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Rule of Law and Judicial Independence in Albania

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ABSTRACT: We know the importance that the rule of law has for our society, our democracy, and the kind of civilization we want, but we rarely take the time to think about what the components of the rule of law are and how we ensure that the rule of law is maintained. In its most basic form, the rule of law is the principle that no one is above the law. Legal documents, such as constitutions, national legislation, a court system, and international agreements, govern a state's actions towards its citizens. Governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The rule of law is a very broad concept. It involves several aspects rooted in democracy. This paper will focus on the independence of the judiciary as part of the rule of law. Judicial independence means that judges are independent from political pressures and influences when they make their decisions, that they should not be pressured by a political party, a private interest, or popular opinion when they are called upon to determine what the law requires. Keeping the judiciary independent of these influences ensures that everyone has a fair chance to make their case in court and that judges will be impartial in making their decisions. Presidents, ministers, and legislators, at times, rush to find convenient solutions to the exigencies of the day. An independent judiciary is uniquely positioned to reflect on the impact of such acts on rights and liberty, and must ensure that those values are not subverted. The need for an independent judiciary in Albania is of paramount importance for Albania's integration in the European Union.

KEYWORDS: *Albania; Judicial; Independence; Law; Rule*

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1. WHAT IS THE RULE OF LAW?

The rule of law is a term that is often used but difficult to define. A frequently heard saying is that the rule of law means the government of law, not men. But what does this imply? Aren't laws made by men and women in their roles as legislators? Don't men and women enforce the law as police officers or interpret the law as judges? And don't all of us choose to follow, or not to follow, the law through our everyday acts or ommissions? How does the rule of law exist independently from the people who make it, interpret it, and live it?[1]

The easiest answer to these questions is that the rule of law can never be entirely separate from the people who make up our government and our society. The rule of law is more of an ideal that we strive to achieve, but sometimes fail to live up to. The idea has been around for a long time. Many societies, including our own, have developed institutions and procedures to try to make the rule of law a reality. These institutions and procedures have contributed to the definition of what constitutes the rule of law and what is necessary to achieve it.[2]

The rule of law, in its most basic form, is the principle that no one is above the law. The rule follows logically from the idea that truth, and therefore law, is based upon fundamental principles which can be discovered, but which cannot be created through an act of will. The most important application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps. The principle is intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus, the rule of law is hostile both to dictatorship and to anarchy.[3]

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[1] See Aba Division for Public Education, *What is the Rule of Law*, Americanbar.Org, http://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf.

[2] *Ibid*.

[3] *See* Christian Fleck, *The Rule of Law*, LexisNexis.Co.Uk, http://www.lexisnexis.co.uk/en-uk/lexisnexis-for-barristers/rule-of-law.page (last visited Jun. 17, 2016).

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The concept of the rule of law means that legal documents, such as constitutions, national legislation, and international agreements, govern a state's actions towards its citizens. It involves a democratic means of establishing ruling factors such as popular sovereignty, majority rule and minority rights, limited government, check and balance of powers, due process of law, protection of individual's fundamental rights and freedoms, etc. The central notion of a rule of law is that society is governed according to widely known and accepted rules followed not only by the governed but also by those in authority.

The various formal requirements of an essentially procedural version of the rule of law derive their point and fundamental value from the broader ideal of constitutionalism to which, ideally, they belong. Lon Fuller's "inner morality" of law - the model of law as a body of general, clear, stable, and prospective rules, capable of obedience, and faithfully applied by judges and other public officials - formed the core of a more elaborate conception of law as a bulwark or barrier against the exercise of arbitrary state power. Fuller's initial attempt to establish a necessary connection between law and justice, on the ground that the precepts of formal legality were necessary conditions for the existence of law, met fierce objection.[4] As H. L. A. Hart observed, the general purpose of "subjecting human conduct to the governance of rules" - the purpose Fuller ascribed to law - would allow us to treat the principles of effective law-making as a moral obligation, whatever the content of the laws, only if that general purpose were itself an ultimate human value.[5]

Fuller's insistence on the moral value of procedural legality makes perfect sense, however, when his discussion is interpreted as an exposition of the liberal or constitutional ideal of the rule of law.[6] Governmental adherence to the precepts of formal legality is a necessary feature of a constitutional regime, in which the values of personal liberty and autonomy are recognized and protected. The value of legal certainty, that procedural regularity and formal equality chiefly serve, as chiefly served by procedural regularity and

[4] T.R.S. Allan, Constitutional Justice: A Liberal Theory Of The Rule Of Law (Oxford Scholarship Online, 2010), at 61
[5] Herbert Lionel Adolphus Hart, Essays in Jurisprudence and Philosophy 349-351 (Clarendon Press, 1983).
[6] Lon L. Fuller, The Morality Of Law (Yale University Press, 1969), at 62.

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formal equality is one of great importance to human dignity. When a legal system satisfies the various principles that Fuller identified as far as is reasonably practicable, people will not be punished for non-compliance with requirements whose existence was not generally known or which were otherwise impossible to obey. Even when the rules enforced fail to secure many of the various rights and freedoms characteristic of a modern liberal democracy, their consistent and accurate application will generally have great moral value: they will at least give fair warning of the exercise of state power. The principle that laws will be faithfully applied, according to the tenor in which they would reasonably be understood by those affected, is the most basic tenet of the rule of law: it constitutes that minimal sense of "reciprocity" between citizen and state that inheres in any form of decent government, where law is a genuine barrier to arbitrary power.[7]

If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: one must first enable the government to control the governed; , and in the next place oblige it to control itself.[8] If considered not solely an instrument of the government but as a rule to which the entire society, including the government, is bound, the rule of law is fundamental in advancing democracy. Strengthening the rule of law has to be approached not only by focusing on the application of norms and procedures. One must also emphasize its fundamental role in protecting rights and advancing inclusiveness, and in this way, framing the protection of rights within the broader discourse on human development.[9]

The rule of law also has extremely important procedural dimensions, in addition to the foregoing substantive dimensions. It requires a set of rules that are known in advance, rules that are actually and fairly enforced, mechanisms to ensure proper application of the rules (but permit controlled departure from the rules where necessary), an independent judicial system to make binding

[7] Allan, *supra* note 4.
[8] The Federalist No. 51 (James Madison).
[9] Massimo Tommasoli, *Rule of law and democracy: addressing the gap between policies and practices*, UN Chron., Dec. 2012, at 29.

