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# “THE LOSS OF EXPERIENCE” IN DIGITAL AGE: LEGAL IMPLICATIONS

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## *abstract*

*Exploring the history of our experience, Hannah Arendt reveals not only a radical transformation of its structure, but also the loss of experience as such and its replacement with technology. In order to identify the place of law in this process, we are trying to clarify the legal aspect of experience in terms of phenomenological hermeneutics and to trace its transformation in the digital age. The experience of law is thought of as one of the aspects of our mode of being-in-the-world, which is based on openness to the world and consists in the mutual recognition of people in their dignity. Digital technologies, in turn, contribute to replacing fundamental openness with illusory freedom in cyberspace. The latter, unlike the public realm as a realm of action of many, and in this sense legal realm, is based primarily on productive activities of one and no longer requires law.*

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## *keywords*

*phenomenological hermeneutics, experience of law, the loss of experience, digital technologies, social media*

## 1. Introduction

The idea of experience as such embodies one of the key motifs of phenomenology – the desire to think of the world, first of all, not as the object of our cognition or technical domination, but as what happens to us. With regard to the philosophy of law, it is about comprehending those aspects of our being-in-the-world that make up the experience of law and are a kind of DNA of law, the only resource that makes it possible to revive law even in the ashes of wars and genocides, when norms and institutions are completely destroyed.

However, experience is obviously not constant. Hannah Arendt in *The Human Condition* explores the history of our experience, showing not only a radical transformation of its structure, but also the loss of experience as such and its replacement with technology. Today, digital technologies have greatly changed the experience of many. Does this leave room for law in the structure of human experience?

In this article we are trying to clarify the legal aspect of experience in terms of phenomenological hermeneutics and to trace its transformation in the digital age. Thinking law in terms of human experience, we move from eidetics (identifying the essential contours of the idea of law, extracted from its real-world instantiations) to constitution analysis (describing how law registers within human experience).

## 2. Experience of Law in the Structure of Fundamental Experience

Phenomenology addresses a basic level of experience as a person’s fundamental engagement with the world. Moreover, phenomenologists refuse to search for a “true” reality outside the reality that is given to us through our experience. In turn, phenomenological hermeneutics regards any form of experience as an experience of understanding, or a meaningful relation. From birth to death, we understand the world and understand ourselves in it, and in this way give rise to meaning. There is no meaning as such, either in the world or in a man himself; meaning is always a meeting.

### 2.1. *The Essence of the Hermeneutic Experience*

The ontological structure of the experience of meaning is a circle: being-in-the-world is that whole, on the understanding of which depends the understanding of its parts – the world and the man. In turn, the understanding of being-in-the-world is determined by the understanding of the world and the self-understanding of the man (Heidegger, 1996, pp. 142-143). The ontological hermeneutic circle assumes that understanding, on the one hand, has always prerequisites (what Martin Heidegger defines as “thrownness”), and on the other, is always incomplete, that is, it is not something present, but its own possibility (“project”) (Heidegger, 1996, pp. 134-139). It is not about the dictatorship of the world or the free-floating creativity of a man, but rather about the dialogue, as a result of which meaning is born.

According to Hans-Georg Gadamer, dialogue is a universal model of all experience. The situation in which we are in relation to the world is like a conversation, the participants of which try not to defend their position and not to accept the position of the interlocutor, but to understand the essence of what is being said (Gadamer, 2004, p. 387). Accordingly, the logical structure of any experience is the question, that presupposes the principled openness to the various answers (Gadamer, 2004, pp. 356-357). Thus, a condition for the possibility of understanding is a recognition of the interlocutor in his claim to be heard not in the sense of simply acknowledging of otherness, “but in such a way that it has something to say to me” (Gadamer, 2004, p. 355). It is noteworthy that as a paradigmatic example of the hermeneutic experience Gadamer considers the experience of law as a *phronetic*<sup>1</sup> experience, which, unlike the experience of the theoretical (cognition of the unchanging truth) and the experience of art (free creativity), is an experience of meaning as a meeting, which always presupposes the experience of the Other as a co-author of the common meaning and involves constant work of recognition (2004, pp. 321-336). Also Paul Ricoeur, following Gadamer, views *phronesis* as the essence of the experience of law, and the experience of law as an illustrative example of *phronesis* as a responsible judgment in a particular situation that always contains an element of risk (2000, pp. XXI-XXII).

