The Albanian Law Journal – is an online non for profit law journal, with open and free access to the legal community and other interested professionals, businesses or citizens. It began as a joint idea of a group of legal and policy professionals discussing on the necessity to extend the participation in the legal and policy debate regarding hot topics impacting citizens, businesses, state officials and the society in general and to contribute to doctrinal creation. Its realization was possible due to the hard work of the Editorial Board, Editor in Chief, European Movement Albania and the grant issued by the Embassy of the Kingdom of the Netherlands in Albania.

The goal of the Albanian Law Journal is to help the creation of a public debate about important aspects of the Albanian legal and institutional framework; to lay the foundations of the creation of a more elaborated Albanian legal and policy doctrine; to deal with issues of EU integration of Albania and in general to help the improvement of Albanian legislation and institutional framework. Therefore ALJ aims to publish articles dealing with actual legal and policy development in one of the following main topics which will constitute the thematic pillars of ALJ: Legislation; Practical and Administrative Issues; Human Rights and EU/EU integration.

ALJ aims to attract an extensive number of authors, Albanian and foreign, from the students community, legal professionals, lawyers, law professors, judicial professionals, policy experts etc. During the first two years of activity, authors will not be charged with any publication costs. The quality of articles submitted to the ALJ will be evaluated through a two stage evaluation phase by the Editor in Chief and the Board of Editors which has the final saying. Rules and procedures for publishing, copyright issues, quality and evaluation of articles are found in the Author’s Guidelines published in the respective ALJ website.
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INTRODUCTION TO ISSUE NO. 3

By the Editor in Chief

Issue No. 3 of the Albanian Law Journal brings four articles with high sensitivity and interest in the fields of Albanian legislation, civil judicial proceedings, human rights and the European Union policies.

Pillar I of the ALJ – Albanian Legislation – introduces a topic which has a significant importance for the Albanian democracy and which has been on a constant focus of the Albanian legislator and public opinion, that of the functioning of the parliament system and of the electoral law. This article first introduces an historic overview of the establishment of the parliament and of the main concepts of representative democracy, going on to analyze the Albanian electoral law and its constitutionality.

Pillar II of the ALJ – Practical and Administrative Cases – deals with another troubled piece of Albanian legislation, that of property law and its procedures. Since the 1990s the property law has been subject to several reforms, yet property issues remain unsolved. The article focuses on a specific procedure of the Property Management Agency and points out the issue of the competence between civil and administrative courts that has arisen lately.

Pillar III of the ALJ – Human Rights – treats a very grave human right violation that of sexual abuse of children. The Article first tries to shed some light on the extent of the phenomenon in Albania, and it also provides the expert opinion of a psychologist dealing with children related to the consequences of this type of abuse. It then analyzes the international instruments and the Albanian legislation in place to protect children from sexual abuse.

Pillar IV of the ALJ – European Union and Integration- presents an article dealing with a very important and highly debated issue within the European Union. That of monetary policies and the way forward for the EU. The article starts by describing the creation of the EU monetary union, its legal framework, the system of the central banks and the specific instruments. It analyzes the costs and benefits of the monetary union and it brings the different theories and possibilities for the way forward.
PILLAR I
LEGISLATION

The crisis of Parliamentarism and some reflections on the constitutionality of the Albanian electoral law

By Bledar Dika
Lecturer at the "Aleksandër Xhuvani" University

I. ABSTRACT
The rule of law state is closely connected to the effectiveness of the so-called separation of powers. As suggested by different voices, a wide institutional reform which should start with the amendment of the Constitution is considered necessary in order to have a proper separation of powers. Such a reform should mature within the Parliament, the body which the Constitution of Albania has appointed and predefined as the hearth and home of legalism and eventually of the institutional organisation of the State. Is the Albanian Parliament, with the existing quality of representation, able to perform these reforms? This article is triggered by some doctrinal thoughts on the political representation and its issues. More specifically the second paragraph of the article starts with a historical approach on the representation and the parliament, the passage from a representation of a private nature to the representation of a political nature, by distinguishing between formal and substantive representation. Starting from such premises, in the third and fourth paragraph the issues of the political representation in general and of Parliamentarism in particular must be distinguished in a clear and systematic way. In its fifth paragraph the article deals with the Albanian experience of the political representation in order to identify its flaws, if any, and especially to analyse the constitutionality of our electoral law by also bringing in the picture the analogue Italian case in the sixth paragraph. The article is concluded with paragraph seven, which provides conclusions and some specific recommendations related to the Albanian electoral system.


ABBREVIATIONS:
CEC Central Elections Commission
CONST. Constitutional
ECHR European Convention on Human Rights
EC/ELECTORAL CODE Law No.10019 dated 29.12.2008, as amended
ICC Italian Constitutional Court
PORCELLUM Italian Electoral Law No. 270/2005
II. HISTORY OF POLITICAL REPRESENTATION AND ITS DEVELOPMENTS

There are various types of parliaments, whose functions and structures differ from country to country, and within these countries from one era to another. From this point of view it is not quite meaningful to create a relation between parliaments of the modern era and the antique assemblies. In the countries of Middle Ages and of the modern era, unlike the Greek city-states, the norm was that the people did not have the possibility to exercise legislative power, hence the need to create representative assemblies emerged. In this aspect, Montesquieu emphasised that: "because in a free state everyone [...] must be guided by oneself, it would be necessary for the people to have the direct power; noticing that this is impossible in big countries and similarly subject of unexpected outcomes in the small countries, then it is necessary for the people to accomplish through their representatives what they are not capable of accomplishing themselves. [...] The great advantage of having representatives lies in the fact that they are capable of discussing public issues, while the common people are not able do it - exactly this constitutes one of the main inadequacies of the democracy".

If we attempt to look at the history of the representative Assemblies, in an extreme synthesis we can argue that the representative Assembly which is famous of being the most ancient Parliament in the world was the Althing of Iceland, where people began to assemble in June 930 in the location named Thingvellir near Reykjavik. However, the first parliament to take the shape of an institution, or better, to have political importance, was undoubtedly the Parliament of England. It has been documented that in 1255 a magnum Parliamentum of clergy, earls and barons was convened in Westminster, which did not accept the demands for economic aid of Henry the III. A few years later, specifically in 1258, Henry the III managed to obtain economic aid but only after meeting the conditions set by the barons led by Simon de Montfort. One of these conditions was to hold regular sessions of the Parliament (three times a year), in order to examine the state of the Kingdom. In 1265, Simon de Montfort managed to ensure the participation of representatives of cities and villages in the sessions of the Parliament. However, what the history knows as the great and model Parliament was convened only in 1295 under the reign of Edward I, bringing together representatives of cities and villages, barons and bishops.

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2 Di Ciolo, V., Ciaurro, L., Il diritto parlamentare nella teoria e nella pratica, Milan, Giuffrè, 2013, cit. p. 17; It a theory classified as a legend, that the First Parliament in Europe, after that of Iceland is the Sicilian Parliament. This Parliament is thought to have given the name: ‘parliament’ to the English one. Less contested is the believe that the Sicilian Parliament was gathered during the period 1232-1240 in Foggia by Frederic II, having gained all the features of a real functioning institution. For more information refer to: Palmieri N., Saggio storico e politico sulla costituzione del Regno di Sicilia, Lausanne, Buonamici, 1847.
3 Fischel, E. Storia della costituzione inglese, II voll., Milano, Corona e Caimi, 1866, p.155.
This way a common denominator was progressively evidenced for all later parliaments. The common denominator would be the claiming of what was achieved at Runnymede on 15th June 1215 when the barons obtained from John Without Land⁵ the *Magna Carta Libertatum⁶*. From that moment on, no taxes or contributions were to be paid without the consent of the barons. It is a widespread opinion that the principle *no taxation without representation* on which the USA constitution is based derives from that event⁷. At that time, members of the councils, states, assemblies, parliaments or medieval Diets⁸, must have been connected to their classes, villages, cities or corporations, by a private type relationship ⁹. They behaved like they were mandated by the latter to represent interests, wills, desires or demands addressed to the monarch¹⁰. In other words, the representative institutions of the Middle Ages must have been

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⁵ King John of England (1167-1216), was the youngest son of Henry II and the brother of Richard I, known as Richard the Lionheart. After the death of Henry II, at 1189 John did not inherit any land from his father, for this reason he will be nicknamed John Lackland. For more information refer to: Norgate, K., John Lackland, (London, 1902, WENTWORTH Press, 2016.

⁶ Magna Charta Libertatum usually referred to as Magna Charta, specifically “the Great Charter of Freedoms” is a document which consists of a list of clauses which restrict the power of the king and guarantee the rights of the barons. Even though it is still presented as an unilateral concession of the King, in reality it is a contract on the recognition of rights. Magna Charta was signed on 15 June 1215 by John Lackland, at Runnymede, near Windsor. For more information refer to: Musca, G., La Magna Charta libertatum e le origini del parlamentarismo inglese: corso di storia medievale, Dedalo,Bari, 1972.


⁸ Deriving from the medieval latin – dieta- dies – day of the assembly. This denomination was provided to the the assemblies of the Holy Roman Empire which used to gather to discuss the most important decisions on public matters, by Carl the Great. For more information refer to: Zerbi, P., “Il medioevo nella storiografia degli ultimi vent'anni”, Milano, Vita e Pensiero”, 1977; Calasso, F., Enciclopedia del diritto, Volume 38, Giuffrè, Milano, 1958, p. 552-553.

⁹ For more information refer to: Kelsen, H., *General Theory of Law and State* dhe G. De Ruggero, *Storia del liberalismo europeo*, Bari, Laterza, 1946, p. 3., who have considered that medieval assemblies were attended not by representatives of the people in modern terms but by: “individuals with a mandate and mediators of different classes and interest groups, lacking on their function that universal feature which is a distinctive element of the public right”. Another thesis, contrary to the formet, is the one of Ambrosini, G., *La rafresentanza degli interessi ed il voto obbligatorio*, Roma, Scientia Sac, 1945, p. 9, who argues that even the medieval representation had its own public nature, taking into account the complexity of a relationship which was based on an initial obligatory mandate further developing into a trust relationship. A middle ground and more articulated theory is the one provided in the position of Miceli, V., *Il concetto giuridico moderno della rafresentanza politica*, Perugia, Boncompagni, 1892, p. 35-65, who after underlying the typical features of private right characterizing the relation, points out the evolution of medieval representation in the direction of a political obligation which bring about an ethical obligation to respect the received mandate. Regarding the continuity from medieval representation to the modern one refer to: Hintze, O., *Stato e Società*, a cura di P. Schiera, Bologna, Zanichelli, 1980, p. 102 and fw. Lastly, for more information on the dichotomy, not only terminological but overall conceptual between the theories: “Medieval Parliament” and “Casts Assembly” refer to: D'Agostino, G., *Introduzione a Le istituzioni parlamentari nell' ‘ancien régime’*, Napoli, Guida, 1980.

¹⁰ Only aristocratic classes and not simple individuals were represented in Medieval Assemblies. (beside being represented indirectly due to the class the pertain to). Among different functions, representatives had as a main function that of submitting requests to the Sovereign (King) regarding the correction of failures or compensation of damages caused by the class they represented. Yet, it looks like that the main reason to create such a relationship between the king and the assemblies was the need of the Sovereign to have an agreement and consensus for the definition and and collection of the taxes. For more information refer to: Stephenson, C., *Taxation and representation in the middle age*, 100th anniversary essays in medieval history by students of
characterised by elements of the private law, including the determination of the obligations that the representative had towards the represented, such as specific tasks of the former to the latter\textsuperscript{11}, and eventually demands for further instructions about unexpected issues that might arise during discussions, and for other issues such as revocation of the mandate, payments etc. However, some type of autonomy of the representatives from the represented had to exist, and it has to have existed in the medieval beginnings of the parliamentarism, otherwise the representatives would have been declassified to simple messengers of villages, cities or certain communities. The convening of the assemblies, or more precisely, the held sessions did not have an agenda, so there was a wide margin of freedom on what was actually discussed. In fact the issues under discussion went beyond the pre-determined treatment to which representatives were bonded in order for them to be synchronised with the pickets placed by the represented. In this sense, as far as the freedom of the representative mandate is concerned, it was impossible for the representatives to consult in real time with the represented in order to take instructions on what stand to take in cases when the discussion would take unexpected turns\textsuperscript{12}. Even more important, in relation to what we just said about the autonomy of the representatives, is the fact that the demands of the monarch at that time carried much more power and value than those of the people represented. Also considering the fact that the monarch required auxilium \textit{et consilium} (support and advice), the representative in these conditions had to attend to a more sublime task, advising the monarch, thus diminishing the relation with the people they represented. For this reason, the representatives had to have complete power and will to act freely and un-coerced (with \textit{piena potestas} and \textit{libera administratio})\textsuperscript{13}. This sometimes resulted in fierce confrontations between officials of the monarch who called the assemblies and verified the mandates and the represented communities, in those cases where the mandates conditioned and were highly binding on the representatives\textsuperscript{14}. Even when the mandates contained specific tasks and instructions for the representatives, it should be implied that after completing and following the given tasks and instructions, the representative were then considered free to discuss and vote all other matters\textsuperscript{15}. The written mandate carried by the representative aimed to justify the legitimacy of participation in the assembly\textsuperscript{16} as a representative of a particular group or community, but also as a representative of the kingdom, an entity above the communities. Under this light it is explained the concern of the sovereign, who demanded that the electorate mandated experts who through \textit{libera administratio} would give advice and assessment not only in the interest of their communities, but also in the interest of the Kingdom, in which the Parliament was

\textsuperscript{11} On the rigidity and other details of the compulsory mandate during the medieval representation you may refer to: C. Muller, \textit{Das imperative und freie Mandat}, Leiden, 1966, p. 204.

\textsuperscript{12} For more information refer to Shih, Marongiu, A., \textit{Il Parlamento in Italia nel medio evo e nell'età moderna}, Milano, Giuffrè, 1962, pg. 496 and fw.


\textsuperscript{14} Marongiu, A. \textit{L'Istituto parlamentare in Italia dalle origini al 1500}, Roma Giuffré, 1949, f. 270.

\textsuperscript{15} \textit{Ibidem}, p. 271.

\textsuperscript{16} \textit{Ibidem}, p. 259.
considered the representative body of the people\textsuperscript{17}. So it would be more precise to define these assemblies as "pre-representative parliaments", meaning much more corporatists rather than parliamentarian.

However it has to be admitted that, in the light of Parliamentarism and not corporatism, the concept of representation would emerge and develop in England, more and before than in any other country. Sir Tomas Smith in 1565 would conceptualised the modern definition of the Parliament, more specifically the concept that "the Parliament represents and bears the power of the whole Kingdom [...] as it is accepted that every Englishman, from the Monarch to the last person in England, participates in it (in person or through a proxy or mandate). Hence the consensus of the Parliament should be considered as representing every citizen."\textsuperscript{18} This development, i.e. the passage from corporatism to the political representation, earlier than anywhere else started and developed in England, because England cultivated the idea of the nation-state and did not accept to be blackmailed by the clientelism of the local clans. England unified the specific interests of the casts and intertwined them with the all inclusive interest of the society - a society conceived as the community of every Englishman. As a synthesis, the success of England lies in the fact that clan and local divisions were not allowed to impinge the unity of the nation, and the representatives managed to overcome the restrictions or orders of the delegating groups, thus becoming conveyors not only of their specific interests, but over all, of England's interests.

Summing up all of the above, we can say that with term "parliament" we understand a reality that changes from one historic period to another, within the same historic period, and also during different political regimes.

\textbf{III. CHARACTERISTICS OF THE PARLIAMENT AND ITS REPRESENTATIVE FUNCTIONS}

To describe some rigid points of the parliamentary institution, we can note that during different developments in different contexts, some features seem to be constant: (i) permanent assembly with a defined group of representatives; (ii) progressive specialisation on the legislative functioning; (iii) the debating methods and the collegial decision making; (iv) placing of this Institution in a middle zone between the society and the governing institutions;

\textsuperscript{17}In this context, the same assembly was attended by representatives of different categories, gathered from different locations of the country, thus it was very difficult the protection of own particular interests. Nevertheless, during the discussion of topics related to other sectors there was a possibility to contextualise and protect the particular interests of the representatives. For more information refer to: Marongiu, A., ibidem, p. 271 and next.

\textsuperscript{18}Smith, T., \textit{De Republica Anglorum}, trad. it. parz., \textit{Antologia dei costituzionalisti inglesi}, a cura di N. Matteucci, Bologna, il Mulino, 1962, p. 44.
(v) transparency and publicity of works and discussions; (vi) tendency for autonomy in organisation and conducting the work of the assembly.

Although these common elements reappear in various parliaments in different periods of time, the reality related to the functioning of the parliament and its composition takes another shape. In this point of view the representative function has never had only one meaning. For example, one can be part of the parliament on the basis of a personal or representative right. Representation on the basis of a personal right may derive from an inherited status (the case of many mandates in the House of Lords in England), from an acquired merit\textsuperscript{19}, or as a result of exercised functions\textsuperscript{20}. The parliamentary mandate on representation basis may express: the representation of general interests (lower chambers); territorial interests (e.g. the German Bundesrat comprising representatives of governments of federal states Lander); sectoral interests\textsuperscript{21}.

Functions of the parliament may change over time and depending on the place. So, the parliament may exercise only legislative functions (in presidential and directional systems) or political addressing functions\textsuperscript{22} (in parliamentary governing systems), deliberative or only consultative functions. The Parliament, more than any other constitutional body, is the indicator of the characteristics of the political-constitutional system, and on the other hand the functions and the competencies of the parliament give a certain nature to the constitutional system. The degree of liberty of the members of the parliament indicates whether the regime is liberal or authoritarian, and within the liberal regimes the relation between the parliament and the government indicates whether the governing regime is presidential, parliamentary, or of an assembly\textsuperscript{23} type. Also important is the relation with other subjects such as parties or unions, which, although part of the society, exercise representation functions anyway. Lastly, we can say that the party system, the nature of the parties and their reciprocal relations might model the structure of the parliamentary representation and the duties of the parliament. On the other hand, the electoral system is the one that serves for the general elections and affects the party system of a country.

\textsuperscript{19} It is the case of perpetual senators of the Italian Senate, who become perpetual due to their distinguished contributions and merits in different fields of society.
\textsuperscript{20} It is the Italian case, for senators nominated as such due to their former occupation as Presidents of the Republic.
\textsuperscript{21} The Albanian fascist corporative Senate of 1939; the Senate of Bavaria; the Senate of Iceland.
\textsuperscript{22} Exercising the function of political direction, occurs when the Parliament is required by the Constitution to approve the political programme and the composition of Government which should be submitted within 10 days following its formation (Article 97, of the Albanian Constitution). The political programme together with the composition of the Council of Ministers are discussed during a plenary session and if approved, it creates a relationship of trust engaging both the Government and the majority who supports it in the Assembly.
\textsuperscript{23} By the Assembly form of government it is implied a pathological form of representative democracies. Assembly government occurs when the power of elected parliaments attempts to become that considerable so as to empty the Government and its organs from their most important prerogatives. De Mucci, R., Voci della politica, Roma, Rubentino, 2004, p. 76.
The foundation of the exercise of any parliamentary function is the Parliament's representation function, so the Parliament in itself is characterised by the representation function. From all entities of the society which may exercise representation functions, only the parliament has the function of representing the society *vis-a-vis* the state, or more precisely, has the function of representing the different strata that form the society. This should be understood as a form of political representation, so, not the representation of some small interests, but of the general interests which are expressed within society. In this meaning, the Parliament has a two-sided nature: on one hand it is a state body, and on the other hand it addresses the society it represents. This is how the functions of the parliaments come into light, being considered as the official residency in which the parliamentary groups exercise the political activity of the political parties, which in turn are considered to be the subjects through which the citizens participate in a more direct way in the politics of the country. This is why it's almost obligatory that in the course of the analysis of the parliamentarism of a certain legal system, features of the political representation within that country are examined. This seems indispensable for the understanding of the healthiness of the parliamentarism of a country, and even wider, of the level of democracy, so it is necessary to explain at least what representation in its formal aspect is.

Theories which consider the representation as a simple situation, begin their explanation with an axiom. This axiom derives from the idea that within a people (or a nation), *there exist some interests that stand above the personal interest and represent the community as the inclusive group of the individuals*. So as a result, a hypothetical popular will exists, committed to pursue these interests by separating itself from the episodic will that a people may have from time to time. The representative is the one trusted with pursuing the above mentioned interests, and at the same time he/she is the expression of a hypothetical will of the people. So, he/she has to represent the interests of the citizens and guarantee the political unity, which according to the doctrine of Schmitt and Leibholz, is the core of the political representation. In this idea of the political representation, three ideological trends confront each-other as different facets of the same prism. However, the fact remains that all these theses, pursuant to which representation


25Starting from the reference of the theoretical notes to the Absolute State, as the true representative of the citizens' interests and the guarantor of the people’s unity, which according to the aforementioned doctrine (Schmitt, Leibholz), would be the essence of political representation, we could easily pass to the configuration of political representation as a symbolic representation. Thus See, Galli, C., *Presentazione a Schmitt, Cattolicesimo romano e forma politica*, italian translation. A cura Galli, C., Milano, Giuffrè, 1986, pg. 9 and fw.

