

THE COMMUNICATIVE CONCEPT OF LAW

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Introduction

One possible means of clarifying the encounters between legal cultures is the building and development of new concepts. Of particular value for this purpose is the communicative concept of law. This paper treats the characteristics and practical consequences of the concept by an account of one example of its application, having first considered cultural plurality as the point of departure and the normal context today for discussion of terminology in the Sociology of Law. According to this concept law is essentially the activity of jurists in relation to legal texts.

Cultural Plurality

Old solutions do not serve in times of crisis such as the present, when concepts themselves are being questioned. Indeed, we can go further and say that it is difficult even to discuss existing concepts. During such times neither old nor new concepts suffice. Some commentators have even suggested that we must renounce any construction that might explain life in general in a society as complex as today's and that we should limit ourselves to making a hermeneutic of everyday things.¹

¹ This position has been markedly developed in legal theory, but also in the sociology of law. An example of a reasoned approximation to the view can be found in Shiner (1992). This author establishes the basis for a non-conventional theory of law, arguing that a metatheory of legal theories can demonstrate that the theory of law itself is, in a way similar to that of professional practice, in a constant process of movement and adjustment between theories which extol the principles of certainty and procedure and those which extol the principles of flexibility and substance

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This follows from the consideration that in moments of crisis it becomes particularly clear that there are no unique worlds. Today there are not even two radically different and absolutely distinct worlds in confrontation. As a consequence, the law is reluctant to present explanations; rather, it has been said, it can only pose problems.² Answers to these can be provided by everyone, and no one can set themselves up as the sole arbitrator or as the possessor of the correct answer. Thus there is no room for either concepts or theories. This would suggest that the point of reference must be that of chaos. However, we must also recognise that we in fact live by paying attention to certain rules and institutions. In certain places chaos is subject to order, whilst in others order is maintained by the use of armed force (on occasions that of the UN). This means that order is capable of explanation and reconstruction. Furthermore, the sociology of law has, by reason of its scientific nature, to reflect on law.

Thus sociological discussion of law remains, although in a context different from that of the beginning of this century. We live today in a plural society where different convictions, beliefs and morals coexist and where, therefore, different people have confidence in different rules or orders of conduct. The problem lies in the fact that the positivist concept of law - the concept of law as a system of written rules promulgated by an authority on which the power to legislate has been conferred by its election through a rational procedure³ - established in consonance with a world having a single morality, namely the Christian-Rationalist morality of the eighteenth century, is rarely sufficient today.

To reflect on the idea of the concept is not, therefore, a purely artificial or academic exercise. Rather, it is necessary when the strength of the answers provided by the tradition of the Enlightenment has started to be questioned. This does not mean that reason or the construction of theories loses strength. It means only that what is generated by reflection needs to serve the different reasonings, including those of the

(Shiner 1992: 326). On the connection between knowing and society, Luhmann states that knowledge is made up of the echo of the structural couplings of the social system (Luhmann 1992: 122).

² For a still effective illustration of the limitations of the 'explanations' see Viehweg (1974: 111-119).

³ This phrase summarises any state of the question on a vulgar positivist concept of law. See the coincidence, for example, with that indicated in Weinberger (1987: 109-112).

fundamentalists, which are considered legitimate in a democratic society, at the time when the rules of co-existence are established or when the power which is itself the essence of law is exercised. This implies an acceptance that these reasonings cannot have absolute objectives, or, which is the same thing, cannot pretend to construct total, detailed explanations of a specific world starting from the analysis of a single principle⁴ or of a body of principles emanating from a single culture.

