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PASQUALE COSTANZO – LARA TRUCCO

THE HISTORICAL ROOTS OF LEGISLATIVE TECHNIQUE IN CONSTITUTIONAL PARLIAMENTARISM (A FRAMEWORK)

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IDEATORE E DIRETTORE RESPONSABILE: PROF. PASQUALE COSTANZO

Pasquale Costanzo – Lara Trucco

The historical roots of legislative technique in constitutional parliamentarism (a framework)*

SUMMARY: 1. Introduction (or the benefits of good legislation). - 2. An old subject and yet always sensitive to the evolution of the form of the State and the government. -3. The theoretical premises of legislative technique in the Age of Enlightenment. - 4. (*to be continued*) Jeremy Bentham *vs.* Common Law. - 5. The experience of liberal parliamentarism in Great Britain. - 6. The experience of liberal parliamentarism in France. - 7. Short conclusions.

ABSTRACT: ***The essay aims to illustrate how the drafting of laws constitutes an important element for the for the history of the parliamentary institutions and one of their major identity components. In particular, it highlights the progresses on a variety of fronts with the development of the modern State and the recently trend to bring the problem of drafting even all the way to the constitutional judicial review, referring to constitutional principles and norms.***

1. *Introduction (or the benefits of good legislation)*

Nowadays, dealing with the matter of legal drafting means in general dealing with the drafting techniques of any legal deed, therefore not just laws, but also legislative contents of the most varied origin, jurisdictional resolutions, contracts and even procedural documents of the parties.

However, given the particular context of the conference, the focus will be on the specific deed that is the law of the parliament, namely a representative body, collegian in structure and, at least since the eighteenth-century revolutions, fundamental for the reconstruction of the government[1].

Therefore, looking preliminarily at the current situation and understanding the matter, drafting as a topic seems to be valid nowadays, perhaps even more than in the past, to provide the identity of a particular legislative assembly and this through the quality of its main product.

In fact, there is no doubt that the degree of progress in legislative techniques is a clear indicator of the institutional importance of parliamentary representation, as well as of the solidity of the state of law in general.

In this regard, even if our focus will be, as requested, on the history of the representative institutions, we believe it is useful to summarize the main advantages offered by good legislative drafting.

Therefore, without going into details, by understanding this formula as the set of drafting techniques used to draw up a legislative text, it may be agreed that not all techniques necessarily head towards good quality content, and it is then necessary to define, at least approximately at first, what a good legislative text is and how it can be recognized as such.

Since this is unfortunately a fairly abstract concept, luckily there are indexes developed by legal literature, jurisprudence and parliamentary practice, and among these, the most appreciated are the perspicuity and understandability of the rules, their accuracy, the non-redundancy of the precepts, their non-contradictory nature, without neglecting their satisfactory efficiency both from an applicability and *ex-post* assessment points of view.

These characteristics have a beneficial direct impact first of all on the recipients of the regulations in terms of legal certainty; however, they can also produce further indirect advantages, such as greater delimitation of the interpretative activity of the judges, thus mitigating the risk of making them *tout*

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* *Per agevolarne un'eventuale, più ampia diffusione, si ripubblica a conclusione dell'annata la relazione svolta alla 70°* Conference of the International Commission for the History of Representative and Parliamentary Institutions (ICHRPI).

[1] See in particular, D. BARANGER, *Penser la loi. Essai sur le législateur des temps modernes*, Paris, 2018.

court creators of legal regulations in clear violation of the fundamental principle of any Constitutional State, and, related to this, that of different applications from judge to judge. This still generates a sense of uncertainty among the governed individuals and excessively exalts the guaranteed role of power of the supreme courts.

Currently, as known, a considerable number of factors plays against good laws, such as, among others, the increasing social complexity, globalization pressure, the need for decisions taken almost in real time, the difficulties of an ideal preliminary investigation given how many variables have to be taken into account, the trend to adopt laws *ad tempus* and *ad personam*, the high number of disputes among members of parliament, and the deliberate adoption of equivocal and amphibologic compromise solutions, the often all-enveloping action - to the brink of corruption - of the lobbies, the inadequacy and age of parliamentary rules and, to be honest, an overall lack of preparation from the emerging political class due to the recruitment systems accepted.

One must say, however, that the governing bodies are well aware of these issues.

This is particularly clear from the multiplication of directives, often within the parliament itself, aimed at encouraging the good drafting of texts and even establishing agencies in charge of their verification.

In addition, there is the concern to limit the excessive number of laws through legislative campaigns and simplification measures. Even if the specific issue of legislative inflation and the damages it causes has ancient roots: let us mention the «*Corruptissima re publica plurimae leges*» by Tacitus and, in more recent times, Montesquieu's warning stating: «*les lois inutiles affaiblissent les lois nécessaires*».

Moreover, it is true that the overall matter dates back to ancient times, thus the impression that the approach to good legislative drafting meets specific current needs is sometimes misleading or that its analysis is a new discipline to be proposed even as completion of legal training in universities.

