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Normativity and Facticity: Foundation of Legal Validity from the Communicative Perspective

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Abstract. The papershows the way in which normativity and facticity are connected inside the principle of recognition based on the theory of legal communication. The hypothesis is put forward that the basis of the validity of law from the point of view of the communicative approach is the principle of mutual recognition of the sovereignty of the individual, due to which there is a convergence of normativity and facticity through the establishment in normative claims of the importance of the interdependence between language and the social world, prompting subjects to dialogue aimed at interaction. We argue, that within the framework of theory of legal communication, not only the gap between normativity and factuality is bridged, but also between the fundamental ideas of Natural Law, positivism and sociological jurisprudence. The principle of recognition of the individual sovereignty finds confirmation in positive law, serves to legitimize it in the minds of actors and is implemented in legal relations. In contrast to the self-referential concept of law, where the emergence of law is outlined as the derivation of a legal norm from higher norms up to a certain initial or basic norm, we defend that from the point of view of a communicative perspective, the basis of the legal validity is rooted in the individual, in individual's communicative nature, which presupposes mutual recognition of individual autonomy in realization of their rights and legal obligations.

Keywords: normativity, facticity, legal validity, theory of legal communication, principle of mutual recognition, individual sovereignty.

Research area: theory and philosophy of law.

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Нормативность и фактичность: основание действительности права с точки зрения коммуникативной перспективы

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Аннотация. В статье показывается, каким образом нормативность и фактичность, разводимые многими классическими концепциями права, связываются посредством принципа взаимного правового признания, разрабатываемого коммуникативной теорией права. Утверждается, что в основании действительности права с точки зрения коммуникативного подхода лежит универсальный принцип, без которого само право теряет свой смысл – принцип взаимного признания суверенитета личности (правосубъектности), то есть личностной автономии субъекта в реализации своих прав и обязанностей. Доказывается, что при помощи данного принципа не только соединяются нормативность и фактичность в праве, но и подтверждаются черты интегрального характера коммуникативной теории права.

Ключевые слова: нормативность, фактичность, действительность права, коммуникативная теория права, принцип взаимного признания, суверенитет личности.

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1. Introduction

The question of the establishment of legal validity (or of its binding force) is one of the most important questions of legal theory. Justification of validity of norms is in fact closely associated with a particular way of understanding the very nature of law, i.e. one of the main issues of legal ontology. At the same time, the binding force of law is quite a problematic issue for research since the answer to it depends on a concrete approach to understanding the nature of law.

The latter affectsthe situation suggesting that a multivariant of ideas, principles, phenomena, and structures could be put forward explaining the establishment of legal validity. Exemplify this with the rationalistic natural law school, where legal validity means the conformity of legal norms to the highest ideal principles (given, for instance, by Nature or God); as to legal positivism it is trying to discover the origins of the "normative" side of law in order to justify its binding force; as to various versions of the psychological its approach place at the center of the study a sense of inner "connectedness" of legal norms; and concerning legal realism it seeks to discover the "effectiveness" of legal norms and connects their binding force through the actual order of relations in society (Vasilyeva, 2019: 283).

Due to the fact that law is not the only normative phenomenon present in a person's life, not the only regulator of one's behavior, there is a need to identify those specific features that are inherent in law and in the process of coordinating interactions between people. The search

for this specific feature should lead a researcher to a combination of normativity (or the idea of the Ought) and of facticity (the idea of the Is). We intend to demonstrate that during the development of legal thought, one can startout from the strict separation of these above-mentioned poles to in the end see and understand their combination. The authors will so reconstruct the ideas about the foundation of legal validity as represented by followers of positivistic and non-positivistic approachesto law (H. Kelsen, H. L. A. Hart, E. Bulygin, A. Ross, C. Schmitt, R. Alexy). The main emphasis however of our analysis is situated on the level of a theory of communication action in its relation to law (J. Habermas, M. van Hoecke, A. Polyakov)[1]. In this respect the authors will use the "theory of legal communication" as the most adequate approach for thinking normativity combined with validity. The leading hypothesis of the authors is the principle of recognition of individual sovereignty that they identify with the theory of legal communication and that they use to analyzethe foundation of legal validity. As they defend the principle of recognition as it allows the convergence between the normative and the factual aspects of law through the establishment of interdependence between language and the social world. This interdependence encourages individuals to dialogue, aimed at interaction, and serves as a rational principle to explain their behavior ant their recognition of the normative sphere as related to the factual in which taking part this behavior.