The concept of experience of law is not a well-established concept either in phenomenology or in the philosophy of law. In its most general form in phenomenology, the experience of law is considered as a part of being-in-the-world, the experiencing of law, during which the ontological region of law is constituted (see for instance Reinach, 1953; Husserl, 1955; Alekseev, 1999). In this, despite the variety of answers to the question of how are we experiencing law, they are all somehow connected with overcoming the initial asymmetry between the I and the Other and the concept of mutual recognition. This is probably why, in the theory of hermeneutic experience as the experience of the Other, the experience of law becomes a paradigmatic example. Indeed, it is the refusal to recognize someone or the threat of such a refusal that gives rise to the claim to justice, and with it the experience that we usually consider to be the experience of law.

## 2.2. Experience of Law

In this article, we regard the experience of law as an aspect of fundamental experience, which is localized in the constant tension between mutual recognition, that enables the experience of meaning, and the unavoidable risk of people not recognizing each other. In this sense, Ricoeur stresses 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 (1996, p. 33). One can assume that it is this shaky status of mutual recognition between fact and norm that caused the existence of institutions designed to increase the weight of the latter – legal institutions in which we confirm each other’s recognition. Whereas in traditional societies, mutual recognition is confirmed by rituals (such as gift exchanges), today, the direct expression of it is human rights, which guarantee everyone the minimum public recognition of his dignity (Hénaff, 2019, part 2). Thus, recognizing the norm, we simultaneously recognize the generalized Other, and vice versa. Thereby our hypothesis is that law is brought about by the fact that, being immanent to experience, the possibility of recognition is always accompanied, like a shadow, by the

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1 Gadamer appeals to the Aristotelian idea of *phronesis* as the capacity of acting in an unforeseen situation, the willingness to meet with the unexpected, in contrast to cognition based on axioms. Aristotle distinguishes between three forms of experience: 1) theoretical experience based on scientific knowledge (*episteme*), that concerns unchanging things; 2) art based on know how (*techne*) as a kind of technology; 3) practical experience based on *phronesis* – practical wisdom regarding correct actions in a particular situation (See Aristotle, 2009, pp. 102-117).

risk of non-recognition. In this risky zone, halfway from non-recognition to recognition, we are dealing with law. To put it differently, the experience of law arises from the claim to recognition as a claim to justice. In this, a theory of the hermeneutic experience shows that the meaning of justice, like any meaning, is not contained in us or outside us; it appears in a meeting again and again, and in this sense, “the just in the final analysis qualifies a unique decision made within a climate of conflict and incertitude” (Ricoeur, 2000, p. XXI). In other words, it is about a *phronetic* experience.

It is in *phronesis* that Heidegger sees not only a model of his own idea of philosophy, but also the most authentic way of dealing with the world in general, that is, the original basis of experience (See Heidegger, 2001). We find a similar opinion in Gadamer: “this is perhaps the fundamental form of experience (Erfahrung), compared with which all other experience represents an alienation, not to say a denaturing” (2004, p. 319). Being an integral (and the most authentic) part of human experience, *phronesis* at the same time is an aspect of our fundamental experience that underlies the experience of law.

However, the structure of human experience changes under the influence of technology, which forces us to rethink also the experience of law.

### 2.3. “The Loss of Experience”

Tracing the dramatic history of our experience, Hannah Arendt reveals a trend, which she describes as the loss of experience. It is about the gradual disappearance from the structure of human experience of the specifically human capacity for generating meaning in the process of thinking and action. According to Arendt, thinking and action, impossible in isolation and occurring in being 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. In turn, she says, technological progress turns the laboring society into a society of jobholders, that demands of its members nothing but automatic functioning, and all human activities “appear not as activities of any kind but as processes” (1998, p. 322). As a result, we are observing not just a radical transformation of our experience, but “the loss of experience” as such as an experience of *worldliness*, which makes meaningful human existence possible (Arendt, 1998, pp. 320-325). Such world-oriented forms of experience are thinking and action – properly human meaning-generating experience, which, unlike work and labor, “needs the surrounding presence of others” (Arendt, 1998, p. 188).

