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Law



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THE AVATARS OF ROMANIA BEFORE AND AFTER THE ACCESSION TO THE EUROPEAN UNION RELATING TO COMBATING NON-UNITARY JUDICIAL PRACTICE

Associate professor PhD Iulia Boghirnea¹

Abstract

In this article we will try to analyse the most important legislative reform measures, which were taken after Romania's entry into the European Union, with the role of prevention and unification of judicial practice, measures which were taken both by the Superior Council of the Magistracy through decisions of its Plenary, as well as through the entry into force of the new codes of civil procedure and criminal procedure. Through the new regulations of these codes, a new procedural instrument was created, namely *"Notification of the High Court of Cassation and Justice with a view to pronouncing a preliminary decision to resolve some legal issues"*, following the model created before the two supreme courts in France, the Council of State (year 1987), respectively Court of Cassation (year 1991)

Keywords: non-unitary legal practice; High Court of Cassation and Justice; resolution of a new legal issue; binding decision.

1. Introduction

Jurisprudence divergences in similar situations lead to the violation of the principle of legal security², to the creation of a state of legal uncertainty and to the lack of trust of litigants in the act of justice, although such trust is one of the "essential elements of the rule of law"³.

Ever since the first Report of the European Commission in 2007⁴, the year

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² "The principle of legal security is an essential component of the principle of the preeminence of law, which is part of the common patrimony of the state parties to the Convention" ECHR Decision of November 2, 2010, Case Ștefănică against Romania. See <http://ier.gov.ro/wp-content/uploads/cedo/Cauza-Stefanica-si-altii-impotriva-Romaniei.pdf> accessed on 05.10.2024

³ Idem.

⁴ Fact sheet with the main findings for Romania [MEMO/07/262] from the 2007 European Commission Report-

of Romania's accession to the European Communities (today the European Union⁵), the European Commission⁶ states that there are "deep-rooted problems, such as corruption", which require taking measures for the effective functioning of the law enforcement, the reform of the judicial system being objective no. 1 of Romania.

The defective activity at the level of the reform of the Romanian judicial system as well as the deficiencies in the implementation of anti-corruption measures were causes that held in place the effective application of normative acts and policies of the European Union, Romanian citizens not being able to benefit from such rights conferred as a result of their acquisition of the quality of European citizens.

Thus, at the level of the European Communities, a Mechanism for Cooperation and Verification (hereafter MCV)⁷ of the progress made by Romania in order to achieve certain specific reference objectives in the field of the reform of the judicial system and of the fight against corruption. Thus, at the level of the European Communities, a Mechanism for Cooperation and Verification of the progress achieved by Romania in order to achieve certain specific reference objectives in the field of the reform of the judicial system and of the fight against corruption.

Among the main objectives established within this Mechanism for Cooperation and Verification were:

- the independence of the judicial system and the reform of the judicial system, in particular through a transparent and efficient judicial activity, by strengthening the capacity of the Superior Council of the Magistracy (hereafter SCM), as well as the supervision of the incidences of the application of the new codes of civil procedure and criminal procedure (the reference objective no. 1);

https://ec.europa.eu/commission/presscorner/detail/ro/memo_07_262, visited on 5.10.2024.

⁵ Denumire schimbată odată cu intrarea în vigoare a Tratatului de la Lisabona la 1 decembrie 2009, a se vedea <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:12012E/TXT> visited on 5.10.2024. For details regarding the Treaty of Lisbon see K. Jance, E. Tiri, *European Construction after the Treaty, of Lisbon, Conference Proceedings, on Research and Education, Challenges Toward the Future*, University of Shkodra "Luigj Gurakuqi", Albania, 2013, p. 2.

⁶ Regarding the institution of the European Commission, we find details in O.Qejvani, Br. Buda (Dhuli), *The impact of European institutions on local and regional development*, EIRP Proceedings, Vol 14, No 1, 2019, p. 94.

⁷ COM (2017) 44 - https://ec.europa.eu/info/files/progress-report-romania-2017-com-2017-44_ro. Following the conclusions of the Council of Ministers of 17 October 2006 (13339/06), the mechanism was established by the Commission Decision of 13 December 2006 [C(2006)6569 / OJ L 354, 14.12.2006, p. 56.

- the adoption of additional measures to prevent and combat corruption, as well as professional and impartial investigation of allegations in high-level corruption cases (benchmark no. 3)

Year after year, from 2007 to 2018, the European Commission presented reports on Romania's progress registered within the Mechanism for Cooperation and Verification, which monitored weak points that needed to be corrected.

As far as that is concerned, the unitary judicial practice was and will remain a desire of Romania, since Romania's accession to the European Union was also conditioned by the solution of this problem that dragged on from year to year.

2. Post-accession reform measures instituted to combat and prevention divergent judicial practice

Since the year of accession, the Superior Council of Magistracy has developed a reform plan regarding taking measures relative to the creation of a unified jurisprudence at the national level.

Thus, in order to combat and prevent divergent judicial practice at the level of the courts, the Superior Council of the Magistracy introduced, in 2015 and completed in 2022, some relevant normative instruments in the matter.

Thus, by Decision no. 1375/2015 of the Superior Council of the Magistracy plenary on the Internal Order Regulation of the courts⁸, some measures were instituted regarding the unification of judicial practice (art. 25 par. 1-2), namely that at the level of each section or, according to case, of each court, if there are no sections, monthly meetings of the judges are organized, in which the *legal issues that led to the pronouncement of different solutions or legal issues of great novelty*, which could generate non-unitary practice, will be discussed. The president of the section or, as the case may be, the vice-president of the court or the judge delegated with the organization of the professional study of judges has the task of ensuring that the practice of the courts of judicial control is analysed in the periodic meetings. Also, the organization of groups of judges is established to discuss the new regulations and how to interpret them.

This Decision of the Superior Council of the Magistracy no. 1375/2015 was repealed by Decision no. 3243/22 December 2022⁹, which completed the

⁸ Decision no. 1375/2015 of the CSM Plenary for the approval of the Internal Order Regulation of the courts published in the Official Gazette, Part I no. 970/December 28, 2015. Currently, this Regulation has been repealed by Decision no. 3.243/ December 22, 2022, published in the Official Gazette no. 1254/27 December 2022.

⁹ Decision no. 3243/ December 22, 2022 regarding the internal order regulation of the

list of reform measures with new elements.

- a) Thus, *the legal issues* that generated the divergent practice are analysed beforehand by the president of the section or, as the case may be, by the vice-president of the court or by the judge who has powers to analyse the practice of courts of judicial review and unification of practice, who will present a synthesis of the divergent issues that he puts forward for debate at professional meetings.
- b) By art. 29, another element of novelty was brought because the creation of a distinct position of a judge was instituted "who has attributions regarding the analysis of the practice of judicial review courts and the unification of practice, who must prepare a monthly report on the relevant legal issues raised in resolving cases, highlighting the non-unitary practice of both the own court and the hierarchically superior court, if applicable".
- c) A third element of novelty is the fact that "judges' opinions on the legal issues debated are recorded in a minute according to the model established for the minutes of quarterly meetings, which will be analyzed within these meetings organized at the level of the appeal court".
- d) A fourth element of novelty brings to the fore the attribution of the vice-president of the court of appeal to organize quarterly meetings of the judges, established by the Section for judges of the Superior Council of the Magistracy, which can also be on areas of specialization, within the court and of the courts in its constituency, in which *the legal issues that generated a non-unitary practice* will be debated. Judges from the specialized section of the High Court of Cassation and Justice may also be invited to these meetings, in order to discuss non-uniform practice issues at the national level.
- e) A fifth element of novelty is ensuring the permanent updating of jurisprudence within the *ReJust portal*¹⁰, by obliging the courts to ensure the uninterrupted connection between their own databases and the data centre of the Superior Council of Magistracy within the technical parameters established by the department of IT specialist within the Council.
- f) Also, the Courts of Appeal have the obligation to prepare quarterly *a material containing their own decisions considered relevant* and prepare annually, by September 1 of each year for the previous year, the "*Jurisprudence Bulletin*"¹¹, both of which are published on the courts' portal, under the supervision of court presidents, vice-presidents and section presidents, who are responsible for taking the necessary measures to carry out these measures..

We will stop, however, with researching the topic, of judicial reform through the entry into force of the new procedural codes: the Civil

courts, published in the Official Gazette no. 1254/27 December 2022.

¹⁰ <https://www.rejust.ro/>

¹¹ <https://www.iccj.ro/biblioteca-digitala/buletinul-jurisprudentei-curti-de-apel/>

Procedure Code¹² (519-521) and the Criminal Procedure Code¹³ (art. 475-477¹).

Pursuant to art. 126 of the revised and republished¹⁴ Constitution of Romania, which provides that the High Court of Cassation and Justice has the role of ensuring the uniform interpretation and application of the law by the other courts, according to its competence, in addition to the appeal in the interest of the law which had a curative role in combating the existing judicial practice at the level of the courts, in 2014, with the entry into force of the new codes of civil procedure and criminal procedure, the legislator created a chapter entitled "*Notification of the High Court of Cassation and Justice in order to pronounce a preliminary rulings for resolving legal issues*".

It is a new element in Romanian legislation as this institution has a role to prevent the establishment of a non-unitary jurisprudence, following the French model which has a similar institution called "renvois pour avis" of the Council of State (procedure established in 1987) and "saisines pour avis" of the French Court of Cassation (created in 1991)¹⁵.

J. Buffet is of the opinion that this procedure "is a procedural incident that resolves a legal issue raised in an ongoing process and on which the legal resolution of the case depends"¹⁶.

The cited author believes that this mechanism has a double objective¹⁷:

¹² Law no. 134/2010 (which entered into force in 2014), republished Official Gazette no. 247 of April 10, 2015 with subsequent amendments and additions.

¹³ Law no. 135/2010 (which entered into force in 2014), published in the Official Gazette no. 486 of July 15, 2010 with subsequent amendments and additions.

¹⁴ The Constitution of Romania from 1991 was amended and supplemented by the Constitution Revision Law no. 429/2003 approved by the national referendum of October 18-19, 2003, published in the Official Gazette of Romania no. 758/October 29, 2003, the date it entered into force.

¹⁵ By the Law amending the Judicial Organization Code by which the "Saisine pour avis de la Cour de Cassation" was instituted, published in the Official Journal of the French Republic on May 18, 1991. Later, this law was completed for the implementation of this institution by Decree no. 92-228 of March 12, 1992. It is thus introduced, in the French Code of Civil Procedure, Book II, Title VII, Chapter. VI, from art. 1031-1 to 1031-7, regarding the referral to the Court of Cassation by the judicial courts "with a new question of law, which presents a serious difficulty and which is recurrent in several litigations".

¹⁶ J. Buffet, *Présentation générale la saisine pour avis de la Cour de Cassation*, Retrieved from https://www.courdecassation.fr/jurisprudence_2/avis_15/presentation_generale_7235.html visited on September 5, 2015.

¹⁷ Idem.

1. First of all, it allows the acceleration of the unification of the interpretation of the new rules of law;
2. Secondly, the legislator sought to prevent the registration of new and innumerable disputes in the courts, since the decision of the High Court of Cassation, in this situation, has the role of a judicial precedent for interpretation¹⁸.

Art. 519-521 of the Civil Procedure Code and art. 475-477¹ of the Code of Criminal Procedure regulates, therefore, in these articles the new procedural instrument created, namely that of the "prior decision".

Thus, according to art. 519 of the Civil Procedure Code/ art. 471 of the Code of Criminal Procedure, if during the trial, a panel of the High Court of Cassation and Justice, of the court of appeal or of the tribunal, which was entrusted with solving the case in the last instance, finds that a matter de jure is new and the High Court of Cassation and Justice has not ruled on it through a prior decision, nor is it the subject of an appeal in the interest of the ongoing law resolution, but on the clarification of which the resolution of the merits of the respective case depends, this panel, through a conclusion that cannot be subject to any appeal, will be able to request the High Court of Cassation and Justice to pronounce a decision by which principle resolution of the legal issue with which it was referred.

From the interpretation of the law, it emerges that in order to notify the High Court of Cassation and Justice, the following admissibility conditions must be met cumulatively:

- the existence of a pending litigation;
- the resolution of the case is in the last instance, and only this panel has the possibility to refer the High Court of Cassation and Justice, which means that the High Court of Cassation and Justice cannot refer itself ex officio. Also, the legislator excluded from the list of courts the Courts (substantive court) for two reasons: on the one hand, the fact that the Tribunal, as a court of judicial review, has the role of unifying the judicial practice of the lower courts¹⁹ and on the other hand, to does not crowd the number of cases pending before the High Court of Cassation and Justice.
- the question of law is new, controversial, of interpretation, which requires a solution in principle by clarifying the meaning of the legal norm, which is susceptible to several interpretations and on which the resolution

¹⁸ It is well-known that never in the history of the Court of Cassation in France, the decisions of this court given on the occasion of "saisines pour avis", have never been violated by the national judges.

¹⁹ A. Cotuțiu, *The usefulness of maintaining the preliminary decision procedure for resolving some legal issues*, Law no. 11/2013, p. 49.

of the case depends. As regards the subject of this condition of admissibility High Court of Cassation and Justice in decision no. 6/2014 the fact that "the novelty of a legal issue can be generated not only by a newly enacted regulation, but also by an old one, provided that the court is called to rule on the respective legal issue for the first time . Therefore, the novelty character is lost, if the question of law has received a release from the courts [...]"²⁰.

Through this conclusion, given by the panel that notifies the High Court of Cassation and Justice in civil procedural matters, the norm is imperative because the case brought to trial the case must be suspended until the preliminary decision is pronounced to resolve the legal issue. In criminal procedural matters, Criminal Procedure Code orders as follows: "the case can be suspended until the preliminary decision is pronounced to resolve the legal issue" if the judicial investigation is not completed. But, in the situation where the suspension was not ordered together with the referral, and the judicial investigation was completed before the High Court of Cassation and Justice ruled on the referral, the legal norm changes, becoming mandatory, the court having, in this case, the obligation, to suspend the debates until the High Court of Cassation and Justice decision is pronounced.

After the registration of the conclusion, the High Court of Cassation and Justice has the obligation to publish it on its Internet page, so that the courts that have similar cases pending have the possibility, but not the obligation, to suspend them until the resolution of the referral.

According to art. 520 of the Civil Procedure Code/art. 476 paragraph 6 of the Criminal Procedure Code, the referral is judged, at the High Court of Cassation and Justice level, by a panel consisting of: the president of the corresponding section of the High Court of Cassation and Justice or a judge appointed by him and 12 judges from the respective section (in total 13 judges) in civil procedural matters, respectively eight judges from the respective section (9 judges in total) in criminal procedural matters, which will be chaired by the president of the section or, in case of impossibility, the judge appointed by him and who has the obligation to take the necessary measures for the random assignment of judges.

After the composition of the panel, its president will appoint a judge who has the obligation to conclude a report on the legal issue submitted to the trial.

²⁰ Decision no. 6/2014 of the High Court of Cassation and Justice, published in the Official Gazette of Romania no. 260/9 April 2014.

If, however, the legal issue concerns the activity of several sections of the High Court of Cassation and Justice, the president or, in his absence, one of the vice-presidents of the High Court of Cassation and Justice will forward the notification to the presidents of the sections interested in solving the legal issue. In this case, the panel will be made up of the president or, in his absence, of the vice-president of the High Court of Cassation and Justice, who will preside over the panel, of the presidents of the sections interested in solving the legal issue, as well as 5 judges from the respective sections appointed randomly/by drawing lots by the president of the panel. After the formation of the panel, the president of the panel will appoint one judge from each section to draw up the report. Reporters are not incompatible.

In order to draw up the report, the president of the panel may request the written opinion of recognized specialists on such legal issues.

The report will include: the different solutions given to the legal problem and the arguments on which they are based, the relevant jurisprudence of the Constitutional Court, the European Court of Human Rights or the Court of Justice of the European Union, if applicable, the doctrine in the matter, as well as the opinion of the specialists consult. At the same time, the reporting judges will draw up and motivate the draft solution that is proposed to be given to the appeal in the interest of the law²¹.

The court hearing takes place within 3 months at most from the inauguration of the High Court of Cassation and Justice, it is non-public (without summoning the parties) and the principle solution is adopted by at least 2/3 of the number of judges of the panel. Abstentions are not allowed as the legal issue must be resolved. The decision is motivated within no more than 30 days from the pronouncement and is published within 15 days from the motivation in the Official Gazette of Romania, Part I.

Art. 521 para. 3 of the Civil Procedure Code/art. 477 para. 2 stipulates that the resolution given to the legal issues is mandatory from the date of publication of the High Court of Cassation and Justice decision in the Official Gazette of Romania, Part I. In civil procedural matters, it is stipulated that for the court that requested the resolution, the decision is binding from the date of the pronouncement of the decision.

However, the legislator provided in the two codes and causes for the termination of the effects of the prior decision. Thus, they cease in the case of repeal, finding of unconstitutionality or modification of the legal provision that generated the unsolved legal problem, unless it exists in the

²¹ It is a non-contentious procedure to combat divergent judicial practice, which is also carried out before the High Court of Cassation and Justice, having a curative effect.

new regulation.

Therefore, from the moment of publication of the preliminary decision of the High Court of Cassation and Justice, the interpretation given by the supreme court is mandatory for all courts of all levels, including the court that requested clarification of the legal text.

We believe that the legislator has correctly regulated that the decision of the High Court of Cassation and Justice is binding since the purpose of this procedure is, on the one hand, the standardization of the jurisprudence so necessary and imperatively imposed in the post-accession period of Romania to the European Union, through the Cooperation and Verification Mechanism and on the other hand, it is necessary for the interpretation given by the supreme court to be a binding guide for the judges of the lower courts for the uniform interpretation and application of the rules of material and substantive law.

3. Conclusions

In addition to other procedural European instruments created at the level of the European Court of Human Rights²² in Strasbourg and the preliminary ruling of the Court of Justice of the European Union, which have the role of judicial precedents of interpretation, being binding for the national courts of the member states of the Council of Europe, respectively of the European Union, here is that considerable efforts have been made at the internal level as well, through appropriate legislation.

Here, the High Court of Cassation and Justice was entrusted with another task, to fulfill its role as a unifier of the interpretation of laws at the national level conferred by the Romanian Constitution. These interpretative judgments form a "common body" with the interpreted law, applying imperatively, continuously, immediately, generally and impersonally, with *erga omnes* applicability just like a law. We therefore consider that these are formal sources of law.

We believe that the European Commission's Cooperation and Verification Mechanism was an effective tool for monitoring and, at the same time, for boosting Romania in terms of achieving the objectives relative to justice reform and implicitly to the prevention and unification of judicial practice.

²² For details regarding the protection of human rights in Albania see E Tiri, E Aliaj, *Promotion of Human Rights in Albania in Light of its Perspective of Integration into the European Union*, **Bulletin of the Transilvania University of Braşov**. Serie, Issue, 16, 2023, p.78.

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2. Decision no. 6/2014 of the High Court of Cassation and Justice, published in the Official Gazette of Romania no. 260/9 April 2014.
3. Decision no. 1375/2015 of the CSM Plenary for the approval of the Internal Order Regulation of the courts published in the Official Gazette, Part I no. 970/December 28, 2015. Currently, this Regulation has been repealed by Decision no. 3.243/ December 22, 2022, published in the Official Gazette no. 1254/27 December 2022.
4. Decision no. 3243/ December 22, 2022 regarding the internal order regulation of the courts, published in the Official Gazette no. 1254/27 December 2022.

Legislation

1. Law no. 134/2010 (which entered into force in 2014), republished Official Gazette no. 247 of April 10, 2015 with subsequent amendments and additions.
2. Law no. 135/2010 (which entered into force in 2014), published in the Official Gazette no. 486 of July 15, 2010 with subsequent amendments and additions.
3. The Constitution of Romania from 1991 was amended and supplemented by the Constitution Revision Law no. 429/2003 approved by the national referendum of October 18-19, 2003, published in the Official Gazette of Romania no. 758/October 29, 2003, the date it entered into force.

ALBANIA & MONTENEGRO'S PATHS TO EUROPEAN UNION INTEGRATION: THE FINAL GOAL AND IT'S CHALLENGES, ESPECIALLY AT THE LOCAL LEVEL

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Abstract

The road of Albania & Montenegro's integration process in the European Union has been long and difficult. EU integration process for these countries, represents perhaps one of the most debated matters in the national public and political discourse. Being considered as the strongest incentive to move forward in the democratization process, the EU integration has attracted the attention of civil society representatives, private sector, the public's attention at large as well as legal scholars. The accession process can be lengthy, notably for states where there have been recent transitions to democracy and significant disparity with the EU in terms of economic development. On this very difficult road with the same end goal, both states have faced and are currently facing challenges in every element of the state and its functioning. In this paper, it will be discussed over the goal of Albania and Montenegro to join European Union and where the accession process has taken these countries so far. Furthermore, it will analyze the difficulties that these countries are experiencing during the accession process and what do they need to do for the end goal to be met sooner.

Keywords: *European Union, local government, municipalities, accession, acquis communautaire.*

Introduction

The European Union is a multi-level polity.³ The European Union is a consciously constructed set of institutions,⁴ that it has been created in a

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³ Gary Marks & Liesbet Hooghe, *Multi-Level Governance and European Integration*, New York, Rowman & Littlefield Publishers, 2001, pg. 66.

⁴ Gary Marks & Liesbet Hooghe, *Multi-Level Governance and European Integration*, New York, Rowman & Littlefield Publishers, 2001, pg. 35.

process that has evolved step by step. The result of this process is a dense and complex polity in which the present structure can still see the traces of the previous treaties.⁵

The EU is transforming politics and government at the European and at national level into deliberative and apolitical governance, where the hierarchy does not exist.⁶

We will focus specifically on the accession of the Western Balkans and the accession of Albania and Montenegro. The EU is fully committed to the EU integration of the Western Balkans. This in itself, is a shared strategic objective that unites the EU and the whole region. Accession talks are underway with Montenegro and Serbia. In March 2020, the Council of the European Union agreed to open accession negotiations with Albania and with North Macedonia. Bosnia and Herzegovina and Kosovo are potential candidates for the European Union membership. Apart from the accession of the Western Balkans, the European Unions's aim is to build good neighbourly relations and to build shared prosperity through the integration, bring forth financial and political support for the other countries of the region. Reforms are key for the European path, but more importantly, they are crucial to improve the governance, in the political and economic aspect, media freedom and also the conditions for civil society.⁷

To go into more detail on the topic we are addressing, I will also focus on the importance and impact of local government in the European Union's integration process. Why should we specifically focus on this level of local government?

The process of integration into the European Union has a very large impact at national, regional and local levels. This impact is, however, most detectable at the local level. It is precisely the local level of the government that has a dominant role in ensuring the best possible implementation of European Union legislation and it's policies. The European Union legislation and European Regional and Cohesion Policies' implementations are the basic instruments through which the process of European integration influences the daily activities of local governments and its

⁵Gary Marks & Liesbet Hooghe, *Multi-Level Governance and European Integration*, New York, Rowman & Littlefield Publishers, 2001, pg. 36.

⁶ Simon Hix, *The study of the EU II*, Journal of European Public Policy, vol 5, no 1: pg. 38–39.

⁷ European Union, External Actions. *The EU and the Western Balkans: towards a common future*, 2022. Link: https://www.eeas.europa.eu/eeas/eu-and-western-balkans-towards-common-future_en

bodies.⁸ The European Commission highlights this role in its 2019 Communication on EU Enlargement Policy, stating: “The role of regional and local authorities in the process of the European Union’s harmonisation and eventual implementation of its rules should be taken into account. An appropriate balance between central, regional and local government should be found that best supports the implementation of reforms and the provision of services to citizens.”⁹

Various studies show that after accession, around 50 to 70% of the European Union’s legal framework needs to be implemented by the local governments. The *acquis communautaire* can have a major impact on the functioning of local government units and the provision of services. It is noted that, based on an analysis of the role of the local units, 23 chapters of the EU *acquis* directly involve the local units in the implementation of this legislation. The level of involvement, on the other hand, varies depending on the chapter. Respectively, about 10 chapters or almost 50% of the *acquis communautaire* requirements will directly affect the functioning of local government.¹⁰

Decentralisation aims to ensure the political, legal and fiscal implementation of the principle of subsidiarity. This principle can ensure a degree of independence for the lower body of government in relation to a higher/central one. Consequently, this principle ensures the independence of local and regional governments in relation to the central government. The aim is to achieve the distribution of powers between several levels of governance, a principle that stands on the institutional foundation of the European Union but also of the member states. The Treaty Establishing the European Community sanctioned the principle of subsidiarity in 1992, and then later it was also enshrined in Protocol No 2. The purpose of these principles, in *acquis communautaire*, is to guarantee that the state powers are exercised as close to the citizens as possible.¹¹ A local government that is effective and autonomous directly impacts the effectiveness of the implementation of the *acquis communautaire* and in the integration into the European Union. What are the challenges that Albania and Montenegro

⁸ Bashkitë për në Evropë, *Legjislacioni I Bashkimit Evropian Dhe Qeverisja Lokale Në Shqipëri*. Tirana, Gent Grafik, 2019, pg. 6

⁹ Directorate-General for Neighbourhood and Enlargement Negotiations, 2019 *Communication on EU Enlargement Policy*, Brussels, 2019, fq. 6.

¹⁰ Bashkitë për në Evropë, *Legjislacioni I Bashkimit Evropian Dhe Qeverisja Lokale Në Shqipëri*. Tirana, Gent Grafik, 2019, pg. 7.

¹¹ Branislav Stanicek, *Decentralisation reforms in the Western Balkans*, European Parliamentary Research Service, 2022, pg. 1.

face at this level of government?

1. Albania

Albania was identified as a potential candidate for EU membership at the EU-Western Balkans Summit in Thessaloniki in 2003. Then, in 2009, Albania submitted its formal application for membership in the European Union. In 2012, the Commission recommended that Albania be granted candidate country status, but while being a subject of key measures such as the judicial and public administration reform. Albania gained the status of the European Union candidate in 2014. Four years later, the Commission's country report recommended that the opening accession talks would start.¹² Finally, in 2020, the European Council decided to initiate accession negotiations with Albania. However, the first inter-governmental conference for Albania was restricted by beginning of the negotiations with North Macedonia, that was hindered by a Bulgarian veto. Consequently, the Council ratified the negotiating framework for Albania and finally set down the date for the first inter-governmental conference on 2022. Finally, on 19 July 2022, in Brussels, the EU held the first Intergovernmental Conference with Albania. The screening process was recommenced, in September 2022, for Albania and North Macedonia. The Commission decided to hold “updating” explanatory meetings for almost all negotiating chapters, that later were followed by bilateral meetings.¹³ In Brussels, the first bilateral meetings were held, that were dedicated to Chapter 23 “Judiciary and Fundamental Rights” and Chapter 24 “Justice, Freedom and Security”. These took place in November and in December 2022. At present, all bilateral meetings on Cluster 1, “Fundamentals” have been completed. Bilateral meetings for Cluster 2 “Internal market”, were initiated in mid-January 2023.¹⁴ On 15 October 2024, the European Union opened the chapters with Albania, after deciding to decouple Albania from neighbouring North Macedonia in its accession process, because of the tensions between Skopje’s nationalist government and its EU neighbours.¹⁵

¹² Branislav Stanicek, *Albania: On the threshold of EU membership*, European Parliamentary Research Service, fq.1.

¹³ Nino Strati, *Cluster 1 negotiations of EU integration: The need for a strengthened accountability agenda*, Tirana, Frefrich Ebert Foundation, 2023, pg. 4.

¹⁴ Nino Strati, *Cluster 1 negotiations of EU integration: The need for a strengthened accountability agenda*, Tirana, Frefrich Ebert Foundation, 2023, pg. 5.

¹⁵ EuroNews, *Albania kicks off EU membership talks despite political turmoil at home*, 2022. Link : <https://www.euronews.com/my-europe/2024/10/15/albania-kicks-off-eu-membership-talks-despite-political-turmoil-at-home> (accessed in 13/11/2024)

1.1 Albania's challenges

The process of the European Union integration is challenging and requires commitment and effort from both the central and local administrations in every candidate state. The government in Albania is moving towards an open government. The aim is to improve the national policies, the transparency and the quality of public service delivery.¹⁶ In Albania, the local units of the government are exposed to the requirements of the *acquis*. Unfortunately, the level of financial resources and the capabilities of human resources remains low in number, as a result of their inability to properly and effectively address the requirements and standards set by European Union legislation. Moreover, the state budget allocations are still not proportional to the legal responsibilities of the local governments. The lack of an institutionalized, effective and continuous dialogue and consultation between the Albanian central government and local government, in this phase of the European Union accession process has brought obstacles to the proper and timely implementation of the *acquis* adopted at local level. On the other hand, the coordination and cooperation between the two levels of government has not been implanted enough in the work culture, in this way limiting the perceptions and sense of responsibility of local government units on policies implemented with the aim of approximation with EU legislation.¹⁷ Overall, the division of responsibilities between central and local government proceeds to be problematic in Albania. There is still a need to organize and highlight the legal framework for the functions of local government units. The local bodies continue to lack quality in the delivery of the public services at local level. Albania is recommended to make ongoing reforms to reduce the staff salary differences between central and local government and between municipalities of different sizes. The efficiency, transparency and accountability of human resources management is also recommended to be improved.¹⁸

In the last communication of the European Commission, it was instructed that Albania should: increase budget allocation, strengthen the capacity of local governments to secure sufficient funding, review social services

¹⁶ Ministria e Punëve të Brendshme, *Bashkitë Në Procesin e Integritetit Të Shqipërisë Në Bashkimin Evropian Raporti i Vlerësimit Për Vitin 2018*, Tirana, 2019, fq. 7.

¹⁷ *Bashkitë për në Evropë, Legjislacioni I Bashkimit Evropian Dhe Qeverisja Lokale Në Shqipëri*. Tirana, Gent Grafik, 2019, pg. 7.

¹⁸ Directorate-General for Neighbourhood and Enlargement Negotiations, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of Regions 2024 Communication On Eu Enlargement Policy, Brussels, 2024, pg. 24.

provision and monitor the Social Fund, and develop a coordinated social service referral system.¹⁹ Another remark is that women's participation in elections at both the local and central levels is not promoted at the levels predicted by gender quotas. Women in political field face several socio-cultural, institutional, and structural barriers.²⁰

A major reform process was launched by Parliament, on 'Good governance, rule of law and anti-corruption for Albania 2030'. The government continues to adopt policies and laws regarding the respect of European Union standards.²¹ The Albanian government has maintained the focus on reforms on the country's path to the EU despite the challenges of addressing the shock from the 2019 earthquake, the pandemic and the Russian aggression against Ukraine".²²

In conclusion, in the whole European Union process, Albania has shown a consistent aspiration for EU membership despite challenges and changes in strategies.²³

2. Montenegro

Montenegro is a country on its path to European Union membership. Montenegro started its formal journey towards the European Union when it submitted its application for membership in 2008. Two years later, it was granted the status of an official candidate country. Since then, Montenegro has been actively engaged in the accession process. The process does require a lot of reforms, particularly in the areas of judiciary, human rights,

¹⁹ Directorate-General for Neighbourhood and Enlargement Negotiations, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of Regions 2024 Communication On Eu Enlargement Policy, Brussels, 2024, pg. 15.

²⁰ Directorate-General for Neighbourhood and Enlargement Negotiations, Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of Regions 2024 Communication on Eu Enlargement Policy, Brussels, 2024, pg. 22.

²¹ Directorate-General for Neighbourhood and Enlargement Negotiations, Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of Regions 2024 Communication on Eu Enlargement Policy, Brussels, 2024, pg. 4.

²² Agjencia Per Mbeshtetjen E Qeverisjes Vendore, *Municipalities in the Process of Integration of Albania in the European Union Assessment Report 2022*, Tirana, Municipalities for Europe, pg.9.

²³ Adelina Nexhipi & Erjon Nexhipi, *Albania's European Perspective and the Albanian Politics. European Journal of Multidisciplinary Studies*, European Journal of Multidisciplinary Studies, 2019, pg. 43. <https://doi.org/10.26417/798kkv34t>

anti-corruption and public administration.²⁴ The High Representative of the European Union for Foreign Affairs and Security Policy, Joseph Borrell, stated that “*Montenegro remains a frontrunner in European integration. To uphold this status, the country needs to advance reforms, particularly when it comes to the rule of law...*”²⁵

Montenegro has stated that the EU accession process is their strategic priority and the integration as the mechanism of all reform processes and positive reforms that are needed for their society. However, the accession road of these countries will be more complicated and demanding than it was so far.²⁶

All negotiating chapters with Montenegro have been opened, with three closed for the time being. In June, Montenegro achieved a big milestone with getting a positive assessment on meeting the interim benchmarks for the rule of law chapters. The intergovernmental conference with Montenegro of 26 June 2024 paved the way for the provisional closure of negotiation chapters.²⁷

2.1 Montenegro’s challenges

Montenegro has been negotiating its accession to the EU for over 11 years. These are the longest ongoing negotiations together with those of Turkey. Montenegro’s journey toward EU membership isn’t just about fulfilling political demands. This process of integration is all about transforming the country’s economy and improving the citizens’ daily life. Right now, there’s still an actual gap between Montenegro and the other developed economies of Europe. The hope of closing this vacuum is what motivates this country to work towards the final goal, that is the integration in the European Union. This void is closed by the that's called

²⁴ President of the Republic of Bulgaria, News: *President Radev: Bulgaria Will Continue to Support Montenegro on Its Path towards European Integration*, 15 May 2023. Link: <https://m.president.bg/en/news7199/prezidentat-radev-balgariya-shte-prodalzhi-da-podkrepya-chna-gora-po-patya-y-kam-evropeyska%20integratsiya> (last accessed 8/1/2025)

²⁵ 24 часа. Жозеп Борел: Ще подкрепим ЧернаInternational Journal of Information Systems and Social Change, IJISSC, Volume 5, Issue 3, July-September 2014; *zopa no evropeyskia y път*, 30.05.2023. Link: <https://www.24chasa.bg/mezhdunarodni/article/14576186> (last accessed 8/1/2025)

²⁶ Gordana Đurović & Danijela Jaćimović, *European Enlargement Policy for the Western Balkans: Case of Montenegro*, International Journal of Information Systems and Social Change, IJISSC, Volume 5, Issue 3, July-September 2014; fq. 202.

