CONSIDERATIONS REGARDING THE INFLUENCE OF LEGAL COMMUNICATION FROM THE PERSPECTIVE OF NATURAL LAW

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Abstract

This article addresses the issue of legal communication within natural law. Law has an important role, in relation to civilization and legal culture and one of the means through which law influences both culture and civilization is legal communication. The patterns of legal communication should be analyzed from the perspective of all important schools of legal thought: natural law, legal positivism, historical school of law etc. In this paper, the perception of law, through legal communication, within natural law is discussed and analyzed, from the principles and statements of Aristotle to the writings of St. Bernard of Clairvaux, St. Thomas Aquinas and later to the theories of Hugo Grotius. This study also aims to prove that the difference between legal communication within the major schools of legal thought does not regard the essence of communication or the various principles of law, but merely the perception of law, which varies from one school of thought to another.

Keywords: *legal communication, natural law, legal semiotics, communication patterns, legal culture.*

1. Introduction

The principles of natural law have been studied thoroughly, throughout the entire history of law.

From the first philosophers of ancient Greece, like Aristotle and Plato, to the fathers of Christian philosophy such as Saint Augustine or Saint Thomas Aquinas, and to modern thinkers like Niklas Luhmann.

The communication of law was also studied, by prestigious scholars like Jurgen Habermas[1], Niklas Luhmann[2] and Marc van Hoecke[3]. In Romanian literature regarding legal theory, the problem of legal communication was tackled by Maria Nastase Georgescu and also Anita Naschitz[4].

The communication of law may be analyzed, on a more specific basis, with regard to the principal schools of legal thought, namely the doctrine of natural law, legal positivism, the historical school of law and the organic theory of law.

The doctrine of natural law was the first to be established, within legal philosophy, and also is the first to mention streams of legal communication between various senders and receivers. The communication model that may be applied to legal communication is the constructivist model, which is a variation of the transactional model. For this model, the meaning of information is essential. In other words, the participants to the communication process have to establish the meaning of information, either through negotiation or through management. Therefore, as it was shown in the specialized literature, it's the person that hears the speech, not the speaker, that establishes the meaning of the information[5].

2. Content

2.1. Legal communication related to the sources of law

The evolution of the law can be, without a doubt, differentiated according to its main divisions, all the more so as the law is thought of as a normative order distinct from natural order itself[6]. Thus, if private law is based on immutable principles and founded on universal principles as holistic equilibrium and subrogation, public law, is a sub-system of law based on defensive principles, which appeared at the same time with the advent of the first humans which evolved together with our society and shall cease to exist at the time with the human society[7]. The law has emerged as a result of essential requirements of human society, its existence being a condition *sine qua non* for the development of the community. In other words, the legal rules are closely related in their evolution to certain social and

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[1] Jurgen Habermas, Communication and the Evolution of Society, trans. Thomas McCarthy, Beacon Press, Boston, 1979, p.58.

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

[3] Mark van Hoecke, Law as communication, Hart Publishing, Oxford and Portland, Oregon, 2002, p.7.

[4] Anita M. Naschitz, Teorie și tehnică în procesul de creare a statului și dreptului, Editura Academiei, 1969, p. 85.

[5] Christina Waters, Invitation to Dance – A Conversation with Heinz von Foerster, Cybernetics & Human Knowing, vol. 6, no. 4, 1999, pp. 81-84.

[6] Tudor Avrigeanu, *Metodologia penală română și totalitarismele secolului XX*, St. de Drept românesc, an 21 (55), nr. 3, p. 261-285, București, iulie-septembrie 2009, p.262.

[7] Claudiu Ramon D. Butculescu, *Considerații privind influența culturii juridice asupra codificării în România, în perioada 1864-2009*, în volumul Știință și Codificare în România, Editura Universul Juridic, București, 2012, p. 368.

juridical phenomena, which have led to various theories, like natural law, the historical school of law, the organic theory of law or legal positivism. The communication of law is realized in a two-way stream: firstly, as a stream of material communication, coming from the society to the state authorities, using the material or substantial sources of law and secondly, the synthesized legal information, streaming back from the legal authorities to the people, through formal sources of the law. The material sources of law have been defined in Romanian doctrine as social sources, that include law configuration factors, human reasoning, legal conscience et.al.[8] On the other hand, formal sources of law have been envisioned as forms through which law is expressed, by which the regulatory content of a norm becomes a mandatory rule of conduct[9].

