RULE OF LAW IN THE ITALIAN LEGAL ENVIRONMENT: A PRINCIPLE STILL IN FORCE?

Raffaele Caroccia

University of Naples "Federico II",
Department of Political Science,
Via Leopoldo Rodinò, 22, 80138 Naples, Italy
raffale.caroccia@libero.it

Abstract

This paper deals with the meaning of the Rule of Law in the Italian legal system and tries to identify two possible recent legislative interpretations. In particular, there will be a brief description of the differences between the Rule of Law and the principle of legality, followed by a summary about the binding role of precedents and the soft law, as introduced in the legal systems in recent years. These can be identified as two attempts to embody the Rule of Law in the Italian legal environment.

Keywords: *Rule of Law, legality principle, stare decisis, guidelines*

1. CENTRAL RESEARCH QUESTION

The aim of this paper is to identify and to assess the current role of the Rule of Law principle in the Italian legal system and its content.
In order to reach this goal, the methodology that will be followed here is an analysis of the main legal sources, from a historical perspective, too. A brief reference to the major scientific views on the given problem will be also made, as it is necessary for a proper and precise mise au point of the research question.
The paper will be structured as follows: in the first stage we are going to outline possible interpretations of the Rule of Law concept in the Italian legal environment; then we are going to analyse two contemporary legislative examples of its enforcement, i.e. the recently acknowledged role of the rulings (decision-making practice) of superior judges in the Italian legal system, and the concept of soft law, in particular the so-called guidelines of independent authorities.

2. TRADITIONAL STATUS OF THE RULE OF LAW IN THE ITALIAN LEGAL ENVIRONMENT

Traditionally, in the Italian legal system the Rule of Law has been identified among public law scholars as a principle of a more political and philosophical rather than a juridical value and as a concept not belonging to the national tradition. [Bin 2018] [Ancora 2018] [Sandulli 2018]

Despite the fact that Gaetano Filangieri was one of the first authors suggesting the importance of the Rule of Law principle during the Enlightenment in his "Science of Legislation", the concept of the Rule of Law has had quite a different and narrower understanding in legislative terms comparing to other countreis and it caused widespread unease among scholars.

As a matter of fact, we can point out that the Rule of Law has been identified mainly as a general legal protection of citizens from actions and orders made by public authorities, rather than a way of organising public bodies themselves or framing the relationship between citizens and government on a stable and fair basis. To fulfil this goal, laws adopted by the parliament became of the centre of the government's interest.

As a result, in the Italian juridical discourse, the main element has always been the legality principle, which is more similar to the German concept of Rechtsstaat, rather than the Rule of Law.

The incomprehensive and partial interpretation of the Rule of law concept in the Italian legal system can been identified as follows: Parliament is entitled to the rule-making power, as it is the representative of the will of the people; law itself is a warrant for citizens, as long as it is clear, general, abstract and self-sufficient; if the citizens think they have suffered any harm caused by a public body, their protection is assured by the judicial power, which simply applies legal commands of the parliament.

The view is in line with a rigid version of the principle of separation of powers, with a central role of law in the legal system, which is typical for the post-revolutionary French juridical tradition, and with considering judges simple os legis or bouche de la loi. Therefore, judges have to apply law, not broaden or even interpret it.

This scenario – typical of civil law systems - was thought to be enough to assure citizens' protection since legal certainty was the result of such a setting.

The importance of the state is strongly accented here; the State is the source and the warden of rights at the same time. According to this view, it is sufficient that parliament confers power to a public body to verify whether the principle of legality is respected. Only in certain cases (mainly concerning property protection), it is necessary for law to describe, how a public body can use its power. Therefore, legality has a formal nature, and its substantive version is limited to few areas of law. This ideological construction was mainly aimed at protecting the bourgeoisie, who used it as well as the principle of legality in order to limit actions of state. This approach was successful from the nineteenth century until after the Second World War.

This concept, which is maybe the best illustration of the Rule of Law in the Italian legal order, was reflecting the state of the legal environment in the country, following by preferable private interest protection as its indirect consequences.

According to this, the Rule of Law in the Italian legal system has its original distinctive features in an objective understanding.