In political terms, when confrontations between the two power blocks have passed into history, when the inhabitants of the Third World emigrate from their places of birth and undertake the work that the inhabitants of the First World do not want to do, when we are faced with the enforced co-existence of different cultures, it is difficult to maintain an idea of law which is restricted to an abstract imperative or normative proposition justified by the principle of universality or by its creation by parliamentary representatives. A preferable idea of law is that of a living organism which is devoted to ensuring, through the activities of the social agents who are entrusted with its care, the co-existence of all citizens, whatsoever their individuality or peculiarity, and which is accepted not because of its abstract legitimacy but because it satisfies, in each particular case and to a greater or lesser degree, the idea of justice. This supposes not only that an initial definition of law is necessary, but also that account has to be taken of the technical and political features of the activities of those social agents, namely the jurists. Furthermore, if the theory is to have at least a minimum of consistency, it must have the power to explain all these activities and not be limited simply to the explanation of problems. It has to rest on foundations which give it the capacity to be the point of departure for explanations that are valid for all those who form part of or who intervene in a specific legal act.

This means that, paying attention to the heterogeneity of the members of our societies, to their differences in cultures and beliefs, it is not now possible to establish strong rules which link them together in a dictatorial fashion on the basis of universal reason. It is necessary to admit that there are many forms of reasoning or of beliefs which are equally legitimate in a democratic society. Gypsies have their beliefs, but then so do Muslims, and marginal groups of all types, and the sick, and

⁴ Analytical philosophy has taken important steps, under the influence of linguistic analysis, in the introduction of social factors into the theory of knowledge. This has been especially the case when it has been claimed that the 'phrase' or 'public discourse' are forms of truth. The problem here resides in the fact that, in the absence of an appropriate theory of communication, theory is reduced to a mere orientation of language (Luhmann 1992: 7). There is an autocriticism of this form of study of reality in von Wright (1992).

the unemployed, and the employed, and the owners of capital, and pensioners.... All of them have the right to participate in the shaping of the rules of co-existence, to choose their parliamentarians, to be members of a jury, to be taken into account in administrative procedures. Therefore, legal rules must be minimal. Especially they must allow for the participation of all, on the basis of their beliefs, in governing the freedom enjoyed by the rest. In the solution of each problem, or better, of each specific conflictive act, it is necessary to articulate the participation of all interested parties. This requires that everyone, whatever their culture, can understand not only the problems but also the peculiarities, notes or characteristics which might be of interest to each individual and, at the same time, to come to a decision in freedom, respecting the freedom of the rest, and participating in the power accumulated by the bodies or institutions which determine the rules governing social relationships.

The Communicative Concept of Law as the Encounter of Legal Cultures

The solution to the conflicts of the 19th century was to see law as reason, or the general will, or to employ the neutral principle of the autonomy of the will. This was the solution of the Code. Today there is no general will. There are many different men and wills, which do not agree with, for example, the notion of a neutral organisation of life and the solution of conflicts. Further there are philosophies which advocate agreement between cultures.

In this sense, today it is understood that there is no clear separation between the two worlds of *sein* and *sollen*. It is held that attention has to be paid to the interaction which in fact occurs between them. It has been observed that the earlier approach was based upon a view of human activities taken out of context, seen in the abstract, on the basis of an individualist concept of man. Now it is proposed that the two worlds be seen as connected, related one to another by the circumstances of intersubjectivity or of communication between men (Habermas 1988: 56, 1993: 33). Legal activities are a good example for this philosophy. They always have a strong political component, developed by way of arguments which are exchanged by the participants in a pluralist cultural environment, rather close to that in which the ideal characteristics of communicative action evolve. These rules or characteristics have been made explicit for the law by that same law (especially its procedural part) and by a body of theories, most specifically the so-called theory of legal argument. According to this the rules are:

- (1) to deal with specific problems by using the greatest possible conceptual and linguistic clarity,

- (2) to use empirical information to the greatest extent,
- (3) to act in general terms, and
- (4) so far as it is possible, to act in a way which is free of prejudice (Alexy 1987: 417).