Drawing on Kant’s distinction between intellect and reason, Arendt distinguishes the monological faculty of cognition and the dialogical faculty of thinking, aiming respectively at truth and meaning. Thinking, she says, “does not ask what something is or whether it exist at all – its existence is always taken for granted – *but what it means for it to be*” (1978, p. 57). Thinking, understood as a craving for meaning, like action, has the structure of an open question described above, and therefore assumes a readiness for an unexpected answer. It is in this sense that “there are no dangerous thoughts; thinking itself is dangerous” (Arendt, 1971, p. 435).

Thinking in turn has a liberating effect on another faculty, that realizes thinking and makes it manifest in the world of appearances. This “manifestation of the wind of thought” is judging – “the ability to tell right from wrong” (Arendt, 1978, p. 193),

a human faculty which enables us to judge rationally without being carried away by either emotion or self-interest, and which at the same time functions spontaneously, that is to say, is not bound by standards and rules under which particular cases are simply subsumed, but on the contrary, produces its own principles by virtue of the judging activity itself (Arendt, 2003, p. 27).

And only if we assume the existence of such a human ability – an analogue of the Aristotelian *phronesis* – is morality possible. “For behind the unwillingness to judge lurks the suspicion that no one is a free agent, and hence the doubt that anyone is responsible or could be expected to answer for what he has done” (Arendt, 2003, p. 19). It is judging, along with thinking, that Arendt considers the most human experience, but at the same time the most vulnerable. In her opinion, the modern age in its concern with maximum profits, as well as technical progress that provides the means to achieve this goal, only contributed to the eternal temptation of a person to get rid of the unpredictability of action’s outcome, the irreversibility of the process, and the anonymity of its authors. The experiments proposed to resolve these calamities always end the same way. Generally speaking, Arendt writes, it’s about replacing the acts of many in their being with each other by the productive activity of one person, be it the outright tyranny, benevolent despotism or those forms of democracy in which the many form a collective body, excluding any pluralism (1998, pp. 220-221). Thus, despite the seeming intensification of communication, in fact, we are witnessing the unprecedented disappearance of public realm as a common world that gathers us together and separates us, like a table between those sitting at it. However, the weirdness of contemporary situation

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 (Arendt, 1998, p. 53).

In turn, the disappearance of public realm means the disappearance of thinking and judging as a meaning-generating experience, which is intersubjective in nature (Arendt, 1978, p. 266). 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” (Arendt, 1994, pp. 308, 317). Thus, the lack of public realm makes an action, and therefore law, impossible. In the absence of a common world, the experience of law as an experience of mutual recognition is fundamentally impossible, and even unnecessary. Driven into our subjective experience, we can no longer hear the other, nor be heard by them.

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 (1996, p. 30), and the erosion of the concept of responsibility (and, therefore, law) in the today’s world associates with the gradual elimination of the acting from the structure of our experience and the transition from individual fault management to a socialized management of risk (2000, pp. 24-26).

Is it not the disappearance of the public realm that we are observing in the contemporary world of digital technology, where we “are all imprisoned in the subjectivity of our own singular experience, which does not cease to be singular if the same experience is multiplied innumerable times” (Arendt, 1998, p. 58)? As a result, the ability to make judgment has fallen under a hail of blows. It is a constant exhausting presence in the overwhelming flow of information, where we are also being manipulated with the help of the digital tools that we are exposed to. This is a general simplification of complex issues, wrapped in an attractive and bright wrapper, which attracts us to take someone’s position – because we are ready to rely on someone’s experience (perhaps studying the issue on our own seems too complicated or we are under pressure from society, or we are in the bubble of opinions).

