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MEDIATION AS A FACTOR STRENGTHENING THE COMMUNICATIVE ASPECT OF LAW[1]

Abstract. When reviewing contemporary concepts of law, it is easy to notice that many of them emphasise the role of communication and dialogue in law. This paper is an attempt to link the philosophical aspect with legal practice, picturing both the basic ontological concepts based on the communicative aspect and the mediation as a form of dialogue in law application process. The aim is to draw attention to the correspondence between the mediation and deliberative democracy in the multi-centric legal reality. The conclusion indicates that the professionalisation of the profession of mediator shall help in such a process.

Keywords: ontology of law, the essence of law, communication, law as communication, dialogue, mediation, legal dispute, decision

MEDIACJA JAKO CZYNNIK WZMACNIAJĄCY KOMUNIKACYJNY ASPEKT PRAWA

Streszczenie. Dokonując przeglądu współczesnych koncepcji prawa łatwo zauważyć, że wiele z nich podkreśla rolę komunikacji i dialogu w prawie. Artykuł jest próbą połączenia aspektu filozoficznego z praktyką prawniczą, ukazując zarówno podstawowe koncepcje ontologiczne oparte na komunikacyjnym aspekcie prawa, jak i mediację jako formę dialogu w procesie stosowania prawa. Celem jest zwrócenie uwagi na korespondencję pomiędzy mediacją a demokracją deliberatywną w multicentrycznej rzeczywistości prawnej. W konkluzji wskazano, że pomocna w tym procesie będzie profesjonalizacja zawodu mediatora.

Słowa kluczowe: ontologia prawa, istota prawa, komunikacja, prawo jako komunikacja, dialog, mediacja, spór prawny, decyzja

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1. INTRODUCTION

Not only scholars, but every lawyer and even a "user of law" (its addressee), i.e. all of us, have their own idea of what law is. Within *sensu largo* jurisprudence, there are numerous concepts about the essence of law (Oniszczuk 2004). At the same time, there is no single and unified definition of such notion. Law is most often understood as a set of facts or a set of norms. These facts may be of social (in which case it is a certain type of behaviour), psychological (law is a kind of experience), axiological (law is an instrument for the protection of certain values), or linguistic (law is a set of statements arising from legal texts – i.e. norms) nature.

The ontology of law as a part of legal philosophy has, contrary to popular belief, a rather important practical value. Since the law is binding upon its addressees (individuals and other subjects of law), it is extremely important what its content is. This, in turn, depends on the source of origin of this content, i.e. the essence of law. The legal traditions prevailing in a given legal culture and determining the legal order depend on an adoption – which is sometimes not fully realised – of the view on the very essence of law. The classic dispute between various legal-naturalistic concepts and varieties of positivism-alike concepts has been complemented by, *inter alia*, psychological, realist (in the American and Scandinavian version), autopoietic, hermeneutic, analytical-linguistic, and communicative concepts of law. Among those mentioned, the last four strongly emphasise linguistic and communicative elements: information processing, text interpretation and analysis, linguistic logic, speech acts, etc. This shows the importance of the role played by the word (especially the written word), language, and communication in law.

2. CONCEPTS OF LAW BASED ON COMMUNICATION AND DIALOGUE ISSUES

Therefore, regarding and accepting the adversarial nature of the very notion of 'law', selected conceptions of law have been described below in the context of communicative actions (Hoecke 2002). It serves as a starting point for considerations of the impact of the recognised concept of law on decisions regarding legal disputes and their resolution, including resolution by mediation. Law has been treated as a kind of *medium*, as a form of communication between the state and society, the state and the individual, as well as various social groups or individuals (addressees among themselves) that make that society up.

Theories that picture law as the result of horizontal actions assume that the source of law's legitimacy is a social consensus (agreement of all) or at least compromise (the effect of mutual recognition of certain expectations).

The negotiative approach to law has been proposed in the context of changes in the legal culture related primarily to globalisation processes. International actors (especially of a regional and supranational nature) as well as non-state actors (mainly of property substrate) have become the bearers of sovereignty, except for states, which was the classic paradigm. This results in the 'flattening' of processes (not of structures, though) related to the law-making and also law-application procedures. This indicates a shift from a vertical to a horizontal and network model (Haarscher 2005). Within the concept of law as communication, a systemic variant and a communicative variant can be distinguished.

Autopoietic concepts (Luhmann 1987), included in the first variant, picture law as an autonomous and self-controlled closed system. An autopoietic system is a system that relates to itself and is not externally controllable (although it can receive and take into account information from the external environment, and transform itself under its influence and in response to it). The concept of autopoietic law emphasises not only intrinsic controllability, but also the fact that traditional methods of vertical control derived from a hierarchical structure are incompatible with the multi-centric structure of modern societies (Luhmann 1983). This changes the role of the state from a controlling to a coordinating actor. Nevertheless, one of the basic functions of law remains the regulation of common and divergent interests as well the creation of material and procedural rules for dealing with conflict situations. It is realised increasingly through horizontal steering, i.e. the creation and introduction of new elements (norms) into the system through the consent of potential addressees and their participation. This, in turn, implies the introduction of negotiating elements into the procedures of law-making and application.

