The Social Technology Approach to Legislation. A Model for Legislating Education

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The transition from communism to a free society in Romania proved to be a complex and lengthy process, taking place in the absence of a coherent global strategy concerning the necessary economic, social, institutional and legal changes. In the conditions of the lack of continuity and firmness in conceiving and applying the reforms, malfunctions and unfulfilled expectations appeared in almost all the fields. The state of the higher education is a good example in point.

Despite the rigidities inherent to the system, educational reforms began almost immediately in the early 1990s but progressed slowly, and their objectives changed through the years. The educational reform policy was based on three components: the legal component, the strategic component and the component regarding the reform implementation[1]. Here I will briefly point out only the legal aspects of this reform in the attempt to focus on the difficulties of the legislative process with respect to educational issues. In the second part of the paper, I will distinguish two theoretical approaches to legislation. I will show that in order to deal with the problem of innovation and experimentation in law we should first of all analyze the possibilities of developing a theoretical approach to the problem and I will conclude that a social technology conception of legislation could provide a rational framework for experiments in various aspects of law-making.

The legal framework of educational reforms in Romania

The legal component of this reform is related to defining the educational ideal and the general principles of education. In 1997, the legal framework of education was still fluid, insufficient and contradictory, while some of the legal provisions adopted immediately after 1990 obstructed the advance of the reform. In its original form the Law on Education regulated the state of education at that time (1995), but could not support the real reform necessary in our education: besides the centralist, equalitarian and populist options there were numerous discrepancies as compared with the reform trends in other European countries. Under these circumstances, the relaunching of the educational reform in Romania first implied a reform of the legal framework. Initially amended through the Ordinance no. 36/1997, the Law of Education was significantly completed and modified through the amendments adopted by the two Houses of the Romanian Parliament through Law no. 151/1999. Law no. 128/1997 regarding the status of the teaching staff and Law no. 88/1993 regarding the accreditation of higher education institutions and the recognition of diplomas are also undergoing a huge amendment process so as to support the reform of education as much as possible. An impressive number of new regulations under the form of laws, ordinances and Government decisions were promoted after 1998 to the same purpose – the rapid advance on the way of the reform. These provisions were designed either to ensure a proper implementation of or to supplement the existing laws regulating education and often including measures for implementing institutional autonomy, and put forward detailed operational guidelines. Pursuant to these legal documents, the activity of higher education has become more and more coherent, based upon the progressive increase of university autonomy and accountability, decentralization of activities, and support to research and technological innovation.

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1 See Korka, Mihai (2000), *The Reform of Romanian Education*, Background Papers presented at the Workshop in Vienna, 11-12 November 2000, Training and Skills in the Pre-accession Countries.

However, the high number of regulations reduced the transparency and coherence of the legislative framework governing higher education and made their application difficult. Moreover, the existing problems were enhanced by situations when government-issued regulations were put into practice despite not having been approved by the Parliament or when the new regulations were inconsistent with previous provisions remaining in effect.

Recent changes undergone by the Romanian and European higher education system are grounded on the *Bologna Declaration*, aiming to achieve a unique European space in this field by the year 2010.[2]

The new legislation of June 2004 (law no. 288/2004) stipulates the reorganization of university studies in three cycles (Bachelor, Master, and Doctoral) starting with the academic year 2005-2006. All candidates for the title of doctor must be graduates of master's study programmes. According to the new law, the applying of the European Credit Transfer System is mandatory to all universities and these will obligatorily deliver for free, including in a foreign language of widespread circulation, the Diploma Supplement, whose content is in conformity with the European provisions.[3]

The reforms have taken place gradually, starting with the passing of legislation and still struggling with the most difficult task of implementation.

