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A BULWARK AGAINST CORRUPTION IN PUBLIC ADMINISTRATION: A RAWLSIAN ETHICAL APPROACH, QUALITY OF REGULATIONS AND A FOCUS ON THE MODEL OF LAW COMMISSIONS**

Abstract [It]: Il presente lavoro evidenzia l'inadeguatezza della regolazione pubblica come una delle cause più rilevanti della corruzione. In particolare, la prima sezione analizza la possibilità di applicare un approccio rawlsiano alle questioni etiche ed alle regolazioni della pubblica amministrazione. Negli Stati Uniti *A Theory of Justice* di John Rawls ha influenzato gli obblighi degli amministratori pubblici, la portata della partecipazione dei cittadini alle procedure pubbliche, nonché l'equa distribuzione dei servizi pubblici. Questo approccio può essere applicato anche ai sistemi amministrativi europei. Seguendo una tale visione, la corruzione istituzionale, derivante da un eccesso di regole, potrebbe essere qualificata come uno "svantaggio" che danneggia la società nel suo complesso e produce una perdita di benessere per un Paese. Il contributo si pone, dunque, nel senso di prospettare che, se si adottasse una visione rawlsiana, si dovrebbero predisporre misure effettive, non solo di natura repressiva/penale, ma soprattutto di natura preventiva, come leggi e regolazioni efficaci ed in numero congruo. Conseguentemente, la seconda sezione del contributo si concentra sulla connessione tra l'introduzione di normative efficaci e la riduzione della corruzione. Infine, la terza sezione prende in considerazione le *Law Commissions* come modello organizzativo da adattare, sia pure con le opportune differenze, alla struttura istituzionale italiana, al fine di implementare una migliore regolazione, nonché una semplificazione di quella esistente.

Abstract [En]: This study highlights inadequate public regulation as one of the most relevant causes of corruption. In particular, the first section analyses the possibility of applying a Rawlsian approach to the ethical issues of public administration. In the United States John Rawls' Theory of Justice has influenced the obligations of public administrators, the scope of citizens participation in public procedures, and the equitable distribution of public services. This approach can also be applied to European administrative systems. Institutional corruption could be qualified as a "disadvantage" that harms society as a whole and produces a loss of well-being for a country. Thus, if a Rawlsian vision is adopted, strong measures should be prepared, not only of a repressive/penal nature, but primarily of a preventive nature, such as effective laws, that guide the behaviour of governments and citizens. Consequently, the second section of the paper focuses on the connection between the provision of effective regulations and a reduction in corruption. Finally, the third section takes Law Commissions as an organizational model to be adapted to the Italian institutional structure, to implement better regulations, as well as a simplification of the existing ones, to reduce an excess of rules, which is fertile ground for increasing discretionary, bureaucratic powers, and therefore opportunities for corruption.

Parole chiave: John Rawls, Qualità della regolazione, Etica, Prevenzione della Corruzione, Law Commissions.

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SOMMARIO: 1. Applying Rawls' approach to ethical issues in public administration as a bulwark against corruption. – 2. Quality of regulation and prevention of corruption. – 3. In search of quality of regulations: Law Commissions as a model to introduce into Italy.

1. Applying Rawls' approach to ethical issues in public administration as a bulwark against corruption

This work aims to highlight how the public administration must act in line with the principles of public ethics in serving the common good. This implies that citizens to whom public functions are entrusted, must act in the exclusive service of the nation (in accordance with Article 98 of the Italian Constitution), with discipline and honour (art. 54, 2nd paragraph, of the Constitution), as well as with impartiality (art. 97 Const.).

In this perspective, the concept of integrity[1] acquires great importance, because it specifies the broader principle of the legality of administrative action, in other words the above-mentioned principle of impartiality, *id est* the need for the administration to remain faithful to the function and purpose assigned to it by the law, without deviating from it because of the pressure of extraneous interests[2].

Public ethics[3] is intricately linked with upholding the integrity of public actions as a cultural norm in executing practices of good administration. It encompasses a collection of principles and regulations governing proper conduct within the administration, serving as a direct reflection of the constitutional principles previously mentioned. As such, it delineates the appropriate conduct expected from public officials while serving the community. This encompasses adherence to the law, ensuring the fulfilment of protected interests, and meeting the aspirations of citizens as users, all while upholding their dignity[4] with utmost respect.

This latter concept has held significant importance in shaping the ethics of public administration since its inception in the mid-1970s in the United States. It sparked a comprehensive doctrinal debate, spanning legal, political, and sociological dimensions, to highlight the implications of this theory within administrative actions. Particularly noteworthy was its influence following the publication of John Rawls' 'A Theory of Justice'. In particular, the interest in Rawls' work stems from the philosopher's criticism of the utilitarian approach, which at that time characterised the action of the public

[1] From an etymological point of view, the term derives from the entry "*integrum*", *i.e.* "not touched". The word consists of the privative-negative particle "in" and the verb "*tangere*" and has a close connection with the term "uncorrupted".

[2] *See* A. CERRI, *Imparzialità e indirizzo politico nella pubblica amministrazione*, Padova, 1973, 105.

[3] On this notion *see* S. CASSESE, *L'etica pubblica*, in *Giornale di diritto amministrativo* no. 10/2003.

[4]. *See* V. CERULLI IRELLI, *Etica pubblica e disciplina delle funzioni amministrative*, volume ASTRID, *La corruzione amministrativa. Cause, prevenzione e rimedi*, edited by F. MERLONI - L. VANDELLI, Firenze, Passigli, 2010.

administration[5].

This essay highlights the tendency of utilitarianism to underestimate individual rights, as well as the uniqueness and differences among people whose utilities are aggregated according to sophisticated, but standardized, models. Furthermore, it underlines the necessity of subordinating the questions concerning economic efficiency to those relating to social justice. Therefore, Rawls' vision is relevant for two reasons. In the first place, because it allows a deontological evaluation of public policies, appreciating the moral costs that every principle, policy or institution imposes on individuals.

According to Rawls, there are essentially two correct criteria of relational order in a society: the first, given by the principle of equality, which requires the equal assignment of fundamental rights and duties and, consequently, postulates effective, innovative social action, aimed at remedying the natural, social and economic disadvantages that can affect some members of society as well as society in general. The second is the principle of difference, which implies that economic and social inequalities are allowed only to the extent that they determine compensatory benefits, in particular for the least advantaged members of society. These principles are ranked lexically and the conditions of the first principle must always be met prior to the fulfilment of the conditions in the second principle (with a few exceptions occasioned by extraordinary circumstances). Therefore, this implies that «*no organization (social, economic, or political) has the right to deny any individual his basic liberties (...) Further, no organization has the right to infringe upon the individual's basic liberties upon the grounds that it will provide greater economic benefits, greater pleasure, or some such*»[6].

Corruption in general, and institutional corruption[7] in particular, as we shall see, could be qualified as a "disadvantage" that grieves society as a whole and produces a loss of well-being[8], affecting the economic growth of a country. In this regard, from Rawls' point of view, strong measures should be prepared, not only of a repressive/penal nature, but primarily preventive, such as rules of ethical behaviour, that guide the conduct of governments and citizens.

Indeed, the well-being and growth of a nation are measured not only in macroeconomic

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[5] On the role and relevance of utilitarianism for public policies, *see* the collections of essays, edited by E. LECALDANO - S. VECA, *Utilitarismo oggi*, Bari, Laterza, 1986. *See* also A. SEN - B. WILLIAMS (eds.), *Utilitarianism and beyond*, Cambridge, Cambridge University Press, 1982, downloadable at: https://www.utilitarianism.com/beyond.pdf. In particular, on the basis of this approach, the task of public institutions should coincide with the definition of the function of aggregate social utility and the policies aimed at maximizing this social function. This task is perceived as technical and neutral, *i.e.* extraneous with respect to the ideological conflicts that characterize politics: it is technical because it uses the theoretical models provided by the doctrine of public choice; it is neutral because it adopts aggregative mechanisms that take into account the preferences of each individual.

[6] For this statement *see* D. K. HART, *Social Equity, Justice, and the equitable administrator*, in *Public Administration Review*, 7, *cit.*

[7] On the problem of corruption of rules and institutional degradation, *see* M. D'ALBERTI, *Il propagarsi della corruzione,* in *Corruzione e amministrazione*, Napoli, Jovene, 2017, 9. The author states that corrupt phenomena are not only in violation of laws but can also fully respect the laws: often the laws themselves are "corrupted". Indeed, the corruption of people is based «on the dysfunction of the structural elements of a society or an institutional system». The author refers in particular to the phenomenon of *Tangentopoli in* Italy, from which it emerged that the corrupt events that arose did not depend only on the immorality of the people involved, but also, and above all, on institutional degradation.

[8] In this regard compare/consider the data to be found on the website http:\\data.worldbank.org/products/wdi, *World development indicators 2016*, Washington, DC, World Bank, 2016.

terms, but also in terms of laws, regulations and the functioning of institutions, policies of social inclusion and equity, and the management of public services[9].