The main aims of this article are: 1) to show the way in which normativity and facticity are connected inside the principle of recognition, and 2) to confirm that the theory of legal communication bears the peculiar features of the integral theory of law.

2. Theoretical Framework

This research is built on the supposition that law is a communicative system. Communication as understood in the sense used by Jurgen Habermas, as an interaction that is symbolically structured based on conventionally determined rules of meaning (Habermas, 1987). In this way *legal communication* could be conceived as a system of individuals' interactions based on the interpretation of legitimate legal texts that invoke mutual rights and legal obligations[2]. Theories of legal communication have been developed by Mark van Hoecke (Gent, Belgium) (Van Hoecke, 2002), Bjarne Melkevik (Quebec, Canada) (Melkevik, 2012a, 2012b) and Andrey Polyakov (St.-Petersburg, Russia) (Polyakov, 2006, 2009, 2011). Numerous efforts to expand this approach, based on the ideas of N. Luhmann, have also been undertaken by Werner Krawietz (Krawietz, 2011)[3]. In a communicative perspective, law is represented as a multifaced phenomenon that cannot be reduced only to one dimension like the legislator's will, or a norm, a Reason, an emotion, or any social interactions. Overcoming the monism of one-dimensional legal theories (natural law school, legal positivism, sociological jurisprudence), the theory of legal communications (in its Russian version) represents itself as an *integral* approach that takes into account the possibility of the existence of law in various guises. "At the same time, law can be an idea and a real fact, a norm and a legal relation, an individual emotion and a social value, a text and an activity for its interpretation and implementation. None of these provisions is true in its isolation and abstraction; only within the framework of a holistic vision of law they do acquire their meaning" (Polyakov, Timoshina, 2005: 58).

The peculiar feature of the theory of legal communication is that it allows one to conceivelaw as an important mean and a condition of human interaction, and not as an order having an end in itself which is imposed on a person from the outside. From Polyakov's perspective, law is discovered and created by anindividual being for an individual being. It creates a framework for the realization of human freedom in society. In an ontological sense, law is in this way a system of relations, based on the interpretation of various socially legitimate legal texts, where individual being

[1] As to theory of legal communication, see, for ex.: Antonov, Polyakov, Chestnov, 2013.

[2] In the interpretation of A. Polyakov (see, for ex.: Polyakov,2016).

[3] See also: Luhmann, 1992, 2004 and the followers of N. Luhmann: Lader, 2007, Teubner,2019, *Autopoietic Law: A New Approach to Law and Society* / Ed. by G. Teubner. Berlin; N.Y., 1988.

interact normatively with each other through the implementation of theirs rights and their legal obligations (Polyakov, 2016: 294–295). The structure of law therefor includes the following interdependent and interrelated elements: 1) individuals; 2) socially recognized binding rules of lawful behavior (norms); 3) correlative rights and legal obligations (Polyakov, 2016: 294–295). None of these elements however represent in isolationthe law; law can only be understood entirely in their joint action.

3. Statement of the Problem

That the question of law is to be understood as an interdependent and interrelated-communicative phenomenon, can now serves us to apprehend the problem raised as to what serves to establish the validityof norms.

Indeed, as long as the law cannot be reduced to positive legal norms, the establishment of legal validity cannot be found in the supposition of a hypothetical basic norm as defended by Hans Kelsen; neither can the foundation of validity of individual norms be found in the publication of official texts and in their accordance with a hierarchical order as in a political state. If the law cannot logically be subsumed under a rational or a Divine idea, the establishment of legal validity cannot be derived neither from the nature of man nor Divine design. Since law as a phenomenon cannot be reduced to any social interactions, the foundation of legal validity does not rest upon the mere coincidence of social ideas in the heads of community members.

From the point of view of the theory of legal communication, the foundation of legal validity could better be established by the principle of recognition of individual sovereignty (or individual legal standing), i.e. the autonomy of an individual to realize his/her rights and legal obligations.

The principle of recognition is a universal principle, without which, we defend, law is impossible.

4. Methods

Putting an individual – as a main character of legal communication – to the center of understanding law is an important trait of the methodological basis in the theory of legal communication.