These are rules which, because of the conditions already mentioned, need to be complemented by the precision provided by another theory, the theory of communicative action. According to this, because of the particular characteristics of each of the different legal activities, they have to be carried out in a pluralistic cultural environment. By contrast, the so-called theory of legal argument has been constructed with the single aim of proposing general rational criteria ('the rules of reasoning') to the construction of regulatory propositions. Thus the above mentioned rules have to be supplemented with another, namely:

- (5) to be mindful of the cultural plurality of the individuals who are involved in legal activities, that is to say, of the phenomenon of inter-subjectivity (Habermas 1983: 144-152, 1993: 18).

This political consideration of legal activities, accepted even by those who propose an exclusively rational view of the law, since that position is limited to rejecting as extra-judicial any stress on this political quality of legal activities, is compatible with the results of the studies of legal thinking in Western culture during the last two centuries. This is the case at the moment when, for the study of legal practice, the Philosophy and the Sociology of law have used the philosophical tools employed in the study of other types of activity. It should be made clear that some of these reflections have emphasised the recurrence in legal activities of this argumentative, political character of systematic virtues and particular qualities (Zippelius 1994: 247-274). In this respect, the principal characteristics of the interpretation and the application of the law have been highlighted in all their complexity. Similarly, the features of the construction of dogmas and the different paradigms of legal science that have been put into practice since the establishment and consolidation of the state operating under the rule of law, from the end of the 18th century have been illuminated. More recently, the characteristics of the construction of normative propositions, and, nowadays, of access to legal texts, have been stressed.

Today it is understood that the object of knowledge which is proper to the philosopher or sociologist of law, and to the lawyer in general, is, apart from the rules, the 'just' activities of lawyers in relation to legal texts - whether open to understanding or inter-subjective (Alexy 1992: 201). The expression 'just' includes activities carried out by applying the democratic process established in the state, operating under the rule of law and driven by consensus. It includes also activities

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which meet the majority-based criteria for action by being respectful of minorities, expressed in their most plural and complex forms: legal rules and principles, moral principles, and social usage. These criteria are systematised according to: philosophical categories or values such as equality, justice, freedom, legal security and community; fundamental legal concepts such as the legitimacy of state action, contract, exchange of goods and services, property, due process and punishment; and political preferences or concepts such as those of efficiency, impartiality and communication (Zippelius 1994: 74-246).

On the basis of this, the law can be defined by starting from the idea of action or communicative relation between all the elements involved in its realisation. These are specifically the subject which generates it, that to which it is directed, the texts in which it is explained, the criteria to which all of them have recourse and, most particularly, the congruence of these criteria with the consensus or the acceptance established by the different cultures which are present when the activity is carried out. Thus an adequate definition of law for these times, inspired by a participative or communicative philosophical reflection, may be the following: the just activity of jurists in relation to legal texts (Galindo, Moreno, and Muñoz 1993: 230). This is the same as saying that the law is an activity which is open to the understanding of its participants (Galindo 1993: 34 and seq.).

This definition is ambiguous in its content but sufficiently clear in its structure. It allows law to be explained from a plural cultural perspective, which is receptive to the characteristics of a heterogeneous society made up of very different people having a broad range of ideas on what principles are to be understood as fundamental. The main emphasis of the definition is placed on activities, leaving to a second level the normative element. This, grouped together under the broad formulation of 'legal texts', allows for the inclusion of both primary and secondary rules, as well as principles. The activities, delimited by the condition that they relate to those carried out by lawyers are, at the same time, linked to justice. We can also note that the imperative element, which is explicitly recognised when reference is made to rules, has been eliminated. However, the most convenient aspect of the definition lies in the fact that, thanks to its limited ambiguity, it is acceptable to subjects with very different characteristics.

