Codification in a Civil Law Jurisdiction: An Italian Perspective

Enrico Albanesi[*]

Abstract

The aim of this article is to describe the mechanism of codification in a civil law jurisdiction. The case study will be based on the Italian system. The history and developments of the Italian codification will also be described here.

In Italy codification is called riassetto, *it is normally carried out by the government but the changes to existing law must be within the strict boundaries of the principles and criteria set out by the parliament. By contrast, the mechanism to amalgamate existing texts dealing with a single topic without radical changes is called* consolidamento. *It is carried out by the government as delegated by parliament. However, as the tools to carry out* riassetto *and* consolidamento *are the same (*decreto legislativo*: a decree issued by the government, which is delegated by the parliament), it is not always easy to understand when the government is allowed to carry out* consolidamento *only or* riassetto *too. Actually, how fundamentally the government is allowed to change existing legislation depends on what the principles and criteria of the enabling Act of Parliament allows.*

A decreto legislativo *that is not in compliance with the principles and criteria established by the Act of Parliament, could be declared void by the* Corte costituzionale *(the Italian Constitutional Court). Therefore, if the government exceeds the boundaries of* consolidamento *or* riassetto, *the* decreto legislativo *could be declared void.*

This essay will also focus on the different drafting techniques of consolidamento *and* riassetto *from a theoretical perspective and from the point of view of the jurisprudence of the* Consiglio di Stato *and the* Corte costituzionale. *Finally, it will look at the drafting process for codes in Italy, underlying the differences with systems where law reform agencies have been established.*

Keywords: civil law jurisdictions, codification, consolidation, legislative drafting, judicial review.

* Lecturer in Constitutional Law at the University of Genoa (Italy) and Associate Research Fellow at the Institute of Advanced Legal Studies (IALS), University of London. Co-leader of the IALS Law Reform Project.

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003

A Codification as a Tool for Better Regulation. An International and European Perspective

Codification is a tool for better regulation. The Organization for Economic Co-operation and Development (OECD), whose mission it is to promote policies that improve the economic and social well-being around the world and, in particular, regulatory policies, in the 2015 edition of its report on the policy framework for investment, states the following. "Governments can enhance the quality of the regulatory framework for investment" by "consulting with interested stakeholders", "drafting in clear language" and "simplifying and codifying legislation, including sector-specific legislation."[1]

Another OECD report on administrative simplification showed in 2010 how "electronic publication, consolidation and codification of legislative texts as well as the review of existing regulation to eliminate inconsistencies and duplications" are tools to make legislation more easily accessible. Therefore, such tools can be useful in carrying out administrative simplification and reducing administrative burdens in terms of both, direct administrative compliance costs ("time and money spent on formalities and paperwork to comply with regulations") and indirect or dynamic costs (which arise "when regulations reduce the productivity and competitiveness of enterprises").[2]

Also the European Union has always considered codification a tool for better regulation. In 2015, in its communication on better regulation, the European Commission announced that it would "continue to screen sectoral legislation in order to identify and propose the repeal of outdated legislation that no longer serves its purpose or is excessively burdensome."[3] At the same time, in its proposal for an interinstitutional agreement on better regulation, the European Commission proposed cooperation between the European Commission, the Council of the European Union and the European Parliament,

> to cooperate continuously to update and simplify legislation and to reduce unnecessary regulatory burdens for business, administrations and citizens. [...] The Commission will identify areas of current legislation for simplification and burden reduction and make proposals to that effect, among others through the repeal of obsolete acts, and by recasting or replacing acts where necessary.[4]

1 OECD, *Policy Framework for Investment. 2015 Edition*, Paris, OECD, 2015, p. 24.

2 OECD, *Why Is Administrative Simplification So Complicated? Looking Beyond 2010*, Paris, OECD, 2010, p. 30 *et seq.* and p. 16.

3 European Commission, *Better Regulation for Better Results – An EU Agenda*, COM (2015) 215 final, 19 May 2015, p. 11.

4 European Commission, *Proposal for an Interinstitutional Agreement on Better Regulation*, COM (2015) 216 final, 19 May 2015, p. 9.

B Codification in the Common Law Systems (and the Differences with the Civil Law Systems)

I Codification as a Mechanism of Law Reform

According to Section 3 (1), Law Commission Act 1965, in England, Wales and Scotland

> It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view of its systematic development and reform, including in particular the codification of such law.

Therefore, codification is seen in the Law Commission Act 1965 as a tool of law reform. However, what does 'law reform' mean?

In the United Kingdom and in the Commonwealth, law reform is first of all 'an effect': "the alteration of the law in some respect with a view to its improvement." However, law reform is also a 'process': "the process by which law reform is carried out, including the selection and application of values and the development and implementation of proposals for specific law reforms" and especially the process in which law reform agencies are involved.[5]

In the civil law systems, we are not familiar with the concept of law reform: we have neither such a body as the law reform agencies nor such a process as the process in which law reform agencies take part. As will be demonstrated in Section F, this is a disadvantage for codification.

II Codification as a Mechanism to Convert Portions of the Common Law into Statute Law

The modern concept of codification was born in France with the *Code Napoléon* (1804). It was rooted in the philosophical ideas of the Enlightenment at the end of the 18th century. According to such philosophical ideas, a rational, clear and politically new legislation would supersede, through codification, the existing legislation of the *Ancien Régime*.

In the United Kingdom at the beginning of the 19th century, Jeremy Bentham was the main supporter of codification in the common law system. His idea of codification encompassed the entire field of law (both statute and case law)

5 *Cf.* W.H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada*, Juriliber, Edmonton, 1986, p. 8 *et seq.* For an updated overview of law reform, *see* G. Palmer, 'The Law Reform Enterprise: Evaluating the Past and Charting the Future', *Law Quarterly Review*, Vol. 131, 2015, p. 402 *et seq.*

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003

with the aim of its reform as its basis.[6] This is the reason why Bentham's concept has always been looked upon with suspicion in the common law world.[7]

As already mentioned, in the 20th century the Law Commission for England and Wales was actually tasked with carrying out codification by the Law Commission Act 1965 (and someone contentiously then argued: "Here Lies the Common Law: Rest in Peace"[8]). However, two years before, in their famous proposal Gardiner and Martin themselves had clearly stated that such a Commission should be tasked with carrying out codification "so far as in the peculiar system of English law codification may be desirable and feasible."[9]

The Law Commission for England and Wales actually proposed codifying portions of the common law into statute law in the First and Second Law Reform Programmes. More recently a call in favour of codification has been raised from a former Chairman of the Law Commission, without tangible results however.[10] On the other hand, various substitutes for codes came into being in the common law systems[11] such as consolidation.

The main differences between codification and consolidation in the common law jurisdictions are the following: (i) the latter mechanism focuses solely on statute law, not on case law; (ii) the latter involves bringing together existing statutes on a particular topic in such a way that substantive statutes on the subject and those which amend them are framed as a single new (consolidating) Act: this is

6 *See* J. Bentham, *The Correspondence of Jeremy Bentham. Vol. 8: January 1809 to December 1816*, Oxford, Clarendon Press, 1988, p. 464 *et seq*. According to Dinwiddy, Bentham introduced the word codification itself in the English language. *See* J.R. Dinwiddy, *Bentham*, Oxford, Oxford University Press, 1989, p. 47.

