

## ON THE CROSSROAD BETWEEN THE LEGALITY AND LEGITIMITY - THE PERSPECTIVES OF THE RULE OF LAW IN THE TRANSITIONAL SOCIETIES

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**Abstract:** Most Balkan countries in their development have gone through establishments, that called themselves "national" and "humane". But after their collapse, a lot of the people faced with the harsh reality that in this country, individualism was suppressed by state and party collectivism. The law in such circumstances was not directed at the establishment of justice, but in the interest of the party elite and at the expense of disavowing the basic freedoms and rights of the people. This has left lasting consequences in the further development of these countries. The transition to democracy and the rule of law for their citizens was a painful experience, filled with ethnic conflicts, partocracy, highly dubious transformation of property, a living standard on the edge of existence, selective justice and captured judiciary, migration processes of young people to more developed countries and numerous other negative phenomena that marked their long transitional period of a path to a more just society. Such experiences have called into question the development perspectives of most Balkan countries for evolving into real civil societies, where law will be in the service of justice and citizens.

**Keywords:** Transition societies, legality, legitimacy, rule of law.

### 1. INTRODUCTION

“Democracy is always in danger, when those who have not learned to listen receive the right to command”  
(Wild, Oscar)

Non sub hominem, sed sub Deo et lege<sup>262</sup> - this expression best describes the law as a protector of the rights and freedoms of people from the arbitrariness and power of any individual or institution in society. The combat for legality takes a significant place in the political and legal history of mankind. It is inextricably linked to the struggle for democracy and the realization of human rights. The fundamental freedoms and rights of human and citizen are guaranteed as the fundamental values of every social order and they should be protected from any arbitrary power of authority. Their confiscation or restriction is impossible, except in cases provided for in law and in court proceedings. Rule of law is an essential prerequisite for civil society, and vice versa, his absence weakens his democratic character. Therefore, the basic normative principle on which democratic countries should be based is to create equally applicable laws for all and equal protection under the law.

But it is very difficult to build a democracy and a state of law on the traditions of mono-party politics and unity that until recently existed in most Balkan countries. The most important question for these societies is to choose what order they will build in the future -by preserving and maintaining the power of the new elites or through greater civic participation in creating public policies ?! Is it possible to create a civil society in which the "higher interests of the party" and other centers of power are replaced by the "higher interests of the citizens" ?! Is it just enough to change the establishment and the laws, or is it necessary to change and to the awareness of the citizens about the need for the rule of law ?! And will this right contribute to greater fairness in these countries ?! The answers to these questions depend on the development perspectives of most Balkan states - to remain stuck in the endless transition or to accept the values of the developed countries and to engage in the contemporary world trends.societies.

### 2. FROM LEGALITY TO LEGITIMITY - DETERMINING THE TERMS

“Good people do not need laws to tell them to act responsibly while bad people will find a way around the laws”  
(Plato)

How to define a legal state? The legal state is a set of certain institutions that participate in the creation and application of the law, as well as a quality system of legal norms. This definition imposes the following questions

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<sup>262</sup>"Not under the people, but under the God and law" or in a free translation - "Do not obey people, but to God and laws", Latin proverb, [dict.cc | Non sub homine sed sub Deo et lege | English-Latin Dictionary](https://enla.dict.cc/?s=Non+sub+hominem+sed+sub+Deo+et+lege)  
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and dilemmas. First, what is it that a regime makes it not only legal, but also legitimate ?! Weber puts forward the thesis that a certain order is "legitimate" if the majority of the citizens recognize it as such. Their number is irrelevant, if the rest or minority in society does not express its dissatisfaction and does not oppose it with its own notion of an alternative order. And Tadic thinks that one power is legitimate, if the majority accepts it with an explicit or silent consent (Tadic, 1998, p. 91/92). According to them, the legality and legitimacy of a regime depends on numerical indicators, that is, from the "majority of citizens". If the "majority of citizens" have a consensus that a regime is legal and if they agree with the existing system of values, then they will act within its framework, thus confirming its legitimacy. Conversely, if there is no majority agreement for that regime, the danger of the change of that establishment will always be present.

