



**PILLAR I**  
**ALBANIAN LEGISLATION**

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

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**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.

**KEYWORDS:** Parliament, Parliamentarism, political parties, political representation, elections, Electoral Code.

**ABBREVIATIONS:**

<b>CEC</b>	Central Elections Commission
<b>CONST.</b>	Constitutional
<b>EC/ELECTORAL CODE</b>	Law No.10019 dated 29.12.2008, as amended
<b>ECHR</b>	European Convention on Human Rights
<b>ICC</b>	Italian Constitutional Court
<b>PORCELLUM</b>	Italian Electoral Law No. 270/2005



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## 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"*<sup>1</sup>.

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<sup>2</sup>. 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<sup>3</sup> 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*<sup>4</sup> was convened only in 1295 under the reign of Edward I, bringing together representatives of cities and villages, barons and bishops.

<sup>1</sup> Montesquieu, C. L., *De l'esprit des lois*, Genève, 1748, trad. it., *Lo spirito delle leggi*, II voll., Torino, Utet, 1952, p. 280.

<sup>2</sup> 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.

<sup>3</sup> Fischel, E. *Storia della costituzione inglese*, II voll., Milano, Corona e Caimi, 1866, p.155.

<sup>4</sup> Mathiot, A., *The British Political System*, Stanford University Press, 1958, (trans. from, *Le Regime Politique Britannique*, Colin, Paris, 1955), pg. 24 and continues.



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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 15<sup>th</sup> June 1215 when the barons obtained from John Without Land<sup>5</sup> the *Magna Carta Libertatum*<sup>6</sup>. 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 event<sup>7</sup>. At that time, members of the councils, states, assemblies, parliaments or medieval Diets<sup>8</sup>, must have been connected to their classes, villages, cities or corporations, by a private type relationship<sup>9</sup>. They behaved like they were mandated by the latter to represent interests, wills, desires or demands addressed to the monarch<sup>10</sup>. In

<sup>5</sup> 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).

<sup>6</sup> *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.

<sup>7</sup> Axelrod, A. *The Real History of the American Revolution: A New Look at the Past*, Sterling, New York, 2007.

<sup>8</sup> Deriving from the medieval latin – *dieta*- *dies* – day of the assembly. This denomination was provided to 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.

<sup>9</sup> 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 former, is the one of Ambrosini, G., *La rappresentanza degli interessi ed il voto obbligatorio*, Roma, Scientia Sae, 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 rappresentanza 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.

<sup>10</sup> Only aristocratic classes and not simple individuals were represented in Medieval Assemblies. (beside being represented indirectly due to the class they 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 collection of the taxes. For more information refer to: Stephenson, C., *Taxation and*



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other words, the representative institutions of the Middle Ages must have been 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<sup>11</sup>, 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<sup>12</sup>. 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 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 uncoerced (with *piena potestas* and *libera administratio*)<sup>13</sup>. 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<sup>14</sup>. 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<sup>15</sup>. The written mandate carried by the representative aimed to justify the legitimacy of participation in the assembly<sup>16</sup> 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

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*representation in the middle age*, in anniversary essays in medieval history by students of Charles Homer Haskins Boston-New York, 1927, p. 7 and fw; and also: Uckmar, V., *Principi comuni di diritto costituzionale tributario*, Padova, Cedam, 1959, p. 7 and fw.

<sup>11</sup> On the rigidity and other details of the compulsory mandate during the medieval representation you may refer to: C. Muller, *Das imperative und freie Mandat*, Leiden, 1966, p. 204.

<sup>12</sup> For more information refer to Shih, Marongiu, A., *Il Parlamento in Italia nel medio evo e nell'età moderna*, Milano, Giuffrè, 1962, pg. 496 and fw.

<sup>13</sup> D. Nocilla e L. Ciaurro, (*Rappresentanza politica*, *Enciclopedia del diritto*, Milano, 1987, ff. 550 and fw.

<sup>14</sup> Marongiu, A. *L'Istituto parlamentare in Italia dalle origini al 1500*, Roma Giuffrè, 1949, f. 270.

<sup>15</sup> *Ibidem*, p. 271.

<sup>16</sup> *Ibidem*, p. 259.



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mandated experts who through *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 considered the representative body of the people<sup>17</sup>. 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.*"<sup>18</sup>. 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.

### 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; (v) transparency and publicity of works and discussions; (vi) tendency for autonomy in organisation and conducting the work of the assembly.

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<sup>17</sup>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.

<sup>18</sup> Smith, T., *De Republica Anglorum*, trad. it. parz., *Antologia dei costituzionalisti inglesi*, a cura di N. Matteuci, Bologna, il Mulino, 1962, p. 44.