²⁷ Directorate-General for Neighbourhood and Enlargement Negotiations, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of Regions 2024 Communication On Eu Enlargement Policy, Brussels, 2024, pg. 5.

socio-economic convergence.²⁸

Under its new government, Montenegro has been able to unblock its accession process. Even though there are many obstacles to be faced, the chances are higher for the EU to accelerate enlargement in the Western Balkans.²⁹

Montenegro strives for decentralisation at the municipal level. This country has 22 local government units and two urban municipalities. The European Union Commission on its 2021 report noted that “*despite agreements to hold all local elections on the same day, the legal framework still provides for their conduct on a rolling basis, leading to nearly constant pre-electoral campaigning at national and local level*”, after the local elections that took place only in two municipalities, Nikšić and Herceg Novi in 2021. Affected by this, in February 2022, the Parliament in Montenegro changed the law to implement nationwide local elections. However, their President was not in support of this change.³⁰ The new 2023 government in Montenegro has been operating in a much more stable political environment, however, its institutions are still very fragile when it comes to new potential political crisis and other institutional blockages. No nationwide elections took place; local elections were held in five municipalities. Overall, the electoral framework is required to be revised.³¹

As for local governance, decentralisation in Montenegro is limited and primarily confined to public space maintenance, water supply and utility services. Also, the law on local self-government limits the local power in passing regulations that only condition general community affairs. But the law also provides the fields on which the municipalities have general competences such as the regulation of the budget, organizing development plan, administration of public property etc.³² On paper, local governments have their own competences, but in fact, in practice they often need to secure the approval of the central bodies. Local governments in

²⁸ Valentina Ostojić, *In terms of living conditions, how far is Montenegro from the EU? A look at poverty, wages and unemployment*, European Western Balkans, 2024. link: <https://europeanwesternbalkans.com/2024/09/25/in-terms-of-living-conditions-how-far-is-montenegro-from-the-eu-a-look-at-poverty-wages-and-unemployment/> (last accessed 1/12/2024)

²⁹ Milan Nič et al, *Montenegro's EU Push: Imminent Opportunities and Challenges*, Berlin, German Council on Foreign Relations, 2024, pg.1.

³⁰ Branislav Stanicek, *Decentralisation reforms in the Western Balkans*, European Parliamentary Research Service, 2022, pg. 2.

³¹ Directorate-General for Neighbourhood and Enlargement Negotiations, *Montenegro 2024 Report*, Brussels, 2024, pg. fq. 3.

³² Law on Local Self-Government of the Republic of Montenegro, 2017, article 31-35.

Montenegro also have very limited financial autonomy and are often not consulted about draft laws that can directly impact their functioning. In a work in process to achieve a stronger local decentralization, in December 2023, the Law on local Self Government Financing was amended, aiming to reallocate the funds among the municipalities and to achieve the increasing of the income of the north of Montenegro' municipalities.³³ In it's recommendations, the European Union highlights the need of Montenegro to strengthen the administrative capacities both at central and local governance level. The lack of administrative capacities significantly hinders progress in Chapter 27 and fulfilling its closing benchmarks.³⁴ Doing so by addressing the staff shortages and the hiring personnel. The European Union also point out the need of Montenegro to address the issues of insufficient inspection services at both levels and of the lack of inter institutional coordination/cooperation.³⁵ In conclusion, Montenegro will need to address the lack of sufficient administrative capacity not only at the local level but also in inspection bodies, the lack of a sustainable financial framework and the insufficient inter institutional cooperation and coordination.

In Montenegro, citizens can establish local communities. In these communities the citizens are entitled to decide and take part in decision-making processes in order to address their local needs and interests in fields such as: organization of settlements, consumer protection, housing, physical education, culture, protection and improvement of environment, and in other spheres of life or work, in accordance with the municipal statute.³⁶ But In practice, these communities do not function. These local gatherings are not able to fulfill their designated role. Over the years, the communities were usually most active during electoral campaigns. It is usually considered a space of gathering of people who support the structures in power. Without active local communities, citizens are usually forced to direct local issues at the central level such as the National Assembly or other the central instituciones, which are not in fact responsible to solve the affairs of the local units. The lack of information and of activation of these communities, is creating a huge gap between

³³ Directorate-General for Neighbourhood and Enlargement Negotiations, *Montenegro 2024 Report*, Brussels, 2024, pg. 23-24.

³⁴ Directorate-General for Neighbourhood and Enlargement Negotiations, *Montenegro 2024 Report*, Brussels, 2024, pg. 82.

³⁵ Directorate-General for Neighbourhood and Enlargement Negotiations, *Montenegro 2024 Report*, Brussels, 2024, pg.82.

³⁶ Law on Local Self-Government of the Republic of Montenegro, 2017, article 95.

the citizens of the local units and the bodies of the local government. This directly affects even the effectiveness of this level of governance. The principle of decentralisation, as an important principle of the organization and functioning of the local government, does not exist.³⁷

To end it, the European Union accession process is the final goal and a priority for the country and has a clear political commitment which is reflected in Montenegro's decisions. The country's objective is to close the accession negotiations with the European Union by the end of 2026. The Commission is committed to support this objective by working on programmes for provisional closure of additional chapters by the end of 2024 and planning a substantial agenda for 2025.³⁸

Conclusions

The process of accession is built on a partnership between the European Union and the candidate country. It is based on reciprocity, meaning it has to work towards good results for both sides of this relation. The candidate's side has to comply with the common union standards at every levels of government, and on the other side, The European Union has to reform the structure of the enlargement process continuously so it can become more efficient, and it stays a desirable destination. The European Union is now functioning in a more complex environment, internally and externally, and as a result the current accession negotiations process is much slower than it was before.³⁹ The local authorities are being recognised more and more in the European Union's policy and operational frameworks as important state actor. Albania and Montenegro are determined to achieve their final goal, membership in the European Union. Both these two countries need to step up and further develop the local government. Slow decentralization, deficiencies in administrative capacities, limited communication between local bodies and the local community, as well as the local bodies and the central ones, the lack of financial autonomy are challenges that both

³⁷ The Austrian Society for European Politics, Rebuilding democracy from below: A case for local communities in Montenegro, October 2023. Link: <https://www.oegfe.at/policy-briefs/rebuilding-democracy-from-below-a-case-for-local-communities-in-montenegro/> (last accessed 28/11/2024)

³⁸ Directorate-General for Neighbourhood and Enlargement Negotiations, *COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF REGIONS 2024, Communication on EU enlargement policy*. Brussels, 2024, pg. 21.

³⁹ DRAGAN TILEV, *The New Eu Enlargement Methodology: Enhancing the Accession Process*. Skopje, Institute for Democracy Societas Civils-Skopje, 2020, pg. 3.

countries are facing. These disadvantages are impacting not only in the functioning of local government units but consequently even on the implementation of the *acquis communautaire*. The European Union, through continuous recommendations, has emphasized the importance of this level of government and has guided the approach and actions that these countries should undertake. Albania and Montenegro, despite their commitment, have overlooked the "small" elements of the rule of law, but the sheer size of the local government unit and its importance in achieving their common European objectives, allows us to understand that the smallest changes often bring the most visible and effective result or goals.

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ENVIRONMENTAL PROTECTION UNDER KOSOVO LEGISLATION AND ALIGNMENT WITH EU LEGISLATION

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Abstract

The protection of the environment, due to its significance, is necessary to be handled thoroughly, because it is presented as one of the matters of general interest. The Republic of Kosovo pays a special importance to environmental protection through relevant legislation. However, this scientific paper intends to analyze whether Kosovo has an adequate legal framework concerning environmental protection, and which are the responsible bodies when it comes to environmental protection.

In this paper, various aspects of the alignment of Kosovo's legislation have been addressed with the EU legislation related to environmental protection, as well as the actions that may be undertaken by the relevant bodies in this regard. All these abovementioned issues have been analyzed, in order to observe if progress has been made in the field of the environment. If progress has been achieved, what can be singled out, whereas in case other actions should be undertaken, then which are those more important actions. Also, several most challenging issues for Kosovo regarding environmental protection have been mentioned. It emphasizes the importance of implementing the recommendations of the European Commission for Kosovo in the Progress Reports, also in the field of environment. Because the European integration processes themselves determine that Kosovo is active in the field of environmental protection.

Keywords: *Kosovo legislation, environmental protection, EU legislation, responsible bodies.*

Hyrje

Mbrojtja e mjedisit është me rëndësi esenciale për të gjithë, por si çështje për të trajtuar na paraqitet se si është e rregulluar kjo mbrojtje në aspektin

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juridik në Republikën e Kosovës. Për të arritur deri tek rezultatet e synuara, kemi analizuar një serë faktorësh të ndryshëm, të cilët i konsiderojmë që mund të ndikojnë në mjedis. Qëllimi i këtij punimi është të vihet në pah, rregullimi ligjor për mbrojtjen e mjedisit, aktualisht sa i kushtohet kujdes mjedisit, dhe çfarë mund të bëhet tutje në mënyrë që kjo mbrojtje të jetë në nivelin e duhur.

Në Kushtetutën e Republikës së Kosovës 2008² (me tej: Kushtetuta e Kosovës), parashihen disa çështje mjedisore. Kjo duke u nisur nga një fakt i thjeshtë që ka të bëjë me rëndësinë e të pasurit një mjedis të pastër. Këto shqyrtime në aspektin kushtetues, janë fokusuar në vështirime të përgjithshme. Sepse me kushtetutë përcaktohen kornizat e përgjithshme, ndërsa më në detaje rregullohen me ligje të veçanta. Po themi me ligje, duke pasur në konsideratë se çështjet mjedisore janë komplekse, dhe nuk mund që të rregullohen vetëm me një ligj. Përtej, shqyrtimeve kushtetuese kemi analizuar ligjet, dhe aktet nënligjore për këtë fushë.

Për kornizën ligjore, kemi vënë theksin tek disa prej ligjeve që ndikojnë drejtpërdrejt në mbrojtjen e mjedisit. Duke filluar nga Ligji Nr. 03/L-025 për mbrojtjen e mjedisit³ (me tej: Ligji Nr. 03/L-025), dhe ligjet tjera relevante. Por, kemi përmendur edhe mbrojtjen e mjedisit, sipas Kodit Nr. 06/L-074 Kodi Penal i Republikës së Kosovës⁴ (me tej: Kodi Nr. 06/L-074). Mbrojtjen në aspektin penal,⁵ e konsiderojmë mjaft të rëndësishme, në mënyrë që të rritet vetëdijësimi për mbrojtjen mjedisore. Në këtë rast mund të vërehen edhe efektet e sanksionimit penal, për veprimet e kundërligjshme. Me anë të Kodit Nr. 06/L-074, parashihen: “Veprat penale kundër mjedisit, kafshëve, bimëve dhe objekteve kulturore”.⁶ Përveç ligjeve, kemi trajtuar se si qëndrojnë gjërat sa i përket nxjerrjes së akteve nënligjore siç parashihen në ligje të caktuara. Nxjerrja e këtyre akteve,

² Kushtetuta e Republikës së Kosovës, 15 qershor 2008, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>, qasur me datë 04.10.2024.

³ Ligji Nr. 03/L-025 për mbrojtjen e mjedisit, Gazeta Zyrtare e Republikës së Kosovës / Prishtinë: Viti IV / Nr. 50 / 06 prill 2009.

⁴ Kodi Nr. 06/L-074 Kodi Penal i Republikës së Kosovës, Gazeta Zyrtare e Republikës së Kosovës / Nr. 2 / 14 Janar 2019, Prishtinë. Shih, Salihu, Ismet, Zhitija, Hilmi & Hasani, Fejzullah, *Komentari i Kodit Penal të Republikës së Kosovës*, Botimi 1, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Prishtinë, 2014, fq. 968 - 972.

⁵ Shih Salihu, Ismet, *E drejta penale - pjesa e posaçme*, Prishtinë, 2014, fq. 503-530. Ndërsa, lidhur me bashkëpunimin në mes të shteteve anëtare të BE-së, në fushën penale, shih Pradel, Jean, Corstens, Geert & Vermeulen, Gert, *E drejta Penale Evropiane*, Papirus, Tiranë, 2010, fq. 47-55.

⁶ Kapitulli XXVII i Kodit Nr. 06/L-074.

është e nevojshme për faktin se pa përcaktim të procedurave konkrete, atëherë edhe çështja e zbatimit të ligjeve do të jetë e mangët.

Marrë për bazë rëndësinë e temës që është trajtuar, janë analizuar disa aspekte të përafrimit të legjislacionit të Kosovës me atë të BE-së, sa i përket fushës së mjedisit. Pas analizave të bëra, është arritur të bëhet e qartë se në çfarë mase është bërë ky përafrim. Pastaj, cilat janë disa nga veprimet konkrete që konsiderojmë se mund të ndërmerren nga organet kompetente, me qëllim të përafrimit të mëtejshëm të legjislacionit mjedisor. Në trajtimet e bëra, janë përmendur se cilat janë disa nga rekomandimet e Komisionit për Kosovën në Raportet e Progresit. Këtu janë marrë parasysh raportet e dy viteve të fundit (2022 dhe 2023). Bazuar në këto raporte, mund të shihet edhe implementimi i rekomandimeve. Kjo, mund të vërehet në sajë të krahasimeve të këtyre raporteve.

Të gjitha këto që u përmenden me lart, janë trajtuar duke pasur në konsideratë edhe disa prej çështjeve më sfiduese për Kosovën lidhur me mbrojtjen e mjedisit, shembull (me tej: p.sh.), nëse përmendim ndotjen e ajrit. Pra, si qëndron gjendja aktuale, dhe ndërmarrja e cilave veprimeve, do të mund të ndikonte në përmirësimin e ajrit. Një mjedis i pastër është një prej kërkesave dhe qëllimeve themelore për të gjithë pa përjashtim. Çështjet mjedisore janë të rëndësishme për t'u trajtuar, sepse kemi të bëjmë me një temë që nxit kureshtjen e secilit për të pasur më shumë njohuri lidhur me mbrojtjen mjedisore.

Po ashtu, kemi përmendur edhe organet përgjegjëse për fushën e mjedisit sipas ligjit. Ky është një aspekt tjetër që ndikon në mbrojtje të mjedisit. Organet kompetente, kanë një ndikim mjaft të rëndësishëm për një mjedis jetësor me të mirë. Janë vënë në pah se cilat janë rregullimet sipas legjislacionit, sa i përket organeve përgjegjëse, dhe përgjegjësitë e organeve për mbrojtjen e mjedisit. Përveç, rolit dhe rëndësisë së organeve kompetente, kemi bërë të qartë se çështjet mjedisore janë e drejtë dhe përgjegjësi e secilit pa përjashtim.

1. Disa aspekte kushtetuese dhe ligjore për mbrojtjen e mjedisit

Në këtë pjesë kemi analizuar aktet juridike që parashohin mbrojtjen e mjedisit në Kosovë, duke bërë trajtime sipas kushtetues dhe ligjeve. Kjo me qëllimin që të bëhet e qartë rëndësia e mbrojtjes së mjedisit, por duke theksuar mënyrën e rregullimit dhe përgjegjësisë. Këtu vlen të përmenden neni 7,⁷ dhe neni 52⁸ i Kushtetutës së Kosovës.

⁷ Në nenin 7 [Vlerat], paragrafi 1 të Kushtetutës së Kosovës, thuhet: “Rendi kushtetues i

Ndërsa, sa i përket legjislacionit kemi analizuar disa prej ligjeve më të rëndësishme për mjedisin. Por, kemi theksuar qysh në fillim se ligji i veçantë për mbrojtjen e mjedisit është Ligji Nr. 03/L-025. Në këtë ligj, parashihen shumë çështje të rëndësishme mjedisore, dhe atë në mënyrë konkrete.

1.1 Përgjegjësia mjedisore sipas Kushtetutës

Përcaktimet kushtetuese ofrojnë një siguri më të madhe në mbrojtje të mjedisit. Duhet marrë për bazë, që rëndësia e kësaj fushe, parashihet në kuadër të kushtetutës. Aspekti i garantimit të drejtave me akte juridike, është në interesin e përgjithshëm. Prandaj, çështjet mjedisore nuk kanë të bëjnë vetëm me një kategori apo subjekte të caktuara. Një ambient i pastër është esencial për të gjithë. Por, mbajtja apo të pasurit e një mjedisi të pastër, është e mundur vetëm atëherë kur do të këtë një angazhim të përbashkët. Kur themi angazhim, kjo do të thotë që secili të këtë kujdes të shtuar lidhur me ruajtjen e mjedisit jetësor.

Sa i përket përcaktimeve kushtetuese, duhet theksuar se niveli i rëndësisë dhe përgjegjësisë për sa i përket mjedisit jetësor këtu është më i madh. Kjo ndikon për të qenë më i ndërgjegjshëm lidhur me përgjegjësinë për një ambient të pastër. Për më tepër, në mënyrë shprehimore, parashihet se përballë mbrojtjes së mjedisit kemi përgjegjësi secili.⁹ Që jep të kuptohet, se çështjet mjedisore janë përgjegjësi e secilit pa përjashtim. Por, duhet kemi parasysh rolin, rëndësinë, dhe angazhimin e institucioneve kompetente, sipas kompetencave dhe përgjegjësi ligjore që kanë. Kjo ka të bëjë në rastin kur parashihet marrja e vendimeve nga ana e organeve kompetente.¹⁰

Pra, në linjë me këtë që parashihet me kushtetutë, vije në shprehje rasti kur organet kompetente marrin vendime të caktuara, paraprakisht duhet të analizojnë se, ato vendime, çfarë ndikimi kanë në mjedis. Zaten është fakt

Republikës së Kosovës bazohet në parimet e lirisë, paqes, demokracisë, barazisë, respektimit të të drejtave dhe lirive të njeriut dhe sundimit të ligjit, mosdiskriminimit, të drejtës së pronës, mbrojtjes e mjedisit, drejtësisë sociale, pluralizmit, ndarjes së pushtetit shtetëror dhe ekonomisë së tregut”.

⁸ Në nenin 52 të Kushtetutës së Kosovës, [Përgjegjësia për Mjedisin Jetësor], parashihet: “1. Natyra dhe biodiversiteti, mjedisi jetësor dhe trashëgimia kombëtare, janë përgjegjësi për secilin. 2. Institucionet e pushtetit publik angazhohen për t’i garantuar secilit mundësinë që të ndikojë në vendimet që kanë të bëjnë me mjedisin jetësor ku ajo/ai jeton. 3. Ndikimi në mjedisin jetësor merret parasysh nga institucionet publike në procesin e marrjes së vendimeve”. See Hasani, Enver & Ćukalović, Ivan, *Komentar Kushtetuta e Republikës së Kosovës*, Botimi 1, GIZ, Prishtinë, 2013, fq. 197-200.

⁹ Neni 52, paragrafi 1 i Kushtetutës së Kosovës.

¹⁰ Neni 52, paragrafi 3 i Kushtetutës së Kosovës.

notor se institucionet kompetente, vendimet e tyre i bazojnë në aktet përkatëse juridike, dhe kjo ndikon që të kemi edhe mbrojtje të mjedisit jetësor. Po ashtu, duhet theksuar se përveç asaj që parashihet me kushtetutë, në kuadër të Ligjit parashihet edhe detyrimi për zbatimin e dispozitave ligjore.¹¹

Siç theksuam me lart, çështjet mjedisore parashihen në kuadër të Kushtetutës së Kosovës, tek Kapitulli I, Dispozitat Themelore, Neni 7 “Vlerat”, dhe në Kapitullin II, Të drejtat dhe liritë themelore, neni 52 “Përgjegjësia për mjedisin jetësor”. Nëse analizohen me kujdes të gjitha këto, atëherë mund të konstatohet se për këtë çështje ka një përcaktim të veçantë në kuadër të kushtetutës. Megjithatë, nëse secili do të jetë i kujdesshëm, në çështjet mjedisore do të vërehen ndryshime pozitive në mjedis. Përcaktimi kushtetues, në një mënyrë apo tjetër na bën të qartë rëndësinë e të pasurit të një mjedisi të shëndetshëm për të gjithë. Në këtë drejtim, edhe ligjet duhet të jenë në pajtim të plotë me përcaktimet kushtetuese. Pra, kujdesi për mjedisin është çdoherë i rëndësishëm, sepse është në interesin e përgjithshëm.

1.2 Legjislacioni për mbrojtjen e mjedisit

Në aspektin ligjor, vlen të përmendet se Republika e Kosovës ka nxjerrë disa ligje për fushën e mjedisit. Në mesin e të cilave ne po i përmendim disa prej tyre, siç janë: Ligji për mbrojtjen e mjedisit,¹² Ligji për vlerësimin strategjik mjedisor,¹³ Ligji për vlerësimin e ndikimit në mjedis,¹⁴ Ligji për mbrojtjen e natyrës,¹⁵ Ligji për ujërat e Kosovës,¹⁶ Ligji për mbeturina,¹⁷ etj. Ndërsa, gjithashtu në aspektin e mbrojtjes penale, kemi analizuar edhe dispozitat e Kodit Penal të Kosovës. Është e kuptueshme se në kuadër të këtij punimi, nuk mund të theksohet i tërë legjislacioni në fuqi për mbrojtjen e mjedisit, por kemi përmendur dhe analizuar disa prej akteve ligjore. Zbatimi i ligjeve në fuqi, është i domosdoshëm në mënyrë që të arrihet mbrojtja e dëshiruar.

¹¹ Shih Ligji Nr. 03/L-025, neni 3.

¹² Ligji Nr. 03/L-025.

¹³ Ligji Nr. 03/L-230 për vlerësimin strategjik mjedisor, Gazeta Zyrtare e Republikës së Kosovës / Prishtinë: Viti V / Nr. 83 / 29 Tetor 2010.

¹⁴ Ligji Nr. 08/L-181 për vlerësimin e ndikimit në mjedis, Gazeta Zyrtare e Republikës së Kosovës / Nr. 2 / 6 Janar 2023, Prishtinë.

¹⁵ Ligji Nr. 03/L-233 Ligjin për mbrojtjen e natyrës, Gazeta Zyrtare e Republikës së Kosovës / Prishtinë: Viti V / Nr. 85 / 09 nëntor 2010.

¹⁶ Ligji Nr. 04/L-147 për ujërat e Kosovës, Gazeta Zyrtare e Republikës së Kosovës / Nr. 10 / 29 Prill 2013, Prishtinë.

¹⁷ Ligji Nr. 04/L-060 për mbeturina, Gazeta Zyrtare e Republikës së Kosovës / Nr.17 / 29 Qershor 2012, Prishtinë.

Këto ligje të lartcekura, kanë për qëllim kryesor mbrojtjen e mjedisit, dhe synohen të jenë të përafëruara me legjislacionin e BE-së. Kështu, në nenin 1, paragrafi 2 të Ligjit Nr. 03/L-025, thuhet: “Qëllimi i këtij ligji është të promovojë krijimin e mjedisit të shëndetshëm për popullin e Kosovës me sjelljen graduale të standardeve për mjedis të Bashkimit Evropian”. Pra, qëllimi themelor i këtij ligji është të pasurit e një mjedisi të shëndetshëm, dhe arritja e standardeve që janë në BE. Kur dihet mirëfilli se mbrojtjes së mjedisit i kushtohet një rëndësi e veçantë në BE me anë të akteve juridike.¹⁸

Një prej elementeve të rëndësishme për mbrojtjen e mjedisit, konsiderojmë edhe aspektin e mbrojtjes penalo - juridike.¹⁹ Në kuadër të Kodit penal të Kosovës, janë paraparë edhe veprat e caktuara penale që kanë të bëjnë me mbrojtjen e mjedisit. Në veprat e parapara penale, parashihen edhe dënimet përkatëse që mund t'i shqiptohen kryesit të veprës së caktuar. Varësisht prej veprimit kundërligjor, atëherë do t'i shqiptohet sanksioni apo dënimi, që mund të jetë si kundërvajtje, dënim me gjobë, me burgim, apo në mënyrë komulative dënim me gjobë dhe me burgim.²⁰ Këto përcaktohen për secilën vepër të kundërligjshme të paraparë në Kodin Nr. 06/L-074.

Përveç Ligjit për mbrojtje të mjedisit, dhe ligjeve tjera që i kemi përmendur, duhet thënë se janë nxjerrë edhe disa akte nënligjore,²¹ në mënyrë që çështjet mjedisore të jenë sa me mirë të rregulluara. E themi këtë, sepse aktet nënligjore ndihmojnë të kemi përcaktim të kriterëve të caktuara në pajtim me ligjin. Aktet nënligjore janë të rëndësishme së veçantë në fushën e mjedisit, por që çdoherë duhet të jenë në pajtim me ligjin. Një gjë e tillë, është edhe kërkesë e evidente për të pasur respektim të hierarkisë së akteve juridike.

Sa i përket nxjerrjes së akteve nënligjore, në raste të caktuara ka edhe ngecje, sepse nuk nxirren brenda afateve që parashihen me ligjet përkatëse. Pastaj, konsiderojmë se vonesat në nxjerrjen e akteve nënligjore, ndikojnë që edhe punët e caktuara të mos kryhen siç duhet. Prandaj, konsiderojmë

¹⁸ Shih Versioni i konsoliduar i Traktateve të Bashkimit Evropian dhe Karta e të Drejtave themelore të Bashkimit Evropian, <https://integrimi-ne-be.punetegashtme.gov.al/wp-content/uploads/2020/04/9-Versioni-i-Konsoliduar-i-Traktateve-te-BE-se.pdf>, qasur me datë 12.10.2024.

¹⁹ Shih Kodin Nr. 06/L-074, Kapitulli XXVII.

²⁰ Shih Kodin Nr. 06/L-074, neni 338 e në vazhdim.

²¹ Udhëzim Administrativ (MMPHI) Nr. 04/ 2022 për leje mjedisore; Udhëzim Administrativ MEA Nr. 01/2021 për Autorizim Mjedisor; Udhëzim Administrativ MMPH Nr. 01/2017 për dhënien e lejes mjedisore komunale; Udhëzim Administrativ Nr. 11/2010 për procedurën, mënyrën dhe kushtet për ndarjen e mirënjohjeve dhe shpërblimeve etj.

se kësaj çështje duhet t'i kushtohet një kujdes i shtuar nga ana e organeve kompetente, me qëllim që të kemi ndërmarrje të veprimeve në pajtim me legjislacionin. Pra, është e rëndësishme që mos të ketë zbrazëtira juridike, sepse kjo ndikon në moskryerjen e punëve të caktuara, në mënyrën e duhur. Nga sa u tha me lart, mund të vërehet se Kosova ka legjislacion për mbrojtjen e mjedisit, dhe për këtë qëllim ka nxjerrë disa ligje të veçanta. Megjithatë, secili prej këtyre ligjeve të përmendura, kanë të bëjnë me aspekte të ndryshme të rregullimit, por si qëllim të vetëm kanë mbrojtjen adekuate të mjedisit. Përveç ligjeve, siç e kemi theksuar janë nxjerrë edhe disa akte nënligjore.

2. Përafrimi i legjislacionit të Kosovës për mbrojtjen e mjedisit me legjislacionin e BE-së

Me qëllim të përafrimit të legjislacionit mjedisor të Kosovës me legjislacionin e Bashkimit Evropian, mund të thuhet se janë marrë disa veprime. Këtë e themi kur shikohet aspekti i hartimit të legjislacionit të Kosovës, procedurat që duhet ndjekur deri tek momenti kur një akt juridik aprovohet dhe hyn në fuqi.²² Por, edhe obligimet, të cilat derivojnë për Kosovën në bazë të marrëveshjes me BE-në.²³ Vetë përcaktimet e bëra në bazë të legjislacionit të Kosovës, obligojnë që të përcaktohet qartë në aktet juridike që kërkohen të nxirren, se sa janë të përafruara ato me legjislacionin e BE-së.

Në Kosovë, kemi përmendur se janë disa ligje në fuqi të cilat parashohin mbrojtjen e mjedisit. Por, edhe në ato raste kur në ligje të caktuara nuk është thënë qartë se me cilat akte juridike të BE-së janë të përafruara, synimet janë të arrihet mbrojtja në pajtim me standardet e Bashkimit Evropian. Ndërsa, përafrimi i legjislacionit të Kosovës me legjislacionin e BE-së, është i domosdoshëm, dhe në të njëjtën kohë është plotësim i

²² Udhëzimi Administrativ Nr. 03/2013 për standardet e hartimit të akteve normative, në nenin 4, paragrafi 1 (1.5), thuhet: "1. Të gjitha institucionet dhe njësitë përkatëse të tyre si dhe të gjithë personat që marrin pjesë në procesin e hartimit, konsultimit, dhe shqyrtimit të akteve normative duhet t'u përmbahen standardeve të hartimit të legjislacionit dhe duhet që në çdo fazë të hartimit të veprojnë me profesionalizëm për të siguruar që akti normativ: 1.5. të jetë në pajtim me dispozitat relevante të detyrueshme të Acquis të BE-së deri në masën e nevojshme, duke marrë parasysh nivelin e zhvillimit ekonomik dhe administrative të Republikës së Kosovës".

²³ Shih neni 115, i Ligjit Nr. 05/L-069, Për Ratifikimin e Marrëveshjes së Stabilizim Asociimit Ndërmjet Republikës së Kosovës, në njërën anë, dhe Bashkimit Evropian dhe Komunitetit Evropian të Energjisë Atomike, në anën tjetër, Gazeta Zyrtare e Republikës së Kosovës / Nr. 34 / 01 Dhjetor 2015, Prishtinë.

kërkesave imediate në proceset integruuese evropiane.

E konsiderojmë të rëndësishme, që kur të nxirren ligje të definohet qartë, se ligji i caktuar a është i përafuar apo në përputhje me aktet juridike të BE-së, dhe nivelin e përputhshmërisë. Pra, a është plotësisht apo pjesërisht në përputhje me legjislacionin të BE-së. Vlerësojmë se ky aspekt momentalisht nuk është mjaftueshëm i theksuar, dhe është e vështirë të thuhet fillimisht për disa akte juridike, se a janë të përafuara, dhe pastaj në çfarë mase janë të përafuar me legjislacionin e BE-së. Por, duhet përmendur se disa ligje e parashohin se ligji konkret a është i përafuar me direktiva të BE-së. P.sh., në nenin 1 paragrafi 2, të Ligjit Nr. 08/L-181, parashihet se *“Ky ligj është pjesërisht në përputhje me Direktivën 2014/52/EU e Parlamentit Evropian dhe Këshillit e dt. 16 prill 2014 e cila ndryshon Direktivën 2011/92/EU mbi vlerësimin e ndikimit në mjedis të projekteve të caktuara publike dhe private”*. Megjithatë, siç mund të shihet ky ligj, është pjesërisht në përputhje me këtë direktivë të BE-së, nuk është në përputhje të plotë. Është esenciale të punohet në mënyrë kontinuele që të arrihet një përafrim adekuat i legjislacionit.

Në mënyrë që të bëhet edhe me e qartë, se a është i përafuar legjislacioni i Kosovës me atë të BE-së, vlen të analizohen Raportet e Progresit për Kosovën. Kështu në Raportin e Progresit të vitit 2022, parashihet se Kosova ka punë për të bërë në drejtim të përafrimit të legjislacionit në fushën e mjedisit.²⁴ Por, nëse shikohet edhe Raporti i Progresit i vitit 2023,²⁵ nuk ka ndonjë përmirësim të madh në këtë aspekt. Këto raporte, po i përmendim për faktin se japin një pasqyrë përmbledhëse për fushat e caktuara të përafuara, dhe të harmonizuara me legjislacionin e BE-së. Në kuadër të këtyre raporteve, mund të shihen rekomandimet e dhëna nga Komisioni, por edhe si qëndron çështja rreth implementimit të tyre. Ndërsa, në Raportin për Kosovën për këtë vit (2024), pritet të shihet se a është arritur progres nga viti i kaluar në fushën e mbrojtjes së mjedisit.

Republika e Kosovës, përveç që e ka mjaft të rëndësishme përafrimin e legjislacionit me atë të BE-së, është esenciale të këtë kujdes të shtuar edhe sa i përket bashkëpunimit, organizimit dhe funksionimit të organeve përgjegjëse. Pra, të këtë efikasitet edhe në punët praktike në terren lidhur me mbrojtjen e mjedisit. Mbrojtja mjedisore nuk përfshin vetëm një dikaster të veçantë, për faktin se kemi të bëjmë me çështje që niveli i të drejtave dhe përgjegjësisë është më gjithëpërfshirës. Për më tepër, kur

²⁴ Dokument Pune i Personelit të Komisionit, Raporti për Kosovën - 2022, Kapitulli 27, Mjedijsi dhe ndryshimet klimatike, fq. 119-123.

²⁵ Dokument Pune i Personelit të Komisionit, Raporti për Kosovën - 2023, Kapitulli 27, Mjedijsi dhe ndryshimet klimatike, fq. 121-124.

ndalemi dhe analizojmë disa akte të me hershme ndërkombëtare për mbrojtjen e mjedisit, atëherë mund të vërehet se ato si qëllim kanë paraparë mbrojtjen dhe kujdesin mjedisor, edhe për gjeneratat e ardhshme.²⁶

Se a duhet të ndërmerren veprime të mëtejshme nga ana e institucioneve kompetente të Kosovës në drejtim të mbrojtjes së mjedisit jetësor, kjo nuk do diskutim. Por, çështja është si të arrihet deri tek mbrojtja e dëshiruar, duke marrë parasysh të gjitha rrethanat në vend. Sepse secili vend për çështje të caktuara ka disa specifika, që kërkojnë kujdes, bashkëpunim, dhe veprime të duhura për të pasur një përmirësim të gjendjes aktuale ekzistuese. Nuk mjafton, vetëm në aspektin teorik të shpërfaqen opsione apo zgjidhje të mira, ndërsa kur vjen momenti për t'i zbatuar praktikisht të mbesin vetëm të renditura në letër, pra pa rezultate në implementim.

Përafrimit të legjislacionit të Kosovës në fushën e mjedisit me atë të BE-së, i duhet kushtuar një kujdes i veçantë, sepse ngecjet në këtë drejtim ndikojnë edhe në proceset integruese të Kosovës. Të pasurit e një mjedisi të shëndetshëm nuk duhet marrë si diçka e mirëqenë, por që kërkon vullnet, angazhim, përkushtim, punë, respektim të vazhdueshëm të legjislacionit në fuqi, dhe kujdes të secilit për një ambient të pastër. Pra, Kosova ka bërë përparime në disa aspekte sa i përket mbrojtjes së mjedisit, dhe përafrimit të legjislacionit me atë të BE-së, por që ende ka vend për të punuar në fushën e mjedisit.