The theoretical elements outlined above correspond with the essence of mediation, particularly through the assumption of the consensuality of expectations and actions rather than the imposition of content and directions.

The communicative variant of the concept of law as conversation, on the other hand, refers to law as part of a broader theory of communicative society. In doing so, it coincides with negotiative and autopoietic concepts in pointing to a change in the position of the state, which becomes one of the negotiating partners, possibly the coordinator of the process, rather than an explicit superior. The theory of communicative action (Habermas 1979) is concerned with the interaction of people with each other through the communicative code (language and/or other signs and symbols). The aim of this interaction is – by its very intention – to achieve agreement among all participants of social interaction. Within such area of communication, both the expression of social will in terms of law-making as well as the amicable resolution of social and individual conflicts are included. Intentional-rational actions correspond with systems – such as the legal system. Communicative actions, on the other hand, comprise what is called the lifeworld – *Lebenswelt* (Habermas 1967). This notion covers phenomena such as society

or culture and, as for legal sciences – a legal order, containing apart from norms and rules also the so-called open criteria referring to extra-legal social norms as products of a given culture. As a result of mental transformations taking place in modern European societies, the law appears – as already presented in the concepts described above – as a system of agreements and understandings of various social partners, one of which is the state. This is primarily due to two factors – the increasing autonomy of citizens and their groups (even if this autonomy is partly illusory), and the change in the essence of sovereignty of modern states in the context of a globalised economy (even if this change is not always accepted in the political sense). Such an approach to law pictures it as the result of activity not of fictional legislator, but of the real individuals who make up society. In this sense, it is a dynamic process rather than a finished product.

The idea of law as a communicative action imposes and promotes a certain commitment, which is essential for a democratic society, to go beyond the boundaries of self-identity as well as the boundaries of a specific community in order to expand it and seek the most possible universal point of view. Thus, the concept proposes some ideal model of social organisation and relations. The fact that recently concepts such as 'dialogue,' 'tolerance,' 'pluralism,' 'divided sovereignty' have beenn subject to a trend towards a harsh – and often trivialised – criticism within an ongoing public debate does not mean that the theories described here have become obsolete. Indeed, the idea of a law that would be an outcome as close as possible to universal consent corresponds to the reality (and, therefore, the "lifeworld") of functionally and culturally-differentiated societies made up of autonomous individuals.

The concept of law as a communication corresponds significantly and clearly with the nature of mediation. First of all, the common starting point is the existence, search for, and finding of a common area determined by a communication code, procedures, and values, within which mutual rights and obligations are agreed. The mediation mechanism also presupposes the existence of rational individuals and the possibility of a rational interaction between them. However, it shall not be overlooked that the idealism inherent in this theory, especially the assumptions of the real equality and good faith of the participants, as well as the rationality of their arguments, can also determine the practical weakness of a specific mediation and pose a challenge to the mediator.

It is worth recalling that the first concept emphasising the close relationship between law and language, and thus communication, was legal hermeneutics (Leśniewski 2000). This is because hermeneutics as a general philosophy of understanding holds the view that the world and language cannot be separated, while understanding itself is "the process by which man expresses his relation to the world, gives it, as it were, meaning" (Wronkowska, Ziembiński 1997).

The concepts examined here are more than just a proposal for a multi-level interpretation of a legal text. They create an ontological issue and present law as the

result of interpretation. And since interpretation always comes from a particular subject, law appears as the result of the largely subjective reasonings and beliefs of the subject giving that interpretation. It is, therefore, understood as an *a priori* phenomenon, originating in the natural order; the legal act is a manner of its exercising, but ultimately its shape depends on the result of interpretation. This is because *ius* is meant to be used to make right decisions 'here and now,' while *lex* as an act composed of general norms can be applied to many cases (Kaufmann 1985). It is worth noting that such an approach is close to understanding law as a relation (Kaufmann 1986) and is also close to the convergence theory of truth and cognition, which are relevant to the theory (and practice) of mediation and to the dialogue in the process of the application of law.

Theories of argumentation, on the other hand, are based on the desire to avoid hermeneutic interpretative subjectivism and thus develop the methods that 'objectify' the understanding of a norm. They stand for what is called cognitive pluralism, i.e. the concept that it is possible to simultaneously accept two opposing judgements about the same subject, providing that they are both reasonable and fair (Perelman 1979). Thus, they assume the existence of different alternatives for action in a given situation, and make their choice dependent on the conviction of the audience, or on agreement between the parties. The way to make a choice can thus be through legal discourse (Alexy 1978), which is the basis for the settlement, or through colloquial discourse that turns into dialogue and leads to a solution.