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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<sup>19</sup>, or as a result of exercised functions<sup>20</sup>. 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<sup>21</sup>.

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<sup>22</sup> (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<sup>23</sup> 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.

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<sup>19</sup> 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.

<sup>20</sup> It is the Italian case, for senators nominated as such due to their former occupation as Presidents of the Republic.

<sup>21</sup> The Albanian fascist corporative Senate of 1939; the Senate of Bavaria; the Senate of Iceland.

<sup>22</sup> 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.

<sup>23</sup> 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.



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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<sup>24</sup>. 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<sup>25</sup>. In this idea of the political representation, three ideological trends confront each-other as different facets of the same prism<sup>26</sup>. However, the fact remains that all these theses, pursuant to which representation

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<sup>24</sup>Fraenkel, E., *Die repräsentative und die plebiszitäre Komponenten im demokratischen Verfassungsstaat*, Tübingen, Mohr, 1958, f. 33 and fw. Italian translation.: *La componente rappresentativa e plebiscitaria nello Stato costituzionale democratico*, Giappichelli, Torino, 1994.

<sup>25</sup>Starting 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.

<sup>26</sup>The 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 its 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



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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<sup>27</sup>. 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<sup>28</sup>.

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widespread theory. See R. Carré de Malberg, *Contribution a la théorie générale de l'Etat*, II vol, Paris, Sirey 1922, pg. 196 and continues., italian trans., "Della sovranità", a cura di E. di Carpegna Brivio, Herrenhaus, Seregno, 2009). So those who express it's will are the delegated (*Carré de Malberg*, R., *vep. e cit.*, pg. 263 and continues.), in full independence from the delegators. Representatives are the bearers of their own authority and must be completely free from conditionalities, instructions or obligations in exercising their decision-making will. As a result electoral choices are simplified in becoming the right instrument for choosing the best and most capable to cover the mandate. The second ideological theory, which we may call *conservative-monarchic*, it is construed under the same medieval ideology which viewed the Pope or the emperor, as the representative of *res publica christianorum* (See, Miglio, G., *Le trasformazioni del concetto di rafresentanza*, in G. Miglio, *Le regolarità della politica*, vol. II, Milano, Giuffrè, 1988, pg. 15 and fw.), and the absolute monarch as the representative of the entire community State (For an analytic overview on the representative monarch See, Hintze, O., *Weltgeschichtliche Bedingun-gen der Repraesentativverfasungs*, in *Gesammelte Abhandlungen*, Goettingen, Vandenhoeck & Ruprecht, 1970.). Under the light of this theory, the position of the monarch and of the House of Lords over the elected Chamber is legitimized, so that all the state bodies appear as representative, and according to some other comparisons, as constitutional. The elected chamber and the inherited chamber, the monarch and the government represent the nation (or the people) in its complexity (See, Ferri, G. D., *La rafresentanza politica*, Roma, Ed. dell'Ateneo, 1936, pg. 71 and fw.). As far as this is concerned in many modern constitutions it is still written that the Head of the State represents the Nation, or rather it is an expression of its unity, even though it is not directly elected by the people. It is precisely this ideological development of the political representation in which we currently find ourselves and which marked the beginning and the half of the twentieth century. The extreme logic and consequences of these attitudes constitute the third page of the prism, namely, the theory of total and absolute independence of political representation from the elections (During the fascist period, many authors developed a serious criticism of the necessity of elections as elements of political representation. C. Esposito, *Lo stato e la nazione italiana*, in *Archibidemo di diritto pubblico*, 1937, pg. 467 and fw.; Crosa, E., *Osservazioni sulla rafresentanza politica*, in *La camera dei fasci e delle corporazioni*, Firenze, Sansoni, 1936.), so if we abuse with this conceptualization, we would qualify as representative any type of state institutions, whether it be an absolute monarchy or a totalitarian regime, therefore all these forms of government could qualify as an integral part of a representative State (*Paladin*, L., *Il problema della rafresentanza nello Stato fascista*, in *Studi in memoria di C. Esposito*, Padova, Cedam, 1972, pg. 853 and continues.; Costa, P., *Lo Stato immaginario. Metafore e paradigmi nella cultura giuridica italiana fra Ottocento e Novecento*, Milano, Giuffrè 1986, pg. 320 and fw.).

<sup>27</sup>This theory of thought begins with Rousseau - according to whom the popular sovereignty appears transitionally on the election day to be completely absent later on - and proceeds with Marx, who mostly in his youth work, evidenced the limits of political representation in a system based on the division of the political state from the civil society, not being political society "real society", "as it would happen if all, who would like to be active members of the State, would participate in the legislative power". See, *Petta*, P., *Ideologie costituzionali della sinistra italiana (1882- 1974)*, Roma, Savelli, 1975, pg. 14.

