THE METHODS OF SCIENTIFIC RESEARCH OF LAW

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Abstract

The term "method" comes from Greek, where "methodos" has the meaning of way, path, manner of exposure. The efforts to perfect the method have led to methodology – the theory, science of method.
In general, method can be defined as a concerted set of intellectual operations (which may consist of principles and rules) that are used for knowing the elements of a phenomenon or the phenomenon in its entirety.

Key words: method, intellectual operations, scientific procedures, law, science

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MATERIAL AND METHOD

Scientific investigations have focused broadly on the analysis of the literature in this field. For this purpose the logical, quantitative, comparative, historical and sociological methods have been used.

RESULTS AND CONSIDERATIONS

The main methods of legal research are:

a. The logical method

- Having as basis the purely deductive character of the science of law, the Theory of law, all legal sciences use the categories, rules and reasoning of logic. The essential logical form of any analytic or synthetic deduction is the syllogism. As stated by Athanasie Joja, "the procedures of sciences vary, but not the form and essence of reasoning, that is why one can only speak with *reservatio mentalis* of a juridical deduction" (Joja A., 1960).

Precisely by its eminently systematic nature, law, as a science, considerably approaches mathematics, proximity resulting from its intrinsic logic character. Of course, this proximity does not refer to the contents of the two sciences, but to the form and the urgent need of proof and formation of hypotheses. The elaboration of legal norms should be done – for the norm to have consistency – by taking into account the principles of formal logic. At the same time, a procedural norm of law binds the one who makes a statement in court to prove it, also setting rules that constitute the technique of evidence.

There has been much debate about the existence of legal logic as a regional logic. The views on this matter are different: Professor Gh. Enescu allows for the existence of a legal logic within normative logic (Enescu Gh., 1973), while Professor Peter Botezatu recognizes the role of law in the building of argumentation theory. In general, the purpose is for the rules to be used in the practical realization of law (legal logic) and less to constitute a distinct field of application of logic within the specific process of legal knowledge.

b. The comparative method

Comparison is the operation which aimes at finding some identical or divergent elements within two phenomena.

Comparing the legal systems of different states, the characteristics of the branches of law, the institutions and their rules is useful and efficient in analyzing the legal phenomenon, especially for EU member or aspiring member states, for two reasons:

- making institutions and procedures compatible;
- ensuring openness of the national legal systems to the Euro-Atlantic rule-making.

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This procedure led to the recognition, in most legal education systems, of a scientific branch – the science of comparative law, particularly as a result of increasing economic, cultural, institutional and military interdependence between states.

In its initial form, the conception on the necessity of comparative law occurs in the first decades of the twentieth century, with the obvious crisis of liberalism - when the first ideas on a universal methodological form of studying law are also advanced. Then there are works that set a basis for both a method of comparative law and of an autonomous science of comparative law.

The specific purposes of the comparative method are determined by the existing relations between the objectives properties of the compared categories. Comparison involves the use of logical tools such as: classifications, definitions, analogies. The science of comparative law has already set some rules aimed at using the comparative method in law, among which:

1. To exclusively compare only what is comparable; the rule primarily requires the establishment of the compared systems belonging to the same historical type of law. If the legal systems which include the compared institutions and procedures are ideologically opposed, the comparative process is relevant only for the purposes of determining differences (e.g. in comparing the institution of property in a totalitarian regime and in the rule of law; in comparing property and its regulation in the Romano-Germanic law – to which the Romanian legal system belongs - and in the Muslim law, one should use contrast analysis – contrasting comparison: In this framework, in the totalitarian state, property is non-individualized, with the exception of an oligarchy; in the Muslim law the theocratic theory applies, according to which the entire land belongs to Allah and his messenger Muhammad, the supreme owner of the Islamic land is the Caliph – the representative and successor of the prophet, property is permanent, there is no statute of limitations and the manners of acquiring property are different from those in Romano-Germanic law; or comparing the institution of marriage is another example of breaking the rule " to exclusively compare only what is comparable", as in Muslim law it is removed from the sphere of divine origin and listed among civil transactions - a contract concluded for the "right to enjoy a woman", a right obviously enjoyed only by men, a contract based on some conditions which ensure its validity: parental consent, the presence of two witnesses, provision of a dowry, engagement as prelude to marriage, consisting of the man's statement; there are also specific rules on divorce, repudiation of the wife and polygamy). Contrasting comparison brings indications on the regulations in different legal systems.

