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MAINTENANCE OF RULES

by

Maria De Benedetto

University of Roma Tre and CREI

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Maintenance of rules*

Maria De Benedetto†, DISP University of Roma Tre and CREI

ABSTRACT:

The maintenance of rules is an emerging and relevant function of every kind of regulators in contemporary legal systems. If we look at history, it has always been present in order to respond to a diversity of needs, such as making rules accessible, or correcting and reforming them. Alongside maintenance in a stricter sense (the specific interventions of compilation, consolidation, revision), there is an increasing request for maintenance in order to ensure the quality of rules: it is, in fact, necessary to evaluate the effects of rules, mainly because of the fallibility of regulation. Maintenance of rules has therefore become an institutional function which completes (and no longer serves) legislation.

Keywords: legislation, regulation, quality of legislation

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†Corresponding Author: maria.debenedetto@uniroma3.it
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1. Which maintenance for which rules?

This article argues that new attention has to be paid to the maintenance of rules where maintenance refers both to the strict traditional processes of reviewing, revising and updating rules (always present) and to the wide emerging processes of regulatory evaluation, implemented in order to ensure the effective results of rules.

What do we mean when we talk about rules?

First of all, we mean individual rules, legal standards which could be part of different kinds of legislation.

An individual rule may, also, express a regulatory content when imposes obligations (i.e. a command) which affects the activities and the organization of its addresses. This regulatory content strongly links the rule to its consequences, also requiring regulatory evaluation of its impact.

The problem of maintenance has been considered from a more general point of view, in the framework of Regulatory Reform, demanding that Governments implement specific activities

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2 See C. Coglianese, Evaluating the impact of regulation and regulatory policy, OECD Expert Paper No. 1, August 2012, p. 8: “Regulations can also derive from any number of institutional sources – parliaments or legislatures, ministries or agencies […] Given their variety, regulations can be described using many different labels: constitutions, statutes, legislation, standards, rules, and so forth. What label one uses to refer to them will not matter for purposes of evaluation”.
4 See C. Coglianese, R.A. Kagan (ed. by), Regulation and Regulatory Processes, Ashgate, 2007, p. xi; on this point, see J. Black, Enrolling Actors in Regulatory Systems: Examples from Uk Financial Service Regulation, in "Public Law", 1, 2003, p. 69: “this is the real heart of the regulatory function: how to alter behaviour so that people act in the way that they would not otherwise do, and in such a way a sto ensure that the objectives of the regulatory system are met”.
5 On this point, C. Coglianese, Evaluating the impact of regulation and regulatory policy cit., p. 9
in order to maintain the stock of rules⁶, while regulatory evaluation has become the way by which specifically unintended and unexpected consequences⁷ of rules are identified.

Indeed, if legislation is a tool for regulation⁸, it should be viewed not only as the sum of binding legal provisions designed to achieve political consensus on the good formal quality of a normative text, but as a collection of regulatory rules, which aims to achieve its objectives, to solve problems⁹ and to avoid (as far as possible) regulatory failures¹⁰. In this sense, legislation should be structured by ex-ante and ex-post evaluation, strongly oriented towards being effective¹¹ and requiring not simply strict maintenance activities but also the already mentioned wide maintenance: when legislation has a regulatory content it would be better to adopt a regulatory logic.

Starting from these premises, the article is organised as follows: section 2 looks at the concept of maintenance, at its purposes and object; section 3 takes a look at strict maintenance from an historical perspective; section 4 reviews the renewed emphasis on maintenance, its link regulatory evaluation and describes different kinds of maintenance interventions; section 5

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⁶APEC_OECD, Co-operative initiative on Regulatory Reform, Symposium on Structural reform and Capacity Building, 2005, p. 29: “regularly appraising the stock of rules (ensuring that rules remain relevant)”. See also, OECD, Report “From intervention to regulatory Governance”


⁸On this point, see OECD, Report on Regulatory Reform, 1997: “regulations include laws, formal and informal orders, and subordinate rules issued by all levels of government, and rules issued by non-governmental or self-regulatory bodies to whom governments have delegated regulatory powers”


concludes that the search for good regulation must involve a strategy of rule maintenance at its heart.

2. Maintenance of rules: purposes and object

Functions of maintenance of rules have been present in legal systems for centuries with the purpose of responding to a diversity of needs. Traditionally, maintenance has been oriented to increase public accessibility of rules and to allow their correction and their reform, as we will see later (par. 3).

However, even in a revolutionary historical period, legal systems are never completely new and, in contemporary law, maintenance of stock of rules is increasingly relevant.

I will try to argue that maintenance of rules is a cross-system question, even if comparison of law-making in different legal systems is not a simple task because “the terms used for these activities vary from country to country and should often be understood within a particular legal or administrative context”\(^\text{12}\).