**3. Legal Implications of Digital Technologies**

It is the prospect of a radical transformation of our moral experience that motivates the concerns of Jürgen Habermas about the rapidly developing biotechnologies, which can lead to the fact that we will no longer be able to understand ourselves as ethically free and responsible creatures (Habermas, 2003, pp. 16-74). However, is it really necessary to intervene in the genome for this? Digitalization seems to have a similar effect.

*3.1. Digital Identity in Public and Private Life*

Digital world and the dynamics of its growth influence every single individual despite the fact that the degree of its influence differs. It goes without saying that the world is extremely heterogeneous, but in the end the ongoing and massive digitalization reaches even individuals with radically different cultural, economic and social experiences. Legal implications of digital technologies are linked to fundamental things such as autonomy, human rights, rule of law, justice and democracy. Even the least evident manifestations of the digital world still bear subtle influence on everyone and even transform the experience of many. In particular, digital identity has born an unreasonably strong influence on human identity as such. Online activities and social media gradually and imperceptibly change our ideas of ourselves. The images that one share in cyberspace are cemented by an incredibly long digital footprint. The images others share can be far from the truth or intentionally fragmented.

Every day one comes across the visible part of other people’s experience in cyberspace. To what extent the images of others could be one-sided? At the same time, one is constantly compelled to compare oneself with others. Disconnecting is becoming increasingly impossible in the digital age.

The fundamental openness which presupposes the initial immersion in the world, certain limits of self-understanding and self-presentation, honesty and, therefore, vulnerability before the Other making a meaning-generating dialogue possible, is replaced by a seemingly safe and therefore attractive false openness of the digital person capable of infinite variability, but incapable of genuine dialogue, and therefore also of thinking and acting.

Accordingly, yet another sphere of life, associated not so much with personal as with public experience, is also undergoing changes. This may be the result of direct impact, in particular the activities of authoritarian and semi-authoritarian governments. Digital technologies allow us to express opinions, mobilize protests, and expand the horizons of freedom, but autocratic governments are also learning to master these technologies (Diamond, 2010). Optimistic opinions regarding the impact of digital tools have overestimated the role of access to alternative and independent sources of information and unfiltered access to the Internet, so more attention should be paid to overcoming the difficulties of online organization in the face of authoritarian governments in an increasingly digital geopolitical environment (Etling, *et al.*, 2010). This may be the result of indirect exposure. The repeatedly discussed Cambridge Analytica case is just one striking example of the gradual indirect influence. Influences like this might have led to election results that were unexpected for many and to some extent jeopardized the values of democracy. Ultimately, this casts doubt on democratic procedures as the most preferred and legitimate. According to Federica Liveriero such procedures “allow solving conflicts and avoiding indeterminacy, while respecting every agent that takes part in the deliberation” (2019, p. 97). The digital environment, on the contrary, is multiplying uncertainty and disrespect.

*3.2. False Openness and Illusory Control*

We seem to have new patterns of interaction in the digital age. The phenomenon of false openness often arises on social media – users want to reveal a little more about themselves. What people visualise on the other side of the screen is a friendly community or group. Users tend to often perceive social media as a private diary, a safe harbor for self-expression and a public tribune at the same time.

Social media stimulate subscribers to reveal data with rewards-likes, frequent offers to share



thoughts, assurances to serve to better match our preferences. Online entities are extremely interested in using the trust resource. According to Christopher W. Savage, they “want people to trust them so they will keep coming online, sharing information, being surveilled, viewing ads, and buying things” (2019, p. 98).

The feeling that cyberspace is a free and self-regulatory space, on the one hand, and the ability to manage our devices, applications and data, on the other, give the illusion of control over what is happening. It is the lack of Arendtian public realm that we can see firsthand when dealing with cyberspace.

In today’s cyberspace some feel that there exists the asymmetry of power and the increasing power of corporations reflected in the asymmetry of power in democratic communities. It is believed that cyberspace was created as free, decentralized, self-regulatory and transnational (See: Gilden, 2000; Svantesson, 2007; La Chapelle & Fehlinger, 2016). Initially a free platform for opinions and information circulation, the cyberspace still allows certain people, or virtual, anonymous projects, to become opinion leaders without institutional support. But just as the asymmetry of power transforms the public space of democratic communities from a neutral to a dictate of the will of the established majority (See: Liveriero, 2019, p. 95), giant corporations reign in cyberspace and the digital world today.