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decisions when conflicts in the application of the rules arise, and procedures for amending and revising the rules.[10]

Rule of law cannot exist without a transparent legal system, the main components of which are a clear set of laws that are freely and easily accessible to all, strong enforcement structures, and an independent judiciary to protect citizens against the arbitrary use of power by the state, individuals or any other organization. There can be no free society without an independent judiciary administering the law. If one man can be allowed to determine for himself what is law, every man can. That means chaos first, and tyranny next.[11]

2. JUDICIAL INDEPENDENCE AND THE RULE OF LAW

There is increasing acknowledgement that an independent judiciary is the key to upholding the rule of law in a free society. An essential feature of modern courts is their independent function, which is based on the separation of powers doctrine. Separation of powers refers to a model of governance whereby the three branches of government (executive, legislative, and judiciary) function separately and equally, while acting as checks on each other. Under the rule of law, judicial independence is generally defined as "freedom from direction, control, or interference in the operation or exercise of judicial powers by either the legislative or executive arms of government."[12] The first one to introduce the idea of the separation of powers was Montesquieu in 1748, in his famous work "The spirit of the laws".

In the framework of the separation of powers doctrine, independent judiciaries play a very important role. The judiciary's check upon the executive and legislative is essential in upholding the rule of law, and plays a crucial role on the transparency and accountability of the government for any illegal political acts committed by political leaders or members.

[10]Samuel L. Bufford, *Defining the Rule of Law*, Judges' J., Fall 2007, at 16, 19.
[11] United States v. United Mine Workers, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring).
[12] *See* American Bar Association, *Judicial Independence Selected Definitions and Writings*, http://www.abanet.org/judind/downloads/jidef4-9-02.pdf.

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Independent courts exercise their authority by interpreting matters before them in deference to the values in a nation's constitution. In this sense, the courts are seen to be the guardians of the constitution, and thereby serve to protect civil liberties of citizens. From a political perspective, an independent judiciary could give a voice to citizens who are traditionally ignored or left out of the political process. For minority groups, this is particularly relevant when the ruling government representing the majority ignores their rights or fails to apply constitutional protections for them.

Judicial independence means that judges are independent from political pressures and influences when they make their decisions. They should not be pressured by a political party, a private interest, or popular opinion when they are called upon to determine what the law requires. Keeping the judiciary independent of these influences ensures that everyone has a fair chance to make their case in court and that judges will be impartial in making their decisions.

Independent judiciaries are characterized by the following: (1) judges are free to make impartial decisions without outside political interference; (2) a judiciary acts as a check upon the executive and the legislature and, (3) judges are not arbitrarily removed or threatened.[13] The integrity of a court therefore depends upon the degree of insulation from external political actors, and their decisions would be honored even if they involve the executive or legislative bodies. Judicial independence allows judges to make decisions that may be contrary to the interests of other branches of government. Presidents, ministers, and legislators, at times, rush to find convenient solutions to the exigencies of the day. An independent judiciary is uniquely positioned to reflect on the impact of those solutions on rights and liberty, and must act to ensure that those values are not subverted.[14]

Another fundamental feature of the independent judiciary is judicial review. In the context of separation of powers, judicial review allows a court to closely review acts of the executive and legislative branches (such as legislation or regulations) without being subjected to unnecessary threats or interference.

[13] *Id.*
[14] Jeffrey Toobin, The nine: Inside the secret world of the Supreme Court 291 (2008).

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Without judicial review, a court cannot adjudicate matters in an objective manner, and carefully tailor their judgments in line with constitutional principles. Indeed, judicial review is essential feature in a democratic nation's constitution, and, as some commentators have noted, it represents the ultimate expression of an independent judiciary.[15]

The Basic Principles on the Independence of the Judiciary, adopted by the United Nations in 1985, outlined the importance to: (1) establish a separate and impartial judiciary that could decide matters without political interference; (2) have a nation provide adequate resources to allow the judiciary to perform its vital functions; and (3) have such power to be enshrined in a nation's constitution.[16] The role played by judges in upholding democracy and the rule of law is also recognized by the Recommendation of the Committee of Ministers n. 12 of 1994, the European Charter on the Statute for Judges, a report of the Venice Commission on the independence of the judicial system adopted by the Venice Commission,[17] and the 2010 "Recommendation to Member States on the subject of judges; their independence, efficiency and responsibilities" of the Committee of Ministers of Council of Europe.[18]

Judicial independence is an essential cornerstone of the rule of law and for the proper functioning of a democratic society. A judicial system must promptly resolve disputes on their merits by an impartial judiciary, as unreasonable delays of the work of the judiciary seriously undermine the rule of law. The rule of law also requires at least some level of appellate review of judicial decisions to ensure proper interpretation and application of the laws.[19] Judicial independence requires that judicial participation in politics be substantially circumscribed. While the law may permit a judge to be a member

[15] Scott D. Gerber, *The Political Theory of an Independent Judiciary*, 116 Yale L.J. Pocket Part 223, 225 (2007).
[16] Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Independence of the Judiciary, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985) http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx, (last visited Nov. 15, 2016).
[17] *See* http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e , (last visited Nov. 15, 2016).
[18] Recommendation CM/Rec (2010) 12 of the Committee of Ministers to Member States on Judges; Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, at the 1098th meeting of the Ministers' Deputies.
[19] Convention for the Protection of Human Rights and Fundamental Freedoms, Preamble, Nov. 4, 1950, E.T.S. 005, 213.

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of a political party, the law should prohibit a judge from running for political office. Similarly, judges should not engage in political fundraising or other clearly partisan activities.