In absolute terms, it also not acceptable that «*le développement véritable de légistique dut attendre l'après seconde-guerre mondiale, pratiquement en parallèle avec la contestation des effets de l'État-Providence*».

The good drafting of legal rules, as a topic in Western parliamentary matters, in fact, boasts strong and historical roots.

Therefore, we will attempt to provide evidence, even if limited by the extent of this report.

2. An *old subject and yet always sensitive to the evolution of the form of the State and the government*

What seems to be unquestionable, instead, is that discussing the legislative drafting in the current sense of the word was not conceptually possible until the notion of the law in the modern sense had not emerged; to be understood as the voluntary product of a parliamentary assembly claiming, for itself or in conjunction with the sovereign, the competence to dictate rules in the most sensitive fields of property, freedom and life itself.

On the other hand, if one would want to reason about a more general need for the creation of good regulations, it would be necessary to admit, without attributing overwhelming importance to even more ancient finds, that it manifested abundantly during the Justinian Age, in which the drafting technique met the government needs of a complex political phenomenon such as that of the Roman Empire at that time. In fact, to this end, an accurate editing and selection of the precepts occurred, as Dante pointed out in the VI Chant of Paradiso (Paradise), writing the famous words of the emperor: «*Caesar I was, and am Justinian, he, who by the will of that First Love which now I feel, withdrew the useless and excessive from the laws*»[2].

[2] With regard to ancient times, see Tacito, "*Corruptissima re publica plurimae leges*", *Annales*, III, 27.

And similar needs were present in subsequent ages. As a way of example, they can be found in the manuscript by the twenty-four barons of the Westminster Provisions (dated 1259), with the main objective of «replacing» the Oxford Provisions (dated 1258), which, instead, represented one personal choice of King Henry III of England.

The fact that, subsequently, these latter were also drawn up in English (as well as in Latin), and that their contents were published (thus restoring a process that at least since Norman times was no longer applied) was not useful to remove the «sin of origin» of their «concession».

Or, again, in the XVI century, when, after the States General of Blois in 1576-1577, Henry III of Valois ordered the drafting of a law to bring back the order in the general confusion of the laws of the time. And yet again, the substantial uselessness of inapplicable laws remains famous for the almost contemporary considerations of the fourteen-year-old Edward VI Tudor, in his *Discourse on the reformation of abuses* in 1551, where: «*Neverthelesse, when all thies lawes be made, established, and enacted, they serve to noe purpose, except they be fully and duely executed*»[3]: while, as multiple sources reported, in his Throne Speech in 1609, King James I complained that: «*divers cross and cuffing statutes, and some so penned that they may be taken in divers, yea, contrary senses*»[4].

However, as stated above, it seems useless, for our specific purposes, to go further back than the eighteenth-century revolutions and the influences that they had in the creation of new constitutions both in America and in continental Europe, influencing also the development of differently structured constitutional dynamics, like the English one. In such a context, in fact, the novelty, if one may say so, represented by the production of the law by assembly, collegial *id est*, represented a major push towards the streamlining of the legislative procedure through pre-existing rules, functional to the successful outcome of the procedure itself. A result that Great Britain had already obtained a long time ago, so much so as to make the experience of the English parliament a sort of universal model, and that only the radical change of political perspective was able to achieve in both sides of the Atlantic.

3. *The theoretical premises of legislative technique in the Age of Enlightenment*.

The aforementioned official time-limit does not exonerate, however, from verifying the ideological and cultural premises of our discourse which, similarly to what led to the establishment of the new representative institutions of the eighteenth century as a whole, finds certain references in political and philosophical Enlightenment.

Even from our perspective, Montesquieu may be considered the most illustrious representative of a public law that, while referring back to numerous examples of the past, forecasts, particularly in chapter XVI of the XIX book of the *Esprit des lois*, the drafting issues that will characterise modern Parliaments between the seventeenth and eighteenth centuries and then more clearly in the first half of the nineteenth century with the triumph of the liberal State.

In fact, it is with the legal Enlightenment that the law drafting technique became more aware; using the words of Baron de la Brède, it is indeed possible to learn that «*Ceux qui ont un génie assez étendu pour pouvoir donner des lois à leur nation ou à une autre doivent faire de certaines attentions sur la manière de les former*» and more specifically, «*Le style des lois doit être simple; l'expression directe s'entend toujours mieux que l'expression réfléchie*» or that «*Lorsque, dans une loi, l'on a bien fixé les idées des choses, il ne faut point revenir à des expressions vagues*», and yet again to draw conclusions on the matter «*Les lois ne doivent point être subtiles; elles sont faites pour des gens de médiocre entendement: elles ne sont point un art de logique, mais la raison simple d'un père de famille.// Lorsque, dans une loi, les exceptions, limitations, modifications, ne sont point nécessaires, il vaut beaucoup mieux n'en point mettre. De pareils détails jettent dans de nouveaux détails*»

[3] Referred in *The Quarterly Review*, XIX, 1818, 87.
[4] In *Hansard's Parliamentary Debates*, vol. CXV, London, 1856, 619.