Despite all this, after the communist period the characteristics of the Romanian Higher Education comprise: a centralized system, mainly state-controlled; an underfinanced system with no strategy to overcome this state of affairs; a system having promoted equalitarian criteria of organization and administration, sensitive to individual or group pressures and interests; a system having accepted quantitative increases and formal horizontal multiplication, instead of supporting and promoting performance, quality and competitiveness; a system that had gradually opened itself up to international cooperation, but which did not know and could not initiate the necessary steps to become internationally compatible.[4]

Under these circumstances, the reform of Romanian higher education needs to trigger a large, systemic and rapid change as well as radical adjustments at the legislative, strategic and operational levels (of implementation). The strategic conceptualization and the legal regulations adjusted to the objectives of the reform must go hand in hand with the operational steps at the level of higher education units, of faculties and colleges, of departments in universities.

The problem of acceleration of educational changes as well as the concrete renewal of education in line with the European Union standards is to be seen as an ongoing process of legislative changes, institutional reorganization and replacement of practices. The rapid development of the educational system in Eastern countries requires not only an appropriate strategy as to the implementation of innovations through legislative measures but also a revaluation of the theoretical aspects of legislating. The theoretical study of legislation may represent a useful instrument in the understanding and explanation of the methodological options needed by legal actors when facing legislative reforms.

In what follows I will try now to answer the following questions:

1. Is there any task for legal theory in solving specific law-making problems?
2. Which kind of knowledge is necessary for the solutions of law-making problems?

In doing so, two different methodological points of view in legal theory that pertains to two opposed conceptions about rationality will be contrasted. Each of these position are theoretical forms of legitimizing the legislative method, but only one may approach legislation in such a way as to provide a rational framework for experiments in the law-making activity.

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[2] A new higher education structure was adopted following the discussions that occurred within the National Rectors Council in November 2003 which showed a general consensus regarding the adoption of this structure. The Declaration of the National Higher Education Conference released on 5 November 2003 expressed the commitment of all academic representatives (Universities, National Rectors Council and Ministry of Education and Research) to sustain the objectives stated in the Bologna declaration and in the Prague 2001, and Berlin 2003, ministerial meetings.

[3] The provisions of the law 288/2004 shall apply to the public and private higher education, accredited or temporary authorized, according to the law, starting with the academic year 2005/2006. The studies leading to professions regulated by European Union sectoral directives are not subject to this law.

[4] Neither the character of education nor its underlying principles has essentially changed, and higher education could still be described, according to professor Andrei Marga, as a system that '*transmits knowledge but does not encourage creativity; mostly repetitive, it is based on separation into rigid subjects, it is still centralized...*'. *Cf.* Marga, Andrei (2001), *The Years of Reform* (1997 – 2000), Foundation of European Studies, Cluj.

The rationality of legislation: two perspectives

In order to indicate how legislation can promote effective innovation, our purpose will be to point to some methodological aspects of law-making process by trying to briefly describe a useful model of legislation based theoretically on a *social technology approach*. This conception has been developed not so much in reference to legislation, but mainly to the philosophy of social sciences by the German philosopher Hans Albert.[5] Here, we will try to outline Albert's conception on social science as social technology in an attempt to use it to the study of legislation showing that such an approach exhibits explanatory power for legal theory as well as for the rationality of legislation. More precisely, it will be indicated that the main trends in legal theory, which try to offer a solution to the achievement of experiments in social practice through the law-making activity, fail to conceive an adequate approach to the method of legislation that goes along with political decisions, on account of their *foundational approach* to legislation. In return, a technological perspective of legislation whose rationality is based on a social critic's view will be deemed as a possibility in formulating valid solutions to the feasibility of various legislatives measures in social practice. At the theoretical level, the difference between the two conceptions can be seen as a mutation in conceiving legislative activity, which consists mainly in shifting the focus from the context of justification to the context of discovery. This change will lead us to outline a possible applied theory of legislation whose aim would be to supply scientifically grounded recommendations for legislation.

