One World? One Law? One Global Legal System? Modern Law and Socio-Legal Communities

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Abstract

In the present article the author considers the issues connected with globalization and structural changes in the contemporary societies. In author's opinion, development of legal regulation encompasses not only the practical and theoretical argumentation in the law. It also includes the informative and communicative perspectives of our analytical and conceptual legal thinking and of our legal world-outlook which is formed accordingly to the social world of law. The author stresses that there are continued processes of genesis of autonomous, socially out-differentiated spheres for activities and of normative programs and criteria of juridical rationalization of human emotions and actions. In the light of such ideas the general theory of law can obtain its justification from the standpoint of structuralism. This theory cannot be identified or confused with the classical theory of division of powers and with the functionalist division of competences of the state organs in the way this division is formulated in the constitutional law. The author insists that there is an on-going process of informative, communicative and theoretical comprehension of legal rules and of modalities of their validity. Such rules shall be orientated toward constantly renewed tasks and values which are legally protected in order to enable individuals and collectivities to choose and to adopt socially adequate, legally correct decisions and to develop correct processes, procedures and ways of resolutions of problems. These processes make the general theory of law to revise and to re-define the current ideas and conceptions.

Keywords

Globalization, legal regulation, world law, international law, social communities, selectivity of law, legal system

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I. The Concept of Law Re-defined

There is now a growing belief that law and its impact on human behaviour require more detailed research across legal and social sciences. Presently, the most relevant areas for such research derive from the theory of norms and action, theory of law and state, theory of society or societies, and, above all, the communication theory of law. The relevance of these research areas will become much clearer in the future. The fact that today's great legal and social frameworks, such as those of Habermas and Luhmann, are also conceived as communication theories in their research design and strategy should give us food for thought. What is still missing, however, is a sufficiently developed communication theory of law.

It was not until the 1970s that theories of normative communication made it into the realm of law, albeit hesitantly and narrowly at first. These theories focused above all on the application of law as perceived by judges, finding expression in the condensed slogan which was common currency in the theory and practice of law: *Law is communication addressed to judges.*

This condensed version ignores almost entirely the *primary system* or *subject system of law*, described by Alchourron and Bulygin in terms of contexts of everyday social interaction. In other words, we can speak about the *system of norms* which regulates the behaviour of legal subjects. This approach sees the law as normative communication addressed to judges, referred *mainly* to the *secondary social* system or, even more narrowly, to the *judges*' system.

This is precisely the weak point — both from a legal practice and legal theory perspective — at the heart of Anglo-American legal systems, with their exaggerated emphasis on the relevance of the law as ruled by judges.

A scientific approach to law, or rather to conceptions of law, which has been restricted to such narrow confines, may appear justifiable if the analysis of law is also territorially limited. In the context of a truly general and global theory of law, with a view even to a global society (world society, world law), such an approach appears far too one-sided.

II. Form, Function and Differentiation of the Legal System

An information and communication theory which focuses on the relationship between norms and actions is not a finished product. The construction and development of such a theory is a highly demanding task, which remains unaccomplished. In pursuing this purpose, we must use a very broad concept of communication in the context of modern institutions and systems theories of law. This concept derives from the dichotomization into institutional facts and norms customary in the language of law. Practical linguistic information and normative communications — or, at least, those that can be formulated linguistically — are the starting points for a social relationship with the law. Law is a specific form of social relationship, but not all law is formalized. There is, as I have previously stated, not only formal law, but also informal law. All forms of social behaviour which serve to establish, concretize and change general or individual legal norms can be considered legal communications.

In accordance with social differentiation established in German law as early as the nineteenth century, we can make a distinction, both from a structural and functional points of view, between primary and secondary systems of law. In legal communication, we regard the day-to-day legal actions undertaken by citizens and legal subjects who derive their behaviour from socially established legal expectations as part of the *primary system* of law, while all decision-taking activities by the legal staff of the state, *i.e.* legislative, executive and judiciary, belong to the *secondary system* of law.

Law is no longer interpreted narrowly or reduced to a static legal order comprising all valid norms, rules and regulations. Nor is it only based on the hermeneutic access to legal texts. Instead, the entire legal order must be understood as a dynamic and socially established network of all legal acts, communications and actions, which together constitute the legal system.

Communications and legal acts in a particular field always follow from preceding communications and legal acts. In this way, they contribute — by way of normative structural coupling — to the continual production and reproduction of the legal system. It follows that the information and communication system of law is a vast network, composed of systemic operations, directives and norms and any number of legal communications. This network can grow thematically and can be expanded at will. It comprises all social areas of human activity.

Following the distinction between directives and norms, as set out by the contemporary analytical-normative theory of law and legal realism and sociological jurisprudence, it can be said that the legal system procreates itself by *self-referentially* linking new legal directives and legal norms to previously validated ones. Legal validity is a product of the legal system and it has different modalities under different societal conditions and in different historical époques. Further starting points for directives and legal norms are formed, and these produce and reproduce the *legal system*. The legal system presents itself, in form and content, as an *internally consistent, normative whole, formed by the primary and secondary social systems of the law.* We are, consequently, dealing not only with a system of norm sentences, but also with a social system, which consists of the entirety of all relevant juridical communications and embraces the constant flow of new communications and legal actions.

