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Communicative Type of Right Understanding: A Critical Analysis

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Abstract

This article discusses the main provisions of the communicative theory of law by A.V. Polyakov, which defines legal communication as a legal interaction of subjects that arises on the basis of the social interpretation of legal texts that provide them with correlative powers and legal obligations that are implemented in legal behavior. The paper presents a number of critical remarks regarding this theory of law.

Keywords
new theories of law; communicative theory of law; integral legal understanding; phenomenological theory of law; legal texts

I. Introduction

We believe that the relevance of this scientific article is determined by the methodological significance of the types of legal understanding, i.e. philosophical and legal concepts containing the original worldview principles of explaining law as an independent social phenomenon. The question of the concept of law is the initial, key one, because depending on its solution, all other legal phenomena are understood and interpreted. There are classical types of understanding of law - normative, sociological, philosophical, which is often identified with natural law, and integrative (complex), unreasonably understood as a broad concept of law. Among the so-called new theories of law, such as libertarian legal[1], naturally positive[2] and Orthodox[3], the communicative theory of law stands out in modern legal literature.

II. Research Method

When preparing a scientific article, the following methods were used:

1. General philosophical (dialectical-materialistic), which is used in all social sciences;
2. General scientific (analysis and synthesis, logical and historical, comparisons, abstractions, etc.), which are used not only by the theory of state and law, but also by other social sciences;
3. Special methods (philological, cybernetic, psychological, etc.), developed by special sciences and widely used for the knowledge of state and legal phenomena;
4. Private scientific (formal legal, interpretation of law, etc.), which are developed by the theory of state and law.

III. Discussion

3.1 On the Content of the Communicative Theory of Law

Andrey Vasilyevich Polyakov, the founder of this concept, considers communication as an integral component of the social. Dzhenevra Igorevna Lukovskaya and Elena Vladimirovna Timoshina fully agree with him, according to whom, "the communicative theory of law is by far the most developed version of integral legal understanding" [4].

According to Andrei Vasilievich Polyakov, the formation of a person became possible thanks to his ability to communicate (communication); law is a form of communication, as well as morality, morality, science, etc. [5]. Andrei Vasilievich Polyakov regards his communicative theory as a kind of "integral" legal understanding, within which, on the basis of a dialogue between different areas and schools, a holistic concept of law is substantiated, free from the shortcomings of the legal views of the Soviet era of legal theory, striving for synthesis on the basis of the classical scientific paradigm (natural law and positivist concepts were formed within its framework), believing that only postclassical approaches to understanding legal reality can give a complete picture of law as a "living" social phenomenon [6].

Andrei Vasilyevich Polyakov considers the phenomenological theory of law of Nikolai Nikolaevich Alekseev to be an important methodological basis for his concept. Andrey Vasilyevich Polyakov defines legal communication as a legal interaction of subjects that arises on the basis of the social interpretation of legal texts that provide them with correlative powers and legal obligations that are implemented in legal behavior [5]. Legal communication, in his opinion, is mediated by legal texts.

At the same time, the scientist considers the legal text as a system of signs, the interpretation of which creates a certain legal meaning aimed at regulating the behavior of subjects through the establishment of their legal rights and obligations. The legal text, according to the ideas of Andrei Vasilyevich Polyakov, must be distinguished from the legal norm: "The legal norm is not in the text, but in the psycho-socio-cultural reality, existing as an ideal-material phenomenon, it is "constituted not by one legal text, but by the entire set of texts of a given culture (intertext)" [5]. The rule contained in the text of a normative act is not yet a source of law in itself, it becomes one only when on its basis corresponding social practices arise, aimed at exercising the powers and legal obligations of participants in legal communication.

According to Sergei Ivanovich Arkhipov, this thesis needs to be clarified. Indeed, if the law itself, another normative act is the result of legal communication, expresses the will of the participants in the legal impact, then the norm "exists" not only in social and legal practices, but also in the text of the law. When the norm of the law, of any normative act is not imposed on the subjects of law from the outside, but is a consequence of their legal communication, then it "lives" both in the text of the normative act, and in the minds of the subjects, and in the legal relations generated by them, as well as in the acts of realization of the law (in the legal behavior of authorized and obligated persons).

In the concept of Andrei Vasilievich Polyakov, the legal text is considered as a prerequisite, the basis of legal communication, and not its consequence, result. But why is the text of the law recognized as legal from a communicative point of view?