This standpoint allows one to consider law, firstly, not as a phenomenon external to an individual, but as a system, a system under constantly creation and depending on individuals' beings always takes part. Secondly, it permit to understand that since individual's social freedom is always placed within the boundaries of his/her lifeworld, which is being formed, among other things, by the generations of the individual's ancestors, we can also use the method of phenomenological sociology (A. Schutz, P. L. *Berger* and Th. Luckmann)[4] and the method ofproblem-oriented theoretical reconstruction (Lukovskaya, 1985: 154) as an important method for studying legal thought. The authors use, at the same time, other methods such as logical analysis, hermeneutics, interpretation, and systems approach.

We must however admit that if, in this research, we conceive law as a complex communicative system, the characteristics of which cannot be reduced to the characteristics of its separate parts, the tools of phenomenological approach are also most suitable.

Especially the technique of phenomenological reduction could be emphasized. This approach allows one to discard all position or thought taken on faith and inherent in everyday practical thinking ideas about the object of research, so to discover the "pure essence", or " εἶδος" of the phenomenon (Husserl, 1956, Losev, 1994: 300–526). As Losev brilliantly says "that one knows everything, who knows the essence of things… The most important to know is not just the external and accidental side of things, but to know the basic and essential, that without which a thing does not exist" (Losev, 1994: 300).

Phenomenology has been successfully applied to legal studies by L. Petrazicky (implicitly) and by N. N. Alekseev (Alexeev, 1998), and is currently used in the works of A. Polyakov (Polyakov, 2016) in description of the structure of law. In our research, we will begin with the concept of the law given by the phenomenological view, and the foundation of legal validity,

[4] See, for ex.: Berger, Luckmann, 1966.

identified by reference to the phenomenological method.

5. Discussion

Turning to the question about the binding force of law, the representatives of the theory of legal positivism in the 19th – early 20th centuries attempted to separate normativity as a characteristic of the "Ought" (sein) and facticity as a characteristic of the "Is" (sollen).

As for the constitutionalist and legal philosopher Hans Kelsen, law refers to the sphere of the "Ought" and the foundation of the binding force of legal norms must in consequence be sought in the sphere of such an "Ought". For instance, the derivability of a norm begins from a higher norm (Kelsen,1967) or from a hypothetical act of will supposed to form a first norm or a Grundnorm(in later works, Kelsen questioned the very possibility of justifying such a norm) (Kelsen, 1986: 117, Antonov, 2013: 182–183).

It means that any ruleof conduct (related to any normativesystem) requires itsown justification, confirming its accordance (or conformity) with the more general rule of the"Ought"; such a justification establish a normative hierarchy until it reaches a kind of normative upper limit, a "ceiling", in the basic normative foundation.

Kelsen's sharp distinction between the order of validity (in the hierarchy of *Sollen*) as distinctive to the order of reality (*Sein*) allows no passage from the one to the other. In this view, the worlds of facticity and normativity are not only *differentiable*: they are totally independent, corresponding to two different spheres of knowledge (Delacroix,2019).

As Professor Stanley L. Paulson confirm: "on one reading […], *Sein* and *Sollen* mark two points of view, the explicative and the normative; they are modalities dere, addressing what can be said about the thing (which is, then, either natural or normative in character). On another reading, *Sein* and *Sollen* are modes of thought – modalities *de dicto*, which, like grammatical modes, address what can be said not about the thing itself but about propositions of judgements (that are in turn addressed to things)" (Paulson, 1998: 157).

It follows that any attempt to derive and explain the binding force of a legal norm with an appeal to social practices, i.e. to the sphere of the "Is", appears from the standpoint of Kelsenas a complete misunderstanding of the difference between the epistemological status of legal norms and of social facts.As a result, Kelsen could not answer the question, "why is it necessary to follow this or that legal norm (including the Grundnorm)?", on the basis of the human lifeworld nor on the basis of the supposed "derivability" of one legal norm from another.

Professor N. Varlamova has rightfully grasped this problem and this "dead-end", when she stresses that "the separation of the spheres of the Is and the Ought is only an epistemological device used for research purposes and predetermining the specifics of the interpretation of the corresponding relations… and "the impossibility of a simple logical transition from normative to factual judgements does not exclude a complex dialectical connection between what is and what is ought" (Varlamova, 2013: 77).

