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SHORT COMMUNICATION/ COMUNICAÇÃO BREVE/BREVE COMUNICACIÓN

Research Methodology in Health Law

Metodologia da Pesquisa em Direito Sanitário

Metodología de la Investigación en Derecho Sanitario

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Abstract: Legal research is usually limited to the field of analysis of doctrine and jurisprudence and also of the knowledge of legal-formal immediate sources. In the case of health law, whose central theme - health - has a great dynamism, it requires not only the analysis of the writing of normative acts and judicial decisions. The facts lining these acts, permeated by biomedical, political, social, economic issues, among others, deserve analysis arising from other sources of knowledge and scientific methodology which, combined with the hermeneutical method, are capable of conferring a more consistent scientific approach with the complexity of the health law.

Keywords: Health Law, Research Methodology, Legal Hermeneutics.

Resumo: A pesquisa jurídica costuma limitar-se ao campo da análise de doutrina e jurisprudência, e ainda, do conhecimento das fontes imediatas jurídico-formais. No caso do direito sanitário, cujo tema central – saúde – possui uma grande dinamicidade, exige não apenas a análise da letra de atos normativos e decisões judiciais. Os fatos que revestem estes atos, permeados de questões biomédicas, políticas, sociais, econômicas, entre outras, merecem análise oriunda de outras fontes do conhecimento e da metodologia científica que, aliadas ao método hermenêutico, se revelam capazes de conferir abordagem científica mais condizente com a complexidade do direito sanitário.

Palavras-chave: Direito Sanitário, Metodologia de Pesquisa, Hermenêutica Jurídica.

Resumen: La investigación jurídica se limita generalmente al campo de los análisis de la doctrina y la jurisprudencia, así como el conocimiento de las fuentes inmediatas-jurídico-formal. En el caso del derecho sanitário, cuyo tema central - la salud - tiene un gran dinamismo, requiere no sólo el análisis de la redacción de los actos legislativos y decisiones judiciales. Los hechos que cubren estos actos, impregnados de temas bio-

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médicos, políticos, sociales, económicos, entre otros, merecen análisis que se derivan de otras fuentes de conocimiento y de la metodología científica que, combinado con el método hermenéutico, demuenstran ser capaz de dar enfoque científico más consistente con la complejidad del derecho sanitario.

Palabras-llave: Derecho Sanitario, Metodología de la Investigación, Hermenéutica Jurídica.

As stated by Silva (1), to speak about method in legal research "is entering in swampy ground", because legal research tends to be limited to the analysis of doctrine and jurisprudence. The qualitative analysis and statistics do not apply to legal research itself, although it cannot be denied that a qualitative analysis can be employed in an investigation of a legal basis and a statistical evaluation is not strange to this discipline.

The legal hermeneutics, however, is the method par excellence in the world of law. It turns out that the hermeneutical model already coexists with other methods that gradually are incorporated in the discipline, especially in the new ones such as the health law that approaches the borders of other disciplines and lays down multi and interdisciplinary dialogs, exchanging methods, models and concepts.

This is because the right to health came to integrate the list of fundamental rights of brazilian citizens with the Constitution of 1988. This document is both a political letter and a magna law. It's a political letter because it is the interpretation of the contemporary Brazilian society desire and it is a magna law because it is the maximum legal term, the supreme binding precept of Government acts and citizens.

The specialist in hermeneutics, examining the constitutional expressions relating to health and the right to health, shall consider, in the interpretation of the legal framework on health, these guidelines drawn by legal and politic planning which aims to guarantee the complete physical, mental and social well-being of the individual and of the society. This legal power emanating from the *Magna Charta* all contaminates, since the legislative formulation to acts of Governments, since the decision making of the authorities to the administrative activities of managers.

Thus, the words written in the Constitution bind not only the infraconstitutional legislator but also the interpreter, the health manager, the ordinary citizen, who while

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reading and applying a law or rule of law, must do so having as the hermeneutic rule the consecrated words of the constituent legislator.

There are three species of hermeneutic rules (2):

a) the legal
b) the scientific
c) the ones from the jurisprudence

In the ancient law of introduction to the civil code, some standards for the interpretation and application of laws were stipulated. The most important one, certainly, is the one that states that "there are no useless, superfluous or with no effect phrases or words on laws" (2).

This means that if the words of the law are as the reason, they must be taken in a literal sense. However, one should not, looking only at the letter of the law, destroy its intent and its spirit.

When the law makes no distinction, the interpreter should not do it, because violent interpretations constitute fraud on the law.