Who determines which words or images will be deleted as hateful? Where to complain if your social media account has been deleted? However unfair it may seem, you will not be able to seek justice in a traditional way since your claims are not directly supported by any law, but are instead regulated by corporate standards and policies. It’s peculiar how one can get a decision in their favor much faster than in court – or find oneself in the void, without tools to appeal that decision.

Thus, law based on the universal structures of our fundamental experience and guaranteeing everyone a minimum public recognition of dignity is replaced by conflict resolution mechanisms focused on corporations’ interests.

In the digital age, people run the risk of being in a situation where they refuse others in claiming the truth, while remaining in their own filter bubbles. They gradually lose the opportunity for dialogue, since the radicalization of views leads to poorer interaction. At the same time, there is an ever-increasing transition of activity to cyberspace and the widespread use of digital tools which eventually deepens the digital divide that is inequality in access and use of digital technologies, which together with gender, economic, political and other dimensions of inequality deepens general inequality and injustice.

It entails the emergence of new types of gaps, as gender digital divide, which creates further problems. Although digital technologies can improve everyday life and be tools to achieve equality through their educational potential, they can still reinforce injustice and give false hopes, while excluding important issues from political agenda. Therefore, feminist approaches to gender digital divide suggest that we should analyze in more depth present sociotechnical transformations and emphasize that “the political activity involved in the recognition of, reflection on, and action regarding the techno-gendered codes requires a technical configuration based on openness and articulation” (Pujol & Montenegro, 2015, p. 183).

New waves or levels of digital divide are being considered today: 1) to access 2) to use and 3) to benefit from digital technologies. According to Massimo Ragnedda the third level of digital divide describes benefits from the previous two and the ability to exploit these benefits in a digital-driving market to improve one’s life chances (2017, p. 5). Duncan Campbell’s optimistic forecast that digital technologies can drive progress and smooth out the development levels of countries “if the digital divide is not to worsen existing patterns of inequality” (2001,

*3.3. The Asymmetries of Power, Corporate Norms and Policies*

*3.4. The Digital Divide, Human Rights, Equality and Justice*

p. 136) has not come true. On the contrary, some abysses have deepened so much that it becomes difficult to believe that such dramatically different practices could even exist. Some of us seem to be so immersed in filter bubbles, that we tend to ignore significant differences and inconsistencies, which leads to an even greater isolation from other opinions and the inability to recognize the Other. This, in turn, jeopardizes the central thesis of the concept of human rights – their recognition to all humans being, regardless of differences, by virtue of recognition of human dignity.

### 3.5. Uncertainty and Its Legal Implications

We never know what delayed or indirect negative effects various actions in cyberspace will have. We are yet to learn how the almost invisible radicalization of opinions undermines democracy, in what way big data affect vulnerable groups and how algorithmic discrimination reinforces inequality. We strongly feel that we must act immediately since the potential legal response might cease to matter.

The potential consequences of many democratic procedures going online are: (1) the habit of joining due to the lack of interaction (we join already formed communities on social media, often clicking “I agree” without reading); (2) silencing of voices, since memorable content is valued higher than the ability to make judgments (demand for more emotional and sensational content); (3) breached trust, because we cannot be guaranteed privacy and security; (4) non-participation in the discourse for those who do not use digital tools.

### 4. Conclusion

Paradoxically, the development of technology, which initially forms an integral part of our mode of being-in-the-world, leads at the same time to the disappearance of the most authentic structures of fundamental experience, which make such a component of being-in-the-world as experience of law necessary and possible.

Digital technologies take this process to a new level, contributing to the replacement of the acting with simple functioning, and fundamental openness with illusory freedom in cyberspace. The latter, unlike the public realm as a realm of action and responsibility of many, and in this sense the legal realm, is more and more a realm of the productive activity of one and no longer requires law.

Thus, we are facing not only with the transformation of the structure of experience, but with the loss of experience as such, and the unprecedented crisis of law in today’s world is perhaps the most alarming symptom of this process.

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