26The three ideological theories which conceiving the political representation in this way, are closely related to one another. *The Liberal theory*, in an attempt to rescue and consider the electoral election of representatives as necessary, simplifies the people (or the nation) in an entity with an abstract identity (Crisafulli, V., *La sovranità popolare nella Costituzione italiana*, in Scritti giuridici in memoria di V.E. Orlando, I, Padova, Cedam, 1957, pg. 51), unable to have it’s own will in order to exercise sovereignty beyond delegation. (In French public law, the theory of delegating the nation’s sovereignty to representatives has been for a long time the dominant and widespread theory. See R. Carré de Malberg, *Contribution a la théorie générale de l'Etat*, II vol, Paris, Sirey 1922,
is simply defined as a situation of power of the representative, shift the sovereignty towards the representative. In the sense that the representative is trusted with the total and final exercise of the sovereignty. On the other hand, the represented is considered, in a totally abstract way, as simply the titular of the sovereignty. In this meaning, an inconsistency emerges with the principle of the popular sovereignty, because of the fact that the hypothetical popular will and the public interest pursued by the representative would not be other than, respectively, the will of the same representative and the public interest he/she interprets.

What is currently noticeable is the fact that the contemporary State to which we belong, has increased its commitment and participation in different sectors of the economic and social life. As a result, the legislative expansion is unavoidable, as it aims to discipline these new sectors
and areas. At the same time it is required that the authors or compilers of this legislation have a more and more specific set of technical knowledge, so that different aspects of the normative product, closer to the specific demand\textsuperscript{29} are treated in the finest details. Considering that the representatives have to make decisions by following rational criteria which can be objectively verified\textsuperscript{30}, in order to pursue the hypothetically general interest, the representatives would find themselves separated and distant from the people they represent. In this sense, a crisis would appear, caused by the transformation of the principle of an abstract equality between the representative and the represented, a crisis which could be solved by getting as closest as possible the representative and the represented by transferring to the representative bodies those criteria through which the citizens can directly make decisions.

This brings the exaltation of the democracy as the law of equality, and as a result of the number of common people that participate in decision making as opposed to aristocracy (as the law of quality and competencies). It is proposed this way the alternative between the direct democracy and representative democracy, and at the same time it is proposed the transfer of the confrontation between those who govern and those who are governed\textsuperscript{31}. As a result, the political representation as the form of power investiture of the former through the latter, loses the logic of existing\textsuperscript{32}. The increasing desire of citizens for a greater participation in the political life and the greater use of the institutions of direct democracy, contribute both in the crisis of the political parties. First, the desire of the citizens for greater participation in public matters would require an increasing participation of citizens in the political life, which would corrode the stiff law of the oligarchies\textsuperscript{33} that run the parties and nurture the formation of different ideological streams\textsuperscript{34}. On the other hand, the institutions of direct democracy put into crisis the very existence of the political parties, because the demand to the citizens emerges directly from a process that subjectively inspires anyone of them, and it forms independently from the suggestions of the political parties, although on the other hand the political parties seek to convey the idea that they have the same benevolent approach, the same as the people's, towards the instruments of the direct democracy (referring to the referendum)\textsuperscript{35}.

\textsuperscript{30} Magee, B., Il nuovo radicalismo in politica e nella scienza, trad. it., M. Baldini e S. Morigi, Le teorie di K. Pofer, Roma Armando, 1977, pg. 42 and fw.
\textsuperscript{31} Carre de Malberg, R, vep. e cituar, p. 372.
\textsuperscript{32} Fisichella D., Sul concetto di rafresentanza politica, in La rafresentanza politica, a cura di D. Fisichella, Milano, Giuffrè, 1983, pg. 6 and fw.
\textsuperscript{34} ibidem, p. 964; Martines T., Partiti, sistemi di partito, pluralismi, in studi in onore di A. Arena, Padova Cedam, 1981, pg.1343 and fw.
\textsuperscript{35} The institution of referendum has a significant contribution also to the emergence of new political formations, sideways or in place of existing parties. For more see Federsen T.J., The dynamics of europian party system: changing patterns of electoral volatility, in European journal of political research, 1979, pg. 9.
Exactly based on this increasing need of the people in general, but also of the individual in particular, to directly participate in public matters, and on the continuously increasing political consciousness or political rationality of the masses and different groups of society, the political parties face tough contradictions in the efforts to maintain their structure which can survive thanks to the stiff law of oligarchies. For example, the approach to referendums reflects exactly this contradiction. Thus, the political parties on one hand see referendum as an opportunity, or better a guarantee, in calling upon the people to confront the risk of being a minority in the parliament, and on the other hand they see it as an institution that puts at risk not only the role of the political parties as intermediaries of interests of the individuals, but also of the parliamentary system itself. A behaviour is noted in which parties may show willingness to hold a referendum for matters and decisions that carry high social sensitivity, and on the other hand to avoid the referendum every time they have the chance to approve laws that derogate from or abrogate such matters. In this regard, the parties are more willing to preserve the oligarchic law that governs them, although this law undergoes a mutation and is not indifferent towards social changes. Let’s explain, without re-proposing the debate between the stances in favour of direct democracy and those in favour of representative democracy, we should nevertheless underline that there are flaws in the direct democracy that should not be underestimated. First, the fact that different matters for which the people must decide are not discussed enough. Second, the questions served to the people are not articulated enough although they relate to complex matters. And the last important fact is that citizens are not aware of all aspects of the matters. The result is that the one who serves the questions to the electoral body (practically the leadership through the machinery of mass communication) will have unlimited power, with the tendency to install a Caesar type dictatorship in which the popular consent is immediate as much as fictitious. The danger also lays on the fact that groups of economic interests may influence or manipulate the so-called public opinion, in order to guarantee a political order in their favour. In this regard, there is a progressive increase of the influence and participation of various organised groups in the life of the "State" community. The increase of the individual awareness and of the direct participation comes with the increase of the influence of organised and powerful economic groups that articulate and present the questions to the individual through various communication means. In other terms, there is an ever increasing tendency of the corporatist privatisation of power and a progressive tendency of the degeneration of the social pluralism into policracy.

IV. ISSUES OF POLITICAL REPRESENTATION AND OF BUILDING OF

36 Bobbio, N., *Il futuro... quoted work.*, pg. 29 and fw.
39 The concept of poly-cracy was used by Schmitt with a negative emphasis, to show the problems of modern parliamentarism. This being a tendency which accentuates the risk that a normal citizen who is required to decide directly, requires more of a “private” happiness than a public happiness.
THE ELECTORAL SYSTEM

In people, rational acting is an action of thought, an action that comes as the result of the utilitarian and pragmatic processing, so the subject is always aware as he/she acts rationally\(^{40}\). Without focusing on the philosophical treatment of the rational and irrational acting and without going into differentiating between the rational and the irrational, what is of interest here is the "typifying rational", i.e. the action of those individuals who have been mandated to express an authoritative will or action, starting with the bureaucrats of every level up to the representatives in legislative assemblies. In this regard, this category, in exercising its activity, is indispensably vested with a purpose, and the pursue of this purpose must be characterised by "rational actions related to the purpose"\(^{41}\). This immediately leads to the idea of obligation and consequently accountability. This is when the accountability of the representatives towards the represented emerges. The former are delegated by the latter to represent their interests, which gives rise to the obligation and the accountability of the representatives towards the represented.

There is a close relation between representation and political accountability, a relation made possible by the autonomy of the representatives\(^{42}\). If we analyse it backwards, it is the accountability that affects the autonomous actions of the representative\(^{43}\), which must be in synergy with the represented, or better, they must not cross the red line that limits the will of the represented. In analogy, the relation between the representative and the represented is preset to be rediscovered not during the political mandate of the representative, but at the moment in which the representative is called upon by the represented to report on his/her behaviour and actions during the mandate. In this regard, the maturing of the moment of accountability can be identified with the elections. From this moment on, we can notice an indispensable relation between representation and accountability, in the sense that one can exist only if the other exists\(^{44}\). However, although periodic elections are not the only mechanism capable of ensuring the homogeneity between the representative body and the people, at least they guarantee that the government officials are accountable to the people they govern, and this is because the electorate is the judge of how the representatives have used the trust vested in them\(^{45}\). Lastly, for the representation-accountability dichotomy to be effectively mutual, but above all to effectively exist, free elections are indispensable and they should enable the people to judge the "work" of the elected. Free elections are guaranteed through


\(^{45}\) For more see Shih, Lavagna, C., *La rafresentanza politica nel mondo moderno*, in Amm. civ., 1958, 10-11, 21.
creation of an electoral system conceived in such a way that makes possible the relation representation-accountability.

With regards to the electoral system and how much this system makes it possible to create the relation representation-accountability, it must be first considered that every political regime pursues a defined goal toward which functional political instruments must be used. The specificity of the democratic regime, or better of the liberal democratic regime, lays in the fact that within in not one, but two goals are pursued. These two goals are evidenced by the fact that while every regime functions as a power system, the democratic regime, if it is to remain as such, must function not only as a power system, but also as a system of control of power. As a result, the necessary instruments to be used for their success, must be conceptualised as serving these goals.

The electoral system too, as any other political instrument, must be consistent with the accomplishment of the goals of the democratic regimes. This is where the problems emerge, in the fact that the technical organisation of democracy appears to be the most difficult and delicate task of the politics. When talking about the influence of the electoral systems on the political life, we refer to the electoral systems as means for the creation of parliamentary, national and state assemblies. The primary importance of the electoral instrument lays on the fact that it fundamentally affects the functioning of the political democracy, and thus it is obvious that elections can be a way of delegating power, which is exercised by most of the social organisations, being the latter large or small. Under these circumstances, the difficulties mentioned above derive exactly from the complexity of the historic development that has characterised the parliamentary assemblies. The representation groups emerge as organisms of the society, with the task of dealing with, negotiate, or exercise pressure on the political power (in the beginning on the monarch). As long as the pressure of parliament on the central power does not go beyond the controlling function, the assemblies, in order to exercise their functions must include more arithmetical proportionality in their structure and composition, i.e. various opinions and interests that "comprise the core of the civil society" must be represented at a higher margin. With the affirmation of the liberal concept and practices of the state, the definition of parliaments radically changes. From being bodies of the society, accredited but not integrated in the state apparatus, parliaments start to become bodies of the state and be internal parts of it. Now the parliament does not have any more the role of the one who is governed, but that of the one who governs, and beside its control function it has also acquired the deliberative / decision making function. This change in positioning brings an essentially important consequence, which can be synthesised in the urgent need of the parliament to ensure, under the attire of a state body, the unity and the will for action that the pre-democratic state accomplished through the monarch. Thus, "a democracy cannot pass its commissioning if it does not achieve success as a governing system". In fact, if a democracy does not

manage to become a governing system, in the end it will remain just an ideal. From this
definition it can be realised how important and necessary it is that a unity of operations and
consensuses is achieved at the top of the democratic regime. Knowing that such a thing is
difficult to happen spontaneously, the electoral system of a democracy is given another
function - not less important that the positioning of the electoral system as the mechanism for
the proportional registration of the socio-political pluralism, - through which it tries to act as a
component of the governing mechanism, more exactly to function as a connecting or
transmission bridge which moves in a bottom-up manner in order to reduce "the many" into
"the simple".48

A group can be representative in the meaning that it conveys, with the exactness and loyalty of
a "mirror"49, the image of the civil society. In this sense, a correspondence or similarity
relation is built between the representative body and the society, in which the representative
body reproduces at a smaller scale the composition of the society. Up to this point,
representation is considered a model in miniature of the society, i.e. “representation as
similarity” of the diversity of the civil society. But for the representation to become
democratic, it has to acquire another meaning. As said above, for a regime to remain
democratic, it has to function not only as a system of power, but also as system of controlling
the power. The specificity of it lays in the fact that the control over power will be exercised by
the same subject who will be the titular of the power. This makes the free and periodic
elections the basic and indispensable condition for a representation to be considered
democratic.

At this point, it is necessary to concentrate the attention on the two above mentioned
attributions of the elections: freedom and periodicity. Freedom guarantees the electorate at
least one effective selection opportunity between various alternatives (otherwise the elections
become some kind of a periodic coercive abdication in favour of an absolute leader.)
Periodicity enables the accomplishment of the "principle of the spatial-time awareness",
in the meaning that the awareness of future elections make the representatives behave like a
responsible representative of a territory (in the broad meaning of the word50), so that they are
not penalised by not being elected in the future elections. The importance of freedom and
periodicity of elections lays in the fact that these characteristics give to the representation its
second meaning - that of accountability. If earlier we said that "correspondence" is similarity,
now we can talk about responsibility that is accountability. In fact, the fear of not getting re-
elected translates in a real pressure on the representative, who has the tendency to do or say
things that the electorate will like, and above all is under pressure not to do or say things that

48 On proportional representation and the relations among the society and the State see Hermens, F. A., Democracy or Anarchy? A Study of Proportional Representation, Indiana, University of Notre Dame Press, 1941, pg.59 and fw.
49 Lakeman E., Lambert, J.D., Voting in Democracies, London, Faber & Faber, pg. 25.
50 In this light it is implied the representative of a territory, who represents not only the territory in the narrow and material sense of the word, but the territory as the collective space of a defined social group and a variety of specified social interests viable within and through, precisely, the territory itself.
the electorate won't like. This way the represented exercise - maybe unwittingly - their function of controlling, stopping and restricting, and put the representative in a situation that makes them feel committed and accountable towards them. This is how the political and not legal obligation of the representative is created - to be accountable to the represented.

As a conclusion we can say that the organisation of the electoral systems must be conceptualised in such a way as to avoid that during the representation process, the aspect of representation does deny or diminish the aspect of accountability.

V. THE ELECTORAL SYSTEM IN ALBANIA
Based on the logic of the above paragraph, naturally comes the question: Does our electoral system enable the relation representation-accountability?

By conducting a diachronic analysis of the representation phenomena in Albania, we can say that it has been conditioned not much by the voters, but by the governing systems, that in most cases have deviated with non-democratic practices. These governing systems have aimed at, at least until the end of the eighties, the conceptualisation of electoral mechanisms that practically denied representation almost completely. The changing of the regime in the beginning of the 90s and the creation of the new parties in the Albanian political arena brought about a radical change of the representation system, and finally an electoral system was put in place that allowed the participation of different political alternatives and the distribution of the mandates between them. This was an important step in breaking the totalitarian one-party system that had ruled Albania for nearly half a century. However, the adoption of the party pluralism and of western electoral systems did not have the desired effect on the development of the country. This was because, firstly, the representatives and their parties were not a derivation of a liberal intellectual development, and secondly because they represented neither the general will of the electorate, nor the interests of organised social and economic groups (the latter had not been created yet). The strategies of the parties in power have been oriented towards the electoral practices, e.g. manipulating the voters' lists, buying or stealing votes, that would bend the standards formally guaranteed by the electoral law, thus shifting the will of the electorate to hold power. On its side, the electorate was in the conditions where they considered the representation in itself as a freedom not to delegate a representative of their interests, but to decide which the was the alternative, not the most representative, but the least damaging one.

The representation system in the Republic of Albania is based on the Constitution of the Republic of Albania, on the Electoral Code and on the relevant sub-legal acts. The Constitution of the Republic of Albania mentions several times the principle of political representation. In fact, paragraph 3 of Article 1 of the Constitution sanctions the need of

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political representation to have a legitimate governing. Specifically, it determines that "Governing is based on a system of free, equal, general and periodic elections", thus through the voting process during the elections, under the framework of a representative parliamentary democracy it is expressed the will of the people, required to exercise sovereignty by electing their representatives. Consequently, paragraphs 1 and 2 of Article 2 of the Constitution sanctions that "Sovereignty in the Republic of Albania resides in the people", "The People exercise their sovereignty through their representatives or directly". It is thus clear that it is the people who elect their representatives through voting in the general elections, voting which pursuant to paragraph 4 of Article 45 of the Constitution must be individual, equal, free and secret. Under this perspective, the electoral system and its mechanisms, must indispensably respect the dictate of these Constitutional norms. On the other hand, the Constitution clearly defines who the active electorate (citizens with the right to vote) and the passive electorate (who has the right to be elected) is. Pursuant to Articles 45(1), 45(2) and 45(3) of the Constitution the passive electorate consists of all the citizens over 18 years of age, except specific restrictions defined by the same Articles. All procedural and administrative aspects of the Albanian electoral system such as conducting, administering and supervising the elections, are regulated by the Electoral Code. The Electoral Code, as a legal act of a lower rank than the Constitution of the Republic of Albania, must respect the above mentioned constitutional principles related the electoral system. However, these principles seem to be impinged by some dispositions of the Electoral Code. More specifically, in Article 98 of the Electoral Code "The content of the ballots", paragraph 3 it is determined that "The names of the electoral subjects are ranked in the voting ballots as per the order defined randomly through the casting of a draw. The logo, the initial, and the name of the chairman of the party are placed alongside of the name of the party. Each subject listed in the ballot has a corresponding space in which the voter can mark their vote", and in paragraph 4 that "Parties member of an electoral coalition are listed one after the other in the section of the ballot that belongs to the electoral coalition. For each of the parties of the coalition, the logo, the initial, and the name of the chairman of the party are included. Each political party member of a coalition has a corresponding space in the ballot in which the voter can mark their vote. Their ranking in the list is randomly chosen through the cast of a draw". Thus, in the Article regulating the content of the ballots, the disposition suffices with regulating just the order of the electoral subjects in accordance with their logos, initials or name of the parties' chairmen, without mentioning the individual names of the candidates on the ballots. As a result the voting itself is realized through the selection of only the electoral subjects, without naming the preference for the candidates of these electoral subjects. In fact this practice is even more reinforced in paragraph 3 of Article 3 of the Electoral Code: "Each voter has the right to cast only one vote to elect an electoral subject", considering that electoral subjects, as per Article 63 of the Electoral Code, are the political parties and coalitions between them. In this sense, the vote formally and effectively goes to the parties or coalitions between parties and not to the specific candidates (citizens) who in fact ought to be the passive electorate, as per definitions of Articles 45(1), 45(2) and 45(3) of the Constitution. Furthermore, Article 68 of the Constitution sanctions that the electoral subjects can present candidates for MPs in the level of electoral
zones, but this does not in any way mean that they can replace the passive electorate (the citizens) with candidates for whom the active electorate (voters) in fact cannot vote, as it happens with the Albanian electoral practice of the closed lists. Pursuant to this practice the voters can only choose the parties as electoral subjects, or coalitions, on the ballot papers ots, but cannot express their preference for the MP candidates (passive electorate as per Article 45(1) of the Constitution).

This way, voters are submitted to a voting process where they can only choose their preferred party or coalition, and they are denied of the right to know the MP candidates at the effective moment of exercising the right to vote. As regards the presentation of the MP candidates in the multi-names lists, the Electoral Code only sanctions their publication in accordance to paragraph 3 of Article 73 which established that: "the Central Elections Commission publishes the full list of the candidates on the media and on its official website". A copy of the list for each electoral zone is sent to the Prefect, the Council of the County and the Zonal Commissions for the Administration of Elections, who publish it on the local media and post it in public places in their zone, in compliance with the instructions of the CEC”. This disposition assumes that the active electorate has the opportunity to know the names of the MP candidates for whom they will have to vote, but it does not in any way guarantee their proactive knowledge, as this can only be achieved by listing the names of the MP candidates in the ballots at the moment of voting. So the electoral law, which has to guarantee political freedom and rights, cannot escape the responsibility to inform the voter about the names of the candidates, by implying that with the publication of the MPs lists the responsibility to be informed is transferred to the voter, otherwise “ignorantia legis non excusat”. If the lawmaker thought that it is the voter's duty to get to know the candidates after they have been made public, then we are setting off from a wrong start. For instance, the norms of an imperative nature forbid electoral practices such as the selling/buying of the vote, family voting, voting more than once etc., and they are followed by sanctions. In this case, the "ignorantia legis non excusat" would make sense. While the voter ignorance of the name of MPs during voting, does not constitute an offence and is not followed by sanctions, so the principle "ignorantia legis non excusat" does not apply in such a case. Consequently this means that the legislator thought that it is not obligatory for the voter to know the candidates when they directly exercise their voting rights (in the ballots box), but it is obligatory that they are guaranteed the right to know them at any time, as this is the only way to "prescribe their right to be informed on the candidates". It is obvious how such a practice formally guarantees that the voter knows the candidate, but does not effectively guarantee this knowledge at the moment they exercise the right to vote.

At the same directions goes the disposition of Article 106 of the Electoral Code which disciplines the effective moment when the voter express their will: "After being given the ballot, the voter enters alone into the voting booth, and writes the sign "x" or "+" or another sign that clearly indicates their choice alongside the name of the electoral subject or of the party member of a coalition." These dispositions impinge Article 45(1) of the Constitution as well as the right guaranteed in paragraph 4 of Article 45 of the Constitution which determines that the vote is
individual and free, where the concepts "individual and free" must be interpreted not in the narrow but in the broad meaning that the vote must be cast for certain candidates and be free of indirect effects as those resulting from imposed electoral systems with closed lists.