We must say that, apart from the historical evolution of the legal system, legal certainty has always kept its constant primary role. It is to be noted that this concept is so deeply rooted in the legal environment, that there had not been any legislative provision of it until 1990, when for the first time, it was established by the General Administrative Procedure Act that public bodies must follow the goals which they are given by law [General Administrative Procedure Act: A1] .

Before this, the Italian Constitution has stressed only the judicial protection of citizens in a variety of provisions [Constitution of the Italian Republic: A24, A103, A113]. It can be noted, that for the first time the right to oppose an administrative act is identified as a fundamental right. Mentioned Constitution's articles were focused on civil and administrative law. Although there is difference in criminal law concerned. In this limited field, the Constitution expressly stipulates that nobody can be punished without a previous law identifying the behaviour as a crime. However, this provision is in line with the Roman tradition, according to which nullum crimen, nulla poena sine lege, rather than with the Rule of Law principle itself. Instead, the provision of Art. 111 on compulsory motivation of sentencing judgments is something more similar to the concept of the Rule of Law.

Anyway, generally the source of the principle of legality in the Constitution is identified in Art. 101, which declares that judges are subject to law only. This provision, rather than being a guarantee of independence of judicial power established for citizens, has been seen as a limit to judges themselves and it resulted in commanding them to enforce law as enacted by parliament.

In this way, we can conclude that even the Italian constitutional legal environment has at its centre the original and limited version of the legality principle.

The evolution towards a different meaning has been first made possible by other norms of the fundamental law. These dealt with general freedoms that are ensured to individual and to collective entities either from state intervention (negative freedoms) or from actions of public bodies (positive freedoms, typical for a welfare state). Human rights and freedoms were not defined by the Art. 2 of the Constitution, however this provision with its general clause has enabled judges to overcome the rigid limits given by the legislator and to enforce human and social rights, even before they were recognized by the parliament. Anyhow, starting from the 1970s and together with building a welfare state, the fundamental value of the Constitution, as far as human rights are concerned, turned out to be a powerful tool given to judges to detect, in the social environment and in its evolution, new rights that could be promoted according to values gradually emerging in the society, in order to ensure substantial equality. An example of this evolution is the protection of privacy. It has been said that in this way, the normative cycle started to move from legislative acts to social realities; this has been identified as the first attempt to narrow the distance between the principle of legality and the Rule of Law, which is deeply rooted in society.

But the real engine that made the Italian legal system more inclined to the Rule of Law was the principle of effectiveness advocated by international courts (mainly by EU judges and by the European Court for Human Rights). This resulted in shaping subjective rights attributed to every member of the legal system and identifiable in a predictable behaviour of public bodies. In fact, both the EU legislation and the Human Rights Convention have at their core the protection of the individual, which has to be guaranteed and exercised by State authorities. So the new version of the principle of legality can be identified as a right to certainty: each individual must be assured of the content and the quality of his legal rights which cannot be modified by public

bodies without a priori defining their power, which has to be used in a proportional way and in at a given time. After the definite time lapses, the individual has a vested right which cannot be overthrown by public bodies. This is a interpretation of the French droit de sureté juridique and its implementation in the Italian legal system is very recent (2015).

The integration of the Italian legal environment into supranational legal systems put first instance courts' judges again to the position of the first applicant of the supranational legal acts: so there has been some critical views of this change according to which the Italian legal system is moving from Rechtsstaat to Richterstaat. This shift has been also identified as a consequence of both the crisis of political representation and the evolution of legal reasoning from syllogism towards more refined hermeneutical procedures.

Moreover, in the Italian legal system, the concept of the Rule of Law has been fostered by globalization. Given the fact that the source of legitimacy no more relies on the parliament only, and economic matters are not solved at a national level anymore, the state – which was, as we have already seen, the central element of the Rule of Law as interpreted in the Italian legal tradition – has weaker powers to regulate society and cannot provide stable guarantees any longer.

In fact, the state does not have the monopoly of laws adoption anymore, thus making the principle of legality old-fashioned. Therefore, a need of adopting legislation to prevent abuse of power by private bodies against other individuals should be adopted. This happens again by implementation practice in this area As a result, the source of juridical strength is no more found inside the legislative environment but in the self-regulation of market actors (so called lex mercatoria), in judicial rulings or in acts and practice of other bodies.