With regard to scientific rules - which are nothing more than the result of thinkers, jurists and philosophers of law about relationship and human conduct related phenomena and its application in the legal field (3) –, they have undeniable role of common sense and wisdom in the doctrinal field of law, interpreting rules and, often, saying the law.

Finally, the rules of jurisprudence, or the interpretation of laws in specific cases brought to trial by the judges. When it comes to health and sanitary laws it is needed to infuse the spirit of judge adding doses of social spirit, to interpret the law.

The knowledge of hermeneutics, or the set of rules that guide the art of ascertaining the Right contained in laws and in other ways (ordinances, decrees, resolutions, contracts, agreements, regulatory instructions etc) in order to apply it to the concrete case is necessary to the Right operator and to any interpreter of law which aims to find the best legal solution to the cases.

It appears therefore that the realization of a legal research requires from the researcher, being a right operator or not, the knowledge of the formal legal immediate sources. "Talk about sources is thinking of the metaphor of the emergence, of the emanation, of the birth or of the outcrop; talking about legal sources is thinking about detecting where the right arises" (4).

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In the case of the health law, the study of these sources is of importance because the discussion of health is dynamic, not restricting itself to the limits of normative texts. The complexity of the topic requires from the researcher a quantity of knowledge that aggregating will lead to a better reasoning to interpret the information extracted from these sources.

The immediate formal legal sources[3], according to Bittar (4) are: law, doctrine, jurisprudence, custom, equity, general principles of law, analogy and legal business. It is through these acts that the right takes body and the State expresses its legal or political and legal decisions.

Some of the sources used in the classification of Bittar are recognized by the Introduction to Civil Code law[4] (Decree Law Number 4.657/1942), revealing that the Brazilian legal system, though tied to legal positivism, allows axiological changes of the standards, through legal and ideological instruments. These changes allow the adequation of the content of the standard the peculiarities of social relations being regulated (4).

The law is the formal legal immediate source of greater relevance in the legal area. It is understood as the act that emanates from the competent legislative authority and that makes the social conduct. "It is the way the standard or set of standards are within the legal system" (5).

The legal system is formed not only by laws, but by standards, which according to a hierarchy, comprise the legal system of a country.

> They are: Constitution, amendment to the Constitution, complementary law, ordinary law, executive law, decree-law; legislative decree or provisional measure; resolutions; regulations; ministerial instructions; ordinances; memos; service orders… and still international treaties and conventions that were constituted as national law by means of decree. (5)

Obeying this hierarchy, the Constitution is the fundamental law of the legal system, and the remaining rules are to harmonise to its precepts. In the case of the health law, health was recognized in the Brazilian Constitution as fundamental and social law, requiring the State politicial and economic actions with a view to its implementation.

[3] The classification of sources of law is not peaceful matter in the doctrine. For more information consult FERRAZ JUNIOR; GUSMÃO; DINIZ, etc.
[4] Introduction to the Civil Code law - Art. 4 When the law is silent, the judge will decide the case according to the analogy, the customs and the general principles of law.

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The doctrine, although does not have binding character, is of undeniable importance because the claims issued will ultimately influence the understanding of law operators. Similarly, the jurisprudence leads the applicators of law to a reinterpretation of understandings and praxis, conferring a greater dynamics to the legal text. They are tools that allow the updating and correction of time that these new perspectives and interpretations enter into our legal texts.

The customs must be understood as the reiteration of a behavior and/or practice within a society, with strength to remove effectiveness from certain standards by the complete disuse of them, or even to fill the content of some social practices. It is the strength of time used to update the legal system.

In turn, the equity is deeply embedded in the idea of justice. It is through the operator of law, when in the analysis of the case, that its decision is to be entered and may adjust or correct the contents of the law.

The general principles of law are the sources responsible for the structuring of the legal system through the study of the axiological content of standards. In this sense, the written law must, in its formulation, observe and answer to the general legal principles that inform a society. According to Ferraz Junior (5), "the general legal principles are reminiscent of the natural law as a source".

The analogy gives the law operator a solution to remedy any omissions of the law. Thus, in the absence of a specific rule for that real case, the law operator can use other standard that has a reflex application in the question to substantiate his decision. This source of law, if well used, would make it possible to mitigate the current legislative inflation, taken the impossibility and no need of establishing specific law standards to each situation.

Finally, the legal business that is constructed observing the legal precepts, or in their absence, observing the customs, the moral and the public order, should also be considered by the operator the law as an element that will guide the decisions taken, as the conclusion of this act bound the parties involved.