7 *See* W. Geldart, *Introduction to English Law* (revised by D. Yardley), 11th edn., Oxford, Oxford University Press, 1995, p. 16 *et seq*. However, some calls for adopting a functional (in place of an ideological) approach to the issue of codification have recently been raised in England (*see* E. Steiner, 'Codification in England: The Need to Move from an Ideological to a Functional Approach – A Bridge Too Far?', *Statute Law Review*, Vol. 25, No. 3, 2004, p. 209 *et seq*.). An historical overview of codification in the common law system is carried out in G.A. Weiss, 'The Enchantment of Codification in the Common-Law World', *The Yale Journal of International Law*, Vol. 25, 2000, p. 470 *et seq*.

8 *See* H.R. Hahlo, 'Here Lies the Common Law: Rest in Peace', *The Modern Law Review*, Vol. 30, No. 3, 1967, p. 241 *et seq*.

9 *See* G. Gardiner & A. Martin (Eds.), *Law Reform NOW*, London, Gollancz, 1963, p. 8.

10 *See* M. Arden, 'Time for an English Commercial Code?', *Cambridge Law Journal*, Vol. 56, No. 3, 1997, p. 516 *et seq*. and M. Arden, 'Criminal Law at the Crossroads: The Impact of Human Rights from the Law Commission's Perspective and the Need for a Code', *Criminal Law Review*, 1999, p. 439 *et seq*. On the Scottish Law Commission *see* recently G. Gretton, 'On Law Commissioning', *The Edinburgh Law Review*, Vol. 17, No. 2, 2013, p. 131 *et seq*. More recently, from the academic side, *see* I. Dennis, 'Codifying the Law of Criminal Evidence', *Statute Law Review*, Vol. 35, No. 2, 2014, p. 107 *et seq*.

11 *See* C. Varga, *Codification as a Socio-Historical Phenomenon*, Budapest, Szent István Társulat az Apostoli Szentszék Könyvkiadója, 2011, p. 161 *et seq*.

designed to supersede and repeal the previous legislation.[12] In the United Kingdom consolidation can also involve some minor improvement of the text, which goes beyond mere structural adjustment: the basic substance of the existing law is not affected though. For example, the Tax Law Rewrite Project was an extension of this approach.[13]

In the civil law system, we do not have to deal with common law and binding precedents within the area to be codified. This is an advantage from the perspective of carrying out codification.

III Codification as a Mechanism Which Might Include (But Which Does Not Necessarily Include) Radical Changes

The concept of codification is used today across the civil and common law systems in a modern sense.[14] Codification is today referred to as setting out in a single text the existing legislation in a specific area of interest, regardless of whether it simply aims at formal simplification and systematization of the law or a reform of the law, as an instrument of a political will to change the law on a large scale.

As John Austin argued at the end of the 19th century, speaking about the English system,

> Codification of existing law, and innovation upon the substance of existing law, are perfectly distinct; although a code may happen to be wholly or partially new in matter as well as in form.[15]

This understanding of codification is rather more in line with the approach of English lawyers today.[16] In fact, as the then Chair of the Law Commission for

12 From the work carried out by Xanthaki into the common law system, it turns out that the difference between consolidation and codification is also a matter of drafting. Codification involves drafting on a large scale as its aim is to create a unique document in the field of law that it refers to, which encompasses legislative regulation as interpreted by the courts. The task of the drafter in codification is to identify a structure for the code; to identify and arrange the contents of each part in a logical sequence promoting clarity; to ensure that any problems arising from the compiling of existing law are resolved; to address vagueness and ambiguity more at the macro-level of the code than the micro-level of words, clauses and sections within the membership of the code. This also includes weeding out any obsolete provisions, any repealed provisions, any possible unconstitutional provisions and any provisions now incompatible with current international law and obligations; identifying and resolving any contradictions in legislation; identifying and supplementing any lacunae in the law; putting to effect any textual and consequential amendments. On the other hand, consolidation involves limited drafting in the form of creating a new clear structure of existing and untouched parts. The task of the drafter in consolidation lies in pursuit of clarity by means of structure alone. *See* H. Xanthaki, *Drafting Legislation. Art and Technology of Rules for Regulation*, Oxford and Portland, Hart Publishing, 2014, p. 276 *et seq*.

13 *See* J. Teasdale, 'Statute Law Revision: Repeal, Consolidation or Something More?', *European Journal of Law Review*, Vol. 11, No. 2, 2009, p. 175 *et seq*.

14 A modern approach to the concepts of codification is presented by D. Tallon, 'Codification and Consolidation of the Law at the Present Time', *Israel Law Review*, Vol. 14, No. 1, 1979, p. 1 *et seq*.

15 *See* J. Austin, *Lectures on Jurisprudence; Or, The Philosophy of Positive Law*, Vol. II, London, Murray, 1885, p. 1026.

16 *See* Weiss, 2000, p. 481.

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003

England and Wales Dame Mary Arden stated some years ago, speaking about the Law Commission's task of codification, there is "no need to assume that the adoption of a code must be accompanied by some radical change in the law."[17]

On the other hand, in the civil law system codification usually includes radical changes of existing law. In Italy this is called *riassetto* (or *codificazione sostanziale*). However, as codification is carried out by the government, these changes must be within the strict boundaries of the principles and criteria set out by the parliament.

In Italy the mechanism to amalgamate existing texts dealing with a single topic without radical changes is called *consolidamento* (or *codificazione formale*). It is up to the Parliament, when it delegates the government to issue a code, to delegate the latter to carry out either *riassetto* or *consolidamento* only.

In France they use the words *codification à droit non constant* in the first case and *codification à droit constant* in the second case. Some scholars use the words *codification-modification* and *codification-compilation*.[18] As Guy Braibant (vice-president of the *Commission supérieure de codification* between 1989 and 2005) said, referring to *codification à droit constant*, "*codifier n'est pas modifier*."[19]

However, in Italy, given that the tools to carry out codification and consolidation are the same (*decreto legislativo*: a decree issued by the government, which is delegated by the parliament), it is not always easy to understand when the government is allowed to carry out *consolidamento* only or *riassetto* too. As it will be demonstrated in Section D, this is a disadvantage for codification.

C History of Codification from a Southern-Europe Perspective. Case Study – Italy

I Codice Civile (Civil Code)

The function of civil codes in Europe and in Italy has profoundly changed since the 18th century.[20]

i) The Italian *Codice civile* (civil code) was enacted in 1865, four years after the unification of the Italian Kingdom in 1861. The *Codice di commercio* (commercial code) was enacted in 1865 and then renewed in 1882. Formerly, there had been some experience of civil and commercial codes in the pre-unification states, such

17 *See* Arden, 1997, p. 518.