Just because it is adopted by an "authorized subject", does it formally oblige someone or forbid someone to perform those other actions? It seems, according to Sergei Ivanovich Arkhipov, that from the standpoint of the communicative-legal approach, the text is legal due to the fact that it arises in the process of legal communication, is based on its internal

principles, laws, expresses not the political will of the ruling subject, but the general will of the participants in the legal communications. It is legal in its communicative and legal nature, and not only on formal legal grounds. It is as a result of the consent reached by the participants in legal communication, the combination of their wills, that he fixes the norms binding on them, which are embodied in their legal behavior [7].

The condition of legal genesis (the process of the emergence of law, its formation as a social phenomenon), in accordance with the communicative theory of Andrei Vasilyevich Polyakov, is the presence not of the state, but of psycho-socio-cultural realities with a communicative orientation, in which legal texts, legal norms and legal relations are objectified [5]. Law, in his opinion, can do without the state, but the state cannot exist without law. It is a special social institution, through which the right receives a specific institutional form of expression (in the form of written acts: laws, other regulatory legal and law enforcement acts adopted by state bodies, as well as in the form of state legal institutions, bodies that ensure the implementation of legal prescriptions, in including through organized coercion). With the advent of the state, law moves to a new stage of development, acquires a civilized character, becomes more formalized and systemic [8].

The author of the communicative theory offers his own version of the relationship between law and ideology, which, in his opinion, is value knowledge (knowledge based on value preferences). He also refers law to the world of value phenomena; legal values significantly affect the consciousness and behavior of participants in legal communication. Based on value preferences, systematized ideas about legal reality are formed - legal ideology. Andrei Vasilyevich Polyakov proposes to distinguish between its types: anthropocentric (individualistic), which is based on the idea of human rights and freedoms; theocentric, in which God is considered the dominant value and source of law; sociocentric (collectivist), in which the right of individual groups, classes, peoples, nations or society as a whole is recognized as fundamental legal values.

Thus, law, according to Andrey Vasilievich Polyakov, has an ideological character, permeated with ideology. His position on this point differs significantly from the ideas of those authors who oppose law to ideology. At the same time, he admits that law has not only a value dimension and therefore it is necessary to delimit it from ideology, but agrees that this is not so easy to do [8]. Based on the concept of Andrey Vasilyevich Polyakov, the eidos (pure essence of the phenomenon, represented in the mind of the subject) of law is expressed in its structure, which reveals a correlative relationship of powers and legal obligations that arise on the basis of the rule of law in the process of communication. At the same time, the eidetic center of law lies in empowerment; it is in it that the author of the communicative theory of law sees the point “from which rays of legal meaning diverge, forming the eidos of law” [5]. This provision testifies to the humanitarian, personalistic orientation of the communicative concept of law. According to Andrei Vasilievich Polyakov, eidetic primogeniture of competence cannot be rationally proved, it can only be described; he is sure that the competence (as well as the law as a whole) is inextricably linked with power, and the legal relation invariably turns out to be a relation of power [5]. With this approach to understanding the authority, from the point of view of Sergei Ivanovich Arkhipov, the author inevitably has difficulties with the separation of legal communication from political. If power is the basis of competence as the essential center of law, then the two systems of social communication (law and politics) merge together, therefore, it makes no sense to consider law as an independent form of communication [7].

Difficult, by his own admission, Andrei Vasilyevich Polyakov, is his question about the relationship between law and the legal system. These categories in his theory are essentially one and the same. At the same time, he distinguishes the internal and external structure of the form of law. The scientist identifies the internal structure with the system of law, however,

along with legal norms, usually considered in the literature as elements of the system of law, he includes them in non-legal relations (subjective rights and legal obligations). The system of law, or law in the narrow sense of the word, is, in his opinion, an active, dynamic component of the legal system. To the external structure of law, he refers to the system of legal texts, objectified in the form of primary or secondary sources of law. Law in a broad sense (legal system) is the unity of texts and behavioral acts, i.e. legal communication. Sergey Ivanovich Arkhipov notes that the subject of law in the communicative theory is taken out of the framework of both the system of law and the legal system, and becomes part of the external environment surrounding the law [7]. Since Andrei Vasilyevich Polyakov limits the circle of legal phenomena included in the legal system, he faces a dilemma: to single out or not to single out another external structure (form) of law - the legal system in the broad (non-strict) sense of the word [9].