In fact the contested dispositions do not allow the voter to express any preferences, but only to choose a list of candidates prepared unilaterally and implied from the logo of the party. The vote becomes essentially "indirect", which is contrary to many constitutional dispositions: Articles 45(1) and 45(4) as mentioned above; Article 70(1) of the Constitution which states that "MPs represent the people..."; with the principles contained in paragraphs 1 and 2 of Article 2 of the Constitution: "The sovereignty in the Republic of Albania resides in the people" and "The people exercise its sovereignty directly or through its representatives". As a result, the spirit of the above Articles of the Constitution sanction that the parties cannot replace the passive electorate (citizens over 18 years of age) by taking away from the voters the right to elect their representatives, and from the elected the direct relation with the voters, as prescribed in Article 70(1) of the Constitution which assumes the existence of a direct relation MP-people. The principle of the direct vote exercised by the voter is clearly stated in Article 3(2) of the Electoral Code: "elections are conducted through free, secret, equal and direct voting". Consequently, the Electoral System put in place through the contested dispositions of the Electoral Code makes the vote be neither free nor individual as sanctioned in paragraph 4 of Article 45 of the Constitution, and not an expression of the direct relation MP - people as prescribed in Article 70(1) of the Constitution. Furthermore, this practice is contrary to paragraph 2 of Article 17 of the Constitution which prescribing the limitation of the essential rights (as is the right to vote) cannot go beyond the limits of the European Convention on Human Rights which in Article 3 of its Protocol acknowledges the people the right to elect their lawmaking bodies.

After voting en bloc the list of candidates, who are moreover not published in the ballot but "assumed" based on the logos of the numerous parties, pursuant to paragraph 5 of Article 163 of the Electoral Code the names of the winning candidates of each party are established, based on their order or ranking on the list, emphasising again the blocked list without a preference vote. Under the same logic operates Article 164 of the Electoral Code which prescribes that "the interrupted mandate is passed to the candidate next in line of the same political party in the respective constituency." So the distribution of the mandates in case of a vacancy follows the same logic of the ranking of candidates on the closed lists prepared by the parties. Under these conditions, existing such dispositions that prescribe a voting right only for the logos of the parties that have the competency to prepare the lists of candidates pursuant to their will, by not allowing the voters to express any preferences on the candidates, who are not even listed in the ballots, make the vote fundamentally indirect. This means that, at least for the first names on the party lists, it is the political parties which fact elect the future MPs. So the fundamental problem is the fact that the voter cannot express any preference on the candidates, and that the political party which should propose candidates for MPs to the electorate, is actually proposing MPs in guaranteed list positions. As repeatedly mentioned above, this electoral practice is contrary to the principle of representation in Article 2 of the Constitution, to the individual and free vote in
Article 45 of the Constitution, and to the direct representation relation MP - people in Article 70(1) of the Constitution.

In line with these arguments, the exercising of the right to vote is unconstitutionally impinged by the Electoral Code. Every power of the active electorate to directly and freely decide on the composition of the Parliament, is eliminated by the fundamental weight given to the ranking of the candidates in the lists submitted to the CEC by the political parties, lists that are prepared by the parties bodies in an order that cannot be changed and do not allow for preferences of the voters different from the preset ranking of the candidates. With the voting system with closed lists, the Electoral Code aims to make the voter simply to ratify the ranking of the candidates as determined by the political parties, and not to allow them to freely elect candidates from the lists presented by the political parties. The voters thus have only one option on the elections day: to compulsorily approve the candidates placed under the logo of the electoral subjects and given the so-called "sure" places by the will of the political parties. Lastly, the vote expressed this way is contrary to paragraph 4 of Article 45 and does not freely express a preference for the MP candidate. In this sense, the Constitutional Court with its decision No. 44 of dated 7.10.2011, paragraph 28, clearly sanctions that "the mandate of an MP is not won in the Parliament, but through a general voting process in which the voters freely express their preference on the candidates."

From the above analysis, it results that: Article 3 paragraph 4; Article 98 paragraphs 3 and 4; Article 106 paragraph 1; Article 163 paragraph 5; Article 164 paragraphs 2, 3 and 4 of the Electoral Code, in an organic way, impair and communicate the impairment of the right to vote (paragraph 4 of Article 45), and of all the rights of political representation prescribed in the Constitution and cited above. Furthermore, paragraphs 1, 2, and 3 of Article 69 and paragraph 4 of Article 164 of the Electoral Code, in an organic way are contrary to the principle of the equal vote, sanctioned in paragraph 4 of Article 45 of the Constitution, and the principle of proportionality of the electoral system in paragraph 1 of Article 64 of the Constitution that states that "the Parliament comprises 140 MPs elected through a proportional system from multi-names electoral zones." The Constitution of the Republic of Albania prescribes 3 political subjects legitimated to present MP candidates in the general elections. These subjects enabled to present candidates as per paragraph 1 of Article 68 of the Constitution are: a) political parties; b) electoral coalitions between political parties; c) voters. In relation to the latter, the Constitution has legitimated the Electoral Code by delegating to it the right to discipline the matter. In fact the Electoral Code in paragraphs 1, 2 and 3 of Article 69 sanctions that apart from the political

\[52\] Article 69 of the Electoral Code. 1. A group of voters in an electoral zone have the right to nominate a candidate for that electoral zone [...] no later than 50 days from the election date. 2. The proposed candidate from a group of voters might not be part of any party or coalition that competes in the elections and neither openly or indirectly support any person or other candidate that competes in elections. 3. For the presenting of a candidate from voters it is established an initiating committee with not less than 9 constituents from the respective electoral zone, who are charged to organize the work of gathering the supporting signatures for the candidate [...] no later than 70 days
parties and coalitions between political parties, "a group of voters" can constitute an Electoral Subject: "a group of voters in a constituency has the right to propose a candidate for that constituency [...]". This way the number of the candidates that can be proposed in a constituency by the electoral subject identified as a "group of voters", is clearly limited. So, irrespective of the number of mandates allocated to a constituency, the electoral subject "a group of voters" can propose **only one** MP candidate. Thus if the electoral subject is a political party, as per Article 67 of the Electoral Code it can submit its multi-names list for each constituency, while if the electoral subject is a "a group of voters" it can only propose one MP candidate and not a multi-names list. In this sense, if a candidate was proposed by a "group of voters" in a constituency with a total number of 34 mandates, for example the constituency of Tirana, and if the candidate proposed by the "group of voters" wins 50% of the votes cast in that constituency, then the result would be that 50% of the votes cast would only produce on mandate, and the other 50% of the votes cast would be divided between the remaining 33 mandates, thus making the vote totally unequal and the distribution of the mandates in Parliament totally non-proportional, contrary to the principles of the equality of the vote and the proportionality of the distribution of mandates (Article 45 and Point 1 of Article 64 of the Constitution).

The situation gets worse with paragraph 4 of Article 164 of the Electoral Code where it is established: "*When the list of the candidates of a party member of a coalition has been exhausted, the mandate is given to the party in the coalition that has the highest quotient*. When an interrupted mandate belongs to the candidate proposed by the voters, the mandate is given to the electoral subject with the highest quotient.* When the mandate belongs to an electoral coalition, it is distributed to the party in the coalition that has the highest quotient*. Unlike the filling of an empty seat in the case of political parties members of a coalition, in the case of a candidate proposed by the voters the seat flagrantly is given to a whole different subject, thus alienating the will expressed by the voters. So the vote that has served to elect a candidate who is not member of a party or a coalition of parties, in case of exhaustion or interruption, is distributed to a candidate of another party, seriously impinging the right of the individual and free vote thus the fundamental freedom "to vote for who I want to".

As for the question asked earlier: "*Does our electoral system enable the relation representation-accountability?*" the answer is absolutely "Not". Not only does the system not enable such a relation, but also the element of representation as a formal situation seems to be impinged. The

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The number deriving out of the division of a number with another number.

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It might be useful to consider the opinion that if groups of voters under the prerogative of the electoral subject could present lists instead of candidates, this fact would fade the role of political parties as political subjects, in this light it may interfere on the establishment criteria of the electoral subjects "A group of voters" hindering their establishment. However, the task of this requirement is not the rationalization of this practice, but the pointing out of the paradox and its normative irrationality.

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present electoral system definitely detaches the representative from the represented, not only in the meaning of the representation as an image, but also in the meaning of the representation of a unitary hypothetical will (representative of a volonte generale), so this relation - basic principle of the representation and representability and of the democracy in general - is almost completely lost. This situation gives us enough arguments to consider our electoral law unconstitutional.

VI. COMPARED JURISPRUDENCE OF THE ANALOGUE ITALIAN CASE

To support the analysis of the unconstitutionality of the above dispositions of the Albanian Electoral Code, we can rely on the comparative jurisprudence. More specifically on the Italian jurisprudence where by the end of 2014 a constitutional decision on the electoral code was issued by the Italian (Decision No. 1/2014), which under the influence of the comparative jurisprudence, may have an effect on all those legal systems where elections are conducted with ballots consisting in long closed lists of candidates.

With decision No. 1/2014 the Italian Constitutional Court decreed that with the current electoral system in Italy "The vote cast by the voter, exercised to define the total composition of the Parliament, is a vote to elect a list, denying the voter any possibility to affect the election of their representatives, which irrespective of the number of the mandates won from the list, also depends on the order of the candidates in the list, an order totally decided for by the parties. In other terms, the preference of the voters translates into a preference vote for the list (in the Albanian case it translates into a simple preference vote for the party logo) - which, in very large constituencies has a large number of candidates that corresponds to the number of mandates of the constituency, and makes them consequently hardly distinguishable from the electorate itself". "Such a discipline deprives the voters from any possibility to elect their representatives, a possibility that is totally placed in the hands of the parties."

The Italian Constitutional Court also explains that it is not against the intermediary role of the political parties, sanctioned by the law and by the Constitution itself which classify them as subjects capable of proposing electoral alternatives. As explained earlier in its Decision No. 203/1975, the Italian Constitutional Court is not against having the lists of candidates ranked pursuant to the order set by the parties, as long as the voters are allowed and guaranteed to manifest their will through the preference vote by marking their preferred candidate irrespective of the order in the list. In the case of the Italian electoral Law No. 270/2005, named "porcellum", this freedom is impinged by the fact that like in the Albanian case the voter "is called to effectuate the election en block of all MPs (...), often voting a long list of candidates they hardly know".

In conclusion, the ICC emphasises that "the MPs elected this way, with no exceptions, lack the support that comes from the individual selections that the citizens are supposed to exercise,

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55 Decision1/2014 par. 5.1. ICC.
which constitutes the representation logic prescribed in the Constitution. Such voting conditions that oblige the citizens to elect en bloc all the candidates from a list, candidates whom they have not had the chance to know and assess and who are automatically given, as per the ranking in the list, the seat of and MP or senator, makes the discipline under consideration incomparable not only to the systems characterised by blocked list for some of the mandates, but also to others characterised by small constituencies in which the number of the candidates to be elected is so small that it guarantees that the electorate effectively knows them, which in turn guarantees the effectiveness of the elections and the freedom of the vote” 56. So, as the ICC emphasises, such a discipline is not found in the compared Constitutional law. For instance, unlike Germany where the blocked lists refer to a certain number of mandates, in Italy the number of the proportional mandates from the blocked lists is equal to the total number of the mandates, hence no mandates can be won in any other way. In these conditions the norm of the electoral law examined by the ICC "not only totally alienates the relation of representation between the voters and the elected, but by impeding the correct and direct instauration of this relation, it coerces the freedom of the voters to elect their representatives in the Parliament which is one of the main expressions of the sovereignty of the people, and as such it is contrary to the democratic principle by affecting the principle of the free vote as per Article 48 of the Italian Constitution" 57.

As a result of the above analysis, all dispositions of the electoral process that allow for ballots which display not the names of the candidates but only the logo of the parties, especially when the logo implies a blocked list in the ranking established by the party, seem to be unconstitutional.

VII. CONCLUSIONS AND RECOMMENDATIONS

It is time, and it is not an anachronisms, for the Albanian level of discussion to be raised at the level of analysing the electoral system as such and of identifying of an electoral system that would be optimal in relation to the representation of the Albanian society. So it is not worthless treating the topic in strictly analytical and procedural terms, and it is not fair scarifying the discussion of such terms in order to discuss other electoral issues that are normally equally important, such as stealing/selling/buying of the vote etc. The latter practices may be favoured by certain electoral systems and maybe be penalised by others, although at a relatively low scale, as these phenomena in the developed western countries are definitely rejected by the collective conscience of the society and by its level of the democratic conscience. Thus the principle, analytical and procedural discussions on the electoral systems would help make the society (the represented or representative) conscious that the primordial behaviours such as stealing/selling/buying of the vote are definitely unacceptable, and that the discussion must be brought to other levels and attention must be focused on the electoral systems themselves,

56 Ibidem.
57 Ibidem.
which can penalise or favour the political representation. Hence even if there is no stealing/selling/buying of the vote, even if the electoral process continues to be free and fair, the citizen might still be misrepresented.

It has to be emphasised that however we look at the case, the representative regime is historically linked to the idea of the existence of an assembly in which the Nation can be represented and which can produce the political unity of the people, so an Assembly where the Nation will be present although not individually. If the elections for the Assembly were democratic, within a system that would not guarantee the representation of the social and ethnic "minorities" present in the society, then such an assembly would be able to achieve the maximum of governing, would be able to undertake efficient governing actions. Such an assembly, representative of a homogeneous society without significant castes differences, would be really democratic; but if we'd compare this to the real people, the people that really exists as per the idea of representation, then this assembly would appear to be the representative of something that does not exist. The real people, the people characterised by differences in religion, castes, interests, aspirations, ideals etc., is not present in such an Assembly. From here emerges the necessity for the representation principle to be corrected with the identity one, e.g. that fragments of the real people be allowed to enter in the representative Assemblies. This way the Assembly would not anymore be the representative of the political unity of the people, but of the social pluralism, meaning that it will be the miniature image of the electoral *corpus*.

If we were to arrive to this solution, the system would be seriously contradicted. The representative Assembly of a homogeneous electorate would manage to have a governing stability and would concentrate in its hands the state power, in the same way that an Assembly that expresses the social fragmentation and plurality of different interests and ideologies would leave aside its representative character to make way for the principle of immediate identity. In this light, the extreme democratisation that sees in the assembly the society in miniature and all interests organised and represented, would transform the Parliamentarism into an advocate of these interests, having no longer autonomy in decision making. Being a representative in the Assembly of the representability is just being fictitious, because the representative does not have the necessary independence to exercise his/her functions - in other words cannot decide according to their *free thinking and reasoning or according to what they think is right*. If the power was concentrated in such an Assembly, this Assembly would be unable to make quick and efficient decisions, would cause instability and frequent changes of the political programmes. Such an Assembly would lose its decision making and governing capacity and would paradoxically marginalise, in a thorough analysis, the representative democracy itself. Again rises the question: Which is the right electoral system? The one that would achieve representation or the one that would achieve representability? The one of decision making or the one of presence?

Seeing that the Executive, through the political power of the Prime Minister, who is also the Chairman of the party winning the elections, has in its hands the mechanism of the candidacies
(in the extreme cases of closed lists) and the control of the legislative activity through the parliamentary groups, it can be concluded that in these conditions the accountability of the MPs has suffered a definitive mutation - from accountability to the voters it is now accountability to the party thanks to which they have the seat. In the same terms we can speak about the accountability of the MPs towards the leader (PM and Chairman of the political party), whose personality and charisma placed them in the list of the MP candidates. As a result, the trust relation between the Government and the Parliament has been inverted, thus it is the Parliament, or better the MPs who need the trust of the leader/ PM, and not the Government which has to be accountable to the Parliament which is supposed to control it. The institutional order is thus given a hard systemic blow. In these circumstances, different from the classical idea of the mandate, the total decision making autonomy of the Government, if not properly corrected, would transform the mandate given to the executive into a dictatorship of a fixed duration.

In these circumstances what is needed is an electoral reform that:

i. would provide a solution in favour of the political representation, hence the implementation of that electoral system that will be capable to detach the supremacy of the party leadership in selecting "ex officio", not of the candidates but of the future "anonymous" MPs hidden in closed lists.

ii. would cure the trust relation between the Parliament and the Government, in which formally, but above all substantially, it will be the Parliament that votes the Government, and that ensures accountability through controlling functions.

iii. would increase the quality of the representatives and hence of the policy making and lawmaking, which would have their echo in the executive and legislative power by placing the right weights and counterweights in order to have separate powers free of impacts on their independence.

iv. would enable the rotation of the party, government, and policy making elites.

Such a solution has to be found in the origin, i.e. at the moment when the power begins to be delegated. So in the elections, as an emblematic moment, or better as the act of gestation of the state itself or its democratic model, where the people (with its various characterising demands) decides on the composition of the institutions in which the interests of each group will be represented, negotiated and pursued. For this to happen, electoral mechanisms capable of ensuring free elections and qualitative political representation must be used, as we will suggest later in this paragraph.

Provided that the influence of the electoral systems on the political life of a country is exercised through the intermediation of the parties, in Albania the intermediation of the political parties is currently almost closed, specifically as a result of the ballots which are also closed. Without wanting to repeat what already has been said above, it is clear that the proportional electoral model (Article 64 of the Constitution) pursuant to the mechanism of distribution of the

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mandates (defined by the electoral law), not only has deteriorated the qualitative standards of representation compared to the previous systems by stripping the Parliament of its functions and weight, but has already caused, and this is an irrebuttable fact, the election of an elite in the midst of the Parliament, which it can be minimally held that needs improvement.

Under these circumstances, our proportional system can be improved by "opening" the ballots through changes of the Electoral Code. However, what needs to be emphasised here is the fact that the improvement of the Electoral Code cannot go beyond the proportional framework sanctioned in the Constitution without reforming the Constitution itself. So we cannot go back to a majority or mixed system without changing Article 64 of the Constitution which sanctions that: "The Parliament is composed of 140 MPs elected through a proportional system from multi-names electoral zones". Seeing that every electoral system has its pros and cons and that every society must reconsider it in relation to the socio-political evolution of the society over time, then it seems to be inappropriate the embedding and positivism of the electoral model in the Constitution. As a conclusion and more specifically, the Constitution must guarantee the indispensability of conducting periodic general elections and hence of the exercise of the people's sovereignty, without trying in vain to select the electoral model. In this sense, the Constitution in Article 64 can avoid defining the electoral model, whose defining and disciplining would be more reasonably delegated to the reinforced legal reserve, i.e. to a law whose approval would require a qualified majority. In concluding this analysis, an electoral system is required that could revitalise the political representation in the meaning that would enable the rotation of the leading elites. Such as system that would break the bad tradition of election of the MPs by an individual that stands at the head of the political party, could be the majority system of elections. By establishing the two rounds electoral system, i.e. the majority system, a candidate, to be elected in the first round of the elections a candidate must reach or surpass the absolute majority of the votes (50+1%). If none of the candidates reaches 50+1% of the votes, then the second round of the elections will take place.

Another system that could be experimented in Albania, which enables the majority elections and at the same time respects the proportionality of the preferences of voters, is the single-seat alternative voting system with absolute majority, also called "instant-runoff", which

<table>
<thead>
<tr>
<th>Rank</th>
<th>Candidate</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Candidate A</td>
</tr>
<tr>
<td>5</td>
<td>Candidate B</td>
</tr>
<tr>
<td>1</td>
<td>Candidate C</td>
</tr>
<tr>
<td>2</td>
<td>Candidate D</td>
</tr>
<tr>
<td>4</td>
<td>Candidate E</td>
</tr>
</tbody>
</table>

*Table 1*
round system, but avoids calling the voters in other rounds or other elections.