Hence the idea of a system of rules no longer has the importance it once had for positivist conceptions. However, this does not point to a diminution of the role of reason. Rather, it is better to speak of the role of democratic reason, the driving force behind consciousness of difference more than of universality (Homann 1988: 284). Furthermore, account has to be taken of the fact that the system is no longer made up solely of rules since, on the basis of the communicative concept, it is

difficult to speak of a single system. There are many systems made up of the characteristic features of different types of legal activities and of their respective participation in justice. That is to say, the ensemble is made up of the totality of socially accepted criteria for each case, in a manner which is respectful of those criteria which are advocated by minorities.

Practical Consequences of the Concept

Today it is clear that, given the general openness of legal texts, the liberty given to any administrative body when applying the law is enormously wide. In practice it acts within its discretion. Thus the role of general laws and principles are reduced to their most minimal, being supplanted by rules of a technical character, which are fundamentally economic in nature. This is not consistent with the principles of a state operating under the rule of law, which lays ultimate responsibility upon the individual who takes the decision, basing this specifically on his conscience or, in more legalistic terms, on the criteria which are recognised by the majority of citizens.

Because of the complexity of present day society, this extensive room for manoeuvre possessed by the administration in its decision-making capacity is essentially moulded by arguments from 'social engineers'. These are mainly economists, political scientists, experts in Public Administration, computer science experts and sociologists, all without knowledge of the law. They control the technical instruments, but not the characteristics of the legal system or of its democratic directives, which require that attention be given to the criteria accepted by the majority of the given society. Thus, in the final instance, on many occasions decisions are taken on the basis of almost exclusively technocratic criteria, and are rarely tested against either majority social opinion or the legal texts approved by the citizens through their elected representatives. This produces a growing alienation between the activities of administrative bodies and the citizens they serve, leading to a loss of participation, and then of the influence of democratic values in the development of administrative acts and, of the efficiency of such acts. This process has dangerous consequences. The danger will increase with the development of administrative practice as the European Union and its bureaucracy is consolidated.

One way to moderate this technocratic despotism is to stipulate that the legitimacy of its acts is subject to its adoption of procedures which are provided for in the Constitution and which regulate the administrative activities of any institution of significance. The procedural rules establish a properly weighted process by way of which a hearing is given to interested parties, or at least to social organisations which are representative of them. It is thus ensured that, apart from decisions which

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are taken by reference to general procedures, decisions are not adopted by a single person, but are developed with the participation of various institutions. This allows for the mechanism of consensus to be activated, for interplay between majorities and minorities, and for the expression of the different distribution criteria accepted in the society if, for example, the case involves the distribution of public funds, and so enables a search for understanding between the participants. This leads, in essence, to the production of a communicative or democratic solution to each situation, instead of administrative decisions which are instrumental or merely strategic.⁵ This is how the communicative concept of law functions in practice.

A research programme entitled “Democracy, the distribution of public funds and administrative decisions”, has been co-ordinated in recent years (1992-1996) by the author of this paper. It is directed towards answering the issues raised in the preceding paragraphs. Its starting point is the participation of the author in the activities of the Head Office of INEM (Government, Employers’ Organisations and Trade Unions) in Zaragoza (Spain) in the distribution of funds between those Local Authorities which wish to execute public works or services with the aim of increasing public employment. This in turn is aimed at the objectives set out in a previous research project entitled “Access to the Law. General theory”, which had as its central objective the study of “access to legal texts”.

The research operates on the assumption that the INEM offices have three principal activities: the payment of unemployment benefits; the encouragement of the creation of public employment through agreements signed with different institutions to that end; and the training of unemployed workers, adjusting their knowledge and skills to the needs of the market with the aim of encouraging their social reinsertion.