Secondly, Rawls' vision indicates the ethical point of view to be adopted by public bodies when they exercise discretionary or regulatory powers, in terms of ethical/constitutional constraints of the type mentioned above, which represent real principles of justice and if correctly applied determine the subordination of the welfare policies undertaken by a government and implemented by the administration, to satisfy stronger rights of social citizenship which fully value the dignity of people as participants in a more active democracy and entitled to the right to good administration[10].

Moreover, this last right is established in a binding way by article 41 of the European Charter of Fundamental Rights[11], turning a «principle in function of the effectiveness of the public administration (*ex parte principis*) to a principle in function of the rights of the citizens (*ex parte civis*)»[12], *id est* it confers rights on the latter, such as those of access, of being heard, of obtaining a motivated decision, as well as the right to defence through the possibility of recourse to a third, impartial judge.

As has already been pointed out, the implementation of the principles of public ethics and integrity, which inspire a good administration, as intended by Rawls' approach, through the instruments of not only legislative but also administrative regulation (such as decrees, circulars and so on) are useful tools to prevent corruption, because activating a qualitatively effective regulation simplifies and makes the action of the public administration transparent and correct, where "correct" means that it cannot be easily corrupted.

2. Quality of regulation and prevention of corruption

A regulation[13] can indicate a set of rules that regulates the behaviour and actions of individuals and organisations (public bodies, private persons) in a given area or sector of activity. In truth, the notion of regulation initially developed in the context of economic policy[14], as a complex of measures which can be assumed at public

[9] In relation to this measurement of national growth, *see* D. ACEMOGLU – A. ROBINSON, *Why nations fail: the origins of power, prosperity and poverty*, New York, Crown, 2012.

[10] As regards the right to good administration *see* also T. LOCK, *'Article 41 CFR Right to good administration'*, in M. KELLERBAUER - M. KLAMERT – J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, 2019; online edn, Oxford Academic; D.U. GALETTA, *Il diritto ad una buona amministrazione europea come fonte di essenziali garanzie procedimentali nei confronti della pubblica amministrazione*, in *Rivista Italiana di Diritto Pubblico Comunitario* 2005, 819.

[11] The charter is available on the following website: https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

[12] *See* S. CASSESE, *Il diritto alla buona amministrazione*, Relazione alla "*Giornata sul diritto alla buona amministrazione*" per il 25° anniversario della legge sul "*Síndic de Greuges*" della Catalogna, Barcellona, 27 marzo 2009, available on the following website: https://images.irpa.eu/wp-content/uploads/2011/05/Diritto-alla-buona-amministrazione-barcellona-27-marzo.pdf.

[13] *See* N. GRECO, *Introduzione e riassunzione. Elementi definitori, problematici ed evolutivi*, in *Introduzione alla analisi di impatto della regolamentazione*, edited by N. Greco, in *La qualità della regolazione. Politiche europee e piano d'azione nazionale*, edited by F. BASILICA- F. BARAZZONI, Rimini, Maggioli, 2006, 859 *et seq.*

[14] A. OGUS, *Regulation, Legal form and Economic Theory*, Oxford, Clarendon Press, 1994, 1.

level[15] to face hypotheses of market failures[16], that is, situations in which the system of supply and demand requires correction because it is insensitive to a series of relevant factors, due to the existence of monopoly conditions, oligopoly, informative asymmetries, externalities, natural monopolies and so on. Thus, the regulation aims to rebalance the anomalous power of the market which is created in such cases[17]. In these situations, public intervention is justified primarily for the defence of the market itself, *i.e.* it is the latter that must be defended against the risks of its internal logic. Therefore, public intervention in a regulatory key finds its rationale and is relevant because of the "maturation" of the markets. Such intervention also requires that the autonomous positive value of the market be recognized in the general interest. In fact, the administrative regulation is seen as a set of measures which presuppose the spontaneity of the economic processes and set as their purpose their orientation only indirectly and externally in order to achieve aims of general interest.

From this eminently economic sphere, the doctrine began to structure the corresponding definition and legal perimeter of regulation, which is broad and heterogeneous, because of the many activities that are related to it.

For a more general notion of regulation, we can mention the one used by the Organisation for Economic Cooperation and Development (OECD) in its documents, which includes «*the different sets of instruments by which governments set requirements in enterprises and citizens*»[18]. As we can see, this is a very broad definition that refers to a relevant activity strictly connected to the public interest, which can manifest itself both through specific measures (such as authorizations to companies), but above all, through decisions by independent authorities/agencies (such as those adopted by the antitrust authorities), as well as through the issuing of regulations and criteria or guidelines, traceable to a normative

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[15] *See* M. RAMAJOLI, *La regolazione amministrativa dell'economia e la pianificazione economica nell'interpretazione dell'art. 41 Cost.*, in *Diritto amministrativo*, 2008, 121-162. Quality public regulation has increasingly been considered an element that favours economic growth, and public intervention in regulatory terms in the economy should be justified from the point of view of limiting the harshness of the market, as a factor for mediation and rebalancing the spontaneous tendencies of this. In particular, the author refers to the precautionary role of regulation, supported by many pronouncements by the Italian Constitutional Court (*see*, among others, sentence 20 July 2012, no. 200).

[16] As concerns market failures, *see* J. E. STIGLITZ, *Economia del settore pubblico 1 Fondamenti teorici*, Milano, Hoepli, 2015, 55-72.

[17] In this regard, administrative regulation is based on the principle of subsidiarity and finds both its most important legitimacy and its limit in market failures. In the European context, in particular, the clearly economic declination of the process of integration between the Member States has meant that regulation has been aimed at improving economic regulatory efficiency through the correction of specific forms of market failure. European standards were, and to a large extent are designed, accepted, applied and evaluated as a means of eliminating or reducing the transaction costs that affected and affect economic trading systems based on bilateral or multilateral international agreements. The European Economic Community (EEC), then the European Community (EC) and finally the European Union (EU) was also created as a useful tool for removing the barriers that segmented the common market (duties, customs, state aid to businesses, *etc.*).

[18] Organisation for Economic Cooperation and Development (OECD), *Report on Regulatory Reform*, Paris, 1997. The regulatory activity includes «*laws, formal and informal orders and subordinated rules issued by all levels of government, and rules issued by non-governmental or self regulatory bodies to whom government have delegated powers*». On this point, *see* M. D'Alberti, *Riforma della regolazione e sviluppo dei mercati in Italia*, in G. TESAURO-M. D'ALBERTI, *Lo stato regolatore*, Bologna, Il Mulino, 2000, 23 *et seq.*, in which an extensive analysis of the notion of regulation in economic theories and political science is noted; F. BASILICA- F. BARAZZONI, *Diritto amministrativo e politiche di semplificazione,* Bologna, 2014, 31 *et seq.*; M. DE BENEDETTO, *La qualità della funzione regolatoria: ieri, oggi e domani,* available on the following website: http://www.historiaetius.eu/uploads/5/9/4/8/5948821/de_benedetto_9.pdf .

or almost normative activity (corresponding to the rulemaking of Anglo-American matrix[19]).

This definition has been accompanied by more restricted notions, such as that of administrative regulation, which refers to any form of exercise of authoritative powers by public administrations[20] and also the regulation more specifically put in place by the so-called independent authorities, such as bodies created for the principal purpose of regulating, for instance, activities, sectors or markets through transparent procedures of consultation, notice and comment which allow a wide, informed participation of all the subjects and interests at stake.

In truth, according to part of the doctrine[21], regulation can now be understood as a new form of impartial administration, to guarantee individual rights rooted in different socio-economic contexts and not only as an instrument of sectoral insurance of market dynamics and reasons. It is precisely this guarantee of fundamental individual rights underlying the regulatory dynamics that has led to a generalised study (by the OECD, the European Union and national governments[22]) of the importance of quality regulation, which interprets the implementation of the principles of public ethics and integrity. These characterise good administration, in the Rawlsian sense outlined in the first paragraph, because better regulation leads not only to greater economic growth, significantly conditioning the functioning of market economies[23], but also meets the primary needs of modern participatory democracies, because it is an essential element of the rule of law and also

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[19] *See* as concerns rulemaking, B. MARCHETTI, *Pubblica Amministrazione e Corti negli Stati Uniti,* Padova, 2005, 52 *et seq*.; M. D'ALBERTI, *Poteri regolatori tra pubblico e privato*, available at the following link: https://images.irpa.eu/wp-content/uploads/2019/03/163.-Poteri-regolatori-tra-pubblico-e-privato.pdf.

[20] D. SORACE, *Diritto delle amministrazioni pubbliche*, Bologna, Il Mulino, 2002, 72-73.

[21] F. MIDIRI, *Il carattere indipendente della regolazione*, *in Amministrare*, 2/2018, 309 *et seq.*

[22] Since the beginning of the 1990s, the OECD has urged the European Union and the individual Member States to undertake regulatory reforms in order to reduce corruption and promote economic growth, because the quality of the rules affects the socio-economic development of the countries. *See* the above-mentioned *Organisation for Economic Co-operation and Development Report on Regulatory Reform*, Paris, 1997.

