

## Contemporary Legal State Features

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### Abstract:

*With other words legal state computes with the state of right namely it means a kind of state, power, that is supported in the right. In the case of legal state, as a state of right, we will understand two main elements: The guarantee for respecting human's rights and freedom, and legal limit of state power.*

*If we elaborate the last element it results that "Every action of state power should be preliminary regulated with the right (with legal norms)". From this it results that all legal actions that are done by state should be regulated from the right, and also the rapport state – citizen. At legal state the conditions for human's rights and freedom should be concretized in strong legal basis, as well as the mechanisms for their protection. "Everything is allowed if it isn't prohibited with constitution and law". This category is relatively new in the legal doctrine. An essential element in the concept of legal state is separation and the limit of state power. No power is absolute. The power is limited with law, which sets the frame for its area.*

*Legal state is computed with independent judiciary, independent judiciary is an institution of a democratic and legal state that should provide citizen's protection from power's arbitrariness, efficient protection of human's rights and freedom, as well as the objective arbitration of courts, in choosing public and private contests. As a rule, human's rights and freedom are guaranteed and as such they are a main precondition to guarantee human's dignity, within a communion like state. Human's rights and freedoms regulate the relations between the citizen and the society as a whole.*

*Taken as a whole for the category or the legitimacy notion is a characteristic to emphasize that within it presents equality and legal security for the subjects of the right, for the physical person or the legal one.*

*Formal legitimacy of the acts stays in the compliance of norms according to the authorizations (competences), procedure and the materialization of legal act. Material legitimacy of acts stays between legal norms and material actions or their application means their legitimacy. The domestic content of legal order constitutes legal norms. The purpose of legal norms is their realization and their application, where people's behavior is regulated with relevant legal norms. With other words the purpose of legal norms is their realization in the overall society practice.*

*Illegality presents the non-compliance between lower legal acts of state administration bodies and justice authorities with higher legal acts. The incompatibility of lower legal acts with the higher ones brings contradictions in two directions: formal legal and material contradiction. But regarding to administrative penalties – sanctions we have: 1. By criteria: physical sanctions, material sanctions, moral sanctions 2. By purpose: retributive sanctions and restitutive sanctions. With sanctions against acts we have to do with the application of sanctions against acts, for example by appointing state employees or in marriage, by violating the relevant norm. These kinds of acts can be declared as inexistent if the relevant norms are not respected, because they can't produce legal effects. In this context, the marriage and the other act of state administration is cancelled, if they were created contrary to the principle of legitimacy, by violating the law.*

**Key words:** contemporary, legal state features

State's and right's consolidation is a commitment and product of state power, legal entity and citizens as physical entity. Our society is in the integration processes, in this context in the process of European Union, process which requires legal state's consolidation. Legal state's institution, respectively the state of right, is connected with the freedoms and human rights of the citizen that presents one of the most important legal institutions. Through this institution, the legal position and the

place of the citizen in society comes to expression and is determined.<sup>1</sup> The principle of legal state entails the liberal state and states in the XXI century. With the liberal state some affirmation was done:

- The principle of legal state's right, namely the need that all the subjects of state's organization, including sovereignty, have to come under laws. This doctrine required the existence of a warranty in a written document for this.<sup>2</sup>

With other words legal state computes with the state of right, so we understand a kind of state, power, which is supported by the right. In the legal state's case, as a state of right, we will implicate two main elements:

- a) The guarantee for respecting human's rights and freedom
- b) Legal restriction of state power.

If we explicate the last element it results that "every move of state power has to preliminary be regulated with the right (legal norms)". From this we can see that all legal moves that state makes, has to be regulated through the right, as well as the state-citizen rapport.<sup>3</sup> In the legal state the conditions for human's rights and freedoms, as well as the mechanisms for their protection have to be concretized in strong legal basis.

"Everything is allowed if it's not forbidden with constitution and law." This institution, this category is relatively new in the legal doctrine.