In the performance of their functions these offices frequently enter into agreements with Local Authorities in the province for the purpose of giving economic support to public works or services executed by these authorities, or by companies that are

⁵ We have noted that the problem resides in the starting point. The framework for decisionmaking is frequently formed by the criteria established by technocrats, primarily at present by experts in the mechanisms of the market. These mechanisms are such that they generally oblige the experts to report with reference to the guidelines of the criteria of efficiency. This may be desirable in cases of great complexity and of the inter-connection of resources, as compared with a tradition of the political resolution of problems. This should not prevent us from recalling the obligation to pay attention to other criteria as prescribed by the legal texts.

contracted by Local Authorities to execute the work, with the aim of generating employment. The agreements provide for the financing of part of the cost of the labour to be employed, currently persons unemployed and registered at INEM offices. In the preparation of the agreements, INEM has to make a selection from the applications received for public funds in the current year, paying attention to the criteria established by the appropriate authorities, and to study the characteristics of the applications, of the public works or services to be executed, and of the petitioning Local Authority.

The research group has to date completed three stages of the work. First, it has made a study of the decision-making process. Second, it has constructed a procedure aimed primarily at assisting a fundamental part of this process, namely the formation of final decisions taken by the Provincial Director of the INEM in Zaragoza. Third, it has made a comparative study of the criteria used and of the decisions taken on their basis for the years 1993 to 1995 on the distribution of public funds. The criteria used have been those proposed by the most significant theories of justice accepted in contemporary democratic societies and advocated by leading authors in the field.

Before commenting in more detail on the characteristics of each of these stages, we should point out that throughout the research we have relied on the collaboration of the INEM personnel who, in the second year of the work, integrated the working method proposed by the research group into the procedures followed in the institution.

The decision-making process

After a full study of the relevant law and modes of carrying out the activity, it was determined that the decision-making process contained the following stages:

- (1) The establishment of the criteria for entering into agreements for the granting of subsidies during the year by the Head Office of INEM.
- (2) Communication by the Provincial Office of INEM to interested Local Authorities of the details of the criteria adopted.
- (3) Resultant applications by interested Local Authorities.
- (4) Scrutiny of applications by the INEM Office to determine whether they meet the criteria.

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(5) Participation in the process by the Provincial Planning Committee (made up of representatives from the Central Government and the different Public Administrative Bodies which have Agreements with INEM) by the establishment of criteria for the province, a global study of the applications, and the issuing of an opinion on each of them as to whether they meet the criteria for the year on investments to be made by the respective institutions.

(6) presentation of the applications by the INEM Office to the Provincial Executive Committee, made up of representatives from the Public Administrations, Trade Unions and Employers' Organisations.

(7) The report of the Provincial Executive Committee as to whether the application is appropriate for subsidy.

(8) The final decision of the Provincial Director of INEM on the applications, after consideration of the reports of the Provincial Planning Committee and the Provincial Executive Committee, and the budgetary situation. Applications are classified as accepted, pending or rejected, according to the criteria previously established for the year.

The procedure

The research group established a procedure to provide support for the eighth stage of the decision-making process. This procedure consists three parts:

(1) The preparation of a document which assists in explaining to all the participants in the decision-making process, the most relevant factors in each application for subsidy. The document lists all the circumstances which may be factors to be taken into account in the final decision of the Provincial Director of the INEM.

(2) The formulation of model list of policies for the distribution of public funds dedicated to encouraging activities in the area of public employment by Local Authorities, with attention being given to the different types of distributive justice currently used in our culture.

(3) The study, by the research group together with the Provincial Director and the civil servants in charge of the area, of the decisions taken.

We shall now set out some of the main characteristics of this procedure.

(a) the document

The document presents some of the elements of each application. These are not always explicitly referred to in the legal texts which govern the granting of subsidies. But they are vital to the decision-making process if this is to have regard to the different policies on the distribution of resources that are currently in habitual use according to the research, whether this policy be utilitarian, impartial or communicative.

The document allows for the possibility of following different policies, by presenting a scale for the elements of each application. This scale takes into account specific data for each application, according to that provided for by the Administration by Regulation (Resolution of the INEM of 21st May 1994, published in the Official State Gazette of 25th June 1994). The scale rules have been adjusted to the Province of Zaragoza by the Provincial Delegation of the INEM.

