The role of law as an instrument of communication within legal positivism

Lecturer **Claudiu Ramon D. BUTCULESCU**[1]

Abstract

This article tackles some aspects concerning the role of law as an instrument of communication from the perspective of legal positivism. The paper presents considerations regarding law communication in relation to legal positivism and scientific positivism. At the same time, the article examines the correlations between the legal communication models and the various inclinations developed under legal positivism. Both within legal positivism and the scientific positivism, the role of law as a communication tool is essential. The concept of legal communication should be considered as the idea of understanding the legal norm by the recipients of law, namely by persons and also acceptance of these rules in order to respect them. Also, clarity and transparency in law communication are very important elements that contribute to the way in which legal standards are received. The analysis of legal communication from the perspective of legal positivism presents a special scientific interest, given the very essence of positivism, namely that the laws are commands of the human being. Thus, it is important to analyze communication patterns that can be applied in the positivist orientation to consistently appreciate the ways in which legal communication can be improved.

Keywords: *legal positivism, scientific positivism, communication patterns, legal communication*

JEL Classification: K10, K30

1. Introduction

Analysis of legal communication is a relatively new niche of scientific research in General Theory of law. Thus, although law communication was mentioned in theoretical works and papers on several occasions, however, a detailed analysis of how this type of communication is done from the perspective of law schools and especially from the legal positivism perspective has not been made. We consider that such an analysis is necessary for a proper understanding of how communication is done within the communication flow established between the state entities and law addressees, or the wide public.

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[1] Claudiu Ramon D. Butculescu - Spiru Haret University, Bucharest, „Acad. Andrei Rădulescu" Legal Research Institute, Romanian Academy, butculescu@yahoo.com .

2. Law communication within legal positivism

Positivism includes the following trends: legal positivism; sociological positivism and scientific positivism, with its branches (American realism, Scandinavian realism and British utilitarianism). Positivism is differentiated as a current, from natural law, which emphasizes eternal[2] and aprioristic values.

The key findings of legal positivism are: a) laws are commands of the human being; b) there is no need to regard real property in reference to morals and ideal law; c) studying the meaning of legal concepts must be achieved, but separately from the historical study of the causes and origin of the laws, social phenomena and sociological approaches; d) the legal system is a closed logical system, from which correct legal decisions, based on pre-established legal norms, can be taken by logical[3] means.

Acceptance of the notion of legal communication is found in the works of *Georg Jellinek (1851 - 1911)*, who debated the social origin of law. Thus, he argued that, in order to convert to legal facts in legal acts, you must have the approval of the people[4], which reminds us of the assertion stated by Luhmann[5], on the acceptance of provided information. In real terms, however, the state is tied to the economic, social, cultural needs that have to be taken into account. This is fully consistent with the circular constructivist model of law communication, within the interaction between material communication based on material sources of law and formal communication based on formal sources of law. The constructivist model is based on the assumption that the communication process is represented by the very messages that are sent within its streams. Some authors[6] have shown that Jellinek set some limits to positivist trends because it assumes that the state will always respect its own enacted rules, which may hinder the circular model shown above. Jellinek has shown, however, that the law must be understood only in consonance with the needs of society, which can only strengthen those stated above. Law communication elements can also be found in the works of Kelsen[7], who founded a trend known as the "Vienna School of jurisprudence" (*Wiener rechtstheoretische Schule*). Among the central themes of this school are: a) the idea of equality between the state and law; b) the pyramidal structure of the legal system; c) the fundamental rule (*grundnorm*) is the basis of the validity of legal norms. The

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[2] Mihai Niemesch, The concept of Human Rights in the View of the Ancient Greek Philosophers until their Establishment in the National Legislation, Journal of Law and Administrative Sciences, Special issue, 2015, p. 581

[3] Sofia Popescu, Teoria generală a dreptului, Lumina Lex, Bucharest, 2001, p. 85

[4] Enciclopaedia Britannica, on-line, www.britannica.com

[5] Niklas Luhmann, Theory of Society, trans. Rhodes Barrett, vol. 1, Stanford, CA, Stanford University Press, 2012, p. 116

[6] Peter C. Caldwell, Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism, Durham, NC: Duke University Press, 1997, p. 43

[7] Emil Gheorghe Moroianu, Actualitatea normatisivmului kelsian, All Beck, Bucharest, 1998, pp. 90-99

school of Vienna considered the judicial system to be creative in its nature, being instrumental in both the implementation and the realization of law[8].

In relation to the explained positivist vision of Jellinek and Kelsen, a particularly important role goes to the judiciary system and the state as they are the prime movers in the formation of law. Thus, we believe that in this case also, the communication model is bipartite, but the steps are reversed in relation to the succession of information flows.

Another interesting approach in terms of communicating law is found in the works of H.L.A. Hart, who showed that legal rules are enacted to provide legal subjects the opportunity to accomplish their wishes.

According to Hart's perspective, the legal system consists of two sets of rules: primary rules and secondary rules. Primary rules require positive or negative obligations to be met by the individual, while secondary regulations confer powers. Also, the primary rules are related to behavior, while secondary rules relate to other rules. Primary rules concern physical actions, while secondary regulations concern the creation of rights and obligations[9].