This framework is characterized by shortening the distances between common law and civil law legal systems, resulting in a kind of global law, which is a blend between the traditional two types of legal systems. Its core should be the Rule of Law, now interpreted as a source of promotion of economic and social growth and not only as a tool to protect individuals. This change has created further deviations from the Italian constitutional tradition, according to which the main value to promote should be personal dignity.

As a result of this transformation, the Rule of Law has been interpreted in the contemporary Italian legal discourse as one component of a cluster of ideas, which are the core of contemporary western political identity together with human rights, democracy and free market. This approach is in line with the opinion that the Rule of Law is mainly coherent with the promotion of free market, as it has been interpreted by the EU Courts, in whose legal reasoning there is small or no space for social rights which caused the first evolutionary factor in legal certainty mutation that made possible the rise of the welfare state. This is an additional cause for unease among Italian scholars.

3. THE NEW BINDING ROLE OF PRECEDENTS

Despite the worries of scholars, the Italian legislator has recently tried to embody some elements thought to be part of the Rule of Law into the legal environment. [Oggianu 2011] [Pesce, 2012] [Follieri, Barone 2015]

The first element, which can identified as a shift of the Italian legal system towards the Rule of Law, is the new role assumed by the rulings of superior courts, which

were made partly binding as an imitation of stare decisis rule. To fully understand the value of this novelty, we have to say, that in the Italian legal system judges are traditionally subject only to the laws and the rulings by other judges – no matter their importance or instance – have merely a rhetorical/persuasive meaning and are not legal sources. This means that such rulings can be used as a tool which can make legal reasoning more predictable, but they can never have a binding function.

As an attempt to make rulings more predictable, to promote uniformity and equal treatment and in order to reduce disparities and to make appeal to superior courts less attractive, starting from 2009, there has been a significant change in procedural legislation: plenary rulings of the Supreme Court became binding for chambers or chambre that are part of the Supreme Court. The divisions of the court cannot judge differently; if they think that the legal solution of the plenary ruling is not correct or persuasive, it can only submit the question again to the plenum trying to get an overruling decision with a different reasoning. This rule was first created for civil cases, then it expanded to both administrative and public revenue cases (it has to be noted that in this area of law, the rule is rigid, because the binding role affects even the judges of the first instance, who in all other cases, are free not to follow the stare decisis rule) and finally was extended to criminal law. This complex semi-binding mechanism was completely unknown to the Italian legal system and was thought to be an useful tool to raise legal certainty; it has to be noted that the tradition of the Supreme Court was to guarantee legal certainty in general not to particular individuals, which was again a common point of both the Italian legal system and the post-revolutionary French one. On the contrary, it resulted in further complications: on the one hand, the divisions tried to provoke a change in the solution by the plenum more frequently; on the other one, they are more comfortable to submit the case to EU judges, assuming that the plenary solution is not coherent with the EU legislation and hoping to alter the plenary ruling in this way with a binding judgment. Thus, the new system has fostered uncertainty. For instance, as far as administrative cases are concerned, in 2006 14 decisions were pronounced by the plenum of Supreme Court, in 2007 12, in 2008 13, in 2009 5, in 2010 3, in 2011 (the year in which the institute became fully operational) 24, in 2012 38, in 2013 29, in 2014 34 , in 2015 11, in 2016 24, in 2017 13. As a matter of fact, there was no promotion of predictability.

Apart from this factual delusion, there has been a widespread criticism, because the new role attributed to precedents is seen as a transplant of a foreign legal tradition.

4. THE GUIDELINES BY INDEPENDENT AUTHORITIES

The second element that caused a confusion between the principle of legality and the Rule of Law was the introduction of guidelines created by independent authorities at the market.

From this point of view, the Rule of Law is understood preferably as an advocacy to go over the traditional catalogue of legal sources in an effort to keep more in touch with fast changing decisions required by the global economy. In order to be compliant with them, law has to become flexible and easily changeable. This new interpretation of the principle of legality is focused on the enterprises as its main beneficiaries, which request an assured trust on stability of decisions taken both by public bodies and judges – legal certainty in its general and wide interpretation. As a result, legal regulation of economic phenomena should become simpler, thus resulting in

challenge of the traditional principal of legality, the core of which was parliament-made law.