As to the famous English legal philosopher Herbert.L.A. Hart, he tries equally to avoid mixing normative and factual aspects when explaining the foundation of the binding force of legal norms. Hart represents a model of normative justification quite like those attempted of Kelsen, by his way of putting a rule of recognition in the place occupied by the KelsenianGrundnorm (Hart, 1961: 100–124). In his attempt to justify the binding force of a legal norm, Hart does not dive into arguing about the difference between "Is" and "Ought", neither do he arguingwhether law belongs to a normative systems or not, he simply take the normative nature of law as given. However, as E. Timoshinaobserves, the nature of Hart's rule of recognition and KelsenianGrundnorm is different (Timoshina, 2011: 53). Kelsen's Grundnorm is an empirically unverifiable metaphysical concept or an idea given *a priori*, while Hart's rule of recognition refers to the sphere of the "Is", of the functioning of a judicial system. The existence of the latter is demonstrated by how individuals inside a legal system identify specific rules as valid, i.e., its existence

is demonstrated by the relevant legal practice made possible by the rule of recognition that became its basis (Hart, 1961: 100–124). Then the interrogation to know if this factual aspect should be taken as a sufficient foundation for identifying law. After all, the Nazi legal system also rested on such a rule.

Eugenio Bulygin and Carlos E. Alchourron develop amore original positivistic conception, in which the foundation legal validity lies in its possibility of being logically deduced from the normative system to which it belongs. The originality of this approach relates to "understanding of norms as linguistic unities (statements that correlate cases with solutions), and normative systems as sets of statements" (Alchourrón, Bulygin, 2013: 51). Bulyginand Alchourrondoes not accept KelsenianGrundnorm as the foundation of legal validity due to its meta-juridical nature, which contradicts the positivist program as related to an existing legal system. Hart's factual rule of recognition has more theirs favors as situating the question of the legal system (Bulygin, 2009: 57–59; Timoshina, 2011: 53).

The German constitutionalist Carl Schmitt took a different stand on normativity and facticity. He denied the possibility of finding any foundation of legal validity within the limits of the "Is". Neither legitimacy, nor sovereign power or social practice can fulfil the function of the foundation of validity since they refer to the sphere of facts. All these things "can serve as conditions for the effective execution of law, or even as a way of such an execution (in the event of a decision), but they cannot become the foundation of the binding force of law" (Kondurov, 2019: 65). Schmitt "denied the possibility of justification of the so-called 'normative force of fact'" (Kondurov, 2019: 65). He considered unified ideas of a specific community, *normal* ideas and concepts of what can be considered as a *normal* situation, which is a *normal* person and what is – subject to fair judgement – specific figures of life, considered in legal life and legal thought as typical – the only possible foundation of legal validity" (Schmitt, 2013: 319). However, the question of normality and what could be treated as such – remained open.

RobertAlexy was also among those who denied the possibility of deducing the binding force of law only from the reality of facts. He identifies three concepts of legal validity: sociological, ethical and legal (Alexy, 2002). R. Alexy considers that any norm could be treated as socially valid, if individuals act in compliance with this norm, or if its non-compliance entails the application of coercion. The ethical concept of validity means moral justification of a norm. Regarding the legal concept of validity, Robert Alexy says that it inevitably includes the idea of effectiveness (if a norm is not effective, it cannot be valid). Using this criterion, we deal both with a positivistic view with non-positivistic elements, a non-positivistic position making a combination of the "Ought" and the "Is", it presupposes the inclusion of an ethical element inside the concept of legal validity, i.e., a need for a moral justification.The ultimate foundation of legal validity could so be sought in the so-called "claim to correctness" theorized by Robert Alexy (Alexy, 1978, 1983). Here Robert Alexy follows Gustav Radbruch in his claim that if a norm loses its legal nature if it exceeds a certain threshold of injustice (Alexy, 2010).

The sociological school. Both in its American and it European setting, tried to connect the normative and the factual dimensions in their search for the binding force of law. So, the Russian-French legal thinker Georges Gurvitch believed that "a certain degree of generalization, which is set by the coincidence of value orientations, "moral ideals" and their "logification" in the form of rules, is typical for law. The existence of value judgements as to law is manifested in a multitude of "acts of recognition". The totality of such acts forms the idea of justice, and the ideal of justice lifted to the degree of universality becomes a kind of code for distinguishing between law and not-law. Consequently, within the framework of justice, a general rule replaces the completely individualized prescriptions of the moral ideal" (See in: Antonov, 2017: 290).

