



State of Law and Human Rights in the Republic of Albania

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Abstract: Upon the fall of communist dictatorial regime in Albania, there were created the possibilities for the theoretical-practical discussion on the state of law and human rights.

At one side the state of law provides to the individuals to live in a democratic environment where law prevails, and at the other side stand the human rights which are rights that protect the individual and enable them to live protected by the state arbitrage, or any other authority. In this paper, we will treat the general framework presented by the state of law in Albania stopping in some important moments such as Decisions of Constitutional Court of the Republic of Albania. 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 improval 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: state of law, law, international acts, constitution, human rights, Constitutional Court, individual.

1 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 every one. 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 law¹.

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 contempered 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 german origin (Rechtsstaat) in the beginning of the XX century, as a “State where the juridical norms were hierarichal in the way that its power is limited”. In this model, every norm takes its validity in accordance with the above norms.

Te state of law may be summarized according to the formula “No one stands above the law”. Generally this regime groups 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 1) made public, 2) no one can be saved from them 3) they must be really applied and 4) the violation of laws must bring sanctions.

Te 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 conscios 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 warrant the fundamental human rights and freedoms, with th 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.....

Than, in the article 3 it is provided that:

1 Loloci Krenar, The new constitution and the need for a new mentality, Publishing House Horizont, Tiranë, 2002, p. 17

2 Zaganjori Xhezair , Democracy and Rule of Law, Publishing house Luarasi, Tiranë, 2002, page 79

3 Chantal Millon-Delsol, The political ideas of twentieth- century, Publishing House Onufri, Tiranë, 2000, page 243.

“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.....”

While 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.

1.1 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 as election system and acts in its application.

⁴ Biba Denar, Zaganjori Xhezair, Implementing the rule of law in Albania, “Political Thought”, N. 32, Shkup, 2010.

1.1.1 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 organizative 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, lbalance and reciprocally control each-other, based in the constitutional and legal norms. The central idea is that by developing free elections nad by applying the principle of democrtatic legitimacy, the whole state power is organized in such way to be set and exercised by different mechanisms⁶. There a legislative power which is normaly 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.

1.1.2 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.

5 Schmitt Carl., Constitutional Theory, Duke University Press, London 2008, page 220.

6 Omari Luan, State of Right, Academy of Sciences of Albania, Publishing House LILLO, Tiranë, 2002 page 99

The decision no. 75/2002⁷, has as its object the interpretation of the articles 128, 140 and 149/2 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 Consitution Court, defined and consolidated several elemens of the regular legal process, the absence of which devaluate the procedures and the decisions made by every body. Te 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 warrantiy 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.

1.2 Principle of Constitutionality and Legimacy

1.2.1 Constitutionality

Constitutionality implies the wholness 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 ontly its formal element but also also the application of the idea of the people sovranity and limitation of absolutism. Therefore the second element, the

⁷ Decisions of the Constitutional Court of the Republic of Albania, Publishing House Dita 2000Tirane, 2005, page 71.

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.

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 cinstitution order. The constitutionality of laws and sublegal acts must be protected form abuses which are approached from the legislative bodies, courts, and political bodies.

1.2.2 Legality principle

The right constitutes the basis and limitations of the state activity⁸ and all the acts must be in accordance with the law⁹. Formaly it indicates the compability 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. Te 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 law¹⁰. The bodies of the public administration develop their activity in accordance ith the Constitution of the Republic of Albania, international agreements, laws inside the borders of the competences conferred in concormity of the aim they were conferred.¹¹. the application of the legality principle is a condition for the

8 Article 4/1 Constitution of Republic of Albania, Publishing House AlbJuris, Tiranë, 2014

9 Article 118 Constitution of Republic of Albania, Publishing House AlbJuris, Tiranë, 2014

10 Article 116 Constitution of Republic of Albania, Publishing House AlbJuris, Tiranë, 2014

11 Sadushi Sokol, Theory of Administrative Act, Publishing House Iliria, Tiranë, 1999, page 174

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 law, support in laws of all the activities and procedures not only of the organizational 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 for 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:

1.2.3 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.

