BRIEF CONSIDERATIONS ON ESTABLISHING OBJECTIVES IN LAW-MAKING

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Abstract
Society is quickly developing, but this process warrants the appearance of new laws, thereby putting the lawmaker under the pressure of regulating ever more diverse social aspects such as economic, political, cultural or ideological. The fast changes in society lead to shifts in social relations and even institutional modifications, which require regularization.
Establishing objectives in law-making involves the participation not only of jurists specialized in this field but also defines a broader outlook including significant interventions from the political class. The law is the product of a compromise between the various political tendencies which clash in order to obtain a parliamentary majority. Starting with these main points, the present article seeks to stress the relation between legal policy, law-making policy, the legislative programme as well as the role of public policies in law-making.

Keywords: *law-making, legal policy, law-making policy, the legislative programme, public policies.*

Introduction

Law-making has been a constant topic for debates of a doctrinal nature and a field of continuous study for political and legal sciences, because it constantly poses new and complex questions. This same subject is always tackled for a different reason or seen from different points of view, therefore making it of permanent interest.

The literature presents law-making as a complex activity of the legislative bodies of the state. Through a series of scientific methods, they discover the social realities that require regulation, which they do afterwards, by using specific rules, and which they adopt in the form of a law, in accordance with a preset procedure.

However, at present, within our own legal system, the law and law-making are going through a difficult period, a time of crisis created firstly by neglecting to follow the essential rules of a sound legislation – a good knowledge of social realities and the reality reflected in the content of the law. By having an unsound foundation, neglecting the social realities and imposing his own realities, the lawmaker creates an unstable, incomplete law, over-technical and quite often impractical.

In this context, it has become necessary to reclaim the specific and essential qualities of the law, which it has lacked for so long. For this precise reason, in our present study we seek to analyse the principles to which the lawmaker must adhere in his activity. This must be scientifically grounded, in the sense that, it must determine first of all the necessity and purpose of the law.

1. The role of politics in establishing the legislative objectives

In establishing the objectives of law-making involves the participation of more than jurists specialised in this field. Its scope is larger, including the politicians as well.

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In principle, it is the politicians who make the law[1]. In current society, the law is the result of a compromise between the various political tendencies which clash to form the parliamentary majority. In these conditions, the relation between law and politics appears extremely complex, given the tendency of the political authority to use the law for its own ends and that of the state to limit their authority. Although the political class is subject to the law, this only partially resolves the matter of that the law depends on the priorities of the political party or parties in power. This is made clear by the fact that only a part of the political institutions are sufficiently regulated.

Law-making does not represent a spontaneous activity which randomly comes about. On the contrary, it is a conscious, well organised activity, the purposes of which correspond to certain well established political goals. It consists of building a system of socially recognised legal norms, which have certainly been influenced by cognitive, informational, axiological factors. Therefore, law-making is integrated in the political system governing society[2].

The act of governing represents a social process that takes place in a social-organisational framework, the structure of which is built to fulfill certain objectives. This government is political in essence because of its objectives and is defined as the line of action (the direction, the principle) and the forms of putting these into practice (the political dimension of the action), carried out in an, organised and structured framework[3].

The literature[4] has shown that "this definition is perfectly applicable in legal policy, since the objectives of law-making is to assimilate the political ones and since the notion of objectives is common to all organisations and its members. Objectives represent a defining element of any organised system by which the desiderata, meaning the desired purposes which must be attained in a certain period, are outlined"[5].

Therefore, the concepts of "legal policy", "juridical policy" and "legislative programmes" are part of the political system governing society, and the way in which legal policy is understood depends on the evolution of the legal system.

Legal policy is made up of all the guiding ideas that determine the direction of the law in the process of its development and practice, ideas which are integrated in the system of political concepts within society, based on which the social forces in power govern society. Legal policy is seen as both an art and a science, that the capacity to come up with and formulate leading ideas which determine the direction of the law[6]. This is made evident by all the public authorities that take part in shaping, applying and developing the law. Therefore, legal policy is also made by the courts, less visibly perhaps, but real nonetheless, especially in the current period when jurisprudential law has developed considerably. The social or economic conceptions and ideologies outlined by this kind of law are subsequently reflected in the legislation. The indirect intervention of an apolitical public authority entrusted with serving the public can only have a positive effect, given that the tendency of the public power to divert political policy is tempered.

A part of the general policy and implicitly of the juridical policy, legal policy represents a complete system of ideas and concepts, with a higher degree of stability, based on which the legal norms are elaborated or in other words, it is the lawmaker's representation of the social purposes of the law as well as of the forms and specific methods of expressing it. E. Zitterman correctly states

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[1] D. C. Dănişor, I. Dogaru and Gh. Dănişor, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 222.

[2] V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 294.

[3] V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 211.