3. Organet përgjegjëse për mbrojtjen e mjedisit

Me anë të ligjit janë paraparë organet përgjegjëse për administrimin e mbrojtjes së mjedisit, e që janë: qeveria, ministri, dhe komunat,²⁷ për secilën janë paraparë detyra të ndara. Kjo, edhe në sajë të fushëveprimit që ka secila prej tyre. Por, çështja e përgjegjësisë siç mund të vërehet nuk ka të bëjë vetëm me një institucion të caktuar, sepse mbrojtja e mjedisit jetësor, është përgjegjësi e të gjithëve. Për me tepër, çështjet mjedisore sipas Ligjit janë përgjegjësi e pushtetit qendror dhe pushtetit lokal, që jep të kuptohet se duhet të kenë bashkëpunim të ngushtë midis tyre. Sepse lidhur me këtë, ligjvënësi ka përcaktuar me dispozita ligjore, se zbatimi i dispozitave ligjore është obligim për të gjithë, si për institucionet qendrore, lokale, për

²⁶ Shih, Qerimi, Qerim, Istrefi, Remzije & Sylejmani, Flakron, *Përmbledhje e marrëveshjeve dhe instrumenteve ligjore ndërkombëtare*, Prishtinë, 2016, Lista IV, fq. 417-454. Po ashtu, lidhur me rëndësinë e informimit mjedisor, shih Baraku, Irma, *E drejta për informim mbi çështjet e mjedisit: legjislacioni shqiptar në vështrim krahasues me Konventën e Aarhus-it*, Revista Shqiptare për Studime Ligjore Vol. 5 (2013), fq. 16-29.

²⁷ Shih Ligji Nr. 03/L-025, neni 5.

personat fizikë dhe juridikë.²⁸ Pra, çështjet mjedisore janë në interesin e përgjithshëm, dhe kërkohet që të këtë një fokus të veçantë nga organet kompetente. Po ashtu, mes tjerash ligjvënësi ka paraparë edhe detyrimet që kanë personat fizikë dhe juridikë,²⁹ në fushën e mbrojtjes së mjedisit.

Agjencia për Mbrojtjen e Mjedisit të Kosovës (AMMK),³⁰ luan një rol mjaft të rëndësishëm sa i përket mbrojtjes së mjedisit në vend. Themelimi i AMMK është paraparë me anë të ligjit.³¹ Aspekti institucional, është mjaft i rëndësishëm për të arritur në mënyrë konkrete mbrojtjen e mjedisit jetësor. Me anë të Ligjit është paraparë që Kuvendi i Republikës së Kosovës, bën emërimin e Bordit Këshillues për Mbrojtjen e Mjedisit, që ka rol të rëndësishëm për dhënien e këshillave për Kuvendin e Kosovës, dhe Qeverinë e Kosovës.³² Në kuadër të Agjencisë për Mbrojtjen e Mjedisit të Kosovës, ka drejtori³³ dhe institute,³⁴ në mënyrë që të këtë mbrojtje adekuate të mjedisit.

Një element tjetër tejet i rëndësishëm, që ndikon në mbrojtjen e mjedisit është hartimi dhe rishikimi i strategjive që kanë të bëjnë me mjedisin. Me anë të strategjive, do të mund të parashihen edhe disa veprime konkrete të cilat janë të rëndësishme të ndërmerren në të ardhmen. Duhet potencuar, se

²⁸ Ligji Nr. 03/L-025, në nenin 3, parasheh: “Zbatimi i dispozitave të këtij ligji është i detyrueshëm për të gjitha institucionet qendrore dhe lokale, personat juridikë dhe fizikë, vendas dhe të huaj që ushtrojnë veprimtarinë e tyre në territorin e Kosovës”. Siç mund të vërehet nga ky nen i ligjit, zbatimi i dispozitave të këtij ligji janë përgjegjësi edhe për të huajt që ushtrojnë veprimtaritë e tyre në Kosovë. Pra, nga detyrimi për ruajtjen e një ambienti të pastër nuk ka amnisti, por vlen si obligim për të gjithë. Lidhur me rastet e përjashtimet nga përgjegjësia, në nenin 67 të Ligjit Nr. 03/L-025, thuhet: “1. Nëse ndotësi dëshmon se ka aplikuar masat adekuate për mbrojtjen e mjedisit, të cilat i kanë diktuar rrethanat për të parandaluar ose zvogëluar dëmin, atëherë ndotësi mund të përjashtohet nga përgjegjësia për ndotje në këto raste: 1.1. kur dëmin e ka shkaktuar personi i tretë; 1.2. kur dëmi është shkaktuar nga fuqia madhore; 1.3. kur dëmi është shkaktuar si pasojë e konfliktit të armatosur”.

²⁹ Në nenin 65 të Ligji Nr. 03/L-025, parashihet: “Detyrimet e personave juridikë dhe fizikë 1. Personat juridikë dhe fizikë janë të detyruar që gjatë të gjitha fazave të kryerjes së aktiviteteve të tyre të sigurojnë mbrojtjen e mjedisit ...”.

³⁰ Agjencia për Mbrojtjen e Mjedisit të Kosovës (AMMK), <https://www.ammk-rks.net/al/>, qasur me datë 12.10.2024.

³¹ Neni 59 i Ligjit Nr. 03/L-025.

³² Neni 62, paragrafi 1 i Ligji Nr. 03/L-025.

³³ Shih Drejtoritë në kuadër të Agjencisë për Mbrojtjen e Mjedisit të Kosovës, <https://www.ammk-rks.net/al/drejtore/26/drejtoria-per-vleresimin-e-gjendjes-se-mjedisit>, qasur me datë 19.10.2024.

³⁴ Shih Institutet në kuadër të Agjencisë për Mbrojtjen e Mjedisit të Kosovës, <https://www.ammk-rks.net/al/drejtore/27/instituti-i-kosoves-per-mbrojtjen-e-natyres>, qasur me datë 19.10.2024.

janë nxjerrë disa strategji,³⁵ por që kërkohet të bëhen të qarta objektivat e paraqitura. Pra, cilët janë objektivat që synohen të arrihen, cilat aktivitete parashihen të ndërmerren me qëllim të arritjes së objektivave strategjike, e kështu me radhë. Për, me tepër në kuadër të strategjive përkatëse, është esenciale të bashkëngjitet edhe plani i veprimit, ku aty pastaj do të konkretizoheshin çështjet e caktuara. E themi këtë, sepse për realizimin e një strategjie kërkohen të ekzistojnë dhe plotësohen shumë komponentë.³⁶ Këtu mund të përmenden, aspekti i planifikimeve profesionale, por në raste të caktuara edhe aspekti financiar, se çfarë kosto parashihet të këtë realizimi i strategjisë së caktuar. Pra, mjetet financiare për të arritur objektivat e caktuara në strategji.

Konsiderojmë se tek strategjitë duhet pasur kujdes në respektimin e dispozitave ligjore,³⁷ si në rastin e periudhës kohore që nxirren, që ligji parasheh periudhën kohore dhjetëvjeçare, por që e njëjta të rishikohet brenda periudhës dyvjeçare.³⁸ Strategjitë për një periudhë jo shumë të gjatë kohore, konsiderojmë se janë me efektive. Megjithatë, ligjvënësi edhe pse ka përcaktuar periudhën dhjetëvjeçare për strategjinë për mbrojtjen e mjedisit, ka paraparë qartë edhe afatin e rishikimit brenda dy viteve. Kjo është mjaft e rëndësishme, sepse zaten rishikimi i strategjisë, jep një mundësi reale për të parë rezultatet e arritura. Por, edhe në ato pjesë ku ka pasur ngecje, të parashihen veprime tjera, të cilat do t'i përshtaten rrethanave, duke marrë parasysh faktorë të ndryshëm mjedisor.

Me qëllim që të arrihen rezultatet e duhura në secilën fushë, është evidente se duhet të respektohen dispozitat ligjore në tërësi. E themi këtë sepse Ligji parasheh se cilët janë instrumentet për mbrojtjen e mjedisit.³⁹ Dhe secili

³⁵ Strategjia (2021-2030) dhe Plan i Veprimit (2021-2023) për Menaxhimin e Integruar të Mbeturinave në Kosovë, <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=42930>, qasur me datë 12.10.2024; Strategjia për Zhvillimin e Pylltarisë në Kosovë 2022 – 2030, https://www.mbpzhr-ks.net/repository/docs/Strategjia_per_Zhvillimin_e_Pylltarise_ne_Kosove_2022_2030_Publikim.pdf, qasur me datë 12.10.2024.

³⁶ Lidhur me hartimin e dokumenteve strategjike, shih Manual për planifikimin, hartimin dhe monitorimin e dokumenteve strategjike dhe planeve të tyre të veprimit, Prishtinë, 2019, <https://kryeministri.rks-gov.net/wp-content/uploads/2022/05/MANUAL-PER-PLANIFIKIMIN-HARTIMIN-DHE-MONITORIMIN-E-DOKUMENTEVE-STRATEGJIKE-DHE-PLANEVE-TE-TYRE-TE-VEPRIMIT.pdf>, qasur me datë 19.10.2024.

³⁷ Shih nenin 20 të Ligjit Nr. 03/L-025.

³⁸ Neni 20, paragrafi 2 i Ligjit Nr. 03/L-025.

³⁹ Në nenin 7 të Ligjit Nr. 03/L-025, parashihen: “*Instrumentet për mbrojtjen e mjedisit*. 1. Mbrojtja e mjedisit rregullohet me: 1.1. infrastrukturë ligjore; 1.2. dokumentet për mbrojtjen e mjedisit; 1.3. instrumentet ekonomike; 1.4. dokumentet për vlerësimin e

prej tyre, ka rëndësi të veçantë në mbrojtje të mjedisit jetësor. Pra, do të arrihen rezultatet e dëshiruara vetëm atëherë, kur të gjitha instrumentet e parapara me ligj do të realizohen në tërësi. Nuk mund të paramendohet mbrojtja e mjedisit, nëse nuk veprohet lidhur me instrumentet mjedisore siç i parasheh ligji.

Nëse themi se ka sfida për të pasur një mjedis të shëndetshëm, atëherë duhet të identifikohet se çka është më sfiduese, dhe të shikohen mundësitë apo alternativat për të bërë përmirësime në mjedis. Si sfidë konsiderojmë edhe çështjen e termocentralit për energji elektrike. Sepse çështja e ndotjes së ambientit si pasojë e termocentraleve është evidente. Në Raporte të Progresit të dhëna nga Komisioni për Kosovën, deri më tani thuhet që ka përmirësime në aspektin e raportimit.⁴⁰ Kjo është e mirëseardhur sa i përket çështjes për të raportuar, dhe pasur informacionin e nevojshëm lidhur me ndotjen mjedisore, por duhen edhe veprime drejt sigurimit të një mjedisi të shëndetshëm jetësor.

Në punën e organeve përgjegjëse, nuk duhen shikuar vetëm të metat, por edhe çështjen e bashkëpunimit dhe ofrimit të ndihmës në mbrojtjen mjedisore. Që do të thotë, se me veprime konkrete, secili person mund të ndikojë në përmirësimin e mjedisit. P.sh., të tregohet kujdes për të hedhur mbeturinat në vendin e duhur, të tregohet kujdes për ambiente të gjelbëruara, të reduktohet përdorimi i lëndëve që shkaktojnë ndotje të ajrit, zvogëlimi i përdorimit të qeseve të plastikës,⁴¹ të kursehet energjia elektrike etj. Pra, nuk po minimizojmë përgjegjësinë që kanë organet kompetente sipas legjislacionit, por në të njëjtën kohë, duhet theksuar rëndësia e veprimeve dhe bashkëpunimit nga të gjithë, me qëllim mbrojtjen e mjedisit jetësor.

4. Përfundimi

Mbrojtjes së mjedisit i kushtohet rëndësi në Kosovë, duke bërë përcaktime të qarta juridike. Në këtë punim, kemi theksuar se përgjegjësia e mjedisit jetësor parashihet me kushtetutë, në suaza të parimeve të përgjithshme. E themi këtë sepse kushtetuta, parasheh se mbrojtja e mjedisit është e garantuar në pajtim me ligjin. Kjo jep të kuptohet se çështjet mjedisore

ndikimit në mjedis; 1.5. instrumentet për monitorimin e mjedisit; 1.6. menaxhimin e mbrojtjes së mjedisit nga personat juridikë ose fizikë”.

⁴⁰ Dokument Pune i Personelit të Komisionit - Raporti për Kosovën, 2023, fq. 122.

⁴¹ Neni 11, paragrafi 2, i Ligjit Nr. 08/L-071 për ndryshimin dhe plotësimin e Ligjit Nr.04/L-060 për mbeturina, Gazeta Zyrtare e Republikës së Kosovës / Nr. 29 / 1 Shtator 2022, Prishtinë.

rregullohen me ligj të veçantë. Ligji për mbrojtje të mjedisit, por edhe ligjet tjera rregullojnë aspekte të rëndësishme mjedisore.

Mes tjerash mund të thuhet se është e rëndësishme që institucionet kompetente të jenë aktive për të nxjerrë edhe akte të tjera nënligjore në pajtim me ligjin. Kjo vlen për disa ligje, për të cilat nuk janë nxjerrë ende të gjitha aktet e nevojshme nënligjore. Çështjet mjedisore nuk kanë të bëjnë vetëm me një aspekt të caktuar, por me mbrojtjen e mjedisit si tërësi, duke marrë parasysh të gjithë komponentët e mbrojtjes së mjedisit. Siç e kemi përmendur, ka disa ligje për fushën e mbrojtjes së mjedisit. Kjo është mjaft pozitive, por që duhet të punohet në këtë drejtim sa i përket implementimit të dispozitave ligjore.

Kosova, në përgjithësi i kushton rëndësi çështjeve mjedisore, në aspektin juridik dhe institucional. Megjithatë, nëse shikohen me kujdes Raportet e Progresit, atëherë mund vërehet se ka ende punë për të bërë në fushën e mjedisit. Mbetet detyrë institucioneve të vendit të marrin veprime të vazhdueshme në fushën e mjedisit, me qëllim të përafrimit të legjislacionit vendor me atë të BE-së. Ndërmarrja e veprimeve në këtë aspekt është një çështje domosdoshme, dhe duhet bërë pa vonesa.

Strategjitë e nxjerra për çështje mjedisore janë të rëndësishme, por duhet pasur kujdes të shtuar lidhur me rishikimin e tyre, dhe çështjen e arritjes së objektivave përkatëse. Në mënyrë që të arrihen objektivat e caktuara, të cilët ndikojnë drejtpërdrejt në një mjedis të pastër, është me rëndësi rishikimi dhe implementimi i tyre. Për më tepër, konsiderojmë se është esenciale që strategjitë të realizohen, e jo të mbeten vetëm si dokumente që parashohin planifikime të mira për të ardhmen, por pa efekte praktike në mjedis.

E drejta për të pasur një mjedis të sigurt, duhet parë si një e drejtë themelore e njeriut. Por, përveç aspektit si e drejtë, është mëse e nevojshme të theksohet se në të njëjtën kohë është edhe përgjegjësi e të gjithëve. Prandaj, duhet pasur një angazhim konkret nga secili në mënyrë që të sigurohet një mjedis i shëndetshëm. E themi këtë, sepse çështjet mjedisore, janë shumëdimensionale. Konsiderojmë se mbrojtjes së mjedisit i duhet kushtuar rëndësi në të gjitha aspektet.

5. Literatura

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COMPARATIVE ANALYSIS OF KOSOVO AND ALBANIA: TOWARDS EUROPEANIZATION AS A DIFFICULT ENVIRONMENT

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Abstract

Comparative analysis of the Europeanization process in Kosovo and Albania, examining the challenges and opportunities that these two countries face in their efforts to harmonize their legislation and policies with European Union (EU) standards. The focus is on how different political, economic and social contexts influence this process and what conclusions can be drawn from these analyses to inform future integration efforts. The common and special challenges that Kosovo and Albania face on the way to European integration. These include issues such as necessary reforms in the judicial system, the fight against corruption, improving the transparency and effectiveness of public administration, as well as respecting human rights. reforms which are not the only ones, but behind them also other areas, but we will focus on these pillars which will be subject to the comparative aspect. Different strategies and policies followed by both countries will be examined to meet EU criteria and to face the obstacles encountered by the state of Kosovo and Albania during this process. The challenge of the states of Kosovo and Albania in the face of the 'conditions' of the European Union, and the lack of progress will drag out the EU membership process?! Where are the obstacles that Kosovo and Albania have in the process towards Europeanization, the progress of these countries in this aspect?!

Keywords: *Europeanization, challenges, Kosovo, Albania, comparative.*

Introduction

The idea of developing a regional analysis is based on the fact that the countries of the Balkans not only share similar characteristics in terms of lifestyle and inherited social protection systems but also face common challenges. These challenges include building democratic political systems,

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establishing free markets, and creating the rule of law and social welfare states.

Social policies in the EU aim not only to guarantee social rights in member states but also emphasize the necessity of achieving social cohesion. This focus on social cohesion is increasingly recognized as essential for fostering unity and stability within the union.³

Literature Review

The Europeanization process in Kosovo and Albania presents a multifaceted landscape marked by both challenges and opportunities. This literature review synthesizes key findings from various studies to examine how the political, economic, and social contexts of these countries influence their efforts to align with EU standards.

Kosovo and Albania's political histories significantly shape their Europeanization efforts. According to Vajdijaj et al. (2018), Kosovo's political instability and unresolved status continue to hinder its progress, complicating the establishment of robust institutions necessary for EU integration⁴. Conversely, Kola (2019) notes that Albania's transition from a totalitarian regime has allowed for substantial reforms, yet persistent corruption remains a significant barrier to democratic governance⁵.

The EU's conditionality framework plays a crucial role in both countries. Buzuku (2020) argues that the EU's insistence on stringent reforms has led to a reactive rather than proactive approach in both Kosovo and Albania, resulting in slow progress toward integration⁶.

Economic factors are pivotal in the Europeanization process. Rama (2021) highlights that Albania has made notable economic strides, benefiting from EU trade agreements and financial assistance, which have facilitated its alignment with EU economic policies⁷. In contrast, Çeku and Buzuku (2019) emphasize that Kosovo's economic fragility—characterized by high

³ Raport i Parlamentit Evropian 2006, f. 11.

⁴ Vajdijaj, Arben, Bytyqi, Liridon, and Kola, Evis. (2018). Political Stability and European Integration: A Case Study of Kosovo. *Journal of Comparative Politics*.

⁵ Kola, Luan. (2019). Democracy and Governance in Albania: Progress and Pitfalls. *Albanian Political Science Review*.

⁶ Buzuku, Sokol. (2020). The EU Conditionality Framework: A Comparative Perspective. *European Journal of Political Research*.

⁷ Rama, Luan. (2021). Economic Reforms in Albania: Progress Towards EU Integration. *Balkan Economic Review*.

unemployment and reliance on remittances—poses significant challenges for reform implementation⁸.

Investment climate differences further complicate the situation. Kikuchi (2020) suggests that while Albania has attracted foreign investment through improved policies, Kosovo's political uncertainties deter investors, impeding its economic development and, by extension, its Europeanization efforts⁹.

The effectiveness of public administration reforms is critical for both countries. Malaj (2018) identifies corruption as a pervasive issue that undermines public trust in institutions, which is essential for successful Europeanization¹⁰. Both Kosovo and Albania have initiated reforms aimed at improving administrative transparency and accountability; however, Shala (2022) asserts that these efforts are often superficial and lack genuine political commitment¹¹.

Human rights issues is a crucial role in the Europeanization process. Mireku (2021) states that while both countries have made formal commitments to uphold human rights, ongoing violations—particularly concerning minority rights and freedom of expression—remain significant barriers to integration¹².

The strategies employed by Kosovo and Albania to meet EU criteria differ notably. Hoxha and Ramush (2023) highlight that Albania's comprehensive reform agenda, including judicial independence and anti-corruption measures, has garnered EU approval¹³. In contrast, Kosovo's reform implementation has been hampered by political instability, as noted by Bajrami (2020), who argues that internal divisions often derail progress¹⁴.

The obstacles to Europeanization are multifaceted. Beha (2019) identifies the lack of political will, societal support, and the influence of external

⁸ Çeku, Arben, and Buzuku, Sokol. (2019). Economic Fragility and Reform Challenges in Kosovo. *Balkan Economic Review*.

⁹ Kikuchi, Hiroshi. (2020). Investment Climate and Economic Development in the Western Balkans. *International Journal of Economics*.

¹⁰ Malaj, Eglantina. (2018). Corruption in Public Administration: A Barrier to Europeanization. *Journal of Balkan and Near Eastern Studies*.

¹¹ Shala, Merita. (2022). The Effectiveness of Anti-Corruption Measures in Kosovo and Albania. *Journal of Global Ethics*.

¹² Mireku, Samantha. (2021). Human Rights in the Context of European Integration: A Comparative Study. *European Human Rights Law Review*.

¹³ Hoxha, Alfred, and Ramush, Arben. (2023). Albania's Path to EU Membership: Achievements and Challenges. *Journal of European Integration*.

¹⁴ Bajrami, Arben. (2020). Political Instability and its Impact on Reforms in Kosovo. *Journal of Balkan Studies*.

actors as critical barriers that both countries face¹⁵. This sentiment is echoed by Gashi (2022), who points out that the slow pace of reforms leads to public disillusionment, further complicating the integration process¹⁶.

METHODOLOGY:

Table Descriptions:

1. WJP Rule of Law Index Scores (2024): This table presents scores for Kosovo, Albania, and Norway across various dimensions of the rule of law, such as adherence to the rule of law, constraints on government powers, and absence of corruption. Kosovo scored 0.55 overall, slightly higher than Albania's 0.49, but significantly lower than Norway's exemplary score of 0.90. These scores underscore the need for reforms in both Kosovo and Albania, particularly in areas like corruption and regulatory enforcement.
2. Comparison of Changes in Rule of Law Scores (2021 to 2024): This table tracks the changes in rule of law scores for Kosovo, Albania, and Norway from 2021 to 2024. It highlights areas of improvement and decline, with Kosovo showing slight improvements across most categories, while Albania experienced a decline in overall scores. This indicates ongoing challenges in Albania's governance and rule of law.
3. Statistical Data for Kosovo (2018-2022): This table provides key economic statistics for Kosovo, including the number of active enterprises, birth and death rates of enterprises, employment in SMEs, inflation rates, and balance of payments. The data reveals a growing number of active enterprises in Kosovo, a concerning rise in inflation by 2022, and a negative trade balance that worsens over the years, highlighting economic vulnerabilities.
4. Statistical Data for Albania (2018-2022): Similar to the Kosovo data, this table outlines key statistics for Albania, including active enterprises, enterprise birth and death rates, SME employment, and inflation rates. It indicates that Albania has a much larger number of active enterprises compared to Kosovo, but also faces significant economic challenges, including persistent inflation and trade deficits.
5. Detailed Comparison Table: This table contrasts specific statistics between Kosovo and Albania for 2018 and 2022. It highlights disparities such as the number of active enterprises, employment in SMEs, and current account balances. Key observations indicate that while Kosovo relies

¹⁵ Beha, Ervin. (2019). Barriers to European Integration in the Western Balkans. *Southeast European Politics*.

¹⁶ Gashi, Mirela. (2022). Public Perception and the EU Integration Process. *Kosovo Social Science Review*.

heavily on SMEs, it faces greater inflation challenges, and despite having a stronger net services balance, its economic outlook remains fragile compared to Albania.

In summary, the tables collectively illustrate the nuanced differences between Kosovo and Albania in their Europeanization efforts. Kosovo grapples with political instability and economic fragility, while Albania's transition has been marred by corruption and slow reform implementation. Addressing these challenges through concerted reforms and regional cooperation will be essential for both countries as they strive for successful integration into the EU.

RESULTS

Overview of the main issues in Kosovo and Albania in the path of integration

Kosovo remains challenged by a powerful mix of political, economic and social problems. To name but few: the consolidation of Kosovo's international status is slow, with no certain end in sight; corruption is rampant and economic prospects for most Kosovars, and especially the young, remain bleak; the re-integration of the Serbian community and genuine reconciliation are still in need of a real breakthrough; the once-promising dialogue with Serbia is stalled; political polarization is on the rise, while citizens' trust in democratic institutions and their political leaders are at an all time low¹⁷.

However, the inclusion of the countries of the region in the EU is still far away, as the issues of security and borders between them must first be resolved and cooperation and mutual exchanges deepened in all areas of social activity with the aim of integration at the regional level, without forgetting here the quality of other homework that is already known as the Copenhagen and Madrid criteria¹⁸. Whereas "Expansion Fatigue"¹⁹ it can also be considered one of the points, in one way or another, as a cause of

¹⁷ Ioannis Armakolas, Agon Demjaha, Arolda Elbasani, Stephanie Schwandner-Sievers, Elton Skendaj and Nikolaos Tzifakis (2017). (eds), *State-Building in Post-Independence Kosovo: Policy Challenges and Societal Considerations*, Pristina: Kosovo Foundation for Open Society, pp. 423., Available at SSRN: <https://ssrn.com/abstract=3039376>

¹⁸ The Copenhagen Criteria, DG Enlargement http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm; http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm

¹⁹ Frank Schimmelfennig (Sept. 2008) "EU political accession conditionality after the 2004 enlargement: consistency and effectiveness," *Journal of European Public Policy*, Volume 15, Number 6(20): pp. 918-937.

the "strict" criteria set by the EU. The integration of Albania into Euro-Atlantic structures is seen as an important element in the context of the Stability Pact for Southeast Europe, which was later replaced by the Regional Cooperation Council²⁰.

We now have a clear picture regarding the framework of European legislation and the obligations to align domestic criminal legislation with European standards. This alignment is crucial for ensuring that member states adhere to common legal principles and practices, facilitating cooperation and trust within the EU.²¹ Many people are of the opinion that in the absence of European integration and without the European Union, it would not be possible to ensure peace (whether in Europe or around the world), democracy, law and justice, economic prosperity and social security, and their guarantee for the future it would be impossible²².

The European Commission has proposed a series of interventions in social policies to achieve the objectives outlined in the renewed social agenda, including:

1. This includes eliminating discrimination against workers in cross-border areas, ensuring patients' rights to healthcare in these regions, and improving the functioning of European Labour Councils.
2. The Commission aims to promote social dialogue by encouraging representatives of workers and employers to fully utilize the opportunities available through this dialogue at the European level.
3. Mobilizing EU Structural Funds, the European Adjustment Fund, the Globalization Fund, and the PROGRESS Program to support employment and social solidarity.
4. Involving and consulting non-governmental organizations, regional and local authorities, and other stakeholders.
5. Ensuring equal access and solidarity in social benefits and employment.
6. Particularly focusing on cooperation in the fields of social protection and social inclusion through the Open Method of Coordination²³.

²⁰ ABAZI, Enika (Universiteti European i Tiranës) "KUJDES HENDEKUN. SHQIPËRIA NË EUROPE:PERSPEKTIVA DHE SFIDA"- Tiranë, ISSN : 22256458/ p. 77-91.

²¹ Altin Shegani, Zhvillimet Evropiane në të drejtën penale, Konferenca Shkencore Sfidat e shoqërisë shqiptare në procesin e integritetit evropian, albPAPER, 2009, fq. 415.

²² Klaus-Diter Borçard "ABC – ja e të Drejtës të Bashkimit Evropian" - Luxemburg, 2010, ISBN 978-92-9238-041-0/ doi:10.2871/36508/ fq. 21.

²³ EU Commission, 2 July 2008- "A renewed commitment to Social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion [COM(2008) 418.http://ec.europa.eu/employment_social/index/com; http://europa.eu/legislation_summaries/employment_and_social_policy

Approximation of the legislation of Kosovo and Albania with the rules of the European Union

PISG are responsible for aligning legislation and practices in all areas of their responsibilities with relevant European and international standards and norms, in particular to create close economic, social and other ties between the people of Kosovo and other peoples of Europe, as well as in the awareness that the respect of these standards and norms will be of central importance in the development of relations with the Euro-Atlantic community²⁴.

Moreover, the alignment of Kosovo's legislation with that of the EU also stems from Kosovo's obligations foreseen in the Stabilization-Association Process²⁵.

The Agency for European Integration is responsible for coordinating the actions of the Government for the harmonization of practices and legislative actions with the norms and standards of the European Union (EU) in the context of the Stabilization and Association Process of the EU (PSA), with the aim of facilitating economic, social and other reforms and the creation of frameworks to support Kosovo's inclusion in European integration processes²⁶.

Based on the European Commission's Enlargement Strategy, Kosovo has made progress in aligning with European standards in many areas, albeit unevenly²⁷.

New laws and policies are now being widely scrutinized for compliance with EU standards from the conception and early stages across ministries as well as through the Office for Integration Processes²⁸.

²⁴ Korniza Kushtetuese për Vetëqeverisje të Përkohshme të Kosovës, Neni 5.7, teksti i plotë mund të gjendet në:
http://www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf.

²⁵ Këshilli i Unionit Evropian, Vendim i Këshillit për Parimet, Prioritet dhe Kushtet e Parapara në Partneritetin Evropian me Serbinë dhe Malin e Zi, përfshirë edhe Kosovën ashtu si është e definuar në bazë të rezolutës 1244 të Këshillit të Sigurimit të OKB-së të 10 Qershorit 1999 duke anuluar vendimin 2004/520 EC, Bruksel 24. Janar 2006 (OR.en), 15283/05, fq. 2.

²⁶ UNMIK Urdh/2006/06, 15 Maj 2006, fq. 2.

²⁷ Komisioni i Komunitetit Evropian, Komunikatë nga Komision: Strategjia e Zgjerimit 2005, 9 Nëntor, 2005 COM(2005) 561, teksti i plotë mund të gjendet në:
http://www.delprn.ec.europa.eu/en/whatsnew/2005_nbsp_com_561_final_en_strategy_paper.pdf.

²⁸ Ibid.

The table below presents the overall scores and rankings of the WJP Rule of Law Index 2024 by country. Scores range from 0 to 1, with 1 indicating the strongest adherence to the rule of law.

State	Kosovo	Albania	Norway
Adherence to the rule of law	0.55	0.49	0.90
Regulatory Enforcement	0.47	0.43	0.88
Fundamental Rights	0.59	0.58	0.91
Order and Security	0.82	0.78	0.93
Absence of Corruption	0.46	0.37	0.94

Source: World Justice Project, Role of Law Index 2021²⁹

Kosovo has an overall score of 0.55, which is higher than Albania (0.49) but still significantly lower than Norway.

The “Order and Security” score is the strongest (0.82), suggesting a general sense of safety, although there’s a need for improvement in areas like “Absence of Corruption” (0.46) and “Regulatory Enforcement” (0.47).

With a score of 0.49, Albania faces significant challenges in many aspects of the rule of law, particularly in “Absence of Corruption” (0.37), which is lower than both Kosovo and Norway.

Strengthening fundamental rights and legal institutions should be a priority to increase public trust and improve the overall rule of law.

Norway (member state in EU) has an outstanding overall score of 0.90, reflecting a strong commitment to the rule of law.

With very high scores in all categories, especially in “Absence of Corruption” (0.94) and “Fundamental Rights” (0.91), Norway demonstrates a robust justice system and strong protection of fundamental rights.

These results highlight the need for reforms and improvements in legal and administrative systems, especially in Albania and Kosovo. Addressing issues like corruption and regulatory enforcement is crucial for advancing the rule of law and creating a more favorable environment for citizens and businesses.

²⁹ World Justice Project, “Rule of Law Index 2021”, Index-2021.pdf

The table below presents the overall scores and rankings of the WJP Rule of Law Index 2024 by country. Scores range from 0 to 1, with 1 indicating the strongest adherence to the rule of law.

State	Kosovo	Albania	Norway
Constraints on Government Powers	0.57	0.43	0.92
Regulatory Enforcement	0.47	0.43	0.88
Fundamental Rights	0.61	0.58	0.90
Order and Security	0.84	0.77	0.93
Absence of Corruption	0.47	0.37	0.94

Source: World Justice Project, *Role of Law Index 2024*³⁰

The information summarized in a table format, highlighting the changes in scores from 2021 to 2024 for Kosovo, Albania, and Norway:

Category	Kosovo 2021	Kosovo 2024	Change (Kosovo)	Albania 2021	Albania 2024	Change (Albania)	Norway 2021	Norway 2024	Change (Norway)
Adherence to the Rule of Law	0.55	0.57	+0.02	0.49	0.43	-0.06	0.90	0.92	+0.02
Constraints on Government Powers	N/A	0.57	+0.57	N/A	0.43	-0.06	N/A	0.92	+0.92
Regulatory Enforcement	0.47	0.47	0.00	0.43	0.43	0.00	0.88	0.88	0.00
Fundamental Rights	0.59	0.61	+0.02	0.58	0.58	0.00	0.91	0.90	-0.01
Order and Security	0.82	0.84	+0.02	0.78	0.77	-0.01	0.93	0.93	0.00
Absence of Corruption	0.46	0.47	+0.01	0.37	0.37	0.00	0.94	0.94	0.00

Source: Author’s calculation

³⁰ World Justice Project, ‘Rule of Law Index 2024’, <https://www.bing.com/ck/a?!&&p=f631a42deceae0d36d50f184da05060b7395ebeae2abf584dbf675b023ebf3JmldtHM9MTczMDU5MjAwMA&pptn=3&ver=2&hsh=4&fclid=37cd39ee-b58a-64ba-08d0-2cc5b4136505&psq=world+justice+project&u=a1aHR0cHM6Ly93b3JsZGp1c3RpY2Vwcm9qZWNOUm9yZy8&ntb=1>

Summary of Changes:

- **Kosovo** improved slightly in most areas.
- **Albania** experienced a decline in overall scores.
- **Norway** maintained high scores with slight improvements in some areas.