(b) the policies

The group has established a number of policies for decision-making in the distribution of public funds for the creation of employment, with the aim of assisting the competent bodies. In fixing their contents, consideration has been given to the social convictions expressed in generally accepted opinions, reflected in a systematic manner by leading authors in the field when establishing criteria for the interpretation of legal texts. Ideally these principles should be

basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation (Rawls 1985: 225).

It should be made clear, therefore, that we have not developed criteria in the form of purified rules forming prescriptive propositions or well founded formulae, but rather principles (Dworkin 1986: 71) expressed in the form of models. What are these data and principles, and what is their core content?

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We have noted that there exist different standard systematisations of social criteria for decision-making, or, to put the same point differently, different 'senses' of justice are used in practice. The commonest are the utilitarian, the impartial and the communicative criteria. Each has its justification and they are all legitimate in a pluralistic society. They all claim to be absolute, that is, it is possible to structure the contents of each in such a manner that it provides the means of giving an answer to any problem (Becker 1992: 707-719).

Their ultimate objective is the achievement of justice, which is taken by all these authors to be equality. This objective is congruent with the social feelings of the present time, by contrast with the proposals of the 19th century which placed the emphasis on liberty. Those who defend equality understand it in different terms. The first group, the utilitarians, believe that equality can be achieved if decisions on the distribution of public funds are based on the principle of the greatest happiness for the largest number. The second, the impartialists, claim that equality will be achieved if attention is given in the first place to equal treatment from a formal perspective and, in the second place, to the distribution of public goods in a way which guarantees the survival of the most disadvantaged. The third, the communicativists, argue that equality is achieved where the sole principle for the resolution of all problems is to give attention to the cultures that are implicated in these problems, that is, through the participation of all those implicated in the problems. We now turn to a brief explanation of these three fundamental theses, and the ordering of criteria in specific decisions which is required by one or the other concept of justice.

(i) utilitarian criteria

Lined up behind what has come to be known as the utilitarian approach, we find those authors who propose criteria which have as their principal aim to reinforce, implant or perpetuate the market in a direct form. They consider that the rules and mechanisms of the market should be used to share all resources. This aim has been defended not only by the utilitarian, but also by liberal economists (Posner 1983: 60 et seq.). This model seeks to demonstrate that the market is best promoted if external additions to it are terminated as soon as possible so as to permit individuals to act in freedom. According to the proponents of this model, the rules of economic freedom, exercised by way of market mechanisms, are best suited to generate wealth and fixed employment. The economic analysis of the law assumes these positions, and Hayek has defended these criteria (Hayek 1976: 114 et seq.).

The problem of formulating policies which follow this model resides in its immediate practical formalism. The application of law is proposed, but

fundamentally of those laws which have no social content and which are not concerned with social complexity. The advocates of this policy seek especially the strengthening of the market and conduct which is congruent with it. They place trust in the workings of the market mechanism and its implied generality in order to provide long-term solutions to the problems of minorities, which, in their opinion, are ultimately social problems.

(ii) impartial criteria

The model of impartiality is also guided by a desire to provide for the establishment of the market and its mechanisms, although this is to be achieved according to this model by making certain corrections in the market. Its principal interest is centred on the question which is the most appropriate neutral or impartial procedure for carrying out distribution, such that we can say that the distribution is just (Rawls 1978: 61 et seq.). It takes as given the coincidence of rationality and way of life amongst all those individuals who participate in the division of resources in the state operating under the rule of law. Rawls is the leading figure in the defence of this position (Rawls 1971).

Those who advance these criteria recognise social problems, but are not preoccupied by a desire to take account of democratic elements in the elaboration of the proposals, that is to say, to pay attention to the particularities of majorities and minorities. Their supporters imagine that the legal decision can be produced in a neutral, impartial process, behind the veil of ignorance, which means being ignorant of what there is. In reality what there includes a body of interests and proposals arising from the plural perspectives of those linked to these interests.