However, it is not just the analysis of the letter of the normative acts and court decisions that make the health law. The facts are constitute these acts, permeated by

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biomedical political, social and economic issues, among others, deserve analysis from other sources of knowledge and from scientific methodology that, combined with the hermeneutical method, are capable of conferring a scientific approach more consistent with the complexity of health law.

The right to health, as a social right and a public subjective right, which brings the implicit question of distributive justice, and based on the principles of universality and completeness, is a complex law, which demands interventions and also complex knowledge production[5]. .

Thus hermeneutics, an interpretive method, typical of positivist science of law, can, and must, for a better scientific analysis of issues involving the health law in contemporary times, be combined with other scientific methodologies.

Nietzsche, as referenced by many authors (6), has announced that “against positivism, which stops before phenomena and says: ´there are only facts´, and I say: ´on the contrary, facts are what there are not; there are only interpretations´”.

This clean and apparently simple phrase from Nietzsche synthesizes, however, a great discussion of the philosophy of science. It puts in question the so-called scientific neutrality of the scientific positivism, built on the iluminist pillars of the objective description and "true" of the facts of reality.

Let us be alert, as teaches us Alves (6), to the premise that the facts do not offer their own enlightenment. And that certain relationships and social phenomena are not confined to be explained positively by causal relationships. When we are faced with a social fact devoid of sense, of a clear sense, we must – as scientific interpreters we are are within this academic space –, create a sense of interpretation.

As Alves notes (6),

> by habit, by constant repetition, we learn that certain things follow the others, that the events are organized in causal chains. But at the moment we cease to be simply interested in using practically these recipes, and we want to understand, we skip the facts to the interpretation.

[5] As Morin (2000) highlights, the relevant knowledge must confront the complexity. And, in the words of the author, "Complexus means what it was constructed together; in fact, there is complexity when different elements are inseparable constituting the whole (as the economic, the political, the sociological, the psychological, the affective, the mythological), and there is an interdependent, interactive and inter-retroactive tissue between the knowledge object and its context, the parts and the whole, the whole and the parts, and the parts among each other. Therefore, the complexity is the union between unity and the multiplicity (p. 38) ".

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For legal science to succeed in producing knowledge in health law and, consequently, be able to form law operators and health professionals effectively able to guarantee this right to multiple strands, it must incorporate the legal knowledge, other knowledge, especially from political science and health sciences.

As highlights Morin (7), "education should promote the" general intelligence" apt to refer to the complex, to the context, in a multidimensional manner and within the overall design".

Here is worth to highlight the concern of Faria (8) about the reduction in understanding of the law itself: "the right is reduced to a simple system of rules, which is limited to give meaning to the legal social facts as they are framed in the existing regulatory scheme".

The panorama involving the application and guarantee of the right to health is composed of complex issues ranging from technical issues involving the medical prescription, the analysis of scientific evidence, even the political and social issues affecting the regulation of pharmaceutical industries, the establishment of clinical protocols and therapeutic guidelines for the provision of procedures and inputs in the SUS, the social inequalities and inequities, among other things.

Thus, it is necessary to break the barriers that encapsulate the scientific knowledge in "closed compartments", which do not discuss among themselves. To these closed compartments, we name them disciplines, which are erected, each within its own logic, based on their own intercommunicating elements[6].

As Morin (7) highlights, "the intelligence splitted, compartmentalized, mechanistic, disjunctive and reductionist break the complexity of the world into disjoint fragments, fractionates problems, separates what is attached, makes the multidimensional one-dimensional ".

For the understanding of the right to health, and that its exercise could be consistent with the contextual complexity that surrounds it, one has to break away,

[6] Costa e Souza Júnior (2009) highlight that "one of the foundations of scientific knowledge consists in the possibility to share the real world in" boxes "or" drawers "so one can look at them in isolation, without the observer interfere in his discursive elaboration object. These boxes we call disciplines. In the past, creating disciplines or areas of scientific knowledge was absolutely essential, since the multiplicity of forms of understanding of a given object prevents the development of a rigorous discourse. The creation of a branch of science could deepen and clarify concepts, so that the truths there inserted could be more reliable "(p. 20).

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gradually, these closed compartments of the legal, politic and medical-sanitary knowledge.

The creation of channels for dialogue is needed, able to exchange the knowledge that underlie in the basis of the understanding and exercise of this right. This both in the judicial sphere, within each post process in trial, as in the extrajudicial sphere, where right also lives and exercises itself daily.

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