Not of lesser importance is the Maieutic role of some Italian scholars, among which in particular Antonio Ludovico Muratori, who, in his work *Dei difetti della giurisprudenza* (1742), focuses on the need to draft clear laws, which must correspond to the *ratio* thought out by the law-maker. Moreover, according to Muratori, the proliferation of confused laws lacking rational order, arbitrarily transfers the authority and task of writing the laws from the princes - subjects entitled to said task - to the Doctors of Law.

Similarly, Alessandro Verri (in his articles published between 1764 and 1766 in the magazine *Il Caffè*) strongly disapproves the accumulation and chaos emerging from the legislations, as a terrain perfect for the proliferation of antinomies, obscurity and chaos. Even for Verri, then, the excessive number of laws leads to having few of said laws to be obeyed, leaving the interpretation up the Courts and leading to uncertainties and lack of a rational order.

However, it is above all with Gaetano Filangieri that the growing drafting of laws enters the limelight and indeed one could say that it is his monumental work "*La scienza della legislazione*" (1784) to mark, even before the British Jeremy Bentham, the start of a specific law literature related to the drafting of laws. Therefore, the goal that Filangieri sets for himself is to provide guidelines for the drafting of legislations that are beneficial to humanity, in compliance with Enlightenment thinking and perceived as the ideal legislation. Similarly, they are rich in formal elements from which the origins of the modern drafting techniques can be traced back. In this framework, he makes reference even to a fourth power, the Censor of Laws, which would have the task to remedy the excess of legislations and oversee their continuous updating.

Not to be neglected, however, is that the idea of a science of legislation attracted German jurists as well, such as Johann Friedrich Reitemeier, according to whom, in fact, said science would have represented the common ground between the task of the legislator and that the of the jurist (by him we should mention at least the nineteenth century study titled *Allgemeines deutsches Gesetzbuch aus den unveränderten brauchbaren Materialien des gemeinen Rechts in Deutschland*).

4. (to be continued) *Jeremy Bentham* vs. *Common Law*

But utilitarian Jeremy Bentham can certainly be associated with legal Enlightenment on the other side of the English Channel.

In fact, he is the first clear critic of the legislative technique linked, this time, to the peculiar topic of Common Law, promoting a system of written legislation as the only one that could pursue the common good through its ability to continuously evolve into controversy due to the immobility of judicial law and jurists as a class in general: an expression of consolidated interests.

In this regard, the distance that separated him from other illustrious English jurists, especially from his approximately contemporary William Blackstone, is known. The idea of Statute Consolidation was present, especially beginning with Francis Bacon, when some sorts of merging between Statute Law and Common Law was rumoured. But the marked difference both of origin and structure between the respective sources of the regulations made this project impossible to implement. Thus favouring the autonomy of Common Law, which was furthermore necessary, according to William Blackstone, due to the redundancy and excessive number of the written sources.

On the other hand, Bentham had a clear preference for regulatory laws characterised by a rigorous and scientifically drawn up logic against the vagueness and lack of legibility of Common Law, which gave, in his opinion, the class of jurists (especially lawyers, fiercely opposed by Bentham) the monopoly of legislative interpretation. From here, again, the identification of an art of drafting laws in an appropriate manner (developing a work of formal law drafting entitled *Nomography or the art of inditing Laws*) and the instruction related to the need to have professional figures in such field.

On the assumption, then, of the essential nature of the function of the regulations «to direct the conduct of citizens», the element of comprehensibility of the provisions is key to the Benthamian analysis (and thus the criticism of provisions and/or sentences too long, excessively short and/or

equivocal, being thus vague or ambiguous). This with the related need to write their contents to obtain clear and concise drafting[5]. From here, again, the vision of legal drafting as «*a practical operation*» and the drafter as a technical, neutral executor of the «pure and simple will of the law-maker».

On this basis, Bentham expressed aversion for the anti-drafting tradition of his country, seeing instead only in law drafting a rationally organised body of laws.

As we know, his attempt to write the *Pannomion*, that is, an organic and complete collection of laws in the most varied sectors was unsuccessful, giving life only to the Constitutional Code, considered a significant priority compared to the rest of the laws and published in 1830: it means two years before his death[6]. Nevertheless, before and after his death, he strongly influenced the theory and parliamentary practice of his time in various countries[7]. Continuing on the topic of the English experience, the Bethamian analysis already initiated, for example, at that time a still ongoing debate about the opportunity - and the possibility - to reconcile the Cartesian style of continental origin with the English language, which, by common opinion «*is not an instrument of mathematical precision*…». In the same time period, John Austin confirmed the difficulty of implementing such an approach considering, in particular «*that what is commonly called the technical part of legislation, is incomparably more difficult than what may be styled the ethical. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver*»[8]. Where even the Courts had started to admit that «*Nothing is so easy as to pull them [Acts of Parliament]) to pieces, nothing is so difficult as to construct them properly*»[9].