<sup>28</sup> On the public interest as the sum of all private interests, which should be represented by any parliamentary see Rosmini, A., *La costituzione secondo la giustizia sociale*, Milano, Giuffrè, 1848, pg. 65.



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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<sup>29</sup> are treated in the finest details. Considering that the representatives have to make decisions by following rational criteria which can be objectively verified<sup>30</sup>, 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<sup>31</sup>. As a result, the political representation as the form of power investiture of the former through the latter, loses the logic of existing<sup>32</sup>. 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<sup>33</sup> that run the parties and nurture the formation of different ideological streams<sup>34</sup>. 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

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<sup>29</sup> Offe, C., *Strukturprobleme des kapitalistischen Staates*, Frankfurt a. M., Suhrkamp, 1972, trad. it., *Lo Stato nel capitalismo maturo*, Milano, Etas Libri, 1977, pg. 92 and fw.

<sup>30</sup> Magee, B., *Il nuovo radicalismo in politica e nella scienza*, trad. it., M. Baldini e S. Morigi, *Le teorie di K. Popper*, Roma Armando, 1977, pg. 42 and fw.

<sup>31</sup> Carre de Malberg, R, vep. e cituar, p. 372.

<sup>32</sup> Fisichella D., *Sul concetto di rappresentanza politica*, in *La rappresentanza politica*, a cura di D. Fisichella, Milano, Giuffrè, 1983, pg. 6 and fw.

<sup>33</sup> Rescigno G. U., *Alcune considerazioni sul rafforzamento partiti-Stato-cittadini*, in scritti in onore di C. Mortati, *Aspetti e tendenze del diritto costituzionale*, III, Milano, Giuffrè, 1977, pg. 964.

<sup>34</sup> *ibidem*, p. 964; Martines T., *Partiti, sistemi di partito, pluralismi*, in studi in onore di A. Arena, Padova Cedam, 1981, pg.1343 and fw.



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)<sup>35</sup>.

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<sup>36</sup>, 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<sup>37</sup>. 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<sup>38</sup>. 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

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<sup>35</sup> The institution of referendum has a significant contribution also to the emergence of new political formations, sideway or in place of existing parties. For more see Federsen T.J., *The dynamics of european party system: changing patterns of electoral volatility*, in European journal of political research, 1979, pg. 9.

<sup>36</sup> Bobbio, N., *Il futuro...*, quoted work., pg. 29 and fw.

<sup>37</sup> Fisichella, D., *Istituzioni e Società*, Napoli, Morano Editore, 1986, f. 39, 42 and fw.

<sup>38</sup> Schmitter, P. C., *Teoria sulla democrazia e pratica neocorporatista, in stato e mercato*, Bologna, il Mulino, 1983, pg. 385 and fw.



the corporatist privatisation of power and a progressive tendency of the degeneration of the social pluralism into policracy<sup>39</sup>.

#### **IV. ISSUES OF POLITICAL REPRESENTATION AND OF BUILDING OF 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<sup>40</sup>. 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"<sup>41</sup>. 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<sup>42</sup>. If we analyse it backwards, it is the accountability that affects the autonomous actions of the representative<sup>43</sup>, 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<sup>44</sup>. However, although periodic elections are not the only mechanism capable of ensuring

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<sup>39</sup>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.

<sup>40</sup> For more see, *Aristotele, Etica Nicomachea*, Milano, *Bompiani*, 2000.

<sup>41</sup> See in D. Triggiano, *Introduzione a Max Weber*, Meltemi Editore, 2008, pg.173.

<sup>42</sup> Biondi, P., *Studi sul potere*, Giuffrè Milano 1965, f. 162 e vazh; Capograssi, G., *Riflessioni sull'autorità e la sua crisi*, in *Opere*, I, Milano, Giuffrè 1958, p.151; Crisafulli, V. *Aspetti problematici del sistema parlamentare*, in «Jus», 1958, pg. 614 and fw.

<sup>43</sup> *Barthelemy, J., Le Gouvernement de la France*, Paris, Payot 1924,p.91, *The Government of France*, London, George Allen & Unwin ltd.

<sup>44</sup> G. Sartori, *Rafresentanza*, in G. Sartori, *Elementi di teoria politica*, Bologna, Il Mulino, 1987. pg. 552 and fw.; Crisafulli, V., *La sovranità, quoted work*, pg. 270 and fw. On the contrary see Shih, Bobbio, N., *Il futuro della democrazia*, Torino, Einaudi, 1984, pg. 56.



