

The Principle of Legitimacy in Italian Judicial System, the Possible Inspiration for Albania

Ph.D. Irvin Faniko

Lector at University "Hëna e Plotë Bedër"

Doi:10.5901/ajis.2015.v4n3p241

Abstract

About the principle of legitimacy can be discussed in two distinct perspectives: firstly, as an obligation of private subjects to respect the law and secondly, as a limit in exercising the public sovereignty. The point in which the two perspectives are different is the form of system that in liberal places the law is for the privates the external limit of their activated autonomy, which can be easily explained according to this idea: "Everything which is not prohibited is right" (article 5 of Universal Declaration of Human Rights and Citizens, 1789), in the other hand, for the public authorities the law represents the title and the base for exercising their sovereignty. Legitimacy, according to the first group, is the guaranty of the liberty against the public and private interferences in their known independency field, and for the second, it is a fact, a condition of their activities. The absent of the law forces the sovereignty of the aliens and decreases the power of public authorities by preventing them to enter into the citizens sphere. The principle of the legitimacy is directly interested in the relation authority-liberty, which characterizes historically the different forms of States, by enumerating the origin of the absolute state, established by the volition of the monarch, and the liberal state, established over the power of law and its subjectivism over public and private power.

1. The Reserves Protected by the Principle of Legitimacy

If we refer to legal reserves is obviously understood that the principle of the legitimacy is established as a prevention of the public authority and which is expressed by the normative prediction of basement and effect of their acts, which as we can administer can be *ex ante* by knowing their liberty limits together with the rights and obligations of being official.¹

In fact, the precursory norm determinates the conditions under which the public interest prevails or can prevail over the private and ensures the instruments of reaction against its infringement.

The guaranteed value of the principle is very simply explained whether it is considered the historical ideology matrix. It reconnects the affirmation of two basements of modern constitutionalism, which was born and developed in western world between the XVIII and XIX centuries. The identification of state with the community of citizens and the credibility of government's sovereignty over more than two organs in the same time in contradiction with the ideology of the absolute state, which identified the state at the sovereign and saw at the last one, the source of its power.

In the first one, it is reconnected the idea of equality and national sovereignty, and at the second, the importance of the exercise of the public sovereignty which must be exercised under the judicial rules conducted by the volition of the sovereign people and represented by the elected officials.

If in the absolute state every power came from the authority of the sovereign, and the last one from the God, in the liberal state established with the French revolution, the sovereignty was born in respect of law.

The law as an express of the volition and will of nation and as a limit for the executive power will be seen as the guarantor of the liberty and the equality of the citizens, and in the same time, as a check-balance system between powers.

So, there is the existence to create judicial instruments to guarantee the observation of legislative organs, not only compared with the privates, but also compared with the public administration.

2. The Legitimacy and National Sovereignty

In a democratic place, inspired by the principle of the national sovereignty in which the law is premeditated by the representatives of the people, the lawfulness tends to adapt with the legitimacy because it must be called 'legal' in the

¹ Sorrentino Federico, *Lezioni sul principio di legalità*, II^a ed., (Torino: Giappichelli G. Editore, 2007), 43.

virtue of democratic heritage.²

In a constitutional state, the same law holds in the same time the volition of the people where can be found the constitutional values (democracy, liberty, solidarity, etc) of its basement, but also the limits of the lawfulness and legitimacy which tends to be one, but also to fill the values where the law isn't 'legal' at that moment.³

At the lawfulness and legitimacy is adopted the lawfulness and legitimacy of the European Union in a equilibrium which isn't too far from its constancy, but that always gives the assertion of the primary moment of the community over the internal one.⁴

In the lawfulness of the European Union is distinguished the problem of the adaption of internal rules with those international for protecting the fundamental rights of humans, by having in mind that according to article 17 of modified Italian constitution, the respect of international obligations is a condition of state legislation.⁵

As we discussed before the profile of the lawfulness which we are going to encounter in the first part and then in the studying of the jurisprudence will send in four big arguments: the lawfulness in a narrow meaning by directing in administrative concept and a comparison of crimes and sentences (the studying of these concept belongs to penal studying persons), constitutional lawfulness, lawfulness of European Union and finally the principle of lawfulness compared divided by state's sector.⁶

3. The Establishment of the Principle of Legitimacy

The principle of legitimacy can be explained by the governmental rules, representatives of cities and communes, to whom the king ordered to put and collect the important taxes for military operations: "*No taxation without representation*", by underlying that taxes can be put also only by a commando represented by an organ, independent from the huge desire of the sovereign (article 12 of *Magna Charta Libertatum* of Giovanni *Senzaterra*, 1215).