Maintenance of rules is, however, becoming more important because it operates nowadays in a context characterised by an exponential growth of legislation\(^\text{13}\): legislative inflation


\(^{13}\) On this point, see S. Eng, Legislative inflation and the quality of law, in L. Wintgens (ed. by), Legisprudence, Hart Publishing, 2002, p. 65-66 onwards, where the term "legislation" is used in a broad sense: "[...] statutes enacted by a democratically elected national assembly [...] other kinds of rule [...] delegated legislation and European Community law".
represents a real menace for the so-called securité juridique\textsuperscript{14}, which consists of clarity, accessibility and predictability of rules.

Nowadays, maintenance of rules aims to achieve one further objective by contributing to make law “capable of leading to efficacy of regulation”\textsuperscript{15}: in other words, today maintenance looks at and focuses on the effects of rules even because legislation is an indispensable means to carry out public policies which require implementation and evaluation\textsuperscript{16}.

In this regard, over the last twenty years, there has been a pressure at international as well as European level to increase the quality of regulation\textsuperscript{17}. The OECD has stated that “better regulation means to adopt regulations that meet concrete quality standards, avoids unnecessary regulatory burdens and effectively meets clear objectives”\textsuperscript{18}. The European Union adopted firstly the concept of “smart regulation”\textsuperscript{19} (which means a regulation “[...] about the whole policy cycle – from the design of a piece of legislation to implementation, [\ldots]”)


\textsuperscript{15} H. Xantachi, Quality of legislation: an achievable universal concept or an utopia pursuit?, in L. Mader, M. Tavares de Almeida (eds.), Quality of Legislation. Principles and Instruments, Nomos, 2011, p. 81


\textsuperscript{17} On this topic, a first analysis has been developed in M. De Benedetto, M. Martelli, N. Rangone, La qualità delle regole, Bologna, Il Mulino, 2011, and later in M. De Benedetto, “Good regulation”: Organizational and Procedural Tools, in “Italian Journal of Public Law”, 2/2013, p. 235.


enforcement, evaluation and revision”), and later the idea of “fit for purpose” regulation\(^{20}\) (because of “the current economic situation demands the EU legislation be even more effective and efficient in achieving its public policy objectives [...] REFIT will identify burdens, inconsistencies, gaps and ineffective measures”).

The question could be synthetically described in terms of a “good” regulatory regime\(^{21}\), strictly connected to enforcement (and compliance) of rules\(^{22}\). In other words, the question is that regulation “seeks to change behaviour in order to produce desired outcomes”\(^{23}\).

This lead to the consequence that the quality of legislation should be considered as a problem of making legislation clear and accessible but also of making it as “easy to comply with as possible”\(^{24}\). We could say that there is a “symbiotic relationship between the formulation of regulatory rules and their application”\(^{25}\).

The object of maintenance activities is, as already mentioned, the single, individual rule. It is clear, however, that “regulation can refer either to individual rules or collections of rules”\(^{26}\).


\(^{21}\) Baldwin, Cave and Lodge, Understanding Regulation. Theory, Strategy and Practice, p. 38


\(^{23}\) Ogus, Regulation. Legal Form and Economic Theory, p. 90. See also Hawkins and Thomas, Enforcing Regulation, p. 173: “Enforcement activities are facilitated and constrained by the form, stringency and coverage of the law”.


\(^{25}\) C. Coglianese, Measuring Regulatory Performance. Evaluating the Impact of Regulation and Regulatory Policy cit., p. 8
but the rule constitutes the minimum of regulation and the object of enforcement\textsuperscript{27}, of evaluation\textsuperscript{28} and ultimately of maintenance.

In this light, the legislative process (which traditionally focuses on the creation of Statutes or other kinds of legislation) should adopt the larger and more comprehensive logic of regulation: “a good law is simply a law that is capable of achieving the regulatory reform that it was released to effectuate or support”\textsuperscript{29}.

It could be useful, at this point, to make some examples.

Firstly, a recent constitutional reform in France stated in 2008 that the French Parliament has been obliged to carry out public policy evaluation sessions, dedicating one week per month to this kind of activity\textsuperscript{30}. For this purpose, the \textit{Comité d’évaluation et de contrôle des politiques publiques} (CEC)\textsuperscript{31} was established inside the \textit{Assemblée Nationale}: it works on the basis of an annual program and could be supported by external experts and by the \textit{Cour des Comptes}, giving its advice on the \textit{études d’impact} presented by the Government\textsuperscript{32}. In the period between

\textsuperscript{27} See R. Baldwin, M. Cave and M. Lodge, \textit{Understanding Regulation} cit., p. 230: “Not all kinds of rule can be enforced with the same degree of success [...] Different enforcement strategies may thus call for different kinds of rule”. See also, R. Baldwin, Rules and Government, Oxford University Press, 1995.

\textsuperscript{28} C. Coglianese, Measuring Regulatory Performance cit., p. 9


\textsuperscript{31} The Règlement de l’Assemblée Nationale was reformed in 2009 (art. 146-2/146-7). In the meantime, the \textit{Loi Accoyer} (Loi n. 2011-140, du 3 février 2011) was adopted “tendent à renforcer le moyens du Parlement en matière de contrôle de l’action du Gouvernement et d’évaluation des politiques publiques”.