5. *The experience of liberal parliamentarism in Great Britain*

«*The rational method, so warmly recommended by Bentham, is the best*»: this is how perhaps one of the most interesting epigones by Bentham is expressed, thus recognising him as a pioneer. In 1835 Arthur Symonds published in London a kind of manual «*Intended for the use of legislators, and all other persons concerned in the making and understanding of English laws*», meaningfully titled *The Mechanics of Law-Making*.

From here, it should be noted that the idea of drafting is some kind of art that shapes precepts not so differently from what an artist would do with matter, understood, on the one hand, to improve the legislative product and on the other hand, to reconcile the recipients of the law with it, closer to the current language and style. In this sense it is sufficient to browse the index of the work to realise how, indeed following on the footprints of Bentham, of whom he shares approvals and disapprovals regarding the current practice in Parliament - furthermore passionate about legislation - Symonds provides to lawmakers the instructions necessary to carry out their work at its best. These instructions, among others, concern the use of terms, the structure of the sentence, the spacing between the title and the body of the law, going through the writing of the exceptions and tiniest details. In addition, it is particularly noteworthy the conviction that it would not be possible to resolve regulatory chaos until actual offices are established for the review of the deeds drafted by the officials who – note – the legislator shall address in advance with the necessary instructions «*governing the arrangement, style, and character of our Acts of Parliament*». Then, the attention to the packaging process of the laws makes the book an actual manual of Parliamentary Law, somehow and in several sections

[5] See, in particular, J. BENTHAM, *A general view of a complete code of laws*, in *The Works of Jeremy Bentham*, vol. III, 1843, 155 and ID., *Nomography, or the art of inditing laws*, in *The Works of Jeremy Bentham*, vol. 3, 1843, 231.

[6] See E. DE CHAMPS, *Loi et progrès dans le Code Constitutionnel de Jeremy Bentham*, in *Les Cahiers du C.R.E.AA.C.T.I.F.*, 2000, 14.

[7] G.R. RAJAGOPAUL, K. KUSUM, *The drafting of laws*, Gent, 2006, 25.

[8] J. AUSTIN, *Lectures on Jurisprudence or The Philosophy of Positive Law*, by R. Campbell, J. Murray, London, 1879, 1136.

[9] Lord St. Leonards in *O'Haberty v. McDowell* (1857), 6 HLC 142 at179.

preceding the more famous work dated 1844 by Thomas Erskine May, *A treatise upon the law, privileges, proceedings and usage of Parliament*.

The second illustrious imitator of Bentham can be considered George Coode. Author of the 1845 work *On Legislative Expression, or The Language of the Written Law*. In particular, in proposing again the idea of the importance of the use of a legal language «*with the simplest, fewest and fittest words, precisely what it means*»[10], he warned of the risks (especially of ambiguity and vagueness) of the use of certain grammatical terms and forms (emblematic, the use of may instead of shall and the use of different tenses[11]).

Focusing now the attention on the institutional context, it is possible to note that in 1850 one of the most important regulatory texts on legal drafting was adopted, namely the *Interpretation of Acts* of 1850 (known as «*Lord Brougham's Act*») with which, by following the path indicated first by Bentham and then by Symonds, it was finally possible to formalize the structure and articulation of legislative acts, until then «with a generally free scheme»[12].

The subdivision into articles and paragraphs was then ratified, and then, in subsections, sections, as well as, for the more complex acts, into parts (numbered in Roman characters and marked by titles is capital letters), sometimes further grouped into chapters (fundamentally, according to the current schematics, today governed by the *Act of Parliament Numbering and Citation* from1982).

It was instead the official clerks to introduce the titles in the legislative acts: first long titles, and then, starting from the late XIX century, short titles, whose discipline would have been later formalized by the *Short Titles Act* of 1892 and 1896.

It was also in terms of practice then that said texts started to be accompanied by «notes on margins» reporting any external regulatory references and the content of the provisions. The documents no longer in force (which we would consider «repealed» today) began to be indicated in the schedules at the foot of the legal text.

On the contrary, it seems that the creation of an office specialized in the subject was established as far back as 1833: the Ministry of the Treasury at the time was «*to draw or settle all the Bills that belong to Government in the Department of the Treasury*»[13] destined to be made available also to other ministries and departments. At that point, the House of Commons also named a «Select Committee» with the task «*to consider of the expediency and practicability of adopting some plan for the more carefully preparing, drawing and revising Public Bills, previous to their being brought in, or during their progress through the House of Commons*».

These innovations surely gave strength, in terms of prestige and legitimacy, to the parliamentary body. But it appeared most controversial with regard to the judicial power, whose activity, in front of well-written laws was seen facilitated (especially from a hermeneutic point of view) and at the same time limited (compared to its nomopoietic capacity).

The role played by the lords, at the crossroads of the multiple centres of power and interests concerned of that time, was decisive in dissolving conflicts[14].

In this regard, emblematic is the figure of Lord Thring «*careful admiring student of Bentham*» and author of: «*Instructions for Draftsmen*» (subsequently published with the Benthamian title «*Practical Legislation*»)[15], where, among other things, it was shown that «*the antagonism*» between French legal drafting and British legal drafting was «*not so absolute as is thus suggested*».