Further, judicial independence requires that both an individual judge and the system of justice be shielded from legislative reprisal for a judicial decision. In addition, legislatures must be prohibited from reducing a judge's salary or benefits, or even reducing the funding of the judiciary generally, because of displeasure with particular judicial decisions. Reasonable access to courts requires that judicial business be conducted in public. This requirement has two dimensions. First, both written judicial decisions and papers filed with courts must be available to the public when a reasonable request is made.[20] Second, courts must be open to the public so that citizens can see justice in action and be satisfied that court procedures are fair and equitable.

The rule of law also requires that judges be competent.[21] This means that judges must meet minimum requirements in education, experience, moral standards, and judicial temperament. It also requires judges to continually keep abreast of new developments in the law, legal systems, and judicial procedures. Because laws and legal procedures change frequently, ongoing judicial education is therefore critical to ensuring that judges will be able to perform their judicial duties effectively.

Although public officials enjoy a measure of immunity while working in their official capacities, the rule of law requires that they nonetheless be subject to the same laws as every other individual outside the sphere of their official duties.

3. JUDICIAL INDEPENDENCE IN ALBANIA

Today Albania is a parliamentary republic. This regime followed the collapse of the communist dictatorship in 1991. During more than four decades of

[20] Bufford, *supra* note 10.
[21] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 18, art. 21 (1); Rome Statute of the International Criminal Court, art. 36 (3) (a), July 17, 1998, U.N. Doc. A/CONF.183/9; Statute of the International Court of Justice, art. 2, Oct. 24, 1946.

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communism Albania was ruled by an extreme authoritarian and dictatorial regime. Its judiciary was subject to the will of the Communist Party's Chairman and the Central Committee, as well as other executive authorities.

The beginning of the nineties marked historical and democratic changes for Albania, marking a turning point in the history of the State and its institutions. In 1998, following a popular referendum, Albania approved its new, democratic Constitution[22] which was followed by a series of important laws on the judiciary. Some of these laws replaced existing laws, while others were totally new for Albania.[23]

At the moment Albania, is going through a very important justice reform, which has included major reforms on the organization and functioning of the judiciary, the prosecution, the Constitutional Court, etc. Today's Constitution of Albania,[24] with its annexes, provides for new institutions such as the High Judicial Council, The High Prosecutorial Council, Commission and College of Appeal, International Monitoring Operation, etc. which aim at bringing the organization and functioning of state institutions closer to the organization and functioning of their counterparts, aiming to give an end at corruption and disorder in Albania and the strengthening of the rule of law.

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[22] Kushtetuta e Shqipërisë [KS] [Constitution of Albania], approved by the referendum of 22.11.1998, adjudicated by the decree of the President Rexhep Meidani no. 2260, dated 28.11.1998. Law no. 8417, dated 21.10.1998 "The Constitution of the Republic of Albania" was amended by laws no. 9675, dated 13.01.2007 "On several changes on law no. 8417, dated 21.10.1998 "The Constitution of the Republic of Albania""; law no. 9904, dated 21.04.2008 "On several changes on law no. 8417, dated 21.10.1998 "The Constitution of the Republic of Albania""; law 137/2015 and law 76/2016 "On several changes to law no. 8417, dated 21.10.1998 "The Constitution of the Republic of Albania.

[23] Ligj për Organizimin e Pushtetit Gjyqësor në Republikën e Shqipërisë, [Law on the Organization and Functioning of the Judicial Power in the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 8436, Dec. 28, 1998 (repealed 2008). *See also* Ligj për Organizimin dhe Funksionimin e Gjykatës Kushtetuese të Republikës së Shqipërisë [Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 8577, Feb. 10, 2000; Ligj për Organizimin dhe Funksionimin e Gjykatës së Lartë të Republikës së Shqipërisë [Law on the Organization and Functioning of the High Court of the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 8588, Mar. 15, 2000; Ligj për Organizimin dhe Funksionimin e Këshillit të Lartë të Drejtësisë Shqipërisë [Law on the Organization and Functioning of the High Council of Justice of the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 8811, May 17, 2001; Ligj për Organizimin dhe Funksionimin e Konferencës Gjyqësore Kombëtare [Law on the Organization and Functioning of the National Judicial Conference], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 9399, May 12, 2005; Ligj për Organizimin dhe Funksionimin e Gjykatave për Krime të Rënda [Law on the Organization and Functioning of the Serious Crimes Courts of the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 9110, Jun. 24, 2003.

[24] Ligj për Disa Shtesa dhe Ndryshime në Ligjin nr. 8417, datë 21.10.1998, "Kushtetuta e Republikës së Shqipërisë" [Law on several changes to Law No. 8417, dated Oct. 21, 1998 "The Constitution of Albania"], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 76, Jul. 22, 2016.

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Nevertheless, the new Constitution, just as the old one, provides that the law constitutes the basis and the boundaries of the activity of the state,[25] that the Constitution is the highest law in the Republic of Albania,[26] and that the governmental system is based on the separation and balancing of legislative, executive and judicial powers.[27] It also provides a set of fundamental rights and freedoms for the Albanian citizens, the main rules for the organization and functioning of different state powers and main Albanian institutions.

Part IX of the new Constitution provides the main dispositions for the judiciary. Judicial power in Albania is exercised by the High Court, courts of appeal and courts of first instances.[28] The major Albanian judicial reform, which started last year, engaged national and international experts, governmental and non governmental institutions and the Albanian society as a whole. Drafting of the judicial reform's laws was done by the Special Parliamentary Commission for the Judicial Reform with the help of the Permanent Parliamentary Commission on Legal Matters, Public Administration and Human Rights. Laws no. 98/2016, dated 06.10.2016 "On the organization of the judicial power in the Republic of Albania" and no. 96/2016, dated 06.10.2016 "On the status of judges and prosecutors of the Republic of Albania"[29] which form part of the judicial reform, have already set important criterias on the independence of the judiciary in Albania. The following laws that will be enacted, such as those providing changes to laws no. 8588, dated 15.03.2000 "On the organization and functioning of the High Court"; no.9399, dated 12.05.2005 "On the organization and functioning of the National Judicial Conference", law nr.49/2012, dated 03.05.2012 "On the organization and functioning of administrative courts and judicial review of administrative conflicts",[30] will also constitute important instruments for the protection of such independence.