H.L.A. Hart considered secondary rules to be subsidiary and a supplement compared to the primary rules. Secondary rules aim to fix some disadvantages of primary rules, such as static disposition, uncertainty or ineffectiveness of social pressure[10]. Considering these aspects, it can be concluded that secondary rules are dynamic, conferring with their concreteness, the certainty of primary rule's enforcement and also as a result of their dynamism and adaptability, they convert the primary rule's ineffectiveness in social efficiency.

The way secondary regulations compensate the problems generated by the primary rules is presented by Hart, using three types of secondary rules: rules of recognition, rules of change and rules of adjudication.

The existence of the legal system is subject to two coordinates, essential in Hart's thought. Thus, the majority of the subjects of law must abide by the law and state authorities should regulate the existence of rules of decision, recognition and change.

The communication model that may be proposed in relation to the concepts argued by Hart also presents itself dichotomous, in that the state authority issues primary laws, binding for its legal subjects and in relation to the response of society, through secondary regulations, conferring social efficiency for the primary laws.

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[8]   W. Friedmann, and Alfred Denning, *Law and Social Change in Contemporary Britain*, London: Stevens, 1951, p. 250
[9]   Michel van de Kerchove and Francois Ost, *The Legal System between Order and Disorder*, trans. Ian Stewart, Oxford: Oxford University, 1993, p. 17
[10]   Sofia Popescu, *op.cit.,* p. 92

3. Law communication within scientific positivism

In contrast with the natural law theory, which has rules that enshrine the idea of perennial, aprioristic and fundamental laws, within American pragmatism the law must have its own purposefulness. Law is dynamic in the American realism sense. At the same time though, the same school considers that society is changing faster than law. Law, like society, is a permanent flow, but at a lower frequency than society (Llewelyn)[11]. This approach is interesting and deserves a closer look. American realism differs quite much to the idea of natural law that romans had *(ubi societas, ibi jus)*. Thus, unlike the naturalistic point of view, where the law exists with the society simultaneously, in the pragmatic American vision, there is an over-unity ratio between the dynamics of society and that of law.

But if we agree with this statement of the American school, we can draw at least two conclusions: 1) society existed before the law, because law is there for a purpose; 2) changes in law must compensate according with the dynamic difference between society and law. Each of the two conclusions are logical and originate from the theory proposed by American realism.

Interesting suggestions on law communication can also be found in Scandinavian realism. According to this concept, law cannot be conceived outside social realities. The notion of legal rules are not of particular importance in the view of Scandinavian realism. The force of a community consists in the existence of some imperatives, which as a whole, ensure compliance with social order.

Likewise, Karl Olivecrona considered that legal language is not descriptive, but imperious and influential, being used as an instrument of social control. Legal texts, in his opinion, have no semantic content, but are effective because they appear suggestive to the common sense of community members[12]. Neither the word "law" has any semantic reference, in his view, although it causes an illusion of power. In full agreement with the ideas of the movement he takes part of, Olivecrona prefers an anthropological and psychological approach to the concept of justice, law, etc., to a metaphysical one. *Anders Lundstetd* considered that law's positive aiming is the wellbeing of the community, characterized by social utility. The approach consists of systemic elements as well, because law is seen as a set of structured groups, which outlines the course of human society.

Law as a communication tool is also of interest for the positivist orientation, given that in the positivist conception, law must be framed in social realities and have a purpose, as a projection of legal pragmatism. Again, we appreciate that this orientation does not show any significant differences from the other trends, only differences in perception and representation. Social realities cannot be depicted outside their historical context and disregarding the universal rules that govern our life.

We believe, however, that between the three major trends there is a chronological interaction, each of which is necessary to conceptually clarify the

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[11] Sofia Popescu, *op.cit.*, p. 96
[12] J. W. Harris, *Property and Justice*, Oxford: Clarendon Press, 1996, p. 130

other. As shown, the physical and material reality and its projection in the legal spectrum, which we can call legal reality is presented to us by the perception of law schools, schools that analyze and recognize the importance of law as a communication tool. This perspective fits in an earlier research that we have undertaken in the field of quantum law[13], a research niche in sociology and phenomenology of law. We believe that this niche is particularly important for concretely analyzing social and legal realities and should be considered by transdisciplinary and interdisciplinary research, enabling reliable conclusions in the field of law. Also, legal communication is extremely important, as legal rules represent the foundation of legal order and protect the main social values and relations[14], so proper understanding of the legal message is crucial.

Regarding the way law schools relate to law as a tool of communication and its role in the entire legislative system, we believe the appropriate communication trend that revealed this role is the constructivist one, with a circular structure. We believe that this model is the only one that allows for a clear and transparent communicational flux, between the legislator and the subjects of the law, seeing that lack of clarity within the law may lead to the impossibility of enforcement[15].

4. Conclusions

In the positivist trend, law communication is done according to the main features of its ideas, closely related to the idea that laws are commands of the human being. However, we believe that regarding legal communication, the differences between the positivist approach and the natural law are differences of perception rather than differences in representation. Also, legal communication analysis from a positivistic perspective is likely to reinforce the idea that the communication model that best fits law communication is the constructivist model, given that this model best characterizes the juridical communication flow established between the state entities, which enact laws, and the recipients of the law, meaning the general public.

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