See also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Smart Regulation in the European Union*, at the following link: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0543:FIN:EN:PDF.

This latter document shows that in the European Union we are reaching a more advanced stage, that is, to quote the words of the President of the European Commission: «*better regulation must become smart regulation*». In particular, according to that communication: «*First, smart regulation is about the whole policy cycle - from the design of a piece of legislation, to implementation, enforcement, evaluation and revision. (…) Second, smart regulation must remain a shared responsibility of the European institutions and of Member States. (...) Third, the views of those most affected by regulation have a key role to play in smart regulation. The Commission has made great strides in opening its policy making to stakeholders. This can also be taken a step further and the Commission will lengthen the period for its consultations and carry out a review of its consultation processes to see how to strengthen the voice of citizens and stakeholders further. This will help to put into practice the provisions of the Lisbon Treaty on participatory democracy*».

The OECD in its surveys on *Better Regulation in Europe: Italy* has called for the implementation of consultation and monitoring policies, combining the production of rules with mechanisms that ensure their effective implementation, also at regional or local levels. Compare OECD, *Better regulation in Europe, Italy, 2012*, available at the website: *https://read.oecd-ilibrary.org/governance/better-regulation-in-europe-italy-2012_9789264204454-en#page1*.

[23] Poor regulation often has a "paralysing" effect on consumers and businesses, due to the resulting insecurity in legal transactions. On the contrary, a good quality of regulatory instruments is considered by many to be an essential element of growth and a useful factor for emerging from possible crises. *See* U. MORERA - N. RANGONE, *Sistema regolatorio e crisi economica*, in *Analisi giuridica dell'economia*, 2/2013, 383.

promotes the common interest and well-being[24].

In his Theory of Justice, taken in this article as a starting point for founding a public ethic on the basis of fair regulations that characterise good administration and serve the purpose of preventing corruption, John Rawls states that: «*institutions are ranked by how effectively they guarantee the conditions necessary for all equally to further their aims, or by how efficiently they advance shared ends that will similarly benefit everyone.* ***Thus, reasonable regulations*** *to maintain public order and security, or efficient measures for public health and safety,* ***promote the common interest*** *in this sense*»[25].

International and national institutions have formulated principles of good regulation as well as the doctrine, as we have seen, requiring that this regulation in all its possible forms[26] be adopted by competent bodies and endowed with adequate expertise, according to transparent, guaranteed and efficient procedures[27], and be coherent and proportionate with respect to the objectives to be achieved. In this sense, the OECD has directed national governments in the direction of a simplification and coordination of the regulatory contexts of the respective States, at the same time, assuring the quality of the new regulations through the introduction of adequate mechanisms for subsequent preventive evaluations of the latter, so as to consider their impact on the already existing regulatory panorama.

As can be seen, drawing up a universally valid definition of regulation is difficult, also because from a subjective point of view, as the above-mentioned OECD definition shows, a multiplicity of acts of various nature and origin can be traced back to it: legislative, administrative, public and private, national and supranational[28]. Indeed, a regulation can be arranged both at the legislative level, and at the level of agencies or structures below the executive, but also by competent independent authorities[29].

In particular, tracing a brief historical *excursus*, legislation represents the traditional form of regulation and there has been a fervent debate concerning the excessive number of laws and their quality for centuries. Therefore, even in Roman times the mass of laws was so large, "disordered", intimately incongruous, and not easily accessible, that there was a social

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[24] The quality of the rules was already highlighted as a fundamental value by Montesquieu in 1748 in the *Esprit des Lois*, in which the author stated that «*Comme les lois inutiles affaiblissent les lois nécessaires, celles qu'on peut éluder affaiblissent la législation*» (*Livre* XXIX, *Chap*. XVI, 505).

[25] *See* again J. RAWLS, cited work, 83 of the pdf book, available at the following link: https://giuseppecapograssi.files.wordpress.com/2014/08/rawls99.pdf.

[26] Regulation is in fact one of the tools that can be used to implement public policies, and legislation is one of the forms that regulation can take (on this point *see* M. HOWLETT-M. RAMESH, *Come studiare le politiche pubbliche*, Bologna, Il Mulino, 2003, 95), alongside many other forms, such as most administrative measures, also created with almost normative characteristics by specialized agencies (for example, in the Italian legal system, some independent authorities, such as *National Anti-Corruption Authority* (ANAC), in the United States the Independent Regulatory Commissions.

[27] R. BALDWIN-M. CAVE- M. LODGE, *Understanding regulation. Theory, Strategy and Practice*, Oxford 2012, 26-27, in which good regulation is characterized as elements like: «*legislative mandate, accountability, due process, expertise and efficiency*» that must be present.

[28] On the notion of regulatory acts *see*, *ex multis*, A. LA SPINA-G. MAJONE, *Lo stato regolatore*, Bologna, Il Mulino, 2000, 31; M. D'ALBERTI, *Poteri regolatori tra pubblico e privato*, in *Diritto amministrativo*, 2013, 608; P. LAZZARA, *La regolazione amministrativa: contenuto e regime*, in *Diritto amministrativo*, 2018, 337.

[29] These are the so-called independent authorities to which regulatory functions are attributed. In this regard, *see*: G. NAPOLITANO, *La rinascita della regolazione per autorità indipendenti,* in Giornale di diritto amministrativo, no. 3/2012; G. NAPOLITANO - A. ZOPPINI, *Le autorità al tempo della crisi*, Bologna, Il Mulino, 2009; F. MERUSI - M. PASSARO, *Le autorità indipendenti*, Bologna, Il Mulino, 2011.

need to organise the body of laws in force, bringing them together in a single compilation: in this way, the consolidation of laws was developed as long ago as the Roman legal system, in which special collections of *leges*[30] were prepared, precisely in order to coordinate the legislation in force. The *ratio* of these collections was to try to remedy the normative hypertrophy, highlighted by Tito Livio, who had already mentioned at that time the problem of the «*immensus aliarum super alias acervatarum legum cumulus*»[31].

In the so-called age of common law, the compilations of canon law stand out, in particular that of Graziano which was formed between 1139 and 1142 and marked the real beginning of canon law science[32]. Moreover, we should also consider the compilations of customs, among which *Libri feudorum* should be highlighted, as well as the numerous compilations of maritime law, among which the most important was the Consulate of the Sea. Furthermore, municipal statutes were also elaborated as real consolidations by various magistrates in charge of municipal governments[33].

Jumping forward to the eighteenth century, scholars such as Gaetano Filangieri[34], and Charles Louis de Secondat*, baron de Montesquieu*[35] reflected on the negative effects arising from the excess of legislation and the poor quality of the rules giving rise to a theme destined to become traditional in government and political philosophy sciences, that is the "goodness" of legislation from the point of view of content. In particular, a central point in their reflection was an analysis of the relationship between the laws and the society on which they are enforced. However, a different area of research which was developed in more recent times, concerns the techniques of drafting laws[36] according to quality

[30] Theodosius, for example, succeeded in forming a compilation of imperial constitutions, the famous Theodosian codex, published on February 15, 438 and divided into 16 books. Justinian then conceived the courageous plan of an integral consolidation of Roman law. His first concern was, in fact, the collection of the leges or imperial constitutions, which were collected in the *Novus Justinianus Codex*, which came into force on 16 April 529 and of which, however, we have no trace, while the second edition, the *Codex Iustinianeus repetitae praelectionis* of 534, has reached us in full. *See* M. VIORA, *Consolidazioni e codificazioni*, Torino, 1967, 10-11.

[31] F. SCHULZ, *I principi del diritto romano*, Florence 1995, 8, with the quoted passage by Tito Livio (from 3.34).

[32] The work was entitled *Concordia discordantium canonum,* but in common use it kept the name of *Decretum magistri Gratiani. See* M. VIORA, *cit*., 26.

[33] *See* M. VIORA, *op. cit*., 29, who also refers to the systematic collections of laws formed in southern Italy, such as the compilation of Norman-Swabian laws published by Frederick II in 1231, known as *Constitutiones Regni Siciliae*.

[34] *See* G. FILANGIERI: «*Se un disordine si fa appena sentire in una nazione, una nuova legge si emana. Essa non ha per oggetto che quel caso particolare, che potrebbe essere facilmente compreso in una legge anteriore, la quale, con due o tre parole in più, con due o tre parole in meno, potrebbe comprenderlo. Ma il destino delle legislazioni è di correre sempre innanzi senza mai rivolgersi indietro. Ecco la causa dell'immenso numero di leggi che opprimono i tribunali d'Europa, e che rendono lo studio della giurisprudenza simile a quello delle cifre dei cinesi, i quali, dopo uno studio di venti anni, hanno appena imparato leggerle*», in *La scienza della legislazione e gli opuscoli scelti*, Volume 5, Livorno, 1873, 373.