As a distinguish representative of Scandinavian legal realism, Alf Ross attempted to overcome the problem of the dualism "Ought-Is". "The law is both, valid and factual, ideal

and real, physical and metaphysical, but not as two things coordinated, but as a manifestation of validity in reality, which is only thereby qualified as law" (Ross, 1946: 20). Alf Ross intended in this way to liberate the concept of legal validity from any metaphysics by interpreting it through the empirical facts. These empirical facts are certain individual experiences (psychological phenomena) supposed to lie beneath the law. The conceptual rationalization of such experience's formslegal validitythinks Alf Ross. In this way A. Ross uses the concept of "experiences of validity" and believes that "it is the very existence of these experiences that has caused the belief in the objective existence of "validity" as a quality of law" (Vasilyeva, 2018: 101–102).

We must acknowledge that theories tend always and unavoidable to simplify the reality, to reduce it to a streamlined or singular foundation. "They construct reality from one specific perspective: legal reality thus becomes a "normative system", or a "sociological interaction", or an implementation of the "idea of justice", or a quest for "the right answer", or "a language", or a psychological phenomenon, etc." (Van Hoecke, 2002: 5). In our view, such a situation can only be overcome by an integral theory of law. Such a theory of law, which will try to look at law not from the one side, but in its 3-D dimension, multi-unity. For example, the theory of legal communication by A. Polyakov. This theory combines the ideas of communicative action of Jürgen Habermas and the phenomenological and *communicative* heritage of Russian pre-revolutionary legal thought (L. I. Petrazicky, P. I. Novgorodtsev, N. N. Alekseev, I. A. Ilyin).

From our perspective of theory of legal communication, we should avoid any social reductionism as our theoretical aim is "regulating and organizing human interaction" (Van Hoecke, 2002: 20).So the necessity of distinguishing sharply between human behavior and human intersubjective interaction as the theory of legal communication deals with the latter. Legal communication is precisely intersubjective communication, and not purely an institutional one[5]. In course of intersubjective communication, "I" acquires self-identification through the relation to the "Other". No communication is possible outside the correlation between "I" and the "Other"[6]. Tocommunicatecompetently "I" must be put in the position of the "Other". This requirement is placed at the heart of any communicative action. According to Jürgen Habermas, such a requirement is implicitly contained in the fact that normative validity claims establish interdependence between language and the social world, pushing discourse participants to dialogue aimed at interaction" (Melkevik, 1992: 134).

It might at first look like there is a similarity between the principle of reciprocity and the Kantian categorical imperative. However, B. Melkevik stresses the fundamental difference between Kantian categorical imperative and the conception of J. Habermas (about the requirement to put oneself in the place of the "Other"). B. Melkevik appeals to Th. McCarthy, who formulated this difference as follows: Instead of imposing on everyone else a maxim that I want to be a universal law, I must submit my maxim to everyone else in order to discuss its claim to universality. Thus a shift takes place: the center of gravity no longer resides in what everyone may wish to assert, without being contradicted, as being a universal law, but in what all can unanimously recognize as a universal standard (McCarthy, 1978: 326). The principle of universality given by J. Habermas is formal and is mainly aimed at communicative "procedurality", leading to consensus. Habermas's analysis of the "double-sidedness" of law (law as an institution and law as an instrument) allows us to consider law as a mediator (connecting bridges) through which the system (normativity) is connected to the lifeworld (factuality). The symbolic reproduction of the lifeworld goes through rational comprehension and mutual understanding and recognition.

To understand the tension and at the same time the close connection between normativity and facticity, J. Habermas builds a solid bridge between them. This is clearly illustrated by the

[5] About institutional communication see: Luhmann, 1992, 2004.

[6] There is no need to organize the activities of hypothetical Robinson Crusoe on a desert island by law. Because there are no other people there. And the law always presupposes the correlation of one's actions with the actions of other people.

example of his human rights discourse (Habermas, 2010: 467). He identifies human dignity a "moral source" that fills the content of all basic rights. From the very beginning, human rights have implicitly recorded "the normative substance of human equality" (Habermas, 2010: 467). The idea of human dignity in this way serve as the conceptual bridge that connects "the morality of equal respect for everyone with positive law and democratic legal declarations" (Habermas, 2010: 469).The outcome of this two-sidedness stands as a political order and a legal system based on human rights.