\textsuperscript{32} The recommendations of the CEC are transmitted to the First Minister or to the Minister responsible. On this point see, P. Avril, Le contrôle. Exemple du Comité d’évaluation et de contrôle de politiques publiques, in www.juspoliticum.com: “D’abord, elle a lieu non dans l’hémicycle mais ici même, salle Lamartine, dont la
July 2010 and February 2012, 11 Reports were adopted and published\textsuperscript{33}. The presented reports show an interesting gathering of evidence\textsuperscript{34} about specific issues and seem to express a serious commitment about public policy implementation, with an effort to fix and describe policy objectives, indicating specific recommendations: e.g. for the case of the \textit{Rapport sur les autorités administratives indépendantes} where - after a documented activity of collecting information\textsuperscript{35} - 27 recommendations on specific aspects of rationalization, independence and control are indicated.

In other words, the French Parliament – traditionally occupied with law-making – is now in charge (more than in the past) of the task of public policy evaluation and evaluation of legislation, performing a sort of law-maintenance activity.

A second example regards the already mentioned EU Regulatory Fitness programme which established that, starting from 2014, “the Commission will not examine proposals in areas of existing legislation until the regulatory mapping and appropriate subsequent evaluation work has been conducted”\textsuperscript{36}. Furthermore, in order to guarantee EU regulatory quality, REFIT programme conclusively provides that “EU legislation and the national rules that implement it, must be managed in a manner that ensure it continues to efficiently achieve its public policy configuration est propice, comme l’a souligné le président Accoyer, à une discussion moins formelle”.

\textsuperscript{33} On this point see, \textit{Rapport d’information déposé en application de l’article 146-3 du Règlement sur le bilan d’activité du Comité d’évaluation et de contrôle des politiques publiques de 2009 à 2012}, where there are indicated the presented Reports: Principe de précaution, Quartiers défavorisés, Autorités administratives indépendantes, Aide médicale d’État, Dispositif en faveur des heures supplémentaires, Médecine scolaire, RGPP, Performance des politiques sociales en Europe, Hébergement d’urgence, Aménagement du territoire en milieu rural, Stratégie de Lisbonne.

\textsuperscript{34} The Report is often accompained by an “Annexe”

\textsuperscript{35} \textit{Rapport d’information fait au nom du Comité d’évaluation et de contrôle des politiques publiques sur les autorités administrative indépendantes, 28 octobre 2010, n. 2925, tome I, p.24

\textsuperscript{36} European Commission, Communication “\textit{EU Regulatory fitness}”, COM(2012) 746 final, p. 4
objectives.” Even in this example such management of legislation evokes a maintenance activity which should be performed by EU institutions and by member State Governments.

Many other examples could be made from specific national experiences in which *ex-ante* as well as *ex post* evaluation of legislation have been provided in the EU, in the UK or the United States, in Australia, Canada or in The Netherlands, in Eastern Europe or elsewhere. In this regards, many comparative Reports have been prepared by national or international organizations as well as by academics and researchers.

In conclusion, maintenance, which was in the past and additional and incidental activity, aims to become an essential part of “good” legislative process (as a consequence of “good” legislative activity).

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37 Ibid., p. 11
regulation)\textsuperscript{45} achieving formal relevance and requiring a specific time in order to be performed.

3. Historical roots of maintenance

In the 1980s, Bardach and Kagan made their famously strong and critical analysis of regulatory rulemaking: in few words they gave voice – from the specific U.S. context - to the very common “experience of being subjected to inefficient regulatory requirements” or to “the evils of regulation”\textsuperscript{46}.

Regulators have made progress during the last thirty years though not sufficiently, and not with the same success everywhere\textsuperscript{47}. Even though there is currently an institutional effort in evaluating and identifying “unintended and unexpected consequences” of regulation\textsuperscript{48}, modern regulation does not always seem conducive, for the moment, to effective maintenance of rules.

Nonetheless, it could be useful to look further back in the past to strict maintenance.

\textsuperscript{45} On this point, see L. Mader, From the struggle for law to the nurture of law-making – recent efforts by the Swiss Confederation to improve the quality of legislation, in “Legislaçao”, 50, 2009, p. 296: “as an important – and scarce – political source, legislation needs care and attention, as well as an ongoing effort to maintain and improve its quality”.


\textsuperscript{47} See, on the specific point of impact assessment, C.M. Radaelli, Diffusion without Convergence: How Political Context Shapes the adoption of Regulatory Impact Assessment, in “Journal of European Public Policy”, 12, 5, 2005, p. 924

As already mentioned, over the centuries, the reasons which prompted the activities of maintenance have very often been a response to the need to assure concrete accessibility to rules, both as a possibility to avail of them and as a possibility to understand them.