According to the new Constitution, High Court judges are appointed by the President of the Republic upon proposal of the High Judicial Council for a

[25] KS, *supra* note 22, art. 4/1.
[26] KS, *supra* note 22, art. 4/2.
[27] KS, *supra* note 22, art. 7.
[28] KS, *supra* note 22, art. 135.
[29] All new laws enacted recently within the framework of the justice reform.
[30] In force at the moment.

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term of nine years, without the right to re-appointment. The President of the Republic within ten days following the decision of the High Judicial Council appoints the High Court judge, with the exception when there are grounds of his or her insufficient qualifications or ineligibility in accordance with the law.[31] The decree of the President of the Republic to reject the candidate has no effect if the majority of the members of High Judicial Council vote against the decree. In such case, as well as if there is no pronunciation of the President of the Republic on the matter the candidate is considered appointed and starts the office term within fifteen days following the date of the High Judicial Council's decision.[32]

High Court judges are selected from the ranks of judges with at least thirteen years of experience. One-fifth of the judges are selected among recognized lawyers with not less than fifteen years of experience having worked as lawyers, law professors or lecturers, senior employees in the public administration or other practices of law. Candidates who are not judges must have an academic degree in law and should not have held a political position in the public administration or a leadership position in a political party in the past ten years before becoming candidate. Further criteria and the procedure for the appointment and election of judges are provided by law. A High Court judge continues to stay in office until the appointment of the successor, except in cases under Article 139, paragraph 1, subparagraph c), ç), d) and dh), which provide the end of term of the High Court's judge.[33]

Part VIII of the new Constitution provides the main dispositions for the Constitutional Court of Albania (hereinafter C.C.A.). Until 28th of November 2016 C.C.A.'s activity was regulated by its organic law no. 8577, dated 10.02.2000 which provided the rules for its organization and functioning. Law no. 99, dated 06.10.2016[34]. which entered in force on 28.11.2016, provides new

[31] Law no.84/2016 "On the transitional re-evaluationof judges and prosecutors"
[32] KS, *supra* note 22, art. 136.
[33] KS, *supra* note 22, art. 136. Article 139 of KS "The mandate of a High Court judge shall end, upon: a) reaching the retirement age; b) the expiry of the nine year term mandate; c) his or her resignation; ç) dismissed as provided in article 140 of KS (commits serious professional or ethical misconduct or is convicted with a final court decision for commission of a crime); d) establishing the conditions of inelectibility and incompability; dh) establishing incapacity to exercise the duties.
[34] "On several additions and changes to organic law no. 8577, dated 10.02.2000 "On the organization and functioning of the Constitutional court of Albania"

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criteria on the election of the judges of C.C.A, on the selection of the President of the Court, the parties that can present a constitutional claim and what cases C.C.A. can decide upon, on the disciplinary measures against constitutional judges, etc.

C.C.A. is different and separate from the ordinary court system and is the authority that guarantees the respect for the Constitution and makes the final interpretation of it.[35] It has the power to examine the constitutionality of norms passed by the Parliament and other normative acts. The Constitution itself does not place this court in the section dedicated to the judiciary,[36] but dedicates to it a special Part,[37] emphasizing the importance of this court. According to the new Constitution, the Constitutional Court consists of nine judges. Three judges are appointed by the President of the Republic, three by the Parliament and three by the High Court. The members will be selected among the three first ranked candidates by the Justice Appointments' Council,[38] in accordance with the law. The Parliament appoints the Constitutional Court judges by three-fifth majority of its members. If the Parliament fails to appoint the judges within thirty days of the submission of the list of candidates by the Justice Appointments' Council, the first ranked candidate will be deemed appointed. The judges of the Constitutional Court are appointed for a nine-year mandate without the right to re-appointment. As to the requirements to be selected as a constitutional judge, the Constitution provides that a constitutional judge must have a law degree, a minimum of fifteen years of experience as judge, prosecutor, lawyer, law professor or lector, senior employee in of public administration with distinguished merits in constitutional, human rights or other areas of law. The judge should not have held a political post in the public administration or a leadership position in a political party in the last past ten years before his/her candidature. One-third of the composition of the Constitutional Court is renewed every three years.

The Constitutional Court judge continues his office term until the appointment of the successor, except in cases provided by Article 127,

[35] KS, *supra* note 22, art. 124/1.
[36] KS, *supra* note 22, pt. IX.
[37] KS, *supra* note 22, pt. VIII.
[38] New institution provided in the new Constitution.

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paragraph 1, subparagraph c, ç), d), and dh) of the Constitution, related to the end of constitutional judge's term.[39]

The constitutional judge enjoys immunity regarding the opinions expressed and the decisions made in the exercise of their functions and duties as such, except if the judge acts based upon personal interests or malice.[40] When there is sufficient ground to believe that a constitutional judge has committed one of the criminal offences provided by Article 128 of the Constitution,[41] by request of the President or any member judge of the Court, the President, or the oldest judge in office term, when subject of the disciplinary measure is the President, can request initiation of disciplinary measures.[42] A Judge's term is suspended when such proceedings start, but also if he is charged with a criminal offence, or a security measure such as "imprisonment" or "house detention" has been taken upon the judge.[43]

The compatibility of a law or other normative acts with the Constitution or international agreements is examined by the Constitutional Court. In such cases C.C.A. can be set in motion by request of the President, the Prime Minister,[44] not less than one fifth of the members of the Parliament,[45] and the Ombudsman.[46] C.C.A. can also be set in motion for the verification of the compatibility of international agreements with the Constitution, prior to their ratification, or for revision of the Constitution. Recourse to the Constitutional Court in such cases can only be upon request of the President or not less than