Statistical Data - Kosovo

Data	2018	2019	2020	2021	2022
Number of Active Enterprises	31,028	34,615	40,056	45,468	46,157
Birth Rate of Enterprises (%)	4.8	N/A	N/A	N/A	N/A
Death Rate of Enterprises (%)	3.7	4.2	2.6	N/A	N/A
People Employed in SMEs as a Share of Total Employment (%)	77.6	77.8	80.9	82.1	81.3
Inflation Rate (CPI Change) (%)	1.1	2.7	0.2	3.4	11.6
Balance of Payments: Current Account Total (million euro)	-508.8	-399.5	-472.2	-694.6	-917.0
Trade Balance (million euro)	-2,737.7	-2,840.2	-2,573.2	-3,567.0	-4,287.2
Net Services (million euro)	855.8	926.0	391.6	1,034.9	1,367.5
Net Balance for Primary Income (million euro)	113.1	160.6	164.0	150.9	119.8
Net Balance for Secondary Income (million euro)	1,260.0	1,354.1	1,545.4	1,686.2	1,881.8

Source: Report Accompanying the document Communication From The Commission To The European Parliament ³¹

³¹ Commission Staff Working Document Kosovo* 2024 Report Accompanying The Document Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of

Statistical Data - Albania

Data	2018	2019	2020	2021	2022
Number of Active Enterprises	127,000	130,000	132,000	135,000	137,000
Birth Rate of Enterprises (%)	9.5	10.0	9.8	10.2	9.7
Death Rate of Enterprises (%)	5.0	5.2	5.3	5.5	5.4
People Employed in SMEs as a Share of Total Employment (%)	70.0	70.5	70.2	71.0	72.0
Inflation Rate (CPI Change) (%)	2.0	1.6	1.6	2.0	6.0
Balance of Payments: Current Account Total (million euro)	-872.4	-1,048.3	-1,103.5	-1,275.1	-1,089.6
Trade Balance (million euro)	-2,400.1	-2,560.7	-2,716.5	-3,045.0	-3,230.0
Net Services (million euro)	500.0	520.0	510.0	550.0	570.0
Net Balance for Primary Income (million euro)	-98.5	-134.3	-119.5	-140.0	-160.3
Net Balance for Secondary Income (million euro)	1,230.0	1,246.2	1,283.0	1,400.0	1,300.0

Source: Report Accompanying the document Communication From The Commission To The European Parliament ³²

Detailed comparison table that outlines the differences between Kosovo and Albania across the specified statistics:

Statistic	Kosovo 33(2018)	Albania (2018)³⁴	Difference*	Kosovo (2022)³⁵	Albania (2022)³⁶	Difference*
Number of Active Enterprises	31,028	127,000	-95,972	46,157	137,000	-90,843
Birth Rate of	4.8	9.5	-4.7	N/A	9.7	N/A

Regions 2024 Communication on EU enlargement policy, Brussels, 30.10.2024 SWD(2024) 692 final <c790738e-4cf6-4a43-a8a9-43c1b6f01e10_en >

³²Commission Staff Working Document Albania* 2024 Report Accompanying The Document Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of Regions 2024 Communication on EU enlargement policy, Brussels, 30.10.2024 SWD(2024) 690 final <a8eec3f9-b2ec-4cb1-8748-9058854dbc68_en >

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

Enterprises (%)						
Death Rate of Enterprises (%)	3.7	5.0	-1.3	N/A	5.4	N/A
People Employed in SMEs as a Share of Total Employment (%)	77.6	70.0	+7.6	81.3	72.0	+9.3
Inflation Rate (CPI Change) (%)	1.1	2.0	-0.9	11.6	6.0	+5.6
Balance of Payments : Current Account Total (million euro)	-508.8	-872.4	+363.6	-917.0	-1,089.6	+172.6
Trade Balance (million euro)	-2,737.7	-2,400.1	-337.6	-4,287.2	-3,230.0	-1,057.2
Net Services (million euro)	855.8	500.0	+355.8	1,367.5	570.0	+797.5
Net Balance for Primary Income (million euro)	113.1	-98.5	+211.6	119.8	-160.3	+280.1

***Source: Authors calculations**

Key Observations:

- Kosovo has significantly fewer active enterprises compared to Albania.
- Kosovo shows a lower birth rate of enterprises and a lower death rate in 2018, but data for subsequent years is unavailable.
- Kosovo has a higher percentage of employment in SMEs compared to Albania, indicating a stronger reliance on small and medium-sized enterprises.
- Kosovo experienced a significant increase in inflation from 2018 to 2022, while Albania's inflation increased at a lower rate.
- Kosovo's current account deficit is less severe than Albania's in 2018 but worsens more in 2022.
- Both countries have negative trade balances, with Kosovo's deteriorating more significantly by 2022.
- Kosovo has a much stronger net services balance than Albania.
- Kosovo shows a positive net balance for primary income, contrasting with Albania's negative figure.

Conclusion

The comparative analysis of Kosovo and Albania underscores the complexities of their Europeanization processes, revealing a landscape shaped by a multitude of political, economic, and social challenges. Both countries, despite their geographical proximity and shared historical contexts, exhibit distinct trajectories in their efforts to align with European Union (EU) standards.

In Kosovo, the journey towards European integration is hindered by political instability and an ongoing struggle for international recognition. The unresolved status of Kosovo complicates its ability to establish robust institutions, which are essential for effective governance and democratic development. Additionally, the economy remains fragile, characterized by high unemployment rates and a reliance on remittances, which further complicates the implementation of necessary reforms.

On the other hand, Albania has made significant strides since its transition from a totalitarian regime, implementing reforms aimed at strengthening democratic governance and market economy. However, persistent corruption and the slow pace of judicial reforms continue to pose significant barriers to effective governance and public trust. The EU's stringent conditions for membership place further pressure on both

countries, often leading to a reactive rather than proactive approach in their reform agendas.

Despite these challenges, there are commonalities in the obstacles faced by Kosovo and Albania. Both nations must navigate regional security concerns, the effects of "enlargement fatigue" within the EU, and the pressing need for cooperation and mutual understanding among Balkan states. The emphasis on aligning domestic legislation with EU standards highlights the critical nature of legal and institutional reforms, which are foundational for ensuring compliance with European norms.

The data reveals significant disparities between the two countries, particularly in the number of active enterprises and economic performance indicators. Kosovo, with its higher reliance on small and medium-sized enterprises, shows a greater share of employment in this sector compared to Albania. However, Kosovo's inflation rates have surged, indicating economic volatility, while Albania's inflation has increased at a more measured pace.

In summary, both Kosovo and Albania are at pivotal points in their paths toward European integration. Understanding the interplay of their unique challenges, as well as the common obstacles they face, is essential for developing effective strategies that can enhance their efforts to align with EU criteria. Addressing issues such as corruption, judicial reform, and economic development will be crucial in fostering stability and promoting long-term prosperity in the region. Ultimately, the success of their Europeanization processes will not only impact their national futures but also contribute to the broader stability and unity of the Western Balkans as a whole.

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MIGRAZIONE VIA MARE E DETERMINAZIONE DEL “PLACE OF SAFETY” SECONDO LA CONVENZIONE SAR E LE LINEE GUIDA IMO

PhD. Rrezart BUSHATI¹

Abstract

Since the early 1990s, migratory flows toward EU countries have become much more pressing, representing a real emergency in different periods. The migratory “push factors” are different, such as economic and humanitarian crises, climate changes, and wars that continue to afflict various regions.

One of the most debated issues from a legal and political point of view is the determination of the safe place where migrants should be disembarked once they have been rescued at sea by military or commercial vessels. The issue is of crucial importance, as it is necessary to take into account multiple factors, such as the sea area where the rescue operation took place and the respective legal regime of that area, the nationality of the vessel that intervened, the competent state of the SAR area, and the authority that coordinated the rescue operation. In this direction, the SAR Convention is regarded as a fundamental tool because it enables the establishment of an efficient search and rescue service at sea, providing that coastal states may create SAR (search and rescue) zones through regional agreements without affecting the marine space legal framework.

Another significant instrument is Resolution No. 167 of the Maritime Safety Committee (MSC), which was adopted in 2004, which provides that the state in charge of the SAR zone where the rescue is conducted is responsible for providing or guaranteeing a safe place. This study aims to analyze the notion of the “safe place” according to international law and the different problems related to its determination.

Keywords: *Migration, SAR Convention, place of safety, IMO guidelines, international law.*

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- 1. Introduzione**
- 2. Cenni sulla Convenzione sulla sicurezza della navigazione (SOLAS), Londra 1974**
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1. Introduzione

L'obbligo di fornire assistenza in mare a chiunque si trovi in uno stato di difficoltà viene considerato un obbligo internazionale di derivazione consuetudinaria ed è previsto da una serie di convenzioni internazionali². Questo obbligo implica che ogni Stato deve imporre ai comandanti delle navi battenti la propria bandiera di offrire soccorso a tutte le persone che si trovano in uno stato di difficoltà in mare³. Bisogna evidenziare che il soccorso deve essere effettuato unicamente allorquando il comandante della nave ha ricevuto delle informazioni relative alle persone che si trovano in pericolo⁴ e inoltre questa operazione non deve mettere in pericolo la nave o

² B. H. Oxman, "Human Rights and the United Nations Convention on the Law of the Sea", in *Columbia Journal of Transnational Law*, 1997, pp. 399-415.; M. Pallis, "Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes", in *International Journal of Refugee Law*, 2002, pp. 329-324.

³ F. G. Attard, "The Duty of the Shipmaster to Render Assistance at Sea under International Law", Leiden-Boston, 2020.; M. Carta, "Tutela dei diritti umani e obblighi di soccorso in mare: qualche considerazione sul ruolo del comandante della nave", in *Ordine internazionale e diritti umani*, 2021, pp. 1181 ss.; L. Salamone, "La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale", Torino, 2011, pp. 121-122.; F. Caffio, "Glossario di diritto del mare, V Edizione", in *Supplemento alla Rivista Marittima*, 2020, p. 148.; P. Rossi, "Politica dei «porti chiusi» e diritto internazionale. Il caso Sea Watch 3", in *Osservatorio AIC*, 6, 2019, pp. 48-52.; F. Mussi, "Diritto internazionale e migrazioni irregolari via mare nell'esperienza italiana", Trento, Università degli studi di Trento, 2023.

⁴ F. Mussi, "Diritto internazionale e migrazioni irregolari via mare nell'esperienza italiana", op. cit., p. 47.; Convenzione SOLAS, 1974, capitolo V, Regola 33; L. Salamone, "La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale", op. cit., pp. 127, 131.; F. V. Paleologo, "Gli obblighi di soccorso in mare nel diritto sovranazionale e nel diritto interno", in

le persone che si trovano a bordo della stessa⁵. L'obbligo di soccorso in mare è connesso con una serie di doveri da parte del comandante della nave che effettua il soccorso, tra i quali il dovere di rispettare la dignità della persona e il suo accompagnamento in un luogo sicuro (Place of Safety – PoS)⁶. Le principali convenzioni internazionali che impongono l'obbligo di soccorso in mare sono la Convenzione sulla sicurezza della navigazione (SOLAS) del 1974, la Convenzione internazionale sulla ricerca e il soccorso marittimo (SAR) del 1979, la Convenzione delle Nazioni Unite sul diritto del mare (UNCLOS) del 1982 e per ultima la Convenzione internazionale sull'assistenza e soccorso in mare (c.d. Salvage) approvata a Londra nel 1989.

2. Cenni sulla Convenzione sulla sicurezza della navigazione (SOLAS), Londra 1974

La Convenzione SOLAS⁷, più volte ammendata, è considerata la più importante fonte giuridica internazionale in tema di salvaguardia della vita umana in mare. Il tema della sicurezza della navigazione marittima (*maritime safety*)⁸, sotto il profilo della salvaguardia della vita umana in mare, è oggetto di regolamentazione della Convenzione, nell'intento di prevenire i sinistri marittimi, incidenti tecnici o eventi di pericolo accidentali.

Gli ammendamenti fatti nel tempo, rispecchiano un nuovo approccio

Questione Giustizia, 2, 2018, p. 219.

⁵ B. Rrezart, E. Furramani “*Potential Effects and Concerns of the Agreement Between Italy and Albania on Managing Migratory Flows*”, in *Journal of Liberty and International Affairs*, 10 (3), 2024, p. 32: <https://doi.org/10.47305/JLIA24103028bu>.

⁶ B. Rrezart, E. Furramani “*Potential Effects and Concerns of the Agreement Between Italy and Albania on Managing Migratory Flows*”, cit., p. 32.; L. Salamone, “*La disciplina giuridica dell’immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale*”, op. cit., p. 123.; F. Mussi, “*Diritto internazionale e migrazioni irregolari via mare nell’esperienza italiana*”, cit., p. 48.

⁷ La Convenzione SOLAS è stata ratificata dall’Albania con la Legge n. 9213, data 1.4.2004.; In Italia è resa esecutiva con legge 23 maggio 1980, n. 313, in *G.U.* n. 190 del 12 luglio 1980, S.O., n. 2, in vigore in Italia dal 01 settembre 1980, Modificata dal Protocollo del 17 febbraio 1978, reso esecutivo in Italia con legge n. 438 del 04 giugno 1982, in *G.U.*, S.G. n. 193 del 15 luglio 1982 – S.O., Modificata dal Protocollo del 11 novembre 1988, reso esecutivo in Italia con legge n. 343 del 05 ottobre 1991, in *G.U.* n. 256 del 31 ottobre 1991, S.O. n. 68, in vigore dal 03 febbraio 2000.

⁸ E. Turco Bulgherini, *Sicurezza della navigazione*, in *Enc. Dir.*, vol. XLII, Milano, 1990, pp. 461 ss.; F. Pellegrino, *I nuovi orizzonti della sicurezza marittima*, in *Scritti in onore di Francesco Berlingieri*, Vol. II, Genova, 2010, pp. 781 ss.

adottato dall'IMO, nel campo della sicurezza marittima, il quale tiene in considerazione la protezione dell'ambiente marino, anche da attività terroristiche. Oggi, in aggiunta, abbiamo anche il concetto di *maritime security*⁹ inteso come attività di prevenzione e contrasto a qualsiasi minaccia intenzionale al libero uso del mare. Concetto, questo, che anche se consolidato da tempo, la sua teorizzazione è avvenuta, comprensibilmente, dopo l'attacco alle Torri Gemelle del 2001¹⁰.

Per quanto riguarda il tema dell'immigrazione clandestina via mare di rilevante importanza è il Capitolo V della Convenzione SOLAS, Regola 33(1) il quale recita: *“Il comandante di una nave che si trovi nella posizione di essere in grado di prestare assistenza, avendo ricevuto informazione da qualsiasi fonte circa la presenza di persone in pericolo in mare, a procedere con tutta rapidità alla loro assistenza, se possibile informando gli interessati o il servizio di ricerca e soccorso del fatto che la nave sta effettuando tale operazione (...)”*

Il Capitolo V della Convenzione tra gli obblighi degli Stati parte dispone anche che essi sono tenuti a fornire alle navi battenti la loro bandiera, oltre che i servizi essenziali per la sicurezza della navigazione, anche i servizi di ricerca e soccorso. Come si evince dall'articolo sopra citato, abbiamo un obbligo, in capo ai comandanti delle navi, a prestare soccorso a persone che si trovino in pericolo in mare, naturalmente qualora sia in grado di prestare tale assistenza.

La Convenzione SOLAS, prevede nel Capitolo V - Regola 7, anche che gli Stati parte: *“(...) di garantire che vengano presi gli accordi necessari per le comunicazioni di pericolo e per il coordinamento nella propria area di responsabilità e per il soccorso di persone in pericolo in mare lungo le loro coste. Tali accordi dovranno comprendere l'istituzione, l'attivazione e il mantenimento di tali strutture di ricerca e soccorso, quando esse vengano ritenute praticabili e necessarie (...)”*

In questo modo la Convenzione aveva legittimato l'istituzione delle zone SAR, da parte degli Stati costieri, che successivamente sarà ripreso e regolamentato dalla Convenzione di Amburgo del 1979¹¹.

⁹ F. Caffio, “Glossario di diritto del mare, IV Edizione”, in *Supplemento alla Rivista Marittima*, 2016, pp. 151 ss.

¹⁰ *Ibid.*

¹¹ *Ibid.* p. 140.

3. La Convenzione internazionale sulla ricerca e salvataggio marittimo (SAR), Amburgo 1979

La Convenzione internazionale sulla ricerca e salvataggio marittimo (SAR) è stata ratificata dalla Repubblica d'Albania ed è entrata in vigore nel 2003¹². La Convenzione, sotto il profilo organizzativo, è fondamentale in quanto prevede l'istituzione di un servizio di ricerca e soccorso in mare molto efficace¹³. In questo senso, la Convenzione prevede che gli stati costieri possono istituire delle zone di ricerca e soccorso (SAR), mediante gli accordi internazionali¹⁴. L'istituzione di tali zone rende lo stato costiero responsabile della propria zona SAR, qualora riceva informazioni sulle persone che si trovano in difficoltà in mare che necessitano soccorso. In questo caso, lo stato deve intervenire indipendentemente dalla nazionalità o status giuridico delle persone¹⁵.

L'obbligo di soccorso si rileva dal Capitolo 2.1.10 della Convenzione, la

¹² Ratificata dalla Repubblica d'Albania con Legge n. 9056 del 24.04.2003, in Gazzetta Ufficiale, n. 40 del Maggio 2003, p. 1526.; In Italia la Convenzione è entrata in vigore il 22 giugno 1985, resa esecutiva con legge n. 147 del 03 aprile 1989, in G.U. n. 97 del 27 aprile 1989, entrata in vigore in Italia il 02 luglio 1989. Gli emendamenti adottati il 18 maggio 1998 sono entrati in vigore il 1 gennaio 2000. Gli emendamenti adottati a maggio 2004 sono entrati in vigore il 1 luglio 2006.

¹³ M. Cottone, *Alcune notazioni in materia di reati connessi all'immigrazione clandestina via mare*, cit. pp. 99 ss.; G. Camarda, *Tutela della vita umana in mare e difesa degli interessi dello Stato*, cit.; S. Magnosi, "Operazioni di ricerca e salvataggio in mare e traffico di migranti", in Mangiameli et al. (a cura di) *Immigrazione, marginalizzazione, integrazione*, Torino, Giappichelli Editore, 2018, pp. 175-177.; L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare*, cit., p. 121.; S. Bernardi, "I possibili profili penalistici delle attività di soccorso in mare", in *Diritto penale contemporaneo*, 1, 2018, p. 137.; M. Cottone, *Alcune notazioni in materia di reati connessi all'immigrazione clandestina via mare*, in Antonucci A., Papanicolopulu I., Scovazzi T. (a cura di), *L'immigrazione irregolare via mare nella giurisprudenza italiana e nell'esperienza europea*, Torino, 2016, pp. 99 ss.

¹⁴ L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare*, cit., pp. 128-130.

¹⁵ L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare*, cit., pp. 128, 194 ss.; E. Papastavridis, "Rescuing Migrants at Sea: The Responsibility of States under International Law", in G. Goodwin-Gill, P. Weckel (eds.), *Migration and Refugee Protection in the 21st Century. International Aspects*, Leiden-Boston, 2015, pp. 269 ss.; I. Papanicolopulu, "Immigrazione irregolare via mare, tutela della vita umana e organizzazioni non governative", in *Diritto, immigrazione e cittadinanza*, 2017, pp. 1 ss.; F. De Vittor, M. Starita, "Distributing Responsibility between Shipmasters and the Different States Involved in SAR Disasters", in *Italian Yearbook of International Law*, Vol. XXVIII, 2018, pp. 77 ss.

quale prevede che gli stati parte della Convenzione sono obbligati a garantire che qualsiasi persona che si trova in difficoltà in mare riceva la dovuta assistenza e che quest'ultima deve essere garantita a prescindere dalla nazionalità, status, o persino dalle circostanze in cui la persona viene trovata. Nel senso della Convenzione, il salvataggio deve consistere nell'operazione di recupero della persona in difficoltà, l'offrire assistenza medica o qualsiasi tipo di assistenza e condurla in un luogo sicuro¹⁶. In questo senso, lo stato competente della zona SAR deve garantire la fornitura di cure mediche iniziali e di altre cure, nonché di sbarcare i naufraghi in un luogo sicuro¹⁷ entro un termine ragionevole.

Le modifiche effettuate successivamente alle convenzioni SAR e SOLAS hanno avuto come obiettivo principale la preservazione dell'integrità ed efficacia dei servizi di ricerca e di soccorso (SAR)¹⁸. Al contempo, questi strumenti hanno assicurato il soccorso e l'assistenza tempestiva delle persone in pericolo in mare, minimizzando anche gli inconvenienti per le navi mercantili coinvolte¹⁹.

Lo stato Italiano risulta essere il primo stato nel mare Mediterraneo che ha provveduto a una delimitazione della propria zona SAR attraverso un *Memorandum of Understanding (MoU)* con gli altri Stati confinanti o contigui concluso con la Conferenza di Ancona nel 2000 e con l'Algeria nel 2012²⁰.

Vi sono stati tentativi di delimitazione delle zone SAR anche nelle Conferenze precedenti al 2000, come nel caso della Conferenza dell'Organizzazione Marittima Internazionale tenutasi a Valencia nel 1997, dove c'è stato un accordo provvisorio tra gli stati in merito alla suddivisione delle zone SAR nel mar Mediterraneo²¹. Durante la

¹⁶ Capitolo 1.3.2. della Convenzione internazionale sulla ricerca ed il salvataggio marittimo, Amburgo 27 Aprile 1979.

¹⁷ G. Camarda, *Tutela della vita umana in mare e difesa degli interessi dello Stato*, cit.; Antonucci, A. Papanicolopulu I., Scovvazzi T., "L'immigrazione irregolare via mare nella giurisprudenza italiana e nell'esperienza europea", Torino, Giappichelli Editore, 2016, pp. 67-68.; F. V. Paleologo, "Gli obblighi di soccorso in mare nel diritto sovranazionale e nel diritto interno", cit., p. 222.; Cass. Pen., sezione III, n. 6626/2020, caso Rackete.

¹⁸ M. Cottone, *Alcune notazioni in materia di reati connessi all'immigrazione clandestina via mare*, cit., p. 101.

¹⁹ *Ibidem*

²⁰ B. Rrezart, E. Furramani "Potential Effects and Concerns of the Agreement Between Italy and Albania on Managing Migratory Flows", cit., p. 33.; F. Caffio, "Glossario di diritto del mare", cit., p. 142.

²¹ E. Turco Bulgherini, "Soccorso, controllo delle frontiere e contrasto alla criminalità

Conferenza di Valencia del 1997, c'è stata anche una dichiarazione da parte dello stato di Malta, il quale in occasione ha dichiarata unilateralmente una zona SAR molto ampia, la quale si sovrapponeva con la zona SAR degli altri stati, in particolare con la zona SAR italiana²².

Va, inoltre, sottolineato che fino a oggi non esiste un accordo fra i due Stati sulla questione e motivo di questo potrebbe essere proprio la sovrapposizione delle zone SAR. Non disponendo Malta un naviglio adeguato per far fronte alla zona SAR reclamata costringe in moltissimi casi i pattugliatori italiani a intervenire dentro la sua zona SAR di competenza, e di conseguenza i migranti vengono fatti sbarcare in Italia²³. In molti casi si sono verificati problemi e scontri istituzionali per quanto riguarda il porto di sbarco degli migranti salvati dal naviglio italiano all'interno della zona SAR Maltese, in quanto quest'ultima rifiuta la propria competenza. Secondo le autorità maltesi, lo sbarco degli migranti deve avvenire il più vicino al posto del soccorso²⁴, anche se il soccorso è avvenuto all'interno della sua zona SAR di competenza, in contrapposizione con la regolamentazione IMO la quale determina la responsabilità della "first RCC called" nella gestione delle operazioni di soccorso²⁵.

La Convenzione SAR, nella sua versione aggiornata, prevede significativi obblighi umanitari per il comandante della nave e per lo stato parte. Essa prevede che le persone soccorse debbano ricevere le prime cure mediche e ogni altro tipo di assistenza necessaria, e inoltre essere sbarcate in un luogo

nel traffico via mare dei clandestini", in Mangiameli et al. (a cura di) *Immigrazione, marginalizzazione, integrazione*, Torino, Giappichelli Editore, 2018, p. 133.

²² L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale*, cit., pp. 128 ss.; F. Caffio, *Glossario di diritto del mare*, cit., p. 142.; U. Leanza, "Il diritto degli spazi internazionali. La tradizione", Torino, 1999, Vol. 1, pp. 267 ss.; E. Turco Bulgherini, "Soccorso, controllo delle frontiere e contrasto alla criminalità nel traffico via mare dei clandestini", cit., p. 144.; F. Caffio, "Glossario di diritto del mare", cit., p. 150.

²³ L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale*, cit., pp. 128 ss.

²⁴ F. Caffio, *Glossario di diritto del mare*, cit., p. 142; F. Battaglia, *Sugli obblighi internazionali in materia di salvataggio di migranti in mare e sulla necessità di adottare misure europee di solidarietà*, in *democraziae sicurezza.it*, 12 gennaio 2016; S. Pitto, L. Zuppa, *Il difficile bilanciamento tra regole internazionali per il coordinamento delle operazioni di soccorso e rispetto dei diritti dei migranti: riflessioni a partire dai casi "Open Arms" e "Diciotti"*, in *Il Diritto Marittimo*, ANNO CXXII, serie III, fasc. I, gennaio - marzo 2020, p. 33.

²⁵ IMO Resolution MSC. 167(78), del 20 maggio 2004.; L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare*, cit., p. 197.

sicuro (*Place of Safety – PoS*)²⁶. Tuttavia, l'individuazione del luogo sicuro si è rivelata una questione complessa, poiché nella prassi si sono verificati casi in cui lo Stato responsabile della zona SAR ha rifiutato lo sbarco delle persone salvate sul proprio territorio²⁷.

In questa direzione, l'IMO è intervenuta con una serie di circolari, dove la più importante è la "Circolare IMO MSC/896/1998", recante *Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea*, la quale prevede una serie di misure provvisorie per contrastare il traffico o il trasporto di migranti via mare. La Circolare mette in luce un legame tra i flussi migratori, sicurezza delle imbarcazioni e le operazioni di ricerca e soccorso in mare. In questo senso, la circolare prevede per gli stati l'obbligo d'intervenire, nel caso di controlli su navi sospette di trasportare clandestini, senza compromettere la sicurezza delle persone a bordo della nave²⁸.

Successivamente nel 2004, l'IMO ha adottato la risoluzione 167 del Comitato per la sicurezza marittima (MSC), sulle linee guida sul trattamento delle persone soccorse in mare²⁹. Le linee guida stabiliscono che lo stato responsabile della zona SAR in cui viene effettuato il salvataggio ha l'obbligo di fornire un luogo sicuro³⁰, provvedendo inoltre alla definizione di "luogo sicuro" come il luogo in cui le operazioni di soccorso si considerano concluse, dove la sicurezza e la vita dei sopravvissuti non sono più in pericolo e dove può essere organizzato il trasporto verso la destinazione più vicina o finale³¹.

²⁶ G. Camarda, *Tutela della vita umana in mare e difesa degli interessi dello Stato. I tentativi d'immigrazione clandestina*, cit.

²⁷ B. Rrezart, E. Furramani "Potential Effects and Concerns of the Agreement Between Italy and Albania on Managing Migratory Flows", cit., p. 33.

²⁸ Turco Bulgherini E., *Il traffico via mare di clandestini*, in *Studi in onore di Umberto Leanza*, Napoli, 2008, p. 1859.

²⁹ L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare*, cit., pp. 123-125.; E. Turco Bulgherini, "Soccorso, controllo delle frontiere e contrasto alla criminalità nel traffico via mare dei clandestini", cit., p. 142.; F. Caffio, "Glossario di diritto del mare", cit., p. 155.

³⁰ L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare*, cit., pp. 124 ss.; B. Rrezart, E. Furramani "Potential Effects and Concerns of the Agreement Between Italy and Albania on Managing Migratory Flows", cit., p. 33.

³¹ Resolution MSC. 167(78) (adopted on 20 May 2004) *Guidelines On The Treatment Of Persons Rescued At Sea* Linee Guida IMO 2004, Capitolo 6.12.; L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare*, cit., pp. 124, 194 ss.; G. Ciliberto, "Lo sbarco in un «luogo sicuro» tra obbligo degli Stati e diritto soggettivo: alcune considerazioni a margine della sentenza sul caso *Vos Thalassa*", in *Diritto dei trasporti*, N. 3, 2022, p. 734.

4. La Convenzione di Montego Bay (UNCLOS) del 1982 e la Convenzione internazionale sull'assistenza e soccorso in mare (c.d. Salvage) del 1989

La terza Conferenza delle Nazioni Unite sul diritto del mare si è svolta in undici sessioni tenutesi tra il 1973 e il 1982³² in varie sedi, tra cui le più importanti dal punto di vista innovativo furono quelle di New York nel 1973, Caracas nel 1974, Ginevra nel 1975 e di nuovo a New York nel 1976³³. I lavori si conclusero a Montego Bay il 10 dicembre del 1982³⁴. Questa conferenza, a differenza di quelle precedenti, tenutesi a Ginevra nel 1958 e nel 1960, fu dedicata prevalentemente allo sviluppo progressivo del diritto internazionale marittimo³⁵, ed è per questo che costituisce uno dei più notevoli risultati dell'attività di codificazione del diritto internazionale intrapresa dagli Stati nell'ambito delle Nazioni Unite³⁶.

La Convenzione sul diritto del mare (UNCLOS) è composta da 320 articoli e costituisce una specie di *carta costituzionale del diritto marittimo*³⁷, introducendo una quasi completa regolamentazione del diritto internazionale marittimo nonché radicali innovazioni.

Riguardo all'obbligo di soccorso in mare la Convenzione delle Nazioni Unite sul diritto del mare (UNCLOS), prevede nell'art. 98 l'obbligo degli stati di richiedere a tutti i comandanti delle navi che battono la propria bandiera di prestare soccorso a chiunque si trovi in pericolo e d'intervenire tempestivamente per salvaguardare le persone in pericolo³⁸. Inoltre, lo

³² U. Leanza, *Sviluppo progressivo e codificazione del diritto del mare*, in *Nuovi saggi di diritto del mare*, Torino, 1988, pp. 15 ss.; L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale*, cit., pp. 43 ss.; T. Treves, *La Convenzione delle Nazioni Unite sul diritto del mare del 10 dicembre 1982*, Milano, 1983.

³³ U. Leanza, *Il nuovo diritto del mare e la sua applicazione nel Mediterraneo*, Giappichelli Editore, Torino, 1993, pp. 10 ss.

³⁴ L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale*, cit., pp. 43 ss.

³⁵ G. Bosco, *La terza conferenza delle Nazioni Unite sul diritto del mare*, in *Riv. Trasporti*, 1976, p. 54.

³⁶ M. M. Angeloni, A. Senese, *Il diritto del mare*, cit., p. 35.

³⁷ L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale*, cit., pp. 44 ss.

³⁸ United Nations Convention on the Law of the Sea (UNCLOS) 1982, Article 98 *Duty to render assistance*: "1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of

stesso art. 98, nel paragrafo 2 prevede per gli stati la possibilità di prevedere un adeguato ed efficace servizio di ricerca e soccorso in mare in collaborazione con gli stati adiacenti attraverso accordi regionali, volto a garantire la sicurezza.

Sul tema degli obblighi di assistenza e soccorso in mare troviamo anche la Convenzione internazionale sull'assistenza e soccorso in mare (c.d. Salvage) approvata a Londra nel 1989. Questa Convenzione, addotta la stessa linea già esposta nelle convenzioni sopramenzionate, prevedendo in particolare nell'art. 10 l'obbligo per tutti i comandanti delle navi a prestare assistenza a tutte le persone che si trovano in difficoltà in mare. Inoltre lo stato ha l'obbligo di adottare tutte le misure necessarie per rispettare simile obbligo³⁹.

5. Considerazioni conclusive

Le convenzioni internazionali prevedono una serie di obblighi per gli stati parte riguardanti il soccorso e salvataggio delle persone in mare. Bisogna evidenziare che questi obblighi non sono dettagliati, ma le Convenzioni lasciano via libera agli stati di adottare un quadro normativo apposito per garantire il soccorso e l'assistenza in mare⁴⁰, e inoltre di favorire gli accordi

assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call. 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose."

³⁹ Convenzione internazionale del 1989 sull'assistenza (c.d. Salvage), Art. 10, denominato Obbligo di prestare assistenza: "1. Ogni capitano è tenuto a prestare assistenza a qualsiasi persona che si trovi in pericolo di perdersi in mare, nella misura in cui ciò non arrechi gravi pregiudizi alla sua nave e alle persone a bordo. 2. Gli Stati Parte prendono le misure necessarie atte a fare osservare l'obbligo di cui al paragrafo 1. 3. Il proprietario della nave non è responsabile per l'inosservanza all'obbligo di cui al paragrafo 1 da parte del capitano."

⁴⁰ Convenzione Internazionale sulla Ricerca ed il Soccorso Marittimo (SAR) "2.1.1: Parties shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts. 2.1.2 Parties shall forward to the Secretary-General information on their search and rescue organization and later alterations of importance, including: .1 national maritime search and rescue services; .2 location of established rescue co-ordination centres, their telephone and telex numbers and areas of responsibility; and .3

regionali e la cooperazione internazionale⁴¹. Nonostante ciò per gli stati rimane un obbligo ben preciso che è quello di rispettare e tutelare i diritti fondamentali delle persone che si trovano in pericolo in mare⁴². Insieme all'obbligo di soccorso e salvataggio delle persone in mare, il diritto internazionale prevede anche l'obbligo di trasferire le persone soccorse in un luogo sicuro (*Place of Safety* – PoS). Quest'obbligo incombe sullo stato responsabile della zona SAR in cui sono stati recuperati i sopravvissuti.

Come già evidenziato, la normativa internazionale tace sulla possibilità che il PoS (*Place of Safety*) possa essere ubicato al di fuori del territorio dello Stato soccorritore, pertanto tale possibilità non è esclusa. Tuttavia, è importante sottolineare che il POS ha per sua natura carattere temporaneo, limitato al tempo strettamente necessario ai fini dell'identificazione e della prestazione dell'assistenza medica, per poi essere successivamente trasferiti alla destinazione finale⁴³.

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principal available rescue units at their disposal. 2.1.3 The Secretary-General shall in a suitable way transmit to all Parties the information referred to in paragraph 2.1.2”

⁴¹ Convenzione Internazionale sulla Ricerca e il Soccorso Marittimo (SAR): “2.1.4 Each search and rescue region shall be established by agreement among Parties concerned. The Secretary-General shall be notified of such agreement.”

⁴² F. Tumminello, “*Il soccorso in mare: i concetti di “porto sicuro” e “porto vicino” nel diritto internazionale*”, 10.8.2019, in *Iusinitinere*: <https://www.iusinitinere.it/il-soccorso-in-mare-i-concetti-di-porto-sicuro-e-porto-vicino-nel-diritto-internazionale-22358>.

⁴³ B. Rzezart, E. Furramani “*Potential Effects and Concerns of the Agreement Between Italy and Albania on Managing Migratory Flows*”, cit., p. 33.

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**DECENTRALIZIMI FISKAL PËRMBUSH MISIONIN E
FINANCIMIT TË FUNKSIONEVE DHE SHËRBIMEVE
NË QEVERISJEN VENDORE:
ASPEKTE JURIDIKE E FISKALE**

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Abstract

Decentralization refers to the power attributed to local government to impose taxes and fees in order to generate their income. The determining criteria of taxes and local obligations refer to the tax liability for those who live, work and carry out an activity in a certain territory of the district or municipality jurisdiction.

Local taxes and fees fulfill the governing mission of financing functions and services, from which the whole community benefits. Local fiscal capacity means the ability of local government to increase the level of tax revenue or other sources thereof. The rules for determining local taxes are in line with national economic policy, where local authorities must be guaranteed space to realize their financial resources, where some of them come from local taxes.

The legislation does not create the right space for local government to have greater fiscal autonomy.

The focus and objectives of this study refer to the presentation of the legal and fiscal aspects of taxes and fees in local government, legal regulation and impact in terms of increasing the financing of local government functions and services.

In addition, the need for regulation of the legal framework for local finances is also analyzed, effecting an improved local government service to citizens and the community, seen in the framework of the integration process by implementing tariffs and taxes, according to the EU Commission 2024 report on Albania.

The purpose of this study consists in the legal analysis, referring to the view of fiscal law, in order to improve the legal mechanisms and the regulation of the fiscal package in local government.