When looking to Roman law, for example, we can find a real opposition to codification, even if Roman law was defined as a “long journey” towards codification. Starting with the Twelve Tables, codification was not proposed again until the end of Roman history, with the adoption of the Theodosian Code and more importantly of Justinian’s Code49.

The greatest problem in Roman legal system was precisely the excessive number of statutes, from which was born the need to bring together legislation50. Already at this time, the idea of the irreducibility of law to codification had been held: this idea has come down to us through the centuries. In fact, it has been affirmed that codification is a simulation of a definitive statement and of a completeness which in reality it does not hold, and that codification makes for rigid legal systems51.

In Italian Middle Ages communes there were *statutarii* (or *correctores* or *emendatores*) who were charged (sometimes in institutionalized roles) with the task of updating, reviewing, correcting and making coherent legislation52. Since then, maintenance has been considered a “delicate activity”, necessary in order to oppose the enormous growth of statutes.

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50 Tacitus (*Annales*, 3, 25) talked about a “*moltitudo infinita ac varietas legum*”.


52 On this issue, see F. Calasso, *Medioevo del diritto – I. Le fonti*, Milano, Giuffrè, 1954, p. 424. See also L. Armstrong, J. Kirshner, *The Politics of Law in Late Medieval and Renaissance Italy*, University of Toronto Press Incorporated, 2011, p. 79
Furthermore, these Commissions (statutarii and so on) have followed a surprising method, which has considered the question of how to regulate the relationship with “interest groups” (as we call them today). In some cases, in fact, compilation and reform developed in a sort of “conclave” until the work had been finished, without any possibility to communicate with the external world. In other cases, statutarii were compelled to engage in real, though rudimentary, consultation processes.

For a long time, maintenance of rules has been considered as a less noble activity than law-making, and as one in the service of law making itself. This was the consequence of a “law-centred” approach, a real legolatria, an inheritance of the Enlightenment tradition. In civil law legal systems the issue of maintenance has for a long time suffered from a sort of theoretical rejection caused by the increased adoption – during the 19th Century – of a codification “ideology”.

The modern idea of code was affirmed by the Napoleonic codifications, which aimed at completeness, systematization and duration of law. As a consequence, it reduced the legitimacy and the concrete feasibility of maintenance, in favour of statute interpretation. On

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54 Conseil d’Etat, Rapport public, La sécurité juridique et la complexité du droit, La Documentation française, 2006, p. 259, reference to “la croyance selon la quelle la loi vien à bout des difficultés, qu'elle est une solution, une garantie ou, en quelque sorte, une thérapeutique”.

55 On this issue, see E. Steiner, Codification in England: the need to move from an ideological to a functional approach-a bridge too far? cit., p. 209. In 1814 there was a discussion between two different positions regarding the “necessity of a codification”: the discussion has been described in v. A.F.J. Thibaut e F.C. Savigny, La polemica sulla codificazione, ed. G. Marini, Esi, Napoli, 1992. See also G. Brabant, Codification, in Encyclopaedia universalis, 1993, p. 39: “Les termes ‘code’, ‘codifier’, ‘codification’ sont des pavillons qui couvrent des marchandises diverses et parfois frétées”. See finally E. Donelan, European approaches to improving access to and managing the stock of legislation cit., p. 167.
the other hand, even in this context, some codifications could be (in reality) consolidation and so could substantially represent maintenance.

In the legal systems of English speaking countries, instead, an *esprit de non codification*\(^{56}\) has been affirmed whereas law revision tools were introduced early on, in order to respond to the need of the maintenance of rules.

In the civil law legal systems, alongside the activity of law-making, the activity of maintenance of rules has become progressively more relevant, despite a process called “decodification”\(^{57}\), in particular since the 1980s, and despite the opinion that considered the code to be a “forme depassée de législation”\(^{58}\).

Instead, the code has gained a renewed vitality, even if with fewer ambitions of completeness, specifically in order to achieve strict maintenance objectives and formal quality of rules: “today the aim of the codes is to make the law more accessible and coherent”\(^{59}\). Sectorial codes have frequently been adopted in public law issues, in order to maintain law in specific and limited fields of regulation, which are characterized by copious regulation.

Even today, a number of maintenance interventions may be considered as responses to the need for concrete accessibility to rules\(^{60}\): strict maintenance still remains valid. In this way, for example, we might consider all the activities which aim to allow availability and usage

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\(^{59}\) E. Donelan, European approaches to improving access to and managing the stock of legislation cit., p. 147.

\(^{60}\) Conseil d’État, *Rapport public, La sécurité juridique et la complexité du droit*, 2006, p. 328, which mentions the idea of “perfectionner la codification et adapter les outils informatiques en vue d’une meilleure accessibilité” and which mentions *Legifrance*, “service public de la diffusion du droit”.

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even through digital formats, specifically data-banks of up-to-date legislation (e.g., the U.S. Code, which collects the Federal legislation\textsuperscript{61}).

