

Means and Methods for Documentation Used in Legislative Work

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Abstract

Law-making involves a complex process conditioned by complex realities, in which two aspects prove equally important and also interdependent - the aspect pertaining to social realities and the technical and formal aspect, pertaining to the elements on the structure of the enactment style and language of corporate and specific procedure for adoption. In this process, an essential role is played by documentation that allows the issue of value judgments in choosing the best solutions to be incorporated in the proposed regulation. Documentation, as an activity is not considered an end in itself, rather it creates prerequisites for a thorough understanding of social phenomena and relations which are to be subject to legal regulation.

Keywords: *law-making, documentation, empirical method, dogmatic method.*

Introduction

Before the expression of will, any law constitutes a reflection of a form of thinking. Depending on the quality of this thinking the law can produce, when applying it, positive or negative consequences, the subsequent social practice is what will validate or invalidate solutions enshrined therein.

The phase of determining solutions for future regulation appears thus extremely important and must leave normative construction that the law intervenes to meet a social need which requires scientific knowledge of reality.

The process of documentation refers to both the state of affairs as well as the state of consciousness, which embraces a wide range of facts and attitudes and concerns not only the present state, but also scientifically anticipates possible future effects.

1. Scientific Substantiation of Legislative Activity

The authorities involved in lawmaking should bear in mind that lawmaking involves foresight and responsibility. Thus, the preparation of laws would require methodic activities, a founding of laws on actual results of scientific research to prevent and exclude "routine empiricism"[1].

The necessity for scientific substantiation of legislative activity is currently determined firstly by the increasing complexity of life caused by the emergence of completely unique social relations. The rapid development of medical science, genetic experiments, "artificial intelligence", information flow and cosmic activity are just a few examples. A legislative intervention in such areas, unsupported by scientific evidence or insufficient research on the scope of such relations can produce socially dangerous effects.

In these conditions, knowledge of reality should be a serious scientific approach of interdisciplinary nature, accomplished on the basis of economic, sociological, psychological, criminological inquiry and prior studies, a scientific documentation and specialized research in the field in which a law is to be developed by involving specialists in those areas, of certain investigatory and analytical bodies, based on documentation done by experts, analyzing the laws of other countries, and last but not least the legislative tradition.

2. Documentation Activity – The Intrinsic Dimension of the Development and Enforcement of the Law

As an act of social decision, the law requires that in the preparation stage extensive documentation be done in order to allow an issuing of value judgments concerning the choice of the best solutions to be incorporated in the proposed regulation. The documentation activity cannot be considered an end in itself. It creates the prerequisites for a thorough understanding of phenomena and social relations that are to be legally regulated, providing relevant factors in choosing the corresponding solutions [2]. According to article 20 of Law 24/2000 on legislative technique "drafting legislation should be preceded, depending on the importance and complexity, by documentation and scientific analysis for a thorough understanding of economic and social realities that are to be regulated, the history of that part of legislation and of similar regulations in foreign countries, in particular those in the European Union".

From a strictly legal perspective, the documentation process is an intrinsic dimension of law enforcement. As part of this process, besides the establishment of facts, the interpretation of law and the application for issuing the act, the choice of the law [1] constitutes an independent stage. However, at the same time, documentation also involves the development process of the law, the goal of which is to acquire

general knowledge of future legal regulations, identify legislation in force which will possibly be repealed, adopt legal regulations in the new law or keep some existing regulations in force, either integrally or partially.

3. Means and Methods of Documentation. A Brief Presentation

Generally, if knowledge is based on documentary research that aims to gather all the human, sociological, philosophical, political, economic, social, historical and other forms of data about the problem which is to be the subject of scientific research, research of positive law or of current legislation aims to pool existing legal elements about the problem meant to be solved. Beyond the subject of scientific research, the performance of this research is subject to two intellectual endeavors: analysis of documentary material and its synthesis.

In the framework of research for documentary material, certain methods are used, most often, putting into question the empirical method and dogmatic method [3]. The empirical method involves using only empirical experience without resorting to a theoretical framework and consists of researching solutions that have already been delivered in identical situations by administrative courts by judicial authorities or other public authorities. On the other hand, the dogmatic or theoretical method is based on a general theory, with direct reference to the legal schools of thought, the history of law, comparative law, general principles, legal categories or other theoretical tools [3].

Usually, a new legal provision appears either to take the place of another which has become obsolete, or to fill a legal vacuum. Thus, in the eventuality of preparing a new law to first carry out an inventory of relevant national legislation. Making an legislative inventory cannot be limited to mere identification of names of laws, but should take the form of a background study aimed at considering both new regulatory issues and issues of existing normative acts in the area to be the object of new provisions.