The main element of state's concept is the separation and restriction of state power. No power is absolute. It is restricted from law, which frames its scope. Legal state computes with independent judiciary, independent judiciary is

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<sup>1</sup> See: Kurtesh Salihu "E Drejta Kushtetuese", libri I, the University of Pristine, Law Faculty, Pristine, 1998.

<sup>2</sup> Entrance in the public right, lectures prepared by: Romeo Gurakuqi, Arenca Trashani, Shkodër – Tirana, 2009.

<sup>3</sup> See: Dr. sc. Osman Ismajli "Fillet e së Drejtës", University of Pristine, Law Faculty, Pristine, 2004.

an institution of the legal and democratic state, which has to provide citizen's protection from arbitrariness of power, effective protection of human's rights and freedoms, as well as objective arbitration of courts, in choosing the public and private disputes.<sup>4</sup> As a rule, citizen's rights and freedoms are guaranteed, and being so they are a main precondition to guarantee human dignity, within a communion like state.

Human's rights and freedoms regulate the relations between the citizen and the society. In contemporary conditions, the notion "human's rights and freedom" computes in the national level, as well as in the international one. Through the internationalization of human's rights and freedoms it is thought that these rights and freedoms are also categories that have international protection.<sup>5</sup> All actions of state power, regarding human's rights and freedoms should be based on laws, the positive right of that country, otherwise all the actions of that state will be seen as inexistent, unacceptable<sup>6</sup> for that society. According to this, the citizen is equal in rapport with the state and others, it is an equal subject and we have legal rapport between state and citizens.

But in this case we have dual responsibility of the individual – citizen and state. The implementation of human's rights and freedoms at last is just a legal characteristic because state will answer for not giving legal help, for not realizing human's rights and freedoms, respectively their protection.

In this way we have the rappings between the state and the individual – citizen and these should be realized and protected according to the dual responsibility.

From this it results that state can't impose anything because we have to do with citizen's equality in rapport with other subjects, respectively the power. With other words the

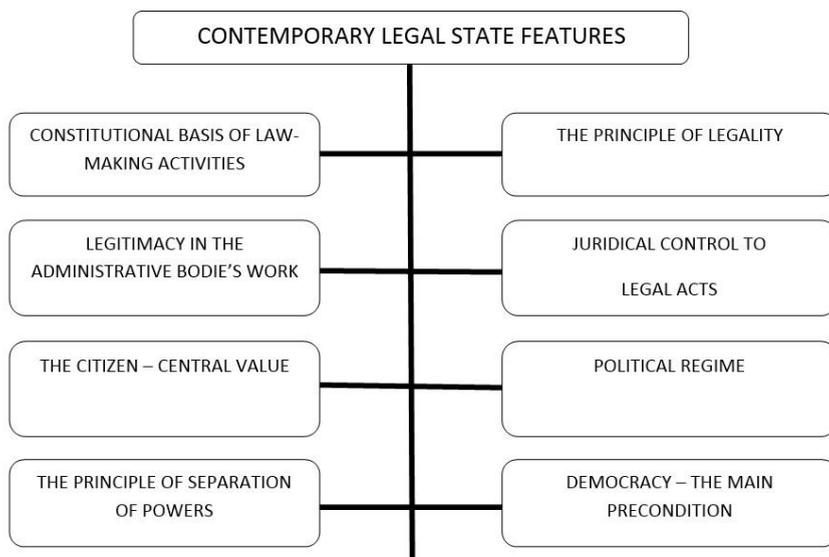
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<sup>4</sup> FAMA college, Arsim BAJRAMI – PARLAMENTARIZMI (Comparative aspects), Pristine, 2010.

<sup>5</sup> See: Stefan Buxhakoski "Fillet e së drejtës si discipline shkencore", Publishing house "Çabej", Tetove, 2007.