[35] This author, with reference to the laws states that: «*Elles doivent être tellement propres au peuple pour lequel elles sont faites,que c'est un très grand hasard si celles d'une nation peuvent convenir à une autre. Il faut qu'elles se rapportent à la nature et au principe du gouvernement qui est établi ou qu'on veut établir… Elles doivent être relatives au physique du pays; au climat glacé, brûlant ou temperé; à la qualité du terrain, à sa situation, à sa grandeur; au genre de vie des peuples, laboureurs, chasseurs ou pasteurs; elles doivent se rapporter au degré de liberté que la constitution peut souffrir; à la religion des habitants, à leur inclinations, à leurs richesses, à leurs moeurs, à leurs manières. Enfin elles ont des rapport entres elles; elles en ont avec leur origine, avec l'objet du législateur, avec l'ordre des choses sur lesquelles elles sont établies*». This quotation is taken from M. H. WADDICOR, *Montesquieu and the philosophy of natural law*, *The Hague*, Martinus Nijhoff, 1970, 22.

[36] In particular, the drafting of standards is the specific subject of a technique that has developed primarily in the United States, the so-called legal drafting, which uses principles of legal linguistics and legal semiotics, trying to limit the complex language of law and provide a precise meaning to the statements. *See* S. Cassese, *Lo stato della normazione*, in *Rivista trimestrale di diritto pubblico*, 2/1992, 321, which states that: «*La linguistica giuridica tende a ridurre la scienza della*

standards. In truth, Jeremy Bentham had already given some attention to this topic in several of his works[37].

Subsequently, a profound change occurred in the idea of regulation with the introduction of modern codifications, which began to take over from the aforementioned consolidations of Roman law and canon law at the end of the eighteenth century, because of the fact that many new laws and customs had been added to these forms of ancient legislation. Consequently, there was an extraordinary variety of sources of legal knowledge and this hindered their practical implementation, since everyone could find arguments and opinions for or against any thesis which were supported in the many sources in force. This caused problems in the administration of justice, opening the possibility of arbitrary decisions, as well as constant uncertainty as regards the application of the rules, leading to inequalities, elusive practices and social tensions. Moreover, the ancient consolidations could not remedy such inconveniences, because they had made the single categories of laws accessible to jurisconsults and judges (see above), but had not eliminated the already cited problems and contradictions, which arose from the fact that there was a multiplicity of chaotic laws.

The solution to these issues was found in the work of codification, which was intended to eliminate opposition, resolve doubts and simplify and clarify the sources of law, so as to proceed to a more equitable application. In this work the School of Natural Law[38] played an important role, because the first draft codes, prepared during the French Revolution, were perfectly in line with the theories of natural law, aiming at reforming all legislation in order to create a system of laws that reaffirmed the original rights of man. Codification, taken in this sense, had the task of providing a substantially new body of laws in fundamental areas that had previously been reserved, as already seen, to the intertwined play of customs, local rights and common law. However, due to the logical and practical necessities of drafting, and in order to facilitate consultation, this body had to be condensed into a clear, organic form with a few exhaustive laws, *id est* codes, subdivided into several parts and falling within different sectors of the system, thus adopting the partitions that legal science had identified in past centuries. Therefore, a Civil Code, a Code of Civil Procedure, a Code of Criminal Laws, a Code of Criminal Procedure and a Code of Commerce were drawn up in France on different occasions (with several drafts and projects, many of which were unsuccessful[39]). They completely replaced the previous sources, no longer being hetero-integrated with other sources of law, as was previously the

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legislazione a tecnica di redazione delle norme. Essa finisce per limitarsi a considerare testo ed enunciati e a dettare loro requisiti, come quelli di unità (presenza di un'idea fondamentale), completezza (pieno svolgimento del tema di fondo), coerenza (non contraddittorietà dei concetti esposti), coesione (buon collegamento delle parole che costituiscono il testo)».

[37] *See*, among others, J. BENTHAM, *An Introduction to the Principles of Moral and Legislation,* 1789 edited by L. LECALDANO - S. DI PIETRO, Torino, Unione tipografico-editrice torinese, 1998.

[38] For a clear reconstruction of the ideas of the School of Natural Law, *see* M. Viora, *op.cit.* 49 *et seq.*

[39] In particular, in the case of the Civil Code there were several projects: the first by Cambacéres in 9 August 1793, considered too complex and protracted; a second of 297 articles, also not approved because the articles were too abstract and rhetorical; a third project, also drafted by Cambacéres, left to decay because of the crisis of the Republic. In the end, the final draft of the Code civil was drawn up during the Consulate of Napoleon Bonaparte, who appointed a committee of experts of the highest level, such as Tronchet and Portalis, and its approval took place on March 21, 1804. *See* C. Ghisalberti, *Tecniche normative e itinera procedurali*, in *Clio - Rivista trimestrale di studi storici*, 1992 510 *et seq.*

case in the system of common law. Moreover, another distinctive feature of the codification was the destination of each code to a specific branch of law.

In particular, these codes constituted a model for many other States[40] and were clearly distinct from the traditional consolidations, since these contained, for the most part, pre-existing legislative material, while the codes were made up of new legislative material and therefore, although drawing also from past sources, were "animated" by a new spirit. Indeed, their norms, far from being slavishly drawn from the ancient juridical tradition, were instead inspired by "new" criteria, such as equity, the consideration of social needs, the prediction of the future needs of peoples, in other words, themes in which also ethics found an important place.

Moreover, it must be said that there were also critical positions to the principle of codification, in particular those formulated by Friedrich Carl von Savigny, the key exponent of the Historical School[41].

However, criticism aside, after the emanation of the French codes the idea of codification was successful due to the advantages associated with it, such as simplification and the consequent greater transparency of legal sources, harbinger of a clearer regulation and therefore less prone to be misrepresented or used to indirectly encourage corrupt behaviour[42].

Subsequently, in line with this codifying trend, there was the issue of the legislative and administrative unification of the Kingdom of Italy[43]. This codification was carried out with delegated laws, which severely limited the role of Parliament in concrete discussions regarding legislative choices. The civil code and the other codes issued in 1865 were approved in this form, which from then on would become the model in Italy whenever technically complex texts such as codes were and are issued.

However, just a few years after the adoption of the Commercial Code in 1865, the field of legislation in economic matters became the subject of wide debate. Pasquale Stanislao Mancini initiated this discussion, because of the need to radically reform the commercial code to adapt it to the requirements of the new growing economy.

Therefore, the issue of improving the quality of legislation in the economic field, by

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[40] Several European and non-European States, in fact, consequently adopted codes, in particular civil, criminal, civil and criminal procedure codes, as well as trade codes, which, to some extent, were inspired by the French model. For example, the Austrian (1812), Dutch (1838), Serbian (1844) and Lower Canada (1865) civil codes, to name but a few. *See* M. Viora, *op.cit*, 78.

[41] *See* Savigny's theorization and arguments in A. PADOA SCHIOPPA, *Storia del diritto in Europa*, Bologna, Il Mulino, 2007, 502 et seq.

[42] As far back as 1532 N. Machiavelli stated: «*di qui gli ordini e le leggi, non per pubblica, ma per propria utilità si fanno*», in *Istorie fiorentine*, in M. MARTELLI (ed.), *Niccolò Machiavelli: Tutte le opere*, Firenze, Sansoni editore, 1971, 63.

[43] The political unification of the Italian peninsula achieved over a two-year period and hailed in Europe as a miracle, immediately posed the problem not only of the legal regime, but also that of legislative unification. In particular, even before the proclamation of the Kingdom of Italy in March 1861, on the eve of the war with Austria, the government had obtained full legislative and executive powers. Therefore, the Minister of Justice, Urbano Rattazzi, used it in order to issue, by virtue of the delegation obtained, a very important set of laws, without having to deal with the long times required by the parliamentary procedure. In particular, these were the laws of 20 November 1859, numbers 3783, 3784, 3786, *id est* a revision of the Criminal Code, Criminal procedure Code and Civil Procedure Code, as well as a new municipal and provincial law. Subsequently, within five years in 1865, the first four codes of the united Italian nation were issued. *See* C. GHISALBERTI, *La codificazione del diritto in Italia 1865-1942,* Bari, Laterza, 2006.

means of proper legislative inquiries, began to emerge tentatively[44].

With the advent of the twentieth century, there was a proliferation of legislation due mainly to the changing role of the State, which was progressively becoming more oriented to social objectives. Indeed, the original role of the State was characterized only by a guarantee of formal equality, the maintenance of internal order and defence of the borders and then evolved in a more interventionist, welfare-oriented direction.

The objectives of States in that century, which can now be seen in the Welfare State model, were and are: substantial equality, the correction of market distortions and the imposition of limitations on individual rights in the name of the collective interest, as well as the protection of weaker social positions in order to favour a greater condition of equity[45] and to guarantee social security to the citizens.

The change in the role of the State, which originated from a series of conflicts related to the political emergence of new classes and the formation of mass parties, was characterized by a massive expansion of public services (postal services, railways, schools, roads, health services among others), which led to a clear extension and multiplication of rules[46].

