European Journal of Science and Theology, December 2012, Vol.8, No.4, 75-84

SCIENCE AND TECHNIQUE IN THE JURIDICAL FIELD
CANONICAL IMPLICATIONS OF THE PROCESS OF WRITING LAW

Anca-Lelia Lorincz*

Police Academy 'Alexandru Ioan Cuza', Aleea Privighetorilor nr.1A, sect.1, cod 014031, Bucharest, Romania

(Received 7 November 2011)

Abstract

Social life – the result of mutual interactions between individuals – needs to take place within a framework that is organised and regulated through a system of social norms, including: religious norms, moral norms, common norms, technical norms, political norms, juridical norms. Just like the role both science and technique play in all fields, besides in-depth awareness of the reality undergoing regulation (scientific substantiation), the rules, methods, procedures used in the process of developing the law are of special relevance in the juridical field, as they would need to converge towards meeting requirements imposed by the need to ensure efficient juridical regulations (legislative technique). In this line of thinking, all implications of religious, moral and social nature of the new regulation need to be considered.

Keywords: social order, religious norms, juridical norms, legislative technique, the new Criminal Code of Law

1. Introduction. Juridical order – the core of social order

"Ubi societas, ibi jus" – where there is society, there is law. The cohabitation of individuals, their inter-relating within the framework of social life implies the existence of law, as a set of rules of behaviour that are instituted and guaranteed by the public power. By regulating the social life and social relationships using juridical rules, the juridical order that the society needs in order to function is achieved.

The juridical order – the law, that is – as a set of juridical norms is the most expressive, accurate and certain form of training and shaping the social life [1].

* E-mail: lelia.lorincz@gmail.com, phone: +21317.55.23/17301

The existence of such juridical order – as a core of the social order – is ensured both through the process of creating, and through the process of realising law. In other words, the activity of developing juridical norms is not a purpose per se, as it is not sufficient for instituting juridical order; the process of creating law only justifies its existence by the translation into reality of the provisions contained in the juridical norms – by the process of realising law. In turn, the process of realising law, which occurs either by willingly abiding by the legal provisions (compliance), or by intervention of the state's structures in charge, implies itself a number of activities, such as interpreting the juridical norms, drafting jurisdictional documents (for instance, in terms of criminal matter, the court decisions through which the sanctions stipulated in the criminal incrimination norms are to be applied), etc.

All these activities (both the activity of creating law, and the activities that ensure realisation of the law) imply a theoretical side (scientific knowledge) and a technical side (procedures, means, methods). Only by combining the two sides, the requirements of the social life will be reflected in the specific form of the legal regulations and met through the implementation of such regulations.

Thus, the moment the juridical thinking became concerned with the theoretical side of the law (about two hundred years ago), the question arose whether law is a spontaneous product, outside the human conscious activity, or an artificial creation of humans. Fr. K. Savigny, representative of the historical school of law (in his work, '*Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*', 1814-1815), distinguishes between artificial and spontaneous elements in the law; that is, between the scientific drafting of law – which he calls the 'technical element' of the law, and the spontaneous creation of the law, in the deep layers of the 'popular spirit' – which he calls the 'political element' of the law. In Savigny's view, through the 'technical element' of law creation (scientific drafting), the legal people bring their creative contribution to the spontaneous emergence of law within the nation.

Towards the end of the past century, Rudolf von Ihering (in his work '*Geist des römischen Rechts auf verschiedenen Stufen seiner Entwicklung*', 1883 -1898) talks about the concept of juridical technique (which he also calls the juridical method, or art), which he defines as the sum of procedures meant to ensure 'formal achievability of the law'.