To be more clear, let's examine the case when none of the candidates has won the absolute majority of the votes as "first preference", then the candidate with the smallest number of votes is eliminated and his votes are distributed to the other candidates according to the "second preferences" on the redistributed ballots. If still none of the candidates reaches the absolute majority, than the least voted candidate is again eliminated and his votes are distributed to the remaining candidates, in accordance with the preferences listed after his/her name (be they second and third preferences). The mechanism goes on like this until a candidate reaches the absolute majority (see example in Table 2 below). In every distribution, the ballots that have exhausted their order of preferences are eliminated, or better the ballots in which the voters have expressed a preference order only for some candidates but not for the remaining candidates are eliminated. We can say as a conclusion that the alternative vote system has the advantage to present or reproduce the vote of the voters in a more loyal and sincere way than the two-round system.
Table 2 - The one name system of the alternative vote with absolute majority (Example of implementation)

<table>
<thead>
<tr>
<th>Votes</th>
<th>Candidate A</th>
<th>Candidate B</th>
<th>Candidate C</th>
<th>Candidate D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct votes</td>
<td>45.000 votes</td>
<td>35.000 votes</td>
<td>20.000 votes</td>
<td>10.000 votes</td>
</tr>
<tr>
<td></td>
<td>40.9%</td>
<td>31.8%</td>
<td>votes 18%</td>
<td>votes 9%</td>
</tr>
<tr>
<td>votes collected after the</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>first redistribution</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>45000 direct votes +</td>
<td>35000 direct votes +</td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td>Candidate D is eliminated because he has the smallest number of votes, and his votes are redistributed among the other candidates according to the second preference indicated in the ballots. So, 9000/10000 ballots on which the second preference is indicated, are distributed as such: 2000 votes to candidate A, 5000 votes to candidate B and 2000 votes to candidate C.</td>
</tr>
<tr>
<td>2000 votes as second</td>
<td>5000 votes as second preferences from the ballots of candidate D</td>
<td>= 40000 = 36.7%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>preferences from the</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ballots of candidate D</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>47000 = 43%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Votes accumulated after the</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>second redistribution</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>47000 direct votes + votes</td>
<td>40000 direct votes +</td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td></td>
</tr>
<tr>
<td>as second preference</td>
<td>second preference votes from ballots of candidate D</td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td></td>
</tr>
<tr>
<td>from the ballots of candidate</td>
<td>13000 votes as second</td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td></td>
</tr>
<tr>
<td>C</td>
<td>preference.</td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td></td>
</tr>
<tr>
<td>+</td>
<td>from the ballots of candidate C</td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td></td>
</tr>
<tr>
<td>700 votes as third</td>
<td>800 votes as third preference</td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td></td>
</tr>
<tr>
<td>preference from the ballots</td>
<td>53800 = 50.04% (winner)</td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td></td>
</tr>
<tr>
<td>of candidate D</td>
<td></td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td></td>
</tr>
<tr>
<td>= 53700 = 49.95%</td>
<td></td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>20000 votes +</td>
<td>10000 votes +</td>
<td></td>
</tr>
</tbody>
</table>

Votes accumulated after the second redistribution: 47000 direct votes + votes as second preference from the ballots of candidate D = 53800 votes. (winner)

Votes accumulated after the first redistribution: 45000 direct votes + 2000 votes as second preferences from the ballots of candidate D = 47000 votes = 43%
Subject-matter competence of courts concerning decisions of the Property Management Agency

By Av. Olesia Dosti,

I. ABSTRACT

The present article calls the readers’ attention on a specific aspect of the Albanian legislation in force, the area of property law. More specifically the articles deals with the role of the Property Management Agency, as the public body legally qualified to regulate issues related to property, the amendments made to the law on property since 1993 to date, by focusing on the current law no. 133/2015 “on the treatment of property and finalization of the process of compensation of property”. Regardless of the amendments and the novelties this law brought in the process of property management, it nonetheless created a set of problems throughout the case law in relation to exercising the right to appeal against decisions of the Property Management Agency, which has subsequently triggered a conflict of competence between the administrative and civil courts.

KEY WORDS: Property Management Agency, the right of appeal, declaring lack of competence, decision on the merits, administrative acts.

ABBREVIATIONS:

APC Administrative Procedure Code
ARCP Agency on Restitution and Compensation of Property
CC Constitutional Court
CPC Civil Procedure Code
DCoM no. 221/2016 Decision of the Council of Ministers no. 221, dated 23.03.2016 “On the organization and functioning of the Property Management Agency”
DCoM no. 222/2016 Decision of the Council of Ministers no. 222, dated 23.03.2016 “On handling of requests for recognition and compensation of property”
ECtHR European Court of Human Rights
Law no. 133/2015 Law no. 133, dated 05.12.2015 “On the treatment of property and finalization of the process of property compensation”
I. BACKGROUND OF THE LEGISLATION ON THE RIGHT TO PROPERTY IN ALBANIA

The law on the right to property has undergone considerable amendments from 1993 to date. The background of amendments of the property law, shall be briefly described below:

i. **Law No. 7698/1993 “On restitution and compensation of property to former owners”**

    Being the first law endorsed in the area of property rights, it recognized the right to property of former owners and their lawful heirs in relation to property which was unfairly taken by the state, expropriated or confiscated in compliance with legal acts, sublegal acts or court decisions issued after the 29th of November 1944. Furthermore, this law foresaw the cases and conditions through which subjects to which the property right was recognized, could request its restitution in kind, compensation in kind or its respective value, in compliance with the requirements therein. The law tasked the Council of Ministers as the sole competent body, with the issuing of the necessary sublegal acts, taking of organizational measures on the implementation of this law, as well as defining additional detailed rules on the methods and deadlines for the compensations.

    Establishment of SCRCP attached to the Council of Ministers was provided for in Article 25. Whenever former owners had not found remedy in this law, they could resort to SCRCP but however, this provision was too general and it failed to mention specifically the cases when the former owners could resort to SCRCP. On the other hand, this law did not foresee a deadline within which decisions of the SCRCP could be appealed, therefore entailing their non-enforcement.

ii. **Law No. 9235/2004 “On restitution and compensation of property”**

    Together with the abrogation of the previous law, the adoption of this law brought novelties in the area of property rights. By means of this law, subjects could now claim the settling of

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59 Article 1, of Law No. 7698/1993 “on restitution and compensation of property to former owners”
60 Article 28, of law no. 7698/1993 “on restitution and compensation of property to former owners”
61 Driza vs. Albania, Appeal No. 33771/02, Judgement of 13 November 2007
disputes on property rights which had emerged following expropriations, nationalizations or confiscations, and the restitution of property or its compensation. Furthermore, the law established the procedures and competent administrative bodies for the restitution and compensation of property. LCRCPs were for the first time established in implementation of this law and performed their activity at the regional level, being responsible for making decisions on recognition or non-recognition of the property rights for expropriated subjects. The SCRCP was also established in implementation of this law, composed of five members to be appointed and discharged by the Parliament, in compliance with the procedures provided therein. Numerous competences were conferred on SCRCP by means of which, it could among others take decisions on appeals against decisions of LCRCPs. The law supplied detailed provisions stating that the right to appeal against decisions of LCRCPs was to be exercised by resorting to the SCRCP, within the deadlines and manner stipulated in the APC.


Law No. 9583, dated 17.07.2006, introduced several amendments to the Law No. 9235, dated 29.07.2004 “On restitution and compensation of property”. This law, inter alia, provided for the establishment of ARCP, as a new body with the headquarters in Tirana and branch offices in every region, having the competence to admit, examine and decide on claims of subjects on the restitution or compensation of property. Offices at the regional level would initially handle requests of the expropriated subjects for property situated within the territory of their region and would issue decisions on the recognition or non-recognition of the property right, whereas the central office in Tirana, would among others, examine the appeals against decisions of the ARCP office at the regional level.

iv. Law No. 133/2015 “on treatment of property and finalization of the process of compensation of property”

Reckoning the chronology of amendments made to the laws on property issues and considering suggestions of the international jurisprudence through the pilot decision “Manushaje Puto and others v. Albania” (a fact which is also highlighted in the explanatory report of the law), the

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[62] Article 1, of Law no. 9235, dated 29.07.2004 “on restitution and compensation of property”


[64] Article 16 of law no. 9235, dated 29.07.2004 “on restitution and compensation of property” “Komiteti Shtetëror për Kthimin dhe Kompensimin e Pronave ka këto kompetenca: a) shqyrton dhe merr vendim për ankesat ndaj vendimeve te komisioneve vendore te kthimit dhe kompensimit te pronave, me përjashtim te rastit te parashikuar ne nenin 19 te këtij ligji;……..gj) përcaqtion mënyrën e zëvendësimit te eksperteve ose anëtarëve te komisioneve vendorekur ata janë ne kushtet e pengesës ligjore për kryerjen e veprimtarisë”

[65] Article 20, paragraph 1, of Law no. 9235, dated 29.07.2004 “on restitution and compensation of property”


[67] Article 16, point 1, of law no. 9583, dated 17.07.2006 “on some amendments and addenda in law no. 9235, dated 29.07.2004 “on restitution and compensation of property” as amended.
need arose for improvement of the legislation on property management in Albania. In fact, ECtHR remarked that none of the Albanian laws which regulated property rights, did contain any provisions related to the enforcement of decisions of the Commission as well as that there were no legal provisions on the deadline for filing an appeal against such decisions with the domestic courts or another competent authority established by law\(^{68}\). Accordingly, the Albanian state had the obligation to undertake the necessary legal and institutional steps to definitely settle\(^{69}\) the process of restitution and compensation of property.

Therefore, the adoption of Law no. 133/2015 “On treatment of property and finalization of the process of compensation of property” followed, it repealed the preceding law (law no. 9235/2004) and had as its objective to incorporate recommendations imposed by the ECtHR in relation to the restoration of the infringed property rights to all former owners. This law introduced novelties in the area of property law because it provided for:

- the methodology related to financial calculation, forms of compensation and assessment of property. As a result, the Property Compensation Fund was established and made available for compensation for the final compensation decisions\(^{70}\). Therefore, compensation decisions indicate a clearly determined economic and financial value, a fact which is useful for their enforcement;

- the establishment of PMA\(^{71}\), as the sole competent body which admits, completes, examines and takes decisions on the requests of the expropriated subjects. The PMA is established in implementation of this law as subordinate to the Ministry of Justice and is managed by the General Director, who among others, represents the institution in relations with third parties, approves the Internal Regulation of PMA or performs any other tasks in compliance with this law and other sublegal acts in force\(^{72}\);

- the right of every interested party to exercise its right to appeal against decisions of PMA within 30 days, with the Civil Court of Appeal\(^{73}\).

II. ROLE OF THE PROPERTY MANAGEMENT AGENCY
The Property Management Agency is the only body, established as a public legal person\(^{74}\) competent to handle and regulate property issues. The essence of the PMA’s activity is

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\(^{68}\) Manushqe Puto and others against the Republic of Albania, Appeals no. 604/07, 43628/07, 46684/07 and 34770/09, Judgement of 31 July 2012.

\(^{69}\) Decision of the Constitutional Court No. 1, dated 16.01.2017, page no. 5

\(^{70}\) Article 9, paragraph 1 of Law No 133/2015 “on the treatment of property and finalisation of the process of compensation of property”.

\(^{71}\) Article 26, of law no. 133/2015 “on the treatment of property and finalisation of the process of compensation of property”.

\(^{72}\) Point 6, of DCM no. 221/2016 “on the manner of organization and functioning of the Property Management Agency”.

\(^{73}\) Article 29 of law no 133/2015 “on the treatment of property and finalisation of the process of compensation of property”.

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restitution and compensation of property, a considerably complex issue in Albania, which has continuously created problems that started to emerge since 1993 with the endorsement of the first law on the restitution and compensation of property\textsuperscript{75}. The main objective of this body is the fulfilment of public interests and as a public law subject, it exercises state functions or some public administration functions in compliance with the legal or sublegal acts in force.

While exercising its public functions\textsuperscript{76}, the PMA expresses its will through the adoption of acts of an executive nature, which are mandatory for the subjects to which these decisions are addressed. As mentioned above, the main mission of the PMA is:

i. Examination of requests of the expropriated subjects; and
ii. Examination and assessment of requests for obtaining the recognised right for compensation\textsuperscript{77}.

Following examination of requests or documentation submitted by the subjects in compliance with the procedures contained in the DCM No. 222/2016 as well as in implementation of the Law No. 133/2015 and DCM No. 221/2016, the PMA is entitled to take a decision concerning the treatment, recognition or compensation of the property, which more often than not creates a confusion in the interested parties, defence counsels and even interpreters of the law (including the courts), who sometimes consider such decision as an administrative act (within the legal definition provided by the APC) and other times as a “quasi” judicial decision\textsuperscript{78}. This controversy is also reflected in court decisions which often fail to determine correctly the legal nature of decisions taken by the PMA, by not being able to identify the type of dispute, whether it is civil or administrative, which is crucial and serves for the designation of the subject-matter competence\textsuperscript{79}.

If we refer to article 8 of the Law no. 49/2012 “On the organization and functioning of the Administrative Courts and the adjudication of administrative disputes”, which provides as follows: “An administrative court does not examine disputes: a)related to normative subordinate legal acts that according to the Constitution, are in the competence of the Constitutional Court; b) the examination of which, according to the legislation in force, is in the competence of another court”, it is noted that this provision stipulates that the administrative court lacks the competence to adjudicate all those disputes which despite being of an administrative nature, have been sent for competence to civil courts, upon a separate law. In these cases, such disputes shall be adjudicated by these courts. Considering that Law No. 133/2015 provides that appeals against PMA decisions as a quasi judicial body, shall be examined by the Civil Court of Appeal in

\textsuperscript{74} Article 5, paragraph 1, of law no. 133/2015 “on the treatment of property and finalization of the process of compensation of property”.

\textsuperscript{75} Law no. 7698, dated 15.04.1993 “on ownership”.

\textsuperscript{76} Article 2, point 1, indent (a) of Law no. 44/2015 “Administrative Procedure Code”.

\textsuperscript{77} Point 1 of DCM no. 221/2016 “on the organization and functioning of the Property Management Agency”.

\textsuperscript{78} Decision of the Civil Chamber of High Court No. 642 dated 16.03.2017, page no. 6.

\textsuperscript{79} Decision of the Civil Chamber of High Court No.58, dated 16.03.2017, page no. 5.
implementation of the principle of article 8 of Law 49/2012 mentioned above, it results that decisions of the PMA cannot be examined by the Administrative Court. Nonetheless, as it will be explained below, the issue of competence is much more complex than this.

IV. RIGHT TO APPEAL AGAINST DECISIONS OF THE PROPERTY MANAGEMENT AGENCY

As mentioned above, the law in force on the treatment of property, Law No. 133/2015, recognizes the right of PMA, as the sole body competent for examining the requests of former owners, to issue decisions on the recognition or non-recognition of the property rights. In relation to appeals against the PMA decisions, article 29 of the Law No. 133/2015 stipulates that: “The interested parties and the State Advocate Office have the right to file an appeal against the decision of the PMA on the recognition of the right, within 30 days from notification of such decision, to the Appeals Court, pursuant to the rules of the Code of Civil Procedures of the Republic of Albania.”

Pursuant to the interpretation of the legislator, the PMA decisions shall be considered "quasi" judicial, and in this case, the PMA plays the same role as courts of first instance and acts in the capacity of a quasi court, which jurisdiction is provided by law. Consequently, no public body enjoys the right to review such decisions and their appeal is deposited with and examined by a higher level court, notably the civil court of appeal. Therefore, although the right to appeal against a judicial decision before a higher court is recognized to anyone, in the case in question, when the PMA assumes the capacity of a quasi court and the appeal according to the legislation in force must be submitted to the Civil Court of Appeal, the question arises whether avoiding one instance of adjudication is in compliance with the constitutional standard of the right to have an effective appeal supported by the CC and ECtHR80. In its Decision No.1 of 16.01.2017, the Constitutional Court states as follows: “the right of appeal foreseen by law no. 133/2015 meets the criteria of having a judicial review of the acts issued by administrative or quasi judicial bodies....the state is under no obligation to foresee more than one instance of appeal, for as long as appeals can be submitted in a court as stipulated by law, within the meaning of article 43 of the Constitution and article 13 of the ECHR.”

Prior to the adoption of the new law no. 133/2015, by default, the right to appeal against decisions of the commissions for the restitution and compensation of property could be effectuated in the court of first instance81, based on the general rules of CPC, a fact indicating that although the previous law did not contain any provision in relation to the appeal, practice showed that the subject-matter competence of the first instance civil courts on such cases, had already been determined. Whereas article 29 of the new law No. 133/2015 foresees that decisions may be appealed against only when the PMA recognises the subject’s right to property, however the law fails to provide for the procedure on how will subjects act in cases when the PMA closes

80 Decision of the Civil Chamber of High Court No. 358, dated 16.03.2017, page nr. 2.
81 Decision of the Civil Chamber of High Court No. 369, dated 07.04.2017, page nr. 5.
the administrative proceeding by not taking a decision on the merits. In these cases, the question arises: *in which court shall the legitimate subjects who need to exercise their right of appeal, resort to?*

Closing of the administrative proceedings by the PMA by means of a decision, when decided unilaterally by the PMA and without the participation of the subjects during the administrative proceedings (DCM no. 222/2016 does not foresee the participation of subjects), is at variance with the principles of administrative proceedings, because it violates several constitutional rights of the subjects such as the right to be heard, the right to defence or the right to submit claims prior to the PMA issuing its decision. Therefore, if we refer to the fair legal process, we may say that in such cases, the right to adversarial proceedings\(^{82}\) of the appellant has been breached. This brings up the question whether the Civil Court of Appeal may exceed its competence for such cases and examine the adequacy of administrative proceedings (in cases when the PMA decision shall be appealed with the Civil Court of Appeal). For similar cases, the case law has been as follows:

The Civil Court of Appeal,\(^{83}\) for those cases when the PMA has not issued a decision on the merits but has limited itself with the closing of the administrative proceedings, has stated that it lacks the subject-matter and functional competence for examining the case as a court of first instance. The Court deems that the PMA has the obligation to issue a decision on the merits in relation to recognition or non-recognition\(^{84}\) of the property right, therefore the court holds that when the administrative proceedings is closed, there is no decision on the merits which according to the law may be appealed with the Civil Court of Appeal, but an administrative decision which may be appealed with the First Instance Administrative Court. The Civil Court of Appeal in its decision No. 189, dated 16.03.2017 holds that "...the decision to close the administrative proceedings, is an administrative act which is not foreseen by law no. 133/2015 and which in its essence expresses the failure to act of the administrative body". Furthermore, the Civil Court of Appeal\(^{85}\) referring to article 7 of law 49/2012, foresees that the first instance administrative courts among others are competent for "disputes which arise from individual administrative acts, normative sublegal acts and public administrative contracts issued during the exercising of administrative activities by the public body", therefore defending its argument that cases with this subject-matter of adjudication must be handled by the administrative courts according to article 45 of the CPC.

The Administrative Courts of First Instance\(^{86}\) have acted in a similar manner. Whenever the ATP does not issue a decision on the merits but closes the administrative proceeding, they declare leak of competence under the justification that law no. 133/2015 explicitly stipulates that the ATP

\(^{82}\) Decision of the Civil Chamber of High Court No. 358, dated 16.03.2017, page nr. 3.
\(^{83}\) Decision of the Tirana Court of Appeal no. 189, dated 16.03.2017, page nr. 1.
\(^{84}\)Article 33 of law no. 133/2015.
\(^{85}\) Decision of the Tirana Court of Appeal no. 497, datë 04.07.2017, page nr. 3
\(^{86}\) Decision of the Administrative Court of First Instance no. 2143, dated 16.05.2017, page nr. 2
decisions may be appealed against with the Court of Appeal, as the competent court. Whenever the Civil Court of Appeal and the First Instance Administrative Court consider at the same time and for the same case that they lack competence to adjudicate the dispute, they find themselves in front of a negative conflict of competences. When confronted with such situation, the only legal means to be followed by the courts is submitting the dispute to the High Court, as provided for in Article 64 of the: "The case, which is sent for consideration from a court to another one of the same level or by a higher court, should be accepted and reviewed by the court to which the case is sent. Conflicts between the courts regarding competence are not permitted, but the court, without interrupting the trial of the case, has the right to present its position to the High Court which decides on the competence according to the rules set forth in the second paragraph of Article 63 of this Code."

To illustrate the above, we may refer to a concrete case from the case law. Upon Decision No. 783 of 30.12.2016 the PMA decided to close the administrative proceeding with the argument that the technical-legal documentation deposited by the claimant was not complete and in line with the requirements of the law and sublegal acts in force. The claimant filed a lawsuit with the First Instance Administrative Court, requesting the repeal of PMA Decision claiming that the decision to close the administrative proceedings could not be considered a decision on the merits according to the provisions of the law No. 133/2015. The First Instance Administrative Court, upon its Decision No 80-2017-2143, dated 16.05.2017, decided to declare lack of subject-matter competence and forwarded the case to the Civil Court of Appeal. On the other hand, the latter upon Decision No. 497 of 04.07.2017, decided to resort to the High Court on the conflict over the subject-matter competence between the two courts. To date, the examination by the High Court in relation to the subject-matter competence of those decisions of the PMA which are not decisions on the merits (recognition or non-recognition) but decisions on the closing of the administrative proceedings, is pending.

V. CONCLUSIONS AND RECOMMENDATIONS
Referring to the explanatory report of the Law no.133/2015, it results that: "...the draft law is proposed with the aim of protecting and guaranteeing human constitutional and fundamental rights and freedoms, as a way to mend the unfairness during the process of naturalization of private property during the communist regime...". Further, on the law establishes the PMA as the sole administrative body for the examination of requests of former owners, and it attributes to the PMA quasi judicial functions, considering that it has the obligation to issue decisions on the recognition or non-recognition of the property right. The PMA in this case exercises functions of the court of first instance, whereas the procedure of judicial appeal against decisions of this administrative body, foresees the means (Civil Court of Appeal) and the deadline for the appeal (30 days), by meeting in principle the constitutional standard of the right to appeal.