III. Law's Binary Code of the Legal System

In our society, moral discourse is excluded from legal communications by the legal system's binary code. The binary code qualifies different operations as *law/non-law, legally valid/legally invalid, legal/illegal, lawful/unlawful, right/wrong* and so on, and screens out other kinds of discourse. Its aim is the production (which always means reproduction) of legal decisions in a self-referential *legal system of directives and norms*, which, by linking communications, differentiates itself increasingly through further directives and norms. Legal theory is a theory of self-referentially organized normative social systems or socio-legal communities.

In view of the traditional, conventionally applied or implicitly pre-supposed concept of legal action, those examining the communication of law from the perspective of the norms and action theory have to be prepared for some overdue corrections and necessary re-arrangements in the theory's design.

In contrast to the traditional individualistic concept of action, the following reflections are based on the realization that all everyday legal communication and action has essentially been guided and steered by normative institutions, organizations and social systems. In my opinion, these normative-institutional facts have not been taken into account sufficiently either by constitutional juridical positivism or by contemporary statutory and legal positivism, advocated today in the context of the normativism of pure legal science (Kelsen) and "institutional legal positivism" (MacCormick, Weinberger).

The concept of normative communication employed in the following reflections covers — both empirically and in terms of legal norm sentences — the entire field of legal communication. In other words, it covers: (a) national (state) law, (b) European communities and the law of the European Union, and (c) international law. As such, normative communication comprises the entirety of *directives and norms*, *self-referentially* produced in the legal system of modern society (that is, with continual logical and social *reference of the respective legal system to itself,* to its constitution, previously passed laws, etc.). The concept of legal communication extends to all forms of legal action and all types of normative attributions of responsibility. Specifically, it applies to the attribution and imputation of rights and duties as we know them today in the realms of civil law, criminal law and public law.

IV. Interaction, Organization and World Society as a Whole

A concept of law derived solely from the state and concerned exclusively with *formal* state law, failing to take into account the manifold of *informal* social conditions and prerequisites for

the production of law, seems, by contrast, far too narrow. Normative self-reference is the institutional legal fact that self-organization and self-production of the legal system and of the required laws take place in the legal systems of modern society. In other words, the communicative legal system is conceived as self-referential, self-maintaining and self-reproducing. There is a continual self-reproduction of the legal system in the sense that it continually refers back to itself in all its factual/normative operations, i.e. it takes into account other previous operations and actions.

Law does not come into existence only through specific bodies set up by the state. The state has neither a monopoly on nor a prerogative for the creation of law. According to legal theory and systems theory, law comes into existence and emerges in *all social institutions and systems,* namely in: 1) interaction systems, 2) organizations and society, 3) *regional* society or — on a higher level of abstraction — *world* society as a whole. What I mean by global/world society is not only — as in Luhmann's approach — world society in its differentiation into independent functional subsystems of society, but also the social reality of law in its interaction and organization systems *as well as* in state legal systems.

My systems-theoretical approach to law differs from Luhmann's — apart from the fact that he does not mention *state* legal systems — above all because the concept of law and society used by me rests on the differentiation between *regional* society and *global* society, that is, society *as a whole.* This distinction appears to me to be of vital importance as a guiding principle for the social observation of law. It is only by adhering to this differentiation that the theory of law can avoid missing the access to the social reality of law and getting lost in speculations about the world society of law. Unless I am wholly mistaken, the *turn to the social/societal reality of law* is now not only possible, but also indispensable!

This is why — keeping in mind the requirements to be met by a theory of normative communication — I am making an attempt to sketch the outlines of a socially adequate framework of legal communication, which rejects as a matter of principle the narrow limitations imposed on legal thinking by individualistic actor- and subject-centered theoretical approaches.

The basis for my approach is the *positivity* of all law which, in accordance with the normative theory of social institutions and systems theory advocated by me, will be understood as *selectivity* of law. Whatever is selected to become law, endowed with legal validity and established institutionally, is always a selection from other existing possibilities — neither more nor less. Every actual ruling, therefore, proves conditional, considering that it might have turned out to be different. This does not, however, mean that the law is arbitrary, since new rulings self-referentially follow from previous rulings (including constitutions, laws, legal rulings and so on). It is precisely the *way the legal system regulates and processes itself* that constitutes genuine juridical rationality, as I have demonstrated in a separate work.

V. Selectivity of Law and the Legal System

According to the juridical communications and systems theory, the normative communication of law consists of a *tripartite selection process.* In social-structural and dynamic-functional terms this process binds together (i) information, (ii) utterance and (iii) understanding into a single *emergent legal unit.* Separately, these components have no independent existence. It is only when, and if, the selectivity of the three operations has a social congruence in the realm of law, i.e. if they coincide with each other, as it were, that a normative communication actually takes place.