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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<sup>45</sup>. 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 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*"<sup>46</sup> 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

<sup>45</sup> For more see Shih, *Lavagna, C., La rappresentanza politica nel mondo moderno*, in *Amm. civ.*, 1958, 10-11, 21.

<sup>46</sup> Locke, J., *Two treaties government*, London, A. Millar et al., 1764, Chapter II, trad. It. In J. Locke, *Due trattati sul governo*, a cura di L. Pareyson, Torino, Utet, 1960.



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*”<sup>47</sup>. 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 than 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".<sup>48</sup>

A group can be representative in the meaning that it conveys, with the exactness and loyalty of a "mirror"<sup>49</sup>, 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 word<sup>50</sup>), so that they are not penalised

<sup>47</sup> Sartori, G., *Democratic theory*, Detroit, Wayne State University Press, 1962, pg. 109-110.

<sup>48</sup> 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.

<sup>49</sup> *Lakeman E., Lambert, J.D., Voting in Democracies*, London, Faber & Faber, pg. 25.

<sup>50</sup> 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.



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 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<sup>51</sup>.

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.

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<sup>51</sup> Dahl, R. A., *A preface to democratic theory*, Chicago, University of Chicago Press, 1956, pg.131.



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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 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, 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.



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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 prescribes that 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<sup>52</sup> of Article 69 sanctions that apart from the political 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 one 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).<sup>53</sup>

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*<sup>54</sup>. ***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

<sup>52</sup> 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 before the election date the initiating committee shall registered in the CEC, presenting the names of the committee members.

<sup>53</sup> 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.

<sup>54</sup> The number deriving out of the division of a number with another number.



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 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"<sup>55</sup>.*

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

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<sup>55</sup> Decision1/2014 par. 5.1. ICC.



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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 bloc 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, 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*"<sup>56</sup>. 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*".<sup>57</sup>

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

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<sup>56</sup> Ibidem.

<sup>57</sup> Ibidem.



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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, 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, casts, 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



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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<sup>58</sup>, 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 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 irrefutable 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

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<sup>58</sup> Duverger, M., L'influence des systèmes électoraux sur la vie politique, Paris, Colin, 1950, pg. 13.



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.

<b>Rank the candidate according to the preference order</b>	
<b>3</b>	<b>Candidate A</b>
<b>5</b>	<b>Candidate B</b>
<b>1</b>	<b>Candidate C</b>
<b>2</b>	<b>Candidate D</b>
<b>4</b>	<b>Candidate E</b>
<i>Table 1</i>	

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 as an exception from the rules, is part of the majority systems. This happens because this system is basically the one-round version of the majority system. This system is based on the fact that the voters are given the

possibility to vote not one single candidate, but they can rank a number of candidates according to their preference. So in this system voters are called to vote the candidates by ranking them with numbers, starting with the most preferred up to the least preferred, as in Table 1. This system enables an electoral mechanism similar to the two-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)*

Votes	Candidate A	Candidate B	Candidate C	Candidate D
<b>Direct votes</b>	45.000 votes 40.9%	35.000 votes 31.8%	20.000 votes 18 %	<b>10.000 votes</b> <b>9%</b>
<b>votes collected after the first redistribution</b>	45000 direct votes + 2000 votes as second preferences from the ballots of candidate D = 47000 = 43%	35000 direct votes + 5000 votes as second preferences from the ballots of candidate D = 40000 = 36.7%	20000+2000 (of candidate D) =22000 20% Candidate C is eliminated because he has the smallest number of votes, after the redistribution of the votes of candidate D, and this time his votes are redistributed among the other candidates according to the second and third preference indicated in the ballots. So, from 19000/20000 ballots where the second preference has been indicated, the votes are redistributed as below: 6000 votes to candidate A, 13000 votes to candidate B, and from the 1500 from the 2000 ballots of candidate D where the third preference has been indicated, 700 votes go to candidate A and 800 votes go to candidate B.	<b>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.</b>
<b>Votes accumulated after the second redistribution</b>	<b>47000 direct votes + votes as second preference from the ballots of candidate D</b>  <b>6000 votes as second preference from the ballots of candidate C</b> + <b>700 votes as third preference from the ballots of candidate D</b> = <b>53700 = 49.95%</b>	<b>40000 direct votes + second preference votes from ballots of candidate D</b>  <b>13000 votes as second preference from the ballots of candidate C</b> + <b>800 votes as third preference from the ballots of candidate D</b> = <b>53800 = 50.04% (winner)</b>		