[39] KS, *supra* note 22, art. 125.
[40] KS, *supra* note 22, art. 126.
[41] The Constitutional Court can decide on the dismissal of the constitutional judge if: a) it finds that the constitutional judge has acted in serious professional or ethical misconduct; b) has been declared guilty by final decision of a court.
[42] Ligj për Organizimin dhe Funksionimin e Gjykatës Kushtetuese të Republikës së Shqipërisë [Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 8577, Feb. 10, 2000 (as amended by Law No. 99 of 2016).
[43] *Id.* art. 10/ç.
[44] *The Prime Minister of the Republic of Albania v The President of the Republic of Albania* [2002] CCA 186, [2002] 192.
[45] *A Group of Members of Parliament v The Parliament of the Republic of Albania* [2007] CCA 36, [2007] 312; *One Fifth of the Members of the Parliament v The Parliament of the Republic of Albania* [2008] CCA 18, [2008] 226; *A Group of 31 Members of Parliament v The Parliament of the Republic of Albania* [2009] CCA 3, [2009] 24; *A Group of Members of Parliament v The Parliament of the Republic of Albania* [2010] CCA 9, [2010] 138; *One Fifth of the Members of the Parliament v The Parliament of the Republic of Albania* [2011] CCA 24, [2011] 380.
[46] KS, *supra* note 22, art. 134/1; Organic law, art. 49/1.

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one fifth of members of Parliament.[47] The Head of High State Audit,[48] any court, as provided by article 145/2 of the Constitution, any commissioner established by law for the protection of the fundamental rights and freedoms guaranteed by the Constitution, High Judicial Council and High Prosecutorial Council, organs of local government, organs of religious communities, political parties and other organizations, as well as individuals can present a request to C.C.A. only if they argue that there is a direct connection between the application of the norm and their interests.[49]

Article 145/2 of the Constitution provides that judges, in the exercise of their powers while deciding a case, may choose not to apply a law, application of which is necessary for the solution of the case, if they consider it to be unconstitutional. They suspend the proceedings and send the question to the Constitutional Court.[50] This recognizes the right of judges, at any stage of the trial, not to implement the law applicable to the case, when they believe it conflicts with the Constitution. Such constitutional control of laws is initiated by courts of the ordinary judicial system.

The acts issued by the Parliament are in this way controlled by the judiciary which serves to balance the legislative branch. This said, judicial independence in Albania has always been a strong argument in and out of the country.[51] The legislative measures of 2008 regarding the election of district courts' judges by the School of Magistrates were seen as positive. The establishment of clear judicial advancement criteria was seen as an objective framework for judicial promotion and hiring. Continuing of legal education, offered by the School of Magistrates, is considered as a positive step and has been mandatory since 2005.[52] Nevertheless, the overlapping competences of inspectorates of the Ministry of Justice and High Council of Justice regarding disciplinary measures against the judges, the election of court chancellors and other judicial staff by the Minister of Justice, and the low salaries of the judges and court personnel have been among the major concerns regarding the

[47] Organic law, art. 49/2.
[48] *The Chairman of the High State Audit v The Parliament of the Republic of Albania* [2007] CCA 19, [2007] 141.
[49] KS, *supra* note 22, art. 134/2; Organic law, art. 49/3.
[50] KS, *supra* note 22, art 145/2; Organic Law, art. 68.
[51] *See* the Progress Reports of the Venice Commission for Albania during years.
[52] ABA Rule of Law Initiative, Judicial Reform Index for Albania, vol. IV, 2008, 9.

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independence of the judiciary in Albania,[53] which led to the new changes on the Constitution of Albania. The new laws, such as The Vetting Law,[54] provide new criteria on the evaluation of judges and law clerks, such as their knowledge, their assets, and their image.[55]

The case law of C.C.A., in recent years, shows that judicial independence has been brought to its (C.C.A.'s) attention many times, the most important cases being the ones of 2011-2012 regarding the election of new constitutional judges. According to Article 9/2 of C.C.A.'s organic law, the termination of the constitutional judge's term is declared by a decision of the C.C.A. In 2010, C.C.A. declared the end of term for three constitutional judges. At the time when C.C.A. was supposed to be renewed by one-third, the President of the Republic, on the 6th of September 2010 sent to the Parliament four decrees for the nomination of the new members of the Constitutional Court. While examining the applications and the career of the individuals presented by the President to be future constitutional judges, a number of members of Parliament, as provided by article 134/c of the Constitution, filed a case with the C.C.A. regarding the interpretation of the articles of the Constitution that provide the renewal of C.C.A. In its decision, dated 09.06.2011 regarding this case,[56] C.C.A. held that:

> The President and The Parliament, in the exercise of their constitutional powers, are the first to interpret the constitutional norms. If C.C.A. would have to decide on the criteria to be met by a candidate, this would lead this Court to take on constitutional competences of each of these bodies. In this regard, the President and the Parliament, based on the principle of constitutional loyalty, must work together to determine the legal criteria, in accordance with the constitutional requirement for high qualification of the

[53] *Id.*
[54] Ligj për Rivlerësimin Kalimtar të Gjyqtarëve dhe Prokurorëve në Republikën e Shqipërisë [Law on the Transitory Reevaluation of Judges and Prosecutors in the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 84, Aug. 30, 2016. The constitutionality of the Vetting Law is currently being revised by the Constitutional Court of Albania. C.C.A. asked the Venice Commission an amicus curiae on the law.
[55] Whether or not, in any way, they have connections with criminal organizations, or groups, etc.
[56] *A group of Members of the Parliament v The President of the Republic, The Parliament* [2011] CCA 24, [2011] 380.

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> candidates. This is necessary to provide a qualitative composition of the Constitutional Court". After such decision of C.C.A., the Parliament decided not to further review the decrees of the President of the Republic for the appointment of the members of C.C.A. until April 2013 as, according to the Parliament's Commission on Legal Affairs, Public Administration and Human Rights, this Court had no vacancies to be filled.