In practical terms, he is recognised the merit «*to have drawn all the most important Cabinet measures of his time*». In particular, the appointment of the Statute Law Committee (established for

[10] G. MACKAY, *Introduction to an Essay on the Art of Legal Composition Commonly Called Drafting, 3 Law Q. Rev 326*, 1887 (now in B.A. GARNER, *Dictionary of Modern Legal Usage*, Oxford, 2001, 663).

[11] G. COODE, *On Legislative Expression: on the Language of the Written Law* (1848), Philadelphia, 1947, *passim*.

[12] A. SYMONDS, *The mechanics of law-making*, London, 1835.

[13] C.P. ILBERT, *Legislative Methods and Forms*, Oxford, 1901, 81.

[14] See, *amplius*, F.A.R. BENNION, *Statutory interpretation. A Code*, London-Dublin-Edinburgh, 1997, 164.

[15] See C.P. ILBERT, *The Mechanics of Law Making,* New York, 1914, 99 and ID., *Legislative Methods and Forms*, above-cited, 84.

the first time in 1868, and then reorganised in 1914) and, above all, the establishment, in 1869, of the «Parliamentary Counsel» established by a circular of the Treasury Ministry (dated 8 February 1869)[16] and its members were appointed by the First Lord of the Treasury, who «*usually represents the Executive Government in the House of Commons*»[17].

«*Parliamentary Counsel*» – of which Thring became *the first man to be put in charge of the Parliamentary Counsel* – can be considered the main legal drafting experience gained at the time, having historically represented the first technical body - «a political» and «non-partisan» one - with the task of drafting laws out of governmental legislative initiative.

With the establishment of the Parliamentary Counsel there would therefore be better focus on «*security for uniformity of language, style, or arrangement, in laws which were intended to find their place in a common Statute Book*»[18]. However, the focus is mainly on the economic data, considering that with it, the goal was to remedy the costs deriving from reliance of legal drafting to external professionals (barristers and solicitors). With the result, according to work of Courtenay Ilbert, *Legislative methods and forms*, edit in 1901: «*this system was far from satisfactory. The cost was great; for barristers employed 'by the job' were entitled to charge fees on the scale customary in private Parliamentary practice*» for different reasons, the lack of a centralised structure able to ascertain the financial coverage of the laws (so that «*there was no check on the financial consequences of legislation. There was nothing to prevent any Minister from introducing a Bill which would impose a heavy charge on the Treasury, and upset the Chancellor of the Exchequer's Budget calculations for the year*»)[19].

In more general terms, the institution of the Counsel should be framed in the evolution of the British form of State and government: hence the focus on the electoral reforms carried out in that period of time (1832, 1867), which led to a progressive extension of suffrage, and to a greater democratisation of the system, from which, in turn, a more pressing question would arise from a better understandable draft legislation especially for the subjects represented[20].

Then, the increase in legislative production of Parliamentary origin (especially bill and statute law, but also subordinate legislation) would have made impelling the topic of the relation with the rules of common law of an everyday nature, so as to further push towards a technical approach in legal drafting within the *iter legis* part of the wider framework of judicial reforms that culminated with the *Judicature Acts* (from 1873-75).

6. *The experience of liberal parliamentarism in France*

It was a Swiss clergyman to act as a *trait d'union* between the British and the French practically at the time of contact between the two parliamentarians. As known, in fact, it is the Geneva-born

[16] A. PIZZORUSSO, *La manutenzione del libro delle leggi ed altri studi sulla legislazione*, Torino, 1999, 23.

[17] Even if later this relationship would not have been more stringent, since the Counsel was called to ensure greater coordination on the matter also with the other ministries and departments «in its character of central department of the administration». When, as has been noted,«*different Departments employed independent counsel to draw their Bills, while other Bills were drawn by Departmental officers without legal aid*» e «*Different Departments introduced inconsistent Bills and there was no adequate means by which the Minister, or the Cabinet as a whole, could exercise effective control over measures fathered by individual Ministers*» (C.P. ILBERT, *Legislative Methods and Forms*, above-cited, 83).

[18] C.P. ILBERT, *Legislative Methods and Forms*, above-cited, 219.

[19] So «*there was no check on the financial consequences of legislation. There was nothing to prevent any Minister from introducing a Bill which would impose a heavy charge on the Treasury, and upset the Chancellor of the Exchequer's Budget calculations for the year*» (C.P. ILBERT, *The Mechanics of Law Making*, above-cited, 64). An important role was also played by the aim of saving costs deriving from the assignment of the legal drafting activity to external professionals (barristers and sollicitors), with the result that «this system was far from satisfactory. The cost was great; for barristers employed 'by the job' were entitled to charge fees on the scale customary in private Parliamentary practice» (v. C.P. ILBERT, ibidem, 83).

[20] L. TRUCCO, *Democrazie elettorali e stato costituzionale*, Torino, 2011, 4 e 182.