This understanding is acceptable only in the part, which points to the interconnectedness and dependence between legality and legitimacy. It is true that these conditions must exist together in a society if its political system wants to ensure its existence. It is also true that the support of the majority is an important factor for the survival of the regime. But does this make the regime more legal or, more importantly, more legitimate ?! Whether totalitarian systems are legal, just because they are based on legality. Certainly not, because their laws promote people's and collective rights, at the expense of civil and individual rights. Such a government is truly legal, but for the citizens it is illegitimate. Therefore, those citizens will oppose such authority.

In this respect, the very term "majority" is debatable. No government, however desirable it can be, is legitimate for all groups in society. On the other hand, the "majority" is not once given and permanently unchangeable category. On the contrary, depending on the circumstances, the consent given by the majority to the regime for an issue can already be changed tomorrow and may be withdrawn tomorrow. Moreover, with the help of pressures or propaganda, not only a "majority" but also a high degree of "consensus support" of the population can be acquired, so that all legal acts or activities according to this criterion would have a high degree of "legitimacy". Moreover, over time and those who disagree with those laws, they will apply them, precisely because of the so-called. "Tyranny of the majority". There is no order, regardless of whether it is democratic or autocratic, where there is no discrepancy between justice and law (Arent, 1990, page XV). The relation between legality and legitimacy can not be seen abstractly, as an ideal type, but depending on the existing circumstances.

Therefore, it is more appropriate to appreciate the legality and legitimacy of any social order, not by numerical but by humanistic criteria. One power expresses its power in a legitimate manner, if it reflects the interests of all citizens. The more it contributes to improving the everyday life of citizens as individuals and the whole society, from every aspect - human rights, social protection or economic well-being; the more it will be accepted and legitimate for most of society. If the power is fulfilled through domination, citizens will "accept it" as legal, only as a result of their own inability to oppose (Levi, 1998, p. 87-93). It is that distinction between the credibility of the government and the need for adequate reciprocity of the citizens. People accept those laws that they feel are being applied in an unbiased manner and in their favor. And vice versa, until the crisis in legitimacy comes when the system can not solve the problems of citizens. Then there is a decline in their loyalty, leading to dysfunction and disintegration of the system itself (Jürgen Habermas, see Tadic, 1988, p. 92).

Apart from the "majority" criterion, the rule of law is defined as a state will, expressed in legal rules, for which enforcement, the government has the legitimacy to apply any mechanisms, and force. But the advocates of these theories demand a limitation of power, even when permitted by law. According to them, the government must be subordinate to the law. In it, the right and the power should be approaching, that is, the force should be in the service of law. Forcing is a means of achieving law, and the state is "a lawful force" and "a rightly established political power" (Blaise Pascal, see Tadic, 1988, page 12). A legal state exists only if there are effective means, with which the state allows the application of the law, but at the same time prevents violation of the freedoms of the citizens. A state that pretends to be legal and righteous should allow man to be a citizen - individual, not a subject who has lost individuality.

The basic rule of a real legal state means - the protection of the rights and freedoms of citizens, whether they are violated by the institutions of government or by other individuals. This means that not only the institutions of the state, but also the freedoms of citizens must not be unlimited, because as such they can be misused to the detriment of other citizens. In a democratic arrangement, where each individual will equals the will of others, the legal rules and the moral judgment of others for one's actions should be at the same time as the highest social categories. All individual wills and even the will of the state should be subject to them. In that case, legality intertwines with

legitimacy and, except for legal, it can be a matter of a righteous state or, moreover, a just society based on mutual respect.