a. The foundational approach to legislation

Legislating is seen as the process of designing, enacting, enforcing and evaluating legislation. According to this definition, legisprudence as a theory of legislation[5] aims to provide scientifically founded recommendations for legislation from the point of view of the quality of legislation in terms of effectiveness, consistency and legitimacy. Its significance is to be appreciated in the development of a conceptual framework and an appropriate methodology. If the consistency of legislation amounts to its internal rationality, the conceptualization of the notion of legitimacy relies in the principles of the constitutional state and the idea of a democratic legislation. Regarding the third aspect of the quality of legislation, that of effectiveness, the theory of legislation has to provide an appropriate empirical perspective which takes into account the functioning of legislation or in other terms, its ability to fulfil its social functions and collective goals.

For legal theory, one way to provide scientifically founded proposals for legal practice is represented by the foundational approach. From this perspective, legal theory would have the function to clarify the conditions and the possibilities of legal scientific knowledge by means of a fixed basis or of an ultimate explanation about the content of the legal order. In this respect, all these aspects of the rationality of legislation have been treated differently in modern legal philosophy depending on the scientist's concept of law of each school of thought. Thus, from the point of view of the analytical jurisprudence, legisprudence should focus on the formal aspects of legislation, while ideas of natural law stress the substance of legislation. A third major school of legal thought, that of legal realism, deals with the study of legislation in actual practice. Since these notions restrict themselves to only one aspect of law, one can see these theories as firmly rooted in a foundational thinking, so that legal theory, as a foundational discipline, would have the function to clarify the conditions and the possibilities of legal scientific knowledge by means of a fixed basis or of an ultimate explanation about the content of the legal order. In all cases we may discern a 'transcendental' principle at work within these trends of thought, telling the scholar what law must be if its cognition is to be possible. More precisely, the foundationalism advances the ideea that the law-making activity is rational because it has a 'foundation' in a fabric of legal norms which are to be *justified* (i.e. it is possible to prove that a norm is valid) in virue of their moral content (natural law), of their pedigree (legal positivism) or of their empirical consequences (realism). Accordingly, the task of the legal science is the elaboration of a theory of legal validity in which the idea of *justification* of norms plays the most important role in the cognition of law.

But legisprudence as a theory of legislation implies and requires an information-evaluation oriented approach, and an interdisciplinary one, that must borrow from economics, ethics, infromatics, logics,

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5 See mainly Albert, Hans (1999), *Between Social Science, Religion and Politics, Essays in Critical Rationalism*, Rodopi, Amsterdam – Atlanta, GA.

5 Etymologically 'legisprudence' derives from *legis/lex* (a law or legislation) and prudential (practical knowledge, reason and wisdom) and alludes to the 'study and theory of legislation', to the 'science, theory or technique' of legislation or to the rational theory of legislation. In any event, legisprudence is defined mainly as a theory of legislation and is characterized as a 'new theoretical approach' and as 'an object of study of legal theory'. See Wintgens, Luc J. (2002), *Rationality in legislation – Legal Theory as Legisprudence: An Introduction*, in: Wintgens, Luc J. (ed.), *Legisprudence, A New Theoretical Approach to Legislation*, Hart Publishing, Oxford – Portland, Oregon.

politics and so on, to assure the rationality of legislation regarding the correct use of scientific methodology and the degree to which it is influential in the legal process and its final product.

b. The social technology approach

The idea of absolute justification[6] which is implicit in all former epistemologies, is also contained in the usual manner of argument with regard to social, political and economic order.[7] The notion of maximal social satisfaction or the doctrine of the rationality of the legislator who is able to enact the best rules for the community are typical products of a justificatory thinking. In this respect, what is important is to legitimize social orders and political measures, existing or envisaged, by reffering to an authority to verify its justification. Like in classical epistemology, this conception ressorts to something that is ultimately given and beyond criticism. If one, instead, leaves this perspective aside, one then opens the possibility of criticizing social orders and institutions, norms and ideals, political decisions and measures by drawing on the individual needs of participating people. It follows that there is no ideal social order that would guarantee an acceptable legitimation for all individual wishes.