4. How maintenance is changing

The question of maintenance has regained centre stage due mostly to pressure from supranational and international organizations, in particular the OECD which has proposed a number of tools to achieve wider maintenance: among them, impact assessment, consultations, ex-post evaluation, and so on\textsuperscript{62}.

For this reason, the concept of maintenance itself has been renewed today: it is no longer a remedy for a pathology (such as difficulty in accessing rules or the need for correcting and revising them), it has become a real institutional function, an essential part in the legislative process. The objectives of maintenance are now more defined and more structured. They respond not only to the generic requirement of accessibility, correction (or bringing up to date) and simplification of rules, but they aim to ensure the continuous adequacy of rules through evidence-based decision-making and evaluation.

Maintenance has become functionally autonomous in the sense that it is no longer in the service of law-making and expects its own rules, specific experts and dedicated offices.

\textsuperscript{61} The \textit{U.S. Code} has been prepared by the \textit{Office of the Law Revision Counsel (House of Representatives)} since 1926, as established by title 2, 285b. The \textit{U.S. Code} collects “general and permanent laws of the United States”, while executive regulations are collected by the \textit{Code of federal regulations}. It could be useful to remember also Legifrance « service public de la diffusion du droit par l’internet, est placé sous la responsabilité éditoriale du Secrétariat général du gouvernement (SGG) ».

\textsuperscript{62} See C. M. Radaelli, \textit{How Context Matters: Regulatory Quality in the European Union}, 2008, Paper presented for PSA Conference, Lincoln, p. 4: “ (a) Impact assessment (RIA) (b) Consultation, typically although not exclusively in the context of RIA (c) Simplification, often supported by impact assessment of the process to be simplified and of alternative options for simplification (d) Access to legislation and regulatory transparency (e) Ex-post evaluation of regulatory tools and institutions (for example, evaluation of how RIA units are performing)”.
4.1. Reasons for change

As we have seen, the enforcement of a rule is necessary in order to allow the rule to achieve its objectives. This is permitted both by the formal quality of the rule (the rule is formulated in a coherent, simple and clear way) and by substantial quality (the rule is formulated through ex ante analysis and ex post evaluation, according to the principles of good regulation\textsuperscript{63}).

However, the more and more rapid obsolescence of rules contributes to the increased relevance of maintenance.

In fact, the frequent abrogation or updating of anachronistic rules could be necessary over time because it is impossible to preserve any static equilibrium for long\textsuperscript{64}. Furthermore, rules might contain defects produced during the law-making process: this could impose their regularization, integration, correction or even reform.

There is, indeed, the insidious “creative compliance”, where the scope of a rule is circumvented and its spirit breached to achieve desired results, without breaking the formal terms of the rule\textsuperscript{65}. Finally, the speed of technological innovation has increased, with the paradoxical effect of legislation always playing “catch up”, but without success.

Obsolescence of rules, defects, creative compliance and technical innovations require adequate responses.

If we take a look in depth, one of the most pressing need for maintenance is epistemological in nature: the limits of reasoning and of knowledge and the question of unintentional consequences of human behaviour

\textsuperscript{63} The OECD (Report on Regulatory Reform, 1997) established principles of good regulation The UK Legislative and Regulatory Reform Act, art. 21, established in 2006 principles of good regulation, based on the Better Regulation Commission’s Principles of Good Regulation. These principles inform a Code of Practice issued by the Minister, “to which regulators must have regard when determining any policy or principles by reference to which they exercise specified regulatory functions”. Art. 21 (2) states that “regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent and also that regulatory activities should be targeted only at cases in which action is needed”.


\textsuperscript{65} On creative compliance see R. Baldwin, Rules and Government cit., p. 185 and R. Baldwin, M. Cave, M. Lodge, Understanding Regulation. Theory, Strategy and Practice cit., p. 232
affect even legislation$^{66}$. It follows that the consequences of behaviour depend (in part) on what other individuals might choose$^{67}$. The perspective which should be adopted by regulators, must be fallibilist$^{68}$ (or anti-perfectist$^{69}$).

When we adopt a regulation, we have to ensure its effectiveness$^{70}$ and monitor the life-cycle of its individual rules. Legislation should be followed just as we would follow the course of a sickness after a medicine has been administered.

### 4.2 Maintenance and quality of rules

Quality of regulation, as we have seen, is not a new problem, neither in the formal quality of rules (related to their coherence, clarity and understandability) nor in their substantial quality (related to the effects of the rules).

Formal quality is the objective of the modern legislative technique, aiming to ensure coherence, clarity and understandability of rules: drafting in English speaking countries$^{71}$, legisistique formelle in France$^{72}$, tecnica

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Formal quality has become the object of specific provisions all over the world.

For example, many provisions have been set out by legislative assemblies, by governments and by the different Conseils d’Etat.