Pierre Étienne Louis Dumont who is responsible for translating into French in 1791 both Bentham's *Panopticon,* to which, among other things, he is personally linked since he resided in London for about 20 years, and, later, in 1816, the famous *Tactique des assemblées législatives*, drawing it from the manuscripts of Bentham himself[21].

Bentham's influence was not only cultural, but also personal, in a sort of triangulation of frequentation mediated by Mirabeau, with whom Dumont held a close relationship. It was yet again Mirabeau to forecast the import of the English parliamentary rules to the revolutionary Constituent Assembly, which as Philippe Valette and Benat Saint-Marsy reported in their *Traité de la confection des lois* dated 1838[22] «*malgré son désir de n'imiter personne, dut subir la puissance de la nécessité, en empruntant au parlement anglais plusieurs formes de délibération qu'on retrouve dans son règlement*»[23].

In this respect, it is still possible to add how the English influence continued in France, passing through parliamentary regulations in subsequent h political regimes, which used the 1790 regulation as their model.

However, it does not seem that the parliamentary rules met much application for the entire revolutionary period due to the significant political turmoil, but that even in the following stage in which Napoleon gained power, they lost importance due to the loss of role of parliamentarian representation.

Paradoxically, however, it is in this second period of time that the major news concerning the matter we are discussing took place and furthermore it was long-lasting because it arrived to the present days.

In fact, under the consular regime, when the government takes on the monopoly of the legislative initiative, a *Conseil d'État* is established (or re-established) with the task, among others, to draft the laws. In this manner, next to the clear political characterisation of this assignment inspired and monitored by the executive power, greater attention in the drafting of the text starts to be paid.

The enthusiasm for such juridical creation, however, must be toned down immediately for a two-fold reason: a historical one and a structural one.

From the first point of view, in fact, this significant resource for law drafting did not have much chance to develop under this approach, both because of the marginalisation that the law underwent during the autocratic periods and due to the short life of the Second Republic, when there had been an attempt to strengthen the technical aspect[24], as well as due to the hyper-parliamentarisation that took place under the Third Republic, which was not open to interferences. As it was verified during the last breaths of the Third Republic, when the use of the Conseil d'état occurred only three times in sixty years, «*Le Conseil d'Ètat n'est pas un organe normalement et pratiquement employé dans l'élaboration des lois. En matière législative il n'est nullement le conseiller technique du Gouvernement. C'est la conséquence du régime parlementaire et démocratique*»[25].

The second one is closely related to the first, since it is clear that the intervention of the *Conseil* is, in any case, upstream of the Government's legislative initiative and has no impact on the legislative production originating from the Parliament.

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[21] The work was also translated into Italian language: G. BENTHAM, *Tattica delle assemblee legislative seguita da un Trattato di sofismi politic*i, Napoli, 1820.

[22] PH. VALETTE e B. SAINT-MARCY, *Traité de la confection des lois*, Paris, 1839, 8.

[23] R. BONNARD, *Les règlements des assemblées législatives de la France depuis 1789 (notices historiques et textes)*, Paris, 1926.

[24] The Constitution of the Second Republic (1848), stated: "*Le Conseil d'État est consulté sur les projets de loi du Gouvernement qui, d'après la loi, devront être soumis à son examen préalable, et sur les projets d'initiative parlementaire que l'Assemblée lui aura renvoyés*» (art. 75).

[25] Even the placement of the Conseil upstream of the legislative initiative of the Government would have limited the effects on the legislative production of parliamentary origin. Over time these défaillances were attenuated and after the last world war the role of the Conseil d'État was enhanced by allowing individual parliamentarians to benefit from the services of the consultative body on the occasion of the constitutional reform of 2008 (P. COSTANZO, *La "nuova" Costituzione della Francia*, Torino, 2009, 273).

History, as well known, will try to mitigate these «*défaillance*s» because, after the last world war, the Conseil d'état will be given more value in its role of drafting, while with the constitutional reform of 2008, even individual members of parliament will be eligible to benefit from the services of the advisory body.

In any case, it is known that in the period now considered, namely that of a strengthening parliamentary system in France of a (in practice under the last House of Bourbon, and more specifically with the July Monarchy), legislative inflation and the obscurity of the regulations with the formation of a contradictory jurisprudence constituted the most felt issues. Note how the *référé législatif*, in force throughout the period from 1792 to 1837 proved to be a mere panacea, with the last word on the meaning to be given to a law being reserved to parliament. Thus, after said date, the only remedy will remain the guaranteed role of power attributed to the Court of Cassation.

After all, the publication of the previously mentioned *Tactique des assemblées législatives* proved the cultural, if not political, need for significant reforms in the sector, which, however, concerning the techniques for a better quality of legislative texts, never saw the light of day within the internal regulations of the assemblies up until those we reviewed in both Republican chambers of June 1876 with the changes brought forth since the First World War.