2. Science and technique in law

At the beginning of our century, François Gény (in his work, '*Science et technique en droit privé positif* ', issued in four volumes, between 1913-1924) has provided an in-depth analysis of the science (theory)-technique ratio in law, based on the distinction between two concepts: 'given' and 'built'. In Gény's view, something is 'given' when it exists as an object outside the human productive activity, and it is 'built' when it is human made; once realised, the 'built' becomes 'given' for everyone, including its creator. The human attitude towards what is 'given' is to know through Science; in relation to the 'built', the

man is the builder, through art or technique. Scientific knowledge tends to grasp reality as accurately as possible, exactly as it is, while human construction, through art or technique, arrives to new things that do not exist in reality. The field of the 'built', in Gény's opinion, also includes customs, the social and political order – and therefore, in conclusion, the state itself is 'built'. As these concepts are applied to the juridical field, the question arises, whether the law is 'given' or 'built', whether it is an object for Science or a technical creation.

Gény deems that, in terms of its historical evolution, the law is 'given', it is an object of scientific research, while in terms of its drafting, positive law requires 'construction', so, in this sense, the juridical regulations are the work of technique. The content of the law (the 'given'), the way it is determined by the economic, social, moral conditions etc. of the society, needs to be 'built' using juridical technique. Assuming that the concept of 'given' corresponds to the notion of natural law, Gény distinguishes between the precepts of natural law, which he calls 'syntheses of reality', and the concepts, the artifices through which this reality is shaped, which he calls 'intellectual procedures of the technique of law' [2]. The 'given' in law consists of a fund of moral and economic truths which, confronted with the facts, determine specific directions, the object of which gravitates around the idea of 'objective justice', represented as a balance of interests; thus, the 'given' is the foundation of positive law. Since it is abstract in relation to reality, the 'given' needs to be exteriorised, implemented, using technique; the juridical technique that consists of action rather than knowledge uses certain artifices, procedures that operate on and shape realities. In order to regulate realities from a juridical point of view, intelligence must intervene and make them accessible to human spirit [2, p. 204].

Imperative through its content, the law requires systematisation and accuracy that can be provided by the 'intellectual procedures of technique'; thus, juridical technique produces the "mediation that is needed between the schematic precepts of our matter and the concrete life of humanity" [2, p. 193].

Paul Roubier takes Gény's view and develops it in a critical perspective, as he does not agree with the idea of the 'built' law being developed from the 'given' simply through a technical feat. In Roubier's view, drafting of the law, legislating, also implies a selective process based on a criterion of value; from the whole range of rules that could be passed, a selection needs to be made to include the ones that do the best service to protecting juridical security, justice and equity, social progress [3].

Our juridical literature too contains views promoting that the shift from 'given' to 'built', from indicative to imperative is not achieved solely through knowledge, but also by performing certain assessment operations that would shape the legislative solutions about to be passed. Moving from law configuration elements ('given') to law ('built'), from reflecting reality to regulating happens through an activity of building, a juridical activity of normative shaping that is not only an action of knowing, but also one of assessment, choice and decision [4].

The idea of distinguishing between 'given' and 'built' in law was also supported by Jean Dabin [5], who adds that the 'built' part in positive law has a very wide scope; laws, case law, common law – as formal sources of law – are the result of this construction (as the law is built by the legislator, case law is built by courts, and common law by the people). The 'given' is the foundation of the juridical construction, as it is a precursor reality that takes the form of 'natural law', 'rational law' or 'trans-positive law'.

Dabin deems that, "whatever the way in which law is formed or formulated, it has no value from a scientific point of view, other than through the sum of juridical reason it contains" [5, p. 137]. In other words, juridical creation is a work of reason, through which the facts, the social relations, all the realities that have to do with the social order are assessed.

Therefore, irrespective of the approach we take on the relation between science and technique in law, or the weight that some authors give to scientific or technical operations within the process of juridical creation, the juridical literature has consecrated this distinction, so that the Science is the one that investigates on the social environment requiring a certain juridical regulation, while technique determines the modalities through which such regulation is to be built and translated into reality.

While noting the distinction between theory (science) and technique in law, however, there is no need to make it absolute; on the contrary, a unity of scientific and technical action should be achieved [6], unity in which scientific operations would provide the necessary framework of rationalism that prevents the legislator's voluntarism and subjective intervention, while technique would project behaviour models in relation to the categories of subjects participating in juridical relations and in connection to the categories of social values that would be protected through specific juridical means. On the other hand, the distinction between science and technique in the juridical field is relative in nature, because juridical technique is also a field of juridical sciences; even though it deals with the form, with the means and procedures for ensuring the result, juridical technique also implies a scientific activity; it implies knowing, analysing and improving these procedures and the way in which they are used.

