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THE LAW IN TRANSITION, THE HUMAN RIGHTS AND THE JUSTICE REFORM

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ABSTRACT

Upon the fall of communism, dictatorial regime in Albania, there were created the possibilities for the theoretical-practical discussion on the human rights. All this, the law and the justice system during the years in our county was in transition. In function of this, in years, a justice reform in Albania has been a necessity. In this paper, we will treat the general framework presented by the state of law in Albania, stopping in some important moments such as justice reform (Laying the groundwork for a consolidated rule of law), decisions of Constitutional Court of the Republic of Albania, etc. Also we will treat some problematic moments that appeared at the field of human rights, which is a warranty of the State of Law. The formal improvement of the legislation or organization of institutions is not enough to realize the protection of human rights and fundamental freedoms, but more is needed in this direction.

Key words: *law in transition, international acts, justice system, human rights, justice reform.*

Paper type: *Viewpoint.*

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1. LAW

Law is a system of rules that are created and enforced through social or governmental institutions to regulate behavior. It has been defined both as *"the Science of Justice"* and *"the Art of Justice"*. Law is a system that regulates and ensures that individuals or a community adhere to the will of the state.

Law has different meanings as well as different functions. Philosophers have considered issues of justice and law for centuries, and several different approaches, or schools of legal thought, have emerged. In this part, we will look at those different meanings and approaches and will consider how social and political dynamics interact with the ideas that animate the various schools of legal thought.

Laws are rules, regulations and restrictions that apply to all members of society. Laws define how people should behave or conduct themselves, and provide sanctions and deterrents against improper and destructive behavior. Laws help to organized our societies, maintain order, ensure our safety and prevent infringements of our rights. Without laws, societies would descend into lawlessness, anarchy and violence. In a democratic society, laws are created by representatives of the people (parliaments) and independent judges and magistrates (courts). There are two types of laws: criminal law, which deals with offences against people, property and morality and civil law, which deals with disputes between different parties.

In societies like Albania, which is a liberal democracy, laws are determined by institutions, not by individuals. Collectively, these institutions are considered to represent the state. Even in a society which operates according to the rule of law, much depends on the trust and consent of the people. The population generally accepts the need for laws and obeys them willingly. The state lacks the power and the resources to enforce and uphold laws if large numbers of citizens willfully disobey them.

1.1 What Is Law?

Law is a word that means different things at different times. Black's Law Dictionary says that law is *"A body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequence is a law"*. (Black's Law Dictionary, 6th ed., s. v. "law.")

1.2 Functions of the Law

In a nation, the law can serve to: **a.** keep the peace, **b.** maintain the status quo, **c.** preserve individual rights, **d.** protect minorities against majorities, **e.** promote social justice, **f.** provide for orderly social change. Some legal systems serve these purposes better than others.

In nations of the former Soviet Union and the nation that were under the communist regime the withdrawal of a central power created power vacuums that were exploited by ethnic leaders.

2. THE LAW IN TRANSITION

The law is fundamentally important, but it is not perfect. The law is only as fair and effective as those who develop, implement and oversee it. Charles Dickens once noted that *"the law is an ass"*, while Martin Luther King correctly observed that "everything that Hitler did in Germany was 'legal'." The law is not above debate, criticism or challenge. The law must be flexible, receptive to suggested reform and capable of change. As people and society changes, so too must the law.

The rule of law is a cornerstone of democratic societies.

In conclusion, the law in transition or the evolution of law is a foundational philosophy or principle that underpins Albania's system of government. It operates to provide citizens with certainty by clearly identifying the conduct required by the law. It also provides protection by requiring the government to act according to the law. That said, the rule of law is sometimes carried only by convention. It is not defined or protected in the Constitution or other legislation, and its meaning and application is open to interpretation. Though the rule of law is important, there are anomalies where the executive arm of government is exempt from ordinary laws of the land.