Even though the President required the Parliament to carry on with the election of the constitutional judges, the Parliament still did not act. According to a letter of August 2011 from the Parliament of the Republic of Albania to the President of the Republic, the reelection of the new constitutional judges was a closed matter until April 2013, time at which the vacancies on the Constitutional Court for the election of three judges would reopen. In October 2011 the President filed an application to the C.C.A. for abrogation of such decision of the Parliament. On 21 April 2012, one of the constitutional judges, whose term was declared terminated by decision of the C.C.A., resigned. C.C.A.'s composition was left with eight judges instead of nine.

In its decision, dated 19.07.2012 regarding the second case,[57] C.C.A. held that:

> The solution on the situation between the President and the Parliament, namely the resolution of disputes of competences between the two bodies, cannot be found by means of constitutional control . . . . C.C.A. cannot suggest or refuse the way or the means used by the legislator to fix the issue . . . . This is out of the role of constitutional control and as such cannot be included in the scope of its discretion. The Court has already emphasized the role and responsibility of the two constitutional bodies, the President and Parliament, in view of the constitutional loyalty during the process of appointment of new members.

[57] *The President of the Republic v The Parliament*, [2012] CCA 41, [2012] 571.

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Three constitutional judges presented their views on the case on their dissenting opinions. The constitutional judge, who later resigned from office, in his dissenting opinion on the case held:

> Under Article 12/5 of the Constitution the constitutional judge whose term has ended remains in office until the arrival of his successor, but this can only last for a reasonable period of time, needed for the appointment procedures of the new judge. The extension of term of the constitutional judge, after the end of his mandate, cannot be as long as to constitute consumption of a substantial part of a second 9-year term.[58] In accordance with the spirit of the Constitution, the continuation of the office term of the constitutional judge, until the appointment of his successor, means respecting three preconditions: 1. the President and the Parliament must exercise their will through respective acts, within the powers given by the Constitution; 2. these bodies must act within a reasonable time and under transparent procedures which clearly define the timeframes necessary for the normal closing of the appointment procedures for the new judge; and, 3. the continuation of the office term of the constitutional judge is to be understood and implemented as a continuation within a reasonable time. A long extension of the office term, after the end of the mandate . . . . although it is not functionally equivalent to a reappointment, legally threatens to resemble a reappointment, in violation of Article 125/2 of the Constitution.[59]

Another much discussed issue on the independence of judges was the one regarding the law on judicial administration.[60] According to such law, the Minister of Justice was in charge of drafting the organic structure of the

[58] *See* Brunilda Bara & Jonad Bara, *Constitutional Court and Constitutional Review in Albania,* 7 ICL Journal, no. 2, 2013, at 216, 217.
[59] *Id.*, (Justice Berberi dissenting).
[60] Ligj për Administratën Gjyqësore në Republikën e Shqipërisë [Law on Judicial Administration on the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 109, Apr. 1, 2013.

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administration of the courts.[61] He was entitled to draft and supervise the politics on the organization and functioning of the judicial administration, the general criteria for their performance and work methodology, the internal rules on the functioning of the administration, and the disciplinary measures, judicial databases, etc.

The case of the constitutionality of such law was presented to C.C.A. by the Union of Judges of Albania (hereinafter U.J.A.). According to U.J.A.'s arguments, the independence of the judiciary must be understood as a substantive, organizational, functional and financial independence.[62] Substantive independence refers to the independence of the judges to to arrive at their decisions without submitting to any inside or outside pressure. Organizational independence consists on the right to draft and select, in accordance with established criteria, the internal administrative structure of the courts, such as recruitment of personnel at various levels, appointment of law clerks, etc.[63] Functional independence is strictly connected to the activity of the institution, activity which is self regulated by these organs and based on constitutional provisions. Each organ has the right to decide freely and independently. No organ can intervene on matters that, according to the case, constitute part of the activity of other constitutional organs or institutions. Financial independence implies the right to propose to the Parliament the annual budget, and, more specifically, the right to independently manage such budget, in accordance with the law. As the activity of the administration of the judiciary is strictly related to the everyday work of the judges, the right of the Minister of Justice to decide on all the above mentioned issues was considered by U.J.A. as an intervention on the function of the judiciary. Nevertheless, this law was abrogated by C.C.A.[64]

Another similar case was the one presented to C.C.A. in 2009 by the National Association of Judges (hereinafter N.A.J.). Law no. 9877, dated 18.02.2008 approved by the Parliament, provided for, among other things, the appointment of the chancellor of the court by the Minister of Justice and his

[61] *Id.* artt. 7, 13.
[62] *Chairman of the High State Audit, The Ombudsman v. The Parliament, etc.* [2007] CCA 19, [2007] 141;, *The Union of Judges of Albania v. The Parliament, etc.* [2012] CCA 5, [2012] 51.
[63] *Id.*
[64] *The Union of Judges of Albania v. The Parliament, etc.* [2014], CCA 10, [2014], 160.

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right (of the chancellor) to appoint or discharge the judicial secretarial personnel and administrative and technical services of the court. N.A.J. argued that the prerogative of the judiciary is to administer justice and the competences given to the chancellor constitute an interference of the executive on the judiciary. According to N.A.J., one of the most important tools for the protection of the independence of judicial institutions or organs is the proper designation of mechanisms or procedures regarding the election, appointment and discharge not only of judges, but also of other administrative staff such as the chancellor or administrative and technical personnel. This is important to guarantee the three components of judicial independence: organizational, functional and financial. The fulfillment of the legal and constitutional functions of such institutions can only be achieved by respecting each component of the independence.[65]

In its decision,[66] C.C.A. held that during the exercise of their activity judges are subject only to the Constitution and the laws. They must ensure the fulfillment of the rules provided in the Constitution, laws and other legal acts and guarantee the rule of law and the protection of individuals' rights and freedoms. Independence means autonomy. The autonomy of the judiciary includes the way the courts arrange their work and activities and even a special budget, which is self administered. The Constitution prohibits any kind of interference on the activity of the court or judges.[67] The term "activity" is strictly related to the function of the courts, which is that of bringing about justice. The independence of the judiciary is also provided for in a large number of international documents, such as: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights (E.C.H.R.), Basic Principles on the Independence of the Judiciary adopted by the U.N. Assembly, Recommendation for the Independence, Efficiency and the Role of Judges adopted by the Committee of Ministers of the Council of Europe, Universal Charter of the Judge, etc.