18 *See* R. Cabrillac, *Les Codification*, Paris, Puf, 2002, p. 189 *et seq.*

19 *Cf.* G. Braibant, 'Le relance de la codification', *Revue Français de Droit Administratif*, No. 3, 1990, p. 308. However, like *consolidamento* in Italy and consolidation in the United Kingdom, *codification à droit constant* might involve those changes to the law whose aim is to improve the quality of the law itself.

20 The book N. Irti, *L'età della decodificazione*, Milano, Giuffrè, 1999, Terza edizione, is a masterpiece on this topic. For a negative comment about Irti's view, *see* R. Sacco, 'A Civil Code Originated During the War (The Italian *Codice Civile*)', *in* J.C. Rivera (Ed.), *The Scope and Structure of Civil Codes*, Zurich, Springer, 2013, p. 249 *et seq.* On codification and decodification from a point of view of constitutional law, *see* A. Morrone, 'Sul riordino della legislazione', *in* M. Cavino & L. Conte (Eds.), *La tecnica normativa tra legislatore e giudici*, Napoli, Editoriale scientifica, 2014, p. 127 *et seq.*

as the Kingdom of Sardinia. Their model was the French *Code Napoléon*, which was rooted in the philosophical ideas of the Enlightenment (see Section B).

At that time codes were also intended to be the tool of the bourgeoisie, the new leading class in the society; they enacted legislation wherein the ideals of the bourgeoisie were solemnly placed: in fact, the codes contained the rules for the fair development of free trade, which would leave the traders at liberty to pursue their chosen goals. From this point of view, the codes were intended to be of a 'constitutional' nature.

Moreover, these rules were supposed to be comprehensive: all the provisions that regulated civil and commercial relations had to be solemnly placed in the codes. Such provisions had to be drafted in a very precise way and the boundaries of each case had to be strictly shaped by them. This would leave little room for the interpretation by the Judges.

This is the reason why at that time the relationship between the codes and the other Acts was intended to be like the relationship between rule and exception (*leggi eccezionali*). Therefore, it was forbidden for the judges to interpret those other Acts by analogy (*analogia legis*).[21]

ii) Things started changing between World War I and World War II when the state was called on to address the new demands of society such as developing public services or creating new jobs. For this reason, the state was tasked with driving trade towards those goals, playing a proactive role in the economic system, setting limits to private autonomy and acting as an entrepreneur.

This role was played out through an increasing number of Acts, which were placed alongside the codes. While the codes set out general provisions (e.g., about leasing), those Acts regulated particular cases (e.g., about leasing of urban real estates, leasing of rural real estates, leasing of commercial real estates) (*leggi speciali*). Judges could fill in the gaps using the general principles of the legal system (*analogia iuris*) and those principles could be found in the codes. In fact, codes were intended to be the general law (*diritto comune*) for private and commercial cases, even if not fully comprehensive any more.[22]

In Italy a new civil code was enacted in 1942 by Mussolini's government during World War II. The existing commercial code was included within this new civil code. Today we still use the 1942 *Codice civile* in Italy. Obviously, it was deeply amended in its substantive content after the rise of the Italian democracy and many of its provisions have been declared unconstitutional by the *Corte costituzionale* (the Italian Constitutional Court), as the 1942 *Codice civile* mirrored the values of a fascist regime.

iii) The role played by the state (as described above) became even more important when the Italian Constitution was enacted in 1947 as many constitutional provisions task the state with pursuing those goals of developing public services. Therefore, the number and the importance of the Acts placed outside the *Codice civile* heavily increased.

21 *See* Irti, 1999, p. 3 *et seq.*

22 *See ibid.*, p. 9 *et seq.*

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003

The relationship between the *Codice civile* and the Acts beside it has also changed. When there are a number of Acts dealing with the same matter, they are usually blended in a *new and minor* code. Such new and minor code acts as a microsystem of provisions, which becomes extraneous to the *Codice civile*, as it regulates a matter that is not connected with that Code any more. Moreover, Judges can discern new principles from this new minor code to fill in gaps regarding the matter under review.

At the end of the day, the *Codice civile* is not able to act as a common framework of the entire civil and commercial law any more, from which Judges could get the general principles they need to fill in the gaps and to interpret the law homogeneously.[23]

The Italian scholar Natalino Irti called this historical period we have been living in since the end of the World War II the *età della decodificazione*, which means the era of decodification (i.e., the era of escape from codes).

These Acts (and, then, these new and minor codes) running alongside the *Codice civile*, Irti says, act as special regulation for specific matters because they have come about through lobbying of the state by particular interest groups (e.g., tenants of urban real estates; tenants of rural real estates; tenants of commercial real estates).

However, in such a context, Judges are not able to assure the principle of equality between groups any more, as they did once by interpreting the Acts within the framework of the *Codice civile* and employing the general principles embodied in the Code.

The only tool to guarantee and implement the (constitutional) principle of equality is the constitutional control carried out by the *Corte costituzionale*, which can declare void an Act that regulates groups in a way that is not in compliance with the principle of equality (which lays down that similarly situated groups must be treated equally).[24]

II Other Codes

The main other three codes in Italy are the *Codice penale* (criminal code), the *Codice di procedura civile* (code of the civil courts) and the *Codice di procedura penale* (code of the criminal courts).

The first Italian *Codice penale* after the unification of Italy was enacted in 1889 (the so-called *Codice Zanardelli*), followed by another code in 1930 (the so-called *Codice Rocco*). This is the same criminal code we are still using today. Subsequently the *Codice penale* was deeply amended and many of its provisions have been declared unconstitutional by the *Corte costituzionale* once democracy was established in Italy.

The first Italian *Codice di procedura civile* was enacted in 1865 and then superseded by a new one in 1940. The first Italian *Codice di procedura penale* was enacted in 1865 and then superseded by new ones in 1930 and then in 1988.

23 *See ibid.*, p. 13 *et seq.*

24 *See ibid.*, p. 26 *et seq.*

III Drafting of Codes

The main four codes in Italy have always been drafted by the then most prestigious Italian lawyers and academics, as the Ministries of Justice have ordinarily appointed commissions of such people for that purpose.[25]

For example, the *Codice di procedura civile* in 1940 was drafted by a commission composed of Francesco Carnelutti, Enrico Redenti, Piero Calamandrei and Leopoldo Conforti; while the *Codice di procedura penale* in 1988 was prepared by a commission composed of Gian Domenico Pisapia, Delfino Siracusano, Ennio Amodio, Vincenzo Cavallari, Mario Chiavario, Oreste Dominioni, Vittorio Grevi, Guido Neppi Modona, Mario Pisani, Giancarlo Caselli, Enrico Di Nicola, Liliana Ferraro, Giuseppe La Greca, Giorgio Lattanzi, Ernesto Lupo, Vittorio Mele, Piero Luigi Vigna and Giuseppe Frigo, all of whom were respected jurists and academics. This led to some very great codes from the point of legislative drafting, as the drafters were very prestigious lawyers and they had enough time and resources to carry out their work.