3. STATE OF LAW

State of law as a concept firstly appeared at the period of political liberalization, through turning the monarchies from absolute into constitutional which brought the concept of state based in rights. The limitation of the monarch power was the main idea where the liberalization was based to and his will would be replaced by the will of the law obligatory to everyone. In a doctrinal definition, the state of law is that state where the right is not only a mean but a limitation of the state activity which is conditioned and defined only by law[1]. An important historical moment is after Second World War, where the State of Law did some very determined steps towards its triumph, on the challenges it had been affronting for a very long time[2]. "The first half of the century (XX) was witness of the distribution of dictatorial and totalitarian systems. The state of Law was criticized here and there and was contempt for its democratic form, accused for corruption[3]". The state of Law is based on the fundamental principle of law respect. The Austrian Jurist Hans Kelsen redefined this concept with germane origin in the beginning of the XX century, as a "State where the juridical norms were hierarchical in the way that its power is limited". In this model, every norm takes its validity in accordance with the above norms.

[1]The state of law may be summarized according to the formula "No one stands above the law". Generally communist regime groups, (like Albania before), several juridical norms that protect the citizens from the arbitrary forms of power (executive). In order that a State of law exists must that the obligations rising from the State are official, general, obligatory and with sanctions. In other words, laws must be:

a. made public,
b. no one can be saved from them,
c. they must be really applied and
d. the violation of laws must bring sanctions.

The state of law requires a written and firm Constitution, which the Albanian legislator performed through the Constitution of the Republic of Albania approved in 1998. The lordship of the state of law is guaranteed from the constitutionality legality and its control. The principle of the state of law is mentioned expressively if the Constitution of the Republic of Albania of 1998. In its preambula, among others it is mentioned that: *"We, the People of Albania, proud and conscious for our history, with responsibility for the future, with trust in God…, determined to build the state of law, social and democratic, in order to warranty the fundamental human rights and freedoms, with the spirit of tolerance and religious relationship, with the commitment to protect the human dignity and personality, as well as for the prosperity of the whole nation, for peace, wellbeing, culture and social solidarity…, set this Constitution…".*

While in the article 3 it is provided that: *"The independence…, human dignity, its rights and freedoms, social justice, constitutional order, …, Are the basis of this state, the duty of which is to protect and respect them…",* and in the article 4 it is added that: *"The law constitutes the basis and limitations of the State activity. The constitution is the highest law in the Republic of Albania…"*. Following, it is natural that there are lots of other provisions of the Constitution,

with directly or indirectly, are connected to the principle of the state of law. Based and in their application there are several other legal and sublegal acts, approved with international expertise and consultancy, mainly of the Europe Council, with which it is aimed to fill the general normative framework to guarantee the special elements of this principle in everyday life. In its wholeness, we can say that the Constitution and legislation create a full and sustainable basis for the recognition and application of the principle of the state of law in the Albanian reality.

Without any doubt the biggest difficulties or several problems are created in the application of the special elements of the principle of the state of law in the everyday life. For this reason, it is right to be highlighted that the application in practice of the elements or standards of the principles of the state of law, is one of the main challenges which Albanian state and society faces. [4]The warranty among the constitutional norms and other legal acts as well as the application of this principle in the everyday life are necessary conditions for the function and development of a free society, for the peace and social security, growth of wellbeing for all the people's classes, the best respecting of human fundamental rights and freedoms. By the state of law we understand: Political and legal power which is limited and controlled, the aim of which is the legal security of the citizen, their equity before the law and protection of human rights by independent courts. Its elements are: *legitimacy of power; division of powers; constitutionality and legacy; judicial control for all the acts; independent courts; legal security; priority and warranty of all citizens' rights and freedoms*.

3.1 Legitimacy of power

The political power must be exercised in accordance with the clearly defined rules.

The political forces select upon consensus the rules of exercising the power such [2]as election system and acts in its application.