The passage from equality before the law (formal equality) to substantial equality conducted to the production and application of different measures, given the diversity of situations to be regulated. One single, identical law for all subjects was replaced by as many laws or norms as the different situations or categories of citizens required.

Among the other causes of this increase in norms, we can also mention an intensification in international relations, rapid scientific and technological progress which determined new situations and new social behaviour and required different, "original" regulations that had to be continually updated, the development of territorial autonomies, which involved a diversification of the sources of law and a multiplication of the centres which produced laws, as well as an accentuated social pluralism.

Today, it is generally considered that there are no longer political and social conditions similar to those from which the great codifications of the past arose. On the contrary, according to the well-known thesis by Natalino Irti[47], the current age should be defined as the age of "*decodificazione*", characterized by the formation of special legislations that have progressively eroded, and continue to erode, the compactness of the classical codes, in particular of the civil code, from which very large branches of family law, labour law, rental law and intellectual property law have been separated, constituting independent micro-systems, endowed with their own principles and to which proper criteria of interpretation are applied.

In particular, from being the centre of a country's legal system the civil code has become,

[44] *See* M. DE BENEDETTI, *cit.*, 7.

[45] *See* the previous paragraph on the contribution of John Rawls' ideas.

[46] In Italy, for example, Giolitti was responsible for the first law on local public services, namely Law no. 103/1903, under the heading "*Assunzione diretta dei pubblici servizi da parte dei Comuni e costituzione ed amministrazione delle aziende speciali*". The purpose of this law was: «*fornire una risposta efficace alla crescente intensificazione della vita urbana, legata non solo al progressivo ingrandimento della città, ma alla moltiplicazione dei bisogni collettivi a cui occorreva dare riscontro con mezzi sociali*». That is what we read in the relevant introductory report of the law to the Parliament.

[47] N. IRTI, *L'età della Decodificazione*, Milano, Giuffrè, 1999.

and is increasingly becoming, a residual collection of principles.

From a legal drafting point of view, it should also be said that an obstacle to the implementation of codification in the traditional sense is the passage from a type of unitary legislation, centralized in a single legislator, to a legislation divided between several international, European, State and regional legislators, which determine a sort of competing or multi-level legislation[48].

As we have seen, historically the idea of a code has been correlated to the single and exclusive state legislator, whereas today the legislatures must keep in mind all the conditions mentioned above, that they have to respect. Furthermore, they should also be aware that many other legislators are working simultaneously alongside them, often in response to the same social demands[49].

In recent times, the expression "reorganization of legislation"[50], which, while not excluding the concept of substantial reform of law, is generally associated with the concept of consolidation, has been widely used for the purpose of improving the quality of the rules present in a system. This has found ample space for development in those of common law countries which have remained outside the movement of the great codifications of continental Europe, but it is, nonetheless, practiced also in those characterized by a traditional codification.

Moreover, the notion of consolidation refers to replacing a plurality of laws or acts on the same subject, which have followed one another and stratified over time, with a single text which restores clarity and consistency in that subject, without making substantial changes to the regulations in force.

On the contrary, simplification entails a modification of the legislation in force, eliminating all superfluous regulations (usually of a bureaucratic nature), reducing the prescriptions of complex procedures and avoiding excessive formalities, through a diminution of non-essential authorizations and controls, a reduction of the time required for the issue of opinions by technical bodies and a unification of procedures relating to the same object. Therefore, as we can see, simplification is essentially administrative simplification, but it also contributes to the quality of regulation.

However, more generally at the European level, we are aware that the improvement of the quality of legislation is not only a purely technical-legal problem. On the contrary, due to its institutional, ethical/social and economic implications, as well as its function of contrasting and limiting corrupt practices, as will be seen below, it is also an important political objective, so much so as to appear in Declaration No. 39 annexed to the Treaty of

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[48] M. P. CHITI, *Semplificazione delle regole e semplificazione dei procedimenti*, in *Studi parlamentari e di politica costituzionale*, nos. 147/148, 2005, 33.

[49] N. LUPO, *La lunga crisi del procedimento legislativo e l'impossibile qualità delle regole*, in *Analisi giuridica dell'economia*, 2/2013, 433.

[50] Classical tools for reorganising legislation are codification and consolidation, which do not designate equivalent concepts. Consolidation is mainly anchored to respect of the existing rules. Instead, codification is mainly aimed at creating new rules, intended to affirm a new legal structure, responding to changed social, political conditions, and is, for these reasons, a substantial novelty with respect to the previous system, although retaining elements of continuity with it. The Napoleonic Civil Code (to which reference is made in note n. 41) constitutes a clear example of codification.

Amsterdam, 2 October 1997, which was dedicated precisely to the quality of the drafting of Community legislation. It states that the quality of this latter «*is crucial if it is to be properly implemented by the competent national authorities and better understood by the public and in business circles*» and that «*the three institutions involved in the procedure for adopting Community legislation, the European Parliament, the Council and the Commission, should lay down guidelines on the quality of drafting of said legislation*»[51].

Indeed, even before that, it is worth indicating an important official survey into the technical and political aspects of the production of laws, issued between 1973 and 1975 by a Commission appointed by the British Government on the recommendation of the House of Commons.

This Commission produced a report, known as the Renton Report[52], entitled "*The Preparation of Laws*", which was presented to the British Parliament in May 1975. It contained an extensive, in-depth analysis of the state and criteria of production of English legislation, and still constitutes, even today, a reference point for the study of legal drafting outside the English context.

On the other hand, since the 1970s, much reference has been made in Italy to the simplification of legislation and in particular, the most significant documents of analysis have been the Giannini Report[53] in 1979, the Barettoni Arleri Commission Report[54] in 1981 and the report of the Cassese Sub-Commission[55] in 1984, which mainly examined the issues of administrative simplification and administrative feasibility of laws.

As far as the process of legislative reform orders is concerned, it has been regulated in general terms by Article 17, paragraph 2, of Law no. 400 of 23 August 1988, which accepted some indications already contained in the regulatory schemes prepared by the Cassese Sub-Commission and consisted in the transfer of the regulation of a given subject from the legislative competence to the regulatory competence.

However, it should be noted that many objections were raised in relation to the adequacy

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[51] M.P. CHITI, *cit.*, 34, mentions this Declaration. The declaration is found in the body of the Treaty of Amsterdam on page 145, which is available at the following web address: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_of_amsterdam_it.pdf.

[52] So named after its president Sir David Renton. The full name of the Report is: *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council. Chairman Sir David Renton*, *Sweet and Maxwell*, *London*, 1975, available in the volume *La preparazione delle leggi. Rapporto presentato al Parlamento inglese (1975),* with introduction and notes by R. PAGANO, *Camera dei Deputati*, Roma, 1990, 33 *et seq*.

[53] This is the report on the main problems of the state, presented to Parliament on 16 March 1979 by the Minister of Public Administration Massimo Severo Giannini. In it, the efficiency of the public administration was linked, among other things, to the quality of the legislation, above all analysed from the point of view of its practicability.

[54] It was the Study Commission for the simplification of procedures, the feasibility and application of laws, which always dealt with the administrative feasibility of laws, even if it dedicated a chapter to the question of legislative technique, pointing out some common hypotheses of defects in legislative technique, and indicating some proposals that would involve constitutional changes, legislative and parliamentary regulations, aimed at eliminating or at least mitigating the most conspicuous aspects of bad legislation. *See*, R. PAGANO, *Introduzione alla legistica - L'arte di preparare le leggi*, Milano, Giuffrè, 2004, 117.

[55] This sub-committee was entrusted with the task of indicating criteria and preparing regulatory instruments for the simplification and rationalization of existing legislation. The subcommittee started to acquire, document and identify regulatory complexes in urgent need of reorganization (*i.e.* revision, coordination and simplification). The sectors identified were road traffic, taxation, social security, work safety, foreign trade, customs and residential construction. *See* R. PAGANO, *cit.*, 119.

of the regulations in Law no. 400/1988.

Despite this, there has been a succession of legislative interventions aimed at delegating entire regulatory sectors and, above all, at simplifying numerous administrative procedures. In particular, Article 20 of Law 59 of March 15, 1997, was more resolute in this direction, establishing an annual law of simplification, which would identify the administrative procedures to be simplified. The aim was to prepare a permanent legislative instrument which would respond to the problem of excessive bureaucratisation of the public administration. This was done through the annual simplification laws, among which Law No. 50/1999 (now repealed in many parts)[56], which dictated rules for delegating, simplifying administrative procedures and drafting single texts, establishing, in particular for the latter, a series of rules aimed at clarifying and streamlining the legislation in force in important areas of civil, economic and social relations. Furthermore, with the aim of simplifying the legislation by trying to reduce the laws in force, art. 14 of Law no. 246/2005 delegated the Government to adopt legislative decrees identifying those legislative provisions, published prior to 1 January 1970, whose permanence in force was considered indispensable. Moreover, this article identified some relevant "sectors" excluded from repeal.