2. The terms subjected to comparison must be analyzed in their real connections, in the social, political, cultural context they resulted from. Hence the need to start the comparison from knowing the principles of law and the regularity that controls the compared legal systems. Taking into consideration principles, in addition to the comparison of the institution and rules, is necessary to increase the scientific potential of the comparative study and to prevent a possible empirical fragmentation; also it is to be carried out the research of the sources of law that provides the image of different position of forms of expression of law (laws, customs, case law) from one legal system to another.

3. In assessing the term to be compared one should take into account not only the original meaning of the norm, but also its previous evolution in time, in the process of application of the norm. In this process, especially when the text survives different social-historical periods, the original form of the rule of conduct can evolve so much that the meaning of the norm appears completely different. In this case, the one who compares will have to turn to specific literature, to investigate the state of morals and the influence of traditions.

4. The discovery of a sufficient number of common indicators must underlay all comparisons, as their existence allows for the discussion about an identity of phenomena.

In conclusion, comparison facilitates the construction of legal typologies and classifications and, in the process of lawmaking, this method ensures the information (for the legislator) about regulations in other legal systems or in international legal documents.

c. The historical method

The historical method is combined with the history of social development (and therefore institutional development) and is important for revealing the sense of past events, of regularities that lead to their succession, regularities that also exercise influence on law, causing changes in the content of the regulations and in the physiognomy specific to legal institutions. Every law corresponds to a real need of life and expresses a certain state of morals. The Law of the Twelve Tables (which survived, with some changes, for 18 centuries), the legislative work of Justinian (the Code, the Digest, the Institutes), the Code of Manu (India), the Code of Hammurabi etc. are both legal edifices, and, equally, a proof of

historical evolution. Also in the case of Romania, the law of the country (the custom of the land), Vasile Lupu's Code, Matei Basarab's Code, Caragea' Law, Cuza's laws, the constitutions, they all express the changes that took place in the regulation of relations between individuals and the state, between individuals as natural persons, as well as the historical evolution of society in its subsystems (economic, political, cultural). In general, law reflects social evolution and expresses the cultural life of a society.

Considering the role of the historical method in approaching law and the correspondence between the spirit of an era and the strive to achieve law, Xenopol launches the question which circumscribes its own answer: "What are all struggles of peoples but the inability to realize the idea of law, or to defend this idea both in the relations between peoples and in those between the social classes?".

The general theory of law and the sciences in this branch deal with the historical dimension of the concepts and categories with which they operate. Thus, in the research of legal institutions, the science of law, starting from the data history offers, records their age, follows their development, configuration, functions etc.. The theory of law operates with the category of type of law, with that of pool of legal civilization, beginning with the knowledge provided by the science of history. Also, the origin and emergence of state and law cannot be studied without having to start from the studies elaborated by historians. There are situations when, based on historical data, the physiognomy of some law institutions is reconstructed, activity that allows for a retrospective analysis with implications in understanding the position of these institutions in current law (Popa N., 1991).

d. The sociological method

The existence of law is correlated with social existence and all legal phenomena are social phenomena. Law is social by its content, since, whatever its forms and genres, it is always founded on collective (common) recognition, without which it could not be established the correlation between the obligations of some and the claims of the others. All great legal scholars regarded law as a social-human reality: Cicero, Hobbes, Montesquieu, Hugo Grotius, have proven the correspondence between law and the social life in which the individual is acting; Montesqieu perceived "the spirit of laws" in the relations between people and between them and the environment, defining laws as necessary relations deriving from the nature of things. However, one cannot talk about a sociological method in the study of law than in the early twentieth century. As a science of the social field expressed its existential forms, sociology began with the expression of reservations about the science of law. Comte excluded the science of law from the picture of sciences imagined by him; there was concern that legal thought, dominated by its principles, could impede the particular tendency of sociology to shift the focus towards the constituent factors of society as a system. Sociology and law intersected in 1904, 100 years after the French Civil Code, finding the falling behind of laws in relation to the evolution of society, a "cultural lag" of law. It could not always provide operative solutions for the new issues that life recorded. Law was falling behind facts, was in crisis, in sharp decline. Thus, one appeals to sociology, researching, beyond the legal rule, the social environment which conditions law. Sociology brings a new vision of law, defining it as a social fact, resynthesizing the sources of evolution and influence of law on society, providing legal sciences with a rational method to study the social phenomenon. The German legal scholar Eugen Erlich, in his work "The Fundaments of Legal Sociology", introduces the sociological point of view in the research of law. An advocate of "free law", he substantiates the need for a more comprehensive research of legal reality, which should not be reduced to study of norms and legal institutions, but extended to the social factors that influence law ("living law").