3.2 Division of powers

The division of powers is considered as the spine of the state of law as only the respecting of the principle of democracy (lordship) of majority is not enough to warranty freedom. This principle prohibits the abuse with power and assures the respecting of rights. The division of powers is the second principle of the state of law in a modern and free constitution. This principle has an organization feature and aims to warranty that all the powers are limited and are submitted to control. [5]In a free and democratic system, there are minimally three independent powers, which interfere, balance and reciprocally control each-other, based in the constitutional and legal norms. The central idea is that by developing free elections, by applying the principle of democratic legitimacy, the whole state power is organized in such way to be set and exercised by different mechanisms[6]. There a legislative power which is normally exercised by the Parliament, the main duty of which is the approval of laws based and in application of the Constitution, the approval of the Government and its political program as well as the control of executive power activity in general. There is an executive power the mission of which is the law implementation in the everyday life and the definition of application of general state politics. In certain cases and conditions, Government must approve normative acts with the power of law as well as it can cause the distribution of the Parliament and other. Finally there is a judicial power, the main duty of which is justice in accordance with the constitution, without being impacted directly in this activity by the legislative power and executive power. The constitution of the Republic of Albania is clearly based in the principle of division and balance of powers, where in the article 7 of the Constitution it is expressively said: *"The governance system in the Republic of Albania is based in the division and balance through the legislative, executive and judicial powers".*

3.2.1 Decision of the Constitutional Court

Upon the constitution of 1998, the problems of respecting the principle of division and powers balance take place directly or indirectly in several of its provisions. On the other hand the jurisprudence o the Constitutional Court has in the following period a bigger commitment and dynamism for the respecting of such an important principle.[3]

The decision no. 75/2002[7], has as its object the interpretation of the articles 128, 140 and149/2 of the constitution, in regard especially with the matter of the dismissal by the Convention of the General Prosecution of the Republic. Among others, in this decision it is stressed that through the control of the constitution of the decision of the Convention, the Constitutional Court reviews not only the procedure of the dismissal but also the essence of the case…, later it was highlighted that: *"The accepted democratic standards, who found their place in the Constitution as well as several decisions of the Constitution Court, defined and consolidated several elements of the regular legal process, the absence of which devaluate the procedures and the decisions made by everybody. The argumentation of the violations, the respecting during the review of the principle of division of powers…, respecting of the right to be heard and protected…",* are some of the basic elements that warranty the constitutional right of anyone for a regular process, as a fundamental right, the violation of which the Jurisprudence of the Constitutional Court identified in every case, as violation of the Constitution.

3.3 Principle of Constitutionality and Legality

3.3.1 Constitutionality

Constitutionality implies the wholeness of political-legal regulation of state, which warranties the democratic exercise of power and citizens freedoms. It assures the compatibility of legal order with the highest legal power. It is treated in three direction: **a.** positivist: compatibility with the constitution of all legal acts (active hierarchy); **b.** political: the application of constitutional limitations in exercising the political power; **c.** political-legal. The existence of fundamental constitutional rules based on which it is institutionalized the political system, warranties freedom and rights of the citizens.

The constitutionalism appeared as a liberal request in the form of the political request, for the institutionalism of the company with written document. We refer to the form as a fundamental element, the written form. But constitutionality does not imply only its formal element but also the application of the idea of the people sovranity and limitation of absolutism. Therefore the second element, the interpretation is attributed to people. We must have the existence of institutions which must be represented by the people. It presents in a different picture the rapport between the individual and state. In a formal point of view, even in a philosophical it diapazone lays to the protection and warranty of human rights in front of political power. This power is a derivate of the majority in democracy. In some way the constitutionalism provides that the constitutional norm is not violated, a constitutional right to limit the government. The individual's rights did not come easy in the environment of human society.

[4]In the formal meaning the principle of constitutionality is not for countries with soft constitutions. But normally even why the strong constitution warranty the constitutionality, it does not assure this principle. On the other hand it presents one of the conditions to be sedented. In its material meaning constitutionality appeared very earlier as a concept in comparison to its formal meaning. Therefore even why the strong and written constitution did not exist in the United States of America, the war for constitutionalism war born. Every act of power not only must enjoy legality, but it also must be in accordance and must not be in contrary to the constitution. The highest legal order is the constitution order. The constitutionality of laws and sublegal acts must be protected from abuses which are approached from the legislative bodies, courts, and political bodies.