In conclusion, we can define ***juridical technique*** as being the whole set of procedures, means, operations, etc. through which the demands of social life take juridical form, receive expression in the content of juridical norms and then become realised through implementation of these norms.

Juridical technique represents all the procedures used in the juridical field (in drafting, realising, implementing law).

3. The concept of legislative technique

The concept of juridical technique should not be mistaken for legislative technique, ***Legislative technique*** is merely a part of juridical technique – actually, it is the juridical technique of law drafting.

The concept of juridical technique has a wider scope than that of legislative technique; it includes the technique applicable in other juridical fields as well – for instance, there is a technique of interpreting juridical norms, a technique of juridical classification etc.

Some authors mistake legislative technique for juridical technique and make no distinction whatsoever between these two notions. Thus, I. Mrejeru [7] deems that D. Mazilu shows a tendency towards expanding the concept of legislative technique, by including procedures used in interpreting and implementing law. In reality, D. Mazilu [8] does not speak about legislative technique, but about juridical technique in general, therefore it is natural that it includes implementation, not only drafting of the law.

Doctrine assigns two senses to the concept of legislative technique: *lato sensu*, legislative technique is the body of methods, means, procedures used during the entire legislative activity, both in developing solutions of the essence of regulating, and in expressing such solutions in the text of normative documents; *stricto sensu*, legislative technique is the set of procedures, operations, artifices used to express the will of the legislator in the text of normative documents.

Thus, some authors have extended the scope of the legislative technique notion and defined it as "the set of methods and procedures used in the activity of developing drafts of laws and other normative documents, which help in determining legislative solutions selected in a well-thought-out manner, according to the social demand, and at the same time, in how such [solutions] are expressed in texts drafted accordingly" [7, p. 29]; or as a "complex of methods and procedures meant to ensure appropriate form of the content (substance) of juridical regulations", based on a "synthesis of past experiences of social life actors, filtered from the perspective of the legislator's value judgements" [6, p. 221]; or as the sum of "principles, methods and procedures used in the process of drafting normative documents" [9].

Other authors (Rudolf von Ihering, in his work '*Geist des römischen Rechts auf verschiedenen Stufen seiner Entwicklung*', 1898) have curtailed the meaning of the notion of legislative technique to comprise the sum of procedures through which 'formal achievability' of the law needs to be ensured.

The explanation for the existence of the two meanings of the notion of legislative technique could be given by J. Dabin's distinction [10] between 'material technique' – that has to do with the essence, the content of juridical regulations, and 'formal' or 'proper technique' – referring to the specific technical procedures (technical installation) through which applicability of the solutions of essence of the juridical regulation in actual social life is ensured.

Thus, the authors that preferred the wider sense of the concept of legislative technique do not make this distinction between material and formal technique, while the others do – and they only retain the formal side of legislative technique as being the proper legislative technique. In this latter view, legislative technique is curtailed to the procedures and artifices through which essence solutions become practical and can be inserted into the social life, while

issues pertaining to organisation and procedure of drafting and issuing normative documents are deemed as existing outside the sphere of the proper legislative technique (although in a connected field) and indicated through notions such as organisation and procedure of legislating [4, p. 199]. A similar classification of the legislative technique can be found in other authors as well [11], who distinguish between 'external legislative technique' – the way in which the law is developed, the procedure that the legislator follows and the passing of the law – and the 'internal legislative technique', meaning the actual technical procedures.

The same line of curtailing the meaning of the concept of legislative technique down to formal aspects includes other authors as well, who use the notion of 'formal legistics' to indicate the sum of "rules and equations that concentrate the essential issues raised by the conception, presentation and drafting of legislative texts, as well as the regulations regarding the coming into force, amending or abrogation of such texts" [12], or the sum of "technical means used by the legislator to translate the material prepared for regulation into the form and language of the law" [13].