Referring to the qualitative, comparative analysis of the legal forecasts of the countries in the study, as well as that of the quantitative secondary data,

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the following research question is:

Is it necessary, an immediate intervention in the legislation, in order to improve fiscal decentralization, as well as whether the current level of fiscal decentralization is adequate and sufficient to realize the mission of local government?

Keywords: *Legislation, tariffs, taxes, mission of government, fiscal policy.*

Hyrje

Njësitë e qeverisjes vendore, gjatë ushtrimit të detyrave funksionale, që kanë lidhje me administrimin e një territori të caktuar, kërkojnë maksimizimin e të ardhurave për të patur një buxhet sa më të lartë, në mënyrë që të ofrohen shërbime dhe investime sa më adekuate për qytetarët e asaj njësie.

Referuar rregullimeve ligjore për qeverisjen vendore³ si dhe ligjeve të tjera e akteve nënligjore që ndihmojnë në administrimin e njësive të qeverisjes vendore, për të siguruar një eficiencë më të lartë në shërbime ndaj qytetarëve, lind nevoja që njësive të qeverisjes vendore t'u atribohen më shumë të drejta në aspektin fiskal.

Krijimi i decentralizimit fiskal ka si qëllim kryesor fuqizimin edhe më tepër të qeverisjes vendore, duke rritur eficiencën, transparencën, mirëpërdorimin e fondeve publike dhe duke maksimizuar punën në shërbime e investime ndaj qytetarëve.

Referuar ligjit nr. 139/2015. "Për vetëqeverisjen vendore në Republikën e Shqipërisë", njësive të qeverisjes vendore i atribohen funksione për të ushtruar veprimtari në fusha të ndryshme. Këto veprimtari duhet të administrohen duke hartuar plane të mirëfinancuara.

Njësitë e qeverisjes vendore udhëhiqen nga parimi i subsidiaritetit, kryerjes së funksioneve dhe ushtrimit të kompetencave në një nivel qeverisjeje sa më pranë komunitetit, duke pasur parasysh rëndësinë dhe natyrën e detyrës, si dhe kërkesat e eficiencës e të ekonomisë.

Vetëqeverisja vendore në Republikën e Shqipërisë duhet të sigurojë qeverisjen e efektshme, efikase dhe në një nivel sa më afër qytetarëve nëpërmjet: a) njohjes së ekzistencës së identiteteve dhe vlerave të ndryshme të bashkësive; b) respektimit të të drejtave dhe lirive themelore të shtetasve,

³ Njësitë e vetëqeverisjes vendore financohen nga të ardhurat që sigurohen nga taksat, tarifatat dhe të ardhurat e tjera vendore, nga fondet e transferuara nga qeverisja qendrore dhe fondet që u vijnë drejtpërdrejt atyre nga ndarja e taksave dhe tatimeve kombëtare, huamarrja vendore, donacione, si dhe burime të tjera, të parashikuara në ligj.

të sanksionuara në Kushtetutë ose në ligje të tjera; c) zgjedhjes së llojeve të ndryshme të shërbimeve dhe lehtësive të tjera publike vendore në dobi të bashkësisë; ç) ushtrimit efektiv të funksioneve, kompetencave dhe realizimit të detyrave nga organet e vetëqeverisjes vendore; d) realizimit të shërbimeve në forma të përshtatshme, bazuar në nevojat e anëtarëve të bashkësisë; dh) nxitjes efektive të pjesëmarrjes gjithëpërfshirëse të bashkësisë në qeverisjen vendore; e) realizimit të shërbimeve, në përputhje me standardet e kërkuara me ligj ose akte të tjera normative.

Për të përmbushur sa më mirë këtë mision të qeverisjes vendore kërkohen financa adekuate, të cilat krijohen nga decentralizimi fiskal, duke përmirësuar burimet financiare⁴ të njësive të qeverisjes vendore dhe autonominë fiskale.

Ndarja e përgjegjësisë ndërmjet pushtetit qendror dhe atij vendor vazhdon të jetë problematike, ku ekziston akoma nevoja për të përmirësuar kuadrin ligjor për funksionet e qeverisjes vendore. Organet e qeverisjes vendore vazhdojnë të kenë mungesë të burimeve financiare dhe të kapaciteteve të mjaftueshme administrative. Mungesa e burimeve financiare dhe të kapaciteteve të qëndrueshme administrative, sjell kufizim në ofrimin e shërbimeve cilësore në nivel lokal.

Duke iu referuar një analize cilësore dhe kritike të rregullimeve ligjore për misionin e qeverisjes vendore, ky studim paraqitet në dy aspekte:

- Identifikimin e vakumit ligjor, në funksion të përmirësimit të veprimtarisë së qeverisjes vendore.

- Identifikimin e mungesës së burimeve financiare dhe kapaciteteve administrative të mjaftueshme dhe të qëndrueshme në ofrimin e shërbimeve cilësore në nivel lokal⁵.

Rishikimi i literaturës dhe hipoteza

Rishikimi i literaturës në lidhje me këtë studim është i kufizuar, pasi metodologjia e përdorur konsiston në analizën cilësore dhe kritike të parashikimeve ligjore dhe praktikës institucionale. Ky studim ka sjellë trajtimin e problematikës së qeverisjes vendore në Shqipëri nga mosrespektimi i parimit të decentralizimit dhe i subsidiaritetit, duke bërë që qeverisja të jetë sa më larg qytetarëve.

Referuar Zaimi - Ahmetaj - Brahimi (2002), është trajtuar koncepti i decentralizimit⁶ si tagër ligjor, që i atribuohet qeverisjes vendore, për të

⁴ Neni 1 Ligji nr. 68/2017 “Për fianancat e vetëqeverisjes vendore”.

⁵ Neni 23 Ligji nr. 139/2015 “Për vetëqeverisjen vendore”.

⁶ Zaimi, V. – Ahmetaj, A. – Brahimi, F. “Kapacitetet fiskale të autoriteteve vendore në taksat dhe tarifatat vendore”, Tiranë, 2002.

vjelur taksa dhe tarifa në mënyrë, që të realizojnë të ardhurat e tyre. Kriteret që përcaktojnë taksat dhe tarifat vendore janë: detyrimi për të paguar taksa dhe tarifa prej atyre që jetojnë, punojnë dhe ushtrojnë aktivitet ekonomik në një territor të caktuar, që ndodhet nën jurisdiksionin e qeverisjes vendore.

Taksat dhe tarifat vendore kanë si qëllim realizimin e misionit për të financuar funksionet dhe shërbimet, nga të cilat përfiton i gjithë komuniteti. Taksat vendore duhet të përmbushin dy kushte: a) duhet të kenë një farë autonomie në përcaktimin e taksës nga autoritetet lokale; b) ndryshimi në 100% i vjeljes në të ardhurat lokale. Aftësia fiskale vendore nënkupton aftësinë e qeverisë vendore, që të rrisë nivelin e të ardhurave nga taksat ose nga burime të tjera. Rregullat për përcaktimin e taksave vendore janë të pajtueshme me politikën ekonomike kombëtare, ku autoriteteve lokale duhet t'u garantohet hapësira për të realizuar burimet e tyre financiare, ku një pjesë e këtyre burimeve vjen nga taksat vendore.

Referuar Ministrisë së Financave (2010) autoriteteve lokale i është atribuar kompetenca, për të vjelur ato taksa⁷ që janë më të thjeshta për t'u administruar.

Referuar Zaimi – Ahmetaj – Brahimi (2003) autoritetet lokale kanë këto të drejta mbi taksat⁸:

- Të përcaktojnë një taksë, që është e miratuar me ligj;
- Të përcaktojnë kohën për aplikimin e taksës;
- Të përcaktojnë nivelin e taksës, në pajtueshmëri me ligjin;
- Të përcaktojnë mënyrën e vjeljes dhe menaxhimin e taksës, brenda kufizimeve dhe parashikimit ligjor përkatës.

Referuar Ministrisë së Financave (2003) menaxhimi i taksave dhe tarifave vendore⁹ konsiston në:

- Identifikimin dhe regjistrimin e kontribuesve;
- Përcaktimin dhe verifikimin e vlerës së bazës së taksueshme;
- Llogaritjen e taksës;
- Informacionin për kontribuesit;
- Ankimin;
- Vjeljen e taksës;
- Regjistrin e kontabilitetit.

Referuar Zaimi – Ahmetaj- Brahimi (2002) aftësia fiskale konsiston në:

⁷ Ministria e Financave, “Sistemi Fiskal në Shqipëri, Tiranë, 2010.

⁸ Zaimi, V. – Ahmetaj, A. – Brahimi, F. “Të drejtat dhe kufizimet e autoriteteve vendore mbi taksat”, Tiranë, 2003.

⁹ Ministria e Financave, “Sistemi Fiskal në Shqipëri, Tiranë, 2003.

- Parametrat e kapaciteteve fiskale vendore përcaktohen me ligj. Ligji për financat e vetëqeverisjes vendore përcakton tipologjinë dhe bazën e taksueshme, minimumin dhe maksimumin e nivelit¹⁰.
- Ente publike vendore të ndryshme mund të demonstrojnë aftësi fiskale të ndryshme, kjo për pasojë të shërbimeve që ata janë përgjegjës. Një qeveri vendore, që realizon një fushë të gjerë shërbimesh, ka nevojë për kapacitete të mëdha fiskale.

Legjislacioni shqiptar, ka nevojë emergjente për përmirësim dhe zhvillim, në funksion të përmbushjes së misionit të qeverisjes vendore, në realizimin sa më mirë të shërbimeve ndaj komunitetit, ku është jurisdiksioni i tyre.

Metodologjia e kërkimit

Metodologjia e aplikuar për realizimin e këtij studimi, është e kombinuar, pasi është analizuar në mënyrë cilësore ligji dhe ndryshimet ligjore, parë nën këndvështrimin kritik, përta i përket nevojës për të maksimizuar burimet financiare të qeverisë vendore, për një administrim të mjaftueshëm e të qëndrueshëm.

Aplikimi i kësaj metodologjie kërkimore, ka si qëllim zhvillimin dhe përmirësimin e parashikimeve ligjore, por dhe hartimin e politikave efektive, rritjen e përgjegjshmërisë institucionale të zyrtarëve dhe bashkëpunimin e mirëkoordinuar, në adresimin dhe zbatimin e masave efektive për decentralizimin fiskal dhe rritjen e kapaciteteve të administrimit.

Gjetjet e konstatuara nga shqyrtimi i rregullimeve ligjore, trajtojnë në mënyrë të detajuar problematikën dhe objektivat e studimit, duke parashtruar konkluzione dhe rekomandime të vlefshme, përta i përket përmirësimeve ligjore në kuadër të financave vendore.

Nga ky studim parashtrohen rekomandime për përmirësimin e burimeve financiare lokale, në funksion të identifikimit të nevojave për përmirësimin e shërbimeve sa më afër komunitetit.

Gjetjet dhe diskutimet në lidhje me funksionet dhe autonominë e pushtetit vendor

Referuar detyrave funksionale, qeveritë lokale gëzojnë të drejtën dhe kanë përgjegjësinë e ushtrimit të autoritetit me interes publik vendor.

a) Organet e njëjësive të vetëqeverisjes vendore mund të ndërmarrin nisma

¹⁰ Ligji nr. 68/2017 “Për financat e vetëqeverisjes vendore në Republikën e Shqipërisë”, Tiranë, 2017.

me interes publik vendor¹¹ në territorin e juridiksionit të tyre, për çdo çështje, që nuk u ndalohet me ligj ose që nuk i është dhënë ekskluzivisht me ligj një organi tjetër shtetëror.

b) Organet e njësive të vetëqeverisjes vendore ushtrojnë kompetencat e tyre, nëpërmjet vendimeve, urdhërësive dhe urdhrave.

Njësitë e vetëqeverisjes vendore kanë këto të drejta dhe përgjegjësi¹²:

1-Të drejtën dhe përgjegjësinë e vetëqeverisjes, sipas së cilës: a) përcaktojnë masa që ato i gjykojnë të nevojshme për kryerjen e funksioneve dhe ushtrimin e kompetencave; b) bazuar në Kushtetutë, në ligje dhe aktet nënligjore, të nxjerra në bazë dhe për zbatim të tyre, për kryerjen e funksioneve dhe ushtrimin e kompetencave, nxjerrin urdhëresa, vendime dhe urdhra; c) krijojnë struktura administrative për kryerjen e funksioneve dhe ushtrimin e kompetencave të tyre, sipas ligjeve në fuqi; ç) krijojnë njësi ekonomike dhe institucione në varësi të tyre. d) krijojnë komitete, borde ose komisione për kryerjen e funksioneve të veçanta sa herë që paraqitet nevoja, duke respektuar ligjin për barazinë gjinore.

2-Të drejtën dhe përgjegjësinë e pronësisë: a) njësitë e vetëqeverisjes vendore ushtrojnë të drejtën e pronësisë. Ato fitojnë, shesin dhe japin në përdorim pronën e paluajtshme ose të luajtshme të tyre, si dhe ushtrojnë të drejta të tjera, sipas mënyrës së përcaktuar me ligj; b) e drejta e fitimit të pronës, nëpërmjet shpronësimeve për interes publik, nga ana e njësive të vetëqeverisjes vendore, bëhet sipas mënyrës së përcaktuar me ligj; c) e drejta e pronësisë ushtrohet nga këshilli përkatës, i cili nuk mund t'ia delegojë ushtrimin e kësaj të drejte askujt tjetër. Njësia e qeverisjes vendore është e përbërë nga dy organe: organi përfaqësues “Këshilli Bashkiak” dhe organi ekzekutiv “Kryetari i Bashkisë”. Organi përfaqësues ka të drejtën që të miratojë me vendim tjetërsimin e pronave të paluajtshme ose t'i japë ato me qira apo në përdorim.

3-Të drejtën dhe përgjegjësinë e mbledhjes së të ardhurave dhe bërjes së shpenzimeve, sipas së cilës: a) krijojnë, mbledhin të ardhura dhe bëjnë shpenzime për përmbushjen e funksioneve të tyre; b) vendosin taksa vendore e tarifa për shërbimet, si dhe nivelin e tyre, në përputhje me legjislacionin në fuqi; c) hartojnë, miratojnë dhe zbatojnë buxhetin e tyre; ç) mbajnë llogaritë, në përputhje me legjislacionin në fuqi, dhe ofrojnë informacione ose raporte financiare për hartimin dhe zbatimin e buxhetit për qeverisjen qendrore ose shtetasit.

4-Të drejtën dhe përgjegjësinë e kryerjes së veprimtarive ekonomike, sipas

¹¹ Neni 8 Ligji nr. 139/2015 “Për vetëqeverisjen vendore” në Republikën e Shqipërisë.

¹² Neni 9 Ligji nr. 139/2015 “Për vetëqeverisjen vendore” në Republikën e Shqipërisë.

së cilës: a) për përmbushjen e funksioneve publike në interes të komunitetit që përfaqësojnë, në përputhje me legjislacionin në fuqi, ushtrojnë veprimtari ekonomike, që nuk bie ndesh me orientimet themelore të politikave ekonomike të shtetit; b) të ardhurat, që përfitohen nga veprimtaria ekonomike, përdoren në pjesën më të madhe për mbështetjen dhe përmbushjen e funksioneve publike; c) veprimtaria ekonomike e njësive të vetëqeverisjes vendore rregullohet në përputhje me legjislacionin në fuqi.

5-Të drejtën e bashkëpunimit, sipas së cilës: a) për kryerjen e shërbimeve specifike në emër dhe në dobi të komuniteteve përkatëse, dy ose më shumë njësi të vetëqeverisjes vendore mund të ushtrojnë së bashku çdo funksion, që u është dhënë atyre me ligj, nëpërmjet zbatimit të marrëveshjeve ose kontratave të përbashkëta, delegimit të kompetencave dhe përgjegjësisë të veçanta njëra-tjetrës ose kontraktimit me një palë të tretë; b) bashkëpunojnë me njësi të vetëqeverisjes vendore, të vendeve të tjera dhe përfaqësohen në organizata ndërkombëtare të pushteteve vendore, në përputhje me këtë ligj dhe legjislacionin në fuqi; c) kanë të drejtë të organizohen në shoqata, në përputhje me legjislacionin përkatës.

6-Të drejtën si personit juridik: si persona juridikë, njësitë e vetëqeverisjes vendore gëzojnë dhe ushtrojnë të gjitha të drejtat e përcaktuara në Kodin Civil të Republikës së Shqipërisë dhe në legjislacionin në fuqi dhe në mënyrë të veçantë: a) të drejtën e lidhjes së kontratës; b) të drejtën e krijimit të personave të tjerë juridikë; c) të drejtën e ngritjes së padisë civile; ç) të drejtën e mbajtjes së llogarive; d) të drejtat të tjera për ushtrimin e funksioneve në bazë dhe në zbatim të ligjeve dhe akteve nënligjore.

Një pjesë e funksioneve, ushtrohet si nga qeveria qendrore, ashtu dhe nga ajo lokale¹³, por qëllimi ligjor është i njëjtë. Në këtë kuptim, shërbimet sociale, të cilat funksionojnë në nivel vendor, por edhe në nivel qendror, që varet nga Ministria e linjës, gjejnë rregullim dhe normohen nga të dyja pushtetet, në funksion të qëllimit të përbashkët. Parimi i decentralizimit¹⁴ kërkon, që funksionet, të cilat kanë të bëjnë me shërbimet në dobi të qytetarëve, të ushtrohen nga qeverisja vendore, duke krijuar hapësirën ligjore edhe për burimin financiar. Decentralizimi lejon një inovacion dhe eksperimentim më të madh, të mënyrës së ofertës të shërbimeve kolektive për të dhënë produkt më të mirë. Decentralizimi fiskal nënkupton: transferimin e përgjegjësisë dhe të drejtës së kryerjes së shpenzimeve; rritjen e të ardhurave të qeverisjes vendore; autoritet i plotë në

¹³ Neni 10 Ligji nr. 139/2015 “Për vetëqeverisjen vendore” në Republikën e Shqipërisë.

¹⁴ Neni 13 Kushtetuta e Republikës së Shqipërisë.

përcaktimin/vënien e taksave dhe tarifave vendore; autoritet i plotë në marrjen e vendimeve për përdorimin e të ardhurave vendore dhe të transfertës së pakushtëzuar. E drejta për vendosjen e taksave dhe tarifave.

Specialistët e fushës shprehen se zyrtarëve të përfshirë në shërbime, nuk iu mungojnë aftësitë profesionale dhe trajnimet¹⁵, por duhet të rritet aftësia financiare dhe autonomia funksionale.

Fakti që, vetë parashikimet ligjore përcaktojnë dy ente, të cilat kryejnë një funksion të caktuar, vështirëson identifikimin e përgjegjësisë në rastin e cënimit të ofrimit të shërbimit në mënyrë sa më adekuate. Duke qenë se ligji nuk identifikon dhe nuk përcakton përgjegjësit konkretë institucionale për ofrimin e shërbimeve të caktuara, lë hapësirë për abuzim dhe mosofrim të shërbimit publik.

Gjithashtu vlen të theksohet se, ky problem, në mënyrë indirekte shkakton pasoja negative institucionale, pasi ndikon në cënimin e kompetencave dhe aksesin e paautorizuar të entit tjetër. Referuar praktikës institucionale, por dhe praktikave më të mira evropiane gjykojmë se, do të ishte më efektive, nëse burimi i të ardhurave¹⁶ si dhe zhvillimi i investimeve përsa i përket nevojave komunitare, të ofrohej nga pushteti vendor. Kjo në funksion të analizës dhe lidhjes së ngushtë midis komunitetit dhe ofruesit të shërbimit, në kuptim të lidhjes ekonomike, kulturore, historike, dhe gjeografike. Në këtë mënyrë ofrimi i këtyre shërbimeve dhe plotësimi i nevojave nga pushteti vendor është më produktiv dhe më i prekshëm, prandaj decentralizimi efektikon maksimizimin e shërbimeve publike dhe të mirave më afër komunitetit.

Në vijim të kësaj analize, ligji për financat e qeverisjes vendore, duhet të pësojë ndryshime duke shtuar burime të tjera financiare për njësitë e qeverisjes vendore. Konkretisht njësitë e qeverisjes vendore, duhet të përfitojnë një përqindje nga tatimi mbi të ardhurat për individët, nga subjektet që ushtrojnë aktivitet ekonomik, si dhe nga tatimi mbi dividendin. Për të arritur këtë qëllim, duhet të bëhen ndryshime në ligjin për tatimin mbi të ardhurat si dhe në ligjin për Procedurat Tatimore në Republikën e Shqipërisë. Gjithashtu një burim tjetër financiar për qeverinë vendore, duhet të jetë edhe një përqindje nga tatimi mbi vlerën e shtuar. Kjo efektikon nevojën e ndërhyrjeve në ligjin për tatimin mbi vlerën e shtuar, duke përcaktuar një përqindje 3 ose 4 % të tatimit mbi vlerën e shtuar, për çdo banor, t'i kalojë njësisë së qeverisjes vendore.

¹⁵ Nenni 64 germa h) Ligji nr. 139/2015 “Për vetqeverisjen vendore” në Republikën e Shqipërisë.

¹⁶ Komisioni Europian, “Raporti për Shqipërinë”, Bruksel, 2024.

Konkluzione**- Në lidhje me përmirësimin teknik dhe ligjor**

Përsa kohë vetë parashikimet ligjore, nuk krijojnë mundësi për përmirësimin e burimeve financiare dhe administrimin e mjaftueshëm e të qëndrueshëm, detyrimisht duhet plotësuar dhe përmirësuar kuadri teknik dhe ligjor, për të zhvilluar përgjegjshmërinë e qeverisjes vendore, të përfshirë në administrimin, shqyrtimin, vlerësimin, hetimin apo vendimmarrjen e shërbimeve në komunitet, duke implementuar mekanizmat ligjore për respektimin dhe përmbushjen e nevojave komunitare.

- Në lidhje me mungesën e përcaktimit të përgjegjësive dhe llogaridhënies institucionale

Përfshirja e shumë subjekteve institucionale me akses në shërbime, të cilat duhet të jenë të qeverisjes vendore, si dhe pamjaftueshmëria e administrimit dhe burimeve financiare, si rezultat i funksioneve të tyre, dhe kompetencave monitoruese, verifikuese dhe vendimarrëse, efektton rrezikun e mospërcaktimit të saktë të përgjegjësive dhe llogaridhënies, si dhe mospërmbushjes së përgjegjësive të qeverisjes vendore.

Qeveria vazhdon të miratojë politika dhe ligje, duke ngritur shqetësime në lidhje me respektimin e standardeve të BE-së. Gjithsesi, shqetësuese dhe e paqartë, mbetet ndarja e përgjegjësive ndërmjet qeverisjes vendore dhe asaj qendrore, në funksion të politikave më të mira të ofrimit të shërbimit.

Rekomandime

- Nevojiten nisma për të përmirësuar burimet financiare të njësive të qeverisjes vendore, kapacitetin administrativ dhe autonominë fiskale. Duhet të rritet mundësia e burimeve financiare dhe e administrimit të mjaftueshëm e të qëndrueshëm, pasi gjykojmë se, nuk janë të mjaftueshme dhe kjo përbën një rrezik të madh për autonominë fiskale të njësive të qeverisjes vendore.

- Ekziston ende nevoja për përmirësimin e kuadrit ligjor për funksionet e njësive të qeverisjes vendore, duke rritur dhe forcuar kompetencat e tyre përballë kompetencave të pushtetit qendror.

Për të ofruar shërbime publike sa më cilësore në nivel lokal, i cili ka mbetur i kufizuar, gjykojmë se kërkohet përmirësimi i kuadrit ligjor për financat vendore.

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GJYKIMI INCIDENTAL, NJË RISI NË GJYKIMET ADMINISTRATIVE

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Abstract

The need to establish and guarantee independent and impartial courts in the Republic of Albania is not only a requirement of Albanian society but also a goal of Albania's efforts to meet and achieve European standards in the field of justice. To enable the realization of such a transformative process, the Republic of Albania has carried out significant reforms in all directions, political, social, and economic, as well as numerous legal reforms in the field of justice.

One of the important elements of legal reforms is the legal notion of “*incidental judgment*” within the framework of the “*due legal process*,” as provided by the European Convention on Human Rights and the Constitution of the Republic of Albania. This notion has been transformed into a constitutional guarantee with the Constitution of 1998, bringing innovation to fundamental constitutional notions in Albania. According to constitutional legal provisions and the evolved doctrine in this regard, any judge of ordinary courts can request incidental control at any time.

Such a constitutional guarantee is also supported by domestic legislation, such as Law No. 49/2012 “On Administrative Courts and the Resolution of Administrative Disputes,” through which administrative courts began functioning and where legal provisions detail the concept of “*incidental judgment*”. One of the innovations introduced by this law is Article 38, which provides that courts can disregard a sub-legal act if, during the judicial review, it determines that the sub-legal act is unlawful. This provision compels administrative courts, either on their own initiative or at the request of the parties, to analyze the conformity of normative sub-legal acts, based on which the administrative action was taken, choosing not to apply it if they determine the sub-legal act to be unlawful.

The purpose of this study is to analyze incidental judgment as an innovative phenomenon in administrative judgments, seen in relation to constitutional incidental control, and how administrative courts proceed in cases where the parties request the non-application of a normative sub-legal act through incidental judgment. Incidental judgment, as a legal innovation, allows

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judges to be direct contributors to the improvement and alignment of Albanian legislation with European standards. Furthermore, it is necessary to address the practices of the Administrative College of the Supreme Court regarding the application or non-application of Article 38 of Law No. 49/2012, as amended, and the relevant recommendations to protect and respect the rights and procedural guarantees of the parties in an administrative process.

Keywords: *process, incidental, innovation, regularity, legal.*

Hyrje

E drejta për një proces të rregullt ligjor, është një e drejtë e garantuar nga neni 6 i KEDNJ-së dhe e drejtë kushtetuese e individëve, nëpërmjet të cilit, ata kërkojnë realizimin e procedurave të drejta dhe të ndershme ligjore. Nga njëra anë, kjo e drejtë universale kushtetuese, përbën një garanci për shtetasit kundër veprimeve të padrejta të organeve të pushtetit shtetëror dhe nga ana tjetër, ajo përbën një detyrim për këta të fundit që të mos çenojnë, të drejtat dhe liritë e shtetasve, pa siguruar respektimin e procedurave të rregullta ligjore².

Një nga reformat tejet të rëndësishme të diktuar në kuadër të integritetit të Shqipërisë në Bashkimin Evropian ishte hyrja në fuqi e ligjit nr. 49/2012 “Për gjykatat administrative dhe gjykimin e mosmarrëveshjeve administrative” dhe fillimi i funksionimit të gjykatave administrative, kjo me qëllim arritjen e standardeve evropiane në fushën e drejtësisë.

Qëllimi i këtij ligji është reformimi i kuadrit të përgjithshëm ligjor administrativ në Shqipëri në kuadër të reformës në drejtësi. Ndërkohë që krijimi i gjykatave administrative lindi si nevojë për garantimin e mbrojtjes efektive të të drejtave subjektive dhe interesave të ligjshme të personave fizikë e juridikë, që mund të çenoheshin nga veprimtaria e organit publik, nëpërmjet një procesi të rregullt gjyqësor dhe brenda afateve të shpejta e të arsyeshme. Me anë të këtij ligji, synohet krijimi i kushteve të përshtatshme për një shqyrtim efektiv dhe të shpejtë, duke vënë në vend të drejtat e cenuara nga veprimet dhe/ apo aktet administrative të nxjerra nga organet publike.

Përpara se të fillonte funksionimi i gjykatave administrative, pavarësisht keqkuptimit që krijohej ndërmjet çështjes administrative dhe çështjes civile, gjykata, së cilës i paraqitej për shqyrtim padia, e zgjidhte çështjen

² Sadushi, Sokol “*Kontrolli Kushtetues*”, Tiranë, Botimpex, 2004, fq. 152

përfundimisht, pa shkaktuar në të shumtën e rasteve ndonjë pasojë juridike për palët. Gjykimi administrativ, që deri përpara fillimit të funksionimit të gjykatave administrative realizohej nga juridiksioni i integruar brenda gjykatave të zakonshme, aktualisht i përket një tjetër juridiksioni të njohur si juridiksioni administrativ autonom.

Funksioni kryesor i gjykatave administrative, shihet në pozicionin e tyre si autoritet shfuqizues ndaj vendimmarrjes së organeve publike, të cilat tejkalojnë pushtetin e tyre dhe çenojnë të drejtat e individëve. Gjykatat administrative jo vetëm zhvlerësojnë një veprim, apo akt administrativ, kur është në tejkalim të juridiksionit, por as nuk ndalohen të kontrollojnë paligjshmërinë e kryer edhe brenda juridiksionit. Ato mund të vlerësojnë të gjitha çështjet e ligjshmërisë dhe, kur rezulton dukshëm nga provat, mund të zëvendësojnë edhe vendimmarrjen administrative³. Në këtë drejtim legjislacioni shqiptar për gjykimet administrative ka ngjashmëri me legjislacionin gjerman. Sipas së drejtës gjermane, gjykatat autorizohen të zëvendësojnë me vendimin e tyre, atë të autoritetit administrativ, nëse kundërshtimi i veprimit administrativ lidhet, p.sh., me pagesën në të holla. Gjithashtu, gjykata mund të urdhërojë nxjerrjen e një akti administrativ nga administrata, kur kërkohet nga paditësi.

Me miratimin e ligjit nr. 49/2012, sistemi gjyqësor shqiptar bëri një hap madhor e historik, duke u orientuar drejt sistemit të dualizmit gjyqësor, pasi me këtë ligj, u krijuan për herë të parë në të drejtën publike shqiptare, gjykata të posaçme të cilat do të gjykojnë mosmarrëveshjet administrative. Në bazë të këtij ligji, mosmarrëveshjet e natyrës administrative do të gjykohen nga gjykatat administrative dhe këto gjykata janë Gjykatat Administrative të Shkallës së Parë, një Gjykatë Administrative e Apelit dhe Kolegji Administrativ i Gjykatës së Lartë.

Me hyrjen në fuqi të ligjit nr. 49/2012 “*Për gjykatat administrative dhe gjykimin e mosmarrëveshjeve administrative*”, më datë 04 nëntor 2013⁴, dispozitat e Kodit të Procedurës Civile, për gjykimin e posaçëm të mosmarrëveshjeve administrative, konkretisht nenet 320, germa ‘a’, 324 deri në 333, si dhe 35, germa ‘b’, të këtij Kodi janë shfuqizuar. Bazuar në ligjin nr. 49/2012, këto gjykata janë të vetmet që kanë kompetencë për gjykimin e mosmarrëveshjeve administrative, sipas rregullave të procedurës gjyqësore administrative, duke përfshirë në objektin e

³ Sadushi, Sokol “*Gjykata Administrative dhe kontrolli ligjor mbi administratën*”, Tiranë, Botimet Toena, 2014, fq. 122.

⁴ Dekreti i Presidentit nr. 8349, datë 14.10.2013 “*Për fillimin e funksionimit të gjykatave administrative*”, përcakton në nenin 1 të tij se “*Funksionimi i gjykatave administrative fillon më datë 04 Nëntor 2013*”.

veprimtarisë së këtyre gjykatave si aktet administrative, veprimet e tjera administrative, mosveprimin e administratës dhe kontratat administrative, përfshirë edhe aktin nënligjor administrativ lidhur me aspekte të paligjshmërisë.

Vlen të theksohet se në të njëjtën kohë që, administrata publike, përpiqet të garantojë përmbushjen e interesit publik, ajo përpiqet të mos çënojë interesat e personave privatë. Në një farë mënyre duhet të ekzistojë një lloj balance për administratën publike në marrjen në konsideratë dhe mbrojtjen e këtyre interesave⁵. Ndërkohë neni 10 i Kodit të Procedurave Administrative, parashikon shprehimisht se “*Administrata publike, në ushtrimin e funksioneve të saj, mbron në çdo rast interesin publik, si dhe të drejtat dhe interesat kushtetuese e ligjore të personave privatë*”, duke treguar qartazi detyrimin e administratës publike për ruajtjen e balancës⁶ që duhet të ekzistojë midis nevojës për mbrojtjen e interesit publik dhe nevojës për mbrojtjen e interesave të palëve private. Ky detyrim për ruajtjen e një balance të tillë shtrihet edhe mbi gjykatën administrative, kjo referuar parashikimeve të nenit 3/2 të ligjit nr. 49/2012. Nëse administrata publike ka dështuar në garantimin e kësaj balance, atëherë i përket gjykatës administrative që të sigurohet për mbrojtjen dhe garantimin e kësaj balance, mes interesit publik dhe interesave të ligjshme të personave fizikë e juridikë.

Ligji për gjykatat administrative solli ndërgjegjësimin e autoriteteve publike, kjo për shkak të kalimit të barrës së provës organit publik, për të provuar ligjshmërinë e veprimeve të tija, duke paraqitur çdo provë të rëndësishme për procesin, duke sjellë njëkohësisht disa risi, konkretisht: faktin se gjykimi është i detyruar të zhvillohet pavarësisht mosparaqitjes së palëve në proces, në rolin e gjyqtarit administrativ, i cili nuk kufizohet vetëm në çështje të ligjit, por edhe të faktit me qëllim zgjidhjen përfundimtare të mosmarrëveshjes, gjykata dhe gjyqtari kanë rol më aktiv, duke detyruar organin të marrë vendimin në përputhje me arsyetimin e gjykatës. Roli aktiv i gjykatës evidentohet në efektet juridike të menjëhershme dhe të urdhrave e vendimeve gjyqësore me sanksione me gjobë ndaj drejtuesve të institucioneve publike, në rast moszbatimi të urdhrave dhe vendimeve gjyqësore. Një risi tjetër që evidenton edhe më qartë rolin aktiv të gjyqtarit dhe gjykatës administrative është parashikimi që bën neni 38 i ligjit nr. 49/2012 për gjykimin incidental.

⁵ M. Hauriou, “*Precis de droit administratifs et de droits public*”, Paris, 1933, fq. 17.

⁶ E. Dobjani, “*E drejta administrative I*”, botim i ripunuar, Shtypshkronja “Perlat Voshtina”, Tiranë, 2010, fq. 52.

Nocioni i gjykimit incidental në kuadër të “procesit të rregullt ligjor”⁷, që parashikon Konventa Evropiane e të Drejtave të Njeriut, në nenin 6 të saj dhe Kushtetuta e Republikës së Shqipërisë, haset fillimisht si garanci kushtetuese⁸ me hyrjen në fuqi të kësaj të fundit, miratuar me ligjin nr. 8417, datë 21.10.1998, i ndryshuar, neni 131 i të cilit ka përcaktuar se “Gjykata Kushtetuese vendos për:… … c) pajtueshmërinë e akteve normative të organeve qendrore dhe vendore me Kushtetutën dhe me marrëveshjet ndërkombëtare… …”. Referuar këtij parashikimi ligjor dhe parashikimeve të nenit 145, pika 2 të Kushtetutës dhe doktrinës së evoluar në këtë drejtim, çdo gjyqtar i gjykatave të zakonshme mund të paraqesë kërkesën për kontroll incidental në çdo kohë.