3.3.2 Legality principle

The right constitutes the basis and limitations of the state activity[8] and all the acts must be in accordance with the law[9]. Formally it indicates the compatibility of all acts lower with the law, support of all the state administrative actions in law and protection of rights and freedoms based on the law. The public administration must act only to the extent it is provided and with the means provided by law. Upon legality it is understood the request to respect without any condition the Constitution, laws and sublegal acts, by the state bodies, social organizations and citizens of the Republic of Albania. The acts with the highest power and obligation of issuing sublegal acts based and in application of the law[10]. The bodies of the public administration develop their activity in accordance with the Constitution of the Republic of Albania, international agreements, Law inside the borders of the competences conferred in conformity of the aim they were conferred[11]. The application of the legality principle is a condition for the existence of the legal state. Legality indicates the governance based on the law. It has a political and legal feature and requires the building of relations through power and the citizens based on the low, support in laws of all the activities and procedures not only of the organization bodies but of all state bodies, warranty of human rights. The legality principle is constituted by two aspects:

1. The priority of law above all the other acts of state power. This means that the administrative acts will be considered invalid if they are in contrary of the law. Thus negative legality requires the respecting of orders and constitutional, legal and sublegal prohibitions.
2. The request of law from exercising of any administrative power. According to the article 4 of the constitution "law is the basis and limitation of the state activity". This implies that the whole state activity is regulated upon the law.

The respecting of legality during the issuing of legal acts is very important for two reasons. The right to be addressed to the Court, Article 42 of the Constitution: *"1.The freedom, property, and rights recognized in the Constitution and by law may not be infringed without due process. 2. Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of an accusation raised against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law".*

Article 43 of the Constitution: *"Everyone has the right to appeal a judicial decision to a higher court, except when the Constitution provides otherwise".*

[5]The state of law does not accept any mix of judicial competences with the administrative ones. The right to be addressed to the court requires: - The existence/ creation of the independent courts by law (the extraordinary courts are prohibited); - The correct definition of material and territorial jurisdiction; - The Conferring of obligatory decisions for the parties; - The competence to annul illegal administrative acts; - This right cannot be remove upon other administrative acts.

3.4 Judicial control of acts

The judicial control of acts is a legal mean for the realization and protection of legal rights of the individuals and other entities of law and an instrument to control the administrative activity.

The applicant: 1. Require the annulment or change of an administrative act; 2.Its contrary to the refusal of the approval of an administrative act in the defined term. The lawmaker must provide the procedure and maintenance of administrative acts.

The state of law must warranty the judicial control of: 1. Administrative acts; 2.Judicial decision of lower instances.

The institute of judicial review is a constitutional warranty for the citizen for the protection of their rights through a fair public trial and form an independent court[12]. This right is sanctioned in the article 42 point 2, of the Constitution of the Republic of Albania. Until 2012 the administrative cases were not specified in the jurisdiction of the courts created for this purpose and nominated as administrative courts. This was made possible only after the approval of the law "on the judgement of the administrative disagreements and organization of administrative justice". This law defined obligatory rules for the subjects of administrative trial, state bodies, legal persons and citizens for the judgement of administrative disagreements, execution of administrative judicial decisions, as well as for the organization of administrative courts.

The administrative court is competent for the review of disagreements: - related to an administrative action, despite its form and type; - labor relations regulated by the Labor Code, where a public body is the employer; - with a normative sublegal act of the central bodies or by bodies of the local governance.

The administrative court does not review the disagreements, related to the normative sublegal acts that according to the constitution, are in the competence of the Constitutional Court, or the review of which according to the legislation in power is in the competence of another court, or according to which the employer[6]is an equal public body. In case of the raise of these lawsuits the court mainly makes the decision to issue the case outside it jurisdiction or to announce it isn't competence and to submit the acts at a competent body.

There are several kinds of administrative disagreements:

-Objective Administrative disagreements and subjective administrative disagreements. As subjective are the disagreements when as the object of review are the administrative acts (individual), while as objective disagreements are those that can be opened against the general acts (normative).

-Disagreements on legality of the act and disagreements of full jurisdiction. In the disagreement on legality of the act the court evaluates if upon the appealed administrative act the law was violated in the material or formal meaning, while in the disagreements of full jurisdiction the court decides the contesting relationship.

In the disagreements of full jurisdiction the judicial decisions are more than the disagreements on the legality of administrative acts. This happens due to the fact that in these disagreements the court is not limited in the annulment of the administrative act, bit decides on administrative cases. As a rule, this is the function of administrative court.