Whatever the meaning (wider or narrower) we choose to give to the notion of legislative technique, we cannot overlook the fact that the process of drafting the law requires the existence of both a material, substantial side (of finding the best content solutions for the future regulation), and a formal side (of building and expressing these substance solutions into the juridical robe of the normative documents), with both sides requiring from the legislator both a scientific and a technical activity (in terms of applying certain rules).

Tackling on *legislative technique aspects*, therefore, means to tackle on rules and procedures that have to do with the activity of preparing and developing drafts of normative documents; passing, amending, complementing, abrogation of normative documents, as well as rules regarding drafting, logic, language, style, conceptualisation procedures and requirements regarding the structure and systematisation of normative documents.

4. The role of legislative technique in the process of developing law

Same as with the role that both science and technique play in the juridical field in general, the theoretical and technical aspects come together in the process of developing law as well; therefore, we can speak about a phase of 'scientific development' and a phase of 'technical development'. In the first phase, the essence of the regulation is grasped, the solutions of the future regulation are determined by extracting them from the social reality and demand; and in the second phase, these solutions are transposed into the text of the normative document, by applying a set of technical procedures. This distinction (signalled as early as F. Gény) is not absolute, however; demarcation between the two phases is merely conventional, since the formation of law needs to be seen as a sole, unitary process that starts with the first social impulses requiring legislative intervention, continuing with identification of the essence solutions of

the regulation, and materialisation of these solutions by drafting normative documents that are going to go through promulgation procedures.

The legislation of a state is a system within which the individual normative documents do not simply co-exist, but they are inter-determining each other, they correlate with each other, first at the level of juridical institutions and branches, and finally at the level of national law. That is why, when developing a normative document, the legislator needs to take into consideration the existence of these correlations, consider all the implications of a new regulation, the subsequent normative amendments, the fields affected by a new normative solution being passed, and the potential conflicts between regulations [6, p. 227].

The normal functioning of the legislative system depends on the correlation and harmony between its components, new and existing regulations, special and general regulations.

Making an inventory of the legislation in force also implies ascertaining its gaps, so that the new regulation covers the existing legislative gaps or disparities. Verification of the legislation in force in terms of its social efficiency offers a possibility for the new regulation to take on the positive aspects, the solutions that life has validated as being in agreement with the social demands and, at the same time, to replace the solutions that no longer match the new social reality. From this point of view, it has been said that legislative technique has a creative role, as it is there to offer the legislator solutions for adapting the juridical regulations and institutions to new social needs, with a view to better satisfying practical social interests and facilitating juridical progress [14].

The scientific substantiation of a legislative draft must include, among others, anticipation of the effects of the new regulations. Especially in criminal matter, insufficient scientific substantiation of the normative act may result in precarious juridical solutions that are built on a fake image of the social effects of the respective regulation. For instance, the new Criminal Code of Law disincriminates prostitution by no longer incriminating the deed of the person practising prostitution, but only that of the person pushing to or facilitating prostitution or gaining patrimonial benefits from such practice (procurement – art. 213 new Criminal Code of Law). The new Criminal Code of Law was passed through Law no. 286/2009, published in the Official Gazette, no. 510/24 July 2009; according to art. 446 of Law no. 286/2009, this Code comes into force on the date that will be established in the Code's implementation law; within 12 months from the date when this Code was published in the Official Gazette of Romania, the Government will submit the draft Criminal Code implementation law to the Parliament for approval.

Prostitution is a form of physical and moral degradation of women, in which the woman is deemed to be an object of pleasure; such situation is condemned by the Church, which sees the woman as being equal to the man in front of God and the society. In other words, prostitution is an attack to both the moral health of a nation and the physical, moral and spiritual integrity of the person [15].

Apostle Paul says, "Flee from sexual immorality. All other sins a person commits are outside the body, but whoever sins sexually, sins against their own body. Do you not know that your bodies are temples of the Holy Spirit, who is in you, whom you have received from God? You are not your own; you were bought at a price. Therefore honour God with your bodies." (I Corinthians 6.18-20).