However, it must be remembered that, by contrast, in Italy minor codes are traditionally drafted by the legal officers of the *Ufficio legislativo* of each Department, who are experts in that specific area of law (the same happens with bills introduced by the government to the parliament and decrees issued by the government). In fact, we have neither law reform agencies nor lawyers who work exclusively on legislative drafting (like those of the Office of the Parliamentary Counsel in the UK). This system does have unfortunate consequences from a legislative drafting point of view, as will be shown in Section F.

D The Distinction between *Riassetto* (Codification) and *Consolidamento* (Consolidation) in Italy and the Main Tools to Carry Out Codification: The *Decreto Legislativo* for Primary Legislation and the *Regolamento* for Secondary Legislation

I Riassetto and Consolidamento

As mentioned in Section B, in Italy we resort to the tools of *consolidamento* (or *codificazione formale*) and *riassetto* (or *codificazione sostanziale*).[26] As stated in Section B, in the civil law jurisdictions codification has a broader meaning than in the United Kingdom (because it usually includes radical changes of the law too) and it is not always easy to say what drafters are allowed and not allowed to do in carrying out codification.

In Italy things are more complex because the tool to carry out *consolidamento* and *riassetto* for primary legislation (the *decreto legislativo*, as will soon be demonstrated) is the same for each.

As it is very technical and demanding work, codification and consolidation in Italy are traditionally carried out not by the parliament through its Acts but by

25 *See* Ministero della Giustizia – Dipartimento per gli Affari di giustizia – Biblioteca Centrale Giuridica, *I lavori preparatori dei codici italiani. Una bibliografia*, 2013, Roma.

26 *See* R. Pagano, *Introduzione alla legistica. L'arte di preparare le leggi*, Giuffrè, Milano, 2004, p. 74 *et seq.* and p. 239.

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003

the government, enabled by the parliament.[27] The main tools to carry out codification and consolidation in Italy are the *decreto legislativo* for primary legislation and the *regolamento* for secondary legislation.

II The Two Tools

1 Decreto Legislativo

Decreto legislativo is a piece of primary legislation. It is a decree that is issued by the government, enabled by an Act of Parliament.

The parliament delegates to the government the exercise of legislative powers by establishing in the Act the principles and criteria that the government shall follow in issuing the *decreto legislativo*, for a limited time and for specified purposes. The relevant committees of the *Camera dei deputati* and the *Senato della Repubblica* (the two chambers of the Italian parliament) have the power to report on the draft of the *decreto legislativo*, scrutinizing whether it is in compliance with the principles and criteria set down by the parliament. Therefore, the relevant committees play an important role (together with the *Comitato per la legislazione* and the *Commissione per la semplificazione*) in legislative scrutiny.[28]

Section 76 of the Italian Constitution lays down that when the government issues a *decreto legislativo*, it shall follow the principles and the criteria that are established by an Act of Parliament. Therefore, if a *decreto legislativo* were to fail to comply with the principles and the criteria established by the Act of Parliament, it would be declared void by the *Corte costituzionale* because it would not be in compliance with the Constitution itself. From this point of view, the *decreto legislativo* works as a '*norma interposta*' (interposed norm): this means that it is 'hung' on a section of the Constitution and for this reason it could be used by the *Corte costituzionale* as a standard for its judgement.

When the parliament delegates the government to issue *decreti legislativi*, it does not usually establish clearly and strictly the principles and the criteria and thus the limits of the delegated powers. The reason is that the parliament (in reality, the majority that support the government) does not want to constrain the action of the government too much.[29]

From the point of view of the technicalities of legislative drafting, this means that the parliament does not give clear and strict instructions to the government for drafting *decreti legislativi*.

This has a bad impact on the drafting of *decreti legislativi*, though. The added value of the *decreto legislativo* should be its double-stepped nature (the Act of Par-

27 *See* Pagano, 2004, p. 239 and F. Mautino & R. Pagano, *Testi unici. La teoria e la prassi*, Milano, Giuffrè, 2000, p. 20.

28 About legislative scrutiny in Italy, *see* E. Albanesi, 'The Mechanisms Used to Review Existing Legislation in the Civil Law System. Case Study – Italy', *European Journal of Law Review*, No. 3, 2016, pp. 289-292.

29 On the way the *delega legislativa* actually works, *see* E. Rossi (Ed.), *Le trasformazioni della delega legislativa. Contributo all'analisi delle deleghe legislative nella XIV e nella XV legislatura*, Padova, Cedam, 2009 and L. Duilio (Ed.), *Politica della legislazione, oltre la crisi*, Bologna, Il Mulino, 2013, p. 107 *et seq*.

liament as a general legislative planning tool; the *decreto* itself as an implementation of that). However, this value is lost when the parliament does not give clear and strict political instructions to the government.[30]

In the United Kingdom, this problem is well known as regards skeleton bills.[31] For this reason, the Delegated Power and Regulatory Reform Committee of the House of Lords was tasked in 1992 with scrutinizing the way legislative enabling clauses are drafted: the aim was to avoid the practice of skeleton bills.[32] However, in Italy *decreti legislativi* are primary legislation (and not secondary legislation like the British statutory instruments). Therefore, the practice of bills that delegate the government in such a way seems to be even more worrying.

2 Regolamento

To codify secondary legislation, we use *regolamenti*, which are fairly similar to the British statutory instruments. There are two kinds of *regolamento*. The *regolamento governativo* is issued by the Council of Ministers, after an opinion given by the *Consiglio di Stato* (which is also an advisory body to the government) and a supervision by the *Corte dei conti* (the Italian Supreme Audit Institution) and it is promulgated by the president of the republic. The *regolamento ministeriale* is issued by a minister in an area of their own competence, when the law gives them this power. Before issuing it, the minister is obliged to inform the *Presidente del Consiglio* (the Italian President of the Council of Ministers).

According to the principle of the rule of law, every *regolamento* shall be in compliance with the law. If it is not, then an administrative tribunal could declare it void.

III The Role of the Consiglio di Stato and the Corte Costituzionale

The *decreto legislativo* is the main tool that we use in Italy to pass a code. When the *decreto legislativo* is a code, there is an extra stage: the *Consiglio di Stato* must give an opinion on its draft, scrutinizing whether it is in compliance with the rule of law and it is properly drafted (Section 20, *legge n. 59 del 1997* as amended by *legge n. 229 del 2003*). It could also happen (but very rarely) that the *Consiglio di Stato* is tasked to draft the code by the government (Section 14, *r.d. n. 1054 del 1924*) (also see Sections E and F).

As already mentioned, the principles and criteria established by the parliament when it delegates the government to issue a *decreto legislativo* are often not clear. When the *decreto legislativo* is used to carry out *riassetto*, this leads to confusion about what the government is allowed and not allowed to do: whether it can

30 As it is underlined by G. Zagrebelsky, Conclusioni *in* Corte costituzionale 2009, p. 326 *et seq.*

31 *See Making the Law: The Report of the Hansard Society, Commission on the Legislative Process*, London, Hansard Society, 1993, p. 64.