In this sense, we must mention the mere cultural influence brought forth by the publication of the translation of the work by Thomas Jefferson - in the same time period (1814) - titled *Manuel de droit parlementaire*, which, even if it is true that it did not have such a specific objective as that of Bentham's work, had as its purpose, according to the words of his author, at that time Vice-President of the United States and as such a Senate Chairman: *«But I have begun a sketch, which those who come after me will successively correct and fill up, till a code of rules shall be formed for the use of the Senate, the effects of which may be accuracy in business, economy of time, order, uniformity and impartiality*»[26].

From all this, it is clear that the lack of sensitivity of the political class towards the internal regulations of the chambers could not compromise right from the start the idea of drawing up more specific rules - and indeed more refined ones - dedicated to the drafting technique. To understand this, it is sufficient to refer to the aforementioned *Traité* of Valette and Saint- Marsy, where «*Elles [les formes réglementaires] existent aujourd'hui, mais dans un état d'infériorité et même d'abandon tel qu'il demeure évident qu'on les a toujours considérées d'un point de vue trop secondaire*»[27].

In our opinion, these considerations justify the fact that, unlike the British experience, the discussion on legislative drafting in France is now continuing only from a doctrinal point of view - certainly no less important.

In this sense, we will briefly review the studies that, during the nineteenth century, mostly took into account the organisation of the work of the chambers, both to provide a critical description and to plead - as already mentioned - for their reform and modernisation.

Therefore, focusing back on the *Traité* of Valette and Saint-Marsy, let us first bring back to memory how it was already the subject of exhaustive and in-depth analyses, so that, for our limited purposes, we note how the two authors demonstrated in several points that they took into account both Jefferson and Bentham showing, however, that they had more affinity with the exegetical method of the American Vice-President than with the more dogmatic method of the English jurist, from whom they somehow dissociated themselves. Actually, it is specifically from a drafting point of view, not taken into specific consideration, that perhaps these differences of opinion can be better measured. Even if, indeed, the sensitivity for the matter of good drafting of the laws emerges in a more general fashion: in fact, «*A ne les considérer que sous le point de vue spécial des formes réglementaires, les débats d'une assemblée législative peuvent donner lieu à plusieurs sortes d'observations. Les uns y verront un moyen de diriger les majorités dans le sens de telle opinion*

[26] T. JEFFERSON, *A Manual of Parliamentary Practice for the Use of the Senate of the United States*, Washington, 1801, XXIX.

[27] PH. VALETTE e B. SAINT-MARCY, *Traité de la confection des lois*, above-cited, 2.

dominante ou dans les vues de tel parti ; d'autres y étudieront les combinaisons et les ressources de la stratégie parlementaire ; il ne faut y chercher, ce nous semble, que le moyen le plus efficace de créer de bonnes lois, parce que là est la fin du régime représentatif»[28].

Before discussing a work featuring particular originality in terms of the history of parliamentary law, namely the *Traité de droit politique, électoral et parlementaire*, by Eugène Pierre, of 1893[29], it seems appropriate to mention another work, perhaps more of a collecting-type of work that, however, contributed to set the tone regarding regarding the drafting issue. The work in question is the *Science nouvelle des lois: principes, méthodes et formules suivant lesquels les lois doivent être conçues, rédigées et codifiées* by Gustave Rousset, published in 1871[30], the year that marked a turning point in the conflict between the autocratic and republican experiences in France.

Curiously, said work does not mention the *Traité* of Valette and Saint-Marsy. Not being able to know the reasons, a perhaps legitimate assumption derives from the type of the treatment, which reminds of the approach of Bentham and Montesquieu himself to whom many passages are dedicated and especially Chapitre II, which expressly discusses *Du style des lois suivant Montesquieu et Jérémie Bentham.* Therefore, unlike the book of Valette and Saint-Marsy, which has as its objective the foundation of parliamentary law as a legal science, the book by Rousset already states in its title the desire to specifically argue on the science of legislation, even described as a Science nouvelle. It is for this reason that all the linguistic, grammatical and syntactical issues already mentioned by the two representatives of the French and English Enlightenment can be found in the treatment.

In conclusion, we wish to give space to a brief and inadequate reference to Eugène Pierre's monumental Traité, which also seems to embody the spirit of the time at its best. However, the work seems to wish to stand almost as an «opera prima» (and it is so, if only for the vastness of the constitutional interests it brings forth): Montesquieu never mentioned, Bentham cited only once, Valette and Saint-Marsy rarely remembered, not to mention Rousset whose memory has been forgotten.