<sup>6</sup> See: Dr. sc. Osman Ismajli "Fillet e së Drejtës", the University of Pristine, Law Faculty, Pristine, 2004.

citizen is a free subject within the relevant legal norms, but has the right to ask from state the help regarding to the realization of his rights and freedoms. Depending on the contents of human's rights and freedoms, these can be grouped in two categories: 1) The politic right and freedom (the right to be participate in public functions), the active and passive right of choice and the right to be equal towards public functions, the right of adequate representation and the rights of communities in state bodies, the social right and freedom (the freedom of association, the right for family protection, the right of motherhood and childhood, health and social protection, favorable vital conditions etc. and 2) the economic, social and cultural rights, as is the right to property, the right for business activity, the right to work, the right to be educated, the right to participate in the cultural life, the right to use scientific and cultural progression, the right of literary, artistic creativity and other kinds of creativity etc. For the legal state, the principle of legality has a particular significance; otherwise we have to do with the opposite, categories which will be discussed below.



Legitimacy is an essential condition for the existence of legal order, for the existence of a legal state, meaning a democratic state, a state that acts according to legal norms. We have said that legal order consists from a lot of elements, from a lot of legal acts, acts that have to be listed according to the principle of hierarchy. Legal acts must be in accordance with the sources of law, in compatibility with certain acts and with general acts. This means that legitimacy is a legal category that in legal doctrines means the compatibility of all material legal acts (the subject's behavior) that are part of the law in the formal-legal meaning. The principle of legitimacy is based in the fact that all the lower elements, acts of legal order should be in compatibility with the relevant higher elements, acts. This means that the category of legitimacy entails aspects of compliance between lower legal acts with the higher ones as well as the harmonization of relevant acts with all other legal acts. Legitimacy also entails the guarantee of legal order, which is a legal hierarchic order that as warranty unites the entirety, meaning the part of legal order that present entirety. In the other hand the entirety represents the certain hierarchy.

The dependence of lower legal acts with the higher legal acts and the respect, the subject's behavior of the right means legitimacy. If we take a look on legal order in vertical or horizontal line, while constructing legal order in pyramid line we understand the dependence and the construction of legal order in the compliance rapport between lower elements, acts with higher legal acts.

If we rely on contemporary norms that regulate the extraction of legal acts, as are state bodies acts, a legal act is called the kind of act that is in accordance with the higher act. As an example for relevant state act's legitimacy we have when the legal act is released in administrative procedure with norms that are provided as necessary for the existence of the principle of the material truth.

Based on this, for an act to be legal, preliminary the act should prove all the facts that are important to release the legal

act. The procedures that precede the extraction of the acts that are in accordance with material provisions, respectively by certifying the factual situation, respectively if the act of the authorized state bodies is released within the defined obligations and achieved results, we can say that we have to do with the notion “legal category of legitimacy”.

The illegal act presents the violation of the legal order and violates the general interest. The illegal acts aren't tolerated in a country with legal order. When the principle of legitimacy is violated, we have to do with illegality.

The principle of legitimacy is expressed in the work of the bodies that release certain administrative and court acts, in the work of the bodies with public authorizations. The principle of legitimacy means that any state body can't take an individual decision that won't be in accordance with a general provision previously announced.<sup>7</sup>

As an example of the hierarchy of legal acts, we take: Person A has signed a contract with Person B, where Person A has to pay Person B 1000 Euros. The obligation of Person A to pay the debt to Person B is predicted with contract, with lower act. But the contract is based in a higher legal act, as is the law and the law is based in constitution. So, Person A's behavior according to the contract with Person B and the completion of this contract that is based in law and the law in constitution, that is the highest legal act, shows that we have to do with the hierarchy of acts that within seem to touch the principle of legitimacy. Therefore we have formal legitimacy and material legitimacy.

- Formal legitimacy, according to the category, procedure of the issuance of the act, acts are predicted to be extracted in a short form, so the act would be illegal if it would be extracted verbally.

Formal legitimacy of act remains in compliance of norms according to the authorizations (competences), procedure and

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<sup>7</sup> Entrance in the public right, lectures prepared by: Romeo Gurakuqi, Arenca Trashani Shkoder – Tirana 2009.

materialization of the legal act and vice versa.<sup>8</sup> If the conclusion of a contract for the transaction of estate items is predicted to be prohibited, then the principle of legitimacy is violated.