The following may serve as an example: the legislator (1) passes a law by establishing normative information in the form of an *if-then* regulation; (2) he publishes the law in the usual

form by addressing it and communicating it to those whom it concerns, so that (3) the addressees of the law who have to comply with it, namely (a) the citizens and legal subjects and (b) the legal staff of the state, have knowledge of it, so that they can understand it.

The normative/factual *information*, whichever way it is *produced,* does not only have to be *uttered*, but also needs to be *understood* because legal communication is only possible on the basis of understanding. From the normative-realistic point of view, the *understanding* on the part of the recipient has to be regarded as a *partial aspect of selecting normative meaning.* It is both empirically and analytically distinct from information and utterance, and always has a degree of independence. There is *no* such thing as *automatic production of law* among the conditions set out for positivity of all law. The success of a normative communication is not measured by the fact that something has been conveyed correctly or incorrectly, but by the fact that normative information has been *produced, uttered* and *understood* and can, but does not have to, provide a link for further juridical communication. The juridical rationality which finds expression in legal communication can, consequently, be seen as a *normative structural coupling,* i.e. a rationality of linkage *("Anschlußrationalität").*

Legal communication is, then, successful if the addressee (the recipient) has understood the factual/normative utterance directed at him by the lawgiver and understands whether he conforms with or deviates from the norm. The ensuing behaviour, which expresses either acceptance or rejection, is already regarded as the *beginning of a further, new communication.* It produces new (factual *and* normative) information, which may be followed by further communications and actions.

The most fundamental unit in social interactions and transactions is *not the human being, the individual, the person or the subject* as the voluntary agent of human action, but the socially structured *juridical communication*, which interlinks with other juridical communications and invests the social order of law with concrete content, binding character and normative stability.

At present, all law is regarded as a normative communication structure of socio-legal communities. It determines the legal actions of human beings, but does not rob them of their spontaneity and freedom.

A theory of normative communication must conceive of law as a normative structure and, at the same time, a social product, without reducing it in a behaviouralist way to a mere fact. The continual self-production of law, which occurs in the legal system through legal communication, is never merely factual. It is a genuinely *normative self-production* and *self-reproduction.* It is important to avoid a purely behaviouralist point of view which seeks to infer the norms only from factual expectations or from behavioural regularities. Doing so is as inappropriate as attempting to deduce law purely cognitively from norms.

When analyzing information and communication systems of modern law from a legal and social theory perspective, it appears vital to ground this analysis in the difference between *regional* and *global* society (global system, "world society").

At present, however, we have neither *one* global law nor *one* global state. There are also a number of reasons why it is highly unlikely that either of them can or will ever exist. *Law*, conceived here as a normatively structured communication system comprising all its interactions and organizations *at the level of global society*, is no more than a *system of legal systems* and *socio-legal communities* which integrates within it all the different national legal systems.

Every modern *legal system,* understood as a *societal subsystem consisting of both primary socio-legal communities* and *secondary systems of law,* can be observed, described and explained in socially adequate terms, using the tools of a theory of normative legal communication and systems theory.

Concluding Remarks

1. The development of a **general** theory **of law** does not occupy the same field as orthodox jurisprudence. Their tasks differ from each other in several important aspects.

2. In order to comprehend the foundations of law and legal systems, it seemed vital to me (i) to stake out an independent position for basic legal research and (ii) to strengthen and increase cooperation between jurists, philosophers and social scientists, in particular sociologists, irrespective of legal dogmas. It was also obvious that a project of this kind would have to take into account the analytical and logical aspects involved in the construction of a theory of norms, particularly a theory of law and legal action, in order to create greater clarity and deeper understanding of the relationship between norms and actions in the legal system.

3. The development of formal logic and modern philosophy of language, which has led to the construction of a normative and structural theory of law largely dominated by logic, is, by contrast, genuinely new. Normative logic, especially legal logic, is concerned with the formal use of normative terminology of the legal language. Indeed, modern legal thinking has already been extensively transformed by the ever-increasing demands of legal linguistics, legal logic and legal information science to restructure modern legal language.

4. Law is foremost a social or normative structure of society, i.e. the legal order is always an integral part of the social order. It is my goal to construct and develop a structural theory of law, which deals not only with the linguistic structure, but also with the social structure of norms, especially legal norms, and with the societal deep structure of the legal order, which underlies all social and legal systems. This theory does *not*, however, help to comprehend and justify the rightness of law from a purely *cognitive* perspective without *volitive* and *evaluative* assessments, value judgments and juridical decisions.

5. Law is something we may speak of in existing society, and there exist normatively coded expectations of behaviour concerning the possibility of distinguishing between right or wrong, lawful or unlawful, which have legal and social validity. Normative coding gives communication within the legal system its legal meaning. It excludes other meanings from the legal system. I wish to differentiate between "reason" and "rationality" when it comes to law and fundamental research concerned with it (Max Weber, Helmut Schelsky, Niklas Luhmann, Werner Krawietz, Georg Henrik von Wright et. al.). Law, as already coded, conditioned and determined by society and history, is *not,* in my opinion, something that could or ought to be subjected *ad libitum* to a moral-ethical or reasonable disposition by a theory and moral philosophy. Law is far too important a matter to be left to moral philosophers who draw on natural law and law of reason.

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