[65] *National Association of Judges v The Parliament, etc.*, [2009] CCA 20, [2009] 224.
[66] *Id.*
[67] KS, *supra* note 21, art. 145/3.

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At the end of the constitutional proceedings, C.C.A. abrogated the provision of the law referring to the discharge, by the chancellor, of the judicial secretarial personnel and administrative and technical services of the court.

Another important case on the independence of the judiciary, filled with the C.C.A. by U.J.A, concerned the transport service for public officials such as judges of the Constitutional Court, judges of the Supreme Court, the Chairman of the Court of First Instance and the Chairman of the Court of Appeal. In its decision, C.C.A. held that the independence of the judiciary, as part of the rule of law, includes a wide range of aspects, which, taken together, create the necessary conditions for the fulfillment of the role and duties of courts, especially regarding the protection of human rights. Some of these aspects are financial, but C.C.A. considered that even other aspects, such as:

> Determining the number of vehicles and drivers, ... protocol status, diplomatic passports and other elements, ... constituted constitutional standards of institutional independence. Consequently, the interference of legislators and the executive . . . . was considered in violation of Article 7 and 144 of the Constitution.[68]

In 2009, U.J.A. considered as interference on the judiciary and its rights the provisions of law no. 9877, dated 18.02.2008 "On the organization and functioning of the judicial power in the Republic of Albania" concerning judges' 30 calendar days of annual paid leave. According to U.J.A., the Constitution provides that: "Judges' term cannot be limited, their salary and other benefits cannot be reduced".[69] The new law of 2008, which changed the law of 1998, provided thirty calendar days of annual paid leave, which did include Saturdays and Sundays. The words "30 calendar days", which replaced the words "30 days" of the previous law on the judiciary, had interfered with the benefits that the judges received.[70]

[68] *The Union of Judges of Albania v The Parliament, etc.*, [2010] CCA 11, [2010] 211.
[69] KS, *supra* note 21, art. 138.
[70] The term "30 days" was interpreted by the judges as it did not include Saturdays and Sundays.

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In its decision,[71] C.C.A. concluded that the words "30 calendar days", in their literal meaning, and also in the meaning prescribed for such terms by the Vocabulary of Today's Albanian Language[72] did not make any changes to the days of holidays to which the judges were entitled to. The first law of 1998, as well as the 2008 law on the judiciary, provided for thirty calendar days and they did include Saturdays and Sundays.

After the entry in force of the new Constitution of Albania and the justice reform, the Parliament enacted law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania", also known as The Vetting Law, which became one of the most discussed laws in Albania following the justice reform. The case of the constitutionality of this law was presented to C.C.A. by one-fifth of the members of the Parliament, who considered the law to be in violation of constitutional principles such as the check and balance, legal certainty, independence of the judiciary and the prosecution, due process of law, individual's right to an effective remedy, right to a private life, etc. The members of the Parliament were joined, in their request for the unconstitutionality of the Vetting Law by the Union of Judges of Albania.[73]

In October 2016 the Constitutional Court of Albania addressed the Venice Commission with an amicus curia on the case, asking the Commission whether the participation of the constitutional judges, also subject to the Vetting Law, in the examination of the case would be considered as a conflict of interest; whether the law respected the fundamental principles of the rule of law and the separation and balancing of powers and whether the independence of the judiciary was endangered by the involvement in the process of re-evaluation of judges and prosecutors of the organs under the control of the executive power; and whether denial of the right of judges and prosecutors

[71] *The Union of Judges of Albania v The Parliament, etc.*, [2009] CCA 31, [2009] 390.
[72] Albanian Academy of Science, Language and Literature Institute, *Fjalor i Gjuhës së Sotme Shqipe (Vocabulary of Today's Albanian Language)*, Toena Publishing (2002).
[73] On 26.05.2017 the Union of Judges of Albania and the National Association of Judges of Albania filed a complaint with C.C.A. on the constitutionality of the Albanian Vetting Law and 2 other important laws of the justice reform. C.C.A. decided to hold a hearing on the case but a date has not been set yet. The parties were asked, until 22.06.2017, to file their written submissions on the case.

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subject to the law on re-evaluation to be addressed to domestic courts was contrary to Article 6 of the E.C.H.R.

In its opinion no.868/2016 on the case the Venice Commission held that the Constitutional Court had to choose between two alternatives. Either it had to exclude the possibility of a judicial review of the vetting legislation, since a regulation of the conflict of interest was missing in the Vetting Law, or it had to recognize the basic importance of the guarantees ensured by a functioning judicial review of legislation and deal consequently with the case submitted to its judgment.[74] Concerning the issue of conflict of interest and the possible disqualification of constitutional judges, the Venice Commission underlined that all the constitutional judges, according to the Constitution and the Vetting Law, would be subject to the Vetting Law which provides for the re-evaluation of every judge in Albania including the judges of the Constitutional Court. Therefore, the possible conflict of interest could affect the position, not only of one or some constitutional judges, but of all the constitutional judges sitting at the Constitutional Court. Consequently, the disqualification of the constitutional judges because of the existence of a conflict of interest would result in the total exclusion of the possibility of judicial review of the Vetting Law in view of its conformity to the Constitution. This would undermine the guarantees ensured by a functioning judicial review of legislation. This situation could be considered by the Constitutional Court as an "extraordinary circumstance" which may require departure from the principle of disqualification in order to prevent denial of justice.[75]

On the question whether judicial independence was endangered by the involvement, of the organs allegedly under the control of the executive power, in the process of re-evaluation of judges and prosecutors, the Commission held that, despite the involvement of executive bodies in the investigation process and the initial research for evidence, the evaluation and assessment of any information or evidence gathered by them rested with the newly created constitutional bodies which possessed both the characteristics of judicial

[74] CDL-AD(2016)036, *Amicus Curiae Brief for the Constitutional Court of Albania on the Law On The Transitional Re-Evaluation Of Judges And Prosecutors (THE VETTING LAW)*, Adopted by the Venice Commission at its 109th Plenary Session (Venice, Dec. 9-10, 2016), p. 18 http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)036-e .
[75] *Id.*, at 61

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bodies and had the power to verify themselves the evidence gathered by the executive organs. On this basis, it held that the Vetting Law did not seem to amount to an interference with the judicial powers.