Within the framework of the system of law, assessed in the social plane, Andrey Vasilievich Polyakov distinguishes between state law and social (non-state) law, which can be centralized and decentralized, official and unofficial and has various forms (custom, myth, scripture, doctrine, etc.). Centralized social law is protected by public authorities, exists not only in pre-state, but also in some modern societies. He refers to the types of decentralized social law individual (social-civil), family, corporate law, a special variety of which is church law. According to him, sports and gambling law can be centralized and decentralized; he considers international law to be a specific type of social law [8].

In law as a holistic communicative phenomenon, Andrei Vasilievich Polyakov identifies the following aspects: 1) textual (semiotic); 2) sociocultural (value); 3) psychological (rational and irrational); 4) praxeological (activity). Any communication is possible only through texts (through a system of signs created by culture), and law in this sense is no exception.

Under the legal text, the scientist understands a communicative-cognitive unit, thanks to which legal communication takes place. He identifies primary legal tests - sources of legal information, on the basis of which legal norms are constituted (laws, by-laws, court decisions, legal customs, etc.) [5]. Any legal text serves as a source of law, only being in a systemic unity with other legal texts, in the context of an integral legal culture, of which it is an element. Andrey Vasilyevich Polyakov defines value as an object in its connection with a person. Based on the significance of the subject for the social subject, he proposes to distinguish between two types of legal values: eidetic and sociocultural. Eidetic - these are the values of the law itself, arising from the legal idea, existing independently of the will, desire of the legislator, its consolidation in legislative texts. The content of socio-cultural values reflects the features of the development of a particular society of a particular ethnic group, that is, they are not universal, they depend on historical, ideological, and other factors.

The main legal value, from the point of view of Andrei Vasilyevich Polyakov, is subjective rights (legal obligations in his concept do not have independent significance); other eidetic legal eidetic ones include the legal order, legal freedom (understood in a narrow sense - how to choose one or another variant of social behavior), responsibility (the conscious focus of the subject on the implementation of what is due), formal equality and justice (as correspondence to what is due in relations between people). In addition, according to the scientist, it is necessary to separate the values of law (inherent in law itself) and values in law (reflect the interests, needs of people, are realized with the help of law, acting as objects of legal relations. As a positive value, he considers the possibility of physical coercion in law, which is embodied in the law enforcement mechanism of the state [5].

The psychological aspect of law in the concept of Andrey Vasilievich Polyakov lies in the fact that law does not exist separately from the consciousness of social subjects, that is, outside legal consciousness, while it is not identical with legal consciousness. In legal

consciousness, the scientist identifies cognitive, value and volitional elements, which together form the structure of legal consciousness (both individual and public). Legal consciousness includes both rational knowledge and irrational (emotional) value attitude to law. In his opinion, law "exists" as a part of public legal consciousness, within the framework of which it is constituted (it is comprehended, legitimized, stored and reproduced) [5].

The activity (praxeological) aspect completes the overall picture of law as an integral communicative phenomenon, acting, system-functioning. "Just as matter is impossible without movement, so law is impossible without its action" [5]. Within the framework of the communicative approach, the operation of law is interpreted as a continuous process of emergence, change, termination of legal communications, which is possible only through the interpretation and legitimization of legal texts by social subjects. The operation of law in the communicative sense is not limited to the emergence of subjective rights and legal obligations, which serve only as a prerequisite for the legal behavior (active or passive) of participants in legal communication. An important element of the mechanism of action of law Andrey Vasilyevich Polyakov calls social and legal legitimation, which is understood as the process of recognizing legal texts as sources of law. It is with her that legal action, legal communication begins.

3.2 Dialectical Assessment of the Communicative Theory of Law. Evaluating the Communicative Theory of Law Dialectically, Sergei Ivanovich Arkhipov Names Both Its Advantages and Disadvantages

a. Advantages of the Communicative Theory of Law

As advantages, it is noted that the significance, scientific value and high degree of elaboration make it possible to put it on a par with the libertarian theory of Vladik Sumbatovich Nersesyants and the legal theories of a number of foreign authors. This theory, according to Sergei Ivanovich Arkhipov, is distinguished by its solidity: it is based on a solid philosophical, sociological, theoretical-legal and historical foundation, on the works of representatives of various legal schools, both Russian and foreign. As part of his research, the author seeks to combine different methodologies, techniques, methods of cognition, reflecting the diversity of aspects of legal reality. The author's desire to form a new, integral type of legal understanding based on the dialogue of various schools and trends in modern jurisprudence is also recognized as a positive moment.

