

Alternatives for and in Legal Regulation

1. Description with regard to the content

As a reaction to the quantitative growth of legislation in the post-WWII-period, this being a consequence of the rising of the welfare state, the notion of deregulation was introduced in the 1980's. The thought behind this was that a simple *disregulation* would automatically result in a smaller volume of regulation and at the same time in a simplification of the social intercourse. The concept of "*command and control*" in the traditional form of legislation was criticised, since this concept was often perceived as a goal in itself, without sufficiently bringing into account the possible - negative - effects that accompanied this form of regulation.

The rather radical thought of deregulation has meanwhile been contested and to a large extent abandoned, as soon as it appeared that especially market leaders in the economical intercourse were interested in deregulation when it concerned their own interests, and not when it concerned other interests, either those from competing market forces, either the general interest.

The idea of deregulation has nonetheless strongly influenced the conception of legislation, because it contained an alternative for legal regulation. In its radical version namely, the abolition of legislation itself - endogenously - is an alternative form of regulation, since it is assumed that a legal intervention in the social context is not supposed to be considered the best form of regulation at any price.

In a more moderate version, the idea of deregulation has instigated the development of some more refined techniques of deregulation, that react against the "*command and control*" approach, which is typical for the traditional way of legislating.

As a general formulation in the form of a working hypothesis for the alternative for legal regulation, it refers to a *legal or otherwise structured regulation that is not imposed unilaterally by the government and that is accompanied by exclusive governmental control and sanction*.

Some embryonic forms of alternative regulative techniques have been generally adopted by society some years ago. In this context, the classical legal regulation as a "conditional program" - in which the prescribed legal consequence follows quasi automatically the factual hypothesis described in the law - is abandoned. Characteristic for these forms of alternative regulative techniques, is the significant augmentation of the participation of the actors, aimed at achieving a specific goal.

The search for alternatives for legal regulation fits in with the current social debate, in which the burden of rules that is put on *companies* is conceived, on the one hand, as superfluous and possibly damaging for the economic production. On the other hand, the burden of rules that is put on *citizens*, is conceived as an exaggerated, that is, unjustifiable limitation of freedom and, due to its predominantly unilateral

character, threatens the efficient and democratically functioning of the administration.

Even though the law in its formal sense, as a foundation of governmental regulation, is thought to be the expression of the will of those who are subjected to it, this idea often appears to be fictitious. The shifting of importance from the legislative to the executive power, which is responsible for more than 85% of the production of norms in most Western European legal systems, necessitates a critical assessment of the real democratic value of the regulations that are thus issued.

The introduction of alternatives for legal regulation increases the democratic value of a social regulation by allowing a more direct participation of the persons involved in the social field. The former thus creates a counter weight for the conditional programming of social interaction through the classical forms of regulation by the legislator or the executive power.

Alternatives for legal regulation also result in the reappraisal of the elected parliamentary enactor of rules. The alternatives, namely, are not necessarily *opposed to* the law, on the contrary. They can be integrated *within* legal regulations, which can give a new impulse to the democratic process. There are several reasons for that.

First, the parliamentary enactor of rules can be more convinced of the participation of those involved than it would be the case in the '*command and control*' approach.

Secondly, and subsequently, the normative activity of the legislator involved will result in the formulation of *general* rules, as should be the case in a constitutional state. Similar *general* rules contain the essential preconditions of a certain regulation, including certain marginal values. The *technical detailing* of legal regulations, which often results in a pernicious rule density, is – as an alternative – filled in by the actors involved.

Thirdly, this results in an increased responsabilisation of the actors. Namely, they are 'co-responsible' for the execution and enforcement of the regulation they co-conceived. Fourthly, a similar increased self-control simplifies the enforcement of the regulations, since alternatives for legal regulation that are built in the latter, call for self-enforcement.

Finally, through an increased degree of participation of the actors involved, social changes can be detected more easily, which optimises the regulation.

2. Subject of the research

2.1. Formulation of the theory

The research contributes to the *legislative methodology*. It is based on three compartments: (2.1.1.) general legal theory, (2.1.2.) legisprudence, and (2.1.3.) the legal system.

2.1.1. Within the domain of *legal theory*, the classical rule model is examined, both with regard to its genesis, as to the evolution of the legal rule into a policy instrument. This means that there is an examination of the actual transition of the rule as a command (as it evolved out of the theory of the social contract) into the rule as an instrument in hand of the government in order to guide, en no longer only to organise society. This evolution is to be characterised as the transition from a conditional society (norm hypothesis related to sanction) into a finalised regulation, where the law is deployed as a specific means of coercion, in order to achieve a preconceived goal.