The stability in the political system and the affirm of the liberal principle of the legislative limitation of the sovereignty must be believed to constitutional mechanisms which are inspired by the theory of distinct and equal powers, studied by *Locke* (*Two Treaties on Government*, 1960) and *Montesquieu* (*De l'esprit des lois*, 1748).

However, the separation of powers was used by the constitutional doctrine of Eighth and Nine-hundredth for the studying of public functions and acts in exercising the public power, by giving life to a complex elaboration of the good work of the German language based on the name of Essential Theory. For this theory in which we still reflect, at every function must correspond a typical form which determines the acts which are in exercise: the law for legislative function, the decree for executive and the decision for judiciary power. With this concept law-material is represented by formal law, the rule as a material law where can be underlined that in some hypothesizes is found a deviation from the ordinary order of competences because of the bad adjustment of the functions exercised by the form of the acts and its incorporation.

4. The Italian Constitution and the Application of the Legitimacy Principle

The question is how and in what limits is the principle of the legitimacy assimilated from the Italian Constitution, which has been a long discussion in the doctrine of Constitutional Court.

The Constitution in fact doesn't specify this principle even why many provisions predict clearly, for example: article 113 (which states jurisdictional tutelage in front of public administration acts), article 97 (reserve of law in administrative organization), article 101 (placement of judge to law not to administrative acts, which doesn't find at above mentioned law their foundations), article 23 (predicted as warranty of private freedom through which a relative law reserve, comparing with acts that force obligations or prohibitions to privates) and for all because has been for a long time on discussion its formal character (in the sense of adequacy to a essential legislative power) simple or essential (in the sense of legislative domination limits and criterions for the exercise of those powers) the principle itself.⁷

² Kelsen Hans, *Teoria generale del diritto e dello stato*, IV^a ed., (Milano: Etas, 2000), 29.

³ Picardi Nicola, (a cur.) Martino Roberto., *La giurisdizione nell'esperienza giurisprudenziale contemporanea*, (Milano: Giuffrè Editore, 2008), 252-253.

⁴ Sorrentino Federico, *Lezioni sul principio di legalità*, II^a ed., (Torino: Giappichelli G. Editore, 2007), 43.

⁵ Tesaurò Giuseppe, *Diritto comunitario*, IV^a ed., (Padova: Cedam, 2005) 343-352.

⁶ Cervati Angelo Antonio, *Studi sulla riforma costituzionale; itinerari e temi per l'innovazione costituzionale in Italia*, (Torino, Giappichelli G. Editore, 2001), 25.

⁷ Picardi Nicola, *La giurisdizione all'alba del terzo millennio*, (Milano: Giuffrè Editore, 2007), 343.

In this perspective article 97 of Italian Constitution, not only expresses a reserve of law on public offices organization, but prescribes that the law provides the progress and without bias of public administration, also implicates so it can tell these proceedings through and thanks these objectives that must pursue.⁸ The principle of fair proceeding that initially Constitutional Court (decision number 13/1962 and 23/1978) used to qualify as general principles in order, non-vulnerable from state legislation obtained then thanks article 97 with constitutional dimension (decision number 225/1999 and 104/2007, the last on about the fair proceeding between politics and administrate), this brings the importance that administration elections to be a result of a proceeding *iter* from which arise (even from their jurisdictional control point of view) investigations and estimates developed for the best care to public interest. Flow from some implications that we can list as below:

First is the one that flows from the principle of lawfulness on formal sense: the importance of the legislative foundation powers used from administrative authority, or from another perspective, that administrative measures to be the exercise of the power emanated by law.

Second one has to do with proceeding of administrative activity.

Third one stays at the importance of the measures, directly or through call that proceeding act does for example thoughts given from advisory bodies to decision maker authority, when results election motivation made in reference with different elements obtained in way to allow so it can display exercised power; so to bring us to given norm's act; as to rebuilt discretionary estimates made in report with indicators come from legislative norms.