However, the main peculiarity of the 2005 simplification law is the procedure defined as "*taglia-leggi*" (internationally referred to as regulatory-guillotine), because the cited art. 14 cited above established that one year after the expiry of a specified term provided for, all legislative provisions not included in the aforementioned legislative decrees are repealed.

Therefore, this "mechanism" introduced a generalized and implicit repeal of the legislation preceding a certain date and this phenomenon concerned legislation which covered a very vast period[57], from the Unification of Italy to 1970.

An important contribution in the direction of regulatory simplification, in terms of achieving better regulation, has been the introduction of the Regulation Impact Analysis (RIA), by art. 14 Law no. 246/2005, following the indications of OECD, mentioned in the previous pages[58].

This instrument consists of a prior evaluation of:

1. the administrative impact of the draft law, *i.e.* verification of the administrative practicability of the bill;

2. the impact on the legal system, *i.e.* its relations and effects in relation to constitutional, European and international treaties, as well as fundamental principles of the law;

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[56] *See* Law 8 march 1999, no. 50, "*Delegificazione e testi unici di norme concernenti procedimenti amministrativi – Legge di semplificazione 1998*". Then, there was Law 24 novembre 2000, no. 340, "*Disposizioni per la delegificazione di norme e per la semplificazione di procedimenti amministrativi – Legge di semplificazione 1999*"; Law 29 luglio 2003, no. 229, "*Interventi in materia di qualità della regolazione, riassetto normativo e codificazione – Legge di semplificazione 2001*"; as well as Law 28 novembre 2005, no. 246, "*Semplificazione e riassetto normativo per l'anno 2005*", analysed in the text.

[57] *See* in this respect the reports of the Parliamentary Committee on the simplification of the 16th legislature, at: http://www.senato.it/application/xmanager/projects/senato/file/Doc._di_Commis._n._10.pdf.

[58] *See* note 24 page 7 and page 8 and also M. De Benedetto, *L'organizzazione della funzione di regolazione*, in *Studi parlamentari e di politica costituzionale*, nos. 149/150, 2005, 73 *et seq.* In addition, for a review of the procedure, R. Pagano, *Introduzione alla legistica cit.*, 127 *et seq.*

3. the economic-financial impact, *i.e.* the evaluation of the costs of the measure;
4. its social impact.

Moreover, on the other hand, the Regulatory Impact Assessment[59] operates a periodic evaluation of whether the law introduced has achieved its objectives and an estimation of its actual effects, through a costs/benefits analysis.

As can be seen, in the light of this short historical/regulatory background, it is, above all, in the last century that attention and reflection was given to the way in which laws are produced and to their quality in terms of clarity, coherence and effectiveness, due to a progressive perception of the increasingly negative repercussions of an inflationary, polluted and inconsistent legislation.

Regretfully, the results of the application of the simplification tools mentioned above, with a focus on the Italian experience, have often been unsatisfactory[60].

Also, as a result of these inadequacies, an increase in different mechanisms of regulation has been noticed, no longer based on the "supremacy of the law" or on its containment/elimination through the "devices" of deregulation, legislative reform orders and repeal.

Therefore, there has been a multiplication of different forms of administrative regulation, such as those concretizing in guidelines and soft law instruments, as well as an opening to regulatory subjects other than the traditional legislator.

This phenomenon has been caused by a rejection of the systematic imposition of rules by the State and the regulatory agencies, which has been observed in numerous empirical studies, and could clearly increase opacity, circumvention and cases of maladministration and corrupt behaviour, primarily in delicate sectors such as environmental regulation and consumer protection.

Therefore, some doctrine has proposed a responsive regulation for these areas, which consists of a series of regulatory strategies, which tend to balance/coordinate the advantages of governance linked to market mechanisms, while state intervention operates in relation to the correction of market failures.

In particular, these strategies, which may consist of recommendations, guidelines or warnings, are intended to "solicit" spontaneous compliance with the rules by the recipients. Indeed, according to the theory of responsive regulation[61], enforcement is read differently, depending on the characteristics of what and who is regulated. When there is a violation of the rules virtuous, competent and rational societies in case of violation of the rules should be advised and well directed. Amoral calculators, with the ability to adapt when this constitutes a clear advantage, could be warned of the possibility of seeing the sanctions aggravated, to convince them that it is rational to obey the rule before sanctions are

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[59] The Regulatory Impact Assessment was introduced by art. 15 of the mentioned Law no. 246/2005 (Simplification Law - 2005).

[60] In particular, with reference to the so-called "*taglia-leggi*", *see* the critical notes of M. CECCHETTI, *Il "taglio" delle leggi tra deleghe legislative, decretazione d'urgenza, clausole "ghigliottina" e abrogazioni espresse*, in *Studi sulle fonti del diritto*, Volume I, edited by S. PAJNO - G. VERDE, Milano, Giuffrè, 2010, 95 *et seq.*

[61] *See* J. AIRES - J. BRAITHWAITE, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York Oxford, 1992.

triggered.

Incompetent societies which lack the ability to be rational or to act in accordance with the rules could be stopped, for example, by revoking their permits/authorizations.

Thus, the theory of responsive regulation provides for different approaches to regulatory regimes depending on the type of recipient.

Moreover, this perspective would be in line with the accentuated legal pluralism of contemporary legal systems, characterized by the intersection of a multiplicity of national and international regulatory sources.

In addition, it would be possible to propose a "delegation" of responsibility for the application of the rules from a legislative body to an agency and to enhance the role of private associations, such as trade associations or those for the legal or medical professions, which the legislation delegates to produce rules for the members of the individual professions.

In these cases, we have a collaborative governance, in which the function of producing rules is assigned to non-state institutions. Within this context, provisions of the European Treaties[62] are emblematic, because in several articles they provide for an improvement of the role played by civil society (through associations), as well as by trade unions and employers through their constant consultation and foresee the possibility for them to elaborate rules to be submitted for ratification by the Council.

However, generally, in sectors and contexts in which a certain flexibility is required, for the purposes of a good, "conscious" regulation (which appeals to parameters also of ethics), the possibility of resorting to forms of collaborative regulation, also by means of instruments of soft law[63], appears worthy of consideration. Such resources are employed in combination with a form of authority which is not based on the promulgation of legally binding instruments (even if it may be connected to the faculty to foresee or impose such instruments). Therefore, one of the distinctive features of soft law is the use of governmental authority, but in a different way than the production of mandatory legal rules[64].

After this general framework on regulation and on its complexity, it is necessary to consider the already partly mentioned distortions, to which bad regulation leads, in the sense of a broad inflationary tendency of legislation and regulation broadly and of the handles which this offers to corruption and maladministration.

As we know, corruption can be declined in two dimensions: a subjective one, relating to the conduct of individuals, which can be administratively and/or criminally sanctioned, and an objective one, which affects the rules and the cultural sensitivity of society and of the

[62] In particular, *see* Articles 11, 151, 152, 154 and 155 of the Treaty on the Functioning of the European Union.

[63] An example of such regulation is cited by C. SCOTT, *Regolazione gerarchica, pluralismo giuridico e rule of law*, in *Ars Interpretandi*, 11, 2006, 116. This author refers to the Pricing Code of the United Kingdom, issued at the same time as the Consumer Protection Act of 1987. This act provides for the commercial misrepresentation of the misleading indication of price in a quantity of materials, but the terminology used does not contain an exact description of the type of commercial practices identified by the Act. This "gap" is filled by the code, which provides several examples with illustrations of conduct prohibited by the Consumer Protection Act.

[64] *See* again C. SCOTT, *op. cit.*, 117.

country, determining a degeneration of the institutional structures and an ethical involution of the citizens.

After all, the phenomenon of the "corruption of rules", inherent in legislative inflation, as we have seen in the previous pages, has very ancient origins, if we consider that Tacitus, among others, already stated: «*Corruptissima re publica plurimae leges*»[65].

Therefore, from the perspective of the second type of corruption, the quality of the rules is absolutely relevant. In fact, the presence of many, obscure, complex provisions feeds a proliferation of corrupt episodes, also because with unclear rules public employees are more at risk of making mistakes and the hypotheses of uncertainty in the application of the regulations seem to multiply.

Thus, the limited quality of regulation gives the interpreter the possibility to identify concrete conduct, leading to an increase in discretionary and bureaucratic powers with a doubly negative effect: on the one hand, legal uncertainty is affirmed by opening the way to different practices while, on the other, the honest decision-maker does not feel protected and the dishonest one has a margin of *manoeuvre* that he can use to his advantage.

Next, and perhaps more controversially, the formulation of rules leads to corruption through consultation processes in which regulators and third parties who contribute to rule making and regulatory policy are involved. This participation brings many benefits in terms of more information, better transparency and accountability, but, at the same time, direct access to regulatory officials could increase the opportunity for corrupt transactions[66].

Hence, the phenomena of "capture of the regulator"[67] can be activated, due also to the imperfect or redundant formulation of many rules, by which consultants and other operators can circumvent regulatory or fiscal regimes, with apparent legality. This is due also to the fact that: «*The official also typically benefits from significant information asymmetry, because the principle or rule to be applied is imperfectly formulated or else confers discretion; and the decision-making process may lack transparency and accountability*»[68].