On the contrary, the illustrious scholar seems to wish to found parliamentary law on the new republican bases: apparent proof of this is the demonstrated affinity of thought with Jefferson, the only author emerging from a similar republican constitutional experience

Regarding the legislative techniques, however, a few interesting ideas are certainly present. Reasoning, for example, about the *Conseil d'État* and explaining the reasons for its marginal role, as previously seen, under the Third Republic, he, however, informs about the attempts made in the past to «*attribuer au Conseil d'État une collaboration plus active dans la confection des lois*», noting the difficulties deriving from the form of government[31]. The aforementioned proposal for a constitutional revision of the then President of the Ministers Council dated 15 October 1888 is interesting, and reporting an extract seems appropriate: «*Un Conseil d'État désigné par le Sénat et la Chambre des représentants, ayant un rôle consultatif dans la préparation, la discussion et la rédaction des lois au point de vue juridique, et renfermant des sections plus spécialement chargées d'éclairer les Assemblées par des avis officiels sur les grandes questions d'affaires touchant aux intérêts du travail, de l'industrie, du commerce, des arts et de l'agriculture*», since what matters is «*que la volonté du législateur soit complètementé clairée au milieu de tant d'intérêts quelquefois contradictoires qui sollicitent son attention et réclamentson intervention; c'est pourquoi il nous paraît bien utile d'organiser fortement autour de lui des conseils techniques (...). Il y faudrait créer des sections spéciales dont les membres seraient aussi choisis par la Chambre des députés et le Sénat, mais sur des liste de présentation dressées par les groupes professionnels légalement constitués et qui seraient désignés par la loi d'organisation. Le Conseil d'État, dont l'intervention ne pourrait restreindre ni*

[28] PH. VALETTE E B. SAINT-MARCY, *Traité de la confection des lois*, above-cited, 3.

[29] E. PIERRE, *Traité de droit politique, électoral et parlementaire*, Paris, 1893.

[30] G. ROUSSET, *Science nouvelle des lois: principes, méthodes et formules suivant lesquels les lois doivent être conçues, rédigées et codifiées*, 2 tomes, Paris, 1871.

[31] E. PIERRE, *Traité de droit politique, électoral et parlementaire*, above-cited, 81 and H. CANNAC, *Eléments de procédure législative en droit parlementaire français*, Paris, 1939, 11 s.

l'initiative parlementaire ni le droit d'amendement, pourrait être chargé, dans des conditions à déterminer, de préparer les lois importantes, d'en suivre la discussion par l'intermédiaire des commissaires»[32].

For the rest, however, the interest in improving the quality of the legislative production can only be perceived, as it was in Valette and Saint-Marsy, by the attention to details with which the preparation procedure of the law is described and commented.

7. *Short* conclusions

We have attempted, with the previous considerations, to illustrate how the drafting of laws constitutes an important element both for the development of constitutional laws and, as far as it is concerned herein, for the history of the parliamentary institutions, and in some way perhaps one of their major identity components.

In accordance with the premises, we were also able to identify how a discipline that is now more current than ever actually has illustrious origins and dates back to the history of Western parliamentarianism[33], with original acquisitions that were already modern at the time, so much so that almost all of them will never become obsolete over time.

Certainly, it must be pointed out how even the precepts of Montesquieu remained largely ignored, given that the legislative production has always inevitably obeyed not so much to the technical approach as to the politics.

Even if it is undeniable how its preparation has progressed on a variety of fronts with the development of the modern State, the change of parliaments, and, more recently, the trend to bring the problem of drafting even all the way to the constitutional level, both by clarifying some of the rules in the Charters, and by considering them implicit in the principles of the constitutional state law, as well as, in one case or another, by making them justiciable before the Constitutional Courts.

Moreover, there are already several examples of interventions in this sense, aimed at declaring invalid those regulations that were badly written, and even - as in a clamorous French case - to the point of denying the law its substantial nature because it was formulated in such a way that it did not meet its purpose: that to provide accurate legislative provisions and not vague political proclamations. A situation, after all, well described, for example, by François Terré, in his study of *La méthode législative* in memory of Jean Carbonnier: «*La divagation législative s'est développée sous l'influence de la colère des victimes, des clameurs de la rue et de l'inculture juridique assez fréquente des médias*»[34].

Finally, we did not mention an old dispute about the exact nature of law drafting, namely whether it is an art, as some of the works would suggest, or a technique, as one would think by considering its rational foundations.

Fortunately the solution to the problem does not seem to be essential and perhaps even impossible, maybe because the law is basically an entity onto itself, oscillating between the aesthetics of poetry and the perspicuousness of prose, so much so that Philippe Malaurie's words can be borrowed: «*Que la loi est belle lorsqu'elle est claire, simple, limpide et compréhensible par tous!*»[35].

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[32] So only in a narrow perspective could it be said that "*le développement véritable de légistique dut attendre l'après seconde-guerre mondiale, pratiquement en parallèle avec la contestation des effets de l'État-Providence*" (J.-P. DUPRAT, *Genèse et développement de la légistique*, in R. Drago (ed.), *La confection de la loi*, Paris, 2005).

[33] E. PIERRE, *Traité de droit politique, électoral et parlementaire*, above-cited, 82.

[34] See *Conseil constitutionnel*, dec. 2005-512 DC (about this see P. COSTANZO, *La "nuova" Costituzione della Francia*, above-cited, 287). More in general, see F. TERRE, *La méthode législative*, in *Hommage à Jean Carbonnier*: "*La divagation législative s'est développée sous l'influence de la colère des victimes, des clameurs de la rue et de l'inculture juridique assez fréquente des médias*", Paris, 2007, 157.

[35] PH. MALAURIE, *L'intelligibilité des lois*, in *Pouvoirs*, 2005/3, 136.