3.3 Disadvantages of the Communicative Theory of Law

However, despite the merits of Andrey Vasilyevich Polyakov in the revival of the communicative approach in Russian legal science, attention is drawn to some shortcomings and controversial points in the views of Andrey Vasilyevich Polyakov. Firstly, the subjective right, defined by Andrey Vasilyevich Polyakov as an eidetic center of law, for all its significance, is not an element of value in itself, but belongs to the subject of law and, like any belonging, exists within the framework and according to the laws of the whole. The author of the communicative theory seeks to overcome the simplified, one-sided technical and legal view of law imposed by positivism in legal science in order to form the foundations of a single (integral) concept of law, but replacing the legal norm with subjective law does not solve this problem. Andrey Vasilyevich Polyakov, like representatives of legal positivism, takes as a starting point, a center of coordinates for law, a legal means, a legal instrument of communication, and not the one who uses this instrument for his own purposes. Sergei Ivanovich Arkhipov believes that the starting point chosen by Andrei Vasilievich Polyakov does not express the essence of legal communication. It can be assumed, assumed that such a starting point for legal communication is not a subjective right or a legal obligation and not a legal norm, but a subject of law. It is by the will of the subjects, in their

interests, for their sake, that social communication is carried out, it contains its meaning and purpose. Legal communication is no exception, all legal threads, all rays of legal meaning that form the eidos of law lead us to the subject of law. He forms the legal system with his consciousness, his decisions, legal acts, puts it into action, ensures its functioning. Secondly, if subjective right and legal duty, as Andrey Vasilyevich Polyakov claims, are correlates (phenomena that do not exist without each other, arise from a common basis and should be defined as mutually complementary), then the communicative essence of law cannot consist only in one of these elements. Otherwise, a strange form of social communication is obtained: everyone seeks to realize only his own interest and does not see the eidetic meaning in the performance of his duties to other persons, in the realization of their interests. Thirdly, the author of the communicative theory of law considers law on a par with morality, ethics, religion, and science. Law is indeed not the only form of social communication. However, it has a fundamental difference from the listed communication systems. And it consists in the scope of the law. Right-global, universal form of communication, all representatives of the human race are not involved in, no one can "get out" of legal communication, refuse it, cease to be a subject of legal relations. Legal communication has long overcome territorial and state boundaries, has become an international, planetary communication system (international law), its principles, basic norms apply to all states and peoples. As for morality, ethics, religion, science, they are not global, universal communication systems; there is no common morality, morality, a single religion, and only a few participate in scientific communication.

Fourthly, Andrei Vasilyevich Polyakov argues that the legal relationship turns out to be one or another variant of the power relationship. However, with this approach to understanding the legal relationship, it is difficult to draw a line between such communication systems as law and politics. In addition, since the scientist includes in the system of law not only state, but also social (non-state) law, which, most often, does not have an authoritative basis and exists in the form of myth, scripture, doctrine, etc., then his thesis about the inextricable link between law and power can be challenged.

Fifthly, Andrey Vasilyevich Polyakov set himself the difficult task of developing and substantiating the communicative concept of law as a kind of integral type of legal understanding in order to overcome the shortcomings of other legal theories. According to Sergei Ivanovich Arkhipov, the desired goal was not achieved in full, as a result of the work done by the author, a theory did not appear that would remove the contradictions existing in legal science and eliminate the gaps of all other theoretical views [7].

It is no coincidence that the well-known representative of the communicative approach, Werner Kravitz, comes to the conclusion that today "we do not have a well-developed communicative theory of law" [10], and Mikhail Valerievich Antonov generally doubts the possibility of creating an integration concept of this kind [11].