### 3. LAW IN SERVICE OF THE POWER - RULES OF LAW IN THE BALKAN COUNTRIES

"The more corrupt the state, the more numerous the laws" -  
Tacitus

The transition from the previous one-party to a democratic order created optimism in the Balkan countries. However, this transition did not fully meet the expectations of all citizens. The overwhelming role of the parties and other informal centers of power led to the dependence of the citizens on them, due to which the guaranteed freedoms and rights were not fulfilled in the expected way. Below the surface of the concept of democracy and civil society a number of negative phenomena have emerged, such as: clientelism, partisanship, social uncertainty and the relativization of the legal state with informal law. This led to a deficit in democratic and social development in all spheres of these countries and created a hybrid society with undefined relationships. Instead of a rule-of-law state in which the power of law rules, a captured state is derogated from the law of power. The Balkan countries are characterized by "... the domination of collectivism on individualism and the state against the citizens ... because of which civil society is weak and dependent" (Schöpflin, G. 1993, p.19). Instead of rights for citizens, they have gained "rights" or, more precisely, power for themselves.

In most debates on the democratization of Balkan societies, the importance or the need to establish effective institutions and legal mechanisms for the consolidation of democracy are not taken into consideration sufficiently. The biggest problem in these countries is not a transition to democracy, but a transition to a legal and legitimate state.

Respecting the laws in a society is a confirmation of its democracy, as well as the rule of law in it. At the same time, their intensity and selective application can be an indicator of its normative weakness. Proof of this are the Balkan countries, where numerous laws are being adopted and applied. But their source is not the will of the citizens, but the will and interests of the centers of power. This confirms the truth that the number of laws does not make these societies more legitimated, that is, legality does not always bring justice to the common man.

The main intention of the democratic changes in the social order in these countries was precisely that - to restore the primary role of law to citizens as individuals, not to the protection and legalization of any new "majority", collectivity or in relation to new carriers of power. Or, to put it differently, to enable citizens to express their individual will and as a common, social will to establish it in legal regulations, which will regulate their lives.

But despite efforts to establish a democratic, rule-of-law state, the basic characteristic of the legal order in transition conditions is its parallel - civic and party character, that is, the rule of parallel law. Instead of serving to promote democracy and human rights, it is in the interest of those in power. That is why, in order to please every new governing body, this right is characterized by a malignant overproduction of latent laws, which is in an inversely proportional relation with their consistency and respect.

On the one side, all laws are carried in a "democratic process". Citizens and other entities (parties or non-governmental organizations), directly or through their representatives in the legislature, are allowed to participate in all phases of their adoption. They can propose a new law or amendments to the constitution and existing laws. Citizens can influence the subsequent adoption of laws, through public opinion or through lawmakers, as well as to participate in a public hearing, and they can then initiate proceedings before the Constitutional Court for reviewing the constitutionality or legality of an act. In addition, the media can create an atmosphere for the (non) adoption of some laws. Although seemingly everything seems fine, we must bear in mind that "... the remnants of an older mentality", that is, the previous order (Burawoy, M / Verdery, K 1999, p.2), make the questionable civil character of legal reforms in these countries. Due to their particularities and for the transitional period, the transition can not be explained from the aspect of existing theories of law and justice. If for traditional understanding of the state, the criterion of "lawfulness" of power meant an indicator and its "fairness", then in transition conditions, "lawfulness" often becomes a source and a driver of injustice. The roots of such reversibility lie in the tendency to conserve power and privileges, whose bearers are the parties in power. Despite their "folk" and "civic" character, most of the laws that are being adopted are in fact the transcendental will of these centers, that is, an instrument for the preservation, realization and expansion of their interests. Through them, as well as through modeled morale, these centers endeavor to regulate all spheres of social life, in a manner and scope that suits them, and legalize the

expansion of the expansionist-egoistic character of their power. This is seen not only in the law-making process, but especially in their application.

The element of interest and party is present at the very beginning. Although citizens participate in the designing and proposing of laws, due to their party affiliation or economic and social dependence on the centers of power, they are most often extras. Therefore, the regulations are rarely in the interest of a wide range of citizens, but rather they start, or the interests of the parties in which they are members or of some personal interest which, due to the stated dependence, should again be aligned with the interests of "their" party or group. This is even more pronounced when the Government or other state institutions appear as proposers. And from this there are exceptions, that is, every citizen or association can make suggestions; but their destiny will be uncertain. They will either not be put on the agenda of parliament, or they will not be voted. This also happens with laws proposed by MPs who are not in the majority.