87 "Administrative law, control on public administration", E. Dobjani; E. Puto; E. Toska; E. Dobjani, pageno. 117
88 Decision of the Property Management Agency no. 783, dated 30.12.2016, pageno. 2
89 Decision of the Constitutional Court no. 1, dated 16.01.2017, page no. 19
However, irrespective of the amendments introduced by the Law 133/2015 on the management of property issues, it still leaves room for different interpretations which create problems for:

i. former owners and their lawful heirs, in relation to exercising of the right to appeal for restoring infringed property rights;

ii. a conflict of competence between administrative and civil courts on issues illustrated above (closing of administrative proceedings);

The law grants to former owners and their lawful heirs the right to appeal only in the case when the PMA takes a decision on recognition or denial of the property right, however the law does not provide for the procedure to be followed when the dispositive part of the decision of the PMA states the closing of the administrative proceedings.

PMA is under the legal obligation to take a decision to overturn the claim or recognize the property right in compliance with the principle of lawfulness and the principle of transparency, provided for in the APC, as well as under the obligation to use the most effective practice for the protection of the lawful interest of subjects in the cases of closing of administrative proceedings, in compliance with the principle of active assistance. Referring to provisions of Law no.133/2015 the PMA may not close the administrative proceedings, but it rather has the obligation to continue examining the claims submitted by former owners or their lawful heirs and then issue a decision on the merits, containing the recognition or lack or recognition of the right to property, providing for restitution, and compensation of the property.

Referring to the provisions of Law no. 133/2015, even though decisions of the PMA are considered acts issued by an administrative body and as such need to be adjudicated by the first instance administrative court, the lawmaker has determined that the right to appeal against quasi-judicial decisions of the agency, shall be dealt with only by the Civil Court of Appeal, as the competent court to examine judicial cases concerning property rights. In principle, appealing against the decisions of PMA with the court of appeal may avoid lengthy proceedings on recognition of property as one of the main objectives of law no.133/2015. However, it carries numerous problems related to the right to appeal against non-merits decisions of the PMA which have caused a conflict of competence between the courts, and which still remain unsettled by the case-law of the higher judicial instances.

It is worth mentioning that the decisions on lack of competence of civil and administrative courts for the examination of non-merits decisions of ATP, are the consequence of a wrong assessment of the facts and of the law, and they do create harmful practice for the proper conduct of trials, as well as for the judicial economy in general\textsuperscript{90}. Unification of the case law through a unifying decision of the high court shall ensure a fair balancing of powers between the administrative judiciary and the civil judiciary\textsuperscript{91}, which will serve to avoid in the future similar cases of subject-matter competence between administrative and civil courts.

\textsuperscript{90} Decision of the Tirana Court of Appeal no. 497, dated 04.07.2017, page no. 2

\textsuperscript{91}“Administrative law, control on public administration”, E. Dobjani; E. Puto; E. Toska; E. Dobjani, page no. 118
PILLAR III
HUMAN RIGHTS

Sexual abuse of children, international protection and the Albanian legal order
By PhD Candidate Elona Hasko and Av. Holta Ymeri

I. ABSTRACT
This article deals with a very serious human right violation, sexual abuse, committed against a particularly vulnerable category of our society: children. The article intends to treat in a comprehensive way the phenomenon of sexual abuse of children and its consequences as well as the measures taken to prevent it at international level and within the Albanian legal order. Thus paragraph II provides an overview of the phenomenon, the collected data and the expert opinion of a psychologist in relation to the consequences of sexual abuse. The following paragraphs provide the detailed analysis of the legislative and administrative measures taken at international and Albanian levels. More specifically paragraph III is dedicated to the existing international documents regulating the matter, while paragraph IV provides the overview of the Albanian legal and institutional framework. Conclusions and recommendations developed in paragraph V provide the comparative analysis of the Albanian legislation compared to the international legislation and contain specific recommendations for legal amendments.

KEY WORDS: children, sexual abuse, Lanzarote Convention, ECHR, protection, EU, Albanian legislation.

ABBREVIATIONS:
CC
CCJM
CoE
CPC
CRC
ECHR
ECHHR
EU
Lanzarote Convention
Law 18/2017
NCRPC

II. CHILD SEXUAL ABUSE, ITS EXTENT AND CONSEQUENCES
According to the (1999) Council of the World Health Organization: “Child sexual abuse is the involvement of a child in sexual activity that he or she does not fully physically comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the law or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person. This may include (but is not limited to): the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of a child in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performance and materials.”

The involvement of a child in sexual activities may be achieved through coercion/voilence or seduction (providing gifts, money, special attention toward the child). The sexual abuse, often, involves the direct physical contact, touching, kissing, fondling, rubbing, oral sex, or vaginal or anal penetration or the child’s coercion to touch the abuser's genital organs. Sometimes a sexual abuser can also gain satisfaction by simply exposing himself or herself to a child or observing him/her while in the toilet or by filming a child taking off his/her clothes. Abusers, often, don’t use physical strength, but they may use games, threats, flattery, or other methods that persuade and engage a young child in order not to tell adults about the abuse. Sexual harassment/abuse also involves indirect contact for example: inappropriate phone calls/texts with sexual content on the computer or handwriting, sexual questions or comments, virtual sex or online sexual harassment, exposure of inappropriate photos of naked child or adults. Child sexual exploitation based on monetary compensation is also sexual abuse.

The phenomenon of child sexual abuse is a global phenomenon. It’s extent is not exactly known due to the difficulty of children to report and denounce the abuse they have suffered. The same difficulty is encountered in Albania, where official statistics are missing and the data are often collected from non-governmental organizations studies and reports who have as their object of activity the protection of child's rights or from sporadic and limited reporting of state institutions which are in contact with this phenomenon during the exercise of their duties. However, there is a lack of a national/varied coordinated data base, which collects and processes data for the entire territory of the Republic of Albania. The data collected from existing studies and reports over the years are mentioned below:

i. According to a study of the Multidisciplinary Treatment Center for Child Behavioral Problems of 2003, involving child of ages 6-12 and 13-18, 11% of them had suffered sexual harassment and 4% of them had experienced it in the family environment. Overall, 4% of involved child in this study accepted experiencing sexual violence.

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93 Referred in the publication of Terre des homes, “Child sexual abuse within the circle of beliefs in Albania : A qualitative study on the prospects and perceptions of professionals, parents and children », 2015, pg.17.
ii. In another study, "Violence against Children in Albania", of 2006 supported by UNICEF, it was found that except rape cases performed by unknown persons, there were also sexual abuse cases within the circle of child's beliefs. Studied subjects reported that 13.3% of them were sexually harassed. According to this study, school is an environment where sexual abuse can occur. Also, according to this study, one in five child sexual harassment authors was a teacher (22.5%). It draws attention the fact that the sexual harassment reported by children in the social care system (15%) was higher than in other environments. In this study, child of the social care system reported sexual harassment abusers as follows: 55.6% by other children, 22.2% by teachers and 22.3% by other persons94.

iii. The Study on "Prevalence of Negative Experiences during Childhood" conducted in 2012 in Albania, provides data on sexual abuse during the childhood of Albanian youth. Thus, from 1437 students asked on negative experiences during childhood (during the first 18 years of life), 6% of them reported that they were sexually abused during this period. The boys reported higher sexual abuse cases than girls during their childhood period (respectively, 8.8% vs. 4.7%).95

iv. Whereas, according to a study on the profile of the Albanian abused children based on reported cases, conducted by the Center for the Protection of Child's Rights in Albania (CRCA) was found that 23% (28 cases from 120 reported) of children had suffered sexual violence. From this study, it was found that 75% of sexually abused children were female96.

v. Also, from institutions that have reported in recent years all kinds of child abuse cases, the General Directorate of Police in Tirana reported the largest number of child abuse cases (790 cases). Child sexual abuse cases, was reported in the largest number by the General Directorate of Police in Tirana again, which recorded 46 cases during 2014-2015. With regards to the punishment provided to child sexual abusers, only the General Directorate of Police in Tirana reported that in 54% of cases (25 out of 46 cases of sexual abuse against children) severe punitive measures were taken against the perpetrators.

vi. Psycho-Social Center “Vatra” in Vlora reported a total of 24 cases of sexual abuse against child for the 2014-2015 period 97.

vii. ARSIS reported 13 cases of sexual abuse against children for the 2014-2015 period98.

94 Ibid.
96 Hazizaj, A., Coku, B., Cenko, E., Haxhiymeri, E., Case-based surveillance study on violence against children in Albania, CRCA Albania, Tirana 2013.
97 Referred in the publication of Terre des hommes “Child sexual abuse within the circle of beliefs in Albania : A qualitative study on the prospects and perceptions of professionals, parents and children », 2015, pg.21-22.
98 Referred in the publication of Terre des hommes “Child sexual abuse within the circle of beliefs in Albania : A qualitative study on the prospects and perceptions of professionals, parents and children », 2015, pg.22.
But which are the consequences of sexual harassment/abuse to children and teenagers? Consequences in young children, of preschool age, might be noticed due to traumatic games played by children in which the child acts out or re-enacts some aspect of the traumatic experience. For example, a child may constantly play the same game of running away or escaping from the “bad man”. Other stress signs may be noticeable such as an increase of conflict or rejection behaviors, an increase of anger bursts or nightmares. The child might engage in inappropriate sexual behaviors for his/her age such as trying to engage another child in oral-genital contact or simulate intercourse. The child might talk about his/her body as being “hurt” or “dirty.”

As regards the consequences to teenagers, the basic symptoms of post-traumatic stress are similar, but as children grow up and develop more autonomy, the difficulties they can get into may be more serious. They have more access to narcotic substances, therefore in order to cope with hyper-alert and re-experiencing of traumatic symptoms, they might be more likely and more willing to abuse narcotic substances. A teenager avoids traumatic memories through social withdrawal. Inflicting self damages through self-cutting the skin or body parts and suicidal behaviors are also more common among adolescents than children.

Numerous research have identified mental health problems that include fear, anxiety, post-traumatic stress symptoms, depression, sexual difficulties, low self-esteem, stigmatization, difficulties in trusting others, cognitive distortion, difficulties with prosocial behavior, aggressiveness, inappropriate behavior, deficiency in social relation with their peers, and other problems. If these problems remain untreated by the professional staffs of mental and social health, the consequences for abused child and teenagers would last in time.

III. SEXUAL ABUSE OF CHILDREN IN INTERNATIONAL LEGISLATION

There is an increasing attention to children’s rights in the last decades, demonstrated by the adoption of a series of international conventions establishing principles and standards that States should follow and respect, when dealing with that vulnerable category of the society named children. The first international document recognizing the importance of the status of the child is the Universal Declaration of Human Rights (UDHR) proclaimed in 1948, which in its article 25 (2) provides that: “motherhood and childhood are entitled to special care and assistance”. Since then, the number of international documents dealing with children’s rights, and establishing standards and principles protecting those rights, has been on the raise.

It is important to mention that international protection of children’s rights is provided through a variety of international legal instruments such as: conventions\textsuperscript{103}; soft-law policies\textsuperscript{104} and recommendations; binding decisions and regulations\textsuperscript{105}; courts\textsuperscript{106}; committees\textsuperscript{107}. The international conventions, may be categorized as following: (i) general international conventions on the protection of human rights which include specific children’s rights dispositions\textsuperscript{108}; (ii) general international conventions on the protection of human rights which indirectly protect children’s rights\textsuperscript{109}; (iii) specific international conventions on the protection of children’s rights. The below paragraphs provide a summary of the most important international conventions and binding instruments which have a significant impact on the protection of children’s right in general and on the protection of children from sexual abuse in particular.


The first international convention dedicated to the specific protection of children’s right is the UN Convention on the Rights of the Child (CRC), which was adopted in 1989 and entered into force in 1990. This convention provides and establishes an important set of legal principles and standards on children’s rights. It starts by determining in its Article 1 that “a child means every human being below the age of eighteen year” unless the member states legislation provides that “majority is attained earlier”. In its Part I, composed of 41 Articles, the CRC extends to children the general human rights and adapts those to the particular condition of the child. The specificity of the CRC is that it introduces at its very beginning a guiding principle which should always be applied when dealing with situations impacting children: that of the “best interest of the child”\textsuperscript{110}. The idea under this principle is that all actions impacting children, whether exercised by public or private entities and institutions, should put in first place the best interest of the child, meaning that when there is the necessity to balance between the rights/interests of other subjects (for instance the parents of children) and the rights of children, the latter, shall prevail in any decision making impacting them. Other important children’s rights established by the CRC are: (i) the right to be heard\textsuperscript{111} in any judicial and administrative proceedings affecting the child; (ii) the right to benefit from child-care services\textsuperscript{112} in particular circumstances; (iii) the right to be protected\textsuperscript{113} from all forms of physical or mental violence, including sexual abuse. Due to its

\textsuperscript{103} For instance the Convention on the Rights of the Child (CRC), approved by the General Assembly resolution 44/25 of November 20, 1959 of the United Nations.

\textsuperscript{104} Council of Europe Strategy for the Rights of the Child, 2016-2020.

\textsuperscript{105} EU DIRECTIVE 2011/92/EU.

\textsuperscript{106} The European Court of Human Rights (ECtHR).

\textsuperscript{107} The Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, (Lanzarote Committee).

\textsuperscript{108} www.coe.int/en/web/cjildren/lanzarote-convention


\textsuperscript{110} Article 3 (1), CRC.

\textsuperscript{111} Article 12 (2), CRC.

\textsuperscript{112} Article 18, 19, 20 etc. CRC.

\textsuperscript{113} Article 19 (1). CRC.
importance, sexual abuse is also regulated by a specific provision of the CRC, Article 34 which initially establishes the principle that “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse”. This principle is backed up by positive actions of the state to “take all appropriate national, bilateral and multilateral measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; (c) the exploitative use of children in pornographic performances and materials”.

3.2. **Lanzarote Convention**

Due to the significant detrimental impact on children’s development, sexual abuse of children has been the subject of specific international instruments. The Council of Europe’s Convention for the Protection of Children Against Sexual Exploitation and Sexual Abuse, was adopted in October 2007 in Lanzarote, Spain and entered into force on July 1, 2010. The Lanzarote Convention is signed by all 47 CoE members and ratified by 41 of them. It is also opened to accession for any non-member state of the CoE[^114]. It starts by establishing in its Preamble that sexual exploitation of children and all forms of sexual abuse are “destructive to children’s health and psycho-social development”[^115] and that it has “grown to worrying proportions at both national and international level”[^116]. It goes on by establishing that “child” shall be considered any person under the age of 18 years[^117]. The body of norms of the Lanzarote Convention is a comprehensive and detailed set of articles which intends to cover and regulate all aspects of the phenomenon of sexual abuse of children. It can be generally said that it is organized in three main pillars: (i) preventive measures; (ii) protective and assistance measures and finally (iv) prosecution measures.

i. **Preventive Measures:** pursuant to Article 4 of the Lanzarote Convention, each party shall adopt the necessary legislative or other measures to prevent all forms of sexual abuse of children. But which are these measures and what is their nature? The question is fast answered in the following convention articles which provides for a wide variety of measures of different application and legal nature. They may be policy measures, administrative measures, or criminal measures, each designed to put in place a system of prevention able to intervene at particular stages of sexual abuse of children. There are the **awareness raising/education policies** designed for a wide category of subjects (children; persons working in contact with children; the general public) aiming at providing knowledge on the phenomenon of sexual abuse of children in a way appropriate and useful to the addressed category[^118]. There are the **training policies** to be provided to persons working with children in different sectors, such as education, health, social protection, judicial, law-enforcement, sport and leisure[^119]. There are the

[^114]: Information document prepared by the secretariat of the lanzarote Committee, ip-dated on 26 May 2016, pg.1.
[^115]: Paragraph 4, Preamble, Lanzarote Convention.
[^116]: Paragraph 5, Preamble, Ibid.
[^117]: Article 3 letter (a), Ibid.
[^118]: Articles 5,6 and 8, Lanzarote Convention.
[^119]: Article 5 (1) and (2), Ibid.
restrictive measures such as the very effective prevention measure included in Article 5 (3) of the Lanzarote Convention pursuant to which, persons who have been convicted of acts of sexual exploitation or sexual abuse of children shall be excluded by professions which implies regular contact with children. There are the coordination measures\(^\text{120}\) which require from national and local agencies and institutions operating in sensitive sectors in contact with children (education; health; social services; law enforcement; judiciary) to coordinate their activities in order to construe an effective system of prevention. Finally, there are criminal law measures, which are preventive measures due to the deterrent effect criminal law it is believed to have on the criminal activity of individuals. In fact the Lanzarote Convention establishes a set of detailed substantial criminal law provisions, criminalizing certain sexual activities with children. The most important of which, for the purpose of this work, are: Article 18 – Sexual abuse - which determines that convention parties should criminalize the intentional conduct of: ‘(a) engaging in sexual activities with a child who, according to provisions of national law has not reached the legal age for sexual activities; (b) engaging in sexual activities with a child with use of coercion, force, threats; abuse made of recognized position of trust, authority or influence over the child, including within family; abuse made of particular vulnerable situation because of physical or mental disability or a situation of dependence”. Article 22- Corruption of Children – pursuant to which convention parties should criminalize the ‘intentional causing, for sexual purposes, of a child...to witness sexual abuse or sexual activities even without having to participate’. Article 24 which provides for the criminalization of aiding or abetting and attempt and Article 28 which identifies some aggravating circumstances. It is interesting to note, that the Convention leaves it open for the states to decide which is the age below which it is prohibited to engage in sexual activities with a child\(^\text{121}\) - meaning it may be lower than 18. This despite the provision in its Article 3 establishing that it is a child every person below the age of 18. This shall be due to the fact that different legal order establishes different age of sexual consent for minors, even at 14\(^\text{122}\) as it is the case of Albania.

di. Protective and Assistance Measures: protective and assistance measures are provided in Chapter IV of the Lanzarote Convention. They include a variety of measures such as: establishing multidisciplinary structures to provide necessary support to victims of sexual abuse and their close relatives\(^\text{123}\); reporting suspicion of sexual abuse by professionals working in contact with children\(^\text{124}\); establishing telephone or internet help-lines\(^\text{125}\); assisting victims in the short and long term during their physical and

\(^{120}\) Article 10, Ibid.
\(^{121}\) Article 18 (2), Lanzarote Convention.
\(^{122}\) Article 100, Albanian criminal code.
\(^{123}\) Article 11, Lanzarote Convention.
\(^{124}\) Article 12 (1), Ibid.
\(^{125}\) Article 13, Ibid.
psycho-social recovery\textsuperscript{126}; co-operating with NGOs and/or civil society engaged in assistance to victims\textsuperscript{127}; removing the perpetrator or removing the victim from the family environment when sexual abuse of children occurs within the family\textsuperscript{128}.

iii. \textbf{Prosecution Measures:} what is identified herewith as prosecution measures includes criminal investigation and judicial proceedings of cases of sexual abuse of children as established in Chapter VII of the Lanzarote Convention. Due to the sensitivity of these procedures the convention starts by stressing that investigations and criminal proceedings shall be carried out pursuant to the principle of the ‘best interest of the child’\textsuperscript{129}, by adopting a “protective approach toward the victims” in order to ensure that criminal investigation and trial “do not aggravate the trauma experienced by the child”\textsuperscript{130}. Thus there are some standards to be followed: investigation units shall be composed by officials trained to deal with abused children\textsuperscript{131}; interviews with children shall be conducted by trained officials, in suitable premises, when possible by the same person/official and in a limited number in order not to expose the child, over and over again to the same traumatic experience\textsuperscript{132}. Similarly, during the judicial proceedings the judge may order closed hearings and the victim may be heard without being present in the courtroom through the use of IT technology\textsuperscript{133}. The convention also establishes some important principles regarding the standards of investigation and prosecution: treat this type of cases as a priority for investigation and prosecution\textsuperscript{134}; ensure an effective investigation and prosecution by allowing covert operations\textsuperscript{135}; start investigation of this type of offences ex officio, without the need of a report or accusation made by the victim\textsuperscript{136}; continue criminal proceedings even if the victim withdraws his/her statements\textsuperscript{137}; provide a sufficient statute of limitation for initiating proceedings after the victim reaches the majority age\textsuperscript{138};

Another important novelty and tool brought about by the Lanzarote Convention, is the obligation on data collection and storage. In fact it is required by the convention parties to collect and store data relating the identity and the genetic profile (DNA) of the persons convicted for sexual abuse.

\footnotesize{\textsuperscript{126} Article 14 (1), Ibid. \textsuperscript{127} Article 14 (2), Ibid. \textsuperscript{128} Article 14 (3), Ibid. \textsuperscript{129} Article 30 (1) Lanzarote Convention. \textsuperscript{130} Article 30 (2) Ibid. \textsuperscript{131} Article 34 (1) Ibid. \textsuperscript{132} Article 35 (1) Ibid. \textsuperscript{133} Article 36 (1) Ibid. \textsuperscript{134} Article 30 (3) Ibid. \textsuperscript{135} Article 30 (5) Ibid. \textsuperscript{136} Article 32, Ibid. \textsuperscript{137} Ibid. \textsuperscript{138} Article 33, Ibid.}
of children. This data should be under the control of a single national authority, which shall be established and communicated by each state party to the Secretary General of the CoE.