Here, certainty is viewed as an objective to be guaranteed to citizens in a more coherent and sensitive way; a general and abstract law is not considered to be able to fulfil this goal anymore. Legal regulation in this new version of the principle of legality become possible by the pre-determination of choices of public bodies, whose actions should be driven by rulings, internal sources, such as operative practice and international standards. This change is more evident in economic activities, but it also effects rights of the individual (e.g. transparency). This evolution of the legal system should in fact be the answer to social changes, which cannot be followed by the legislator's initiative that retreats in favour of guidelines, the main representative of the so-called soft law.

This expression [Mostacci 2008] [Morettini 2011: 11] [Torchia 2016: 16] [Morbidelli, 2016: 16] [Ramajoli 2017: 147-167] [Deodato 2016] is referred to as a broad and not well-defined variety of acts that do not have a binding effect. They appeared for the first time in the 1990s in international law, consequently also in the national legal context in the last ten years.

Their birth is generally linked to a phenomenon of self-regulation and to the awareness that traditional legal sources are no longer able to regulate contemporary global transactions effectively (e. g. lex mercatoria). The subjects in a legal environment with loose regulations (e.g. international law system), consequently decide to create a framework in which they consensually lay down basic operational rules, and thus shaping a common and predictable operative framework. This process is voluntary and it relies on self-compliance. Generally, there are no tribunals to which disputes on such legal rules can be submitted.

In the national legal environment, on the other hand, soft law has became somewhat typical for independent authorities and its aim could be described as a moral suasion. As a consequence, from the theoretical point of view it should not enter hierarchy of the legal sources and should only clarify previous legal prescriptions, answer questions raised by subjects of law and enhance and promote best practices. Soft law has a role, which can be described as a compass, which is capable to orientate both enterprises and administrations to the same goal [Mital 2016: 96].

Soft law has a regulatory effect, at least as a "tertiary law". Due its character it is supposed to be adopted only after a notice and comment procedures among stakeholders, especially when its effectiveness refers to a plurality of cases. As a consequence, it is, in fact, a crypto-hard law if considered more closely [Ramajoli 2016: 16]. This feature is immediately visible in the national legal context – as the Italian one – where acts of public bodies have a traditionally binding effect; so the difference between soft law and the traditional legal sources is made less perspicuous.

In order to justify soft law in the administrative legal system, two proposals have been made.

The procedure of a public consultation before the adoption of a guideline is thought to be an effective tool to get some legitimacy to the regulatory act by bodies which do not rely on the will of the people. Furthermore, there must always be a judicial review of soft law, as a consequence of the general protection against all acts of public administration.

There is no doubt that guidelines have regulatory content, no matter what kind of legal sources they resemble, and no matter being set by an authority, which does not

rely on a direct democratic legitimacy. Nevertheless, it can pose limitations and burdens on subjects of law.
In order to fix the flaws presented by these two features, it has been unanimously suggested that a deep judicial review can make this kind of source of law more compliant with the traditional configuration of a modern democracy.
The judicial review, in fact, can help overcome the missing link with general will and grant control, even if it is performed post factum only. It can also create a barrier from the phenomenon of soft regulation, whose unwilled result can be a supremacy of economy and technical power over political authorities. In this way, the right to file an action by subjects of law can give an equilibrium the whole system; in order to be true, it must be added, on the other hand, there is not a clear standard upon which guidelines can be reviewed by a judge.
The expansion of regulation based on guidelines in the Italian legal environment dates back to 2016, when the Anti-Corruption Authority was given a governance role on the regulation of public tender procedures.
We need to stress that the new sources did not prove to be a workable solution; in fact, in 2019, the legislator has acknowledged the failure of this new type of legal regulation and decided to return to the traditional ones with a new reform of public tender legislation. The regulative scenario, in fact, has been once again thought to be completed by an act adopted by the Government in order to substitute guidelines, which proved to be vague and quite instable. These two features were criticized by Courts and private subjects a withdrawal of such a regulation was suggested.

CONCLUSION

To sum up, the concept of the Rule of Law is quite unaccustomed to the Italian legal system; as noted above, both the binding role of precedents and the soft law have not proven to be proper instruments and at least one of these two novelties has soon declined.
So - to conclude - we can say that the Italian legal system is acquainted with the traditional and minimal meaning of the principle of legality, while the concept of the Rule of Law is far from being permanently embodied as a core principle both in legislation and in legal reasoning.

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