It is true that, most of the times, the person practising prostitution is a victim of traffic in human beings, but disincrimination of this deed will not lead to a diminution or to the eradication of the phenomenon of non-institutionalised prostitution (assuming that the intent – based on financial reasons – is to institutionalise the activity with a view to taxing it); rather, it would merely promote a situation that is abnormal, clearly immoral and against the religious norms to become the law.

Therefore, disincrimination of the prostitution will have negative social effects.

On the other hand, the new Criminal Code of Law incriminates some new deeds; for instance, Chapter III in Title VIII, Special Section ('Crimes affecting relationships that have to do with social cohabitation') provides for deeds that bring prejudice to the religious freedom and to the respect owed to deceased persons. Thus, considering the texts in force at the present time, the new Criminal Code of Law incriminates new criminal deeds that have been signalled lately, such as profanation of religious places or objects (art. 382). Other legislations include similar regulations: the German Criminal Code of Law (§ 166-167), the Austrian Criminal Code of Law (§ 188-189), the Spanish Criminal Code of Law (§ 522-524), the Portuguese Criminal Code of Law (art. 251-252), the Swiss Criminal Code of Law (art. 261), the Norwegian Criminal Code of Law (§ 142) (presentation of arguments to the new Criminal Code, www.minjust.ro).

Therefore, the process of writing normative documents should take into consideration all the social, moral and – last, but not least – religious implications of the new regulations.

We were noting that the legislation of a country is a system; however, we cannot overlook the fact that, in turn, national systems are grouped into large juridical systems (or families of law). Making an inventory of the legislation in force also requires looking at the legislation in other countries in the matter to be regulated, by conducting comparative law research that requires looking into several legislations regarding a specific juridical institution and comparing them using a specific method. Such comparative law studies also aim at highlighting the practical results that other countries have obtained by applying certain regulations. For instance, by incriminating certain deeds, the legislator needs to look at the efficiency that such regulation has produced in terms of putting a stop to the criminal phenomenon in other countries.

Consideration of elements of comparative law implies that each side of the comparison is considered within the social, political, cultural and juridical context it originates from. At the same time, a specific moment of reference

needs to exist when assessing regulations from different legislations, also taking into account the historical development and the nuances that the respective regulations have taken in time, in the process of their implementation.

Foreign legal systems may be considered first, with the object of preparing the international unification of law, secondly, with the object of giving adequate legal effect to a social change shared by the foreign country with one's own country, and thirdly, with the object of promoting at home a social change witch foreign law is designed either to express or to produce [16].

The comparison is more efficient when carried out within the same system of law, which works with the same juridical view or mentality and with similar regulations. The juridical map of the world does not overlap the geographical map; depending on their common origin, the similar structure of the system of law sources, the presence of common juridical institutions, etc., the following large law families or systems have taken shape [13, p. 34]: Roman-Germanic law, Anglo-Saxon law ('common – law'), socialist law, and the large group of religious and traditional systems (Muslim law, Hindu law, Rabbinic law, etc.).

Aspects of legislative technique can be found in the big Roman-Germanic law system, where the written law is the main source of law. In other systems of law, where the main source of law is either judiciary practice (in Anglo-Saxon law), or specific sacred books (in the religious and traditional systems), legislative technique is no longer considered – or not to any significant extent (for instance, in Anglo-Saxon law, especially in the United States of America, where the written law, under the name of 'statute law', has a clear place alongside subsystems like 'common law' and 'equity') [13, p. 15].

5. Conclusions

Within the present context, where economic development and social balance depend on legislative stability, it is necessary that the purpose of the legislating process be to develop and pass laws that respond to the demands of the society and which do not need amending or complementing, except to the extent to which such demands change. In order to preserve the authority of the law, legal provisions should be modified, complemented or cancelled not in order to cover the deficiencies of legislative activity, but only with a view to adapting such provisions to the dynamics of life, by taking into consideration all the social, moral and canonical implications of the new regulation. Thus, the subject of legislative technique is of interest not only from a theoretical point of view, but also in terms of practical consequences.

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