[4] A. J. Arnaud, „La contribution du sociologue juriste", in *Le recours aux objectifs de la loi dans son application* (Bruxelles, 1990), 209.

[5] H. Heyvaert and F. Martou, „*La direction générale*", in *L'Entreprise Moderne* (Paris: Hachette, 1972), 116.

[6] I. Craiovan, *Tratat de teoria generală a dreptului* (Bucureşti: Ed. Universul Juridic, 2009), 409; I. Craiovan, *Metodologie juridică* (Bucureşti: Ed. Universul Juridic, 2005), 185; V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 294-295 ş.a.

that a century ago "law-making was a part of politics, appearing as an art form which had two sides: the content and the technical side. The content involves the matter of purpose, aspirations, since the law-making had to relate to true values of culture. The relation between legal policy and positive law represents a point of compromise between law and life. Within its framework, all intellectual human aspects must be considered in order to find the solution considered as most suitable." Therefore, legal policy is the one that ensures the end purposes of legislation, by establishing its guidelines, objectives, whereas legislative technique is used to shape the law in accordance with the points set out by the legal policy. Conceived as an ensemble of technical procedures and methods whereby laws are created, the legislative technique therefore differs from legal policy.

The exact instrument of legal policy is the legislative programme, which is used to establish the priorities in law-making, selecting and spreading a number of legislative projects or sets, during a period of time, which were conceived of course to fit a certain political agenda[7]. In a state under the rule of law, there is a variety of legislative programmes imposed or not at a given time depending on the democratic machinations. The legislative programme includes a set of objectives, priorities and options of certain political parties and it is put into practice only if these parties form a majority in parliament. Obviously, if the majority is lost, the new political formations who gain power will back up their own legislative programme.

Legislative programmes are not only mandatory but they maintain a certain amount of uncertainty. Not even when the projects are marked down in the order of the day of the legal authority, there is no certainty that they will be debated. Quite often there are legislative emergencies which modify the established order. Therefore, the legislative programme, a document which categorically has a particular importance towards outlining the legislative policy, can never have a mandatory character[8].

Consequently, legislative policy and programmes are parts of governmental policies which pertain to state authorities that have the right to legislative initiatives. Besides having to meet certain other conditions, this initiative belongs equally to political parties, the population as well as to other initiators. Law-making involves a set of complex activities which cannot be overlooked, of a political, economic, social, moral, historic, national and international nature.

2. Respecting the general principles of legislative policy – a condition of carrying out the specific objectives of the law through legislature: unity, stability and legal security

Besides combining the legal, political and organisational, we must keep in mind the series of objectives or final goals specific to the law and which must be legislated and which are legal unity, stability and security.

Therefore, "the activity of law-making must meet with the contradictory demands which fall in certain broad categories: legislation must ensure the security and certainty of those answerable before the law, which means going into details and may indirectly lead to a decline of the law; the lawmaker has the task of contributing to the foundation of a new society (to its permanent renewal), therefore a creative activity, which apparently goes against the conditions of stability and durability. These conditions are dependent on acquiring a certain amount of experience in law-making as well as on the wisdom of those that use it; legislation must be in accordance with the constitution, political objectives (public policies), but in the same time it must keep its autonomy (be it a relative one); even if they must be identified, respected and included into the juridical system and the rules and regulations representing a guarantee of stability, since at the same time they must be reunited or

[7] V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 295.

[8] V. D. Zlătescu, *Introducere în legistica formală* (Bucureşti: Ed. Rompit, 1995), 31; M. Grigore, *Tehnica normativă* (Bucureşti: Ed. C.H. Beck, 2009), 31.

assembled in a whole unit."[9] Therefore, law-making has the difficult role of solving this system of united equations[10].

The development of legal policy which can solve these equations involves the respect of general principles, known under the name of legislative political principles and considered "the natural laws of law-making"[11]. These principles are as follows: the law must pursue the attainment of the common good, law-making seeks to regulate only the external behaviour of individuals, the law must only intervene when the common good requires so and the scientific foundation of law-making and the guarantee of balance between dynamics and the lack of dynamics in the law.

2.1. *The objective of the law is to guarantee the common good*

Pursuing the "common good" or "the social purpose" as it has been called, is a vague demand, given the imprecise nature of this notion. Today it is considered a purely theoretic ideal, even though it does not manage to actually limit political power throughout the course of outlining legal policy, it nonetheless succeeds in establishing certain moral limits. The common good which we have mentioned is not a purpose onto itself and it does not refer to the creation of an ideal society, as imagined by communist sympathisers, for example, who promoted the creation of a new man and of a multilateral developed society, while ignoring the realities of the times. In fact it refers to all that can be accomplished "in a precise time and space, in a social environment and depending on the means and elements they actually have at their disposal."[12]The literature has shown that "this common good is oriented towards the development of civil society, the state being an instrument for the fulfilment of this goal. On the other hand, the progress of civil society must ultimately seek the wellbeing of individuals. Law-making must not be practiced randomly, like a work of art, but firmly keeping in mind the principles of reason. It is a work done with prudence with one practical goal in mind – organising the social relations as suitably as possible given the times."[13] Sadly, nowadays this "common good" which should help guide the legislator, and before him, all those involved in formulating legal policy, is quite often overlooked. Sometimes, it is used in elaborate political speeches, but only with the clear intention of impressing the voters. The laws will no doubt become ineffective if they conform to certain lesser rules of the existing morality in the collective conscience. The neglecting of this natural precept of law-making is one of the causes for the "crisis" of law and law-making currently facing Romanian society.