At subnational level, formal quality has been considered both by federal systems and regional ones. Guidelines, checklists and handbooks on drafting have been produced at metanational level – as in the case of Belgium, France and Italy. In 2008 the Belgian Conseil d’Etat produced a Guide de rédaction des textes législatifs et réglementaires (Principes de technique législative). In Italy, the Consiglio di Stato, Sezione consultiva per gli atti normativi, n. 2024/2007, “Presidenza del consiglio dei ministri – Piano di azione per la semplificazione e la qualità della regolazione”, has affirmed that “le ‘buone regole’ sono quelle che garantiscano un livello qualitativo elevato del rapportoAutorità-cittadini e Autorità-imprese, mediante scrittura formale e contenuti certi, chiari, razionali, coerenti”. In 2005 the French Conseil d’Etat produced (with the Secrétariat général du Gouvernement) a “Guide pour l’élaboration des textes législatifs et réglementaires” (a more recent version was adopted in 2007).


See the special edition of “Il Foro Italiano”, 1985, V, p. 20 onwards, entitled “La tecnica legislativa: un artigianato da valorizzare”.


As in the case of Germany, Italy and Spain. In Germany there is a common regulation for federal ministries (adopted in 1976 and later modified). In Italy, there is the Circolare della Presidenza del Consiglio dei ministri, n. 1088/2001, “Guida alla redazione degli atti normativi” and more recently the Direttiva del Presidente del Consiglio dei ministri, 2009, “Istruttoria degli atti normativi del governo”. Spain saw the adoption, in 1991, of Directrices sobre la forma y estructura de los Anteproyectos de Ley and, in 2005, of Directrices de técnica normativa.

As in the case of Belgium, France and Italy. In 2005 the French Conseil d’Etat produced (with the Secrétariat général du Gouvernement) a “Guide pour l’élaboration des textes législatifs et réglementaires” (a more recent version was adopted in 2007).

In Italy too, the Regions refer to a single drafting manual, prepared by the Osservatorio legislativo interregionale (OLI) at the request of the Conference of Regional Assembly Presidents (2nd ed., 2002).
of the European Union\textsuperscript{78} – and at international level, as in the case of OECD\textsuperscript{79} and other international organizations\textsuperscript{80}.

Alongside drafting, the science of legislation, starting from the work of Filangieri\textsuperscript{81}, aims to redesign the way in which to achieve “good” legislation, from the point of view of its content. The science of legislation has gained a certain theoretical importance especially in German speaking countries, with the Gesetzgebungsllehre\textsuperscript{82}. The problem of “good” legislation is also object of the legisprudence, a normative theory of rational legislation, which will take into account both the form of legislation and its content\textsuperscript{83}.

There is large agreement about the opinion that quality of rules is nowadays a “comprehensive” question which implies formal quality and substantial quality aspects.

Law takes hold in the field of law-making and law-maintenance\textsuperscript{84} because it regulates the genesis and the effects of regulation.

Many legal provisions establish, in some way, that rules must be efficient\textsuperscript{85}, and that their application is to be measured and evaluated: efficiency becomes subject to quality rules in the regulatory process, because “the


\textsuperscript{79} See n. 8 of the OECD check list (1995)

\textsuperscript{80} This is the case for the International Labour office (ILO), Manual for drafting ILO instruments, 2006, where “formal structure of the instrument” (p. 1) and “substantive content of the instrument” (p. 31) are distinguished.


\textsuperscript{82} The most important contribution on this topic is devoted to P. Nöll, Gesetzgebungsllehre, Rowholt, 1973


\textsuperscript{84} S. Cassese, Introduzione allo studio della normazione, in “Rivista Trimestrale di diritto Pubblico”, 1992, p. 309, affirmed: “la progettazione della legge è estranea all’essenza del diritto”.

\textsuperscript{85} On this issue, see F. Denozza, Norme efficienti. L’analisi economica delle regole giuridiche, Milano, Giuffrè 2002.
process of law-making is, as a rule, regulated by law. There is, in other words, an “evaluate first” principle. This situation brings about an increasing relevance of experts in the law-making and law-maintaining processes, as well as an increasing pressure on political decision-makers to justify rules.

4.3 Kinds of maintenance (compilation, consolidation, revision, reform)

In the different systems of law-making there are various uses of terms like codification, consolidation, revision, reform, etc. There is the risk that the same word could refer to different activities in different legal systems.

This difficulty is due to possible (and often frequent) contamination of different degrees of maintenance inside a single maintenance intervention. It is possible, for example, that a compilation activity is the occasion for consolidation; in a reform there would also be rules which are subject to revision alone.