R. Alexy's theory of legal argumentation, derived from the theory of communicative action, is at the same time not identical to legal rhetoric, i.e. Ch. Perelman's theory of argumentation, although both have similar assumptions about the acceptability of the results of communication by the actors involved in it. Both also relate primarily to processes of law application. Legal rhetoric, however, has primarily a practical orientation and refers to the centuries-old achievements of rhetoric as the art of persuasion, but emphasises not so much the veracity of arguments as the conviction of their veracity. Thus, it introduces into rhetoric, understood mainly as *ars bene dicendi*, elements related to ethics and social responsibility, consensual theory of truth, and proposes to look at law as "a set of norms that can count on social acceptance by way of convincing the actors concerned" (Wronkowska, Ziembiński 1997). The claims emerge through the acceptance of the participants in communication, i.e. based on the conviction of the truthfulness and validity of the agreed or accepted arguments. The same arguments can therefore be effective for some and ineffective for other participants in communication, depending on their particular needs, beliefs, or interests.

As for the applicability of the theory of argumentation to mediation, the most important common point here is the assumption of the existence – also in a disputed decisional situation – of different alternatives for action. Their choice can be made by means of an agreement between the parties, which arises from noticing, defining, and making the *loci communes* [En. common places] in the

context of the identity of the parties to the decision. What is at stake here is the interests, needs, or beliefs that – together with law – determine the arena of conflict and the area of agreement.

3. MEDIATION AND THE COMMUNICATIVE APPROACH TO LAW – CONCLUSIONS

In summary, the *loci communes* of the described concepts constitute more or less implicitly the following conclusions on the nature and the role of law – also in resolution of a legal dispute:

– the structure of communication within law is closer to a dialogue than to a monologue;

– the recognition of the plurality of identities and interests, mutual recognition and the search – through law – for areas of common ground makes it possible to come to an agreement;

– the holistic approach to conflict and the resulting legal dispute both increase such a possibility;

– there is the appreciation of the dynamism and permanent evolution of social relations followed by the law;

– the important role of the individual and of civil society is essential for Western philosophy of law;

– there is the repositioning of the state from an overarching actor to a facilitator and participant in arrangements.

Translating these philosophical and legal considerations into the language of legal practice, the above assumptions coincide with the idea of resolving legal disputes according to the Alternative Dispute Resolution (ADR) – including mediation as perhaps the most important of its forms – which is an amicable and conciliatory way of resolving conflicts and disputes based on the idea of seeking agreement in a conflict situation. The ADR is, therefore, in its essence, based on a dialogue and 'win/win philosophy,' i.e. seeking common solutions recognised (accepted) by all participants and preferring reaching an agreement over having a point. It thus corresponds with the concept of law as a horizontal, communicative, and argumentative activity; in short – law as communication.

Mediation itself is based on the following decision-making paradigms: 1) the decision to enter into the ADR rather than judicial mode; 2) identification of interests, expectations; and needs of the parties (replacing fact-findings); 3) the establishment of the common area (*loci communes*) and options for resolving the dispute within the limits of the law; 4) mediation 'subsumption'; and 5) autonomous final decision – i.e. the choice of consequences and drafting the agreement.

Autonomous decisions resulting from interaction have a greater potential for effectiveness than heteronomous decisions. However, horizontal models should not be idealised (which is a mistake often made by advocates and popularisers of mediation). It is worth stressing that not in every case should a conflict of individual interests or a legal dispute be resolved by consensual means, and the ADR is not by definition better than the judicial route.

Nevertheless, it should be highlighted that the idea of ADR – with all its advantages and disadvantages – strongly corresponds with current trends ongoing in the Western legal philosophy. Furthermore, the ADR correlates with the most relevant phenomena and changes taking place within European legal culture (Helleringer, Purnhagen 2014). Indeed, law is changing together with the social environment and the globalised and multi-centric reality. It can be legitimate to conclude that it now has a clear tendency to take on a framework character. The framework character tends to include predilection to submit a case to mediation.

Increasing a mediation area is thus an expression of a more general trend of the gradual evolution of contemporary legal systems from the model of law as technique to the model of law as communication. Despite the evident crisis of words and dialogue, as well as the decline in respect both for the philosophy of law itself and for the ideas and concepts developed by its European representatives that refer to communication, argumentation and recognition, and sometimes even attacks on rational discourse itself, it would be unfair to conclude that these concepts and their underlying values have been proved misguided. Therefore, they constitute the specificity of the European culture, including legal culture.

Mediation as such appears not only as an institution that unifies the legal culture (i.e. a common mediation mechanism) and strengthens democracy – as well as a form of the 21st-century justice that corresponds to respect for individual freedom of choice within the limits of the law – but also as a tool for increasing the area of a dialogue within the law.

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