(iii) communicative criteria

The communicative model assumes that advantages can be achieved through modifications to the market mechanism made following the implantation of the social state operating under the rule of law. Notwithstanding that, however, it does not aim to realise large constructions linked to any particular formulation of the aims of society. It is principally occupied with proposing appropriate guidelines to encourage, by way of concrete activities, the inter-subjective coexistence of and communication between the different cultures which live together in Western countries. It holds that the legal procedures proper to the state operating under the rule of law encourage understanding between cultures through communication with the objective of consensus, a fundamental rule of such a state. In the pursuit of this objective, proposals made by the different fields of knowledge, both philosophical

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and scientific, have to be taken into account for each specific action. This position is defended by Habermas (1991: 168, 1993) and, in specific terms, by others who are grouped under the title of 'communitarian' thinkers.

From a practical point of view a problem in this position is that it does not formulate absolute criteria, as do the others. Thus it produces uncertainty in decision-making. Its advantage lies in the fact that in all cases it seeks the participation of all and gives attention to all aspects of the complexity of the situations which require decisions. In this respect it apparently satisfies both majorities and minorities.

(iv) precedence of criteria

In principle, in a democratic society, the choice of one of these criteria for a decision is a matter of indifference, depending on the convictions of those who take the decision. From a legal point of view, any of them can be justified in terms of the legal texts, with the first two criteria being more consistent with neutrality and the third more directly applicable to other cultures. All of them, notwithstanding, have to be considered as instruments directed towards the same aim, that is to say the achievement of justice. It behoves each of us to opt for one or the other, in the consciousness that the choice of one or of a combination of them implies that one of the earlier expressed legal criteria, that is to say security, formal equality, participation and dignity or cultural plurality, will take priority in the resultant activities.

Notwithstanding this, the practical consequences of the choice of a particular criterion, when dealing with the distribution of subsidies for the creation of public employment amongst applications from different Local Authorities, is that certain applications gain priority over others. As studies by the research group have shown, the consequence of using one option rather than another is a distinct ordering of the features which are noted in the documents drawn up for the different applications upon which a decision has to be taken and, therefore, totally different results with respect to that decision.

(c) the decisions

Currently the research group, using the procedure described above, is examining the decisions taken by INEM in 1993, 1994, 1995 and 1996 with respect to the creation of public employment on the basis of the selection of applications from Local Authorities in the province of Zaragoza. The group checks the criteria on which the decisions have been based and compares the results with those which might have

ensured had criteria from different policies, philosophies or doctrines of justice been used.

It is proposed to continue this work in the future, showing the results to the different authorities and institutions which take part in the decision-making process between 1995 and 1997. It is proposed further to adopt another object of study, namely the decisions taken by INEM in supporting training for unemployed individuals. Another objective of the research is to compare the experience of the province of Zaragoza with that of another province, in principle Valencia or of Guipuzcoa.

The inclusion in the study of decisions as to support for the training of unemployed individuals allows us to admit into consideration a central feature of a plural society in the process of change. This is the change in the training paradigm that is taking place in Spain, and indeed in all other countries at this time, both in vocational training and at University level.

Conclusion

In accordance with the guidelines of the communicative concept of law, this paper sets out to study the activities of the application of law by administrative bodies. These bodies are required to make their decisions in a form which is followed by other social agents, in accordance with the co-management and co-participation measures established by Spanish law in the last few years. This study shows that the research is related to the subject of recent sociological and philosophical discussion on the activities of jurists. Specifically, the research allows us develop the following aspects of the subject.

In the first place, and this is its clearest advantage, the research shows ways of allowing for participation in the decision-making process through the construction of procedures auxiliary to the distribution of subsidies by INEM, within the scope of the programme for the creation of public employment by Local Authorities in the province of Zaragoza.

This collaboration in the innovation of procedures has allowed for an in-depth study of decision-making at INEM, testing its degree of democratic legitimacy in the following aspects.