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90 A compilation activity could be the opportunity for a revision, as a reform could consist of a consolidation of existing norms. For example, the U.S. Code refers to activities which are defined as “consolidation and revision” and which consist of compilation and revision, sometimes consolidation; the French codification is often consolidation and revision, sometimes a real reform; in the U.K. revision means abrogation of norms, as described by E. Donelan, European approaches to improving access to and managing the stock of legislation, cit., p. 167. In Australia, the Legislation revision and publication Act (2002), promoted "an ongoing program for the revision and publication of legislation", with the aim "to consolidate public general legislation and make up-to-date copies of the public general legislation". In Italy, there is a distinction between "riordino" and "riassetto" of norms: the first, has a conservative character, the second has the objective of a substantial revision of legislation.
Difficult as it may be to recognize the kinds of maintenance of rules, it is nonetheless possible to distinguish the interventions which have quantitative effects on the stock of legislation from the interventions which are limited to ordering regulation.

The first kind regards activities of “removing legislation”, carried out in some English speaking countries with the Statute Law Revision Act, a normative act with a typical content, in some way echoed by the Italian taglia-leggi (a sort of legislative guillotine)\(^91\).

Regarding the second kind of maintenance, we can proceed towards a graduation based on the pursued objectives. If the pursued objective is accessibility of rules, there will be interventions of compilation or consolidation. If it deals with their correction or updating, there will be a revision. If it is the innovation (or simplification) of regulation, there will be a real reform (or codification).

The objective of accessibility to regulation\(^92\) could require compilation\(^93\), which is the first type of maintenance: in compilation, normative texts are gathered into a single collection, which retains their separate identities. The Roman leges collection were inspired by the logic of compilation, as we have seen, in the same way as the United States Code, which collects Federal Legislation.

Through consolidation, instead, scattered rules are gathered together into a single, up-to-date, normative text. Consolidation constitutes a very important category, because it stands in contrast with modern codification, from theoretical and historical perspectives, and because the two are very often confused\(^94\).


\(^92\) E. Donelan, European approaches to improving access to and managing the stock of legislation, cit., p. 149. The French Conseil d’Etat in the “Guide pour l’élaboration des textes législatifs et réglementaires” (2007) affirmed: “Essentiellement fondée sur une consolidation et une meilleure organisation des normes existantes, la codification tend à faciliter la connaissance et la communication des règles de droit”.

\(^93\) E. Steiner, Codification in England: the need to move from an ideological to a functional approach-a bridge too far? cit., p. 219: “Compilations, designed to bring together into one statute existing laws, either in chronological order or by subject, but without altering their form”.

\(^94\) On this issue the historical contribution of M.E. Viora was very important: Consolidazioni e codificazioni. Contributo alla storia della codificazione, Torino, Giappichelli, 1967.
In France, for example, codification – which operates à droit constant – is a consolidation. Even in Italy, codification is today substantially a consolidation: here the “single text” (testo unico), which represents the typical administrative form, has been affirmed. Furthermore, consolidation is also used in the UK system and in the legal systems of other English-speaking countries.

If maintenance responds to the need for correcting or updating rules, then it is necessary to resort to revision, in order to eliminate “defects or anachronisms”, such as in the many commissions which operate in the U.S. (e.g., the State of New York Law Revision Commission).

In the UK, revision has to be considered in the broader category of law reform: revision is the technique which imposes the abrogation of useless (sometimes obsolete) rules, the fusion of similar rules, the elimination of anomalies. This process is the specific degree of maintenance which better corresponds to the

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95 The Commission supérieure de codification, established by the Décret n. 89-647 (1989) was in charge of the task to schedule the codification activities and to adopt and transmit the draft codes to the Government. On this point, see G. Braibant e A. Zaradny, L’action de la Commission supérieure de codification, in «AJDA», 2004, p. 1856, who have written that “la codification actuelle apparaît comme un besoin d’une société démocratique au bord de l’asphyxie normative”. See also OECD, Rapport sur la qualité de la réglementation en France – La capacité du gouvernement a produire des réglementations de grande qualité, 2004, p. 6: “Par nature, le système juridique français de droit romain écrit, qui ne connaît pas de date limite pour la validité des textes, conduit à un empilement historique des textes. Le mouvement de codification et de simplification administrative apparaît alors comme le pendant nécessaire qui accompagne d’une certaine façon la complexité croissante. Jusqu’à présent la codification permet de rationaliser en partie l’empilage des textes existant mais elle n’en réduit pas la complexité car elle s’est effectuée à droit constant, c’est-à-dire sans changement dans la substance de la loi ou de la réglementation”.

96 E. Steiner, Codification in England: the need to move from an ideological to a functional approach-a bridge too far?, cit., p. 219, used the word restatement in this regard: “this type of codification does not necessitate reconsideration of the relevant law with a view to reform, although it may include minor improvements such as the repeal of obsolete texts or the elimination of inconsistencies”. The concept of “revision” was described by Alfred Clapp in the foreword to Title 2A of New Jersey Statutes, as reported in the Annual Report of the New Jersey Law Revision Commission (1989), p. 16: “The task of making a revision is primarily to rewrite where language can be improved upon materially without ripping up the fabric of the law satisfactorily settled, to boil down, to clarify, to eliminate the obsolete, to reconcile the inconsistent, to correct clear errors”.