Sociological research then gains momentum in addressing the legal phenomenon through the contribution of sociologists such as Gabriel Tarde, Emile Durkheim, Max Weber, Georg Simmel, but also of some legal scholars such as Theodor Geiger, Rudolf Stammler, H. Levy Bruhl, Maurice Hauriou, Renato Treves Jean Carbonier. In Romania it was noticeable the monographic sociological school organized and led by Dimitrie Gusti (known in Europe as the "Sociological School of Bucharest"), the research on legal axiology accomplished by Petre Andrei, the works of Mircea Djuvara, Eugeniu Speranția Mircea Manolescu, Traian Herseni.

The sociological method applied in law provides a new perspective in the study of legal reality as social reality, checking the manner in which society influences law and, in turn, accepts the latter's influence. Both legal sciences and legal sociology have law as subject but, the former study it from the inside and the latter appears as an extrinsic approach. According to Jean Carbonier's statement, sociological research of law shows that among social phenomena there are some who have a special legal character – the laws, the judicial activity, the administrative activity - sometimes called primary legal phenomena, as their obviously

legal essence makes them identify with the law (Carbonier J., 1977).

There are also secondary legal phenomena, in which the legal element is less obvious, such as responsibility, the status and role of the individual, authority, even limited sovereignty and sociological-legal research approaches both types of phenomena.

Using specific methods such as observation, survey, sociological survey, questionnaire, interview, legal sociology addresses areas such as: creation of law, the degree of knowledge of laws by citizens and the state bodies, the position of individuals in relation with the legal regulations in force, research of actual causes of law breaking, the limits of legal regulation, the relation between legal and extra-judicial regulations etc.. Legal sociological research (the sociological method) may be used by the legislator to obtain information as to whether the law is respected, and to what extent it finds support from common legal sense.

In conclusion, since law is a social reality and the rules of law present significant consequences for the individual's destiny, legal scholars cannot be isolated by an exaggerated technique and are compelled to consider the sociological aspects of law.

e. The quantitative methods

The deciphering, explaining and proposing decisions and the prognoses are based on theoretical considerations motivated by experience gained from the study of individual cases. In Western countries a specialized branch has developed - jurimetrics – which starts from the casuistic procedure, as an approach oriented towards a singular case. The need to introduce quantitative methods in scientific research and in the practice of law sprang from the need to give research new meanings, in conjunction with practical units. Computer use and the establishment of legal informatics lead to the increment of the efficiency of decision making. Professor Vladimir Hanga, talking about the role of the computer in decisions with "repetitive" character, emphasizes the openness of the legal world to the field of a science with immediate impact - informatics, particularly in the field of administrative decisions, characterized by the fact that in their content it is made the mechanical and identical application (for the same categories of facts) of certain legal norms to situations reducible to final mathematical forms (Hanga V., 1989). Worldwide, the research of legal informatics was oriented in the following directions:

- elaboration and systematization of legislation;
- legislative recording;
- case law recording;
- storing and systematizing legal scientific information;
- criminological records;
- records of offences and contraventions etc.

Concerning legislative recording, the computer provides the necessary data for accurate assessment of the correlations between regulations, offering a comprehensive census of the rules that may be in conflict, incompatible or having possible dysfunctions.

The Council of Europe (through the Directorate of Legal Affairs) and the European Commission (through the Legal Service) coordinate the activities concerning the unification of research in the field of Community law, operating through experts for the use of legal information in the areas on international treaties, internal regulations, legal statistical data etc..

The use of computers was considered even for ruling in cases, by substitution of the judge, but it is, however, considered impossible due to the need of individualization of the offense and of the punishment; the court must make an assessment of each case, to take into account mitigating and aggravating circumstances, personal circumstances, the particularities of each participant in the trial (plaintiff, suspect, defendant, civil party, civilly liable party).

CONCLUSIONS

In conclusion, since law is a social reality and the rules of law present significant consequences for the individual's destiny, legal scholars cannot be isolated by an exaggerated technique and are compelled to consider the sociological aspects of law.

In general, the quantitative methods applied to law contribute effectively to the improvement of legal regulations, to the increment of their social efficiency, to the development of the practical activity to create law.

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