3.5 Legal Security

Legal security as a constitutional concept includes the clearly and sustainability of normative system. This principle includes among other the faith at the legal system, without being committed in the warranty of not changing a favorable situation. This principle is sanctioned at the preambula of the Constitution of the Republic of Albania[13]…, the state of law, which is guaranteed in the preambula of the Constitution, is one of the most important fundamental principles on state and democratic society. Therefore its violation constitutes a basis to declare this law as anti-constitutional.

The legal security means the faith of the citizens in the state and the law not changing the already fixed relations. The faith has to do with the conviction of the citizen that they must not worry about the negative consequences of legal acts, which can violate the private and

professional life. The legal regulation deal with the rights of the citizens. As rule no interest can be denied and legal acceptance at the citizens from the changes in legislation and the state should only aim to bring positive impacts only. This principle includes among others the faith at the judicial[7]system, without undertaking the warranty of any expectation for not changing a favorable legal situation. The principle of legal security is also a very important element of the state of law. Correctness, clearly and sustainability are considered as its main formal standards. On the other hand, as the main standards in the material meaning are considered the not violation of the gained rights and legal expectation that the acts in power guarantee. On this basis, the citizens define the freedom space or the manner they act in society and state[14].

3.5.1 Legal security in the judicial practice in the Republic of Albania

As said above, in the case of our country, the constitutional basis for noticing this important principle is made referring to the commitment to respect the state of law, expressively mentioned in the preambula of the Constitution of the Republic of Albania. The Constitutional Court of the Republic of Albania treated the decision making and the principle of legal security. The relatively short time made the building of a sustainable practice in this direction impossible.

In many cases it was managed that this constitutional principle was exploited and to set important standards dealing with its recognition and application in practice. In one of its decision the Constitutional Court expressed that this situation, is it would be repeated, would violate the fundamental principle of parliamentary democracy. On the other hand, as it is ascertained even in jurisprudence if the lawmaker does not react to the legislative vaccum, the constitutional system does not offer an effective mean, and this situation would lead in a crisis of the representative democracy law. The court evaluates also that upon the above prohibition the lawmaker aimed to avoid the legislative vacuums in protection of a very important principle, the one of legal security. The condition that the remained part of the law in case of a referendum of annulment is enough, serve to the sustainability of the legal system[15].

3.6 Defense of Human rights

The law must not be understood as the will of one or more persons, but as something based on the general reason, not simply like volunteers but more as ratio[16].

The state of law form the material point of view guarantees: - Freedom of every individual protecting them with the constitution and without violating the eights of others - Equality of all citizens in front of the law.

Prohibition of different treatment for same persons. - Procedural warranties penal or civil (the right of defense, not judgement more than once for the same offence, the right to be heard, not punishment without law etc.)

4. HUMAN RIGHTS IN THE REPUBLIC OF ALBANIA AND SOME CURRENT PROBLEMS

Human rights at the 20th century had a very big turn upon the Universal Declaration of Human Rights of the United Nations in 1948. Referring to history the first document that sanctioned the human rights was Magna Carta Libertatum which was signed on 15th June 1215 in England. *"Magna Carta"* was the first document imposed to a king of England form a group of his dependents limiting his power through law. The first full document of human rights is considered the Declaration of Human and Citizen Right in 1789 which defines several individual and mutual human rights. All the people are born and live as free and equal before law, a phrase connected directly to the French Revolution. Only with the foundation of the United Nations in 1945 Human Rights get a dynamic by putting them into a legal level, and

announcing their universal feature and the moral obligation of all the member of ONE to protect and respect them.

4.1 A short review on the legislation of human rights in Albania

[8]Protection and respecting of human rights was one of the fundamental conditions to assure the state of law and democracy in Albania. The constitution which is the highest law in the country has the principles of protection of human rights and fundamental freedoms, where in its preambula it is stressed that: *"the Albanian people ... set to build the state of law, democratic and social, in order to warranty the human rights, human fundamental freedoms, with the spirit of religious tolerance, committed to protect the human dignity and personality, prosperity of all the nation with the conviction that justice, peace and harmony between nations are the highest human values"*.