Such an instrumentalistic legal conception has to be criticised, to the extent that the law is presupposed as an undisputed instrument to the exclusion of alternative regulative techniques that are possibly more appropriate to realise a preconceived goal, respectively to allow participants in a specific social praxis to co-determine the objectives that are to be realised.

The theories that have to be analysed critically for this purpose are a.o. the normativistic legal theory, according to which the rule necessarily originates with the state and is accompanied by a sanction (Kelsen); the hermeneutic legal theory, according to which – contrary to the normative legal theory – the effectiveness/efficiency doesn't necessarily imply a sanction, but is based on *commitment* (Hart); the economical legal theory, according to which an optimal regulation has to be in harmony with the principle of the economic efficiency, based on *rational choice* (Posner/Calabresi); the systemic legal theory, according to which merely the juridical procedures that are foreseen within a legal system constitute a necessary but also sufficient foundation for legal rules (Luhmann); de communicative legal theory, according to which the open social communication between actors results in legitimate regulation (Habermas); the autopoietic legal theory, according to which regulation is merely the result of the autonomously functioning legal order (Teubner); the theory of the law as “exclusionary reason”, according to which governmental regulation is the only valid foundation to take action, to the exclusion of alternatives (Raz); the economic legal theory, or the theory of the “good order”, according to which social structuring can be established on the basis of several models of interaction, including legislation, contracts, management, customary law, etc. (Fuller).

Within this legal theoretical range, it will be demonstrated to what extent legal theory itself has facilitated, respectively encouraged or criticised the penalistic legal concept of the “*command and control*” approach in the legislative process.

2.1.2. With regard to the domain of *legisprudence*, the elaboration of a theory of alternatives for legal regulation fits within the new field of research on the principles of legislation. On the basis of the general idea of freedom, it is argued that the organisation of the state according to Modern philosophy enhances a democratic

pattern of decision making. Principles of legislation call for a method of weighing and balancing, in order to achieve rules that are alternatives for failing social interaction, that have at the same time the proper normative weight (punishment), and that preserve the coherence of the legal system as a whole.

Yet, current legal theory deals only with formal validity of legal rules, neglecting thereby other modes of validity (efficacy, effectivity, acceptability, and efficiency). By inscribing the research project into this domain, it will be argued that the elaboration of a theory of alternatives for legal regulating strongly contribute to the democratic character of the legal system. It is via participation of the citizens, not only via representation, but also via the concrete elaboration of patterns of behaviour that regulate their social interaction apart from, be it not necessarily outside, the law as it is formulated in legal rules.

2.1.3. The *practical legal* part of the research project links up with the legal theoretical part, of which it is an implementation. This implies an elaborate examination of legislation and doctrine, including an examination of case law of the Belgian legal system, as well as the European legal system, in order to place the identified alternatives in the proper perspective. Within this examination and in the framework of the legislative methodological principles that were formulated in the legal theoretical compartment, the following alternatives have to be critically enquired:

- **deregulation:** deregulation in a pure form is by definition the most far-reaching alternative for abolition of the existing legal regulations; a less fundamental form of deregulation consists of abolishing legislation that is obsolete, ineffective, inefficient or counterproductive, in order to reduce the rule density.
- **certification (labelling):** the technique of certification or labelling departs from the attribution of a certificate by an independent actor to a product, service or person that meet certain preconceived demands; the government can limit itself to the determination of certain prerequisites, respectively marginal values within which the certification has to be performed; the following examples can be found: the technique of the ISO-norms; certification of nutritional products or production techniques; recognition of diploma's that give entry to certain professional activities.
- **privatisation:** tasks that are considered within a traditional notion to belong to the governmental area of action, can be entrusted to private social actors. Classical exemplary sectors are: social security, education, health care, prison system, certain areas of the economy such as telecommunication, where the main research question is whether a far-reaching privatisation entails an optimisation of the regulation in the area concerned, or whether the use of hybrids has to be emphasised (partial privatisation, combined with other regulative techniques).
- **subsidization/technique of the positive incentives:** in order to achieve a certain social goal, the conditional programming (sanctioning of an undesired goal) can

be replaced by the deployment of values that are positively evaluated by the social actors concerned (money, recognition), in order to achieve a specific goal. Examples can be amongst others: scholarships for the advancement of participation in education; fiscally favourable consideration of saving behaviour (retirement funds, health insurance); subsidizing certain economical sectors.