32 About the outcome of the Committee *see* R. Fox & J. Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation*, London, Hansard Society, 2014, p. 48 *et seq.* and p. 69 *et seq.*; M. Russell, B. Morris & P. Larkin, *Fitting the Bill: Bringing Commons Legislation Committees into Line with Best Practice*, London, UCL Constitution Unit, 2013, p. 34; D. Greenberg, *Laying Down the Law: A Discussion of the People, Process and Problems that Shape Acts of Parliament*, London, Sweet & Maxwell, 2011, p. 210 *et seq.*

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003

carry out a formal simplification and systematization of the law (*consolidamento*) or a reform of the law, as an instrument of a political will to change the law on a large scale (*riassetto*).

In reality, the enabling Acts of Parliament very rarely use the words *consolidamento* and *riassetto* properly. Moreover, the clear theoretical distinction between these two concepts has been lost in practice. Therefore, the degree of changes to existing legislation the government can carry out when it drafts a code today depends on what the principles and criteria of the enabling Act of Parliament actually allow in relation to that specific *decreto legislativo*.

To understand this point, it could be useful to analyse in detail the different drafting techniques used in carrying out *consolidamento* and *riassetto*, both from a theoretical perspective and from the point of view of the jurisprudence of the *Consiglio di Stato* and the *Corte costituzionale* (see Section E).

E The Different Drafting Techniques for Codification and Consolidation in Italy

I Theoretical Perspective

From Rodolfo Pagano's point of view,[33] drafters shall not 'create' new provisions while they are carrying out consolidation, but they are allowed to do so while they are carrying out codification.[34] According to Pagano, when the drafters are carrying out consolidation, they can adjust

i) the language of the law:
- correcting any language errors;
- making every quotation uniform;
- explaining acronyms;
- making spelling uniform;
- updating the names of the bodies that have been changed;
- removing every ambiguity that comes from a misuse of punctuation.

ii) the systematization of the structure of the law:
- introducing new groupings to order homogeneous sections;
- renumbering sections and subsections;
- adjusting internal references to sections or subsections;
- removing regulations that do not relate to the subject of the law;
- merging sections that regulate the same subject.

33 Rodolfo Pagano was the clerk of the *Camera dei deputati* who in the 1980s and 1990s carried out research on drafting and collected legislative standards of the main European countries (*see* R. Pagano (Ed.), *Normative europee sulla tecnica legislativa*, Roma, Camera dei deputati, 1988) and edited the Italian translation of the Renton Report (*La preparazione delle leggi. Rapporto presentato al Parlamento inglese, 1975*, con introduzione e note di R. Pagano, Camera dei deputati, Roma, 1990) on behalf of the *Camera dei deputati*.

34 *See* Pagano, 2004, p. 74.

iii) the relations between pieces of legislation:
- weeding out repealed or amended provisions (also by *referenda*);
- weeding out provisions that have become obsolete according to the courts;
- adjusting provisions that have not been explicitly amended;
- weeding out provisions quashed by the *Corte costituzionale*;
- adjusting provisions according to the new meaning given by the *Corte costituzionale*.[35]

II The Jurisprudence of the Consiglio di Stato

As stated in Section D, the *Consiglio di Stato* is tasked with giving advice on the draft of the *decreti legislativi* when they are codes.

The *Consiglio di Stato* is the Italian High Administrative Court and also an advisory body to the government. It is composed of Judges who are also experts in legislative drafting. In fact, one of their tasks is to scrutinize, in general, whether administrative acts are in compliance with the rule of law or not and, in particular, whether the *decreti legislativi* (especially the ones that codify legislation) and *regolamenti* are drafted properly or not. The *Consiglio di Stato* can be also tasked by the government with drafting bills (and codes), but it is rarely asked to do so.[36] Therefore, being an independent, prestigious and highly qualified body, the *Consiglio di Stato* plays an important role in the drafting process for codification and consolidation.

The *Consiglio di Stato* usually uses the words *riassetto* for codification and *mero riordino* for consolidation. According to its jurisprudence, the difference between *riassetto* and *mero riordino* is a matter of degree. This means that when the government is delegated by the parliament to carry out *riassetto*, the principles and the criteria established by the parliament are wider and the government is authorized to change the substance of existing legislation, not just to carry out its formal simplification and systematization.[37]

It is also interesting to note that actually, according to the *Consiglio di Stato*, the word '*codice*' should be used instead of the word '*riassetto*'. The word 'code',

35 *See ibid.*, p. 80 *et seq.*

36 About the tasks of the *Consiglio di Stato* dealing with legislative drafting, *see* G. Fontana, 'Considerazioni critiche sul ruolo del Consiglio di Stato nella più recente attività di semplificazione normativa', *Federalismi.it*, No. 3, 2015, pp. 1-27. *Cf.* <www.federalismi.it/nv14/articolo-documento.cfm?Artid=30587>.

37 *"Ciò che cambia è la portata, per così dire, 'quantitativa' dell'intervento innovativo, poiché per i decreti legislativi di 'riassetto' vi sono criteri di delega più ampi e incisivi, che autorizzano il legislatore delegato non soltanto ad apportare modifiche di 'coordinamento formale' alla disciplina di rango legislativo, ma anche a consistenti innovazioni del merito della disciplina codificata." See Cons. Stato parere n. 2 del 2004, Adunanza generale del 25 ottobre 2004 (Codice dei diritti di proprietà industriale), punto 3.3. See also Cons. Stato parere n. 11602 del 2004, Sezione consultiva per gli atti normativi (Codice del consumo); Cons. Stato parere n. 149 e n. 152 del 2010, Commissione speciale (Codice e testo unico delle disposizioni regolamentari in materia di ordinamento militare), punto 6.2; Cons. Stato parere n. 153 e n. 155 del 2010, Commissione speciale (schema di decreto legislativo recante riordino della normativa sull'attività agricola e schema di decreto del Presidente della Repubblica recante le relative disposizioni regolamentari), punto 1.1; Cons. Stato parere n. 3244 del 2010, Sezione consultiva per gli atti normativi (c.d. taglia-regolamenti), punto 5.*

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003

even in its current 'post-Enlightenment' meaning, contains both the following features: the substantial innovation and formal consolidation.[38]

III The Jurisprudence of the Corte Costituzionale

As already mentioned, if the *decreto legislativo* is not consistent with the principles and criteria set out by the enabling Act of Parliament, the *Corte costituzionale* could declare it void (see Section D). The *Corte costituzionale* has explained in its jurisprudence what this means when the *decreto legislativo* is used as a tool to carry out codification and consolidation.[39]

First of all, codification carried out by the government might include radical changes to existing legislation, provided that the parliament sets out principles and criteria that allow for that and define the boundaries.[40]

Therefore, codification carried out by the government cannot include radical changes to existing legislation outside the boundaries set out by the principles and the criteria established by the enabling Act of Parliament.[41]

Second, as neither the enabling Act of Parliament nor the judgments of the *Corte costituzionale* use the words '*riassetto*' and '*consolidamento*' in a clear and precise way,[42] it is necessary to interpret the principles and the criteria established by the parliament in the enabling Act and more generally the aim of the enabling Act.[43]

Finally, the consequences for the *decreto legislativo* issued by the government are the following:

i) If the government changes the substance of existing legislation (*riassetto*) outside the strict boundaries established by the parliament, the *Corte costituzionale* could declare the *decreto legislativo* unconstitutional. This was the reason why the *Corte costituzionale* quashed some sections of the *Codice del processo amministrativo* (Code of the administrative courts) in 2012 and 2014.