Thinking in terms of justifications leads us to conceive legitimation and effectiveness of legislation in terms of autoritative principles. On the contrary, thinking in terms of alternatives, a mode of thought cultivated in the economic tradition of social scientific knowledge can be considered a useful model of rational problem-behavoir. This seems to be also an adequate method of legislative thought in which theoretically founded social criticism can be combined with teoretically based social technology. From this perspective, especially in regard to methodology, legislative measures must always be considered and treated as hypotheses in solving political problems. The method of critical examination will thus be the developement of concrete and realizable alternatives that can be compared with the existing solutions. Within legal theory, this method would be aimed at formulating, under certain hypothetically presupposed view points about a given area, particular interpretative proposals for the recognized set of norms in the valid law, particular proposals for modifying the sistem of valid norms so as to remove norm conflicts, and also proposals for developing the system by introducing new norms through legislation.[8] An applied science of this kind can only point to *possibilities of action*, and therefore to possibilites for achieving particular goals or combination of goals. It can at best show, on the basis of relevants laws, possible kinds of institutional arrangements and their mode of functioning, attempting to exhibit realizable alternatives and to show their strenghts and weaknesses. The use of scientific knowledge in an analysis of alternatives answers the question of feasibility, including legislative feasibility. This method does not emphasises stabilizing and legitimizing traditional solutions, but instead encourages the discovery of new ones, as well as the critical confrontation of those to which we have been accustomed to and that we take for granted.

In this respect, at the level of the internal rationality of legislation the focus of legislative drafting is not primarely aimed at achieving legal validity, but rather on reaching the highest possible quality standard of legislative decisions. A legislation of this kind will be aware of the fact that legislative decisions can never claim to be perfect, or legally valid decisions. They can only claim to be 'relatively appropriate' solutions in view of all the (factual, political, socio-economic, institutional) circumstances involved. Legislative decision-making is not therefore a process of application of fixed legal standards, but an open process in which a legislative draftsman weighs different solutions in light of their relative appropriateness.

At the level of effectiveness, the law-making activity is a restructuring of social order and therefore directed at changing the course of social events in particular areas. It is concerned with legal reforms, that is to say to the degree to which the political goals of these reforms have been achieved and the causes for potential failures. This may raise the question of the legislative inflation, when new legislation is considered a means of achieving certain politically determined goals, which in turn may affect the internal rationality of a legal order as a whole. But to the extent that appropriate sociological findings are available, one can indeed elicit the effect of the regulations on the control of what happens in society, and these results can be assessed on the basis of various hypothetically assumed value standpoints as to the functioning of legal arrangements within certain areas. It is important to note that this assessement can be valid even for those who deny any of these standpoints and that one cannot make these value positions binding. It is the comparative evaluations of alternative solutions to the

6 In modern epistemology this idea is strongly connected with the manifestation doctrine according to which we can reach the truth with the help of an infallible method and then we can have a genuine knowledge about reality.

7 See, Popper, Karl Raimund (1974), *The Poverty of Historicism*, Routledge and Keagan Paul, London.

8 *Cf.* Albert, Hans (March 1998), 'Critical rationalism: The Problem of Method in Social Science and Law', *Ratio Juris*, I, no. 1.

problem that replace the justification of the legal order. The problem of social technology, which is to be solved in each case, can be reduced to the question of how certain solutions can be institutionally embodied and thus adopted in law by analyzing their effects in respect of the performance characteristics formulated on the basis of certain postulated value positions.

If one admits that knowledge of social technology may be used in the law-making activity, one must be aware that the legislative practice has to function always by taking into consideration certain *regulative ideas* hypotetically presupposed, which constitute the background for the analysis of the legislative solutions that will be chosen among availabe alternatives. They express the requirements of the adequacy of a social order and represent values of some aspects of the social reality which have to be analysed by comparative evaluation. In order to better understand the utility of these methodological principles we should take a look to the Romanian educational legislative system.