4.2 Some problems of human rights

The fundamental problem regarding human rights is still the wide spread corruption in all the governance braches and in the judicial system. Other problems related to the human rights include domestic violence, violence form the police and maltreatments of every kind during the investigation, conditions of the prisons, a not efficient judicial system under the political pressure and abuse with children. I still a problem the children of streets and the displaced ones, especially the ones of Rome community. The abuse with rom and Egyptian-Balkan communities are serious problems. The discrimination on the basis of sexual orientation and gender identity are problematic as well. Cases of persons trafficking are still reported.

4.2.1 Prevention of torture and other dis human treatments

Starting from 1993 the Republic of Albania is part of the Convention against torture and other cruel, dis human treatment. The constitution highlighted that no one can be submitted to torture and other dis human treatments. According to the law "on changes in the Penal Code of the Republic of Albania (2007), article 86 of the Penal Code as amended, providing the definition of torture, in accordance with the article 1 of the Convention against Torture. Torture is defined as the performance of the acts that cause pain or strong suffering, physical or mental, caused willfully from a person against another in order to a) get information for a third person b) to punish him for an action he or a third person has committed c) to frighten or exercise pressure against him or a third person d) for any reason of discrimination e) or any other dis human action. Although it is banned from the Constitution and Law, the police and prison guards exercised violence with the suspected and arrested persons. The ombudsman is mandated by the law in order that through the National Mechanism on Preventing the Torture monitors and reports regarding the prisons and custodial detention centers. During the year the ombudsman received from the arrested persons 386 complaints for physical abuse and torture, illegal arrest, illegal caught, illegal penalties, violation of privacy, humiliation and lack in providing the right information. The ombudsman reported for lack of proper health care in many prisons and custody detention centers as well as improper living conditions

The Albanian Community of Helsinki reported that police in several cases exceeded the use of force and that the conditions where police kept the arrested persons were so inadequate that constitute inhuman treatment. The major part of the complaints included unjustified detention from the police, arrestments beyond legal terms, not presentation of the persons with their rights in case of detention and unacceptable conditions in detention center. ACH declared that police often reported that the arrested who claimed for abuse came with previous injuries/ wounds.

The conditions in prisons and detentions centers where very different from one center to another. The old facilities had insufficient water supply, cleaning, airing, light and health

care. The old facility were not hygienic and a lot of basic conditions were absent. Also, the maltreatment from the guards and the threats between the prisoners, threatened the life of the arrested. The ombudsman and the ACH reported that these persons had no sufficient possibility of medical controls or other services. The police station and detention environments are under the control of the Ministry of Interior. The conditions in these facilities are totally unacceptable. In some cases, there is no heating during winter. Some had absences of basic hygiene conditions such as showers and sinks and little or no airing or natural light, there were no beds or benches and the areas were very small. The authorities investigated some of the reliable claims for inhuman treatment and documented the results of their investigations. Corruption is a serious problem at the detention centers.

The ombudsman after an inspection performed in prisons rise the disturbance regarding the situation of overpopulation and addressed several recommendations to the Ministry of Justice and to the stations. The Ombudsman evaluates that the Privation of the Freedom through the arrestment must be considered not as a primary option, but as the most severe measure which is granted only in accordance with the articles 228 and 229 of the Penal Procedure Code. The control was performed in all the institutions of legal privation of freedom. The data on overpopulation of prisons and detention centers in Albania during 2014, except the problem of structural denigration of the buildings and bed service for the persons who are deprived from freedom, raise the disturbance of national and international institutions regarding the respecting of the human rights in a democratic country.[17]

There were ascertained cases of person with security measure that continued to stat at these areas outside the legal framework. The major part of the persons at the security rooms were detained for offences provided at this time at the Penal Code (mainly abuse with electric energy). As a consequence, a very important factor for the overpopulation results to be the severe penal policy, which is not the only mean to empower the public order, and less the state of law. The European trends stand for alternative punishments.

Arrest Procedures and treatment in detention. The Constitution requires the judge issues an arrest notification based on sufficient evidence. According to the law, police must notify the prosecution immediately. The prosecution may free the person or send a request addressed to the court within 48 hours to detain the person longer. The court must decide within 48 hours to put the person in detention, require warranties, prevent movements, or to require that the defendant is regularly presented at the police. The prosecution required and the court ordered the arrest in several penal cased duly.

