LEGISLATIVE TECHNIQUE (FORMAL LEGISTICS) - AUXILIARY BRANCH OF LAW. FUNDAMENTAL ELEMENTS OF CONSTITUTIONAL LAW

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Abstract:
The legislative technique or formal legistics is the art of making laws; it represents a part of the legislative science which has as object the enforcement of the options of the legislative policy and consists not only in the drafting of the text of the law or more generally in its organization, but also in the choice and coordination of the phrasing of the rule of law and the technical procedures to achieve it. The issue of drafting legislative acts has been particularly important in the last two centuries, as a result of social development, increasing complexity and volume of inter- and intra-social contacts, legal thinking begins to address the theoretical side of the legislative process but we must not forget that one of the indisputable legacies of Roman law is the creation of the legal alphabet and progress in the field of legal technology.
Keywords: *legislative technique; the rule of law; legislative policy; the legislative process; the legal order.*

Legislative technique - conceptual and introductory elements

The legislative technique also known as "Formal Legistics" is a leading field of legal science. Through the legal regulation of the procedure for drafting legislative acts which becomes common, among the countries that impose it, including Romania, the discipline is transformed from a collection of recommendations and advice for legislators, into a real branch of law: the law of drafting legislation.[1]

The issue of drafting legislative acts[2] has been particularly important in the last two centuries, as a result of social development, increasing complexity and volume of inter- and intra-social contacts, legal thinking begins to address the theoretical side of the legislative process but we must not forget that one of the indisputable legacies of Roman law is the creation of the legal alphabet[3] and progress in the field of legal technology.

If they did not leave a cohesive scientific theory of drafting law, the elaborate techniques of Roman law, the precision and clarity of definitions, the logic and consistency of legal thought, all these prove and bear witness to the great art of Rome's

jurisprudents. This made such constructions able to go withstand time, to be appropriated, over thousands of years, by any legislator.

Doctrine and legal thinking begin to deal with the theoretical side of the legislative process, starting with the 19th century. The main issue that arose was whether law is a "given" outside of any human drafting or is "constructed" by man.

Legislative technique - a branch of legal science

Thus the thinking of the historical school of law[4] recognizes the existence, under the name of legal technique, of a scientific drafting of law that is distinct from the "political element" of creation, by which he understood the spontaneous creation of law in the deep layers of popular spirit.

The classical expression of the distinction between “given" and “constructed" - “le donné" and “le construit", a new orientation of the science of law is found at the beginning of the 20th century. In the work *Méthode d'interprétation et sources en droit privé positif*, the author[5] overturns the old method of interpretation that dominated both the doctrine and jurisprudence of the 19th century, a method known as the "exegetic school" or "exegetic method", consisting in overburdening the virtues of the law, in the religious aspect of the texts. He replaces this method with the scientific method.

Furthermore among the elements of the "given" of the law the following must be taken into account: the real conditions, the historical conditions, the rational conditions and the conditions elements which coincide with the fundamental elements of the configuration of law.

Also in this theory[6], rational data constitute a kind of "transposing law" - natural law - which is also included, along with "positive law", in the composition of law.

The "given" remains the essential basis of positive law[7], it brings us the "rule", the "principle". However, it is sometimes vague, of a moral nature, being too abstract in relation to tangible realities, it must be implemented with the help of technique. What characterises the legal technique is the artifice that operates on things, shaping them by a series of means, adapted to all the purposes of law, means which are practically inexhaustible, coming from all the sources of the ingenuity of the human mind and being necessary for law to achieve its final goal, and perfect, insofar as they will allow the goal

to be achieved as fast, as completely and as economically as possible.

This doctrine has exerted an enormous influence on the theory of law, being embraced and critically supplemented by many theorists of law. There have also been authors interested in the creative role of the legal technique in Romanian law, who have developed a theory of eventual rights, a new legal category, which enriched the traditional classification of legal acts into pure and simple and conditional, which was considered insufficient and restrictive.[8]

However, there are objections to this doctrine which conceives the elaboration of the "constructed" law on the basis of the real, historical, rational and ideal "given" in the sense that some authors do not agree that this would be a simple technical work but consider that, in reality, there can be no legislation without selection. From the complex set of rules that can be adopted, the one which best corresponds to one of the following values: legal security, justice and fairness, social progress, must be selected, based on a value criterion.[9]

As far as the unity of scientific and technical action in the process of drafting legislative acts is concerned, within it, the scientific operations ensure the essential framework of rationality which prevents the voluntarism of creation, the lawmaker's subjective intervention, not founded on knowledge. Legislative activity[10] should be seen only as a whole, without a rift between the two concerns: scientific and technical, although science investigates the social environment that requires the intervention of the lawmaker, and technology determines the ways in which intervention becomes possible through direct action of the lawmaker.

Legistics or legislative science constitutes the set of methods, techniques, procedures for the material or formal expression of ideas that need legislative reflection in appropriate forms.[11]

The drafting of laws is carried out respecting certain procedures and methods, as well as certain principles which must respond as precisely as possible to the requirements of a concise, clear, coherent scientific regulation.

The principles, methods and procedures used in the process of drafting legislative acts constitute the legislative technique, which ensures the systematization, unification and coordination of the legislation, as well as the adequate content and legal form for

each normative act.[12] In the Western specialised literature[13], the term formal legistics is preferred. *The legislative technique[*14] or otherwise known as *formal legistics* is part of the legislative science or legistics, a term more commonly used in the West.