2.2. *The law must only regulate the external behaviours of individuals*

Another rule not to stray from while determining legal policy is that the law regulates only the conduct of individuals, since only the relations between the subjects of law are of interest in the social life and therefore, in legal order: "Law-making must not try to regulate only the external behaviours of individuals, barring any attempt at regulating a person's private thoughts, feelings and desires."[14]

2.3. *The law must intervene only if the social reality requires it and to guarantee a balance between the dynamics and the lack of dynamics in the law*

The development of a law is required only if the social reality warrants it. However, nowadays, law-making is less and less often the result of a real necessity, but rather is used to increase the political capital of their initiators. Each political group in power wants to impose their

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[9] V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 217.

[10] In this sense: Fr. Ewald, „Rapport philosophique: une politique du droit", in *Le Code civil 1804-2004. Livre du bicentenaire* (Paris: Dalloz), 84.

[11] D. C. Dănişor, I. Dogaru and Gh. Dănişor, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 222-225.

[12] J. Renauld, *Cours d'encyclopedie du droit* (Louvain, 1966), 83.

[13] D. C. Dănişor, I. Dogaru and Gh. Dănişor, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 223.

[14] D. C. Dănişor, I. Dogaru and Gh. Dănişor, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 223.

own legal programme, each member of the lower or upper house of parliament seeks to tie their name to a normative act. Therefore, legislation has become more of a media spectacle used in acquiring popularity among the voters, and neglecting the true needs of law-making

Then again, society is evolving quickly, and it is for this reason that new laws are adopted. The lawmaker is facing various social pressures, economic, political, cultural or ideological. Quick changes intervening in society lead to shifts in social relations and even institutional transformations that require regulation. The legislative bodies cannot proceed to normative changes too often because frequent adaptations of the legislation affect their effectiveness, and consequently the efficiency and stability of the law. They must not forget J.J. Rousseau's statement which is valid no matter the nation or times, "the people will come to despise laws that change daily"[15] or even Montesquieu's idea that "Useless laws weaken the authority of necessary laws."[16] In this way, P.C. Vachide noted that "Inflexible laws separated from real life pose a danger. However, this does not mean they must change since an instable democracy could be more damaging than helpful, given the lack of stability of the legislative system which can decrease the value, prestige and confidence that the law should inspire. If the change too fast, they betray the uselessness of their role. The law can stay in force indefinitely on the condition that they gain in necessary flexibility through serious legal practice and doctrine paves the way for new scientific perspectives."[17] Therefore, "the lawmaker must maintain the balance within the law, ensuring through legal policy the natural stability of social relations regulated by the law. For this reason, the relation between the dynamics and the lack of dynamics of the law poses not only a question of legal policy, it pertains to the raison d'être of the law, its social purposes."[18]

2.4. *The elaboration of normative solutions must be scientifically founded*

In order to maintain the balance between the dynamics and the lack of dynamics of the law, it is necessary that the lawmaker start developing by acquiring knowledge of social realities with scientific precision. As such, a good legislative policy must have a starting point for its sound research of social realities, then identify the effects of the future law, estimate its acceptability by the public and the concrete possibilities of implementing this law. The scientific foundation of law-making constitutes a basic requirement in order to sanction the systematic preoccupation made up of scientifically motivated solutions for the new law. Since the lawmaker's decisions are backed up by the results of this research, they are then in accordance with the objective requirements of social evolution and the subjective requirements that form in the collective conscience. In this way, doctrine has shown that "legislative work must be inspired out of a deep and precise knowledge of social and national needs and out of a clear perspicacity capable of seizing the real facts, and only after all these steps have been performed, will normative solutions be formulated through the lawmaker's creativity."[19]Although scientific possibilities of discovering the social realities are extremely varied today, we are not seeing a regulated reality but a constrained one through the law. In many cases, the law is no longer capable of reflecting the social reality and therefore creates a parallel reality. Obviously, in consequence the law is unable to protect and guarantee the real rights of individuals which should form the true purpose of any law.