Gjykimi administrativ në gjykatat administrative dhe veçoritë e tij në Shqipëri pas hyrjes në fuqi të ligjit nr. 49/2012 rezulton të jenë trajtuar në një sërë punimesh e botimesh shkencore, për të drejtën administrative procedurale, veprimtarinë e organeve publike, si dhe të gjykatave administrative dhe kontrollit të tyre ligjor mbi administratën publike, por pa u ndalur në një analizë të detajuar të nenit 38 të ligjit nr. 49/2012 dhe revolucionit që kjo dispozitë paraqet në gjykimet administrative, prandaj dhe ky punim synon të qartësojë qëllimin e këtij parashikimi ligjor, rastet kur mund të përdoret nga gjykata dhe gjyqtari administrativ.

1. Kontrolli incidental kushtetues

Kontrolli incidental kushtetues është parashikuar në pjesën e nëntë të Kushtetutës, në të cilën janë parashikuar gjykatat e zakonshme, për faktin se janë këto të fundit që mund të iniciojnë këtë lloj kontrolli para Gjykatës Kushtetuese. Referuar këtyre parashikimi ligjor dhe parashikimeve të nenit 131 dhe nenit 145, pika 2 të Kushtetutës dhe doktrinës së evoluar në këtë drejtim, çdo gjyqtar i gjykatave të zakonshme mund të paraqesë kërkesën për kontroll incidental në çdo kohë. Kur gjyqtarët e gjykatave të zakonshme çmojnë se ligji për zgjidhjen e çështjes konkrete bie ndesh me kushtetutën, ato pezullojnë gjykimin dhe i drejtohen gjykatës për të verifikuar kushtetutshmërinë e ligjit.

Një burim tjetër që ka lidhje me procedurën e kontrollit incidental kushtetues në Shqipëri është Konventa Evropiane për Mbrojtjen e të

⁷ Konventa Evropiane e të Drejtave të Njeriut, e cila ka hyrë në fuqi në datë 3 shtator 1953, Neni 6 i saj.

⁸ Kushtetuta e Republikës Popullore Socialiste të Shqipërisë, miratuar me ligjin nr. 5506, datë 28.12.1976, nuk e njihje fare si koncept pajtueshmërinë e akteve normative të organeve qendrore dhe vendore me Kushtetutën dhe kuadri ligjor i kohës nuk parashikonte ekzistencën e Gjykatës Kushtetuese.

Drejtave dhe Lirive Themelore të Njeriut, në mënyrë specifike neni 6 i saj. Në këtë dispozitë parashikohet procesi i rregullt ligjor i zbatueshëm dhe në gjykimet kushtetuese. Këtu zënë vend të rëndësishëm vendimet e Gjykatës Evropiane të të Drejtave të Njeriut, që kanë përcaktuar se deri ku shtrihet zbatueshmëria e nenit 6 të KEDNJ-së në gjykimin kushtetues. Mund të përmendim këtu çështjet: *Shkalla kundër Shqipërisë*, *Marini kundër Shqipërisë*, *Qufaj kundër Shqipërisë*⁹. Përsa i përket vendimit të parë, GJEDNJ-ja gjeti shkelje të të drejtës për akses në gjykatë, për shkak të mënyrës se si Gjykata Kushtetuese e Shqipërisë kishte përlllogaritur afatin 2-vjeçar.

Burim tjetër tejet i rëndësishëm i së drejtës, që ka të bëjë me procedurën e kontrollit incidental është ligji nr. 8677, datë 10.2.2000 "*Për organizimin dhe funksionimin e Gjykatës Kushtetuese të Republikës së Shqipërisë*". Kontrolli incidental kushtetues në këtë ligj është parashikuar në kreun VII, ku rregullohen procedurat e veçanta. Nenet 68-70 të këtij ligji parashikojnë vënien në lëvizje të Gjykatës Kushtetuese nga gjykatat ose gjyqtari, kur mendohet se ligji për të zgjidhur çështjen bie në kundërshtim me aktin me fuqi juridike më të lartë, siç është Kushtetuta, shqyrtimin e çështjes në gjykimin incidental kushtetues dhe vendimmarrjen e Gjykatës Kushtetuese. Një ndër burimet që zë vend në gjykimet kushtetuese, është padyshim Kodi i Procedurës Civile në Republikën e Shqipërisë, që Gjykata Kushtetuese zbaton përkrah ligjit organik të saj, në rast vakumi të këtij ligji.

Kërkesa për kontroll incidental sikurse u citua më sipër, parashikohet në nenin 145, pika 2, të Kushtetutës, i cili u njeh të drejtën gjyqtarëve që në çdo fazë të gjykimit, kur çmojnë se ligjet bien në kundërshtim me Kushtetutën, të mos i zbatojnë ato, të vendosin pezullimin e gjykimit të çështjes dhe dërgimin e saj Gjykatës për t'u shprehur për kushtetutshmërinë e normës. Kjo dispozitë, e konkretizuar edhe në nenin 68 të ligjit nr. 8577/2000, i ndryshuar lidhet me kontrollin kushtetues të ligjeve nga Gjykata, kur ky kontroll kërkohet nga gjykatat e juridiksionit të zakonshëm. Sot Gjykata Kushtetuese ka një praktikë të konsoliduar dhe elaboruar, lidhur me gjykimin incidental. Në të tilla kërkesa të paraqitura përpara Gjykatës Kushtetuese nga gjyqtarë të gjykatave të juridiksionit të përgjithshëm të shkallës së parë, të apelit dhe të Gjykatës së Lartë, Gjykata Kushtetuese ndalet dhe analizon fillimisht çështjen e legjitimitetit (*locus standi*), që është një ndër aspektet kryesore që lidhet me nisjen e procesit kushtetues.

⁹ Vendimet të GJEDNJ-së; *Shkalla kundër Shqipërisë*, *Marini kundër Shqipërisë*, *Qufaj kundër Shqipërisë*, faqja zyrtare e GJEDNJ-së (European Court of Human Rights).

Për sa i takon legjitimitetit të gjykatës referuese, Gjykata Kushtetuese ka zhvilluar disa kriterë kumulative, sipas të cilave, gjykata referuese duhet që gjatë gjykimit që zhvillohet pranë saj:

- të ketë identifikuar ligjin që do të zbatohet për zgjidhjen e tij dhe të ketë krijuar bindjen se gjykimi i saj nuk mund të përfundojë në mënyrë të pavarur nga çështja në Gjykatë - pra lidhjen e drejtpërdrejtë midis ligjit dhe çështjes kushtetuese;
- të ketë parashtruar arsye bindëse për antikushtetutshmërinë e ligjit, duke referuar në normat ose parimet konkrete të Kushtetutës;
- të ketë bërë të gjitha përpjekjet për ta interpretuar atë në përputhje me Kushtetutën.¹⁰

Në vijim, për të arritur në përfundimin nëse gjykata referuese ka plotësuar kriteret e mësipërme të legjitimitetit për vënien në lëvizje të gjykimit incidental të normës, Gjykata Kushtetuese, ndalet në analizën e secilit prej tyre. Për këtë arsye, kërkohet një raport i domosdoshëm midis vendimit të Gjykatës Kushtetuese (zgjidhjes së çështjes së kushtetutshmërisë) dhe zgjidhjes së çështjes konkrete nga gjykata referuese¹¹.

Në këtë kuptim, gjykata referuese duhet të evidentojë jo vetëm objektin, por edhe standardin kushtetues të cënuar në funksion të vënies në lëvizje të gjykimit kushtetues, pra jo vetëm normën ligjore, por edhe parimet ose standardet kushtetuese që ajo cënon në rast se zbatohet për zgjidhjen e çështjes. Vlen për t'u theksuar fakti se, nisur nga parimi i prezumimit të kushtetutshmërisë së normës me Kushtetutën, interpretimi pajtues është i mundur kur një ligj ose dispozitë ligjore mund të interpretohet në më shumë se një mënyrë, njëra nga të cilat është në pajtim me Kushtetutën¹². Vetëm në rast se gjykata referuese vlerëson se çdo interpretim i mundshëm bie në kundërshtim me Kushtetutën, atëherë duhet t'i drejtohet Gjykatës Kushtetuese, duke kërkuar kontrollin e kushtetutshmërisë së normës të individualizuar si të zbatueshme¹³.

1. Dallimi midis juridiksionit kushtetues dhe juridiksionit të gjykatave administrative në kontrollin e akteve administrative

Dallimi ndërmjet juridiksionit të Gjykatës Kushtetuese dhe juridiksionit të gjykatave administrative lidhur me shqyrtimin e vlefshmërisë së akteve

¹⁰ Shih vendimet nr. 32 datë 30.05.2023; nr. 7, datë 23.02.2021 dhe nr. 8, datë 07.02.2017 të Gjykatës Kushtetuese

¹¹ Shih vendimet nr. 73, datë 17.11.2017; nr. 4, datë 23.02.2016 të Gjykatës Kushtetuese.

¹² Shih vendimet nr. 5, datë 16.02.2012; nr. 33, datë 24.06.2010 dhe vendimin nr. 29, datë 31.05.2010 të Gjykatës Kushtetuese.

¹³ Shih vendimin nr. 20 datë 03.04.2024 të Gjykatës Kushtetuese.

administrative qëndron në radhë të parë, tek karakteri i përmbajtjes së aktit administrativ, kriter i cili i ndan ato në akte normative dhe në akte individuale dhe, së dyti, te fakti i antikushtetutshmërisë ose paligjshmërisë së aktit. Për këto dy momente të rëndësishme ka dhe qëndrime të ndryshme, të cilat shprehen në praktikën gjyqësore, të këtyre organeve. Pikëpamjet e ndryshme shprehen më tepër për konceptin mbi paligjshmërinë dhe antikushtetutshmërinë e aktit¹⁴. Kështu një ndër pyetjet që shtrohen është nëse akti normativ i nxjerrë nga organet qendrore dhe vendore, do të jetë objekt shqyrtimi i juridiksionit të Gjykatës Administrative të Apelit, apo i Gjykatës Kushtetuese?

Parashikimet e neneve 7, shkronja “a” dhe 10, pika 2, shkronja “b” të ligjit nr. 49/2012 “Për gjykatat administrative dhe gjykimin e mosmarrëveshjeve administrative”, i ndryshuar, lidhur me kompetencat e Gjykatës Administrative të Apelit krijon një lloj paqartësie apo konfondimi me kompetencat e Gjykatës Kushtetuese, që sipas nenit 131, shkronja “c” të Kushtetutës, vlerëson kushtetutshmërinë e akteve normative.

Në rrugën e kontrollit të kushtetutshmërisë së normës, Gjykatës Kushtetuese, nuk i krijohet shumë hapësirë për verifikimin e paligjshmërisë së akteve normative. Nga interpretimi i dispozitave kushtetuese, por edhe jurisprundencia kushtetuese rezulton se shqyrtimi i pajtueshmërisë me ligjin i akteve normative nuk është brenda fushës së kontrollit kushtetues. Kjo tregon se, Gjykata Kushtetuese, është para së gjithash mbrojtësi i kushtetutshmërisë, qoftë edhe gjatë vlerësimit të akteve nënligjore¹⁵.

Megjithatë nuk përjashtohen rastet kur paligjshmëria e një akti normativ mund të identifikohet, njëkohësisht, edhe me antikushtetutshmërinë e tij. Sipas nenit 118, pika 2 të Kushtetutës ligji duhet të autorizojë nxjerrjen e akteve nënligjore, të përcaktojë organin kompetent, çështjet që duhen rregulluar si dhe parimet në bazë të të cilave nxirren këto akte. Kjo dispozitë kushtetuese ka kufizuar të drejtën e organeve të nxjerrin akte nënligjore, në rastet kur ligji nuk i ka autorizuar në mënyrë specifike apo ia ka njohur një të drejtë të tij.

Ashtu siç dihet, ligji për gjykatat administrative, në nenet 7, 10, 15, 17, 37 ka parashikuar kompetencën e Gjykatës Administrative të Apelit për të shqyrtuar ligjshmërinë e akteve nënligjore normative. Gjykatës Administrative i njihet gjithashtu e drejta të mos zbatojë një akt nënligjor normativ, në bazë të të cilit është kryer veprimi administrativ, që

¹⁴ Sadushi, Sokol, “Gjykata Administrative dhe kontrolli ligjor mbi administratën”, fq. 210, Tiranë, Botimet Toena, 2014.

¹⁵ Sadushi, Sokol, “Drejtësia kushtetuese në zhvillim”, fq.230, Tiranë, Botimet Toena, 2012.

shqyrtohet, kur çmon se akti nënligjor është i paligjshëm (neni 38 i ligjit nr. 49/2012 “Për gjykatat administrative”, i ndryshuar).

Ndërsa për sa i përket aktit administrativ individual, me krijimin e gjykatave administrative, si dhe me përkufizimin që i është dhënë në këtë ligj organit publik, por edhe aktit administrativ, duket se problemi ndërmjet pakushtetutshmërisë dhe paligjshmërisë së aktit individual apo mundësisë mes një konflikti mes juridiksionit kushtetues dhe juridiksionit gjyqësor administrativ, nuk ekziston. Për më tepër që rregullimet e bëra së fundmi në Kushtetutë, por edhe qëndrimit e vërejtura në praktikën gjyqësore kanë konsoliduar opinionin se akti administrativ individual është objekt i juridiksionit të gjykatave administrative, përjashtimisht atyre rasteve, që përcaktojnë shprehimisht Gjykatën Kushtetuese si organ kompetent¹⁶. Është e kuptueshme që antikushtetutshmëria e një akti nuk e përjashton paligjshmërinë e tij. Megjithatë detyrë e gjykatave administrative mbetet vetëm shqyrtimi i paligjshmërisë së aktit dhe joantikushtetutshmërisë së tij.

2. Koncepti i gjykimit incidental si një risi në gjykimet administrative dhe tregues i rolit aktiv të gjyqtarit administrativ

Në nenin 38 të ligjit nr. 49/2012 “Për gjykatat administrative dhe gjykimin e mosmarrëveshjeve administrative”, i ndryshuar është parashikuar Nocioni i gjykimit incidental. Kjo dispozitë në mënyrë esplicite ka parashikuar se “1. Gjykata administrative, gjatë shqyrtimit gjyqësor të një veprimi administrativ, kryesisht ose me kërkesë të palëve, vendos të mos zbatojë një akt nënligjor normativ, në bazë të të cilit është kryer veprimi administrativ që shqyrtohet, kur çmon se akti nënligjor është i paligjshëm. 2. Gjykata vendos në këtë mënyrë edhe nëse gjykimi parësor i aktit normativ nuk është në kompetencën e saj. 3. Ky vendim përmban në mënyrë të hollësishme shkaqet e paligjshmërisë, të konstatuara nga gjykata”.

Sikurse u theksua më sipër, veprimtaria e organeve publike përfshin tërësinë e akteve dhe veprimeve të ndryshme, nëpërmjet të cilave formulohet dhe shfaqet vullneti i administratës publike. Ky vullnet i organeve publike i shprehur në aktet administrative individuale e normative, në kontratat dhe në veprimet e tjera administrative gjen pasqyrimin e vet në Kushtetutë, në ligje dhe në dispozitat e tjera me karakter nënligjor. Veprimtaria administrative nuk është e pagabueshme. Mbikëqyrja e veprimtarisë administrative i nënshtrohet, si kontrollit politik,

¹⁶ Sadushi, Sokol, “E drejta administrative procedurale, një analizë mbi Kodin e Procedurave Administrative”, fq. 452, Tiranë, Botimet Toena, 2017.

nëpërmjet organeve të caktuara për këtë qëllim, ashtu edhe kontrollit të brendshëm administrativ dhe kontrollit gjyqësor.

Instituti i kontrollit gjyqësor të akteve përbën një garanci kushtetuese për shtetasit, për mbrojtjen e të drejtave të tyre, nëpërmjet gjykimit të drejtë publik nga një gjykatë e pavarur dhe e paanshme. Legjislati dhe jurisprudenca gjyqësore kanë krijuar bazat për rishikimin gjyqësor. Kontrolli gjyqësor mbi aktin kërkon në radhë të parë autorizimin përkatës legjislativ, që përligj ndërmarrjen e veprimeve të ndryshme ligjore mbi të drejtat dhe liritë e shtetasve. Kushtetuta dhe ligji autorizojnë gjykatën administrative¹⁷, si organin kompetent që shqyrton mosmarrëveshjet me natyrë administrative. Pra kontrolli gjyqësor i pushteteve të tilla nga gjykatat administrative, të cilat janë ngarkuar nga ligji për zgjidhjen e mosmarrëveshjeve nëpërmjet personave nga njëra anë dhe shtetit nga ana tjetër. Kushdo që ka një interes të përligjur një veprim administrativ, mund t'i drejtohet gjykatës dhe mund të kërkojë anulimin ose shfuqizimin e tij, në rast se nuk është i bazuar në ligj, ose në aktet e tjera me karakter nënligjor.

Në varësi të pretendimeve, që paraqet kërkuesi shqyrtimi i pavlefshmërisë së aktit normativ mund të mbetet jashtë juridiksionit kushtetues, por nuk do të mbetet jashtë kontrollit ligjor të Gjykatës Administrative të Apelit. Një rrugë përmes së cilës mund të shmangen efektet e aktit normativ të paligjshëm është gjykimi incidental. Ky është një institut i ri i së drejtës që parashikohet për herë të parë në legjislatin tonë administrativ. Sipas nenit 38 të ligjit nr. 49/2012, i ndryshuar, gjykata administrative gjatë shqyrtimit gjyqësor të një veprimi administrativ, kryesisht ose me kërkesë të palëve vendos të mos zbatojë një akt nënligjor normativ, në bazë të të cilit është kryer veprimi administrativ, që shqyrtohet, kur çmon se akti nënligjor është i paligjshëm. Shmangia nga zbatimi i aktit normativ, të cilin e bën gjykata administrative, nuk është shfuqizim i aktit.

Referuar parashikimeve të kësaj dispozite, nëpërmjet gjykimit incidental subjekti që i është drejtuar gjykatës kërkon të shfuqizojë aktin individual, që është bazuar në aktin normativ. Për zgjidhjen e çështjes konkrete dhe nëpërmjet gjykimit incidental, megjithëse gjykata e ka shmangur zbatimin e aktit normativ, duke arsyetuar në mënyrë të hollësishme mbi shkaqet e paligjshmërisë, akti normativ do të mbetet i pacënuar.

Sikurse rezulton, neni 38 i ligjit për gjykatat administrative, parashikon përjashtimin e akteve normative nënligjore nga kuadri ligjor i zbatueshëm,

¹⁷ Sadushi, Sokol, "E drejta administrative procedurale, një analizë mbi Kodin e Procedurave Administrative", fq. 404, Tiranë, Botimet Toena, 2017.

nëse vërehet se një akt i tillë është i paligjshëm edhe nëse nuk është ankimuar nga kërkuesit në proces. Gjykatës, i njihet e drejta qoftë kryesisht, apo me kërkesë të palës që të mos zbatojë një akt nënligjor normativ në bazë të të cilit është kryer veprimi administrativ që shqyrtohet, kur çmon se akti nënligjor normativ është i paligjshëm. Kompetenca e gjyqtarit, për të vendosur sipas nenit 38 të ligjit nr.49/2012, është një nga tagrat ligjor që vetë ligjvënësi i ka atribuar gjyqtarit të gjykatës administrative. Ky pushtet dhe rol aktiv i gjyqtarit, referuar parashikimeve të kësaj dispozite ligjore, buron edhe nga neni 145/1 i Kushtetutës, i cili u jep atyre mundësinë të mos e marrin parasysh zbatimin e një akti nënligjor kur çmojnë mospërputhjen ligjore ose kushtetuese të tij.

Në interpretim të dispozitës së sipërcituar, ligjvënësi ka përcaktuar shprehimisht se edhe gjykatat administrative të shkallës së parë kanë të drejtë të verifikojnë në mënyrë të tërthortë ligjshmërinë e një akti nënligjor normativ edhe pse nuk është në kompetencën e drejtpërdrejtë funksionale të saj.

Pra, nëpërmjet gjykimit incidental, pala paditëse mund të pretendojë se akti administrativ individual që ka dalë në zbatim të një akti nënligjor normativ të paligjshëm, cënon të drejtat e tij dhe, në këtë rast, gjykata ka detyrimin të marrë në shqyrtim këtë pretendim, në zbatim me parashikimet e nenit 37 të ligjit nr. 49/2012, i cili ka përcaktuar kufijtë e shqyrtimit të çështjes. Gjatë shqyrtimit të çështjes, gjykata administrative e shkallës së parë është ajo e cila bën një vlerësim të faktit nëse akti nënligjor normativ është nxjerrë ose jo në zbatim të ligjit dhe, në varësi të kësaj analize, disponon me vendim vetëm në lidhje me aktin administrativ individual. Nëse gjykata çmon se akti nënligjor normativ nuk ka dalë në zbatim të ligjit ose ka dalë tej parashikimeve të tij, ç'ka e bën atë të paligjshëm, e konstaton këtë fakt në arsyetimin e vendimit të saj dhe në funksion të gjykimit në themel mënjanon zbatimin e aktit nënligjor normativ, duke zbatuar drejtpërdrejt ligjin dhe duke disponuar me pranimin e padisë e shfuqizimin e aktit administrativ individual, që ka cënuar të drejtat e palës kërkuese.

3. Praktika e gjykatave administrative në aplikimin e nenit 38 të ligjit nr. 49/2012, i ndryshuar për gjykimin incidental

Ndonëse ligji nr. 49/2012 *“Për gjykatat administrative dhe gjykimin e mosmarrëveshjeve administrative”*, i ndryshuar ka filluar të zbatohet me fillimin e funksionimit të gjykatave në datë 04.11.2013, praktika gjyqësore e gjykatave administrative në drejtim të zbatimit kryesisht apo me kërkesë

të parashikimeve të nenit 38 të këtij ligji për gjykimin incidental, është e vakët.

Vlen të evidentohet fakti se nga hulumtimi i realizuar nga ana ime në kuadër të këtij punimi, nuk më ka rezultuar asnjë vendim gjyqësor i dhënë nga gjykatat administrative, në të cilin gjykata administrative t'i jetë futur kryesisht analizës së faktit nëse akti administrativ individual objekt gjykimi, ka dalë në zbatim të një akti nënligjor normativ të paligjshëm dhe të ketë zgjedhur të mos e zbatojë atë, referuar rolit proaktiv që i njeh parashikimi i kësaj dispozite. Ndërkohë që rastet në të cilat gjykatat administrative, kanë shqyrtuar një kërkim për gjykim incidental nga pala kërkuese janë të pakta në numër.

Sikurse rezulton, para Gjykatës Administrative të Shkallës së Parë nga subjekte kërkuese janë paraqitur kërkesë padi, me objekt kërkitim dhe bazë ligjore nenin 38 të ligjit nr. 49/2012, për gjykim incidental dhe në një rast, Gjykata Administrative e Shkallës së Parë Tiranë, ka vendosur pranimin e kërkesë padisë, duke shfuqizuar aktin individual, të dalë në zbatim të një akti normativ të paligjshëm, duke zgjedhur të mos e zbatojë atë, vendim i cili është lënë në fuqi edhe nga Gjykata Administrative e Apelit¹⁸. Gjykata e Lartë nuk është shprehur ende lidhur me shkaqet e rekursit të paraqitura nga pala e paditur: DRSSH Tiranë, duke mos pasur kështu ende një qëndrim përfundimtar lidhur me këtë çështje, përfshirë edhe qëndrimin dhe analizën e dy gjykatave më të ulëta përsa i përket zbatimit të nenit 38 të ligjit për gjykatat administrative në rastin konkret.

Ndërkohë, në raste të tjera, Gjykata Administrative e Shkallës së Parë Tiranë, kanë rrëzuar kërkitime të palëve kërkuese¹⁹, përfshirë edhe kërkitimin për gjykim incidental dhe më pas, Gjykata Administrative e Apelit, ka vendosur prishje pushim gjykimi të çështjes, duke mos bërë një analizë të hollësishme se përse nuk merret në analizë pretendimi i kërkuësve për gjykim incidental.

Po ashtu edhe Gjykata e Lartë, nuk ka një praktikë të zgjeruar sa i përket gjykimit incidental. Në këtë punim kam zgjedhur të evidentoj një rast të trajtuar nga Kolegji Administrativ i Gjykatës së Lartë, ku është bërë një

¹⁸ Shih vendimin nr. 3212, datë 03.10.2019 të Gjykatës Administrative të Shkallës së Parë Tiranë, i cili është lënë në fuqi me vendimin nr. 86-2021-156, datë 24/02/2021 të Gjykatës Administrative të Apelit, që i përket paditësit: E. Dobjani ndaj të paditurit: DRSSH, Tiranë.

¹⁹ Shih vendimin nr. 2940, datë 24.07.2018 dhe vendimin nr. 3190, datë 17.09.2018 të Gjykatës Administrative të Shkallës së Parë Tiranë, me anë të të cilëve është vendosur rrëzimi i kërkesë padisë. Këto vendime rezultojnë të jenë prishur dhe pushuar çështja nga Gjykata Administrative e Apelit respektivisht me vendimet nr. 86-2023-1157, datë 08/11/2023 dhe nr. 86-2023-1032, datë 13.10.2023.

analizë e nenit 38 të ligjit për gjykatat administrative për gjykim incidental, duke mbajtur qëndrim njëkohësisht sa i përket legjitimitetit të palës kërkuese për kundërshtimin e aktit normativ nënligjor në Gjykatën Administrative të Apelit. Konkretisht në përmbajtje të vendimit që i përket çështjes me nr. 31001-00165-00-2022i Regj. Themeltar, me palë paditëse: V. K; të paditur: Këshilli i Rregullimit të Territorit, AKPT dhe Bashkia Tiranë, me objekt: Anulimi dhe shfuqizimi i vendimit nr. 1, datë 14.04.2017 i Këshillit Kombëtar të Territorit, për pikën (harta e rrjetit rrugor të propozuar), në seancën gjyqësore të datës 28.10.2022, Kolegji Administrativ i Gjykatës së Lartë ka arsyetuar dhe konkluduar ndër të tjera se “... .. kolegji vlerëson se vendimi nr. 1, datë 14.04.2017, të Këshillit Kombëtar të Territorit, objekt gjykimi, është akt administrativ me karakter normativ. Konkretisht, me aktin, objekt kundërshtimi, është miratuar Plani i Përgjithshëm Vendor të Bashkisë Tiranë. Akti objekt gjykimi nuk i drejtohet subjektit individualisht të përcaktuar (në këtë rast paditësit); nuk krijon, ndryshon një marrëdhënie juridike konkrete të së drejtës administrative, por vendos rregulla të përgjithshme për planin rregullues vendor, Bashkia Tiranë dhe që nuk është shterues në zbatimin e tij

... ..Sipas praktikës së konsoliduar gjyqësore dhe kushtetuese, individët apo subjektet e tjera, për mbrojtjen e të drejtave apo interesave të tyre të ligjshme, duhet të provojnë veçanërisht interesin e tyre të drejtpërdrejtë, për kundërshtimin e një akti nënligjor normativ, duke bindur gjykatën se nuk kanë rrugë tjetër për të mbrojtur të drejtat e tyre. Për vetë natyrën e tij, pasojën e drejtpërdrejtë juridike mbi subjektin nuk e krijon akti nënligjor normativ. Akti nënligjor normativ përmban norma abstrakte dhe si rregull, ai nuk mund të zbatohet, nëse organi administrativ nuk nxjerr aktin individual ndaj subjektit konkret. Kjo do të thotë se në këto raste përjashtohet kundërshtimi në Gjykatën Administrative të Apelit të aktit nënligjor normativ, por mbrojtja e interesave të ligjshme për çdo subjekt bëhet me paraqitjen në gjykatën administrative të shkallës së parë të padisë ndaj aktit individual konkret. Pra, çdokush që cënohet në të drejtën e tij dhe ky cënim rezulton të jetë konkret, aktual, i sigurt dhe i formësuar në një akt individual, duhet t’i drejtohet gjykatës administrative të shkallës së parë që ligji ka ngarkuar për shqyrtimin e saj, si nga pikëpamja lëndore, tokësore dhe funksionale, pa pasur nevojë t’i drejtohet Gjykatës Administrative të Apelit, për kundërshtimin e aktit nënligjor normativ.

Nga ana tjetër, Kolegji e vlerëson të nevojshme të theksojë se ligji nr. 49/2012 ka parashikuar, për herë të parë, një tjetër mjet të rëndësishëm që në fakt synon shmangien apo moszbatimin e aktit normativ, që vlerësohet si i paligjshëm. Konkretisht në nenin 38 të tij parashikohet se “1. Gjykata

administrative, gjatë shqyrtimit gjyqësor të një veprimi administrativ, kryesisht ose me kërkesë të palëve, vendos të mos zbatojë një akt nënligjor normativ, në bazë të të cilit është kryer veprimi administrativ që shqyrtohet, kur çmon se akti nënligjor është i paligjshëm. 2. Gjykata vendos në këtë mënyrë edhe nëse gjykimi parësor i aktit normativ nuk është në kompetencën e saj. 3. Ky vendim përmban në mënyrë të hollësishme shkaqet e paligjshmërisë, të konstatuara nga gjykata”.

Në interpretim të dispozitës së sipërcituar, ligjvënësi ka përcaktuar shprehimisht se edhe gjykatat administrative të shkallës së parë kanë të drejtë të verifikojnë në mënyrë të tërthortë ligjshmërinë e një akti nënligjor normativ edhe pse nuk është në kompetencën e drejtpërdrejtë funksionale të saj. Pra, nëpërmjet gjykimit incidental, pala paditëse mund të pretendojë se akti administrativ individual që ka dalë në zbatim të një akti nënligjor normativ të paligjshëm, cënon të drejtat e tij dhe, në këtë rast, gjykata ka detyrimin të marrë në shqyrtim këtë pretendim, në zbatim me parashikimet e nenit 37 të ligjit nr. 49/2012, i cili ka përcaktuar kufijtë e shqyrtimi të çështjes.

Nga shqyrtimi në tërësi i pretendimeve të ngritura në rekurs dhe të parashtruara në seancë gjyqësore dhe atyre që ndodhen në dosjen gjyqësore, Gjykata Administrative e Apelit ka arritur në përfundimin se pala paditëse Valbona Kotorri është individ dhe, si i tillë, nuk gëzon tiparet e “grupit të interesit” ose “shoqatës” të kërkuara në mënyrë të posaçme nga neni 15 shkronja d) për ta legjitimuar formalisht atë në këtë gjykim. Paditësja qartësisht ka një mjet tjetër në dispozicion për mbrojtjen e të drejtave të saj individuale, që është padia ndaj aktit zbatues të nxjerrë nga pala e paditur, në ekzekutim të parashikimit abstrakt të aktin nënligjor normativ objekt gjykimi.

... .. Kolegji i gjen të mbështetura në ligj konkluzionet e Gjykatës Administrative të Apelit, që paditësja V. K. nuk ka legjitimitet aktiv për të kundërshtuar drejtpërdrejt, në Gjykatën Administrative, ligjshmërinë e vendimit nr. 1, datë 14.04.2017 i Këshillit Kombëtar të Territorit për miratimin e Planit të Përgjithshëm Vendor (PPV) të Bashkisë Tiranë.....”.

Konkluzione

Zhvillimet aktuale në sistemin gjyqësor shqiptar ndikohen fort nga standardet evropiane, në veçanti nga garancitë procedurale të nenit 6 të KEDNJ-së, si dhe nga *acquis Communautaire* e BE-së. Edhe pse fusha e zbatimit të tyre është e kufizuar, së bashku ato i kërkojnë gjykatës administrative të sigurojnë mbrojtjen e të drejtave të individit dhe bërjen

efektiv të shtetit të së drejtës. Ky është një zhvillim krejtësisht i ndryshëm, i evidentuar në legjislacionin procedural dhe në jurisprudencën gjyqësore, por që kërkon domosdoshmërisht edhe një ndryshim rrënjësor të orientimit, të mënyrës së sjelljes dhe të mentalitetit të gjyqtarit administrativ.

Një ndër risitë që solli ligji nr. 49/2012 “*Për gjykatat administrative dhe gjykimin e mosmarrëveshjeve administrative*”, i ndryshuar, që mbron dhe garanton të drejtat dhe liritë e individëve është edhe parashikimi që bën neni 38 i tij, i cili i jep mundësinë gjykatës administrative që gjykon një mosmarrëveshje të kësaj natyre, për të moszbatuar një akt nënligjor në rast se gjatë shqyrtimit gjyqësor çmon se akti nënligjor është i paligjshëm. Një parashikim i tillë detyron gjykatat administrative qoftë kryesisht ose me kërkesë të palëve, t’i futen analizës së përputhshmërisë së akteve nënligjore normative, mbi bazën e të cilave është kryer veprimi administrativ, duke zgjedhur të mos e zbatojnë atë, në rast se çmojnë se akti nënligjor është i paligjshëm.

Ky parashikim detyron gjykatat administrative qoftë kryesisht ose me kërkesë të palëve ta bëjnë një gjë të tillë, duke i dhënë rol tejet aktiv gjyqtarit administrativ, i cili bie në kontakt me një akt të tillë, qoftë ai gjyqtar i shkallës së parë, gjyqtar i Gjykatës Administrative të Apelit, apo i Gjykatës së Lartë. Praktika gjyqësore rezulton të jetë e vakët dhe të mos jetë elaburuar shumë në këtë drejtim. Ndonëse ligjvënësi i ka dhënë një rol proaktiv gjyqtarit administrativ në këtë drejtim, duke e bërë atë kontributor të drejtëpërdrejtë në përmirësimin dhe përafrimin legjislativ shqiptar me standardet evropiane, jurisprudenca gjyqësore në këtë drejtim nuk ka evoluar me ritmet e kohës dhe në sinkron me parashikimet ligjore.

Nisur nga koha e gjatë e hyrjes në fuqi të ligjit nr. 49/2012 “*Për gjykatat administrative dhe gjykimin e mosmarrëveshjeve administrative*”, i ndryshuar dhe zbatimit të vakët në praktikë i nenit 38 të këtij ligji, vlerësoj se, njësimi i praktikës gjyqësore nga Kolegji Administrativ i Gjykatës së Lartë²⁰, do të luante një rol tejet efikas në praktikë, duke detyruar gjykatat më të ulëta, që të zbatojnë standardet e vendosura nga Gjykata e Lartë në gjykimin e çështjeve të ngjashme lidhur me gjykimin incidental, në gjykimet administrative.

