

Legislative drafting and political will

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ABSTRACT

The first requirement to fulfill in order to draft a good law is a clear political choice. Administrative, financial and technical contexts limit the political will. Bureaucracy can emphasize those limits, but politics minimize them.

Legislative drafting is a matter of interpretation. Examples taken from parliamentary activity in the Chamber of Deputies (learning by doing!) show that political pressure can affect the quality of legislation.

1. An old lesson

About 25 years ago, prof. Giuliano Amato wrote an essay about principles of legislative drafting, as a result of his course at ISLE (where he used to teach legislative drafting!). In that essay he provided a list of six requirements to fulfill in order to draft a good law.

The first aspect he focuses on is the political choice (which is the goal to be reached?). Technical drafters, in theory, have nothing to do with the political choice. But law, at the same time, encounters specific limits: e.g. logical, juridical, practical, administrative and financial.

The other aspects in the list are: formal clarity, substantial clarity, homogeneity, legitimacy, consistency.

Moreover, 25 years later, the interaction between local and national dimension, European level and International level has absolutely to be considered in order to produce better legislative drafting. In this framework, interparliamentary cooperation can enhance good drafting and practices.

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2. A difficult balance

The first issue regards the balance between politics and technique; this means, in my professional experience, the balance between MPs and bureaucratic staff.

The first thing to teach (and to learn): legislative drafting is not so neutral. It implies and requires a deep knowledge of different fields (law, economics, administration) and contexts. Contexts in general limit the abstract possibility of the law and the political will. Bureaucracy can emphasize those limits, but politics tend to minimize them.

3. From legislative drafting to interpretation

At the same time, we have to recognize that legislative drafting is basically a matter of interpretation: interpretation of the political will in relation to a written text and interacting with it.

What happens if the political will is – or wants to be - unclear or uncertain when it addresses complicated and very technical topics? The quality of legislative drafting worsens, the consistency of a written law is in danger, the solidity of the legal system as a whole is weakened. As civil servant, all I can do is to warn deputies and show them very clearly the pros and cons of their choice.

4. Learning by doing

An Italian example: when Government, first, and Parliament, later, drafted the fiscal federalism bill in 2008-2009, a general political compromise was pursued, between parties supporting tax autonomy and parties supporting State (or federal) equalisation. The result is a list of general principles that don't allow the interpreters to establish how "federal" or how "equalized" our local finances should be. Autonomy and solidarity coexisted in that bill and later on in the law. Some commentators noted very early that Law 42/2009 did not make any clear choice and that this could affect its final results. History has proved them right.

My very first lesson (as a “student”, working in the Chamber of Deputies) was exactly this: political dimension always prevails over the legislative drafting and often, as a result, undermines it.

But this “learning by doing” method shows also that even the strongest political will cannot achieve every goal, basically because of three factors:

- a) political will cannot foresee every possible interpretation of the law, it can only try to make concepts as clear as possible, but it has to take into account that judicial interpretation works on a different and basically unpredictable level. False accounting crime is a recent example of this: Parliament tried to establish more severe rules that turn out to be – to a certain extent – less severe than the previous law. Interpretation by legislator during the law making process is different from judicial interpretation;
- b) political will has to consider administrative and financial constraints;
- c) political will cannot do anything regarding the so called “mute Law” (law without text) as described by Rodolfo Sacco in his recent book. Mute Law plays a relevant role even in civil law systems.

5. Which achievements?

MPs, whenever they adopt different criteria under political pressure, can achieve negative results.

Two examples from my professional activity:

1. *Holocaust denial.*
 - a. The Senate recently approved a bill concerning the punishment of conduct regarding Holocaust denial, but for that purpose amended the law currently in force (654/1975) in a confused way.
 - b. The official purpose is to introduce more severe measures against discrimination conduct related to Holocaust denial.
 - c. The law in force punishes whoever incites others to commit discrimination conduct (one year and a half in jail), unless the same conduct constitutes a more serious

crime. *Public* incitement to commit crimes is already punishable according to criminal code (from one to five years in jail).

d. The Senate bill introduces *public* incitement regarding discrimination conduct.

e. Result:

→ non public discrimination incitement cannot be punished anymore;

→ public incitement is punished only through criminal code and not through law 654. In other words, you amend a law and make it not applicable anymore.

2. Judges "holidays".

a. A law Decree, introduced in 2014 by the Government, reduced leave days for judges (from 45 days to 30 days per year).

b. the reduction was provided without amending the previous provision on judges leave, regarding judges carrying out judicial functions (but not seconded or in apprenticeship judges). Because of many factors (and despite many commentators and much documentation by the Chamber Research Department that had underlined the overlap of the two laws), the Decree was approved by the Parliament. The advice of Committee for legislation on that point was not considered. Currently, two different leave terms coexist: the old, 45 days term and the new, 30 days term. The new provision was probably drafted by some judges working in the Justice Ministry. Serious implementation and interpretation problems have arisen.

6. How is legislative drafting taught in the Chamber?

Parliamentary counselors learn legislative drafting by doing, from other colleagues, following good practices, implementing drafting rules, advising MPs about costs and benefits of different legislative choices.

Should they teach MPs?

In the Chamber of Deputies a specialized body was established in 1997: the Committee for legislation, an advisory body on drafting topics, composed equally of majority and opposition deputies, that supports permanent Committees during the law making process. Ensuring better

regulation is the main task of the Committee: legislative drafting is not merely a technical matter anymore.

Moreover, every permanent Committee, according to Chamber rules of procedure, has to consider all the aspects affecting better regulation. Committees scrutiny has a constitutional relevance (art. 72 Cost.), therefore drafting has an indirect constitutional relevance, as well.

Many branches/departments of the Chamber administration deal with legislative drafting, ranging from formal drafting to counseling about legislative consistency. Not less than approx. 40 counselors from different Departments are involved.

7. A difficult task in European perspective

The most difficult task is to keep this activity impartial and independent from political context and to assess envisaged measures and solutions in order to increase the quality of legislation.

In its last communication on better regulation, the EU Commission proposes again to appoint a neutral body to assess regulation impact.

An old and very controversial proposal, even in the European Union: once more, political will vs. drafting technique?