Taken as a whole for the category or the notion of legitimacy it is a characteristic to mention that within it presents equality and legal security for the subjects of the right, no matter if it is a physical or legal person. Taken as a whole the authorized state bodies, that use public authorizations, must be subjected to this principle, the principle of legitimacy. Generally it is accepted that the state of the right in the formal meaning includes the commandments for recognition and respect of certain forms and procedures about the construction and activity of state bodies.<sup>9</sup> Legitimacy as a main principle, exclusively for a state body is mainly provided in the state's constitution. The legitimacy principle has exceptional significance especially for state's administration bodies.

- **Material legitimacy.** In the material meaning, legitimacy is understood as the requirements to guarantee the content of certain laws, among which the acts about basic rights and freedoms have a special place.<sup>10</sup> In this context, the material legitimacy has to do with the relations between legal norms and material actions or their application. The purpose of legal norms is their realization and their application, where people's behavior is regulated with the relevant legal norms. With other words the goal of legal norms is their realization in general social practice.

Legal order consists of legal norms, and the subject's behavior according to these norms presents the factual element.

The creation of legal norms and their realization in practice presents the legal order.<sup>11</sup> And, legal order is nothing but a form of society order. The factual element is embedded with

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<sup>8</sup> Dr. M. Dimitrijević, "Uvod u pravo", Belgrade, 1986, cited book, pg. 220.

<sup>9</sup> Zagonjari XH. "Demokracia dhe shteti i së Drejtës", Publishing house "Luarasi", Tirana, 2002.

<sup>10</sup> See *ibid.*

subject's behavior according to relevant norms. The normative element consists of legal norms, from psychic actions, which foster the creation of legal norms.<sup>12</sup> Meanwhile the factual element of legal order consists of material actions. The relation between psychic actions and material actions in the right creates the respect of the principle of legitimacy. As a rule the principle of legitimacy always submits the request and finds the application. The application of the principle of legitimacy in the field of state administration appears specifically, not only in the fact that the entire legal and illegal activity of the administration is done in accordance with its requests, but also in the responsibility that they have in front of law. In this context legitimacy represents the systematization and the union of legal norms in a single entirety that can be identified with legal order. For the content, the legitimacy's principle is a legal-political principle. Formally it means the compliance of material acts with all legal acts that has to do with them, respectively the compliance with all lower legal acts with law. At the same time, legitimacy means basic guaranteeing of human's rights and freedom, the submission of all individual acts, law norms, the support in law of every procedure in front of the administration's bodies and the court ones when decisions are made, regarding to citizen's rights.<sup>13</sup> As a rule the legitimacy's case is mostly seen at state power's bodies and in particular in judicial and administrative power, because these mechanisms, in one way or another, are competent for the issuance of individual acts for citizens, where the activity of these state mechanisms is limited only by law. By respecting law we provide legitimacy, equality and legal security for citizens. As a result, one of the principles with which legitimacy is provided, is the limit of administration bodies and judicial bodies with general rules. Democracy may work only if

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<sup>11</sup> See: Prof. Ass. Dr. Fejzulla Berisha "Hyrje në të drejtën", Pristine, 2011.

<sup>12</sup> See: Dr. sc. Osman Ismajli "Fillet e së Drejtës", the University of Pristine, Law Faculty, Pristine, 2004.

<sup>13</sup> Dr. R. LLUKIQ "Teoria drzhave i prava", book I, Blegrade, 1995.

legitimacy is provided and respected, and there is legitimacy in those countries where democracy principles work.<sup>14</sup> One of the main principles of legal state are: the principle of constitution and legitimacy, equality in front of law and the principle of non-discrimination, citizen's rights and freedoms, the separation and limitation of powers, the depolitization of state's public services, the independent judiciary, civil society, etc.<sup>15</sup> With this we understand that state's administrative bodies respectively the justice authorities by implementing the positive right as a right that is a force itself by implicating that we have to do with the notion of legitimacy. As a rule, legitimacy is a main condition for the existence of a legal state, respectively a democratic state that acts according to the laws and other legal acts, where their respect is required. Said otherwise, according to formal and material legitimacy all powers which are authorized to issuance acts should be limited and go through a control.<sup>16</sup> Taken as a whole, legal acts that are released from these bodies should be in accordance with higher legal acts in the formal meaning, as well as in the material one.