Orest Vladimirovich Martyshin is even more critical of the communicative theory, who, evaluating the definition of law from the position of the first, namely, "law as a total intersubjective reality is considered in the communicative-active, value, semiotic and psychological aspects and, accordingly, ontologically interpreted and phenomenologically described as a polyunity, including both norms and legal relations, both values and legal consciousness, both legal texts and activities for their interpretation and implementation"[8], firstly, wrote that this definition is a traditional integralist definition of law, practically coinciding with the definition of law by Gennady Vasilievich Maltsev, the essence of which was that law is "a set of norms, ideas and relations"[12]; secondly, it is superfluous and incomprehensible to include values in the above definition along with legal consciousness; thirdly, the definition of law as a total reality is puzzling. Orest Vladimirovich Martyshin believed that all other provisions of the communicative theory were also marked by the lack

of novelty, which essentially boiled down to the fact that “law is impossible without social communication” [13].

Basically, agreeing with Orest Vladimirovich Martyshins criticism of the communicative theory of law, it is necessary to emphasize once again that both the author himself and Gennady Vasilyevich Maltsev mentioned by him unreasonably identify the integrative concept of law with a broad concept, which was discussed in sufficient detail in the previous chapter of the textbook when characterizing integrative legal understanding.

Finally, one cannot ignore the position of Mikhail Iosifovich Baitin, who criticized the communicative theory of law in detail [14]. Without setting ourselves the task of fully elucidating the critical remarks of Mikhail Iosifovich Baitin, we will dwell on only one of them.

Mikhail Iosifovich Baitin believed that one of the most controversial places in the communicative concept is the ambiguity as to what is meant by “socially recognized and generally binding norms”, on which the components of the legal relationship of authority and obligation are allegedly based. We are talking about the concept of law, according to Andrey Vasilievich Polyakov, interpreted as “a communicative order of relations based on socially recognized and generally binding norms, the participants of which have interdependent powers and obligations” [8]. It would seem, Mikhail Iosifovich Baitin continued, that Andrey Vasilyevich Polyakov means here nothing more than a legal norm. “The eidos of law,” he noted, is expressed in its structure, which is a correlation of powers and legal obligations, constituted by a generally valid and universally binding legal norm” [5].

However, at the same time, Andrey Vasilyevich Polyakov defends the opposite idea that the norms he is talking about are not necessarily the norms of law, since the social recognition of norms is based on their social value value, the universal validity of legal norms, on the one hand, does not differ from the universality of other normative systems that formulate the rule of due. In this sense, - he believes - the norms of morality are just as obligatory for everyone as the norms of law.

But, on the other hand, if the observance of the norms of morality presupposes the self-binding of the subject, then the observance of the norms of law is connected with the requirement of the empowered subject to fulfill a legal obligation. But what guarantees this requirement? - Mikhail Iosifovich Baitin asks a question. “Failure to fulfill such a duty,” the author explains, “entails psycho-social opposition on the part of authorized subjects and is associated with both external, both mental and physical coercion” [8]. At the same time, the right, considered as socially justified claims of some subjects for the fulfillment of their legal obligations by others, is always psychologically coercive. The possibility of physical coercion in law is limited and is associated primarily with certain types of offenses [8].

From the position of Mikhail Iosifovich Baitin, with which one should agree, in the same spirit as with morality, the author examines the correlation of the norms of law with other social norms, in particular, with corporate ones, in which he sees rules that are individual for each corporation. Accordingly, he considers the existence of corporate law possible, including such varieties of it, mentioned by us above, as sports law, gambling law, canonical (church) law. But what is this if not a confusion up to the identification of “right” and “wrong” [14].

Obligations of the parties are reciprocal. For that if it happens violation of obligations that have been regulated by laws and regulations or work agreement, each party can sue the other party. Basically, the working relationship is a relationship that regulates rights and obligations between workers and companies. The rights and obligations of each parties must be balanced. Therefore, the essence of "employee rights is an obligation". employers”, and conversely “the rights of the entrepreneur are the obligations of the workers”.

IV. Conclusion

In conclusion, we emphasize that this theory, as noted above, is often criticized. So, Vyacheslav Nikolaevich Zhukov, noted that the experience of the nineteenth, and especially the twentieth century. showed that not all philosophical schools were methodologically fruitful for the philosophy of law. According to the author, often lawyers artificially, quite arbitrarily tried to combine philosophy and jurisprudence, thereby proving not so much the possibilities of philosophy in the matter of knowing law, but their own abilities in constructing their own schemes. The scientist believes that concepts built on the basis of phenomenology and existentialism look strained, invented [15]. It seems that this fully applies to the communicative theory of law.

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