The government carried out some radical changes in issuing the code but, in doing so, it went beyond the principles and the criteria established by the parlia-

38 *"Il termine 'codice', pur nella sua accezione 'non illuministica' che oggi solo può avere, contiene entrambi gli elementi caratterizzanti sopra descritti: l'innovatività sostanziale e il consolidamento formale." See Cons. Stato parere n. 2 del 2004, Adunanza generale del 25 ottobre 2004 (Codice dei diritti di proprietà industriale), punto 3.3.*

39 *See* E. Albanesi, 'Delega legislativa e codificazione nella XVI e XVII legislatura a fronte dell'eclissarsi dello strumento della legge annuale di semplificazione', *Federalismi.it*, No. 3, 2015, pp. 1-25. *Cf.* <www.federalismi.it/nv14/articolo-documento.cfm?Artid=30573>.

40 *"Qualora, come nella specie, la delega abbia ad oggetto il riassetto di norme preesistenti, questa finalità giuridica giustifica l'introduzione di soluzioni sostanzialmente innovative rispetto al sistema legislativo previgente soltanto se siano stabiliti principi e criteri direttivi volti a definire in tal senso l'oggetto della delega ed a circoscrivere la discrezionalità del legislatore delegato." See Corte cost., sent. 17 maggio 2007, n. 170, punto 4 del Considerato in diritto, Giur. cost.*, 2007, p. 1653 *et seq.*

41 *"Il legislatore delegato, in definitiva, non poteva innovare al di fuori di ogni vincolo alla propria discrezionalità esplicitamente individuato nella legge delega." See Corte cost., sent. 8 ottobre 2010, n. 293, punto 8.5 del Considerato in diritto, Giur. cost.*, 2010, p. 3797 *et seq.*

42 Words as *revisione* and *riordino* are used as well.

43 *"Per valutare se il legislatore abbia ecceduto tali – più o meno ampi – margini di discrezionalità, occorrerà individuare la* ratio *della delega." See Corte cost., sent. 24 giugno 2010, n. 230, punto 4.2 del Considerato in diritto, Giur. cost.*, 2010, p. 2668 *et seq.*

ment. According to the principles and the criteria, the government should have followed the jurisprudence of the Highest Italian Courts in regulating the matter, but it did not.[44]

ii) If the government changes the substance of existing legislation (*riassetto*), while the principles and criteria of the Act of Parliament allowed the government to carry out systematization and simplification of the law only (*consolidamento*), the *Corte costituzionale* could declare the *decreto legislativo* unconstitutional. For example, during the last few years the *Corte costituzionale*:

- quashed a subsection of the *Codice della proprietà industriale* (Code of the industrial property rights) in 2007 because the Code set out a new regulation of the process regarding industrial and intellectual property rights. Actually, the principles and criteria set out by the parliament (as interpreted by the *Corte costituzionale*) allowed *consolidamento* of existing law only;[45]
- quashed a section of the *Testo unico delle disposizioni legislative e regolamentari in materia di espropriazione per pubblica attualità* (Code of confiscation) in 2010 because it set out a new regulation about confiscation while the principles and criteria set out by the parliament (as interpreted by the *Corte costituzionale*) allowed *consolidamento* of existing law only;[46]
- quashed several sections of the *Codice della normativa statale in tema di ordinamento e mercato del turismo* (Code of tourism) in 2012 because it included a new regulation regarding the division of responsibilities between the state and the regions on this matter while the principles and criteria set out by the parliament (as interpreted by the *Corte costituzionale*) allowed *consolidamento* of existing law only. The *Corte costituzionale* underlined that such a new regulation could only have been decreed by the parliament;[47]
- quashed a part of a section of the *Codice dell'ordinamento militare* (Code of the army) in 2014 because it repealed a criminal offence while the principles and criteria set out by the parliament (as interpreted by the *Corte costituzionale*) allowed *consolidamento* of existing law only. Once again, the *Corte costituzionale* underlined that such a new regulation could only have been created by the parliament, at least in terms of principles.[48]

44 *See Corte cost., sent. 27 giugno 2012, n. 162, punti 4.1 e 4.2 del Considerato in diritto, Giur. cost.*, 2012, p. 2204 *et seq.* and *Corte cost., sent. 15 aprile 2014, n. 94, punto 4 del Considerato in diritto, Giur. cost.*, 2014, p. 1681 *et seq.* On these two judgments *see* G. Serges, *La difficile determinazione dei confini della giurisprudenza esclusiva mediante rinvio ai principi desumibili della giurisprudenza, Giur. cost.*, 2012, p. 2221 *et seq.* and G. Serges, *La giurisdizione in materia di sanzioni inflitte alla Banca d'Italia tra principi elastici di delega e reviviscenza di disposizioni abrogate, Giur. cost.*, 2014, p. 1692 *et seq.*

45 *See Corte cost., sent. n. 170/2007, punto 4 del Considerato in diritto.*

46 *See Corte cost., sent. n. 293/2010, punti 8.4 e 8.5 del Considerato in diritto.*

47 *"Richiede in tal senso una precisa manifestazione di volontà legislativa del Parlamento." See Corte cost., sent. 5 aprile 2012, n. 80, punti 5.4., 5.5. e 5.6. del Considerato in diritto, Giur. cost.*, 2012, p. 1089 *et seq.*

48 *"L'abrogazione di norme penali incriminatrici solo apparentemente connesse con la materia oggetto del riassetto normativo si colloca evidentemente su un altro piano e richiede scelte di politica legislativa, che, seppur per grandi linee, devono provenire dal Parlamento." See Corte cost., sent. 23 gennaio 2014, n. 5, punto 6.3 del Considerato in diritto, Giur. cost.*, 2014, p. 92 ss.

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003

At the end of the day, what the government is allowed to do (*riassetto* or *consolidamento*) and in the first case how fundamentally it can change existing legislation, depends on what the principles and criteria of the enabling Act of Parliament actually allow for.[49] The *Corte costituzionale* can quash the *decreto legislativo*, if it is not in compliance with those specific principles and criteria.

As is clear to see, this way of enabling the government to carry out *riassetto* and *consolidamento* can, and does, lead to confusion. Therefore, first of all the Italian parliament, when it delegates the government to issue a code, should use clear language and state explicitly whether it is delegating the latter to carry out *consolidamento* only or *riassetto* too. Second, principles and criteria established by the parliament should be more precise when the parliament delegates the government to carry out *riassetto*.

F The Lack of Law Reform Agency and of a Tool to Programme Codification in Italy

In Italy (as in other civil law countries) we do not have any law reform agency or any law reform process to carry out codification.[50] Unfortunately, we do not have either a tool to programme policies of codification, as happens in France.

i) As codification is carried out by the government enabled by the parliament, this means that codes (as bills and drafts of decrees) in Italy are drafted by the legal officers of the *Ufficio legislativo* of each department.[51] Commissions of prestigious lawyers and academics were tasked with drafting codes in the past but this happened very rarely, as already seen for example, with the main codes (see Section C). The *Consiglio di Stato* scrutinizes whether the draft of the code is in compliance with the rule of law and it is drafted properly, but it only gives its opinion to the government (see Section E).