- (1) The degree of participation achieved in the elaboration of decisions by the institutions which collaborate in the decision-making process, namely, the Provincial Planning and Investment Co-ordination Committee, and the Provincial Executive

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Committee, made up of representatives from Central, Regional, Provincial and Local Government, and social agents from the Employers' Organisations and the Trade Unions.

(2) The criteria for the distribution of public funds as used in the decision-making process, which will be compared with those adopted in another INEM Head Office of similar characteristics to those of Zaragoza, either Valencia or San Sebastian.

(3) The social efficiency of these decisions, which will be tested through a consideration of the degree to which the subsidies granted are used by the Local Authorities in ways which advance the policies in pursuance of which they are granted, and the degree to which their use is followed up by the INEM office which has granted them.

Further, it will be possible to extend the study to include a consideration of one of the currently most important functions of the INEM. This is the distribution of funds for the training of the unemployed amongst the Collaborating Centres, mainly companies, Employers' Associations and Trade Unions, associated with INEM. It is noteworthy that this activity, like the other discussed earlier in this paper, is the subject of co-participation by the social agents. Appropriate adjustments will have to be made to the model designed on the basis of the Local Authority experience, so that it can be used in the INEM decision-taking process with respect to training for the unemployed.

Furthermore, these steps allow us to advance in academic areas such as, for example, the preparation of a monograph on the application of law by administrative bodies. This will enhance earlier studies on related matters, including the concept of law, the theory of law, the application of law by judicial bodies, and the use of legal texts as a professional activity carried out by jurists.

It is possible to construct models for the distribution of public funds in the areas of public employment and the reintegration of the unemployed by adapting their working practices and knowledge to the needs of the market. These models may be designed by reference to the different policies with regard to the market that are defended in a democratic society. This elaboration will give rise to proposals for specific criteria for the distribution of public funds in these areas, relying on real data. The social interest of this development resides in the fact that, notwithstanding the current relevance of the issues, there is in general a lack of such criteria for the division of funds when these are scarce, as they are today, when the so-called

welfare state is itself being questioned.

The perspective we have chosen to adopt allows for work of an inter-disciplinary and inter-institutional character, including both public and private institutions. It can be linked to such socio-legal themes as studies of legal activities, the legitimisation of democracy, and policies for the distribution of resources.

If we analyse the consequences of the extension of the research work from a practical, technical perspective with regard to the example studied, we see that we can also:

- (1) extend the use of the procedural aid model created by the research group for the distribution of public subsidies to promote the offer of public employment, already used by the Provincial Head Office of INEM in Zaragoza, to other Provincial Head Offices;
- (2) generate a procedural model to assist in the distribution of public subsidies to promote vocational training for the newly employed; and
- (3) expand the procedural aid models for the distribution of public subsidies developed during this research programme, for use by other institutions.

All this will provide the following political and economic benefits. First, it will increase the administrative efficiency of the institutions studied. Second, it will increase the level of transparency in the decision-making process. Third, it will increase the possibility of participation in the decision-making process by different social agents. Fourth, it will produce further economic benefits. These are difficult to quantify, but have been confirmed in practice by the INEM Head Office in Zaragoza. The practice of this office has markedly improved during the two years in which the model has been in operation, according to the civil servants who have worked with it.

This paper sets out to demonstrate that the communicative approach is the most appropriate for advancing the sociology of law. The communicative concept of law proposes, as a programme of study and action for the jurist, that he conducts just activities in relation to legal texts. The proposal to conduct just activities is related to: (i) the traditional activities of jurists such as the study of legal texts, the interpretation of the law, the application of the law, and the construction of dogmas and theories; and (ii) the democratic justification of those activities, that is to say,

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the consensus of the pluricultural ideas on justice held by the various different individuals who take part in legal activities. This thesis is demonstrated by the initial case-study of the distribution of public funds for the reduction of unemployment.

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