²⁰ Shih nenin 62/a, pika 1 të ligjit nr. 49/2012 “*Për gjykatat administrative dhe gjykimin e mosmarrëveshjeve administrative*”, i ndryshuar, me këtë përmbajtje “Kolegji Administrativ, kryesisht ose me kërkesë të palëve, mund të vendosë nisjen e procedurës së gjyimit për të njëzuar ose ndryshuar praktikën gjyqësore. Nisja e procedurës për ndryshimin e praktikës gjyqësore mund të vendoset edhe nga Kryetari i Gjykatës së Lartë... ..”.

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"THE SPECIAL COURT" IN KOSOVO CONTESTED LEGITIMACY

Triumf SADIKAJ¹

Abstract

This paper deals with the contentious character of the Specialized Chambers for Kosovo, starting from the context, format, legislative purpose of their establishment and the continuous contestation and social and political interpretation that is given to them.

The dimensions of the conflict and crimes of the years 1998-1999 by the dictatorial regime of Serbia under Milosevic against the people of Kosovo are historically known, and based on these dimensions, the accusations of war crimes against members of the KLA were not only unexpected but also accompanied by many legal and legitimate doubts. However, these accusations have found their way and have been established in the ranks of a campaign that preceded the need to clarify them.

The political features of the states and the characteristics of their conflicts also imposed new methods that had to be internationally legalized. The product of this approach led to the establishment of so-called hybrid courts. The freshest case, which is currently active and developing the case process, is precisely the case of the Specialized Chambers and the Specialized Prosecutor, related to the alleged crimes committed by former members of the Kosovo Liberation Army.

Keywords: Special court, legitimacy, Specialized Prosecutor.

1. Introduction

Throughout its history, human society has always found itself in the midst of competition for resources and territory, a demand that has historically produced conflict. However, in parallel with the advancement of the tools of the conflict and its dimensions, in an almost linear way, there has also been a permanent effort to institutionalize the development of the conflict, so that it would be kept under control and that the violence arising from it

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would be exercised in a limited way and be subject to some basic principles.

Political history has produced capital events that have brought together these two sides, through which human society has manifested its nature, that is, the violence from the conflict and the effort to keep its exercise under control. The central dimensions of political systems from antiquity to the present day are also based on this principle. On this same principle has traveled the law related to the conflict and the warring parties.

Although it is often not referred to as it deserves, it was the Liber Code, during the American Civil War,² that constitutes the starting point of the institutionalization and codification of law related to rights of parties during the war. The diplomatic discussions that culminated in the Geneva³ and Hague Conventions, which then advanced and tried to "humanize" the parameters of the war scenarios, were conducted on its principles.⁴ These international legal sources began their journey at the beginning of the 19th century, a century that was a prelude to the 20th century, which produced the discourse of total war and the most serious crimes that human history has known. After the end of the Second World War and the establishment of the UN, the effort to prevent such crimes was institutionalized both at the international level and at the local, national and state levels.

However, the various political factors that created tensions and war grounds for the release of these tensions, were a step before efforts for peace and tolerance between states, between nations and between ethnic groups. As a result, despite the fact that the institutionalization of the principles and rules of war had taken shape, the prevention of war crimes by the warring parties was not effective.

This is due to the fact that even after the Second World War and the Nuremberg process, competing ideologies sparked the birth of a multitude of conflicts and wars that have been characterized by violations of human rights, as well as international conventions and principles related to the law of war. Among others, the civil war in Nigeria, Rwanda, the war between Eritrea and Ethiopia, the Arab Israeli conflict, the conflict between Iraq and Iran, as well as the wars during the breakup of Yugoslavia, are just some of the examples where the brutality of the violence during the conflict reaches

² Source: International Committee of Red Cross (ICRC), *Database of International Humanitarian Law*, accessible at: <https://ihl-databases.icrc.org/en/ihl-treaties/liebercode-1863>.

³ Roxburgh, Roland (1920), *"International Law: A treatise"*, Longman, London, p. 707.

⁴ Gardam, Judith (2011), *"Necessity, Proportionality and the use of force by States"*, Cambridge University Press, p. 7.

the scale of genocide.

Such events produced effects and a reaction of world opinion, in which case efforts were increased to establish a kind of order that acts and applies justice to the parties involved in the conflicts. As a result, several legal mechanisms were established for their treatment, such as the International Criminal Court in The Hague for crimes in the former Yugoslavia and that for crimes in Rwanda.

However, the political features of the states and the characteristics of their conflicts also imposed new methods that had to be internationally legalized. The product of this approach led to the establishment of so-called hybrid courts. The freshest case, which is currently active and developing the case process, is precisely the case of the Specialized Chambers and the Specialized Prosecutor, related to the alleged crimes committed by former members of the Kosovo Liberation Army.

The dimensions of the conflict and crimes of the years 1998-1999 by the dictatorial regime of Serbia under Milosevic against the people of Kosovo are historically known, and based on these dimensions, the accusations of war crimes against members of the KLA were not only unexpected but also accompanied by many legal and legitimate doubts. However, these accusations have found their way and have been established in the ranks of a campaign that preceded the need to clarify them.

This paper deals with the contentious character of the Specialized Chambers for Kosovo, starting from the context, format, legislative purpose of their establishment and the continuous contestation and social and political interpretation that is given to them.

2. The prelude to the 1998-1999 war and the evidence for "alleged crimes"

Kosovo, as an open political issue, has its history linked to the events and political developments that took place before and after the First World War. It had remained outside the borders of the autonomous Albanian state resulting from the decisions of the Conference of Ambassadors in London,⁵ while after the Second World War, it found itself again as part of the Socialist Federative Republic of Yugoslavia, starting from September 1945, when the People's Assembly of Serbia, within the framework of other political developments that characterized Yugoslav socialism, established

⁵ Michael Graham Fry, Erik Goldstein, Richard Langhorne (2004). *Guide to International Relations and Diplomacy*” Bloomsbury Academic Publications, p. 144;

the autonomous province of Kosovo or as it was known by the official name "oblast", as a constituent part of Serbia.⁶

The initial period of rule by the Yugoslav and Serbian central authorities over Kosovo was a period of administration through the police-state format, where Serbia dominated all public spheres, which it protected through the state security apparatus led by Alexander Ranković.⁷ The constitutional changes of 1974, the establishment of the University of Pristina, as well as the "liberalization" of Yugoslav socialism as a trend, gave space to the beginning for the political articulation of Albanians, both from the institutional form, and from the form of rebellion, as were the demonstrations of 1981 onwards.⁸

However, the phase of Kosovo's constitutionality within the former Yugoslavia was not long-lived because Serbian nationalism led by Milošević, in 1989 removed the element of autonomy and restored the measures of systematic violence and classic occupation of Kosovo by Serbia.

The period between 1989-1997 was characterized by several important developments such as the attempt to internationalize the issue of Kosovo and consolidate a fictitious democratic state.⁹ These actions are evidence that a state political idea had begun in Kosovo and, moreover, it was coming to reality at a time when Yugoslav communism, like everywhere else in Europe and beyond, was in its last days. Consequently, since Kosovo became a political subject with the clear aim of raising it to the rank of a state, the brutality of the Serb-Yugoslav regime became bigger and more pronounced. The political events and developments in the former Yugoslavia, including the war and the independence of Slovenia, Croatia and Bosnia, which split after large-scale ethnic violence, caused the political situation in Kosovo to deteriorate further.¹⁰

The deterioration of the situation also contributed to the political discourse, devaluing the calls for peaceful resistance and the demands for the solution of the Kosovo issue with compromise parameters. As a result, after the 1995 Dayton Conference, political factors that constituted the doctrine of liberation by war, were set in motion and founded the Kosovo Liberation

⁶ Weller, Marc, (2009). *"Shtetësia e kontestuar: administrimi ndërkombëtar i luftës së Kosovës për pavarësi"* Botimet Koha, p. 79;

⁷ Schmit, J. Oliver, (2012). *"Kosova: histori e shkurtër e një treve qendrore ballkanike"* Botimet Koha, p. 176;

⁸ Po aty, p. 181-182;

⁹ Malcolm, Noel, (1998) *"Një histori e shkurtër e Kosovës"* McMillan, p. 346;

¹⁰ Finlan, Alastair. (2004). *"The collapse of Yugoslavia 1991-1999"* Osprey, p. 16;

Army. From the struggle of the people of Kosovo for freedom led by the KLA, new political circumstances were created in Kosovo. The KLA managed to organize and conduct a successful guerrilla war which escalated the behavior of the Yugoslav army. The serious events and systematic violence on a genocide scale by the Serbian army and police in Kosovo prompted NATO's humanitarian intervention.¹¹ This led to the liberation of Kosovo from the Yugoslav Army and the establishment of the United Nations Mission - UNMIK, as the first step after which a series of revolutionary events followed, culminating in the declaration of Kosovo's Independence on February 17, 2008, internationally recognized by the vast majority of Western democracies.

After a genuine experience of state consolidation, the political relationship between Kosovo and Serbia continued to be unresolved. Negotiations continued and in parallel, between 2005-2010, there was also a silent effort by Western democracies to create a rehabilitation corridor for Serbia, within the integration ambition. One of the ways this rehabilitation was supposed to take root, was by trying to apportion blame for the events of 1998-1999. In these circumstances, after a systematic diplomatic pressure started by former senator Dick Marti's claims about the trafficking of organs by KLA members, whose report was approved by the Council of Europe, Kosovo established the Specialized Chambers, the entity that is mainly known as the "Special Court". These chambers, which are currently working, have changed the political reality and produced a socio-identity crisis among the Kosovar society. At the same time, they continue to be contested for a number of reasons that will be elaborated further.

3. The process of establishing Specialized Chambers

On January 7, 2011, the Parliamentary Assembly of the Council of Europe adopted the resolution that was based on the report of the Committee on Legal Affairs and Human Rights, drafted by the rapporteur, Swiss Senator Dick Marty, regarding the "inhumane treatment of people and illegal trafficking of human organs in Kosovo".¹²

These claims caused a great uproar, because it was the first time that an international instance had reached the point of taking such a position towards the "truth" of the KLA war. In his report, Marti presented the

¹¹ Henkin, Loius, (1999). *"Kosovo and the Law of Humanitarian Intervention"*, The American Journal of International Law, Cambridge University Press, p.824-826;

¹² See resolution:

https://assembly.coe.int/committeedocs/2010/20101218_ajdoc462010provamended.pdf

trafficking of organs by former members of the KLA from an interpretive point of view, not a factual one. However, this was a stain that weighed on the era of the KLA war and its purity and historical integrity. As a result, the way was paved for the treatment of these claims and that the same were paved by the discourse of war crimes.

A specialized investigative task force was established for the preliminary investigation of these claims, whose findings, although had failed to document the well-founded suspicion, had drawn circumstantial findings that, according to them, constituted war crimes, which sealed the further process.

Since the characteristics of Kosovo within the state formation process were special, the alternatives for their treatment by an international panel were more debatable. As a result, the process of establishing a special hybrid panel began, which would be composed of international judges and prosecutors, while formally falling under the jurisdiction of the Republic of Kosovo. In order to pave the way for the constitutionality of the establishment of these chambers, the former President of Kosovo, Atifete Jahjaga, exchanged credentials with the high representatives of the European Union, which were formalized through the approval of the Law on the Ratification of the International Agreement between Kosovo and the European Union, on April 23, 2014.¹³

The approval of this agreement paved the way for the process of amending the Constitution, where through amendment 24, the way was opened for the establishment of panels of Specialized Chambers.¹⁴ In parallel with this, the Law on Specialized Chambers and the Office of the Specialized Prosecutor was also approved,¹⁵ as well as the one for the Protection of Potential Accused from Specialized Chambers.¹⁶

The package approval of the constitutional amendments and the above-mentioned laws for the establishment of the Specialized Chambers was characterized by an extensive social, parliamentary and political debate for months. Two fundamental views stood in opposition to each other in this discourse.

First, the unshakable collective belief that the KLA had committed no crimes and that instead of punishing and holding accountable members and leaders of the Serbian military and police for crimes of genocide

¹³ See the law: https://www.scp-ks.org/sites/default/files/public/04-l-274_a_0.pdf

¹⁴ See the constitutional amendment: https://www.scp-ks.org/sites/default/files/public/amendamenti_kushtetues_nr_24.pdf

¹⁵ See the law: https://www.scp-ks.org/sites/default/files/public/05-l-053_sh.pdf;

¹⁶ See the law: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=11037>

proportions that were documented and recognized internationally, the charges against former KLA members were unjust.

Second, the conviction that Dick Marti's accusations constituted a bad stain on the integrity and purity of the KLA's struggle, which had to be removed precisely through the open confrontation with the untruth of these accusations.

The debate of this nature took the form of a powerful clash between the opposition and the position within the Assembly of Kosovo, however, the parliamentary majority at the time managed to approve the necessary legislative changes after two attempts. The completion of the consolidation of the Chambers was then concluded with the agreement between the Republic of Kosovo and the Kingdom of the Netherlands, of February 2016, ratified by both parliaments of the respective countries, through which the location of the location of the Special Court was formalized, whose seat was set in The Hague.

Already based on the law and the constitution, the Specialized Chambers constitute a semi-local and semi-international judicial system, entering the framework of what science knows as hybrid tribunals.

Hybrid tribunals thus, "borrow mainly from the domestic law of the states in question, while being internationalized in terms of their personnel, their functioning and the categories of crimes in question."¹⁷ These courts are called "mixed" or "internationalized" to differ from international ones. The name of these institutions varies. In some cases they are called "courts" or "tribunals", while in others "panels" or "chambers".¹⁸ There are also changes in designations in the bodies of these institutions. Each of these institutions was created in response to a specific conflict, under specific political circumstances, which makes generalizations difficult. This is also the reason why there is no unique model that could respond to all post-conflict situations.¹⁹

This format of the Specialized Chambers of Kosovo also corresponds to the classification of the third generation of transitional justice mechanisms. Precisely, most authors agree that transitional justice has developed in at least three stages:

¹⁷ Sorel, Jean – Marc, (2011). "*Les tribunaux pénaux internationaux: Ombre et lumière d'une récente grande ambition*" *Revue Tiers – Monde*, p.29-46;

¹⁸ Fichtelberg, Aron. (2015). "*Hybrid Tribunals, a Comparative Examination*", Springer, p. Xxi;

¹⁹ Rachel Kerr and Eirin Mobekk. (2007). "*Peace and Justice, seeking accountability after war*" Cambridge, p. 2.

- a) The first phase begins with the establishment of the Nuremberg and Tokyo Military Tribunals, which are considered the first judicial mechanisms, which preceded the development of transitional justice later.²⁰
- b) The second phase of transitional justice is closely related to what Samuel Huntington calls the third wave of democratization and which, as stated above, coincides with the beginning of the democratization of Southern European states (Spain, Portugal, Greece) in the 1970s; those of Latin America in the 1980s and of Central and Eastern Europe after the fall of the Berlin Wall, as well as South Africa, after the fall of Apartheid, in the early 1990s.²¹
- c) The third phase is the phase of raising transitional justice at the global level. This globalization will be made possible through the consolidation of international criminal law. In this phase, transitional justice will deal with serious violations of human rights through the punishment of persons who have committed war crimes, crimes against humanity or genocide. The basis of the trial of these people will be the flagrant violation of international humanitarian law."²²

The Specialized Chambers of Kosovo enter the third wave of transitional justice, but not only for time reasons. The fundamental fact that paved the way for the establishment of hybrid chambers is related to the political context in which the transition from the war period to their establishment took place, preceding the definition of these mechanisms of transitional justice. Among the main claims of this international spirit for hybrid panels is the belief that their current advantage focuses on law and principles, as the basis through which societies will confront the past, despite the models of reconciliation and acceptance commissions, or amnesty.

So, the basic doctrine that was laid out in the case of the establishment of the Specialized Chambers in Kosovo is a doctrine based on the basic premise that sustainable peace and the rehabilitation of the past can only be achieved through the implementation of laws that deal with the dimensions and responsible actors.²³

4. The legislative purpose of establishing the Specialized Chambers

As I mentioned above, the decision-making context for the implementation of the constitutional amendments for the establishment of Specialized Chambers has been characterized by a wide and multi-dimensional debate,

²⁰ Teitel, Rudi, (2003). "Transitional Justice Genealogy" *Harvard Human Rights Journal* 16, p. 70.

²¹ Oduro, Franklin. (2012) "Transitional Societies, Democratic Accountability and Policy Responses: The Formulation of the Truth Commission-Approach to a Transitional Justice Policy" University of Carlton, Ottawa, Doctoral Thesis, p. 31.

²² Teitel, Rudi, (2003). "Transitional Justice..." p. 71.

²³ Hazan, Pierre. (2010). "Judging War; Judging History: Behind truth and reconciliation" Stanford University Press, p. 30-31.

especially about issues related to legal sovereignty, the subject concept, as well as the basis on which the need for the establishment of these Chambers has been laid.

Public opinion was preceded by the conviction that the accusations of organ trafficking by former members of the KLA were fictitious and unfounded, but the theft within these accusations of Serbia's traditional claims for the alleged crimes committed by the members of the KLA was the problematic element that ignited the passions of the citizens.

As has been seen further or currently in the subject matters that are being developed by the special court, it seems that such concerns of public opinion were right, since conditionally one can observe an excess of the subject and time concept of the subjects that the court has prioritized.

Despite the debate and political and media controversies that have characterized the process of establishing these chambers, to lay this perspective it is important to understand the legislative purpose of their establishment. Thus, in terms of legal sovereignty, the Specialized Chambers have been established in accordance with the Constitution of the Republic of Kosovo, giving them a degree of local ownership.

In terms of the subject concept, the subject concept that was debated within the framework of the proposal for constitutional changes and the adoption of the special law for Specialized Chambers, was the discourse on the alleged crimes which were articulated as such by the Rapporteur of the Council of Europe, Mr. Dick Marty, who in his report has alluded to crimes alleged by former members of the KLA, of the nature of organized crime consisting of notions such as organ trafficking committed from "the middle of the summer of 1999 and later".²⁴

So, the subject concept of these Chambers in the legislative context is the opportunity to investigate and judge the alleged crimes that took place in Resolution 1782 of the Parliamentary Assembly of the Council of Europe.²⁵

In terms of the basis on which the need for the establishment of these Chambers has been laid, the debate has been characterized by the logic that "crimes of the alleged nature" cannot be fully treated within the framework of "war crimes" as defined by the Rome Statute, nor sufficiently through the legal basis given in the Criminal Code of the Republic of Kosovo, leaving room for a "legal entity" based on the Constitution of Kosovo and international law.

²⁴ See the resolution of the Parliamentary Assembly of Council of Europe with number 1782, <https://pace.coe.int/en/files/17942>.

²⁵ Law for the Specialist Chambers, article 1, point 2: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=11036>.

In order to understand the clear legislative will in the case of the adoption of these constitutional amendments, the reference to the special law on Specialized Chambers should be taken into consideration, where article 1, point 2, clearly defines the scope of the law, referring to the context of the adoption of the constitutional amendments in the subject dimension, namely "crimes which are related to those reported in the Report of the Parliamentary Assembly of the Council of Europe Doc 12462, dated January 7 2011, and which have been the subject of criminal investigations conducted by the Special Investigation Task Force ("TFHS") of the Special Prosecutor's Office of the Republic of Kosovo ("PSRK").²⁶ **Further, in article 6, Subject Jurisdiction, in point 1 it is clearly stated that "Specialized Chambers have jurisdiction over the crimes provided for in articles 12 - 16 that relate to the Report of the Assembly of the Council of Europe"**²⁷

In addition to the fact that the law is quite clear, the transcript of the discussions of the plenary session where it was approved is also accessible, from which the positions of the parliamentary groups and individual deputies can be understood, the references of whose discussions make it quite clear the subject competence with an exclusive focus on the Report of Senator Dick Marty.²⁸

The failure to address organ trafficking and the attempt to expand the thematic issues in the general direction of war crimes, as specified in the Rome Statute, forms the basis of the debate about the legitimacy of these chambers, a debate that continues to this day.

5. Contested Legitimacy

On June 24, 2020, the Specialized Chambers shocked public opinion in Kosovo and beyond, after they announced that they had filed an indictment for war crimes against President Hashim Thaçi, for the time he was the leader of the KLA during the 1998-1999 war. In the same indictment, other important personalities of the Kosovo Liberation Army were included, such as Mr. Kadri Veseli, Jakup Krasniqi, Rexhep Selimi, etc.²⁹

Bringing forward the accusations of the personality of Mr. Thaçi and the

²⁶ Ibid.

²⁷ Ibid.

²⁸ See the transcript:

http://old.kuvendikosoves.org/common/docs/proc/trans_s_2015_06_26_10_6021_al.pdf;

²⁹ Source: Specialist Prosecutor Office: Indictment against Thaci and others,

<https://repository.scp->

[ks.org/details.php?doc_id=091ec6e980d7b4f9&doc_type=stl_filing_annex&lang=eng](https://repository.scp-ks.org/details.php?doc_id=091ec6e980d7b4f9&doc_type=stl_filing_annex&lang=eng)

former leaders of the former Kosovo Liberation Army, it was a moment that evoked multiple and numerous reactions, since the full format through which the Kosovar society would face during this process was already emerging.

In this context, the reactions of lawyers, scholars, professors, civil society and political actors gave shape to a discourse that questioned the legitimacy of the special court. In general terms, the central argument of the contestation of this legitimacy rests on three reasons as follows:

a) First, the mandate of the Specialized Chambers is determined by the Law on Specialized Chambers, which has as its subject the claims of the Report of the Parliamentary Assembly of the Council of Europe. However, none of the indictments filed purport to address these claims. Consequently, this is interpreted as exceeding the mandate established by law.

b) Secondly, from the other point of view, the mandate of the Specialized Chambers originates from the sanctioning of International Law, which includes genocide, crimes against humanity, war crimes, and crimes of aggression that contradict the Charter of the United Nations. In terms of scope, crimes against international law include, among others: murder, extermination, enslavement, deportation, imprisonment, torture, sexual rape, persecution on political, racial, ethnic or religious grounds, forced disappearance of persons and other inhuman acts, violation of the Geneva Conventions, attacks on the civilian population, attacks on civilian objects that have nothing to do with military assets, murder, wounding of fighters who have surrendered or are injured during the fighting, etc.³⁰ As long as these crimes have really happened but have as protagonists exclusively the activity of the Yugoslav army and the paramilitary and police forces of Serbia, the search for responsibility for such a jurisdiction of international law in the address of the former members of the KLA, is interpreted as baseless, especially when the historical period to which the mandate of the DHS refers as an entity is known and is quite well documented.

c) Thirdly, the idea that war crimes should be dealt with according to the definition of international law, which to be such include a geographical area, warring parties, as well as military responsibilities, the Specialized Chambers, contrary to these principles, have raised exclusively one-sided accusations excluding the real perpetrators of the crimes, namely the Yugoslav army, thus they are considered illegitimate.

Currently, the Specialized Chambers have handed down two convictions against former KLA members, while the main trial against Thaçi and others is ongoing. For the aforementioned arguments and justifications, the basic perception towards the Specialized Chambers is that of a hybrid court, which in the name of international law, has actually built a mono-ethnic

³⁰ Statute of Rome, art. 5, 6, 7 and 8. Source accessible at: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>;

narrative of handling its own cases.

Taking as a basis many other circumstantial factors, it is not expected that in any near period something will change in relation to the mandate of the Chambers, but their legitimacy will continue to be contested, constituting a case study that should also be addressed in relation to the compatibility of the goals of international law, so that such panel formats have proper credentials and in the function of justice.

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PR AND MEDIA ROLE IN JUSTICE SYSTEM - ENHANCING PUBLIC TRUST AND TRANSPARENCY

*PhD(c) Eni LASKU*¹

Abstract

When addressing stable institutional foundations, one of among the most significant elements of how they evolve is institutional communication with the general population and media. The public, the media, and the institution have always had a nearly mutually advantageous relationship that illustrates the institution's personality, image, and values. Albania along with other developing countries are currently going throughout a critical period, in particular when it relates to integration processes where in institutional communication is vital.

Public relations and the media have been seen as the two key instruments to strengthen transparency and raise public trust as the implementation of the justice reform is concerned. In order to guarantee that the public comprehend legal processes and all of its operations of justice institutions in an effortless and unbiased approach, communication professionals frequently develop statements that are simple for people to comprehend, transparent, and accessible.

In an attempt to explain the legal framework while making it easier to understand and transparent for the general public, this article will explore various techniques applied to strategic communication using traditional as well as digital media. We are going to take a look at how European Union regulations relating to the right to information are implemented, with emphasis on how different strategies influence how the public thinks of the justice system.

The result will be conducted through an investigation at the High Prosecutorial Council's communication strategies (PR & Media) cases with the objective of strengthening the concept that transparent, continues, and clear communication is vital in enhancing public trust in the truthfulness and reliability of the processes that result from the successful implementation of the justice reform. We will conclude by working on to

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look at the difficulties and proposals for further development of communication between institutions in the judiciary.

Keywords: *Media, PR, Justice reform, transparency, right of information*

1. Introduction

In transitional democracies like Albania, institutional communication is particularly significant for affecting how the general population perceives justice institutions. The legitimacy of justice systems relies on accountability, transparency, and public trust, all of which are promoted by effective communication.² By making legal processes easier to comprehend and accessible, strategic communication helps bridge the gap among the general public and judiciary bodies in nations like Albania which are going under major transformations.³

The Justice Reform, which aims to get Albania's judicial system towards accordance with EU standards, is extremely significant to a nation that is aspiring for European integration⁴. The reform's primary goals are to strengthen the judiciary's independence, fight corruption, and make the legal framework more efficient⁵. Building public trust, displaying progress, and confirming Albania's dedication to EU values—all of which enhance citizen engagement and self-assurance in the legal system—require transparent and ongoing discussion about these actions.⁶

One of the most substantial legislative adjustments Albania has executed since the collapse of communism is the Justice Reform, which was launched in 2016. The need to address serious issues in the judiciary, such as incompetence, corruption, and a lack of public trust, influenced this reform⁷. The reform, which was supported by the European Union and other foreign organizations, aimed to align Albania's legal framework into accordance with EU standards strengthening the country's legitimacy and paving the way for EU membership.

² Harlow, C., & Rawlings, R. (2012). *Law and Administration*. Cambridge University Press.

³ Koch-Baumgarten, S., & Voltmer, K. (2010). *Public Policy and the Media: The Interplay of Media, Politics, and Public Policy*. Routledge.

⁴ European Commission. (2023). *Progress Report on Albania*.

⁵ Balkan Investigative Reporting Network. (2022). *Albania's Justice Reform: A Path to European Union Integration*.

⁶ OECD. (2022). *Trust in Public Institutions: The Role of Communication*.

⁷ European Commission. (2018). *Albania 2018 Progress Report*.

Promoting transparency in the court system is one of the reform's primary objectives. To preserve integrity and reduce corruption, this includes vetting prosecutors and judges.⁸ The reform sought to restore public trust in the legal system by carefully evaluating the assets, professional backgrounds, and relationships to bribery of judiciary officials⁹. Institutional approaches to communication aimed to inform the public about updates and accomplishments in the world of law are added in transparency efforts. Fostering public trust, carrying accountability, and integrating citizens into the democratic procedure all rely on the disclosure of information.¹⁰

Public relations (PR) and media play a pivotal role in modern institutions, serving as vital tools for managing communication between organizations and their stakeholders. In the justice sector, where public trust and transparency are especially critical, PR and media function to enhance public understanding, build credibility, and foster accountability.¹¹

PR in the justice system involves crafting clear, consistent, and honest communication to convey judicial processes and decisions, promoting an open dialogue between the courts and the public¹². Media coverage complements these efforts by informing the public and holding institutions accountable, thus contributing to an informed citizenry and a transparent judiciary.¹³

Transparency is essential for cultivating public trust. By using strategic communication campaigns, press releases, and public briefings, justice institutions can demystify complex legal processes and demonstrate their commitment to fairness and impartiality¹⁴. In Albania, for instance, enhanced PR efforts have been key in communicating the progress of the Justice Reform, ensuring that citizens remain aware of anti-corruption measures and judicial improvements.¹⁵

2. Literature Review

Building public trust requires institutional communication, particularly in

⁸ Venice Commission. (2016). Opinion on the Draft Constitutional Amendments on the Judiciary in Albania.

⁹ Balkan Insight. (2019). Albania's Vetting Process and Judicial Reform.

¹⁰ OECD. (2022). Trust in Public Institutions: The Role of Communication.

¹¹ Grunig, J. E., & Hunt, T. (1984). Managing Public Relations. Holt, Rinehart & Winston.

¹² Cutlip, S. M., Center, A. H., & Broom, G. M. (2006). Effective Public Relations. Pearson.

¹³ Roberts, J. V., & Doob, A. N. (1990). Public Opinion, Crime, and Criminal Justice. Routledge.

¹⁴ OECD. (2022). Trust in Public Institutions: The Role of Communication.

¹⁵ European Commission. (2023). Albania's Progress Report on Judicial Transparency.

the legal system. Institutions that communicate well provide accurate, timely, and transparent information, which increases public trust and credibility. According to academics like ¹⁶Grunig and Hunt, effective communication techniques greatly enhance favorable public perceptions. This is especially true in the judicial system, where transparency and clarity are critical to demystifying intricate legal procedures and encouraging responsibility.¹⁷

Based on research, when justice institutions actively communicate with their audiences, public trust is improved. In along with distributing information, this involves creating channels for public participation, including press releases, public briefings, and online outreach. The importance of these practices can be seen by studies by Tyler¹⁸, who pointed out how individuals gain control by consistent and straightforward communication because it allows them fully to understand their rights and how to take advantage of the judiciary. Additionally, Koch-Baumgarten and Voltmer ¹⁹ indicate that institutions are perceived as more accountable and encourage system trust when they openly disclose their strategies and decision-making processes.

Albania provides an outstanding example of how effective communication may influence the public's trust. As part of their strategy to restore trust in the judiciary, Albania's reforming the judiciary attempts, which have been supported by foreign organizations, have focused a high priority on open communication. In accordance with the European Commission's 2023 evaluation on Albania's justice reform, public perceptions have evolved substantially as a result of the communication regarding efforts to fight corruption and the judge vetting procedure²⁰. These communication strategies have been critical in demonstrating the judiciary's commitment to fairness and change, as stated in reports by Balkan Insight.²¹

Regardless of all of this accomplishment, obstacles still remain. Research by Grunig,²² putting an end to public skepticism is a challenging enterprise that requires effective messaging that is consistent and culturally relevant.

¹⁶ Grunig, J. E., & Hunt, T. (1984). *Managing Public Relations*. Holt, Rinehart & Winston.

¹⁷ Roberts, J. V., & Doob, A. N. (1990). *Public Opinion, Crime, and Criminal Justice*. Routledge.

¹⁸ Tyler, T. R. (2006). *Why People Obey the Law*. Princeton University Press.

¹⁹ Koch-Baumgarten, S., & Voltmer, K. (2010). *Public Policy and the Media: The Interplay of Media, Politics, and Public Policy*. Routledge.

²⁰ European Commission. (2023). *Albania's Progress Report on Judicial Transparency*.

²¹ Balkan Insight. (2019). *Albania's Vetting Process and Judicial Reform*.

²² Grunig, J. E. (1992). *Excellence in Public Relations and Communication Management*. Lawrence Erlbaum Associates.

In particular situations, a lack of effective or continuous methods of communication could result in suspicion and mistrust.²³ In order to preserve and enhance public trust, institutions must constantly modify their communication strategies. Justice institutions can increase their reputation and fortify their ties with the public by emphasizing open and proactive communication. The beneficial effect of straightforward communication on the trust of the public has been shown by the example of Albania's justice reform, which indicates that targeted outreach is necessary for accountability and transparency nowadays governance.

2.1 Role of Media as a Mediator

The complicated interaction between the transmission of information and public opinion is emphasized by theories addressing the role of media in shaping public opinion and conveying institutional messaging to the general audience. The agenda-Setting hypothesis put forward by McCombs and Shaw²⁴ is one essential theory in this regard. Based on this hypothesis, the media greatly affects people's thoughts by stressing particular issues over others, even if it may not explicitly tell them what to think. Agenda-setting, as it relates to institutional communication, emphasizes the media's ability to shape and prioritize institutional messages, focusing the public attention on particular narratives and influencing their prominence in public discourse.²⁵

The Structuring Principle, which outlines how information presentation might affect audience interpretation, is another crucial framework. Entman²⁶ states that framing is the process of stressing specific elements of a perceived reality in communication so as support particular problem definitions, causal interpretations, or moral assessments. Public trust in the justice system can be affected by how the media presents institutional messaging, which can either strengthen or weaken the legitimacy of the justice system. Although selective or unpleasant framing may increase doubt, open reporting on judicial reforms, for instance, can improve perceptions of accountability²⁷.

²³ Harlow, C., & Rawlings, R. (2012). *Law and Administration*. Cambridge University Press.

²⁴ McCombs, M. E., & Shaw, D. L. (1972). The Agenda-Setting Function of Mass Media. *Public Opinion Quarterly*.

²⁵ McCombs, M. (2004). *Setting the Agenda: The Mass Media and Public Opinion*. Polity Press.

²⁶ Entman, R. M. (1993). Framing: Toward Clarification of a Fractured Paradigm. *Journal of Communication*.

²⁷ Scheufele, D. A., & Tewksbury, D. (2007). Framing, Agenda Setting, and Priming: The

Understanding the impact of the media on public opinion is another benefit of Cultivation Theory. Following to this idea, which was first proposed by ²⁸Gerbner and Gross, people's views of reality can be affected by continuous exposure to news coverage. Positive or bad, repeated media narratives concerning judicial processes have the power to gradually shape public attitudes and beliefs in the overall structure of institutional communication. For example, continuous media coverage which emphasizes justice reforms and open processes may increase a sense of justice and faith, whereas an emphasis on corruption and failures can strengthen opposing views²⁹.

The media functions as both a filter and an amplifier for institutional communication, as demonstrated by experimental studies performed in transitional democracies like Albania. Based on different researches, the public's comprehension and understanding of the outcome of judicial reform and other institutional attempts is significantly assisted by the media. According to the European Commission.³⁰ Public opinion and trust has been significantly affected by how Albania's vetting process has been depicted in the media. The ability of the media to successfully achieve a balance between critical analysis and positive coverage helps increase the perceived legitimacy of institutional reforms and fosters an informed public discussion.

The media has a strong function, but there are drawbacks to how it mediates institutional messaging. Incomplete or distorted depictions of institutional efforts can result from problems like media bias, ownership, and political influence that skew the framing and agenda-setting processes.³¹ These elements demonstrate the necessity for proactive communication tactics used by justice institutions to make sure their communications are understandable and impervious to deception.³² Strategic media involvement helps the judicial system in particular by promoting openness and public confidence. Understanding and putting these theories into practice helps institutions to better control how the public perceives and understands their messages, enhancing their

Evolution of Three Media Effects Models. *Journal of Communication*.