It should be emphasized that R. Alexy follows J. Habermas in this thesis and insists that human rights as moral rights (moral requirements) "belong exclusively to the ideal dimension of law" (Alexy, 2010: 265). However, "the transformation of them into constitutional (positive) rights represents an attempt to connect the ideal dimension with the real one" (Alexy, 2010: 265). As Dzh. Lukovskayaso elegantly formulate it, "R. Alexy connects institutional procedures of law creating with the discursive ones. At the same time, he focuses on the criteria of discourse rationality and compliance of the legal system with the claim to correctness as the moral validity of fundamental human rights. Human rights "circumscribe precisely that part (and only that part) of morality which can be translated into the medium of coercive law and become political reality through the roughly expressed contents of these rights" (Habermas, 2010: 470).

As a result, human rights bind together internal morality rooted in subjective consciousness and positive law. Both were born from a symbiosis of fact and norm typical of natural law. This correlation was made possible through the application of the concept of human dignity.

Developing these ideas further, A. Polyakov emphasizes that the basis of any legal communication rests on the paradigm of individual sovereignty. Individual sovereignty, he argues, is "the independence of the individual from any unlawful interference in the sphere of his rights and legal obligations", and"the ability to realize his rights and legal obligations independently" (Polyakov, 2017: 14). Foran individual to be an actor in the legal sphere, two ontological levels of organization are consequently required: 1) self-organization and 2) organization of relations with other actors (Polyakov, 2017: 14). This approach is in harmony with the position defended by A. Honneth, who comes to the conclusion that "the individuality is formed through a practical attitude towards yourself, self-understanding, which, in turn, develops in a relationship of recognition" (See: Honneth, 1995). The paradigm of recognition proposes an anchoring of mutual recognition of human dignity in social institutions and practices, through which the social, moral, and legal independence (autonomy) of individuals can be ensured.

If recognition of human dignity for everybody should be counted as necessary for a normal functioning of a society, then recognition of individual sovereignty is necessary for a normal functioning of law. The recognition of individual sovereignty is the very foundation of legal validity[7].

To illustrate this assertion, we may use different approaches, including phenomenological reduction. We may just look to what can be counted as a specific characteristic of law, as compared to other normative or social phenomena (Polyakov, 2016: 281), to see that the aggregation (mutually recognized) of rights and legal obligations constitute the "εἶδος" (Polyakov, 2016: 282), the "essence", of law, and give it its exclusively legal meaning. When we talk about the binding force of law, then the basis of the legal validity will be something that encourages individuals to act in order to realize their own rights and their legal obligations, and subsequently not to limit others in their realization of their rights and their legal obligations. This "something" is the principle of mutual recognition of individual sovereignty (legal standing), which is implicitly existing and explicitly expressed in legal behavior and forms its theoretical understanding.

Consequently, on the level of self-organization, we need the recognition of our identity (the acquisition of a personal "I"), and

[7] For example: norms – there are not only legal norms, but the moral ones; will – not every will has to do with law; coercion – can be not only legal, but also illegal etc.

at the level of organization of relations with other actors, we need the recognition of individual sovereignty, i.e., autonomy in the realization of rights andlegal obligations. I behave in order not to violate the sovereignty of the Other; and at the same time, I let the Other do the same (and I expect it), so that the two sovereignty can function together without prejudice to no one.

The principle of recognition of individual sovereignty has in this way both a normative and a factual dimension. If I recognize that the Other has the autonomy to realize his/her rights and legal obligations, then I not only recognize this autonomy as a person, but I also express a positive attitude towards him/she as having and exercising this autonomy. Such recognition implies that I have an obligation to treat this person in a certain way, i.e., I recognize a certain normative status of a person as free and equal.Following A. Polyakov, this is the normative dimension and the first (basic) level of legitimation of law as a law inalienable from human nature[8].

Understanding the aggregation of validity and facticity is this way depends largely on feedback given by other actors and the intensity of intersubjectivity relations in each society. If an individual fails to receive adequate recognition, it is difficult for him/her to perceive himself/herself and to treat his/her actions as equally valuable. Thus, nonrecognition prevents, counteracts, both the attitude towards oneself (at the level of self-organization) and the interactions with others (at the level of organization of relations with other actors). As to the question of law, the absence of recognition of an individual as a unique spiritual being, whose intrinsic value is, rends the law non-operant. Recognition, therefore, is a "vital human need" (Taylor, 1992: 26), rooted in individual's mental consciousness. As such, recognition of "I" and of the "Other" and the aggregation of this recognition as a fact functioning in normative terms presents the law as "Is" and "Ought" at the same time. So also justifying the implementation of this principle by positivizing it in official law and legitimizing in legal relations[9].