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 removed upon other administrative acts.

1.3 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. Requires the annulemtn or change of an administrative act;
 2. Is 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 court¹². This right is sanctioned in the article 42 point 2 of he Consttution 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.

Te administrative court does not review the disagreements, related to the normatice 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

12 Sadushi Sokol, Theory of Administrative Act, Publishing House Iliria, Tiranë, 1999, page 68

is an equal public body. In case of the raise of these lawsuits the court mainly makes the decision to issue the case outside its jurisdiction or to announce its non competence and to submit the acts to 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, but decides on administrative cases. As a rule, this is the function of administrative court.

1.4 Legal Security

Legal security as a constitutional concept includes the clarity and sustainability of the normative system. This principle includes among other things the faith in the legal system, without being committed in the warranty of non changing a favorable situation. This principle is sanctioned in the preamble of the Constitution of the Republic of Albania¹³... the state of law, which is guaranteed in the preamble of the Constitution, is one of the most important fundamental principles of the 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 regulations deal with the rights of the citizens. As a rule no interest can be denied and legal acceptance of 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 in the judicial

13 Decision 34/2005 of Constitutional Court of Albania, Publishing House Dita 2000, Tiranë, 2005

system, without undertaking the warranty of any expectation for non changing a favorable legal situation.

The principle of legal security is also a very important element of the state of law. Correctness, clarity and sustainability are considered as its main formal standards. On the other hand, as the main standards in the material meaning are considered the non 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 state¹⁴.

1.4.1 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, if 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 vacuum, 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

1.5 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 voluntas but more as ratio¹⁶

14 Zaganjori Xhezair, Democracy and Rule of Law, Publishing house Luarasi, Tiranë, 2002

15 Decision 31/2003 of Constitutional Court of Albania, Publishing House Dita 2000, Tiranë, 2004

16 Schmitt Carl, Constitutional Theory, Duke University Press, London 2008, page. 182

The state of law form the material point of view guarantees:

- Freedom of every individual protecting them with the constitution and without violating the rights 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 defence, non judgement more than once for the same offence, the right to be heard, non punishment without law etc)

2 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 from 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 UNO to protect and respect them.

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

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".

2.2 Some problems of human rights

The fundamental problem regarding human rights is still the wide spread corruption in all the governance branches and in the judicial system. Other problems related to the human rights include domestic violence, violence from the police and maltreatments of every kind during the investigation, conditions of the prisons, a non efficient judicial system under the political pressure and abuse with children. It is still a problem the children of streets and the displaced ones, especially the ones of the Rome community. The abuse with the Roma 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.

2.2.1 Prevention of torture and other inhuman treatments

Starting from 1993 the Republic of Albania is part of the Convention against torture and other cruel, inhuman treatment. The constitution highlights that no one can be submitted to torture and other inhuman 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 inhuman 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, non 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 were very different from one center to another. The old facilities had insufficient water supply, cleaning, airing, and light and health care. The old facilities 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 stations 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 raised the disturbance regarding the situation of overpopulation and addressed several recommendations to the Ministry of Justice and to the stations. According to the ombudsman, 1340 people sleep on the floor or on shifts, and many without any blanket. 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. Above the official capacity of 4537 persons, the overpopulation is at the extent of 1340 persons, who sleep on the floor, with no blanket or on shifts¹⁷. 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.

From the inspections performed in 21 police units who areas of detention, a considerable number have resulted to be overpopulated, over the official capacity. There were ascertained cases of person with security measure that continued to stay 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.

17 Annual Reports of Ombudsman of Albania, Report 2014, <http://www.avokatipopullit.gov.al/en/reports>

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 cases 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 their were punished later this time was calculated as service time.

3 Conclusions

The state of law is a basic and important principle for the existence of the democratic state. There are no different 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 totalitary 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. Te last years it has a main role in developing the concept on legal security as an important element of the state of law.

Eventhough 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.

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