Therefore, in Italy the multiplication of different types of legal sources (laws, regulations, guidelines, directives, *etc.*) and decision-makers (parliament, independent authorities, judges) becomes often a cause of maladministration.

This phenomenon could be avoided by means of an improvement in the quality of rules, achievable through a careful evaluation of their impact and their periodic review, by making appropriate use of the tools that we have already seen, such as the analysis of impact and impact assessment of the regulation and strengthening the justification of rules and their costs.

Indeed, another profile to be increased is that relating to the traceability of interests, placed at the basis of the legislation/regulation, so as to understand those who benefit or

[65] P. C. TACITO, *Annales*, *Libro* III, 27.

[66] *See* A. OGUS, *Corruption and regulatory structures*, in Law and Policy, 2004, vol. 26, July-October, page 341.

[67] *See* S. ROSE ACKERMAN, *Corruption. A study in political economy*, *Academic Press*, Amsterdam, Elsevier, 1978; N. FRANZINI, *La corruzione come problema di agenzia*, in R. ARTONI, (ed.), *Teoria economica e analisi delle istituzioni*, Bologna, Il Mulino, 1991.

[68] *See* again A. OGUS, *cit.*, 331.

are disadvantaged by the adoption of certain regulatory interventions. In this context, it would be desirable if there were a general discipline of lobbies[69], *id est* the interest groups which tend to try and influence the public decision-makers in order to obtain an advantage which is not necessarily economic.

Last but not least, it is necessary to ensure that the existing rules are maintained and reviewed intelligently, in order to guarantee the supremacy of law, which is a characteristic element of modern-day democracies, as well as being a founding element. Hopefully, this will occur according to criteria of ethics and equity, in the Rawlsian sense outlined in the previous pages, intervening also in delicate social sectors and favouring practices of good administration.

In this light, an instrument that is particularly effective is the English Law Commission, introduced as far back as 1965. Since then, it has formulated many formal projects, in order to modify or abrogate numerous legislative measures and regulations, eliminating obsolete or superabundant rules and giving rise to an effective work of consolidation and repeal.

This institution has led to a considerable reduction in the existing body of legislation and to its rationalisation thanks to the codifications carried out.

As we shall see in the next paragraph, the English Law Commission could be a model to follow.

3. In search of quality of regulations: Law Commissions as a model to introduce into Italy

The Law Commissions were created in a very different legal system from that of continental Europe, where the legal tradition, deriving to a large extent from Roman law, played a strong role, and the most important development of which was the Napoleonic code which, as we have seen, inspired many subsequent European codes. The purpose of these codifications was to condense the prescriptions into principles of broad scope and application, avoiding an excess of too detailed rules[70].

On the contrary, over the centuries, a case law approach to legislation has been developed in England, since the scope of law was (and generally is also now) to foresee and regulate for all possible cases of a given subject.

There are essentially two reasons for this approach:

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[69] *See* P.L. PETRILLO, *L'irresistibile (e impossibile) regolamentazione delle lobbies in Italia*, in *Analisi giuridica dell'economia*, 2/2013, 465 *et seq.*

[70] A clear example of this is the formulation of art. 1382 of the Civil Code (on which the corresponding article of the Italian Civil Code was also modelled), which states that «*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer*» (Any act by a human being causing damage to another obliges the guilty person to compensate for the damage).

The generality and abstractness of this rule is a precise consequence of the elaborations of Enlightenment rationalism and the School of Natural Law, as already noted in the previous paragraph, but it is clear that such a principle could never have been written in such a form by an English jurist or by the English Parliament.

This example is cited by R. PAGANO, *Introduzione alla legistica L'arte di preparare le leggi*, 2004, Milano, Giuffrè, 17, with regard to the English system also the entire chapter of Part IV of the volume, dedicated to Great Britain, 172 *et seq.*

a) By virtue of the principle of parliamentary sovereignty, it is Parliament that must decide how the law is to be applied in different circumstances, because there is a fear of entrusting the concrete application of a general principle to the interpretative discretion of the judiciary or to the subordinate legislation of the executive power through statutory instruments. Moreover, this idea responds to the principle of the rule of law, in particular that of its applicative certainty: the addressees of the laws must be able to account for the contents of the laws without any margin of doubt.
b) On the basis of the principle of *stare decisis*, or rather *stare rationibus decidendi*[71], the judges, in resolving the concrete cases that come to their attention, must apply the principles of law used in analogous cases, previously resolved by themselves or by the superior judicial authorities.

However, they must apply statute law, following a lexical analysis of the text, *id est* literally. In other words, the Courts presuppose that the legislative body knows exactly what it wants to dispose and it is not their task to interpret its intentions, nor to fill in any gaps, because this would entail a usurpation of the legislative function. The foundation for this attitude lies in the courts' sense of deference to the sovereignty of Parliament.

Moreover, the "case law" profile of the British statutes is also due to the fact that they were conceived as an exception to common law, based on a system of precedents. It is for this reason that the statutes have ended up being modelled and conformed to the fragmentary structure characterized by judicial precedents which is typical of this legal system.

Therefore, an extremely different model of legislation has been created from the idea of law progressively affirmed in the countries of continental Europe following the French Revolution which led, as highlighted above, to the modern codifications.

In truth, the system of judicial precedents creates a relevant obstacle towards the systematization and completeness of the codes in English statute law, even if, as seen in England in the 18th century, Jeremy Bentham proposed the transformation of the rules of conduct of common law into "statute law" through an all-encompassing codification[72], on the model of the continental ones.

Indeed, given the aforesaid characteristics, a codification of the statute law presented many technical problems and this is why particular instruments, such as the already mentioned consolidation and revision[73] of the statutes, were elaborated in the Anglo-Saxon countries from the 19th century on, with the aim of periodically reorganizing the legislation.

Moreover, the technical profiles of legislative drafting have assumed a central role which has progressively developed in continental countries only in more recent times.

Therefore, in the light of all these assumptions, it can be understood that in England the

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[71] *See* M. ZANDER, *The law making process*, 1980, Cambridge University Press, 102 *et seq.* For a general examination of *stare decisis see* also R. SACCO, *Sistemi giuridici comparati*, Torino, Utet Giuridica, 2005, 69 *et seq.*

[72] In this regard, *see* 8 and footnote 42, as well as P. SCARLATTI, *Codificazione e normografia nell'opera di Jeremy Bentham*, in *Studi parlamentari e di politica costituzionale*, no. 169, 3rd quarter, 2010. However, during the 19th century, thanks to Chalmers' intense activity, only a few minor codifications in secondary subjects were realised. In this regard, *see* M. Zander, *op. cit.*, 282 *et seq.*

[73] In England revision means the mere removal of repealed and/or amended laws from the body of legislation.

debate regarding the poor quality of laws and the possible remedies really goes back a long way and even in the sixteenth and seventeenth centuries there were requests for revision of the statutes[74].

However, the growing expansion of legislation, especially from the 19th century onwards, produced a considerable worsening of the problem and served as a stimulus to search for durable solutions, also from an institutional point of view.

Among the various remedies developed, it is worth noting the development of technical bodies, such as the Legislation Committee and the Future Legislation Committee[75], introduced into the Government structure in order to elaborate its legislative programme. In addition, the Parliamentary Counsel Office is a permanent body made up of jurists and officials, whose task is to implement the plan in legislative texts to be presented to Parliament, on the basis of ministerial instructions and in close contact with the officials of the ministers concerned. Then, there is also the Joint Committee[76], that is a bicameral commission.

In any case, apart from all the bodies mentioned above, the English Law Commission[77] (and also a corresponding Scottish Law Commission) is distinguished by its different features, because is an advisory body of the Government on legislative technique, with wide autonomy and specifically responsible for the development of consolidation, codification and law reform initiatives and projects.

Therefore, the English Law Commission is the most interesting institution among those indicated above, and its introduction was due to the extensive law reform and codification programme that the Labour Party had developed in view of the legislative elections in 1964, which it went on to win. Thus, the Law Commission Act was drafted very quickly in 1965[78] and the five members and their staff (a total of 47 people, plus 5 draftsmen from the Parliamentary Counsel) were appointed. Judge L. Scarman was nominated as president and at this point the Law Commission was able to begin its work.

Consequently, the Law Commission was charged with the duties of:

1) Law reform, that is, to provide for the simplification and modernization of the law,

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[74] In particular, the above-mentioned Renton Report (note 63), issued by the Renton Committee, established in 1973 on the initiative of the Heath Conservative government, highlights the limits and evils of English legislation, by roughly stating these concepts: «The draftsmen of our laws have worked hard to express themselves as accurately as possible. They have tried to anticipate every possible situation that may arise. They sacrificed style and simplicity. They have abandoned brevity. They have become verbose and involute… The judges have adapted. They interpret the law in the sense of its application to the circumstances highlighted by the words themselves. They give a literal interpretation». *See* Renton Report (par. 19.38), but also A. Pizzorusso, *Il Renton Report e le prospettive di evoluzione del sistema giuridico inglese*, in *Rivista trimestrale di diritto processuale civile*, 1984, 741 *et seq.*

[75] On the functions of these Committees, *see* R. PAGANO, *cit.*, 172 *et seq.*

[76] In particular, from 1892 onwards, Parliament began the practice of appointing (initially on a case-by-case basis) a Joint Committee on Consolidation Bill, *i.e.* a bicameral committee to which consolidation projects would be sent for examination. *See* R. Pagano, *op. cit.,* 178.