The implementation of all the above dispositions of the Lanzarote Convention is monitored by the Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, (the “Lanzarote Committee”). The Lanzarote Committee has monitoring functions, meaning it assesses the implementation of the convention’s principles and standards by the convention parties. It does so by addressing a questionnaire to the monitored convention parties and civil society organizations, NGOs and other relevant bodies operating in those convention parties. Based upon the collected information the Lanzarote Committee drafts the implementation report which contains the assessment and relevant recommendations to convention parties. The first implementation report was adopted by the Lanzarote Committee in 2015 and was focused on a special type of abuse, specifically the sexual abuse of children in the circle of trust.

3.3. EUROPEAN CONVENTION OF HUMAN RIGHTS (ECHR)

The European Convention on Human Rights (ECHR), which entered into force on September 3, 1953 is one of the most active international instrument for human rights protection operating under the framework of the Council of Europe. Its peculiarity and success lays with the establishment of the most effective international monitoring mechanism: the European Court on Human Rights (ECtHR). Through the ECtHR judgments, which are binding for the Convention parties the ECHR has become one of the most effective instruments of international control on human rights protection in its area of operation. Being a general convention on human rights, the ECHR does not specifically deal with children’s rights or with the protection of children from sexual abuse. Nevertheless, children’s rights are protected by the convention indirectly, through the protection of other general human rights, which naturally apply to children as well.

There are two ECHR rights which have had a profound impact on cases dealing with sexual abuse of children. These are: Article 3 – Prohibition of torture which provides that “No one shall be subject of inhuman or degrading treatment or punishment” and Article 8 – Right to respect for private and family life pursuant to which “Everyone has the right to respect for his private and family life, his home and his correspondence”. Through both these dispositions, the ECtHR since the early 1985 onward has developed a consistent body of principles and standards applicable to cases of sexual abuse of children. In fact, several of the principles and measures which were codified by the Lanzarote Convention in 2007, have been previously identified through the ECtHR case-law.

But how do these rights apply to cases of sexual abuse of children?

139 Article 37, Ibid.
140 Article 41, Lanzarote Convention.
Sexual abuse cases are filed to the ECtHR usually complaining the joint violation of Article 3 and Article 8. There are no doubts in the ECtHR case-law that sexual abuse of children qualifies as inhuman or degrading treatment under Article 3. Thus, when there is sufficient evidence of such sexual behaviors against children the ECtHR will assess the case at its scrutiny under this article. Article 8 will be especially invoked in cases when sexual abuse of children occurs within the family home or within the structures where children live (within the circle of trust). Through its case law based mainly of these two articles, the ECtHR has established during the years an important set of principles the most important of which are summarized below, chronologically:

i. **Case of X and Y v. the Netherlands (1985)**\(^{142}\): through this case the ECtHR has identified since 1985 important principles applicable to prosecution measures in cases of sexual abuse of disabled children. Specifically, a mentally disabled girl living in a private structure was sexually abused when she was 16 years old, by a relative of the directress of the structure. Due to her mental problems, the girl was unable to file a criminal complaint herself which was filed by her father. Following the dismissal of the appeal by the Public Prosecutor, the father appealed the dismissal and the Court of Appeal dismissed the father’s appeal under the reasoning that only the victim herself could take action\(^{143}\). The ECtHR starts by pointing out its fundamental principle that in relation to all ECHR rights, Article 8 included, the state has not only an obligation to abstain from interference on the exercise of the rights (negative obligation) but also an obligation to adopt measures as to ensure the enjoyment of those rights even in the sphere of individual relations (positive obligation)\(^{144}\). Under this light the ECtHR goes on reviewing whether the legislation in place in the Netherlands violates the positive duty of the state to adopt measures so as to ensure the right to respect for private and family life. It establishes two important principles regarding prosecution measures. First of all that cases of sexual abuse of minors are cases “where fundamental values and essential aspects of private life are at stake”\(^{145}\), thus effective deterrence is indispensable and can only be achieved by criminal law provisions\(^{146}\). Secondly that the impossibility of initiating criminal proceedings due to the lack of ability of the victim to file a complaint, does not offer a practical and effective protection thus violating Article 8 of the ECHR\(^{147}\).

ii. **Case of Scozzari and Giunta v. Italy (2000)**\(^{148}\): the case originated due to the complaint filed to the ECtHR by the mother of two children who were removed by her custody and placed into a children’s community named “Il Forteto”. Despite the fact that this case deals with the contrary situation of parents invoking violation of their right to respect for family life, it contains an important set of principles related to the

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\(^{142}\) X and Y v. the Netherlands, Application no. 8978/80, Judgment of 26 March 1985.

\(^{143}\) X and Y v. the Netherlands, Application no. 8978/80, Judgment of 26 March 1985, §12.

\(^{144}\) X and Y v. the Netherlands, Application no. 8978/80, Judgment of 26 March 1985, §23.

\(^{145}\) X and Y v. the Netherlands, Application no. 8978/80, Judgment of 26 March 1985, §27.

\(^{146}\) Ibid.

\(^{147}\) Ibid, §29.

social care provided to sexually abused and/or neglected children. One of the issues at the present case was that “Il Forteto” Community had been subject to criminal investigation for pedophilia and two of its founding members were convicted for ill-treatment and sexual abuse of children within the community. Nevertheless these two founding members continued to work within the community and had very active role on it. The ECtHR first of all established that in removal cases, when balancing the right of the parents to family life and the rights of the children, the best interest of the child should be provided with particular importance and may prevail. Secondly it established that it had strong reservations about the fact that public authorities let the children be taken care of by two people who were convicted of ill-treatment and abuse of children entrusted under their care. Due to this and other circumstances of the case, the ECtHR decided that “authorities have failed to show the degree of prudence and vigilance required in such a delicate and sensitive situation, and have done so to the detriment … of the superior interests of the children” and there had been as a result a violation of Article 8 of the ECHR.

iii. Case of E. and Others v. the United Kingdom (2002): the case originated due to the complaint filed to the ECtHR by four citizens who claimed that they had suffered sexual and physical abuse by their mother’s cohabitant partner when they were children, abuse which consisted in inhuman and degrading treatment pursuant to Article 3 of the ECHR. Through this judgment the ECtHR established and put together some important principles regarding the state’s positive obligations in these kind of cases. First of all it established that the State is under the positive obligation to take measures insuring that subjects under its jurisdiction are not subject to inhuman or degrading treatment. These measures should provide effective protection especially when there are children involved and should include reasonable steps to prevent ill-treatment which the authorities knew or ought to have known. It found that failure of the local authority to protect children from abuse they were aware of, for a long period of time, was in breach of Article 3 obligations. This failure was due to the lack of investigation, lack of cooperation and communication among involved authorities in the present case, thus the failure to take appropriate steps.

iv. Case of E. S, and Others v. Slovakia (2009): the case originated due to the sexual abuse of a father on his children and physical abuse on his wife. The applicants complained to the ECtHR that the Slovak state had failed to provide them the necessary

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149 Ibid, §31 and 32.
150 Ibid, §31
152 Ibid, §216.
154 Ibid, §88.
155 Ibid.
156 Ibid, §100.
157 Ibid, §100.
protection against abuse consisting in inhuman and degrading treatment pursuant to Article 3 of the ECHR and to guarantee respect to their private and family life pursuant to Article 8 of the ECHR, because of failing to approve an interim order removing the abuser from the family home. Having assessed the Slovak legislation and the case before it the ECtHR found that the failure to issue the interim measure of removal indicated that the state failed to discharge its positive obligations to protect the rights of the applicants under Article 3 and Article 8, consisting in a violation of these rights.

3.4. EUROPEAN UNION LEGISLATION

The European Union is another international organization which is very active in several fields of activity and produces a consistent body of binding legislation upon its member states. Apart from the internal market legislation, with the adoption of the EU Charter of Fundamental Rights (EU Charter) the EU attempted to introduce within its legislation a human rights approach. The way toward the adoption of the EU Charter started in 2007, by its proclamation at the Nice European Council on 7 December 2000 having no binding legal effect and was concluded in 2009 with the entry into force of the Treaty of Lisbon on 1 December 2009 when it gained the same legal value of the EU Treaties themselves. Since then, human rights included and recognized in the EU Charter are binding both for EU institutions and bodies and for the national authorities of EU member states when they implement EU law. The EU Charter recognizes the rights of the child and regulates them in a specific disposition, its Article 24 which recalls the principles of protection and care of children and their well-being and consideration of the best interest of the child by all public or private institutions.

But the EU has not satisfied itself only with including the right of the child in the EU Charter. It has made use of its peculiar legislative function, that of adopting binding legislation in the very delicate area of criminal law, and has adopted a directive regulating sexual abuse of children containing minimum rules on the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children and introducing provisions to strengthen the prevention of sexual crimes against children and their protection. This is Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 “on combating the sexual abuse and sexual exploitation of children and child pornography...” (Directive 2011/92). Similarly to the Lanzarote Convention, Directive 2011/92 establishes a set of preventive, protective, assistance, support and prosecution measures and principles in cases of sexual abuse of children. The novelty brought about is that when establishing substantive criminal law provisions it also establishes the minimum terms of imprisonment for each offence. For instance Article 3 (2) provides a minimum term of 1 year imprisonment, for causing a child to witness sexual activities; Article 3 (3) provides for a minimum term of 2 years imprisonment for causing...
a child to witness sexual abuse; Article 3 (4) provides for a minimum term of 5 years imprisonment for engaging in sexual activities with children who have not reached the age of sexual consent, and so on. Another novelty brought by Directive 2011/92 is the effective tool to implement the restriction, already established in the Lanzarote Convention, of disqualifying temporarily or permanently persons convicted of offences related to sexual abuse and sexual exploitation of children, from activities involving direct and regular contacts with children. This includes the possibility of employers to request and obtain criminal records on these type of offences against children from the persons applying to jobs in direct and regular contact with children. Finally it should be mentioned the importance of having an EU directive on this matter which derives by the fact that the EU member states are obliged to transpose within their internal legislation the minimum criminal rules adopted by Directive 2011/92 as well as the prevention, protection, assistance, support and prosecution measures and principles mentioned therewith. This combined to the fact that monitor and control mechanisms under the EU framework are stronger and more incisive that any other international piece of legislation, makes Directive 2011/92 a fundamental piece of international legislation on the protection of children against sexual abuse and sexual exploitation.

IV. ALBANIAN LEGAL AND INSTITUTIONAL FRAMEWORK

The Albanian legal framework on protection of children from sexual abuse is composed of constitutional provisions, ratification of the international instruments, domestic law, sub-legal acts and administrative procedures. The Constitution of the Republic of Albania deals with the right of the child in its Article 54 and provides, among others, these important principles: (i) that every child has the right to be protected from violence, ill-treatment and exploitation which may damage his/her health, moral or endanger his/her life and normal development; (ii) that the highest interest of the child is always prevalent in all matters related to the child. In addition to these constitutional provisions, Albania has also ratified the abovementioned international conventions on the right of the child, and specifically: (i) it ratified the CRC Convention through Law no. 7531, dated 11.12.1991 “On the ratification of the Convention on the Rights of the Child”; (ii) it ratified the ECHR Convention through Law no. 8137, dated 31.7.1996 “On the ratification of the European Convention on the protection of human rights and fundamental freedoms” becoming a state party of the ECHR; (iii) it ratified the Lanzarote Convention through Law no. 10 071, dated 9.2.2009 “On the ratification of the European Council on the protection of children from sexual abuse and exploitation”. As a result, the provisions of the abovementioned ratified international conventions are now part of the Albanian domestic legislation. It should be noted, with regards to the EU, that Albania is a Candidate country thus not yet obliged to transpose EU directives. Nevertheless due to its commitment toward EU

165 Article 10 (2), Ibid.
167 Article 54 (4), Ibid.
integration it is on the process of approximating its legislation with EU law in various fields of activities.

Constitutional provisions and ratified international conventions need specific national laws, sublegal acts, administrative procedures and institutions in order to be implemented. As a result, throughout the years, the Albanian legislator has drafted and approved a series of national laws regulating different aspects of children’s rights. This legislative corpus is composed of the specific organic law on the right of the child, the criminal code, the criminal procedure code and the most recent legislative novelty, the code of criminal justice for minors.

4.1. **Law on the rights and protection of children**

Law no. 18/2017 dated 23.02.2017 “On the rights and protection of children” (Law 18/2017) is the organic law which provides the overall principles, measures, standards of protection and the institutional framework on children’s rights. It should be immediately pointed out that this recently approved law, which repeals and replaces the 2010 law regulating the same matter, constitutes a significant improvement of the Albanian legislation on this matter. This is due to the fact that it has introduced and regulated in a detailed and systematic way the principles, standards and measures provided for in the Lanzarote Convention and in the other above mentioned international instruments. Having established that ‘child’ is considered every person under the age of 18\(^{168}\) and having established the well-known principle of the best interest of the child\(^{169}\), Law 18/2017 provides for: (i) **preventive measures** such as: trainings, awareness raising and education campaigns on the protection of children from abuse addressed to persons working with children, public administration officials and citizens\(^{170}\); employment restrictions for citizens convicted with a final court decisions for crimes against persons, or against whom a protection order in family violence cases had been issued by the court, to work in contact with children\(^{171}\); employment suspension measures for citizens working with children against whom a criminal investigation related to child violence is initiated\(^{172}\); (ii) **assistance and support measures** such as: free legal and psychological aid during each administrative or judicial process involving children\(^{173}\); coordination measures among the several involved institutions and the creation of technical cross-sectoral group in each local unit with more than 3.000 children\(^{174}\); creation of children telephone help-lines\(^{175}\); extensive reporting obligations for every person who has knowledge of child abuse, every person working in contact with children including, a specific reporting obligation for teachers and health personnel\(^{176}\); (iii) **protection measures** such

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168 Article 3 (4), Law no. 18/2017 dated 23.02.2017 “On the rights and protection of children”.
169 Article 5(2), Ibid.
170 Article 43 (2), Ibid.
171 Article 45 (1), Ibid
172 Article 45 (2), Ibid.
173 Article 29 (1),
174 Article 52 (1)
175 Article 68, Ibid.
176 Article 67 (1), (2), (3) and (4), Ibid.
as: **alternative care measures**\(^{177}\) consisting in placing the child with another family member, with a foster family or with a care institution for a short period of time, under the principle that priority should be given to placing the child in a family environment; **emergency protection measures**\(^{178}\) consisting in the removal of the child from the family home and placement in alternative care; measures of specialized supervision within the family environment\(^{179}\); drafting of the Individual Protection Plan for each child which contains the overall set of measures for a child, including measure for immediate intervention and investigation, health care measures, psychological and legal support, social support and any other necessary service for the rehabilitation and re-integration of the abused child.

It is worth mentioning that a new novelty of Law 18/2017 is the establishment of the national electronic register\(^{180}\) containing the cases of children in need of protection. This data will be collected and managed at the national level by the State Agency for the Rights and Protection of Children (SARPC). The law does not introduce any substantial criminal law provision or any prosecution measures because both are regulated under the Criminal Code and the new code of criminal justice for minors.

In addition to the abovementioned novelties, Law 18/2017 sets up a well organized institutional framework, with various bodies exercising different functions at the central and local level. What is most welcomed is that the functions of each body are described in a detailed and structured way, as summarized below:

i. **The National Council for the Rights and Protection of Children (NCRPC):** it is a consultative body which has as its main function to provide consultancy and to coordinate state policies for children’s rights\(^{181}\). An important function is that of assessing the planned budget from the children’s rights approach\(^{182}\) and providing special recommendations to the central government and agencies dealing with children’s rights.

ii. **The Minister coordinating protection of children’s rights**\(^{183}\): it’s the main responsible authority on this matter. It has coordination functions on children’s rights policies; monitoring functions regarding the implementation of policies and measures; controlling functions over the SARPC; supporting functions for NGOs dealing with children’s rights; it adopts measures in cooperation with the other ministries for the establishment of an integrated system for the protection of the child through multidisciplinary services; it establishes an accreditation system for the control and

\(^{177}\) Article 31 (1) and (2), Ibid.

\(^{178}\) Article 55 (1) (a), Ibid.

\(^{179}\) Article 55 (1) (c), Ibid.

\(^{180}\) Article 38 (2) (ë), Ibid, Law no. 18/2017 dated 23.02.2017 “On the rights and protection of children”.

\(^{181}\) Article 35 (1) and (2), Ibid.

\(^{182}\) Article 36 (b) and (2), Ibid.

\(^{183}\) Article 38, Ibid,
quality of child protection structures; it creates and establishes the National Electronic Register of the cases of children in need of protection.

iii. Other Ministers: other line Ministers, within their fields of competences have policy functions related to children’s rights. One important function is that of forecasting in annual or multi annual budget plans the necessary funds for implementing children’s rights and children’s protection.

iv. State Agency for the Rights and Protection of Children (SARPC) is the national central agency exercising a series of important competences and functions related to children’s rights in Albania, such as: organization and coordination of the integrated system of child protection; direct support to local structures for child protection including trainings, assistance in case management, supervision of specific cases, consultancy etc.; collect data at national level and manage the National Electronic Register of children in need of protection; coordinate works with the ministry in charge of children protection; organize awareness raising and education campaigns, etc.

v. Municipalities: are responsible of establishing at municipality level and administrative unity level of the integrated system of child protection by ensuring among others: implementation of programs and projects; collection, assessment and reporting of data in cooperation with other institutions; establishment of the structures for children protection; implementation of the procedure for case-management of children in need of protection; establishment and coordination of the referral, reporting, protection and follow up system; organization and provision of services for children in need of protection as well as supporting services for families and services for alternative care; establishment of rehabilitation and re-integration programs and services for children in need of protection, especially children victim of violence; etc.

vi. Social Services Structure within the Municipality: these structures are in general responsible for child protection matters and also for specific child protection issues such as: to report to the Mayor and to the Municipality Council the progress of child protection cases within the territory of the municipality, to establish the cross-sectoral technical group at the municipality or administrative unit level and to coordinate and

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184 Article 39, (c) Ibid,
185 Article 40, Ibid,
186 Article 41, (1) Ibid,
187 Article 41, (2) Ibid,
188 Article 41, (3) (a) Ibid, Law no. 18/2017 dated 23.02.2017 “On the rights and protection of children”.
189 Article 43, (3), Ibid,
190 Article 46, Ibid,
191 Article 46, (c), Ibid,
192 Article 46, (dh), Ibid,
193 Article 46, (e), Ibid,
194 Article 46, (ê), Ibid,
195 Article 46, (f), Ibid,
196 Article 47, (2), Ibid,
supervise its works and activities\textsuperscript{197}. It should be mentioned that these structures hold also very important functions related to the approval of protection measures since it is the Director of the Social Services Structures who decides on protection measures, approves and coordinates the implementation of the Individual Protection Plan, and adopts 24 hours emergency measures which are then notified to the State Police\textsuperscript{198}. In addition all the functions related to micro management of individual cases\textsuperscript{199} of children are exercised by the special Child Protection Unit, situated within this structure. The Child Protection Unit, is composed of social workers, named child protection workers, who follow up the cases of child victims from its origination/identification up to the adoption of measures and their implementation. Child protection workers have, among others, some significant functions such as: to propose protection measure\textsuperscript{200}; to propose the Individual Protection Plan its amendment or removal\textsuperscript{201}; to take part in judicial processes reviewing protection measures proposed in Individual Protection Plans\textsuperscript{202}; to address the public prosecutor for the removal of parental rights\textsuperscript{203}; to assist the child or his/her family in drafting and submitting of complaints to the People’s Advocate or other authorities\textsuperscript{204}.

\textbf{vii. Technical Cross Sectoral Group}: in each municipality and administrative unit with more than 3,000 children it is established the \textit{ad hoc} Technical Cross Sectoral Group dealing with cases of children in need of protection\textsuperscript{205}. It is composed of representatives of the state police, social services structures, education, health, justice structures, NGOs as well as any other specialist who has knowledge on the particular case of the abused child\textsuperscript{206}. The Technical Cross Sectoral Group supports child protection workers and facilitates the referral of the case, its management and implementation of the specific measures\textsuperscript{207}.