The second highlight of the adopted laws is that unlike the relative stability of the law in conditions of democracy, according to the transitional experiences of most Balkan countries, the law in these societies can not be long-lived. As well as the conditions it regulates, it is also a changing, transitional law, which adapts to the demands and interests of each new party or new interest group. Because of the inconsistency of the new social conditions, even if they want, these countries can not create a stable legal system. On the contrary, laws become a kind of fluid or "right with constant change". New laws are constantly being adopted or the existing ones are changed, but in all of them, the content is ambiguous and has legal gaps. It is used mostly by centers of power to interpret them as they see fit. The meaning of one law is to apply it in reality, that is, it was necessary to create a need for it in the society beforehand. While the nonsense of many laws consists not only in their uselessness for society, but also in the non-creation of conditions for their application. It's tantamount to lawlessness. For these reasons, the law-making process should be seen as a need, and not as a necessity to satisfy the arbitrary duties given by any power center. This also undermines the functioning of the rule of law.

Such a distortion of the legal order is even more pronounced in the application of legal regulations, regardless of how much they are socially useful. The number of laws is inversely proportional to their application and effectiveness. In the Balkan countries, the emergence of inflation in laws means deflation of justice, that is, there is a collision between the number of laws and the legal security of citizens. The more laws are worn, the less righteousness and fairness comes to light, and it is harder for the citizens, especially for those who belong to the opponent's party. Such "excessive legality" is the hallmark of societies in which the political is predominant (Madjar, Lj. 2001). The increase in their number not only does not increase the reliability of the citizens, but also aggravates their position even more.

The appearance of a violation or abuse of laws is present to that extent, which is why the dilemma arises - whether the laws themselves are the reason for this, that is, whether their inconsistency, "partisanship", subjectivism and utilitarianism, that is, the personal interest of those who bring them until their auto - negation. Or, the degradation of the basic moral principles is so ingrained in people and society that any constitution and law are to be adopted, and how useful they are to society, the effect would again be the same - the parallel rule of formal law of one and a factual injustice on the other. In fact, both in the transition conditions are complementary.

The main reason for their inefficiency is impotence in relation to the requirements that are set before them. The Balkan countries produce too many laws, but they are divided by the practical problems of the ordinary people. They are not worn because of citizens and their needs, but to meet the interests of the bearers of power. In a situation of a great degree of politicization and corruption in society, the application of laws is guided by the stated utility. By doing so, the laws become another instrument for "encouraging" citizens to give "more enthusiastic support" to the goals and interests of the centers of power. Their "logic" says it is "not unjust," but "a new way of establishing justice." Though absurd and contradictory, this phenomenon reflects "their" perception of "justice." Instead of the right to contribute to the achievement of equity and equality in society, it largely becomes a "legal creature", which is in the service of injustice, discrimination and the power, that is, the power of these centers. This creates a kind of "pathology" of the legal order, where all "ordinary" and "useful" laws, in their application, take on their "face" as an existential "right of the stronger." Instead of respecting individuality and neutrality, interests and power emerge from them. Thus, the proclaimed values for equal validity of laws and their social interest, in transition conditions, pervert in discrimination and subjectivism.

In addition, despite the formal laws and in parallel with them, the application of the unwritten law, ie the "right of the stronger" (the more powerful), is on the rise. The power of these centers is so great in most Balkan countries, so

only a phone call with a "well-intentioned advice" is enough to forget all laws. Their "recommendations" are a command or "law over the laws", whose execution does not stand the objection. At the same time, the centers of power determine not only the norms, but also the manner of their execution. This leads to the creation of an "arbitrary right", which is guided exclusively by their needs. It is also a source for the creation of new laws. But given the changing will of these centers, in case of its collapse with the laws, priority is always given to the first. It is evidence that egoism is elevated to the level of the basic legal principle, which denies every other instance of itself and any control beside itself. Its basis is the moral deformity and acceptance of the wrong and destructive value system among some of the citizens in these countries. More and more people are ready to follow the example, not to those who are honest and committed to their work and society, but to those who have "managed to find out" in transitional conditions. That is why the basic motto in these countries reads "does, as do the others" or "when they can, I can too". The social position of individuals and groups is determined by the privileges that are acquired in exclusive private relations with the holders of power. The individual can not rely on the protection of his rights through the justice system, but is directed to look for it in his clientelistic relations with the holders of power.