In Romania, for instance, the legal actors who are responsible for the law-making process as well as for the interpretation and application of law adopt an uncritical attitude towards the current opinions on law and justice. In legal practice as well as in legal theory, the first style of legislation, the foundationalist one, is generally considered to be the most practical and also the most acceptable way of guiding human behavior. It is based on a hierarchical and one-way model of legislation: a superior (the state) gives a clear-cut command (the law) to its subordinates (the people), who are expected to obey and who are punished if they do not. The validity of norms is measured in terms of authoritative, ultimate criteria and values. From this perspective, legislative educational reforms are mechanically pursuing the 'Europeanization' process in the absence of a social dialog and of a regional development strategy. For the Romanian legislator, the European directives are ultimate values that must be adopted in the law while not being aware of the fact that Europeanization without clear domestic performance indicators risk to have no impact at all. The Education Ministry, for instance, boasts on the speedy adoption of the Bologna criteria, while what Romania really needs is a process of monitoring the impact of the Bologna reforms on the quality of higher education in Romania and certain legal arrangements for the evaluation of comparative solutions regarding the implementation of European directives. In other words, and using the social technology conception, it would be more advisable to develop various standpoints on the basis of which we can assess the effects of legal regulations on educational institutions, finding that a particular regulation leads to an inefficient structure and thereby to a reduction in educational quality in the society. This is only possible by taking in consideration the current national legal framework and the relevant legislation in the area concerned.

Unfortunately, in Romania, the government seems to believe that Europeanization is reform enough and that reforms are important in themselves and not for their results. Even though in Romania there is a rule according to which the government is supposed to consult on policy and legislation prior to make a decision, this often remains on paper and tenths of bills required by the process of integration are rushed through the Parliament, leading to legislative inconsistency.

To conclude, I could say that a better way to cope with experiments in educational legislation would be to consider that the values promoted within educational systems (i.e. the social cohesion, cultural and linguistic rights, etc.) are regulative ideas, that is to say goals to be achieved but never in a exhaustive way, then it becomes possible to develop legislatives strategies taking account the proposed alternative solutions and regarding them as imperfect, in need of need improvement and revision. They have to be subjected to rational argumentation in the light of alternatives and of relevant experiments and to be elucidated differently according to the various points of view and interests. The choice will be made in accordance with the characteristic performances of each proposal by considering the present legal framework and factual conditions of each space-time region considered. While these proposals can be made explicit by persons of the community and institutions in an attempt to comprise in legislation central values of the community, the incorporation of these suggestions within valid law resides in legal practice, that is to say, in the activity of judges and of the law-making apparatus – the only ones authorized to do so.

Bibliography

Aarnio, Aulis, & Van Hoecke, Mark. (eds) (1985), *On the Utility of Legal Theory*, A-Tieto Oy, Tampere

Albert, Hans (1999), *Between Social Science, Religion and Politics, Essays in Critical Rationalism*, Rodopi, Amsterdam – Atlanta, GA

Albert, Hans (March 1988), 'Critical rationalism: The Problem of Method in Social Science and Law', *Ratio Juris*, I, no. 1

Korka, Mihai (2000), *The Reform of Romanian Education*, Background Papers presented at the Workshop in Vienna, 11-12 November 2000, Training and Skills in the Pre-accession Countries

Marga, Andrei (2001), *The Years of Reform (1997 – 2000)*, Foundation of European Studies, Cluj

Popper, Karl Raimund (1974), *The Poverty of Historicism*, Routledge and Keagan Paul, London

Wintgens, J. Luc (ed.) (2002), *Legisprudence, A new Theoretical Approach to Legislation*, Hart Publishing, Oxford – Portland, Oregon