\section*{4.2. Criminal Code (CC)}

The substantive criminal law provisions regarding sexual abuse of children are enclosed and determined within the Albanian Criminal Code. As a general remark it can be noted that the CC provides for high penalties for sexual abuse offences consisting in multiple years of imprisonment, at least some of them are consistently higher than the minimum penalties provided for similar offences by Directive 2011/92/EU. There are two articles which specifically deal with sexual abuse of children. The other articles, regulating different aspects of sexual abuse

\textsuperscript{197} Article 47, (3), Ibid,
\textsuperscript{198} Article 48, Ibid,
\textsuperscript{199} Article 49, Ibid,
\textsuperscript{200} Article 59, (2), Ibid
\textsuperscript{201} Article 51, (e), Ibid,
\textsuperscript{202} Article 51, (f), Ibid,
\textsuperscript{203} Article 51, (g), Ibid, Law no. 18/2017 dated 23.02.2017 “On the rights and protection of children”.
\textsuperscript{204} Article 51, (gj), Ibid,
\textsuperscript{205} Article 52, (1), Ibid,
\textsuperscript{206} Article 52, (2), Ibid,
\textsuperscript{207} Article 52, (5), Ibid,
are general clauses, which include acts of the punishable type against children as an aggravating circumstance. More specifically the following substantive criminal law provisions address the different types of sexual abuse against children:

i. **Article 100 – Sexual or homosexual activities with minors:** engaging in sexual or homosexual activities with minor children who have not reached the age of 14 or with an infant female who has not reached sexual maturity, it is punishable by imprisonment from 7 to 15 years\(^{208}\). This article provides for the following aggravating circumstances: for sexual activities performed in complicity with others, more than once, or when it causes grave consequences to the child’s health imprisonment of not less than 20 years\(^{209}\); when it causes the death or suicide of the infant imprisonment of not less than 30 years or life sentence\(^{210}\).

ii. **Article 101 – Sexual or homosexual activities with force with minors aged 14-18 years:** engaging in sexual or homosexual activities with minors from 14-18 years old who have reached sexual maturity it is punishable by imprisonment from 5 to 15 years\(^{211}\). This article provides for the following aggravating circumstances: for sexual activities performed in complicity with others, more than once, or when it causes grave consequences to the minor’s health imprisonment from 10 to 20 years\(^{212}\); when it causes the death or suicide of the minor imprisonment of not less than 20 years\(^{213}\).

iii. **Article 106 – Sexual or homosexual activities with persons related or under custody:** engaging in sexual or homosexual activities among parents and children, brothers and sisters, among other related persons or with persons under custody or adoption relations, is punishable by imprisonment up to 7 years.

iv. **Article 107/a – Sexual violence:** exercising sexual violence by performing of sexual nature activities on the body of another person through objects its a criminal offence punishable by imprisonment from 3 to 7 years\(^{214}\). Aggravating circumstances include: directing this offence to **children from 14 to 18 years** (punishable by imprisonment from 5 to 15 years)\(^{215}\) and directing this offence to **infants of less than 14 years**, or who has not reached sexual maturity even if not performed by violence (punishable by imprisonment of not less than 20 years)\(^{216}\).

v. **Article 108 – Indecent acts:** performing indecent acts with infants who has not reached 14 years is punishable by imprisonment from 3 to 7 years\(^{217}\). The same offence performed against an infant who has not reached 14 years with whom the author is in

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\(^{208}\) Article 100, par (1), Criminal Code.  
\(^{209}\) Article 100, par (2), Criminal Code.  
\(^{210}\) Article 100, par (3), Criminal Code.  
\(^{211}\) Article 101, par 1, Criminal Code.  
\(^{212}\) Article 101, par (2), Criminal Code.  
\(^{213}\) Article 101, par (3), Criminal Code.  
\(^{214}\) Article 107/a, par (1), Criminal Code.  
\(^{215}\) Article 107/a, par (2), Criminal Code.  
\(^{216}\) Article 107/a, par (3), Criminal Code.  
\(^{217}\) Article 108, par (1), Criminal Code.
family relations is punishable by imprisonment from 5 to 10 years\textsuperscript{218}. The intentional involvement as a witness of an infant of less than 14 years or of a minor who has not reached sexual maturity, in activities of a sexual nature it’s a criminal offence punishable by imprisonment from 1 to 5 years\textsuperscript{219};

vi. \textbf{Article 108/a} – Sexual harassment: sexual behaviors which violate the persons dignity, with every mean or in any form, which create a threatening, hostile, degrading, humiliating, or offensive environment is a criminal offence punishable by imprisonment from 1 to 5 years\textsuperscript{220}. Aggravating circumstance is the same offence when performed against children and it is punishable by imprisonment from 3 to 7 years\textsuperscript{221}.

It is interesting to note that the CC also provides in its Article 104 for Sexual or homosexual activities with the threat of arms and in Article 105 for Sexual or homosexual activities with abuse of duty. These articles have a general application and there are no specific aggravating circumstances when the abuse is directed at children as it was the case for some of the abovementioned articles. Also, it should be pointed out that there are other parts of the Criminal Code dealing with criminal offences against children, which may be of a sexual nature or of another nature. For instance under Section VIII of the CC named ‘Criminal offences against moral and dignity’ it is provided in Article 117 for the criminal offence of \textbf{pornography}. Despite its general wording - which leads you to believe that pornography as such constitutes a criminal offence in Albania - that offence is in fact related only to \textbf{child pornography} and does not punish pornography as such, or pornography among adult people. In addition Section IX of the CC named ‘Criminal offences against children, marriage and family’ provides for a bunch of offences against children related to of abuse or neglect other than sexual violence.

In addition rules on the statute of limitation are also regulated by the CC. What the CC does is to provide in general the statute of limitation for criminal offences, and to calculate terms based on imprisonment duration. It does not provide specific statute of limitation for offences related to sexual abuse of children. In fact Article 66 of the CC provides that criminal prosecution cannot start when the following period of time has elapsed from the commitment of the criminal offence to the declaring of a person as an accused: (a) 40 years for offences punishable by life imprisonment; (b) 20 years for offences punishable by imprisonment of not less than 10 years or higher; (c) 10 years for offences punishable by imprisonment of 5-10 years imprisonment; (c) 5 years for offences punishable by imprisonment of up to 5 years; (d) 3 for offences punishable by imprisonment of up to 2 years; (dh) 2 years for offences punishable by fines. Some of the criminal offences related to murder are not subject to statute of limitation. Interestingly this exclusion does not apply to murder of infants at the hands of the mother after giving birth which is a specific criminal penalty provided for in Article 81 of the CC punishable by 5 years of imprisonment.

\textsuperscript{218} Article 108, par (2), Criminal Code.
\textsuperscript{219} Article 108, par (3), Criminal Code.
\textsuperscript{220} Article 108/a, par (1), Criminal Code.
\textsuperscript{221} Article 108/a, par (2), Criminal Code.
4.3. Code of Criminal Justice for Minors (CCJM)

An important legislative development in the Albanian children’s rights legislation is the approval in March 2017 of the CCJM. It is for the first time that Albania develops a full set of norms to regulate the position of children within the criminal justice sector and to approve specific rules and procedures needed to treat this delicate category. The CCJM it is mainly focused on regulating aspects of the criminal liability of children who commit criminal offences but it provides also important dispositions in relation to children victims of crimes, including sexual abuse. In fact, the CCJM regulates issues such as: the position of the child victim during investigation and prosecution; interviews with children; protection measures throughout the process in order not to aggravate their trauma; protection of personal data of child victims and similar issues. All aspects which were mentioned and called for regulation by the several international instruments which were explained in the previous paragraphs of this article. The CCJM starts by enunciating the principle of protection of minors and their highest interest\(^{222}\) and by determining that ‘minor’ is every person below 18 years of age\(^{223}\). Below will be provided the most significant dispositions related to child victims of sexual abuse as regulated by the CCJM:

i. **Article 17 - Priority review and prevention of aggravating trauma**: it is established the principle that each competent authority shall review quickly and with priority cases of victim children, by guaranteeing that no stage of the criminal process aggravates the caused trauma\(^{224}\). To be noted that with competent authority\(^{225}\), CCJM intends all officials dealing with victim children including: judges, prosecutors, state police officials, social worker, employers of the Child Protection Unit, etc.

ii. **Article 18 – Obligatory participation of the psychologist**: it is established that in order to protect children from trauma, the presence of the psychologist is compulsory throughout the criminal prosecution procedures (investigation and trial). The presence of the psychologist is also necessary to ensure that interviews with children are done properly. In addition, it is provided than where possible, the same psychologist is assigned to the same child victim throughout the whole process.

iii. **Article 20 - Free aid to children**: it is established that legal and psychological aid provided to victim children in each phase of criminal prosecution will be free of charge and guaranteed by the state.

iv. **Article 21 – Protection of private life**: it is established that in all phases of criminal prosecution the privacy of children should be respected and all information that may lead to identification of children victim is not allowed to be published.

v. **Articles 25-29-30-31-32 - Trainings and specialization of competent authorities**: it is established that competent organs dealing with minors have the necessary expertise\(^{226}\).

\(^{222}\) Article 2 (2), Law no. 37/2017 “Code of criminal justice for minors”.

\(^{223}\) Article 3 (3), Ibid.

\(^{224}\) Article 17 (2), Ibid.

\(^{225}\) Article 3 (15), Ibid.

\(^{226}\) Article 25 (1), CCJM.
and that persons administering the criminal justice process are specialized and trained in protection of children’s rights\textsuperscript{227}. This obligation includes several officials and professionals such as: prosecutors; judicial police officers; state police officers; lawyers; psychologists; child protection unit employees, etc.

vi. **Article 25 (2) - Restrictions for persons working with minors:** it is established that competent authorities ensure that every person who has been convicted with a final decisions for an intentional criminal offence against children or for family violence it is prohibited to work with children.

vii. **Article 27 – Special judicial sections for minors:** within the district courts are established special sections dealing with minors issues. These sections will also review cases of offences of adults against minor/children victims.

viii. **Article 37 – Protection measures for children victims:** it is established that during each phase of the criminal process special protection measures for victim children may be adopted when the safety of the child is at stake. Depending on the circumstances these measures may be adopted by the judge \textit{ex-officio}, public prosecutor, judicial police, the Child Protection Unit. Protection measures consist of: avoid contact between the child victim and the perpetrator throughout the process; request the issuance of a restriction order from the court; request pre-trial detention measure for the perpetrator; police protection of the child; other appropriate measures.

ix. **Article 41 – Special interview rules for children victims of sexual abuse:** these special rules are applicable to children of sexual abuse in addition to the other interviewing rules for children established in articles 39 and 40 of CCJM. It is established that: interviews of sexually abused children are compulsorily conducted through video and audio registration; video-audio registrations may be heard at the court session; the testimony of the child may be heard without him/her being present using IT tools; it is forbidden to interview the child victim of abuse within the family in the presence of the parent or the abusive family member during the issuance of protection orders; the trial reviewing sexual abuse of children is held with closed doors.

x. **Article 136 – Criminal justice database for minors:** the database is created with the aim of establishing an integrated system of data collection for minors. It will enclose data on every stage of criminal proceedings involving minors, being those perpetrators, victims or witnesses of crimes. The system is managed by the Ministry of Justice\textsuperscript{228} and all officials who have a role during criminal proceedings (prosecutors, judicial police etc.) have the right to access the system and insert data in their possession.

4.4. **Criminal Procedure Code (CPC)**

Before adoption of the CCJM, it was the criminal procedure code which regulated some aspects of the standing of victim children within the criminal process. Nevertheless those dispositions were limited as to the content and extension and did not offer the degree of protection as now

\textsuperscript{227} Article 25 (4), Ibid.

\textsuperscript{228} Article 137, Ibid.
provided by the CCJM. As a result those CPC articles which still exist will not be dealt with in this paragraph. Yet two important matters affecting the system of protection of children victims of sexual abuse are still regulated under the CPC. These are the rules on the initiation and following up of criminal prosecution in cases of lack and/or of withdrawal of report from the victim and the rules on the collection and processing of data on criminal conviction, which is important with regards to the restrictions imposed on persons disqualified from working in contact with children.

Article 24 (6) of the CPC establishes that initiation of criminal proceedings in Albania may start *ex officio* – meaning with the own initiative of the Public Prosecutor - when the complaint of the victim it is not necessary. Cases where the victim’s complaint is necessary are provided in Article 284 (1) and include among others, the offences provided for in Articles 105 and 106 of the CC. For these cases criminal prosecution may only start after the victim files a complaint. In addition, Article 290 (1) (c) of the CPC establishes that the withdrawal of the complaint by the victim causes the cease of the criminal prosecution, for cases where a complaint is necessary to start criminal prosecution. There is a judicial register where data related to criminal proceedings for citizens are collected and processed. This register is regulated by Articles 481-484 of the CPC and it is administered by the Ministry of Justice. What is important for the purpose of this work is Article 484 (1) which provides that there are some authorities/entities that have the right to obtain attestations issued from this register. These are judicial organs, public administration organs and *entities charged with performing public services*. These authorities/entities may obtain attestation of the criminal records of a person when such attestations is necessary for the performance of that person’s duties.

V. CONCLUSIONS AND RECOMMENDATIONS

It is noticeable that during 2017 Albania has significantly improved its domestic legislation related to the protection of the rights of the child. Law no. 18/2017 and the CCJM are an important step forward in aligning the Albanian system of protection of children to international standards and principles which were mentioned above. Nevertheless the road to ensure effective protection is difficult and goes beyond the written letter of laws. The newly approved legislation is pretty ambitious and it provides for the establishment of a series of new structures and new procedures. These should be backed up by appropriate budgetary and human resources assigned to social and judiciary services for sexually abused children, both elements which have been lacking in the past years.

It often happens that Albania adopts legislation which is conform to the best international standards - so as to tick the box of its international obligations - but which in fact lacks of administrative procedures, human resources and enforcement will needed for its implementation. As a result there is a general disillusion among lawyers and human rights operators toward ‘good laws’. In the present case, for these ‘good laws’ to be effective there is a series of sub-legal acts needed to be approved. These are not yet approved despite the fact that the time-limit of 6 month established for some of them, has already passed. Nevertheless the very existence of the
principles and procedures established in the new laws is a positive step toward which provides us with useful tools to require the Albanian state to implement its positive obligation to protect children from all types of sexual abuse.

Despite the above general comment, the question is: at what extent the current Albanian legislation on protection of children from sexual abuse is conform to the international legislation analyzed above? Are there inconstancies and do we still need improvements?

**With regard to Law no. 18/2017** it can be generally concluded that it has adopted almost all measures and principles established by the Lanzarote Convention and the other above mentioned international instruments. These measures consist in assistance and support measures, coordination measures, help-lines, reporting obligations, training and awareness raising measures, restrictive measure for persons working with children and protection measures for children. In relation to protection measures Law 18/2017 has vested with significant responsibility the social structures within the Municipality (child protection units) to decide on the adoption of protection measures for endangered children. Such protection measures are adopted and implemented by the own decision of the Municipality structures dealing with children, previously to addressing the court. In this sense it is positive to have in place structures able to intervene and have the possibility to take relevant decisions for children before addressing the court. On the other hand this is also a very delicate decision making which shall be trusted only to highly specialized and well-trained social workers who are really able to identify the gravity of the circumstances and make the right decision considering the high interest at stake. In addition in order to make all the structures effectively function, necessary budgetary and human resources should be provided to Child Protection Units within the Municipalities and to the SARPC.

**With regard to the CCJM** it may be concluded that it adopts the international principles and standards required when dealing with children victims of abuse, sexual abuse included. As a result its adoption is a step forward and it is most welcomed. Nevertheless there is no trace of the approval of the sub-legal acts necessary for implementation of some of its procedures within the 6 months term as provided for in Article 141. Thus having regard of the challenging process of building a new criminal justice system for the protection of children it is recommended that all involved institutions activate in order to establish and make it effective.

**With regard to the CC** it may be generally concluded that, after the improvement of the Albanian legislation through the introduction of the abovementioned novelties, the CC remains the weakest part of the children protection system in Albania. This because criminal offences related to sexual abuse of children are not formulated in line with the international requirements.

First of all it should be pointed out that the Albanian criminal code makes an incomprehensible distinction between sexual and homosexual abuse. The distinction consists only in indicating these abuses as being of two different forms, and not in the degree of punishment which is the
same for both. Despite the fact that this part of the CC has been amended in 2013 the legislator did not change this distinction thus maintaining this discriminatory provision enshrined in the criminal code. This was also pointed out by the Lanzarote Committee in its 1st implementation report of 2015, holding that the same fact that the CC considers sexual abuse and homosexual abuse as two different offences is stigmatizing. It is thus recommendable that all articles of the CC containing this distinction be immediately modified.

Secondly the substantive provisions of the CC related to sexual abuse of children are incomplete, do not have the extent required by international instruments and are provided in a disorganized way which may lead to confusion. The only article perfectly in line with the Lanzarote Convention and Directive 2011/92/EU requirements is Article 100 of the CC that punishes sexual activities with minors of 14 years old. Moreover it goes beyond international requirements by providing that it is punishable also the sexual activity with a minor which has not reached sexual maturity, despite the age. Yet, by the wording of the article it is understandable that this extension is applicable only to female children, which is again a discrimination of the abovementioned type which should be immediately removed.

Sexual activities against children through the abuse of a position of trust, authority or influence it is not expressly regulated. There is Article 106 CC which punishes sexual activities among related persons such as parents and children, brothers and sisters, or adoptive parents and guardians. Nevertheless this article seems much more oriented at preventing sexual relations (incest) among family members, whether natural or acquired than of specifically protecting children from abusers they trust, they are influenced from or that exercise authority on them. In addition, even if this article may be used, as it is now, to punish sexual offences of parents and guardians against children, it leaves out a wide range of other persons who due to their position may abuse their authority on children or exert improper influence on them such as: teachers; extended family; family friends; neighbors and similar persons which are considered as the ‘circle of trust’ which goes beyond the categories enumerated in Article 106. As a result it is recommended that such a specific provision be introduced in the criminal code and be worded as provided for in the Lanzarote Convention.

Sexual activities against children through the abuse of coercion, force or threats it is not fully regulated. Article 101 punishes sexual abuse by the use of force against minors from 14-18. It does not mention coercion or threats as required by the Lanzarote Convention. As a result the Albanian provision narrows the range of criminal behaviors punishable by Article 101 and its amendment is required by introducing threat and coercion in the wording of this article.

Sexual activities against children through the abuse of a particularly vulnerable situation of the child, because of mental or physical disability or a situation of dependence, it is not fully

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229 Lanzarote Committee, 1st Implementation report, “Protection of children against sexual abuse in the circle of trust: The framework”, Pg.15.
regulated. Article 103 provides for the offence of sexual abuse against persons unable to defend themselves. It applies in general to physically or mentally disabled persons, without age limits. Being a child does not constitute a special aggravating circumstance. In addition the situation of dependence, as required by the Lanzarote Convention is not even mentioned. As a result there should be introduced a specific article which punishes the sexual abuse of children in these vulnerable circumstances, or introduce these type of abuses against children as an aggravating circumstances of Article 103 of the CC.

Another amendment of the CC deemed necessary for it to conform to international requirements are the rules on the statute of limitation regulated by Article 66 CC. Lanzarote Convention in its Article 33 requires that the statute of limitation for initiating proceedings regarding sexual abuse of children shall be sufficient to allow the victim to start proceedings after it has reached majority age. Through the joint interpretation of Article 66 CC with the specific articles on sexual abuse of children it can be calculated that the statute of limitation for the basic offences is 10 years after committing the offence (20 years when aggravating circumstances apply: severe damage to the child; death; suicide etc). Logically 10 years is too short of a term for children to recover from the traumatic experience and take the courage to denounce the abuse, especially when that has happened within the circle of trust. Considering the gravity of the offences at stake it is recommendable to exempt these types of offences from statute of limitation terms as it is already done for some type of murders. It should be kept in mind that sexual abuse does not only harm the child of the present but it harms the adult of the future thus causing a huge damage to the individual and to the society as a whole. As an option, statute of limitation should be linked with reaching the majority age of the child and providing sufficient time as asked for by the Lanzarote Convention.

Lastly it would be advisable that all offences related to sexual abuse of children be regulated in a harmonized and coordinated way in a specific part of the Albanian criminal code, by adopting a clear and non-discriminatory wording which includes all the variety of sexual behaviors which may harm children, at least those which are already provided for in international conventions ratified by Albania. With regard to the CPC provisions it is necessary the amendment of Article 284 (1) in relation to initiation of criminal proceedings. Specifically Articles 105 and 106 of the CC should be removed from the requirement of starting criminal prosecution after the victim’s complaint. As regards the criminal records register regulated by Articles 481-484 of the CPC, a special section of it should be dedicated to persons convicted for offences related to sexual abuse of children. This way a more complete and organized data base would be in place and would facilitate the job of authorities when checking the integrity of persons working with children. Moreover this is a requirement of the Lanzarote Convention which provides not only for the collection of identity data of these type of sexual offenders but also the collection of their genetic profile (DNA)\(^{230}\). There is no trace of the existence of the latter system, or of plans to put in place such a system in Albania.

\(^{230}\) Article 37 (1), Lanzarote Convention.
The future of the European monetary policies
By MsC. Sajmira Kopani

I. ABSTRACT

United Europe started a new era with the Maastricht Treaty, since the latter triggers the triumph of a numerous achievements both in the economic and political domain. The establishment of the monetary market and the preparations for introduction into the market of the common currency signals the maximum economic integration and refinement of the single market. The Economic Integration of the EU through promoted mechanisms of the Roma Treaty and later on of the Maastricht Treaty aims simultaneously at the economic growth of member states and the strengthening of the European Union as a competitor within global markets. To complete the notion of the single European market, the Maastricht Treaty foresaw the Convergence Criteria for acceptance in the European Monetary Union. The latter it is thought to be the maximum of European integration and constitutes a great experiment (Van Veen, 2002). This is the reason why it is interesting to discuss regarding its history, legitimacy, costs and its future. After the financial (global) crisis of 2008 and 2010, which affected the Eurozone, the regulations for the European monetary policy are streamlined and diversified even intervening at regulation of fiscal aspects. These regulations highlight that integration, as far as integration policies are concerned, is enhanced and this integration is seen as a theory that will assist on the prevention of future crises.