Another definition of formal legistics is that it represents “the research of the procedures, rules and formulas aimed at a correct drafting and a better understanding of legislative texts and which seeks to achieve this goal through harmony, clarity and rejection of unfounded differences.[15]

At important scientific events, formal legistics or legislative technique was defined as that science that analyses the communication system and provides the principles meant to improve the knowledge of legislative texts.

An important work of Romanian law[16] examines some of the prominent personalities who, over time, in one form or another, have brought into discussion the issue of law development, its principles and the issue it raises - the "legislative technique" or "formal legistics".

The study states that “the norms of social life must be scientifically translated into precise formulas, which would subject the complex reality of social life to that discipline of logic and clarity which is the science of law.

In the same opinion, the precise knowledge of the superior principles of law and their enforcement in the lawmaking activity belongs to the legislative technique.

Another seminal work[17] also specified that the activity of legal regulation necessarily implies a precise definition of all the elements of this regulation. Aiming to guide people's conduct, prescribing certain behaviours, prohibiting others, establishing rights and obligations, determining legal statutes, capacities, spheres of competence, establishing sanctions, legal regulations must operate precisely, to restrict as much as possible the sphere of indeterminacy. Defining the concepts with which it operates is, as such, a condition for the effectiveness of these regulations.

Regarding the drafting of legislative texts, many authors consider this not only a science, but an art.[18] Even though states can learn from each other's experience, each ultimately evaluates its own legislative system, given only the way in which it would work best. Studies of comparative legislation, detailed and updated, give a broad picture of the status of the legislative technique at a global level, without neglecting the contribution of

technical achievements in this field, computer science in general and the Internet in particular. And, last but not least, the studies referring to the legislative language, to the publicity of the legislative acts, to the republication and rectification which represent an absolute novelty in the matter, in the Romanian law.

Elements of constitutional law in legislative technique

Drafting law[19] is a difficult process, in which the drafts of legislative acts must bear the imprint of a scientific activity, so that the envisioned regulation is suitable to the political, social, economic, cultural changes that have appeared in the field subject to regulation. From this perspective, the purpose of the new legislative act is to eliminate all the dysfunctions of the old regulation and to introduce adequate provisions for the social relations under consideration.

The determining criterion in choosing the form of the legislative act is the acts for establishing the competencies provided in the Constitution, laws, ordinances and even decisions of the Government, for the bodies subordinated to it.

Determining the category of the legislative act in which the new regulation is to be made is important from a practical point of view. Correlating the new legislative act with the existing ones depends on it, especially regarding the fact that through that new act it is possible to modify, complete or abrogate, or not, a certain regulation in force.

As far as the discussions related to the possibility of amending an organic law by an ordinary law are concerned, where the former does not include regulations in the field of organic laws, the majority opinion of specialists is that an ordinary law provision contained in an organic law cannot be amended by an ordinary law.

The issue of repealing a legislative act by another having a legal form equal or superior to that of the legislative act to be repealed is equally simple, the cases in which a decision of the Government is abrogated by law being frequent.

The constitution establishes the competence of the Parliament to draft laws, as well as the fact that the Government issues acts in the execution of the law, in an adequate manner.

The difference from other legislative systems, such as the French one, which achieves the limiting enumeration, through the Constitution, of the fields that are reserved

for legislation, is evident.

Most authors[20] agree that, while the decision represents the original legislative competence of the Government, which involves the elaboration of legislative acts for the execution of laws, the ordinance is not limited only to the aspects related to the enforcement of laws. Compared to decisions that can be elaborated only secundum legem, in the case of ordinances, the government goes beyond the scope of the decision in the executive field, entering the field of primary regulation.

The Constitution expressly regulates the regime of legislative delegation, the issues related to the content of issued documents and the procedure for issuing them. The provisions of the article make a distinction between two categories of ordinances: ordinary, simple ordinances and emergency ordinances, with different issuance procedures and natures.

Legislative policy or material legistics[21] has the creation of the aims and means of a legislative action, by discerning what is desirable from what is possible as object.

Material legistics refers to the system of action which legislation represents. It divides the legislative process into several phases and provides methodological recommendations to improve the effectiveness of the law.

The legislative technique or formal legistics is the art of making laws; it represents a part of the legislative science which has as object the enforcement of the options of the legislative policy and consists not only in the drafting of the text of the law or more generally in its organization, but also in the choice and coordination of the phrasing of the rule of law and the technical procedures to achieve it.

The norms of legislative technique define the constituent parts of the legislative act, the structure, form and manner of systematizing its content, the technical procedures for amending, supplementing, repealing, publishing and republishing legislative acts, as well as the language and style of the legislative act.

Conclusions

In principle, the best way to prepare a legislative text is an activity that takes place in two phases: the drafting of legislative policies and the phrasing of the text - the drafting of legislative acts.

This task falls to specialist in drafting laws, who are generally officials with legal studies. Drafting laws requires the systematic and often very thorough use of specific qualities of analysis and wording. The main task of editors is to transpose a specific policy into a coherent set of rules.

In countries of Roman-Germanic tradition, the drafting of laws is generally the responsibility of officials with senior administrative tasks in the competent ministries.

In most Central and Eastern European countries, which are also part of the family of Roman-German law, the drafting of laws is generally entrusted to a working group in the competent ministry.

In the Anglo-Saxon tradition, the drafting of laws is dissociated from the drawing up of legislative policies.

Thus, a body of lawyers at a Government level is tasked with drafting the text of the law, in order to follow the detailed instructions of those responsible for drawing up legislative policies in the competent ministry. The text of the law is established by these specialized editors, but within a process of concentration, those responsible for policy making continue to contribute to substantive issues, through precise opinions on the policy to be followed.

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