The constitution requires to the authorities to introduce to the detained persons with the accusation and the rights they have, but this right was not applied in all the cases. There is no efficient system for management of the financial aspect of warranty. Often, the court requires that the suspected are presented at the police or prosecution every week. Many suspected were ordered to stay in home arrest, often upon their request, as if there were punished later this time was calculated as service time.

4.3 Justice reform

[9]The state of law is a basic and important principle for the existence of the democratic state. There are no deferent approaches by the democratic states due to special elements it contains. Referring to the situation in Albania with last 25 years, as one of the former totalitarian countries, we can claim that a very big development has been made in installing the state of law fast. A very important role in this regard was played by the Constitutional Court which is committed in the doctrinal interpretation of the Constitution expanding and consolidating the state of law in Albania. The last years it has a main role in developing the concept on legal security as an important element of the state of law. Even though our country has had big

achievements in protecting the human rights, problems in this regard are still present. The Albanian government is stuck in big problems of the field and often this was reflected in violations of the Constitution or other legal acts. Law reform is driven by bodies like the parliament and its committees, Commonwealth and State law reform commissions and Royal Commissions. Pressure for law reform also comes from lobbyists, the media and interest groups. These lawgovpol.com topic pages summaries the various institutions and processes that contribute to law reform. These pages have been written by lawgovpol.com authors.

One important challenge for lawmakers is law reform. Society changes over time and so the views and values of its citizens. Law reform is the process of changing and updating laws so that they reflect the current values and needs of modern society. Those responsible for making our laws must identify and study shifts in values, behaviors and expectations; they must consider whether new or amended laws are required; they must develop and implement these changes. Law reform is a perpetual or ongoing process: it never finishes. The law must be flexible and receptive to change, so that stays fair, relevant and up to date. Above all, it must serve the needs of the people. A law based on outdated or irrelevant values will only let down the people it is intended to serve and protect. The law must also be able to respond to situations and scenarios thrown up by a changing society, such as new forms of criminal activity.

On July 21st, Albania virtually adopted a new Constitution and is now preparing to change much of the state's legislative bulk. Albanian citizens have so far watched the umpteenth reckless struggle between majority and opposition to snare the right to appoint officials and recorded the triumphal declarations and smug smiles of all the country's leaders at the end of vote.

Some of the ways that society changes, generating a possible need for law reform, include:

4.3.1 Changing social values

Social values are the fundamental ideas we have about people and society in general. They include ideas about race, gender, families, children, violence, personal responsibility and behavior, and the law itself. Social values tend to change quite slowly – but they do change. Prior to 1972, for example, women in the workforce received only three-quarters of the average male salary, even if they were doing the same work as men. Shifting conceptions about the status of women produced social and political pressure. This pressure eventually led to minimum wage laws that brought women's pay in line with that of men. Changing attitudes to narcotic drugs, homosexuality and divorce are also examples of changing social values that contributed to law reform.

4.3.2 Changing morality

Individuals can be quite rigid in their views about what is 'right' and what is 'wrong', shaped by upbringing, education and religious teachings. In the past, behaviors such as homosexuality, prostitution, pornography, adultery and promiscuity outraged individuals to such an extent that society deemed them to be immoral or sinful. This was reflected in various laws that criminalized these behaviors and imposed sanctions on those who engaged in them. Today, society is generally better informed about the causes and the nature of these behaviors, so the law has changed to reflect this.

4.3.3 Changing ethics

Like morality, ethics is concerned with what is right and wrong, though on a social level rather than what offends the individual. Ethics considers whether specific practices or decisions are fair to all involved and whether certain behaviors are both responsible and acceptable.

Amongst the ethical questions that law academics and reformists have considered and will consider are capital punishment, abortion, euthanasia, stem-cell research, 'cloning', assisted reproduction therapies, experimentation on animals and genetically-modified foods.