In Italy the drafting process is carried out by the *Ufficio legislativo* of each department. There is nothing similar to the British Offices of Parliamentary Counsel (OPC).[52] Our *Dipartimento per gli affari giuridici e legislativi (DAGL)*,[53] which belongs to the *Presidenza del Consiglio dei Ministri* (a sort of Prime Minister's Office), is only tasked with supervising and coordinating the *Uffici legislativi* of the departments but it does not have the exclusive task of drafting bills and decrees as Parliamentary Counsel does.

49 *See* G. Tarli Barbieri, 'La delega legislativa nei più recenti sviluppi', *in* Corte costituzionale (Ed.), *La delega legislativa*, cit., p. 127.

50 For a comparison between the British and the Italian system, *see* E. Albanesi, 'I meccanismi di semplificazione normativa nel Regno Unito', *Rass. parl.*, No. 2, 2015, p. 433 *et seq*.

51 *See* B.G. Mattarella, 'Il ruolo degli uffici legislativi dei Ministeri nella produzione normativa', *Nomos*, No. 4, 1993, p. 119 *et seq*.

52 *See* Greenberg, 2011, p. 19 *et seq*.

53 *See* C. Zucchelli, 'Il coordinamento normativo del Governo: il Dipartimento per gli affari giuridici e legislativi della Presidenza del Consiglio', *in* Associazione per gli studi e le ricerche parlamentari (Ed.), *Quaderno n. 14*, Torino, Giappichelli, 2004, p. 199 *et seq*.

This system has two unfortunate consequences. First of all, this means that the relevant department is essentially focused on dealing with policy and legal aspects of the bill or of the decree and not exclusively on legislative drafting.

Second, this system does not allow our officers to develop specific expertise in legislative drafting (unlike those of the Office of Parliamentary Counsel) and in the mechanisms used to review existing legislation (unlike those of the law reform agencies).

As far as the mechanisms used to carry out codification are concerned, the way the law-making and the drafting processes work, leads to a double paradox. First of all, these mechanisms are carried out by the government using the same tools (*decreti legislativi* and *regolamenti*) by which the ordinary day-to-day legislation is usually carried out. This means that they are carried out in the same chaotic way and with the same unfortunate outcome.[54] Second, such mechanisms are drafted by the relevant Department whose officers are not specialized in legislative drafting and in the mechanisms of codification.

Sometimes the *Consiglio di Stato* has been tasked with drafting a code, as happened in 2009 with the *Codice del processo amministrativo* (Code of the administrative courts).[55] However, the impression is that in that case the *Consiglio di Stato* has been asked to draft the Code not because it is composed of drafters who are experts in legislative drafting but of judges who are expert in the specific matter to be codified: the regulation of the administrative courts.[56] At the end of the day, it seems that the *Consiglio di Stato* was involved only because, in this case, these two roles overlapped.

The same seemed to happen with the codification of the provisions about the *Corte dei conti* in 2015. A Commission, established within the *Dipartimento per gli affari giuridici e legislativi* and composed by experts in legislative drafting and of lawyers expert in that matter, was tasked by an Act of Parliament with drafting that Code. Once again, the impression is that in that case the *DAGL* has been asked to draft the Code to involve lawyers who were experts in the specific matter to be codified.[57]

ii) In Italy, we do not have a tool to programme policies of codification either,[58] as happens in France for example. In 1989 in France a *Commission supérieure de codification* was established to lead, coordinate and supervise programmes of codification. Actually, this *Commission* is tasked with *codification à droit constant* (see Section B).

The *Commission* is chaired by the prime minister. The vice-president is a *conseiller d'État*. Other members are High Court Judges, High Officers and one member of the *Assemblée National* and one member of the *Sénat*.

54 About the Italian law-making process, *see* more in depth Albanesi, 2016, pp. 279-284.

55 A negative opinion on this task is expressed by Fontana, 2015, p. 22 *et seq*.

56 *See* Albanesi, 2015 (1), p. 9 *et seq*.

57 *See ibid*., p. 20 *et seq*.

58 About the lack of a programme of policies of codification in Italy, *see* B.G. Mattarella, *La trappola delle leggi. Molte, oscure, complicate*, Bologna, Il Mulino, 2011, p. 192.

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003

The task of the *Commission* is not to draft the texts of the *code* (the relevant department is tasked with doing this) but to set out a programme of *codification*, to lay down the methods with which to carry out *codification*, and to lead, coordinate and supervise the departments when they draft the *code*.

The draft of a *code* is sent to the *Conseil d'État* for its opinion. In France the *Conseil d'État* plays a very important role in legislative drafting because its task is to give advice on the bills whether they are in compliance or not with the rule of law. This task is very important in relation to *codification*, of course.

After this, the *code* is introduced to the parliament, which can approve it through a statute (for the part of the *code* that is a statute). It is also approved by the government through a *décret* (for the part of the *code* that is not a statute).

In Italy a mechanism to programme policies of codification was established in 2003 but it failed. It involved a yearly Act of simplification and codification (*legge di semplificazione e di riassetto*), through which the parliament could delegate the government to carry out codification in some specific subject matters or at least within a common deadline and within some common principles and criteria.[59] However, the parliament used this tool only twice, in 2003 and 2005: this showed the weakness of a tool that is not able to bind the parliament and the government when they legislate – it is a piece of primary legislation and not of a constitutional nature.[60]

In June 2014 the *Camera dei deputati* passed a resolution that invited the government to carry out a programme of consolidation but nothing came of it.[61]

G Amending (Explicitly) the Codes: A Matter of a Constitutional Nature

The amendment of codes is one of the main related problems in Italy. In fact, every subsequent amendment that does not explicitly amend a code undermines one of the aims of codification, which is to merge and keep existing legislation on a specific subject in one single text.

One of the main legislative drafting rules lays down the use of the *novella*, which is the tool to amend explicitly existing legislation.[62] However, such a rule is not strictly binding as it is set down by a mere administrative act.

In a civil law system the only way to make such a rule legally binding (at least with regard to codes) is to place it in the Constitution – or, at least placing in the Constitution a rule that mentions an Act of Parliament as the piece of legislation in which to place such a rule. In the first case, the *Corte costituzionale* could declare void an Act of Parliament that did not explicitly amend a code, as such an

59 *See* G. Savini, *Esperienze di nuova codificazione: i "codici di semplificazione di settore"*, Padova, Cedam, 2007.

60 On these aspects, *see* N. Lupo & G. Tarli Barbieri, 'Le leggi annuali di semplificazione: appunti per un bilancio', *in* P. Caretti (Ed.), *Osservatorio sulle fonti 2007. La qualità della regolazione*, Torino, Giappichelli, 2007, p. 221 *et seq.*

61 *See* Albanesi, 2015 (2), p. 19 *et seq.*

62 *See Presidenza del Consiglio dei Ministri, Circolare 20 aprile 2001, n. 1.1.26/10888/9.92, Regole e raccomandazioni per la formulazione tecnica dei testi legislativi, in G.U., Serie generale, 27 aprile 2001*, n. 97, p. 59.