At the end, the main consequence of the lawfulness principle as is understood on jurisdictional tutelage that must allow judges to compare prior act of legislative standard even referring coefficient that comes from measure's motivation, of all elements on base of which discretionary power has been exercised.⁹

As we mentioned above, law number 241/1990 of Italian legislator already modified and integrated from law number 15/2005 and from decree-law number 35/2005 converted on law 80/2005 applies on legislative level constitutional forewords at lawfulness and proceeding topic, in a special way it predicts obligation and motivation for every administrative measure except or controversial for normative acts and for them that have a general content, importance that has the beginning of the proceeding, which should communicate all involved subjects, possibility to interfere on proceeding subjects that are interested for determining the time frame for ending of proceeding. This law has produced the effect to be transparent or better knows all the phases of administrative proceeding, allows administration even through interested participation a better known of reality which it called to work and to extend the jurisdictional tutelage done.

5. Conclusions

European integration process, in what affirmed a national lawfulness that comes close and sometimes overlaps the state ones, represents a central chapter and at the same time of constitutional law of interested states, for studying which is necessary returning institutional manuals. It is a process even *in fieri* where any kind of conclusion that might happen and it cannot take temporary character.

European integration, really, brings for the states that participates a strong reduction for their sovereign power, together with creation on top of public institutions with normative power, administrative and jurisdictional, where their use procedure effects against public and private subjects that are apart inside order. The last ones so is the most visible feature of phenomenon being equipped with legal subjectivity on both subjects are the rates meant and at the sometimes holders of subjective rights that arise from one and another system rates.

In the current historical moment, where for a step is realized one important extension from the born of European Community and for the next step are developing attempts for a constitutionality of European order, presented on a situation where states always see more improved their sovereignty, at traditional conditioning of legislative functions, administrative and jurisdictional, that flows from creative treaties to which is since 1993 creation of common market that even as consequence of agreement Schengen, at which many of member states have acceded, has brought a consequence for states a deep loss over the control of the territory and with Maastricht treaty European community, that has predicted and Economic Union, the loss on the favor of the Central European Bank to financial traditional sovereignty (specially: handlings over the interests and liquidity control).

⁸ Cervati Angelo Antonio, *Per uno studio comparativo del diritto costituzionale*, (Torino: Giappichelli G. Editore. 2009), 38.

⁹ Sorrentino Federico., *diretto da Santaniello Giuseppe, Trattato di diritto amministrativo*, XXXV^a ed., (Padova, Cedam, 2007), 225-229.

Conclusion that can be obtained from the fast considerations is that a lawfulness principle conquers on modern constitutionality claimed on all directions and the branches of the legal order still fights to be established on its implication. It is not as all values and warranties where liberal-democratic orders inspire, but a war result for the right that one day and at each level must be followed. On emergency challenge at which the world is, to collect as against inside terrorism also its international belongs to this war at which security and integration of liberal constitutionality values should not prejudice the essential reserves of internal and international lawfulness.

Attempted attack of 9th September 2001 has lighten many inconsistencies on western world, creating a strong tension between security and lawfulness and sometimes forgetting that meaning of that as the other guaranties, is on the universal value, because it protects directly, the rights that everyone despite on the leads it is destined to improve. On this aspect, the lawfulness and security shouldn't be against, but to work together being not confirmed at any kind of lawfulness on an order that doesn't offer security even not being desired in a situation where the entrusting security to be the self-judge or illegal acts.

References

- Cervati Angelo Antonio, 2001, Studi sulla riforma costituzionale; itinerari e temi per l'innovazione costituzionale in Italia, Torino, Giappichelli G. Editore.
- Cervati Angelo Antonio, 2009, Per uno studio comparativo del diritto costituzionale, Torino, Giappichelli G. Editore.
- Kelsen Hans, 2000, Teoria generale del diritto e dello stato, IV^a ed., Milano, Etas.
- Lepri Laura (a cur.) 2002, Albania questa sconosciuta, Roma, Editori Riuniti.
- Picardi Nicola, 2007, La giurisdizione all'alba del terzo millennio, Milano, Giuffrè Editore.
- Picardi Nicola, (a cur.) Martino Roberto., 2008, La giurisdizione nell'esperienza giurisprudenziale contemporanea, Milano, Giuffrè Editore.
- Sorrentino Federico., diretto da Santaniello Giuseppe, 2007, Trattato di diritto amministrativo, XXXV^a ed., Padova, Cedam.
- Sorrentino Federico, 2007, Lezioni sul principio di legalità, II^a ed., Torino, Giappichelli G. Editore.
- Tesaurò Giuseppe, 2005, Diritto comunitario, IV^a ed., Padova, Cedam.