4.3.4 Changing technology

As new technologies and medical advances are develop and come into common use, they impact on the way people live and behave. They may also produce ethical debates and dilemmas – and they may give individuals new avenues for offensive and potentially illegal behavior. The rapid expansion of the Internet, mobile phones and other technological devices have provided lawmakers with new challenges. These technologies have created behaviors that a decade ago were unlikely or even unheard of, such as software piracy, 'phishing', 'sexting', cyber bullying and e-stalking.

4.3.5 Significant events

Sometimes a single event can spark changes to a particular law or laws. Catastrophic events such as the Port Arthur massacre (1996) the September 11th terrorist attacks (2001) and the Victorian 'Black Saturday' bushfires (2009) have all prompted a significant review of laws and consequent changes. Sometimes the event may be relatively minor, such as a single criminal case, yet it may highlight an inefficiency, loophole or shortcoming in existing laws.

Sometimes law reform is driven not by social change but by procedure. It is sometimes necessary to simplify or 'tidy up' the law, to make it easier to access and understand, or to ensure it is more consistent for all Australians. Australia has thousands of laws, spread across numerous jurisdictions (Federal, State and Territorial) and made by numerous parliaments, court hierarchies and subordinate authorities. These laws can be found in a vast body of statutes, court rulings, precedents, rules and regulations. All this can make the law confusing, contradictory or difficult to access. Sometimes legislators may act to limit this by passing one of the following:

4.3.6 Codifying legislation

This is a bill that sets an existing judicial precedent or statutory interpretation into legislation. Codifying legislation ensures that these examples of court-made law are fixed in law and not subject to change by future court decisions.

4.3.7 Complementary legislation

A bill which replicates legislation in another jurisdiction. This ensures uniformity of laws in separate parts of the same nation so that individuals in one place enjoy similar rights and laws as those in another. In 2004-5 Australian State parliaments passed uniform defamation laws for this purpose.

4.3.8 Consolidating legislation

A bill that repeals two or more existing pieces of legislation and combines their content in the one act. This not only removes unnecessary legislation, it also simplifies access by having related laws under the same Act of Parliament.

These changes may not be 'reforms' as such, because they may not change the substantive meaning of the law. True law reform occurs because society has changed and the law needs to change with it.

4.3.8.1 What changes in the judicial system?

This reform and the new Constitution aim to redefine especially the judiciary and the prosecution system, stop the rampant corruption in the field of justice, and break the bonds of

judges and prosecutors with politics and crime. Changes to the appointment mechanisms for officials have virtually monopolized the debate between the majority and the opposition – the agreement on this delicate point has been reached through a complicated, almost inscrutable, mechanism.

The main changes include the establishment of the Supreme Judicial Council and the Supreme Prosecution Council, two structures located at the apex of justice and prosecution systems to ensure their efficiency and independence. A court and a special prosecutor for the fight against corruption and organized crime, the main weakness of the Albanian state, will also be established.

Much debate has been raised by the so-called "vetting" process, the verification of the credentials of those who apply for the posts envisaged by the new judicial system. All judges, prosecutors, and senior officials will be subjected to a detailed examination of credentials resume, professionalism, patrimony, and possible links with crime – by two other new institutions, the Independent Commission of Qualifications and the Board of Appeals. Both will be supported by the Monitoring International Operation, an EU-managed commission with experts in the justice system of member countries, with at least 15 years of experience.

What proved divisive a few days before the vote was precisely the role of the latter. Initially designed to ensure impartiality (certainly not a foregone conclusion in a climate of absolute mistrust between majority and opposition), the Operation was also meant to be tasked with assessing the credentials of the Independent Commissioners of Qualifications, to ensure the absolute integrity of those who would evaluate their colleagues. But the opposition saw this as a violation of the sovereignty of the country, thus denying the necessary votes for approval. With an intervention in extremis, the EU suggested that the Operation may have only a monitoring and advisory role, its opinion not binding. The formula proved attractive and the reform was passed.

4.3.8.2 The results of the justice reform

Formulation of the justice system strategy/reform with a view to guaranteeing independence, transparency and efficiency, increased professionalism and accountability of the services of the Albanian Ministry of Justice, increased unified judicial practice enforced by the High Court, reduction of trial duration, as well as a reduction of the backlog of court cases, international training of the judges and prosecutors organized by the school of magistrates.

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