According to the Commission, it is quite normal and in line with European standards that the evidence presented to a court of law is initially obtained by executive bodies such as the police or prosecutor. Provided its evaluation, i.e. the assessment of its veracity and the weight to be attached to it is a matter for judicial determination, this does not amount to an interference with the judicial power.[76] The bodies involved in the vetting process have instrumental and subservient functions aimed at helping the new institutions to carry out their difficult mandate. Decision-making power in all cases appears to remain with the Independent Commission and Appeal Chamber, established for this purpose in accordance with the provisions of the Constitution as independent and impartial judicial bodies.[77]

As to the question of C.C.A. on the comformity of the law with Article 6 of the E.C.H.R. regarding the right to fair trial,[78] the Commission held that the provisions of the new Constitution provided sufficient elements to conclude that the newly created constitutional bodies presented judicial guarantees for the judges and prosecutors undergoing the vetting process and the rights and safeguards contained in the legislative and constitutional scheme seem extensive. In its decision dated 18.01.2017 on the case, by a majority of votes, C.C.A. held the Vetting Law was in accordance with the Constitution of Albania.[79]

In addition to the independence of the judiciary from the legislative and the executive, other much discussed issues in Albania are the independence of the judiciary from the parties to the case; additionally, when it comes to cases regarding members of the Parliament or the government, many court decisions are viewed as political.

Because the perception of the corruption of the judiciary still remains widespread not only by the public, but also by the media, and the cases of

[76] *Id.*, at 36.
[77] *Id.*, at 38.
[78] Question 3 of the *Amicus Curiae*
[79] *Not less than 1/5 of Members of Parliament, Union of Judges of Albania v The Parliament*, [2017] CCA 2.

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judges prosecuted for corruption being rare, as many Albanian constitutionalists had previously suggested,[80] our system needed radical changes. The new Constitution and the new institutions provided therein hopefully will strengthen the rule of law in Albania and public's trust in the Albanian judicial system. Nevertheless it is up to the courts and state institutions to emphasize its importance and to obey the rule of law, while at the same time guaranteeing the respect for an independent judiciary.

4. CONCLUSIONS

The challenge for emerging democracies is to build public confidence in the belief that a body politic is firmly founded upon the rule of law. Such confidence is established where citizens know that they are protected against state interference other than 'in accordance with law'; that no one, regardless of position, is above the law and that the law itself is transparent and fair. Judges uphold the rule of law by acting as fair and impartial arbiters of disputes and by conducting trials on legal grounds only and without any improper influence. Judges can only fulfill this important public service if there exists secure structures which protect their internal and external independence thereby enabling them to decide "without fear or favor, affection or ill-will".[81]

An independent judiciary is, therefore, the key to upholding the rule of law in a free and democratic society. No other organ of state carries out the crucial function of fairly and impartially resolving disputes between individuals and the State in accordance with law. The independent judge is there not just to uphold the rights of the individual but "to strike a balance between the rights and freedoms of the individual and the protection of the rights and freedoms of the community". Where that balance is not struck fairly

[80] Kristaq Traja, Speech at Sheraton Hotel Tirana on the Occasion of the 15th Anniversary of the Constitution.
[81] Ann Power, Judge of the European Court of Human Rights, Int'l Bar Ass'n Conference, *Judicial Independence and the Democratic Process: Some Case Law of the European Court of Human Rights* (Sep., 2012), 2.

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and impartially, the seeds of resentment, bitterness and discord are cultivated and peace, which can only be founded upon justice, is jeopardized.[82]

The principle of independence of judges was not invented for the personal benefit of the judges themselves, but was created to protect human beings against abuses of power. It follows that judges cannot act arbitrarily in any way by deciding cases according to their own personal preferences, but that *their duty is and remains to apply the law.* In the field of protecting the individual, this also means that judges have a responsibility to apply, whenever relevant, domestic and international human rights law.

Only an independent Judiciary is able to render justice *impartially* on the basis of law, thereby also protecting the human rights and fundamental freedoms of the individual. For this essential task to be fulfilled efficiently, the public must have full confidence in the ability of the Judiciary to carry out its functions in this independent and impartial manner. Whenever this confidence begins to be eroded, neither the Judiciary as an institution nor individual judges will be able to fully perform this important task, or at least will not easily be *seen* to do so.[83]

Judicial independence and judicial supremacy work together in an attempt to guarantee that the rule of law will not be eroded by the political pressures in existence at any particular point in time. By removing the ultimate interpretation of constitutional provisions from elected officials, the principle of judicial supremacy reduces the likelihood that basic legal protections will fall victim to the passions of the moment. Insulating judges from political influence advances the same objective.[84]

The justice reform going on in Albania aims for a total reformation of the judicial system and the functioning of the courts in Albania, including the Constitutional Court, placing important criteria on the selection not only of the judges, but also of the law clerks, emphasizing the importance of the

[82] *Id.*
[83] *See* U.N. Office of the High Commissioner For Human Rights and International Bar Association, *Human Rights in the Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers,* 115, Professional Training Series No. 9 (2003).
[84] *See* David Boies, *Judicial Independence and the Rule of Law*, 22 Wash. U.J.L.Pol'y 57, 58 (2006).

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independence of the judiciary, moving forward to Albania's integration in the European Union.