As shown below, the law has an important role in its relations with civilization and culture, especially from the perspective of legal communication. Moreover, a more thorough analysis of the legal communication may significantly contribute to a better understanding of the relations developed within the system of law. To this end, it is necessary, in terms of scholarly research, to explain a few introductory concepts of the doctrine of natural law, and how this doctrine envisioned law as a communication tool. In this regard, we appreciate that within natural law, the role of law in the legal system, from the perspective of communication has been analyzed and appreciated in a specific way. In order to correctly assert the perception of legal norms, through legal communication, it is necessary to analyze the influence of law from the point of view of legislative communication within the main schools of law: natural law school, the historical school of law and legal positivism. While the analysis of legal communication from the perspective of legal positivism[10] has already been analyzed in another article, this paper address the issues of legal communication within natural law. Incidentally, the subjective perception of the law may constitute an important starting point in analyzing legal communication, seen through the perspective of law schools. Undoubtedly, each of these schools of thought, include, even if not directly, elements of legal communication. Starting with the principles laid down by natural right and continuing with the ones stated by legal positivism, all come into contact, more or less with the concept and effects of legal communication.

2.2. Legal communication analyzed from the perspective of natural law

Within the concepts natural law school, the first approach in consideration of law as a communication tool was that of Aristotle, who put into opposition the natural justice to earthly justice. He preached the idea of invariability in natural justice, in contrast to the variable and degradable nature of legal justice, which through concrete application, leaves the upper sphere of neutrality and becomes biased. This concept was especially addressed in one of his famous works - *Rhetoric*. In fact, some basic concepts regarding communication where laid within this work of Aristotle[11]. Interesting in Aristotelian theory is the fact that he does not criticize the perennial nature of the fundamental principles, but the human ability to perceive them justly. Thus, we may bring into discussion a possible communication of the law, which, however, is incorrectly perceived by the human community, as the message gets deteriorated. By applying the above-referred mentions to the model of communication, it is reasonable to believe that this theory can be applied successfully to the constructivist model of legal communication, in which the message may be not properly received, due to faulty perception, while the source does not show any signs of deterioration. An example of erroneous perception of natural laws may be found in antiquity, in the work of Aeschylus, called The Eumenides. As an effect of matricide, Orestes murder becomes the subject of a conflictual relation, involving punishment, according to natural law and should be punished by the Erinyes. Still, Orestes has acted as a result of the dire predictions made by Apollo, implying that natural law does not apply without exception. But this inflexibility is precisely what constitutes the essence of natural law, that applies regardless of time, space or person, as an expression of its universal character. If Orestes would not have followed the prediction of Apollo, that would mean that the aforementioned god's prophecy was not infallible, so the prophecy of divine origin could not be perfect. Following a logical reasoning, we may consider that divine law is not perfect. However, we can consider interpretations that may serve as a work around this apparent paradox. Thus, a possible explanation could be the following: Orestes did not violate the natural law, and the conflict was born as a result of erroneous perception by the Erinyes, with regard to natural justice. Also in ancient times, a similar form of communication is discernible in the works of

[8] Mihai Bădescu, *Teoria generală a dreptului*. Curs universitar. Editura Sitech, Craiova, 2013, p.108.
[9] Nicolae Popa, *Teoria generală a dreptului*. Ediția 3, Editura C.H. Beck, București, 2008, p. 147.
[10] Claudiu Ramon D. Butculescu, The role of law as an instrument of communication within legal positivism, Juridical Tribune, Issue 2, December 2015, pp. 132-137.
[11] Robert L. Heath and Jennings Bryant, *Human Communication Theory and Research: Concepts, Contexts, and Challenges*, 2nd ed. (Mahwah, NJ: Lawrence Erlbaum Associates, 2000), 56, http://www.questia.com/read/14363794.

