or simply the instinct of self-preservation, that makes us still resist these processes. Hénaff writes about it: “The marketplace may well claim to set a price on what is priceless, but we are aware that it cannot determine the value of the priceless or grasp its boundless character. We know that no commercial equation will ever express the price of life, of friendship, of love or suffering, or shared memories – or the price of truth.”⁴⁶ Or the price of justice, – we will add for our part.

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⁴⁵ “It would be intolerable if every exchange of goods were understood as a request for recognition, but life would be unlivable if no exchange were understood as such a request.” (Ibid, 401).

⁴⁶ Ibid, 17.

Bibliography

- Agamben, Giorgio. *State of Exception*. Translated by Kevin Attell. Chicago & London: The University of Chicago Press, 2005.
- Gadamer, Hans-Georg. *Truth and Method*. 2nd ed. Translated by Joel Weinsheimer and Donald G. Marshall. London and New York: Continuum, 2004.
- Habermas, Jürgen. "The Concept of Human Dignity and the Realistic Utopia of Human Rights." *Metaphilosophy* 41, no. 4 (2010): 464–80.
- Heidegger, Martin. *Being and Time*. Translated by Joan Stambaugh. New York: State University of New York Press, 1996.
- Hénaff, Marcel. *The Philosophers' Gift: Reexamining Reciprocity*. Translated by Jean-Louis Morhange. New York: Fordham University Press, 2020. Epub.
- Hénaff, Marcel. *The Price of Truth: Gift, Money, and Philosophy*. Translated by Jean-Louis Morhange and Anne-Marie Feenberg-Dibon. Stanford: Stanford University Press, 2010.
- Lebeck, Mette. "On the Problem of Human Dignity." *Bioethics Outlook* 21 (4) (2010). <https://mural.maynoothuniversity.ie/2374/>.
- Levinas, Emmanuel. *Totality and Infinity. An Essay on Interiority*. 20th ed. Translated by Alphonso Lingis. Pittsburgh: Duquesne University Press, 2007.
- Posner, Richard. *Economic Analysis of Law*. Boston: Little Brown, 1973.
- Ricoeur, Paul. *The Course of Recognition*. [In Russian.] Translated by Irina Blauberg and Irena Vdovina. Moscow: Rossijskaja politicheskaja jenciklopedija, 2010.
- Ricoeur, Paul. *The Just*. Translated by David Pellauer. Chicago: The University of Chicago Press, 2000.
- Ricoeur, Paul. "Love and Justice." *Philosophy and Social Criticism* 21, no. 5/6 (1995): 23–39.
- Sandel, Michael J. *Justice: What's the Right Thing to Do?* New York: Farrar, Straus and Giroux, 2010. pdf.

Наталія Сатохіна. Право і дар: феноменологія правового досвіду

Анотація. Стаття має на меті розкрити специфіку правового як такого в його відмінності від політичного чи економічного з феноменологічної точки зору, тобто визначити, що являє собою досвід права і яке його місце в нашому досвіді в цілому.

Ключове припущення полягає в тому, що в той час як політичне та економічне ґрунтуються на логіці еквівалента, яка передбачає встановлення балансу виходячи із співвідношення сил або взаємозамінних благ, досвід права є принципово антиутилітарним і підпорядкований радше логіці надлишку, або дару.

Ця ідея розгортається в три етапи. Перша частина статті визначає місце дару в людському досвіді як такому. Другий розділ присвячено проясненню місця права в нашому фундаментальному досвіді та зв'язку між досвідом права та досвідом дару. У заключній частині порушується питання про трансформацію людського досвіду в сучасному світі та відповідні перспективи права.

Авторка стверджує, що право вкорінене в структурі нашого фундаментального досвіду, або способу буття у світі. Останній полягає у відкритості до безкінечної інакшості Іншого і в цьому сенсі підпорядковується логіці дару. Водночас ця відкритість ніколи не гарантується, що й породжує досвід права. Націлене на підтримку логіки надлишку, або дару, право виявляється не просто одним із аспектів досвіду, а умовою досвіду як такого. Разом з тим сьогодні, в умовах поширення ринку та властивої йому логіки еквівалентності на всі сфери життя, досвід права, підпорядкований протилежній ідеї, а з ним і досвід як такий, опиняється під загрозою.

Ключові слова: досвід права; дар; безцінне; взаємне визнання; гідність.

Наталья Сатохина. Право и дар: феноменология правового опыта

Аннотация. Цель статьи состоит в том, чтобы раскрыть специфику собственно правового в его отличии от политического или экономического с феноменологической точки зрения, то есть определить, что представляет собой опыт права и каково его место в нашем опыте в целом.

Ключевое предположение состоит в том, что, в то время как политическое и экономическое основываются на логике эквивалента, предполагающей установление баланса на основе соотношения сил или взаимозаменяемых благ, опыт права является фундаментально антиутилитарным и подчинен скорее логике избытка, или дара.

Эта идея раскрывается в три этапа. Первая часть статьи определяет место дара в человеческом опыте как таковом. Второй раздел посвящен прояснению места права в нашем фундаментальном опыте и связи между опытом права и опытом дара. В заключительной части поднимается вопрос о трансформации человеческого опыта в современном мире и соответствующих перспективах права.

Автор утверждает, что право укоренено в структуре нашего фундаментального опыта или способа существования в мире. Последний состоит в открытости к бесконечной инаковости Другого и в этом смысле подчиняется логике дара. В то же время, эта открытость никогда не гарантируется, что и порождает опыт права. Нацеленное на поддержание логики избытка, или дара, право оказывается не просто одним из аспектов опыта, а условием опыта как такового. Вместе с тем сегодня, в условиях распространения рынка и присущей ему логики эквивалентности на все сферы жизни, опыт права, подчиненный противоположной идее, а с ним и опыт как таковой, оказывается под угрозой.

Ключевые слова: опыт права; дар; бесценное; взаимное признание; достоинство.

Nataliia Satokhina. Law and Gift: Phenomenology of Legal Experience

Abstract. The article aims to reveal the specificity of the legal as such in its difference from political or economic from a phenomenological point of view, that is, to determine what the experience of law is and what is its place in our experience as a whole.

The key assumption is that while the political and the economic are based on the logic of the equivalent, which implies the establishment of a balance based on the balance of forces or interchangeable goods, the experience of law is fundamentally anti-utilitarian and subordinated rather to the logic of excess, or gift. This idea unfolds in three stages. The first part of article detects the place of gift in human experience. The next one is about the place of law in fundamental experience and the relationship between the experience of law and the experience of gift. In the final part, the question of the transformation of human experience and the corresponding perspectives of law is raised.

The author argues that law is rooted in the structure of our fundamental experience or way of being in the world. The latter consists in the openness to the infinite otherness of the Other and, in this sense, is subject to the logic of the gift. At the same time this openness is never guaranteed, which gives rise to the experience of law. Aimed at maintaining the logic of excess or gift, law turns out to be not just one of the aspects of experience, but a condition of experience as such. However, today, in the conditions of the spread of the market and its inherent logic of equivalence to all spheres of life, the experience of law, subject to the opposite idea, and with it the experience as such, appears to be under threat.

Keywords: experience of law; gift; priceless; mutual recognition; dignity.

Одержано/Received 15.04.2022