### **1.1 Illegality**

Illegality presents the mismatch between lower legal acts of state administration bodies and justice authorities with higher legal acts. The mismatch of lower acts with higher legal acts brings contradictions in two directions: formal legal and material contradiction. Since concrete acts, as special acts, are revealed according to relevant norms, if these are revealed with contradictions between them we encounter in the illegality of the current act's issuance with the general legal act. Therefore, concrete acts, as state administration's acts and special acts of justice authorities, as are court acts, should be in hierarchy with the general legal acts, otherwise we have to do with

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<sup>14</sup> See: Jon Elster, Rune Slagstad, *Constitutionalism and Democracy*, Cambridge Universitets forlaget, 1998.

<sup>15</sup> Arsim BAJRAMI, *PARLAMENTARIZMI (Comparative aspects)*, Pristine, Fama College, 2010.

illegality. Every act of state administration, respectively justice authorities as are courts, should be in accordance with law, which means it should be exclusively supported in law and in other general acts that were issued for its application.

The illegal acts are classified in some groups by the legal theory and in most cases of illegality done by state administration authorities or justice authorities, respectively courts are:

- Incompetence;
- The violation of the rights in procedure;
- The violation of legal – material rights;
- The wrong authentication of factual situation and
- Illegality in the opportunity or the purpose of act.<sup>17</sup>

Regarding to incompetence, namely relevant state bodies or justice authorities during their activity can also show their incompetence or we may have to do with occupation of competence, namely the relevant bodies are introduced office-holder regarding to the competence of relevant act's issuance, while in fact we have to do with incompetence. With other words this act can't produce legal effect and should be declared as an inexistent legal act. The violation of the rights in procedure, respectively the violation of material – legal rights, we have in the concrete cases where its placed with act trial, had to apply the norm and was incorrectly applied, or there was a wrong interpretation of the relevant legal norm. illegality in opportunity entails the an official that with the case of the relevant act's issue, issues the act for other purposes and not for what it was dedicated to be issued, namely he issues the act for a whole different purpose, by misusing the official's authorization, by neglecting the competence of the relevant body. As a rule, all these actions that could be crowned with the relevant legal acts should be declared inexistent, invalid acts.

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<sup>16</sup> Schmitt C., *Constitutional Theory*, Duke University Press, London 2008.

<sup>17</sup> Luan Omari, "Parime dhe institucione të së drejtës publike", the tenth edition, "Elena Gjika", Tirana, 2007.

## **2. Sanctions against illegality**

When the illegality of an act is proved then measures are taken for that act to be removed from legal order, to be canceled and to avoid all the legal consequences, and also these acts should be denied so that they won't come across in the future. The sanctions are separated in restitutive and retributive.<sup>18</sup> a. restitutive sanctions aim to return the so called previous situation, situation that has been before the infliction of illegality. b. retributive sanctions are sanctions that aim penalties by causing a bad thing so that in the future there won't be such violations. In the case of illegal acts there are sanctions against acts imposed, that aim the return of the former situation or the cancellation of the legal act with consequences which he caused with legal order. And, if these kinds of acts are announced as null then all the consequences caused by them should be cancelled and we should consider they never existed. For example, the contract for transaction has been signed which has been cancelled as illegal. This means that the item should be returned in the condition that he's been before the contract was signed, that the things and the price will be returned, along with the item. Thus, if the illegal act stands in the non-payment of the debt, the sanctions stands in the opposite action, so the debt should be paid. If the illegal act stands in the burning of the house, the cutting of trees, the poisoning of animals, here the sanction stands in building the new house, planting new trees, buying other animals etc. Against infringers, that have conducted illegal acts, sanctions are used in order to not allow these illegal administrative violations in the future.