The necessity to make an inventory and analyze legislation in the area to be regulated subsequently is necessary from several points of view: it helps determine the legislative shortcomings which require legislative intervention and oriented towards finding appropriate solutions, the current law plays the role of a social experiment; it helps determine the issues of the new regulation, by avoiding the creation of legislative holes; it helps legislative correlation, by offering the possibility

of resolving problems of the new legislation confronting current one; it determines the laws to be repealed, amended or completed; it helps systematize legislation by determining provisions to be concentrated in uniform regulations and avoiding duplication in regulation.

Within the framework of documentation, not only knowledge of national legislation is necessary, but also knowledge of the laws of other countries, which may be as useful as their legislative experience may provide some relevant factors in determining future regulatory solutions. However, this should not mean copying the legislation of other states, but should consist of a comprehensive study of comparative law. Simply copying provisions from other states, as certain institutions sometimes appear (e.g., the administering of another person's property and fiduciary contract), in our New Civil Code does not constitute an actual legislative activity because there is the risk that the way certain institutions are regulated in other states the right may not correspond to the environment where its implementation is desired which can lead to a lack of finality of certain rules [4].

In the contest of modern society, the study of comparative law is no longer a simple approach to foreign laws, but comparative law represents a philosophical and social science, which legislature cannot ignore. Thus, in the midst of diversity converge the fundamental principles common to the laws of the main countries. Sometimes, that is true, the same principles are developed differently and produce different effects, though these laws were introduced in the same period. Obviously, it is not about acquiring knowledge of all national legal systems, which is impossible, but the referral of essential mechanisms to understand the approach developed by these systems. This approach in particular is forced upon the legislator especially if we take into account the fact that today we are part of large communities that exceed national entities and which quite often just aim at close legal solutions. Thus, at EU level, the work to harmonize laws is often preceded by an analysis of comparative law which seeks to produce the solutions and techniques acquired in different Member States [5]. Currently, comparative law is considered as "the most appropriate and meaningful way to respond to each and every one of the requirements of first-order contributions in terms of work to create the law that modern law so desperately needs [6]".

Also, according to article 21 of Law 24/2000 "in the activity to obtain documentation for the base of a legal bill, the practices of the Constitutional Court in

that field will be examined, case law of the European Court of Human Rights, the judicial practice in applying the regulations and legal doctrine in the field". Therefore, besides analyzing legislation, an examination of the practice of the courts in this field is necessary. In litigation, courts acknowledge the existence in the content of certain laws of certain obscure, less explicit provisions or lack of regulations. For example, if there is something missing in the law, the case must be resolved nonetheless, and in such situations the judge calls on general principles, in time outlining a certain practice in that field, or, in the case of unclear and obscure regulations, to create a unitary practice throughout the proceedings to which those provisions, the High Court of Cassation and Justice issues decisions of principle in the resolution of appeals on points of law by showing the application of legal provisions and thereby directing the work of courts of law. Thus, in general, jurisprudence is an extremely important documentary source to develop new legal rules.

Another useful documentary source for the normative construction is legal doctrine. Firstly, it feeds the thinking of lawmakers by *law ferenda* proposals made subsequent to the critical analysis of the legal system. It is recommended that the lawmaker know the doctrinal views expressed on the subject matter of legislation in order to find the best legislative solution.

The literature [3] shows that in documentary research, as a rule, classical documentation is usually used or, more recently, computer documentation, or the two combined.

Firstly, the researcher that uses traditional documentary research should determine the scope of documentation, i.e. to establish whether to investigate legislation in a particular field, case law, administrative authorities or practice of legal doctrine or all of these at once. Then, he will move on to the discovery of documentary sources (directories, catalogs, bibliographic files, etc.) to identify materials that will form the subject of the documentation. After the identification of sources, there is the extraction of legislative texts, of judicial and administrative solutions, conclusions and proposals made by legal doctrine, useful for drafting the law bill or of other regulations. Subsequent to the analysis performed on the documentary material there is a synthesis operation, which ultimately leads to finding the most important principles, concepts, notions and legal solutions that will shape the new legal regulations. Among all this documentation, an irreplaceable instrument for any person who performs a public function is the Romanian Law Directory,

published annually by the Legislative Council, legal and administrative documentation instrument that helps identify any enactment of legislation in Romania, issued by the public central authorities [7].

Nowadays, classical documentation tends to be taken for electronic documentation. The databases include various, legal information, which are interconnected creating national, regional or international computer networks. The computer has become indispensable in current society in the legislative work "the right, by using the computer as valuable auxiliary documentation, to draft laws and repetitive decisions" [8]. However, the role of information technology in developing legal rules should not be generalized as artificial intelligence will never be capable to replace the reflective capacity for and the study of specific legislative work.

Conclusions

Documentation must involve not just a thorough knowledge of the legislative, jurisprudential or doctrinal "starting point", but also the discourse of people, their grievances, claims and ideals. This obedience only brings an advantage in creating the rule, the lawmaker must always bear in mind that the recipient of the law is the human person, and the purpose of the legal norm should be to ensure individual rights, freedoms and the "common good".

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