- **self-regulation:** instead of a unilaterally imposed obligation by government, institutes or social groups are offered the possibility (if so desired in co-operation with government through a declaration making it legally binding) to regulate their activities from inside, which gives a better image of the assessments and professional insights of the people concerned; possible examples are: deontological codes for professional orders; the system of envelope financing in health care; the Rules of arbitration of the International Chamber of Commerce.
- **the technique of the covenants or policy agreements:** instead of enforcing a unilateral governmental measure, agreements are made between government and a branch of industry or internally between different governments, about the realisation of a specific social goal; the choice of the means that are to be deployed belongs to the social actors; possible examples are: environmental covenants for sprays, batteries; covenants between municipalities and regions with regard to waste.
- **the technique of information:** the realisation of a specific social goal can be achieved through an extensive information campaign with regard to the positive, respectively negative consequences of a certain action (this before proceeding to a more thoroughgoing regulation in case of small effectivity); possible examples are: information with regard to the damaging nature of tobacco (linked up with a ban on publicity for tobacco); information with regard to energy saving and the recommended speed in traffic (linked up with the sanctioning of excessive speeding); information about AIDS.
- **self-implementing regulation:** in order to achieve a specific goal, the material environment of the actors is adjusted in such a manner that the desired goal realises itself automatically (if not it will result in a direct and foreseeable detriment for the actor); a possible example is the construction of speed ramps, in order to limit the speed in road traffic.
- **the technique of deliberation:** with this technique, the governmental action is replaced, respectively preceded or completed by consultation between the concerned actors in the specified social field; through this technique those involved themselves establish a binding framework that functions as a foundation for further regulation; possible examples are: the technique of the collective agreement; social consultation.
- **temporary legislation (*sunset-legislation*):** through the technique of temporary legislation, a clause is stipulated in the regulation on ground of which this clause ceases to exist when a preconceived time period is terminated; in general the

regulation can not be extended, unless after evaluation of the positive and negative effects, after which this regulation is proclaimed – if necessary in a corrected version – through the regular procedure for the issuing of rules; possible (approximate) examples are: temporary regulation (e.g. through freezing) of rental prices; temporary regulation of price increases of certain products.

- **experimental legislation:** the technique of experimental legislation permits to test a certain regulation within a limited territory (e.g. certain municipalities within the district), if so desired in a simplified form, departing from a provisionally too limited factual knowledge from the regulator with regard to the subject that is to be regulated and aimed at an experimental refinement of the means that are to be used; within this technique, existing variations are the method of the “*try out*” and simulation (computer-controlled or otherwise); possible (approximate) examples are: the experimental regulation with regard to favourable fares for public transport, for the benefit of certain population groups in a restrictive area of the district.
- **management contracts:** instead of regulating the public service directly and unilaterally, the functioning of an autonomous government service is established in a contract between the government and the autonomous service that guarantees a service of public welfare and that was traditionally reserved for government; possible examples are: the management contract between the federal government and the National Railway Company of Belgium (N.M.B.S.); the management contract between the federal government and the Postal Services.
- **tort rules :** tort rules can take over the role of legal regulation in as far as they allow to claim damages in case of an illegitimate action. There is no need, that is, to elaborate new rules that regulate specific situation, in as far as an elaborate application of a regime of tort rules contributes to an effective and efficient allocation of the problem. From that perspective, tort rules make new regulations superfluous.

3. Methodology

The general methodology of the research project leads to the formulation of a new theory of legal regulation. As far as the three parts of the project are concerned, the methodology can be specified in the following way.

3.1. The legal theoretical compartment consists of a critical *literature research*. This falls into two sub-compartments. In the first place, primary literature has to be delineated. On the basis of an elaborate database containing literature data, a first delineation is effectuated, from which the foundations of the theory concerned emanate. In the second place, the secondary or applied literature is concentrated on the alternatives for legal regulation. On the basis of the results of this research, the alternatives for legal regulation are theoretically underpinned.

3.2. The part that deals with legisprudence aims at identifying and validating the alternative techniques that result from the first part. In so doing, the theoretical model set out in the first part will be refined, by showing how the techniques relate to legal theories thus investigated.

2.2.2. The legal compartment consists of an original fieldwork of legislation, doctrine and case law that is to be executed, in order to determine, respectively criticise the legal foundation of the alternatives. In order to implement the theory established in the first and the second part, a extensive thesaurus is to be set up, that gives an account of the techniques used in the Belgian legal system.

As for this part, each of the examined alternatives and analogous techniques identified subsequently, will be compared to similar techniques that are in use in the system of European Law. Additionally, this aspect of the research uses the method of *internal comparison of law*, namely examining parallels in the sub-systems of the Belgian legal order.

3. Situation of the research project within the research area

The research is situated on the crossroads of legal theory, legal philosophy, legal science and political theory on the one hand and legislative and regulative practice on the other. The combination of these various disciplines results in the refinement of the legislative methodology, which distinguishes itself from legislative theory (the foundations of legislation) and legistics (formal aspects of legislation). By its very nature, this research project is interdisciplinary, in that it combines the methods and research results of the different disciplines mentioned above.