When the illegality is proved from the competent justice authorities, these acts as a rule are removed from legal order. With this, where there are opportunities the legal consequences

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<sup>18</sup> Luan Omari, "Parime dhe institucione të së drejtës publike", the tenth edition, "Elena Gjika", Tirana, 2007.

of these acts are also removed because they have violated legal order, respectively the positive right as a right that is in power. For the legal order to be stable in a certain society, as a rule the relevant society through its competent mechanisms provides the opportunity for these acts, that are illegal, that have produced negative legal effects, to be imposed with relevant sanctions.

Therefore legitimacy in every legal order about legal acts that are illegal provides relevant sanctions. As a rule the sanctions are predicted against the violators and acts that are considered as illegal. Regarding to the illegal acts, we mention the sanctions that should be implemented against illegal acts exclusively in respecting the principle of legitimacy.

## **2.1 Administrative sanctions**

In the legal literature of different countries and authors about the notion “delinquency” we have different opinions. According to Albanian legislation they say: “Delinquencies are violations of legal order placed with legal dispositions of state bodies, for which there are administrative penalties set since they have low society dangerousness.”<sup>19</sup>

The law for delinquency, administrative delinquency defines it as violation with the fault of legal dispositions issued by the competent state bodies, done with action or inaction and for this there is provided administrative punishment.<sup>20</sup> Criminal sanctions are more severe than administrative sanctions, but the difference exists in the fact that at criminal sanctions we have to do with the dangerousness of criminal act as a dangerous act for the society and the penalties are more severe. Meanwhile the delinquency sanctions are easier because we have to do with lower violation of law, and the dangerousness of the act is lower if compared with the criminal act. The rate of social riskiness between the criminal and delinquency act stays in the field of administrative

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<sup>19</sup> See: Official newspaper of RPSSH, Nr. 10 v. Tirana, 1953.

<sup>20</sup> See: Official journal Nr. 5, Tirana, 1993

responsibility, which is regulated with competent state body's norms. But regarding to administrative punishments – sanctions we have: 1. By criteria: physical sanctions, material sanctions, moral sanctions 2. By purpose: retributive sanctions and restitutive sanctions.

Looking through different author's opinions about the notion of delinquency – administrative violation, respectively administrative punishments, we think that the administrative delinquency can be defined as “a violation that is done with action or inaction of the approved dispositions from the competent state bodies, done with guilt and from irresponsible persons, for which administrative punishment has been set because of the low society riskiness”.<sup>21</sup>

Administrative delinquency distinguishes from criminal acts, because it presents low society riskiness, where it can be normalized not only with laws and decrees, but even with other state body's dispositions. The rating of administrative delinquency is also regulated with dispositions that are issued from local government bodies that have legal power only within the relevant territory, where it lies as relevant local body.

## **2.2 Sanctions against acts**

We have to do with the application of sanctions against acts, for example by signing state employees or in marriage, by violating the relevant norm. These acts can be declared as inexistent if the relevant norms are not respected, because they can't produce legal effect. In this context the marriage and the other act of state administration is cancelled, if it was created contrary to the principle of legitimacy. In this context we ask if the international right is right and if there are sanctions or not? In one side the international right, according to some authors is not a right because it doesn't contain international sanctions and they can hardly be implemented, it is not organized as the inner right, regarding to the application of sanctions. Meanwhile

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<sup>21</sup> See: T. Papapavli, “Drejtësia Popullore”, Nr. 5, Tirana, 1993

according to some other authors the international right is a right because this right even though looks so universal does also have sanctions. But the international right has sanctions that are dedicated to the inner right and about this we have economical sanctions, diplomatic sanctions and the declaration of war. So the international right is an organized right and can be called a right because within it has the sanctions that we mentioned above, which are applied according to its own authorized mechanisms. In this context we have to do with the sanctions of Security Council that can be applied against the inner right of a state. This case – category is best regulated by the international public right, respectively the international right. According to this the international right is an international organized right. As a rule when it is proved that the illegality exist in these legal acts, they are dismissed from legal order, where legal consequences should also be removed, which were produced from these kind of illegal acts.

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