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REPORT

"GOOD LAW-MAKING PRINCIPLES"

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The introduction implies a practical definition of the law making functions which was elaborated by a famous book published in United Kingdom in 1976 by William Twining and David Miers, " How to do things with rules ". I think that the title of the book offers a clear suggestion about the purposes of the law making. When we make law we have in mind very practical aims, we don't want oly leave a written message of our intention and will, we want create concrete situation of the public life in accordance with our intention and will. Therefore the necessary follow up of the legislative and normative activities is the concrete application of the law we made to the real life, to the living experience of our society in view of obtaining the compliance with it by the destinataries of the legislative and normative acts.

But before being applied the legislation has to be interpreted. This is the reason why the two mentioned authors defined their book " a primer of interpretation ", that is an hand book to help the teaching of the interpretation of the law we make.

1) *writing the law in view of its interpretation*

Which is the lesson we can draw from the authors of " How to do things with rules "? The first lesson is that we have to write the legislation taking into account the fact that it has to be interpreted. Therefore we have to keep in mind the legal and cultural rules which support the interpretation of the law. As far as the legal practice is in conformity with these rules, we understand that the knowledge of them is essential in writing the law: only if we know the effects of the interpretation rules on the application of the law we can write the law in a manner which is adequate to the things we want to make.

As a matter of fact some recent draft laws examined by the Venice Commission dedicated some provisions to the interpretation of the law, to its rules, suggesting that they have to be kept in mind at the moment of writing the legislation if we want to be sure that the law will be read and interpreted according to our will and intention. For instance, there are provisions in the law which refer to previous legislation to amend or abrogate it: if we make a generic, not specific mention of this previous legislation, we are giving a lot of discretion to the interpreters in reading the law and in implementing it, discretion which is, instead, missing if we explicitly mention the laws which we want abrogate or amend with the new legislation.

Moreover in drafting the legislation we shall use the words of our language in their own specific legal meaning or in the meaning that they have in the everyday conversation, when the specialistic meaning is missing. We have to be very careful in choicing the words we use because it is normal that the interpreters give to those words or the technical meaning they have in the legal practice or the more simple meaning of the everyday conversation. If we have the feeling that the use of new words or expressions can create ambiguities it could be helpful to state the meaning of the used words and expressions in the text of the law itself we are drafting. But obviously the problem is not completely solved when we adopt this choice because also the definitions stated in the provisions of the law have to be interpreted.

We cannot write a law forgetting that it shall be interpreted in a systemic way, that is taking into account the previously existent legislation, e therefore it has to be read in coherence with it, the meaning of the new law affecting the old one e viceversa. From the all legislation we derive principles which have to be coherently accepted by the interpreters: if we want derogate from the principles of the preexisting legislation, we have to say explicitly that we are introducing a new special legislation inspired by principles which are different from those of the existing legislation: the point is important in relation of the presence of lacunae in the legislation, lacunae which can be filled with reference to the legal principles. Obviuosly principles can be used to fill the lacunae of a legislation in a way which is coherent with them. To fill the lacunae of a legislation we cannot use principles which are in conflict with the purposes of that legislation, the basis of the operation of introducing by analogy, for a specific case, the missing

rule – in case of an hole in the legislation - is the existence of a principle covering cases which are similar to the case at stake and are inspired to purposes similar to those of the incomplete legislation.

2) *from the policy to the draft*

The reference to the rules of interpretation in view of the drafting a new legislation regards the writing of the bill, but the preparation of a bill implies political choices concerning the content of the new legislation and its purposes. This is the first step of the decision making process which is aimed at the adoption of a law.

The political choices regard the matter which will be affected by the law, the economic and social implications of the policy which has to be implemented, the institutional arrangements which are required to put in effect all the machinery of the policy itself. Therefore at the basis of the preparation of a new bill there has to be the contributions of different expertises, not only administrative and legal but also economic and social. All these contributions have to be summarized in an act which we can call the conception of the new law. Their elaboration is frequently supported by a public debate between the people interested: this debate shall be the result of a public discussion which is to be freely promoted by associations, trade unions, social non governmental organization, the initiators of the bill – specially if it is a body of a public institution or organization (a Minister, the Cabinet, members of the Parliament) – are not obliged to organize the debate, but they have to make public their intentions and the relevant documents to give to the interested people the possibility of opening the debate. A debate which is mandatory for its partecipants is not coherent with the principles of a free democracy and reminds us the modalities of the political participation in the authoritarian regimes of the past.

The case which specially deserves our attention in this seminar is the case of the preparation of bill by ministries or other organization of the Government. It is evident that in this case the preliminary steps of the work will be made in the internal structure of the institution concerned. Afterwards the relevant authorities will make public the conception of the law in such a way of promoting a free debate on its content. Procedures and practical arrangements of this phase of the process don't require special attention as far as they are probably those of the normal activity of the relevant ministry.

3) *the drafting of the bill*

This is the step of the procedure which specially implies the existence of specific structures aimed at the preparation of the bills. In a ministry should exist a legal department which has to be entrusted with the task of preparing the text of the bill. This is the phase in which the s.c. drafters should intervene. They are required to prepare a legal text which appears formally correct from the lawmaking perspective but they are also required to comply with the suggestion of the conception of the new law. Therefore they cannot work in a kind of complete isolation but they have to be continuosly in touch with the administrative, economic and social experts which give them the necessary support to understand the legislative implications of the economic, social and administrative choices made by the Government.

The actors of thi phase shall be identified by law: the importance of this passage of the procedure requires that the distributions of the functions is clear with the necessary separation of the tasks. For instance the last word should be left to the legal experts, that is the drafters, but their work should be the subject of a final review of the administrative, economic and social experts to insure the correspondence of the bill to the political purposes of the initiative of the Government, to avoid misunderstanding or corrections of its direction.

But the problem does not regard only the Government. Also members of the Parliament are

allowed to exercise the legislative initiative. They don't have the structures and the services which are at the disposition of the Government. Therefore they should look for help asking the cooperation of their own political strucures, of private think-tanks, or of other non governmental organization. In some Parliament there exist services which are at the disposal of the Members of the Parliament. Obviuosly they are not in the position of supporting all the initiatives of all the parlamentarians, who have frequently to require the cooperation of people and organization which are external to the Parliament. This is the way which is frequently followed by the lobbies to get the support of the Members of the Parliament to their requests.

4) *the rules governing the drafting of the legislation should be tha same for the Cabinet and for the Parliament*

If it is evident that the procedural rules governing the activity of the Parliament have to be different from those affecting the activity of the Government, it is also evident that the rules concerning the substantial aspects of the drafting of the legislation, that is the organization of the mattersw and the wording of the text should be the same for the Government and the Parliament. It frequently happens that the parliamentary institutions claim their prerogatives pretending to amend the bill submitted by the government or by the members of the Parliament, even if the corrections imply a conflict with the material rules of the drafting (that is the compliance of the text with the rules of the legal interpretation, the coherence of the use of the technical and not technical words, the order of the organization of the matters). This attitude is not correct: the prerogatives of the Parliament are not at stake when attention has to be paid to the possibility of having a correct interpretation of the legislative texts and to thei understanding. Therefore even in the parliamentary decisionmaking processes space has to be found to insure the intervention of technical bodies entrusted to check the correctness and fairness of the legislation. In every chamber of the Parliament should be created a special office responsible for the drafting of the legislation. On other side Government and Parliament should agree the common preparation of an handbook of rules of drafting which should be binding both the partners.