97 The State of New York Law Revision Commission was established by the Legislative law, art. 4-A, implemented with the charter 597 of the Laws in 1934. LRC has such important tasks as studying and proposing new legislation, revision of current legislation, drafting in legislative process. In California there is the California Law Revision Commission (1953), in Michigan the Law Revision Commission (1965), in New Jersey the Law Revision Commission (1985), in Oregon the Law Commission (1997).
logic of quantitative interventions on the stock of legislation (Statute Law Revision Act or the Italian taglia-
leggi).

Finally, if there is a real need for “much more substantial changes”\textsuperscript{98} in regulation – in other words to codify
(and simplify) rules – it is possible to implement a reform (intervention which would take the form of
codification, also known as riassetto in Italy) which implies a wide maintenance activity based on regulatory
evaluation.

The relationship between the technical phase of the decision and the political choice in maintenance of rules
has a different relevance in the first three kinds of maintenance (compilation, consolidation and revision) as
well as in the fourth (reform). In the first three of them, formal quality dominates, as well as technical
evaluation and law-making expertise. In the fourth, policy evaluation, guided by the regulatory options, is
necessary in order to achieve substantial quality: a regulatory analyst (for the technical decision) and the
regulator itself (for the political decision) are necessary here\textsuperscript{99}.

5. The modern legislator walks on two legs: law-making and law-maintenance

At the end of this essay, it is clear that the modern legislator should walk on two legs: law-making, on one side, and law-maintenance, on the other\textsuperscript{100}, in order to ensure formal and substantial quality of legislation as well as the continuous adequacy of rules.

complete reconsideration of the law in a particular field with a view to its reform” (E. Steiner, Codification in
England: the need to move from an ideological to a functional approach—a bridge too far?, cit., p. 220).

\textsuperscript{99} M. De Benedetto, M. Martelli, N. Rangone, La qualità delle regole, cit., p. 111

\textsuperscript{100} This is the title of my speech at the Workshop on “Legislation and Legistic in European Countries” organized
by the International Association of Legislation, Berlin, 19-21 October 2012.
This comprehensive point of view is a direct consequence of a public policy approach to legislation: if legislation is a tool for public policies and regulation, and if public policies and regulation are processes, then it should be obligatory to produce good quality legislation as well as evaluate legislation even after its adoption.

In this sense, maintenance of rules is not only a way to ensure accessibility, clarity and coherence of legislation (where rules must have formal quality as a result of the application of drafting techniques) but also the way for ensuring the continuous adequacy of rules in achieving regulatory objectives expressing and demanding a logic of continuation. Legislation should be built to be maintained, thanks to an evidence-based decision-making and to economic analysis of regulation (such in the case for cost-benefit analysis) which could bring greater rationality to public decisions.

This is also possible through consultations, which may anticipate the criticisms or failures of regulation, strengthening the legitimacy of regulation and reducing litigation.

The function of maintenance, however, could redefine the horizon of political action and could help politics to provide remedies for its more frequent mistakes.

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104 Communication Towards a reinforced culture of consultation and dialogue, COM(2002)704
105 K.R. Popper, *The Poverty of Historicism*, London-New York, 1957, Routledge & Kegan Paul, (Routledge Classics 2002), p. 81: “Scientific method in politics means that the great art of convincing ourselves that we have not made any mistakes, of ignoring them, of hiding them, and of blaming others for them, is replaced by the greater art of accepting the responsibility for them, of trying to learn from them, and of applying this knowledge so that we may avoid them in the future”. See U. Karpen, Comparative Law: Perspectives of Legislation, in „Legisprudence“, vol. 6, n. 2, 2012, p. 149.
This new, more complex and modern perspective for maintenance of rules goes against the opinion that studying and planning rules is better (and easier) than verifying and implementing them\textsuperscript{106}.

Alongside a number of examples of strict maintenance in history, it is even more frequent to find cases also in the field of wide maintenance, in order to achieve the continuous adequacy of rules: we have already mentioned the French Constitutional reform (2008), the EU regulatory fitness program (2010), but also the widespread recourse to \textit{ex-ante} and \textit{ex-post} analysis of regulation all over the world.

Rather, it will be important that Governments adopt a legislation maintenance strategy which should include both the stock of rules and the regulatory flow.

Legal systems are, more or less, like public gardens. In the same way as in a city garden service, it is indispensable for Government to establish maintenance task forces of “gardeners”, experts in the field of drafting as well as in regulatory analysis, in charge of planned activities to support law-making and maintenance of rules. Sometimes, such “gardeners” will intervene for daily activities (\textit{strict maintenance}), sometimes they will implement stronger interventions (\textit{wide maintenance}).

In any case, it is becoming more and more clear that legislation founded only on the leg of law-making seriously risks limping and, in limping, it risks failing in its role, such as a city garden service which is responsible for a garden, well-designed and planted but completely abandoned.

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