3. The importance of public policies in law-making

Taking into consideration the need for scientifically precise knowledge of the social reality, which involves preliminary economic, sociological and psycho-social investigations, the legal policy

[15] J.J. Rousseau, *Contractul social* (Prahova: Ed. Antet XX Press, 2005), 42.
[16] Ch. Montesquieu, *Despre spiritul legilor* (Prahova: Ed. Antet XX Press, 2011), 9.
[17] P. C. Vlachide, *Repetiția principiilor de drept civil*, vol. 1 (București: Ed. Europa Nova, 1994), 125.
[18] N. Popa, *Teoria generală a dreptului* (București: Ed. C.H. Beck, 2008), 174.
[19] N. Popa, *Teoria generală a dreptului* (București: Ed. C.H. Beck, 2008), 173.

cannot be the result of only one legislative body. For this reason, "administrations of all types supply the facts that the lawmaker requires to reach a decision. To transmit the information means to select it and therefore to decide. The administration therefore acquires an essential role in orientating legal policy."[20]

Nowadays, the socio-political contextualisation is observed more and more closely, meaning the sets of acts and measures which the public authorities decide to implement in different fields of activity. Whether in establishing objectives or the methods employed to reach them, the core of this idea is the attention given to "public policy".[21]

Pursuant to article 1 paragraph 3 from Law 24/2000 in its current form "the activity of law-making represents the main means of implementing public policies, to ensure the necessary tools to apply the solutions for economic and social development, as well as to exercise public authority", and article 6 paragraph 4 stipulates that "Normative acts that impact society, economy and environment, the consolidated general budget voted by the parliament or the government. The government defines the types and structure of public policy documents". Considering these aspects, the use of public policies in law-making is more than favourable.

Lato sensu, we understand by "public policies" all the actions aimed at solving problems of public interest[22]. The concept of "public policies" appeared and quickly instilled itself as a result of society becoming more conscious of its fast development, increasing complexity and their development improves the decision-making process. The meaning of "public policies" must not be confused with "politics", since public policies refer to concrete programmes and not to political ideology. Indeed, the strategy is established through political ideology, however the technical methods by which the strategy is implemented strictly pertain to public policies.

Contemporary society demands that politicians and crisis-managers find more effective ways of establishing objectives, in order to improve the quality of decisions and selections, as well as to optimize the use of human resources and materials meant for these actions. As a scientific discipline, public policies use theory and specific concepts of social sciences, economy, sociology and psychology etc., in general, offering politicians and jurists large volumes of specialised and structured scientific knowledge referring to a large variety of matters, from education and health, to urbanism and international relations as well as offering information concerning the concrete impact of the different types of public intervention.

Conclusions

By using public policies in developing the law, the lawmaker, the government's activity and the activities of public administration in applying the law are interconnected to ensure a better and quicker way to obtain knowledge of changes in society, at shorter or longer intervals of time, meaning the sources of evolution in society.

Scientifically obtained knowledge is nowadays closer to being "a science of action", since there is the possibility of offering a wide array of options to public authorities, politicians, jurists and administrators (policy sciences). Social sciences do not limit themselves to stipulating through rational sciences, what must happen, but what concerns the prior formulation of the best options for setting the objectives and what must be done in order to reach them[23].

In law-making, legal policy is an important part in establishing objectives, meaning the totality of guiding ideas influencing the direction of the law in its development and application which

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[20] D. C. Dănişor, I. Dogaru and Gh. Dănişor, *Teoria generală a dreptului* (Bucureşti: Ed. C.H. Beck, 2008), 224.

[21] V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 212.

[22] Consult also: E. Young and L. Quinn, *Cum se scrie un Studiu de Politici publice efectiv. Ghid pentru consilierii de politici publice din Europa Centrală şi de Est* (Budapesta: Institutul pentru o Societate Deschisă, 2002), 13-14.

[23] Consult: V. Pătulea, *Tratat de management juridic şi jurisdicţional* (Bucureşti: Ed. I.R.D.O., 2010), 213.

materialize through the activity of all public institutions involved in developing and applying the law. Legal policy is understood in a way, which depends on the evolution of the legal system.

In its turn, legislative policy as a part of legal policy coincides with the representation that the lawmaker creates for himself with respect to the social goals of the regulation as well as with respect to specific forms of expression, given its higher degree of materialization. The concrete instrument of legal policy whereby priorities are set in law-making is the legislative programme. Moreover, through legislative technique the objectives set by legislative policy acquire a certain form.

In conclusion, legal policy and legislative programmes are components of the government's policy and they belong to state authorities who have the right to legislative initiative. As such, law-making involves a set of complex activities whose key factors include those of a political, economic, social, moral, historical, national and international nature.

However, in order to reform the law it is not enough to simply improve the activity of the lawmaker by using public policies and respecting the aforementioned principles of legal policy, what is necessary is a strong political will and constant efforts from all three national powers - legislative, executive and judicial.

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