Another major problem is the selective application of laws. The centers of power retain the democratic slogan that "no one is preferential to the law". But translated into reality, it means that "the law is no privilege for anyone," that is, no one can feel protected from the rights guaranteed to him by a constitution or a law. Given their utility character, laws in transitional societies can be interpreted in a different way and applied according to the current needs of those in power. This is especially noticeable in the penal laws, whose application is much more diverse when it comes to members of opposition parties or ordinary citizens, than when applied to members of the government or the ruling parties.

In this regard, the role of the judiciary is indisputable. Instead of independence, as a key criterion in his work, it becomes dependent on the centers of power, which leads to asymmetry in their mutual competencies, in favor of the latter. For holders of power, courts are merely an instrument of intimidation and coercion, and their will becomes a substitute for legality. Through the courts, the power (evil) uses the fight with crime to compete with the opponents. This leads to a personal union in the jurisprudence between the accuser and the sueer, ie the infiltration of the executive order in the judiciary, because of which the entire justice system is politicized and in the service of power. The government uses the penal policy, not as a measure of coming to justice, but because of the intimidation of opponents. Unlike the constitutionally guaranteed right that everyone is innocent until proven otherwise; in these countries, the rule is that "everyone is guilty until proven otherwise". Courts operate in an atmosphere of constant pressure, not only from the authorities and parties, but also from the media and the public, who are often instrumentalized by these centers. As a result of this, public opinion regarding judges is mainly negative. Because of such relations with the government, as well as because of their inefficiency, citizens lose trust in the courts.

It does not return to the key issue of this paper - can such justice be expected in society, that is, whether its legality satisfies the criteria of legitimacy ?! Obviously not, because for the realization of justice, the laws that are supposed to implement it must be based on non-discrimination. The basic source from where they should draw their authority are rationalism, moral and humane standards of freedom, equality and responsibility; ie all those traditional values for justice and injustice, which are equal in all circumstances and which apply to all periods of human history. It makes the laws to be general and invariable and apply for an infinite number of cases. By contrast, the laws in these countries, in accordance with the stated partcentism and utilitarianism, are variable and selective and are used as a means of achieving one's goals. This decisionism of the carriers of power can not be called legitimate. Therefore, regardless of the "democratic" in their adoption, this "legality" must not be equated with that objective and unchangeable justice, which we have known for centuries, as a righteousness for all. On the contrary, it is some kind of variable, apparent "justice," because the "moral principles" that are called upon and the "legal regulations" with which it is exercised are variable. This "justice" does not stem from the needs of individuals and cannot express their interests, but from the will of the centers of power, whose interests it attains. Such a legal order, however much it seeks to be shown to be righteous for all, will distribute justice only to the centers of power.

#### **4. THE LAW AS A SERVICE OF CITIZENS - OPPORTUNITIES AND PERSPECTIVES**

In order for our transitional societies to achieve the ideal of a genuine rule of law, they must eliminate any authoritarian, discretionary power of any political elite. Instead, it must adopt stable (less changeable) and credible (acceptable for most citizens) rules, as well as to have independent (from the holders of power) judiciary and public administration that will apply them. Judges should be independent and subordinate only to laws, that is, free from

any influences, instructions or pressures from the executive, from the centers of power (parties), from the media or from the public. While deciding on a particular case, the judge must be bound by the right and with his conscience.