If legal texts (including legislation) work in such a way that they encourage (persuade / stimulate) people to conform their behavior in accordance with the principle of mutual recognition of individual sovereignty, then such texts receive binding force in fact and are justified theoretically, that is, they are valid and they "invoke" law as understood and respected by ordinary people.

The validation test according to Jürgen Habermas is carried out in terms of practical discourse, it is a special communication procedure, within which the validity claim of the proposed or assumed norms can (or cannot) be satisfied(Melkevik, 1992: 129). The validity of a distinct norm, according to J. Habermas, is defined as follows: "We say that a norm exists or has social validity (sozialeGeltung) if it is recognized as valid (gültig) or legitimate by its addressees" (Habermas, 1987: 139).More precisely: "The fact that a norm works ideally means that it deserves the consent of all interested persons, as it regulates action-related issues in their common interest. The fact that a norm actually exists means that its validity claim is recognized by all interested persons, and this intersubjective recognition substantiates the social reality of the norm" (Habermas, 1987: 104).

Accordingly, the validity of a norm is a product of mutually reflexive communication, which includes three stages: 1) "meaning" and "validity" within the framework of the normative perspective inherent in linguistic communication; 2) "universality" and "cognition" as indicators of achieving validity; 3) "consensus"as method and aim around which the producing of the validity of legal norms revolves (Melkevik, 1992: 129).

The late WernerKrawietz also developed his theory from the perspective of norms and facts, connecting normativity and facticity. He wrote: "My central thesis is that in the modern information society, any action, and especially a legal action, is based on informationally

[8] As to que question concerning implicit and explicit legitimation see: Polyakov, 2019a.

[9] We leave aside such philosophical ideas arising from this principle (requiring special research) such as legal freedom, legal equality, legal dignity, legal responsibility, legal solidarity, legal justice. Seeaboutit, forex.: Polyalov, 2019b.

coupled intentional models of behavior, which combine both normative and factual components orienting the behavior of individuals. I am specially talking about information-related legal communication, but not about some kind of "will" of the legislator or the parties of the agreement" (Krawietz, 2011: 15). And further: "at the center of legal communication is always the relationship between the legal establishment and the legal consequence. The existing correlation between norms and facts, which finds here its embodiment cannot therefore be reduced only to a normative, or positivist, system of thought, which often happens in the methodology of legal science and in general theory of law" (Krawietz, 2011: 17).

6. Conclusion

The approach toward the question about the foundation of legal validity offered by the theory of legal communication surely has an anthropological character. Instead of insisting on the motivating power of potential sanctions, legal communication theory highlights the immutable value of the individual as an autonomous being situated in a social setting. Individual should be understood as persons with their own sovereignty claim and as in charge of realizing theirs rights andtheirlegal obligations. Equally any validity claim is undeniably rooted in moralityand receives the rational motivating force in the process of positivation and legitimation. Legitimation (as skillfully shown by A. Polyakov) is also a multilevel process based on the principle of mutual recognition, and concretization, say in the procedures of the correct establishment of norms and their factual effectiveness.

The legal communication theory that we defend believe that the gap between normativity and facticity can be overcome. That it can be overcome if we rightfully reject the understanding of factuality as a question of an objective reality and better understand reality as a question that individuals being resolves by their participation in rational discourse or in legal communication. In the same way that the question of validity is not a question of objectivity neither, but more a question of producing validity in practical procedures to build such a validity that can serve us as individuals and social beings. We do not have any grudge against fundamental ideas of natural law, or legal positivism, or sociological jurisprudence, or theories finding its source in morality, from our standpoint the principle of recognition of the individual sovereignty finds confirmation in positive law, serves to legitimized it in the minds of actors and is implemented in legal relations. In contrast to the self-referential concept of law, where the emergence of law is outlined as the derivation of a legal norm from higher norms up to a certain initial or ground norm, we defend that from the point of view of a communicative perspective, the basis of the legal validity is rooted in the individual, in individual's *communicative* nature, which presupposes mutual recognition of individual autonomy in realization of their rights and legal obligations.

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