Ariston of Chios, who proposes the existence of two categories of rules: firstly, the rules that are imperfect, because there will always be exceptions, which may not be limited to these rules and secondly, principles, which constitute the universal rules[12]. Natural law school proposed the idea of an immutable law, which is communicated to the human society, which in turn applies it inefficiently, because it is incompletely or erroneously perceived. However, we should take into account Luhmann's theories, which spoke of meaning and acceptance in legal communication[13]. Therefore, one should analyze to what extent the rules of natural law are applied incorrectly because they are perceived incorrectly or because they are not accepted by the recipient. To this purport, in a subsequent period, *St. Ambrose (337-397 A.D.)* considered that the ten commandments were stated and communicated to Moses because mankind has ceased to observe and respect the natural law. It is interesting to observe that within the relationship between the society and the earthly authorities there is a third important party, which presents itself as a source of natural law, namely the deities. It is not the society that communicates the law, but the deity, who is the one that transmits natural laws, only to be applied by people to the people. Of course, the question arises as whether at a perceptive level, we can envision a direct source of law or just an interpretation of certain perennial principles, adapted to the limited human knowledge. Without a doubt, the natural law is made known to recipients directly, as it is seen in the Decalogue. However, there are also indirect meanings within the rules, proof being the very fact that Moses is commanded in the first commandment: "Thou shalt have no other gods before Me" and as Mircea Eliade remarked[14], this commandment does not preclude, ab initio, the existence of other deities but only imposes a ban, or better said, a mandatory prohibition. In this view, it is the responsibility of the people not to worship idols, and if they do not comply with this obligation, certain liability shall be imposed on them, characterized by penalties and punishments. The difference between responsibility and liability was analyzed at length in the works specialized in matters of the general theory of laws[15]. Interestingly, such communication is not circular in nature, but rather rectilinear. The material sources of law are not the needs of society, but the universal laws, which are communicate by deities, through sacred, albeit earthly authorities. Of course, in those times, the authorities commonly had religious attributes. Another example regarding the communication of law, we find, at a microsystemic level in the works of *St. Bernard (1090-1153 A.D.)* (*Bernard of Clairvaux*) who speaks about natural law, considering that on the basis of the latter, individuals must act in relation to other people as they would want others to act towards them[16]. At the same time, other representatives[17] of the natural law in medieval times indicated perception as a singular means of ensuring effective communication. In order to assess properly the effects of law, we should first define the scope of their action. To do this, it is necessary to resort to psychological instruments, more specifically to the concept of perception. The effects may be multiple, but in the context of this paper we should put into question those effects which may be levied and felt by the recipients of legal norms. These norms should be perceived and understood. For the compliance or refusal of the recipients to exist, as referenced by N. Luhmann, the rules must first be perceived. Also, the effects of these rules should be perceived distinctly by the recipients, respectively by the members of the community. Thus, there must be a distinction between the effects of legal communication, in its wholeness and effects of legal communication in relation to the perception of the recipients. The entire legal system is built on the basis of a referential system; on which we can assign symbols or meanings to our own perceptions. As shown above, William of Auxerre *(-1233 A.D.)*, believed that natural law is known through direct perception of divinity. Contrary to this idea, *Thomas Aquinas* and *Albertus Magnus (1193-1280 A.D.)*, believed that natural law is perceived by humans with the aid of reason.

3. Conclusions

The idea of legal communication can also be found in contractualism theories, as described in the works of Grotius, subsequently developed by Pufendorf and Thomasius. If there is even an empirical notion of social contract, then there must be a prior stream of communication. Thus, the social contract could be considered the effect of the communication right in the sense of acceptance of mandatory rules. Also, Christian Wolff, a disciple of Leibniz believed that justice and morality are projections of natural law (universal). Unlike Pufendorf or Thomasius, Wolff believed that these universal precepts are accessible without human revelation. Another example of communication of law we find in the works of Jean Jacques Burlamaqui, which differentiates between natural

[12] Julia, Annas, *The Morality of Happiness*, New York: Oxford University Press, 1995, p. 104.
[13] Niklas Luhmann, *Theory of Society*, trans. Rhodes Barrett, vol. 1, Stanford, CA, Stanford University Press, 2012, pp. 116-120.
[14] Mircea Eliade, *Istoria credințelor și ideilor religioase*, Editura Univers Enciclopedic, București, 2000, p.120.
[15] Mihai Bădescu, *Teoria generală a dreptului*, Editura Sitech, Craiova, 2013, pag. 304.
[16] Saint Bernard (of Clairvaux), Gilliam Rosemary Evans, *Selected Works*, Paulist Press, New Jersey, 1987, p. 242.
[17] Jean Porter, Nature as Reason: A Thomistic Theory of the Natural Law, Grand Rapids, MI: Eerdmans, 2005, p. 248.

law and jurisprudence. Through natural law, he envisioned the law imposed by God to men, which may be perceived and understood with the aid of reason. Natural jurisprudence was considered the art of gaining knowledge regarding the laws of nature, explaining them and their application to human actions18.

The role of law as a tool of communication within the school natural law obviously stems from the perspective of how law is envisioned in this doctrine. In principle, the human society does not carry out a material communication of law, because, according to this current of thought, the principles of law are perennial and immutable, and preexisting the society itself. So, communication has rectilinear form, and through this form of communication, abstract and perennial principles are adapted to daily realities. This assumption is not necessarily against the concrete reality, but the aprioristic structures confer an inflexible character to this type of communication. However, another interpretation could be that there are, on a priori basis, certain universal principles, without mandatory legal content, which govern the society, and the society, by adapting to these general rules, carries out a substantive communication to the state authorities, to be able to be supported in its development. If we continue on this reasoning, it seems that communication is rectilinear only in the beginning, afterwards developing a circular character. This articles addresses certain issues regarding the legal communication from the perspective of natural law, by explaining briefly some propaedeutic aspects related to natural law, legal communication and legal cultures.

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[18] J.J. Burlamaqui, *The principles of Natural Law*, *London*, 1752, p.126.