[77] On the Law Commission, *see*, *ex-multis*, J. H. FARRAR, *Law Reform and the Law Commission*, Sweet and Maxwell 1974; G. DWORKIN, *The Law Commission Act, 1965*, in The Modern Law Review, 1965, 675 *et seq.*; J. BROOKE, *The role of Law Commission in simplifying Statute Law*, in *Statute Law Review*, Volume 16, no. 1, 1. 1995; S. M. CRETNEY, *The Law Commission: True Dawns and False Dawns*, in *The Modern Law Review*, September 1996, no. 5, 631 *et seq.*

[78] *Law Commission Act*, 15 June 1965; E. ALBANESI, *I meccanismi di semplificazione normativa nel Regno Unito*, in *Rassegna parlamentare*, April/June 2015, 433 *et seq.*

through the "elimination of anomalies", the revision of the parts of the "obsolete and unnecessary" parts of the laws and the reduction of the number of laws[79];

2) Studying the possibilities of codification in some matters, with the clarification however that, if it is true that the Law Commission was granted wide powers and good decision-making autonomy, it is also true that the final choice regarding the matters to be submitted for examination has always been, in some way, "directed/controlled" by the Government, as provided for by the founding Act itself.

The procedure followed by the Commission for the issue of its reports is divided into the following stages:

a) The presentation of a Consultation paper, in which it proposes an examination of the criticalities inherent in the legislation in force in the area under analysis, offering in-depth and comparative analyses, and outlines the prospects for possible reform. The consultations, which now take place in telematic form, can also be integrated with meetings or working papers with stakeholders (associations, individuals working in the field to be reformed) and have been complemented by an analysis of the impact of regulation for about 10 years.

b) At the end of these stages, the Commission publishes a final report, in which it justifies its proposal in the light of the material acquired during the complex phase of consultations, outlined above.

With reference to the practical results achieved in this period of more than fifty years of activity, it can undoubtedly be said that the area in which the Commission has had the most impact has been that of technical law reform, consisting of the rational and systematic work of consolidation and revision of laws. In fact, this activity was previously realised in much more occasional and uncoordinated forms.

However, despite this meritorious activity of rationalisation of the existing legal system, the Law Commission, despite its initial intentions and attempts, has been kept away from legislation of greater political importance, such as that of administrative law, constitutional law and industrial relations, and this has considerably diminished its capacity to implement the tasks of law reform with which it had originally been attributed[80].

In particular, with regard to the matter of administrative corruption, the legislation of the United Kingdom has focused almost exclusively on the subjective dimension of corrupt events, without considering their institutional or cultural scope, thus fighting them only on the individual level of criminal repression and not on that of prevention through laws that sanctioned and prevented the phenomena of administrative and regulatory corruption. Only recently, a broader interpretation of corrupt phenomena seems to have been taken

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[79] *See* Art. 3.1. of the text of the Law (Act) of 1965.

[80] Indeed, the opinion of the first Chairman of the Law Commission, Lord Scarman, was clear on the matter: «*I challenge anyone to identify an issue of law reform so technical that it raises no social, political or economic issues. If there is any such thing, I doubt if it would be worth doing anything about it*», in L. SCARMAN, *Law Reform: The new Pattern*, London, Routledge, 1968, 28.

into consideration[81] and extended to institutional and administrative regulations, through an analysis of public officials' conflicts of interest and incompatibilities.

Furthermore, another weak point of the Law Commission is constituted by its aforementioned relations with the executive power, because on the one hand, a close dialogue and a continuous, profitable collaboration with the Government are necessary, but, on the other, it is also necessary to endow the Commission with effective counterweights, so as not to render it subordinate to particular and contingent (political) interests.

Moreover, the appointment of the Commissioners is governmental and the funding to the Commission is partly established by the Parliament and partly attributed by the various government departments in favour of the particular projects that interest them, on an annual basis.

Another critical point is the Commission's limited power of initiative, because it presents its own reform programme, but the Government can veto (denial) certain subject areas in this plan and submits to Parliament only the reports it deems to approve.

Moreover, with the introduction of the Law Commission Act in 2009, the Lord Chancellor was required to submit an annual report to Parliament on the reports presented, on the implementation of those still pending and on the reasons for the rejection of others. However, this Act provided the possibility to sign a Protocol to increase cooperation between the Commission and the Government.

In 2010, this Protocol[82] was stipulated with the Ministry of Justice and the question of the choice of subject matter/areas to be reformed now seems to be connected to the "independent - not political" nature of the Law Commission. Moreover, the Protocol requires that the Commission and the executive have a constant dialogue during the writing of each project. Consequently, it seems that the independence of the Law Commission was and is being further reduced[83].

Despite this, a very positive assessment of its activity can be expressed. Its merits can be summarised in several points, which serve as guarantees/counterbalances to the previous critical issues:

a) The Law Commission has made it possible to reorganize entire areas, which otherwise would be ignored, because they are not very attractive from an electoral point of view;

b) It costs and continues to cost relatively little[84];

c) It is composed of Commissioners with particular professional skills (magistrates, solicitors, barristers and university lecturers in legal subjects) and the chairman is a judge;

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[81] To that end, read, D. BEETHAM, *Moving Beyond a Narrow Definition of Corruption*, in D. WHYTE (edited by), *Introduction: A Very British Corruption, How corrupt is Britain*, London, Pluto Press, 2015, 124 *et seq.*

[82] *See Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission, 2010, par. 5.*

[83] As regards this opinion, read WILSON, *Reforming the Law (Commission), a crisis of identity*, in *Public Law*, 2013, 26 *et seq.*

[84] In 2016, the total number of staff employed by the Commission was only about 55. On this figure, *see* D. LLYOD JONES, *50 Years On: The Law Commission at 50,* 3, available at the internet address: https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2016/04/CALRAS_2015_DLJ2.pdf.

d) It can only be repealed by means of a law since, as we have seen, it was instituted by law and this protects it from the whims of the executives, making Parliamentary intervention necessary to eliminate it.

Finally, with reference to the possibility of introducing such an institution in Italy, it should have a more limited scope of action, since the codification of the law in force, which was the main objective not achieved by the English Law Commission, is not a primary necessity for our legal system.

Therefore, if anything, the main aims of its activity could, more profitably, be the simplification of the system, control of the quality of new legislation and legislative drafting. Moreover, the procedures for consultation regarding new provisions and an impact analysis of them, should provide an adequate assessment which is also relevant to reforms concerning the prevention of and fight against corruption, through the adoption of the Corruption Impact Assessment[85].

Then, the establishment of a special technical body, like the English Law Commission, would be extremely useful for implementing an analysis of primary and secondary legislation and for drafting specific proposals, with a view to reducing and simplifying them. In fact, neither a parliamentary committee (such as Comitato per la qualità della legislazione[86]) nor the Italian National Anti-Corruption Authority (ANAC) (already burdened with numerous tasks), can be asked to undertake such articulated tasks.
Consequently, such a Commission could certainly help to bring order to the chaos of often obscure and conflicting legislative and regulatory provisions that encourage corrupt phenomena.

In conclusion, unlike the English model, a coherent and far-reaching programme of reforms could also be developed to tackle the revision of sectors which are less politically attractive because they do not bring short-term electoral results, but which have an impact in the medium and long term on delicate themes, such as those concerning an adequate distribution of public services or respect for civil rights. All this to be carried out according to the canons of substantial equality, in a Rawlsian perspective such as that adopted here. This is due to the fact that the drafting of good rules is intimately and primarily connected to factors which regard not only the very relevant political and institutional context but, above all, a cultural and ethical sensitivity that Rawls was able to grasp very well and that it would be appropriate to concentrate in the creation of a better regulation, which is also fairer and more democratic.

Moreover, the method used by the English Law Commission to conduct broad and detailed stakeholder consultations could be implemented to this end, *id est* constituting a decision-making system with democratic legitimacy, improving compliance with reforms

[85] In relation to the analysis of the impact of corruption, *see* L. DI DONATO, *L'analisi di impatto della corruzione (AIC): un nuovo strumento per i regolatori?*, in *Federalismi.it* 2015/21, 1 *et seq.*

[86] The Comitato per la qualità della legislazione is a committee set up with the reform of the Italian Chamber of Deputies' Rules of Procedure in 1997 (see Article 16a of the Chamber's Rules of Procedure) and is a peculiar internal body of the Chamber of Deputies of the Italian Republic based in Palazzo Montecitorio.

and acting as a mechanism of cultural change for those who would use the reformed provisions on a daily basis.