Act would not be directly in compliance with the Constitution. In the second case, the *Corte costituzionale* could also make a declaration of unlawfulness as such an Act would not be in compliance with a *norma interposta* (see Section C), thus indirectly not in compliance with the Constitution.

In 1997 the bicameral committee for the amendment of the Constitution chaired by Massimo D'Alema proposed in its bill[63] the following sections:

> *La legge regola le procedure con cui il Governo propone alle Camere la codificazione delle leggi vigenti nei diversi settori*[64]

and

> *I regolamenti delle Camere prevedono l'improcedibilità dei disegni di legge che intervengono nelle materie già codificate senza provvedere, in modo espresso, alla modifica o integrazione dei relativi testi.*[65]

Such rules, as placed in the Constitution, would have been strictly binding and would have allowed the *Corte costituzionale* to declare void those Acts of Parliament which would have not explicitly amended the codes. However, that bill was not passed by the parliament.[66]

In 2016 the constitutional reform passed by the parliament[67] (but rejected by the people through a constitutional referendum on 4 December 2016) did not lay down any similar rule. However, it is interesting to note that during the parliamentary debate at the *Senato*, *sen*. Pagliari introduced the following amendment to the constitutional bill:

> *La funzione legislativa ordinaria deve essere esercitata tramite l'adozione di testi unici o di codici per singole materie o funzioni o per materie e funzioni omogenee. Le successive leggi o disposizioni di modifica o di integrazione della legislazione vigente devono consistere in novelle ai testi unici o ai codici nel rispetto del principio dell'unicità della fonte di cognizione.*[68]

63 *See* XIII leg., A.C. 3931-A/A.S. 2583-A, 4 November 1997.

64 Translation: "An Act of Parliament lays down the proceedings through which the Government proposes to the Parliament the codification of existing legislation in different areas of law."

65 Translation: "The standing orders of the two Chambers lay down that the bills, which regulate matters which have been already codified without explicitly amending existing legislation, are not acceptable."

66 On this proposal of constitutional provisions, *see* M. Ainis, 'La codificazione del diritto oggettivo: problemi e prospettive, R. Dickmann, Codificazione e processo legislativo, and F. Sorrentino, Relazione di sintesi', *in* P. Costanzo (Ed.), *Codificazione del diritto e ordinamento costituzionale*, Napoli, Jovene, 1999, p. 27 *et seq*., p. 53 *et seq*. and p. 249 *et seq*.

67 For a description of the contents of this reform *see* Albanesi, 2016, pp. 292-294.

68 *See XVII leg., A.S. 1429, Proposta di modifica in Commissione n. 8.103*. Translation: "Primary legislation shall be enacted by carrying out codification in different areas of law. Following Acts or provisions which amend existing legislation shall explicitly amend existing codes." Similar to this, *see XVII leg., A.S. 1429, Proposte di modifica in Commissione n. 26.70, n. 8.1000/70, n. 26.1000/107* and *XVII leg. A.S. 1429, Proposta di modifica in Assemblea n. 30.149*.

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003

Those amendments were not passed by the *Senato*.[69] However, the government accepted an *ordine del giorno* (a kind of resolution), introduced by *sen*. Pagliari, which states that:

> *Il Senato della Repubblica, considerata irrinunciabile l'esigenza di disciplinare l'esercizio della attività legislativa per garantire chiarezza, omogeneità e conoscibilità della legislazione, impegna il Governo ad assicurare le opportune iniziative legislative affinché l'attività legislativa debba attenersi ai seguenti criteri: novella alle norme vigenti sempre riferite ai testi unici o ai codici.*[70]

However, the government and the parliament have been focusing on the constitutional reform for the last two years and the policy of codification does not seem to be a priority among the policies to be carried out in Italy during this period.

H Conclusions

In the era of decodification the intended use of codes is no longer as it was during the Enlightenment: a tool to get rid of the existing legislation and the values of the *Ancien Régime*. Moreover, the purpose of a code is no longer to produce a set piece of legislation designed formally to lay down in one place all the provisions relating to, e.g., civil and commercial law.

However, codification is a goal that should still be strongly pursued in our societies as it is a tool for better regulation, through which the legislator could carry out not only a formal simplification and systematization of existing legislation but also a change in its substance.

Carrying out codification in civil law jurisdictions is obviously easier than in common law jurisdictions as we do not have to manage with common law and binding precedents within the area to be codified.

However, in Italy there are two problems regarding the tools to carry out codification. First, due to the chaotic law-making process and the misuse of the tools to enact legislation, the principles and criteria established by the parliament when delegating the government to issue a code are often not clear and this leads

69 The 2016 constitutional reform set out another important rule concerning explicit amendments, although not necessarily referred to codes. With the reform, the *Camera dei deputati* would have had the general power of definitively approving the bills, which means that it would have been able to reject definitively the amendments passed by the *Senato* (Section 70, subsections 2 and 3, Const.). However, the general power of the *Camera dei deputati* of definitively approving the bills would have been some exceptions. For such bills as constitutional or electoral ones, legislative powers would have been exercised collectively by the *Camera dei deputati* and the *Senato*, as happens nowadays (Section 70, subsection 1, Const.). The Acts passed with this proceeding could have been repealed or modified only explicitly and by Acts passed with the same proceeding.

70 *See XVII leg., A.S. 1429, Ordine del giorno G30.149*. Translation: "The Senato della Repubblica, considering the importance of ruling the enactment of primary legislation with the aim of promoting its clarity, homogeneity and knowledge, requires the Government to take all the initiatives to assure that the amendment of existing legislation shall be carried out by amending explicitly codes."

to confusion about what the government is allowed and not allowed to do: whether it can carry out a formal simplification and systematization of the law (*consolidamento*) or a reform of the law, as an instrument of a political will to change the law on a large scale (*riassetto*). The *Corte costituzionale* is tasked with overseeing when the government exceeds the boundaries set out by the parliament. However, such confusion should be avoided.

Second, codes are traditionally drafted by the legal officers of the *Ufficio legislativo* of each department, who are experts in that specific area of law. We have neither law reform agencies nor experts in legislative drafting who work exclusively on it (like that of the Office of the Parliamentary Counsel in the UK) to carry out codification.

As far as our law-making process is concerned, it should be borne in mind that the constitutional reform passed by the Italian parliament in 2016 tried to improve it, by superseding equal bicameralism.[71] However, such reform was rejected by the people through a constitutional referendum in December 2016.

So far as drafting codes is concerned, it would be wise to learn something from the experience of those countries which have established law reform agencies tasked with reforming and codifying their existing legislation.

71 For a description of the contents of this reform, *see* Albanesi, 2016, pp. 292-294.

European Journal of Law Reform 2017 (19) 4
doi: 10.5553/EJLR/138723702017019004003