A stable and credible legal framework creates a favorable ambience for a greater initiative of the civil sector in proposing, adopting and implementing legal acts. In addition, clear procedures are required for the adoption of laws, and the judiciary should be independent both by those who carry them, and by those who apply the laws. The rule of law should protect the rights of the individual by the will (or rather, arbitrariness) of other individuals or groups, regardless of whether they are a majority or a minority. Therefore, if the Balkan countries want to evolve into societies of free individuals, the rule of law must be the basic paradigm of social life. Security and stability in transition countries can only be ensured through the functioning of the rule of law, which should protect the individual. Therefore, after the expiration of a certain amount of time, the fairness, and not just the legality of the adopted regulations, should be checked.

Whether and how much such verification is possible and which instrument can the citizens apply to achieve this goal?! It is possible by applying various forms of examination of public opinion, monitoring the applicability of the adopted laws and monitoring the effects they cause on the quality of life for the citizens. In addition, the basic criteria for such testing should be: the freedom of the person, the freedom of the citizens (but not as a mass and group, but as individuals), freedom of opinion and speech, that is freedom to criticize the holders of power and to make them to respect the will of the people and the laws, on which they are called so much.

The rule of law, combined with human and ethical values, traditions and contemporary needs, historical circumstances and current affairs in the Balkan countries, the independence of the judiciary and the division of power, constitute a necessary condition for the consolidation of democracy in these countries and for the establishment and existence of a true civil society.

It is possible by using multiple instruments:

- Adoption of legislation that will minimize the arbitrary action of the centers of power, especially with regard to the financing and operation of political parties,
- Reducing their influence in the decision-making processes of the formal government institutions and in proposing and enacting laws, while simultaneously increasing the participation of citizens and the civil sector in these processes,
- Strict prohibition and sanction for any interference by centers of power in the work of the courts,
- Adoption of regulations, which will enable the civil sector greater leveling with the political parties, which will enable it to have greater insight and control over their work, because the assumption for a real civil society is the so-called "Transparency of power", where decisions and actions of all social actors must be subject to participation, monitoring and control by citizens and civil society,
- All regulations must be based on the needs of citizens, to emerge and follow social processes,
- In the context of the above, it is necessary to raise the level of transparency and inclusiveness of the citizens and the expert public in the legislative process, by expressing their opinions, maximizing inclusion in the creation of public policies, as well as greater participation in proposing and adopting the laws, ie they pass through a process of corporativism (cooperation) and codetermination (mutual conditionality),
- Reforms in the judiciary, due to its greater independence and efficiency, as a matter of fact, the Republic of Macedonia and other Balkan countries are bound by the Copenhagen criteria as one of the preconditions for their entry into the European integration processes.

The success in building a real state of law is the foundation for building a stable and healthy society. For the creation of a general and impartial legal system, the demonopolization of law from the hands of formal government in the hands of citizens and civil society, is necessary. Representation and participation of citizens in the creation of social policies are key concepts for each country, which is intended to be called democratic and legal. The power centers in the Balkan countries must still learn how to open themselves for greater participation of citizens, especially in making those decisions that are in the interest of the whole society.

## 5. CONCLUSION

"The past never dies". This film title seems to have been mirrored in the Balkan countries. The relics of their past are still an obstacle for better present and future. Like all domains in society, the law in these countries is susceptible to numerous "transitional diseases". Most of the newly adopted laws formally legally comply with the standards of international law and those in developed democracies. But their compatibility with the circumstances prevailing in

these countries is questionable, their volatility and their use in the interest of certain formal and informal centers of power; which basically makes them powerless in terms of the "right to power".

Therefore, thorough reforms of the legal orders in these countries are necessary as an integral part of a broader, synchronized and complementary reform project, which includes institutional stability, dispersion of power over several carriers, above all citizens, departation when adopting and applying regulations and raising on the capacities of the judiciary in the performance of its functions, on the basis of the principles of independence and accountability. Moreover, the success of such reforms is impossible without supervision and broad support of the citizens in these countries. The public can and must participate in the creation of its present and future. Laws are legitimate only if they are based on human and ethical values and if they are in accordance with the principles of justice. The rule of law should be a framework for impersonal, objective and rational justice, rather than legitimizing the arbitrariness and the rule of certain power centers. Only this conceptualized law can produce a society of justice. society.

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