KEY WORDS: European monetary policy, Economic Crises, The Stability and Growth Pact, European Financial Stabilisation Mechanism.

ABREVIATIONS
ECB European Central Bank
ECJ European Court of Justice
EER European Exchange Rate

231 The USA-s have assisted for the creation of free market and its internal market is viewed as the chosen model for the common market. In addition, the Marshall Plan after the Second World War, aimed to increase the economic exchange and trade with EU.
HISTORIC DEVELOPMENTS OF THE EUROPEAN MONETARY UNION

First movements towards the European monetary union have started during the last days of the exchange rate “Bretton Woods”, at the start of the 1970s. In the US dollar system, which started after the Second World War, the currencies of large industrial countries had a fixed price with reference to US dollar. Meantime, the US dollar had a fixed price of $35 for golden cube. This system also served to establish the exchange rates among European currencies. The fall of the “Bretton Woods” system opened the door for mutual exchange rates determined from market forces and not based on a government decree, or a similar executive act (bylaw).

Triggered from this situation, a committee chaired from Mr. Pierre Werner, Prime Minister and Finance Minister of Luxemburg started its work in the 1970s and came with a report in which fixed exchange rates were proposed among EU countries and the establishment of a federated system of central European banks. This report was approved from the Council of Europe in March 1971.

A complete effort for a system of an exchange rate for Europe was the establishment of the European Monetary System (EMS), which started on March 1979, where eight out of nine members of the European Community (all except Great Britain) became part of a European Exchange Rate (EER) mechanism. On that period of time, the rates of inflation in member states of EER were high,\(^1\) with different boundaries.\(^2\) These differences of inflation made difficult the guarantying of EER stability, where with a fixed exchange rate the difference in inflation

\(^1\)The high inflation rate is a direct consequence of entering without control of the money in the market and on others the lack of public goods or services which are reflected with an uncontrolled decrease of prices. If a foreign currency will be exchanged with a local currency, it will result with considerable loses.

\(^2\)The boundaries presume the immune rate against inflation which is defined from the leading institution of the national monetary policy.
translated directly into changes of relative prices, which ruin competition among member states.\textsuperscript{235}

The report of year 1989, prepared from the committee chaired from Jacques Delors, President of the European Commission stated that “\textit{A single market requires a single currency.}” The Single European Act prompted for removing of all internal barriers on trade, free movement of capital and working forces inside Europe, up until the end of 1992. This act was another step towards the European Economic Integration, which started with the Rome Treaty.\textsuperscript{236} The Maastricht Treaty, signed at the end of 1991, defined a time limit for this process; specifically, it foresaw that the common currency will enter into circulation not later than first of January 1999.

\section*{III. LEGAL FRAMEWORK OF THE EU MONETARY POLICY}

In the preamble of the Treaty of the European Union, it is stated that the founding states where: “RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union, a single and stable currency…” From this statement it results that one of the goals that the European Union has defined for itself is: “\textit{...the establishment of the union based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress...}” goal that becomes more achievable and manageable with the application of a single currency.\textsuperscript{237}

The common currency has a significant role even regarding the dimension of the European Identity. It has always been a symbol in the efforts for the creation of nations.\textsuperscript{238} This effect increases considerably due to the direct relationship that citizens have with the currency on their daily dealings and helps in the creation of the feeling of belonging. The design of currencies override any symbol of the well-known national leaders, intellectuals, artists, and it is served with an abstract representation where are shown in one side bridges that symbolize the interactions among states and on the other side, multiple windows and doors that symbolize the

\begin{thebibliography}{9}
\bibitem{teu} TEU Article 3: Aims of the EU (3) The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. - It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. - It shall promote economic, social and territorial cohesion, and solidarity among Member States. - It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
\end{thebibliography}
openness to each other and cooperation.239 By having a single currency, Europe becomes even more united, people move easier without exchanging currencies, feel more safe for their investments and savings and a better business environment is created regardless of the fact that crises has hit even this aspect.240 Moreover the fact that European Union is divided into countries inside of the Eurozone and those outside of the Eurozone could be a destructive factor for the common European identity.241 However the common currency has also been perceived as the loss of part of the national identity regardless of the impact that it might have had in the creation of the new European identity.242

The Treaty on the Functioning of the European Union foresees in its article 3 (c) the exclusive competence of the European Union in the monetary policy and the usage as the common currency of the “Euro”.243 The goal of a common currency is to eliminate the risk of the exchange market, to insure the transparency of prices and to facilitate trade and cross border transactions.244 In Article 119 (2) of TFEU the chapter on “Economic and monetary policies”, it is provided among other things, the implementation of a monetary policy and a common single policy on the exchange rate, the main objective of which will be the safeguard of the price stability and support of general economic policies of the EU, in accordance with the principle of an open market economy, with free competition aiming at fulfilling one of the main goals of the European Union.245

The presented framework of the chapter “Economy and Policy of the EU”, is defined as asymmetric.246 This for the reason that the monetary ‘pillar’ is much more advanced than the economic ‘pillar’. The competences of the monetary policy are transferred to the System of the European Central Banks (SECB), while the economic policies are still dominated by the

243Article 3(4) (c) TFEU: e Union shall have exclusive competence in the following areas: Monetary policy for the Member States whose currency is the Euro;
competencies of the Member States. Directive no. 2003/223 of the Council of Europe\textsuperscript{247} does not give equal rights to each governor of the Governing Council of the ECB (the decision making body), but foresees a voting with rotation. In concrete terms with the adoption of Euro currency from Slovakia, the number of the members in the Governing Council of the ECB, exceeded the number 21. Article 10.2 of the Statute of ECB, defines that when the number of members in the Governing Council will exceed 21, each member of the Executive Board will have a vote and the number of members with the write to vote will be 15. For this reason, the member states of Eurozone are divided in two groups, based on their economic and financial strength (power). To define to which group each governor will belong to, a list is approved. Governors representing the states ranked in the list of five countries with the largest economic power, more specifically Germany, France, Italy, Spain and the Netherlands, are each spared 4 voting rights. All the other states, 14 in total, share 11 voting rights. The Governors take their seat to exercise the voting right based on a monthly rotation. The main criteria in which it is based this system is the monetary contribution for the EU of the member states. Out of two groups currently categorizing member states, they will be categorized in three groups when the number of countries in the Eurozone will reach 21. Currently there are 19 member states of Eurozone and we are getting close to the moment that the states will lose even that little impact that they had on monetary policies, while the democratic deficiency of the EU will increase in parallel.

IV. EUROPEAN SYSTEM OF CENTRAL BANKS

European System of Central Banks includes national central banks and the European Central Bank.\textsuperscript{248} The principle of independence of the European System of the Central Banks is very important. During the exercise of the competences and duties that are defined to it, this system is independent and does not take into consideration any guide from the institutions, bodies or different agencies, this for the reason of the delicate domain that it covers.\textsuperscript{249} However, the Council, based on the proposal of the Commission and after consultation with the European Parliament and the European Central Bank, may approve measures to harmonise costs and technical specifications of all currencies dedicated for circulation, but this decision making is more technical and not interventionists in the policies that the Economic System of Central Banks does apply.\textsuperscript{250}


\textsuperscript{248}TFEU 127(1-2) The primary objective of the European System of Central Banks [i.e. The ECB and the national central banks] shall be to maintain price stability...

\textsuperscript{249}TFEU 130 When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body.

\textsuperscript{250}TFEU 128 Member States may issue euro coins subject to approval by the European Central Bank of the volume of the issue. The Council, on a proposal from the Commission and after consulting the European Parliament and the European Central Bank, may adopt measures to harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Union.
The high degree of the independence of the European Central Bank (a positive element according to the opinion of the author) it is not balanced by a strong controlling procedure on the work of the ECB. The lack of a centralized supervision of the banking system in the Eurozone helps to explain the severity of the financial crises 2007-08. Thus the ECB does not enjoy all attributes of a Central Bank, for example it lacks the function of direct last lender; it does not exert the supervisory and regulatory role of a central bank etc. The structure of the European Monetary Union constitutes what most consider as its fatal flaw (draw back). This situation was tempted to be corrected through two large programs of the European Union: the Pact for European Stability (PES) and the Banking Union.

The PES was created after the changes of Article 136 (1) of the TFEU, which prescribes that to insure the proper functioning of the monetary and economic union for all the states of the eurozone: “...the Council shall adopt measures (a) to strengthen the coordination and surveillance of their budgetary discipline; (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance” After the crises, aiming to solve it, through Article 1 of the Decision 2011/199, it is prescribed the amendment of article 136 of the TFEU, adding article (3) s below: “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”.

This amendment has been appealed to the Court of Justice (the Pringle case) which through its decision making considered it as legal, with the main and far-fetched argument that this was a credit not an assistance. Article 122 of the TFEU regulates assistance pursuant to which: “Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned”. The main debate in the Pringle case was the limits of competences of the EU in relation to economic policies, by ‘disguising’ economic policies as monetary ones, which is contrary to the TFEU. Article 3/1(c) of TFEU, states with regard to monetary policies, that the Union has specific competences, while for the economic policy, the formulation of Article 5.1 TFEU provides that “The member states coordinate their economic policies as part of the EU”. As a consequence, economic policies are still preserved by the member states and the EU does not have any competence apart from the coordinating role.

254 ECJ Case C-370/12 Pringle kundwr Irelandws.
The objective followed by this mechanism, which is the safeguard of the stability of the Eurozone as a whole, is evidently different from the objective of the safeguard of the price stability which is the main objective of the monetary policy of the EU. According to the decision of the Pringle case, even though the stability of the Eurozone may affect the stability of the used currency in that zone, the measures that impact the monetary policies cannot be treated as equal with those having impact on economic policies, simply with the argument that they might have indirect impact on the stability of the Euro.  

Under the framework of the changes of Article 136 of the TFEU, an international body was created with the headquarters in Luxembourg, the European Stability Mechanism (ESM). This body will ensure when necessary, financial aid in the form of loan to member states of the Eurozone (in the quality of debtors), if they are found in financial difficulty to the extent of 500 billion euro. ESM substituted two funding programmes which were established for a limited period of time: “the European Financial Stability Facility (EFSF) and the “European Financial Stabilisation Mechanism” (EFSM). Currently ESM is responsible for all the new landings that serve to save countries from the economic collapse. Meanwhile, EFSF and EFSM will manage only the previous landings from Ireland, Portugal and Greece.  

To cope with the crises ECB presented the programme “ECB’s Outright Monetary Transactions” (OMT) where it was legitimised to purchase treasury bonds on the secondary markets. With regard to the validity of the ECB’s decision making regarding OMT, the Federal Court of Germany required an interpretation by the Court of Justice. The Court of Justice, through its decision determined a standard. The objection of the Federal Court of Germany was related to the fact that the OMT programme was not approved on the proportional way as provided by Article 5(4) of the TEU, and furthermore it was not drafted as a legal act since it consisted in a simple press statement of the President of the ECB, Mr. Draghi, where the latter explained the way of functioning of the OMT programme. As a consequence, as the German Federal Court held, its validity could not be examined by the Court of Justice which had no jurisdiction for these type of issues. With regard to this aspect, the Court of Justice holds in its jurisprudence that for an act to be qualified as admissible for judicial review it suffices for it to be obligatory and to bring about effects/legal consequences despite its form, and when dealing with a general action programme with an obligatory nature for a specific subject(obliging the latter to take a decision) and when the act contains measures that creates rights and obligations for third parties, the admissibility criteria should be more flexible. This is due to the fact that the general

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255 ECJ Case C-370/12 Pringle kundwr Irelandws, prg 56.
257 ECB’s Outright Monetary Transactions”.
programme of the authorities might have non-typical forms and may be able to have direct impact on the legal situation of persons.\textsuperscript{259}

According to the Court decision no. C-62/14, refusal to admit judicial review of this type of decisions would exclude a large number of ECB’s decisions from judicial review because these press releases are not formally approved and published on the official gazette.\textsuperscript{260} But this practice bears the risk to open the way for the European institutions to be governed with non legal measures and we should keep in mind the fact that the necessity for quick measures is not proportional with the mechanisms and legal procedures that should be, well weighted and follow the law requirements of the entire process.\textsuperscript{261}

In order to enforce the monitoring role of the ECB, the Banking Union was established. It determines that the ECB is not only the main partner of the system but also a monitoring body of banking activities within the Eurozone. More importantly the Banking Union has made the ECB a \textit{de facto} last direct lender of the European banks, instead of the governments.\textsuperscript{262} Aiming to facilitate and safeguard the Economic and Monetary Union (EMU), based on Articles 121 and 126 of the TFEU, the Stability and Growth Pact has been elaborated.\textsuperscript{263} It was not respected by the states and this might have had the impact of harshening the crises, which might have been easier should the states have kept in mind and controlled the parameters such as the budget deficit at the threshold of 3\% of Gross Domestic Product (GDP); the public debt in the scale of the 60\% of the GDP. In 2011 the Stability and Growth Pact (SGP) was amended aiming to take into consideration the national conditions of the member states, and to add more economic reasoning to the rules applying to it.\textsuperscript{264} Having established the midterm objectives, the Council, as part of the multilateral monitoring framework pursuant to Article 121 of the TFEU, was given the competence to elaborate the midterm budget objective presented by the particular member state; to assess whether the economic assumptions on which the programme is based are convincing; whether the road towards the midterm budget objective is appropriate and whether the undertaking and/or proposed measures are sufficient to reach the midterm objective during the cycle.

The lack of mechanisms to implement fiscal policies is another reason of the crises that hit the Eurozone during 2010 and the lack of fiscal consolidation is a consequence of safeguarding national sovereignty of each member state concerning the field of taxation. The legislation on the monetary policies improved through the group of regulations known as “\textit{Six Pack}”. The

\begin{itemize}
    \item \textsuperscript{259}ECJ Case C-62/14. Peter Gauweiler and others Vs. Deutscher Bundestag. prg 75.
    \item \textsuperscript{260}ECJ Case C-62/14. Peter Gauweiler and others Vs. Deutscher Bundestag. prg 89.
    \item \textsuperscript{261}ECJ Case C-62/14. Peter Gauweiler and others Vs. Deutscher Bundestag. prg 115, 122.
    \item \textsuperscript{263}Resolution of the European Council on the Stability and Growth Pact (Amsterdam, 17 June 1997) [Official Journal C 236 of 02.08.1997], as amended
\end{itemize}
monitoring of the budgetary and economic policies is planned to be organised according to the European Semester and other details for the implementation of the rules on the Stability and Growth Pact are prescribed on the “Code of Ethic”. This was followed by the “Two-Pack” programme which further improved the budgetary monitoring in the Eurozone. Based on the procedure of the European semester, every country that use the Euro shall submit its project budget at the Commission at the middle of October. If the Commission assesses that this project budget does not fulfil the rules of the single currency, it may require changes and revisions.

All amendments made to legislation on monetary and structural policies and the increase of the competences, are important to address the roots of the crises and to create the favourable conditions for economic growth, to create new jobs and to improve the competition which are interlinked fields of each other. Many critics have argued that the economic policies disguise as monetary ones and are being diverted from the exclusive competences of the states. There are others that argue that after 2008, it was noticed that the economies were much more integrated with each other and the states should modify their structures in their global contexts and that the crises of the 2008/2010 was not the financial crises but the first global crises. This is an argument that supports the idea that the existence and the strengthen of the competences of international institutions is a necessary measure.

V. COSTS OF EUROPEAN MONETARY UNION
The inclusion in the Eurozone, apart from the good will of the establishment of this zone, produces costs for member states. The main reason is that the state loses the ability of using national instruments concerning the monetary policy (for example, the norms of exchange rates). This problematic is evidenced in particular when the economy of a country experiences asymmetric shocks. Analyses for the assessment of those costs are based on the recognised contribution of Robert Mundell (1961). If we suppose that France and Germany are affected from these asymmetric shocks and specifically this is reflected with the decrease of the aggregate demand in France and the increase of the demand in Germany, by analyzing the management of this crisis in both regimes (the Monetary Union and independence on monetary policy) costs will be evident.

None of the member states cannot stimulate or limit the demand using national monetary policies. However, there are alternative mechanisms of the European Monetary Union like for example flexibility on payments or movements of the working force. We should take into consideration that the movement of the working force is very limited in Europe, in particular for the unqualified workers and the main reason is that of the social security schemes. In case the payments and prices will not be flexible, the movement of working force will be restricted.

(limited), the cost will be that large that the countries will regret being member of the Eurozone. This because if they would have preserved their independence, sovereignty on the monetary policy they would be able to use even other instruments such as exchange rates, interest rates, while as the situation currently stands they are becoming debtors of a currency over which they have no control. Thus, the loss of the monetary independence causes a change on the capacity of a government to finance their budget deficiency, but this does not make the states of the EU not to have any control over their deficit. EU institutions define the amount of public debt they would have and their period of time to manage it. The goal is that the states shall become more responsible in managing the public debt. The aim is that member states become more accountable on managing the public debt, a feature that the EU elaborates on its programme on “Corporate social responsibility” which aims to establish a mechanism that commits to a self regulatory programme.

Moreover, this does not imply that countries outside of the Eurozone do not have problems since even they are faced with asymmetric shocks and the financing of the debt through money issuance, in order to overcome the situation, may increase the level of inflation in those countries.

VI. THE FUTURE OF EUROPEAN MONETARY POLICIES PURSUANT TO PREVAILING THEORIES

The European monetary policy has been viewed in different perspectives from different thought theories. The intergovernmental theory of thought does make a liberal interpretation, according to which the moving force of European integration is the agreement amongst Member States, only to the extent that it serves their interests. The common monetary policy has been positive concerning the benefits they would enjoy, while the Stability and Growth Pact failed according to this theory, and this is evidenced by the amendments undertaken almost every two years to it to strengthen efficiency and efficacy of its dispositions.

The federalist theory of thought argues that the common monetary policy is an essential factor for a total integration and the establishment of a federalist union, but the analysts argue that there is a considerable gap between the actual system and system considered as a federalist one. This stance is based on some components of macroeconomic stability. First of all the lack of a definition and capacities to apply the fiscal rules even after the reform of the Stability and

270 In 2001, Portugal was the first that exceeded the defined limitation defined from EU Stability and Growth Pact. Moreover, other countries from Germany to Greece followed violating permanently these criteria’s and avoiding penalties. In average most of the member state countries to have had a budget deficit more than twofold the allowed threshold of 3%
Growth Pact; also the lack of fiscal policy coordination among member states and the lack of financial autonomy.\textsuperscript{271}

According to the neo-functional theory of thought, the autonomy of the Member States is lost in favour of EU institutions, of the Commission in particular. This is evidenced with the devolution of national currencies in favour of the Euro currency regulated by central Institutions.\textsuperscript{272} One of the most well known neo-federalists, Ernst Haas, based in this theory of thought, has predicted, that the common monetary policy should be all means be followed by a common fiscal policy. Having a common currency requires indispensably a common framework on expenses, so that the deepening of integration is a necessity and the crisis confirmed it. At the end of 2013 there was an intergovernmental agreement for the Fiscal Treaty signed from 25 countries of the European Union (all EU countries except GB, Czech Republic and Croatia).\textsuperscript{273} Regardless of the fact that this agreement does not have the status of an EU regulation, the ECJ is authorised to set a sanction (0.1\% of GDP) towards the member state which does not fulfil correctly the set expectations of the treaty or fails to make them part of the mandatory domestic legislation. Thus, it is evident that EU is moving towards common fiscal policies.

All recent measures taken in particular as part of the European monetary policies, apart from the fact that saved the Eurozone, practically enhanced the integration of countries, and it appears that the neo-functional theory of thought, is the one that gives a reasonable explanation concerning the trends of European integration.

VII. CONCLUSIONS AND RECOMMENDATIONS

It is noticeable that European Union is taking another direction, it is shifting away from the federalist agenda and policies and it is moving towards a policy coordinator of member states as well as of those states aspiring to join the EU. This is highlighted even in the recent policies undertaken by the EU, asking to EU Member States and those states on the path to join the EU, to prepare “National Planning Programs”, which were previously named “Programmes for National Recovery”. Through these initiatives, EU is providing recommendations for states to establish self regulatory programmes and improve failed policies. Thus, the European Union is more and more orienting itself toward the role of a policy coordinator leaving room for self regulation. This position of the EU was taken even regarding monetary policies.\textsuperscript{274} As a result, it is recommendable for Albania, to take into account to the extent possible, during the negotiation stage of the monetary policies chapter with the European Union, this new direction of the EU.

\textsuperscript{271} Afonso, Oscar and Alves Rui Henrique “Fiscal Federalism in the European Union: How Far Are We?” (2008) pg. 6-24
\textsuperscript{272} Cooper, Ian.“The euro crisis as the revenge of neo-functionalism”. Euro observer. (2011) accessed in January 2016 at: https://euobserver.com/opinion/113682