²⁸ Gerbner, G., & Gross, L. (1976). Living with Television: The Violence Profile. *Journal of Communication*.

²⁹ Gerbner, G. (1998). Cultivation Analysis: An Overview. *Mass Communication & Society*.

³⁰ European Commission. (2023). Albania's Progress Report on Judicial Transparency.

³¹ Herman, E. S., & Chomsky, N. (1988). *Manufacturing Consent: The Political Economy of the Mass Media*. Pantheon Books.

³² Grunig, J. E., & Hunt, T. (1984). *Managing Public Relations*. Holt, Rinehart & Winston.

transparency and credibility.

2.2 EU Law Concerning Information Rights

Transparency is ensured in large part by EU laws pertaining to the public's right to information, especially in the legal system. The dedication to promoting transparency and trust between institutions and citizens—two essential elements of democratic governance—lays the groundwork for this legislative framework. This commitment is expressed in a number of important legal documents that serve as a guide for both EU member states and prospective nations as they align their policies with these fundamental principles.

The European Union's Charter of Fundamental Rights is one of the most widely recognized foundations protecting the right to information. The idea that disclosure is essential for effective governance is supported by Article 42 of the Charter, which assures the right of access to documents maintained by EU institutions, agencies, and bodies. This right supports an open culture where public oversight is a reality by giving citizens access to information about how institutions operate.³³ The same concept applies to legal institutions as well, strengthening their integrity and transparency.

Regulation ³⁴(EC) No 1049/2001 specifies comprehensive requirements for public access to documents from the European Parliament, Council, and Commission, strengthening this commitment. By creating policies and guidelines that make it possible for the general public to obtain such information, this legislation represents a significant step in integrating transparency into the day-to-day activities of EU institutions. In areas as delicate as justice, it fosters the notion that institutional transparency is an active process that is essential to enhancing public trust rather than just a passive virtue.³⁵

The scope of the EU's commitment to transparency can be seen by its integration of international principles such as the Aarhus Convention into EU law. EU policies have been greatly influenced by this convention, which places a strong emphasis on public engagement, information access, and access to justice in environmental problems. The principles of the Aarhus Convention emphasize that an informed public is empowered to interact meaningfully with institutions and hold them responsible, are

³³ European Union. (2012). Charter of Fundamental Rights of the European Union.

³⁴ European Parliament and Council. (2001). Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council, and Commission documents.

³⁵ European Parliament and Council. (2001). Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council, and Commission documents.

applicable to all areas of governance, including justice, despite their primary environmental focus.³⁶

Laws like Directive (EU) 2019/1024 on open data and the reuse of public sector information are especially helpful of justice transparency. By promoting the availability of public data, this regulation helps to increase transparency in governance and public services. Although it has an extensive spectrum of applications, its focus on open data benefits the justice system by making pertinent institutional information accessible to the public, creating an atmosphere that encourages public scrutiny and builds confidence in legal processes.³⁷

Particularly in candidate nations like Albania, the EU's legal framework asks for practical the implementation in alongside theoretical compliance. These guidelines establish a path to more open and accountable institutions for Albania, which is implementing major legal system changes as part of its EU integration initiatives. According to European Commission reports, Albania must follow these transparency guidelines in order to conform to EU standards and principles. This alignment shows that openness and transparency are essential to democratic legitimacy and is not only a bureaucratic necessity but also a critical step in fostering public confidence in its developing judicial system.³⁸

However, there are still barriers in the way of accomplishing this legislation's objective. Transparency attempts can be limited by issues including political influence, bureaucratic opposition, and inconsistent application among EU member states, even in the face of strong legal provisions. In order to guarantee that the values of openness and public access to information are continuously maintained, the EU keeps addressing these concerns through policy reviews, guidelines, and monitoring.

Whatever may be considered, EU laws pertaining to the freedom of information provide a strong foundation for maintaining openness and encouraging public confidence in institutions. The EU's commitment to an open, responsible, and inclusive system of governance is reflected in the ideals enshrined in important treaties such as the Charter of Fundamental

³⁶ United Nations Economic Commission for Europe (UNECE). (1998). Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

³⁷ European Union. (2019). Directive (EU) 2019/1024 on open data and the re-use of public sector information.

³⁸ European Commission. (2023). Progress Report on Judicial Transparency in EU Candidate Countries.

Rights, Regulation (EC) No 1049/2001, and open data directives. Adopting and implementing these principles is a crucial step for nations like Albania in their path to EU membership, underscoring the global significance of access in promoting faith and boosting democratic institutions.

3. Methodology

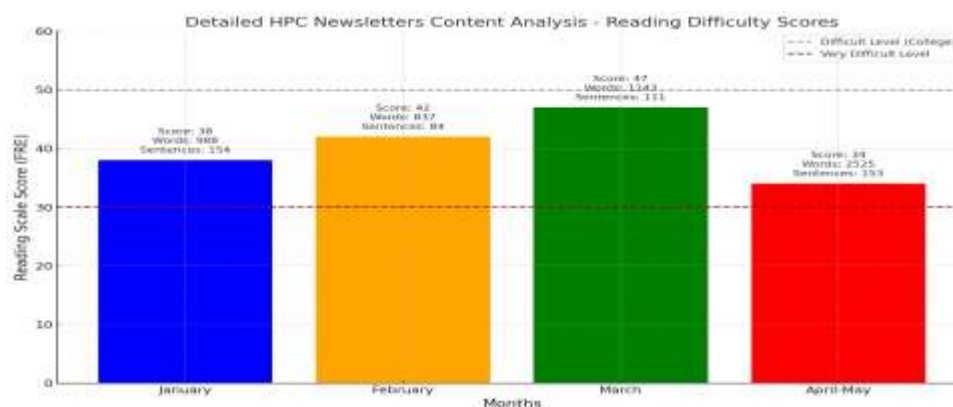
This study uses a mixed-methods approach, blending both quantitative and qualitative methods in order to examine the function of media and public relations (PR) in Albania's legal system. The objective is to evaluate the ways in which these components support increased public confidence and openness in judicial institutions.

The investigation of PR professionals' strategies and processes in justice institutions, as well as the way these institutions are described in the media, will be the main focus of the qualitative component. Analysis of the written materials will be addressed in this part. Public relations materials, such as press releases, official statements, and public communication strategies used by justice institutions, will be carefully reviewed. To do this, we will need to investigate the releases of one of the PR tools that are utilized by this institution, such as newsletter, and, whereas, we are going to examine the information generated by social media.

4. Findings and Results

The information obtained through media outlets, newsletters, and social media posts from the Albanian High Prosecutorial Council, demonstrates the general public's perception of the High Prosecutorial Council (HPC) and its attempts to boost transparency and trust regarding Albania's justice system and the institution itself as well.

4.1.HPC's Newsletters Content Analysis



Every single one of the HPC newsletters deliver challenges for the average reader, as per an examination of the content accomplished throughout the initial five months of the year. The Flesch Reading Ease (FRE) algorithm was utilized to assess each newsletter, giving insight on the complexity of the writing style used.

Informative Tone: By highlighting achievements and programs designed to improve the transparency of the legal process, the newsletters frequently maintain an optimistic and informative tone. Newsletters, for instance, provided details about fresh regulations, community outreach campaigns, and workshops aimed at enhancing the general public's awareness of the legal system.

Highlights: The newsletters' main impressions were offers for improvement and accountability. Public feedback, however, indicated that despite these messages were genuine, they often came up missing in giving an account of the practical effects for the citizens (HPC Newsletter, 2024). With a FRE score of 38, the January newsletter was considered tricky to comprehend yet suitable for an university-level audience. The same pattern maintained until February, where the newsletter obtained a score of 42, which suggests it was as demanding. Although the March edition scored 47, it was still clearly in the challenging category, showing that though the writing was a little simpler to understand, it was still difficult for ordinary readers to comprehend.

The April-May newsletter, which was given a score of 34, notably indicated a decline in readability. This score is the highest degree of difficulty reported in all of the newsletters that were evaluated implying that the content may have evolved increasingly complicated, which might put away readers who are not aware of the topic.

Although the newsletters successfully reach a college-educated population overall, they might use certain modifications to make them friendlier to read. Enhancing accessibility using language simplified terminology the adoption of different sentence structures, and the integration of graphic elements would boost attendance and make sure the message is understood to a wider target audience.

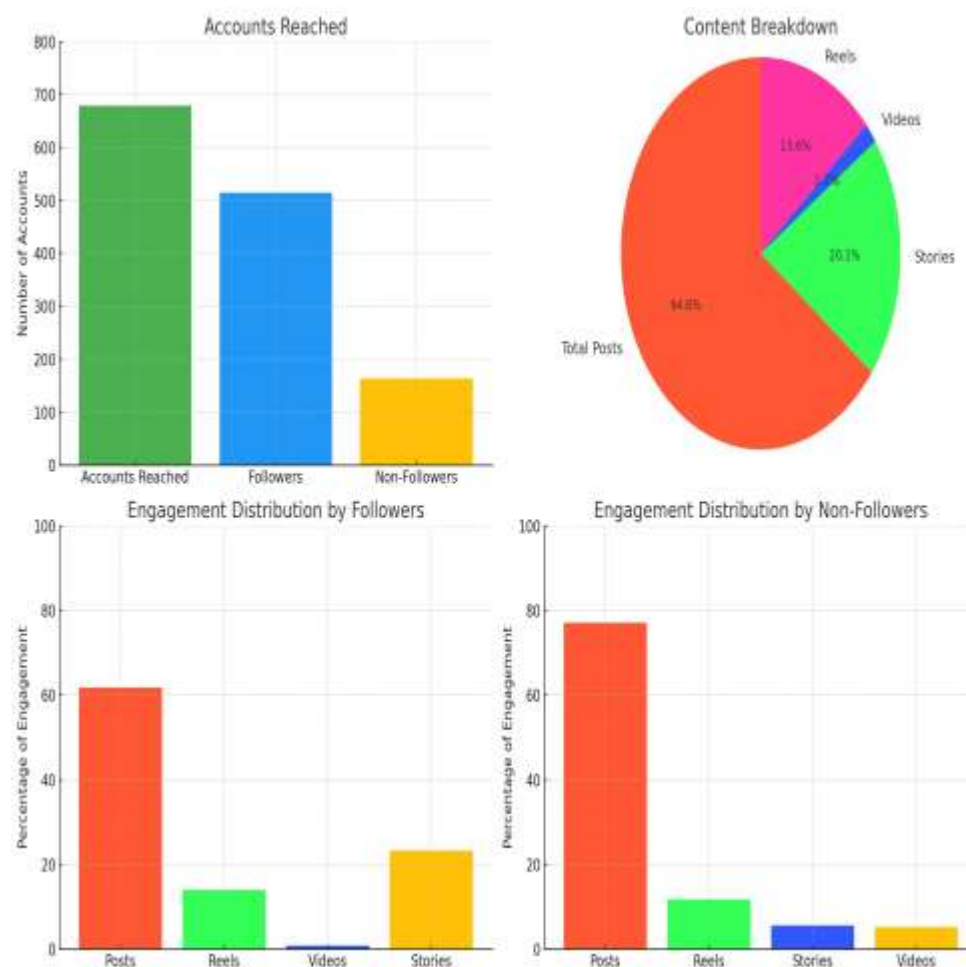
4.2 Social Media Insights (Instagram official account)

The official Instagram account of the High Prosecutorial Council has collected 679 accounts in the last 90 days, with approximately 75.9% of these accounts being followers and 24% not. This suggests the current following is proactively engaged, which is important in establishing relationships and trust.

The account has published 1,199 items in total, indicating an elevated

degree of activity in terms of content. This consists of 253 reels, 31 videos, and 372 stories. The diverse content approach emphasizes an attempt to reflect audiences' diverse preferences by involving them with various types of media.

Metrics of engagement offer fascinating data on how followers and non-followers engage with the content. Reels accounted for 14% of total engagement among followers, however posts accounted for 61.8%. Furthermore, stories were important, making up 23.2% of follower engagement. On the other hand, non-followers demonstrated an independent commitment trend. Through posts, they generated 77.1% of engagement, whilst reels drew 11.8%. Interestingly, non-followers were less likely to interact with stories and videos (5.6% and 5.3%, respectively).



5. Analysis and Recommendations

Considerable developments regarding audience composition and relationship methods have been demonstrated by the High Prosecutorial Council's (HPC) Instagram social media performance that presents an important opportunity for prospective growth and communication.

According to the data, followers make up the vast majority of the HPC's reach, with current followers making approximately 75.9% of all accounts reached. Assuming their interest in the shared content, this high percentage implies a high level of engagement from this group. Nevertheless, an important rise possibility is shown by the reach's 24% non-followers. Bringing in new audiences might contribute to raising HPC's popularity and impact, demonstrating that transforming non-followers into followers must be a top goal oriented.

It is obvious when analyzing content engagement statistics that traditional posts predominate. Their capability to successfully communicate the HPC's themes has been shown by the observation that they generate the highest levels of participation for both followers and non-followers. This trend indicates that the audience reacts positively to content provided in a post format.

Reels, on the contrary hand, show considerably fewer interaction levels on Instagram, even if they are a popular and trending genre. The gap implies that whereas reels might garner attention in general, the HPC audience could not perceive them to be as captivating. In order to more effectively fulfill the expectations of followers, it may be necessary for someone to review the reel content strategy.

Another crucial element of the HPC's content approach is stories. They maintain followers' focus and encourage interaction, as shown by the fact that they account for 23.2% of follower engagement. Despite the fact that stories are capable of captivating current followers, they might not be equally effective at reaching new audiences, as seen by the relatively modest engagement rate of 5.6% among non-followers. This limitation allows the HPC to explore novel storytelling tricks or subject topics that might boost stories' appeal to a wider demographic.

The HPC's media outlets, along with its social media campaigns, consist of substantial products that are tricky for the typical reader to fully comprehend. The Flesch Reading Ease (FRE) algorithm is used to evaluate the content from the first five months of the year, and the results reveal a consistently high level of writing style complexity. Despite keeping an optimistic and informative tone, every communication often falls into the

category of challenging to read. The January newsletter, for instance, obtained a score of 38, indicating complexity suited to an audience at the university level. February came next with a score of 42. The average reader continued to consider the March edition challenging, despite a minor improvement to 47. The April-May newsletter, which had the greatest percentage of complexity of all the newsletters examined, notably declined to a score of 34. This trend means that as the time went on, the information could have become more technical, which could have turned off readers who are not quite as familiar with legal terms.

In addition to offering information on updated legislation and promotional initiatives, the newsletters aimed to help inform the public about results and actions focused on enhancing the judicial system's transparency. Public feedback, however, pointed out that despite these messages contained good intentions, they frequently lack clarity as to how they were going to impact citizens in practise. Overall, the newsletters might incorporate adjustments to help make them less difficult to read, yet they successfully target a college-educated demographic. Simplifying language acquisition, providing a range of sentence forms, and including graphics may significantly improve accessibility and ensure that the intended points have been comprehended by a broader demographic.

A few recommendations could potentially be made for utilizing the best use of the data that was obtained. First, considering the increasing acceptance of this format, it is suggested that reels and video content be generated at an increased pace. Reach and engagement could be enhanced by experimenting with engaging and informative reel content. Second, in order to effectively convert non-followers into followers, the HPC ought to worry about generating content that is specifically targeted to them. This content may involve success stories and educational postings on HPC campaigns. Last but not least, using stories that involve engaging components like polls and questions and answers can promote greater community involvement connection and create informed follower feedback, which boosts interaction.

In conclusion, a combination examination of the HPC's communication with newsletter and Instagram insights reveals both possibilities for improvement and audience engagement strengths. The HPC can enhance its outreach and effectively convey its purpose to a broader audience by stressing readability and accessibility in its publications and refining its social media strategies.

6. Conclusion

The study of the High Prosecutorial Council's (HPC) newsletters and social media metrics reveals significant data about the nature of institutional communication in the legal system today. Based on the findings, the HPC has successfully reached a college-educated community through its newsletters and social media accounts, but there are still significant obstacles in the path of making this communication accessible for a broader demographic. The newsletters' informative but complex formulation indicates an ongoing commitment to transparency and accountability, but it also makes it challenging for many citizens to understand them. The average citizen could consider law adjustments and attempts as no longer meaningful as a result of this degree of complexity.

At the same time, social media engagement signals show a solid follower base but also suggest unused potential among non-followers. The HPC is successfully communicating with its current followers, but it has still not entirely grasped new media formats that might expand its reach, as indicated by the majority of traditional posts over reels. Moreover, the significantly lower story engagement rates among non-followers imply that more specific content may be necessary on these platforms in order to attract in and enlighten a broader demographic.

Public relations and the media play a vital part in improving public trust and transparency in the judiciary. An educated public that is prepared to actively participate in dialogues on legal changes and activities is encouraged by clear, friendly, and attractive communication. The HPC has enhanced communication between the organization and the public, supported through designing newsletters, providing interactive content for non-followers, and making more effective use of social media.

The HPC ultimately has an outstanding opportunity to further develop its communication approaches in order to successfully achieve its objectives of transparency and accountability as well as strengthen public understanding and trust. However, HPC can encourage a more informed public and assist in developing a transparent justice system that takes into account the interests and concerns of all members of society by actively interacting with the general public and implementing inclusive communication strategies.

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HOUSING OF NATIONAL MINORITIES IN ALBANIA ACCORDING TO ARTICLE 20 OF THE CONSTITUTION

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Abstract

The Constitution of the Republic of Albania provides the right to housing for national minorities. The right to housing is sanctioned as a fundamental human right in the European Convention on Human Rights, ratified by Albania in 1996. Everyone has the right to respect for their private and family life, home and his correspondence. In the article 20 of Albania Constitution the national minorities have their rights and freedoms. This families have the right to housing in territory of the Republic of Albania and based on article 18/2 of the Constitution they can't be discriminates for reasons such as: gender, race, religion, ethnicity, language, political religious, economic status, education or parental status. The law "On social housing" was approved in 2018. This law guarantees that the Roma families will benefit from all programs of social housing and defines the Roma as a priority group in some social housing programs. Albania has taken measures to support the housing of Roma and in particular in housing legislation: providing free legal aid to Roma applying for legalization, integration of families through pilot projects for urbanization and integration.

Keywords: *Housing, national minorities, law.*

1. Hyrje

Në Shqipëri jetojnë disa pakica kombëtare. Historikisht pakicave kombëtare u është kushtuar vëmendje e vazhdueshme me qëllim për të

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siguruar një mjedis jetese ku të mbizotërojnë bashkëpunimi, mirëkuptimi dhe toleranca fetare ndërmjet pakicave kombëtare dhe pjesës tjetër të popullsisë që jeton në territorin shqiptar. Shqipëria ka ratifikuar një sërë aktesh ndërkombëtare për mbrojtjen e të drejtave të njeriut e në veçanti të drejtat e pakicave kombëtare, një ndër to është Konventa Kuadër e Këshillit të Evropës “Për mbrojtjen e pakicave kombëtare”. Konventa u nënshkrua nga Republika e Shqipërisë në vitin 1995 dhe u ratifikua nga Kuvendi i Republikës së Shqipërisë në vitin 1999.

Në Republikën e Shqipërisë pakicat kombëtare janë: greke, maqedonase, arumune, rome, egjiptiane, malazeze, boshnjake, serbe dhe bullgare. Prej disa vitesh është duke u punuar për anëtarësimin e Shqipërisë në Bashkimin Evropian. Në kuadër të plotësimit të kërkesave të Marrëveshjes së Stabilizim - Asocimit dhe të gjithë procesit në vazhdim për anëtarësimin e vendit në BE ishte e nevojshme integrimi i pakicës rome dhe asaj egjiptiane. Për mbrojtjen e të drejtave të pakicave kombëtare në Republikën e Shqipërisë u themelua Komiteti për Pakicat Kombëtare. Ajo u krijua me Ligjin 96/2017 “*Për mbrojtjen e Pakicave Kombëtare në Republikën e Shqipërisë*”. Komiteti ka qëllim sigurimin e mbrojtjes dhe promovimit të të drejtave dhe të interesave të pakicave kombëtare në Shqipëri. Komiteti për Pakicat Kombëtare është organ konsultativ.

Për integrimin e pakicës rome dhe asaj egjiptiane, Shqipëria miratoi disa plane veprimi në përputhje me standardet dhe kriteret evropiane³. Një nga problematikat kryesore e konstatuar ishte strehimi i komunitetit rom, problematikë të cilën nuk e hasim te komunitete të tjera. Masat e Planit Kombëtar të Veprimit për Integrimin e Romëve dhe Egjiptianëve (2016-2020) u hartuan në gjashtë fusha prioritare: regjistrimi civil, arsimi dhe dialogu ndërkulturor, punësimi dhe zhvillimi i aftësive, kujdesi shëndetësor, strehimi dhe integrimi urban dhe mbrojtja sociale.⁴ Mbrojtja e të drejtave të njeriut, përfshirë romët dhe politikat antidiskriminim, është një nga pesë përparësitë kryesore të axhendës së integrimit në BE për Shqipërinë.⁵

³ Plani kombëtar i veprimit për romët dhe egjiptianët, duke marrë parasysh prioritetet e vendosura në Kuadrin Strategjik të BE-së për romët (2020-2030).

Planin strategjik të veprimit të Këshillit të Evropës për përfshirjen e romëve dhe udhëtarëve (2020-2025).

Plani Kombëtar i veprimit për barazi, përfshirje dhe pjesëmarrje e romëve dhe egjiptianëve në Republikën e Shqipërisë (2021-2025).

Plani kombëtar i veprimit për integrimin e romëve dhe egjiptianëve (2016-2020).

⁴ Plani kombëtar i veprimit për integrimin e romëve dhe egjiptianëve (2016-2020), fq. 5.

⁵ Po aty, fq. 5.

2. Kuadri ligjor për strehimin e pakicave kombëtare.

Në Kushtetutën e Republikës së Shqipërisë parashikohet dhe mbrohet e drejta për strehim e pakicave kombëtare. Strehimi ofrohet dhe garantohet me ligj në mënyrë të barabartë për shtetasit shqiptar dhe personat që u përkasin pakicave kombëtare të cilët jetojnë në territorin e shtetit shqiptar. Po çfarë është strehimi? Bazuar në nenin 2 pika 40 të Ligjit nr. 22/2018 “Për strehimin social”, strehimi është tërësia e elementeve financiare, sociale dhe institucionale të procesit të sigurimit të banesës. Çdo person madhor ka të drejtë të përcaktojë lirisht vendbanimin e tij⁶. Ligji favorizon çdo person në zgjedhjen e vendit të *banimit*.⁷ Ndalohej trajtimi i diferencuar ose *diskriminimi*⁸ i personave që u përkasin pakicave kombëtare në krahasim me personat që janë shtetas shqiptarë. Në bazë të nenit 20 të Kushtetutës së Shqipërisë, personat që u përkasin pakicave kombëtare ushtrojnë në barazi të plotë para ligjit të drejtat dhe liritë e tyre. Në mbrojtje të të drejtave dhe lirive themelore të njeriut Shqipëria ka ratifikuar akte ndërkombëtare, Konventën Evropiane të të Drejtave të Njeriut. Në nenin 8 të konventës parashikohet se çdokush ka të drejtën e banesës. Në ofrimin e barabartë të së drejtës për strehim vendi ynë ka aplikuar dhe *programet e strehimit social*.⁹ Në nenin 2 të ligjit për strehimin e banorëve në zonat urbane parashikohet se programet sociale të strehimit klasifikohen në tri kategori:

- a) *Programe të banesave sociale me qira;*
- b) *Programe të banesave me kosto të ulët;*
- c) *Programe të pajisjes së truallit me infrastrukturë.*

Programi i banesave sociale me qira është ndër programet më të gjera dhe që krijon më shumë hapësira për komunitetet në nevojë dhe grupet e

⁶ Shih neni 12 të Kodi Civil i Republikës së Shqipërisë, dhjetor, 2014.

⁷ Po aty, “*Banimi është vendi ku personi, për shkak të punës apo të shërbimit të përhershëm, të ndodhjes së pasurisë apo të realizimit të interesave të veta, qëndron zakonisht ose të shumtën e kohës. Çdo person madhor ka të drejtë të caktojë lirisht vendbanimin e tij. Personi nuk mund të ketë njëkohësisht me shumë se një vendbanim. Kjo dispozitë nuk zbatohet për vendbanimin e veprimtarisë së tregtarit.*”

⁸ Në nenin 18 të Kushtetutës së Republikës së Shqipërisë parashikohet se “*Askush nuk mund të diskriminohet padrejtësisht për shkaqe të tilla, si: gjinia, raca, feja, etnia, gjuha, bindjet politike, fetare a filozofike, gjendja ekonomike, arsimore, sociale ose përkatësia prindërore*”.

⁹ “*Programe sociale strehimi*” janë programe, të cilët shërbejnë për strehimin e familjeve dhe të individëve, që nuk janë në gjendje ekonomike e sociale të përballojnë ofertën e tregut të lirë të banesave ose atë të kredive hipotekore.

rrezikuara. Në këtë program përfshihen:

- a) “banesat, që ndërtohen apo blihen nga tregu i lirë prej bashkive ose organizatat jofitimprurëse, të cilat jepen me kontratë qiraje sociale;
- b) banesat ekzistuese, në pronësi të personave fizikë ose juridikë, të cilat janë klasifikuar nga organet e qeverisjes vendore apo nga organizatat jofitimprurëse si banesa sociale, që mund të jepen me qira për familjet që përfitojnë bonus strehimi;
- c) objektet e dala jashtë funksionit, si rezultat i mbylljes së një veprimtarie, të cilat kanë kaluar në pronësi të bashkive dhe janë miratuar për t'u kaluar në fond banesash sociale me qira, në përputhje me planin rregullues urbanistik¹⁰”.

Mbi strehimin e pakicave kombëtare problematika janë hasur vetëm mbi strehimin e komunitetit Rom. Kjo situatë ndikon në miratimin e masave kombëtare për zgjidhjen e kësaj problematike. Për komunitetin egjiptian nuk ka ndonjë strategji të veçantë, por ky komunitet trajtohet mbi bazën e strategjisë kombëtare të përfshirjes sociale, si dhe strategjive sektoriale të arsimit, shëndetësisë, punësimit. Në vitin 2009 në kuadër të politikave sociale për strehimin vendi ynë miratoi, Planin e Veprimit për dekadën e përfshirjes së romëve. Strehimi dhe infrastruktura është një nga gjashtë prioritetet e këtij plani.

Korniza ligjore e miratuar është në harmonizim me legjislacionin e Bashkimit Evropian. Harmonizimi i legjislacionit shqiptar u diktua drejtpërdrejt në kuadër të përmbushjeve të detyrimeve që rridhnin nga Marrëveshja e Stabilizim-Asocimit.

2.1 Efekti i masave kombëtare mbi strehimin.

Në kuadër të integritetit të komunitetit Rom dhe Egjiptian masat në nivel kombëtar janë miratuar në mënyrë periodike. Fillimisht do të ndalemi në trajtimin e Planit Kombëtar të Veprimit për barazi, përfshirje dhe pjesëmarrjen e romëve dhe egjiptianëve në periudhën 2016-2020. Masat e parashikuara janë hartuar në bazë të nevojave që kanë romët dhe egjiptianët. Për të indentifikuar këto nevoja janë përdorur anketimet, të dhënat bazë që zotërohen nga institucionet kompetente në këtë fushë. Masat e hartuara mbi strehimin nuk i dhanë zgjidhje përfundimtare problemit, sepse ato u hartuan nisur nga mundësitë dhe të ardhurat që vendi ynë kishte.

¹⁰ Shih nenin 3 të Ligjit nr. 9232 “Për programet sociale për strehimin e banorëve të zonave urbane”.

Familjet romë nuk mund të përfitonin as nga ligji për strehimin social, sepse ata nuk mund të plotësonin kriteret e parashikuara nga ligji për të ardhurat minimale, për të mbuluar shpenzimet për banesë sociale. Komuniteti egjiptian në krahasim nga komuniteti Romë e ka më të lehtë të aplikojë për banesë sociale, sepse ata janë më pak të varur nga puna informale¹¹. Nisur nga pamundësia ekonomike e komunitetit Romë, Avokati i Popullit rekomandon heqjen e kriterit për të ardhura minimale si kusht për të përfituar nga strehimi social. Ligji i vitit 2018 “Për strehimin social” në nenin 10 pika 2 parashikon që të drejtën për të përfituar nga strehimi social e ka kushdo, në bazë të parimit të mosdiskriminimit. Përjashtim nga zbatimi i këtij parimi do të ketë vetëm në ato raste kur një program social strehimi është i programuar në mënyrë të posaçme dhe të shprehur për t’i ardhur në ndihmë individëve ose grupeve në nevojë.

Megjithatë, pamjaftueshmëria e masave për t’i dhënë zgjidhje problemit do të sillte si domosdoshmëri hartimin e masave të reja. Së fundmi është miratuar Plani Kombëtar i Veprimit për barazi, përfshirje dhe pjesëmarrjen e romëve dhe egjiptianëve në periudhën 2021-2025, i cili është një dokument relativisht i ri për politikën integruese të komunitetit Romë dhe Egjiptian. Plani prezanton një përshkallëzim të masave tashmë të miratuar dhe në zbatim, dhe do të parashikojë, gjithashtu, nisjen e aktiviteteve të reja për nxitjen e integritetit të romëve dhe të egjiptianëve¹². Plani u miratua në përputhje me kornizën e re strategjike Romë të BE-së për barazi, përfshirje dhe pjesëmarrje 2020–2030¹³. Ai do të përmbushte detyrimin e marrë përsipër në deklaratën e Partnerëve të Ballkanit Përfundimor mbi Integritetin e Romëve në Procesin në kuadër të Zgjerimit të BE-së. Integriteti i romëve dhe egjiptianëve u mendua të realizohej duke zhvilluar, miratuar dhe zbatuar standarde rajonale mbi buxhetimin publik, në lidhje me integritetin e romëve për politikën e synuar, si dhe rritjen e buxhetit publik në nivel qendror dhe lokal për integritetin e këtij komuniteti.

Plani Kombëtar i Veprimit për barazi, përfshirje dhe pjesëmarrjen e romëve dhe egjiptianëve në vitet 2021-2025 është hartuar në mënyrë të tillë që të sigurojë integritetin me aspektet e planifikimit, aspektet operacionale dhe aspektet e kontrollit, monitorimit.¹⁴ Situata e strehimit është ende e vështirë

¹¹ Plani Kombëtar i Veprimit për barazi, përfshirje dhe pjesëmarrjen e romëve dhe egjiptianëve 2016-2020, fq. 19.

¹² Vendimi Nr. 701, datë 18.11.2021, Për miratimin e planit kombëtar të veprimit për barazi, përfshirje dhe pjesëmarrjen e romëve dhe egjiptianëve, 2021–2025.

¹³ Po aty, fq.3.

¹⁴ Vendimi Nr. 701, datë 18.11.2021, Për miratimin e planit kombëtar të veprimit për barazi, përfshirje dhe pjesëmarrjen e romëve dhe egjiptianëve, 2021–2025, fq.4.

për shumë anëtarë të pakicave rome dhe egjiptiane në Shqipëri. Përveç kushteve shumë shpesh të vështira në të cilat jetojnë, mungesa e titujve të pronësisë ose e marrëveshjeve të sigurta të qiramarrjes i bën shumë anëtarë të këtij komuniteti të prekshëm nga dëbimet. Masat e miratuara nuk kanë arritur t'i japin një zgjidhje përfundimtare çështjes së strehimit të familjeve rome. Problematikë që do vijojë të trashëgohet edhe në të ardhmen.

3. Problematikat mbi strehimin social

Në kuadër të rrugëtimit të Shqipërisë në arenën ndërkombëtare dhe anëtarësimin në Bashkimin Evropian, ishte e nevojshme të merreshin masa në nivel kombëtar dhe vendor për strehimin e komunitetit Rom, i cili do të vijonte të ishte një problem prezent. Ligji për strehimin social i miratuar në vitin 2018 ka si qëllim përcaktimin e rregullave dhe procedurave administrative për mënyrat e:

1. planifikimit,
2. sigurimit,
3. administrimit dhe
4. të shpërndarjes së programeve sociale për strehimin.

Përcaktimi i tyre bëhet me qëllim krijimin e mundësive për strehim të përshtatshëm dhe të përbalueshëm, duke u mbështetur në aftësitë paguese të familjeve që kanë nevojë për strehim dhe në ndihmën e institucioneve shtetërore përgjegjëse. Në analizën e këtij ligji shohim se familjet rome pa të ardhura mund të përfshihen vetëm në programin social të strehimit për subvencionimin e bonusit të strehimit dhe atë të granteve të vogla, ku ky i fundit arrin të financojë vetëm përmirësim të kushteve të banimit dhe jo strehim të kësaj kategorie.

Gjithashtu, programet e tjera sociale të parashikuara nga ky ligj kërkojnë që përfituesi të ketë një nivel minimum të ardhurash dhe duke qenë se këto familje jetojnë në informalitet është e vështirë matja e të ardhurave të tyre. Për të përfshirë këtë komunitet dhe familje pa të ardhura në programet sociale të strehimit do të ishin të rekomandueshme ndryshime në këtë ligj në disa drejtime, me qëllim për të qenë sa më efektiv. Për familjet rome ka pengesa dhe vështirësi specifike që nuk mundësojnë përfshirjen e tyre në programet e strehimit social, në përputhje me legjislacionin në fuqi. Këtu mund të përmendim mungesën e lejeve të banimit dhe regjistrimin e tyre në zyrat e gjendjes civile.

Pronësia mbi tokën është një nga problemet kryesore që ka krijuar mjaft

vështirësi në zbatimin e pjesës së strategjisë së strehimit, sepse zonat e banuara nga romët nuk janë pjesë e zonave informale të cilat rregullohen me reformën e legalizimit. Sipas të dhënave vetëm 4.3 përqind e romëve kanë pronësinë e tokës për shtëpitë e tyre; 87 përqind e këtyre sipërfaqeve zotërohen nga persona të tjerë, ndërsa 8.7 përqind janë në zotërim të shtetit¹⁵. Problematike është situata, kur për shkak të ndërtimit të veprave publike apo zhvillimit të pronës nga pronari këto familje janë dëbuar nga vendbanimet e tyre. Në legjislacionin shqiptar, familjet rome, nuk gëzojnë mbrojtje të veçantë për vendbanimet e përkohshme të tyre, qofshin këto baraka ose tenda.

3.1 Avokati i Popullit

Avokati i Popullit një ndër prioritetet e punës së tij, ka dhe respektimin e të drejtave të komunitetit Rom¹⁶. Në raportin e vitit 2012 Avokati i Popullit është shprehur se zgjidhja e problematikave të komunitetit Rom nuk është e lehtë, pjesë e të cilës ishte edhe strehimi i tyre. Vendbanimet e përkohshme të komunitetit Rom kanë ndikuar negativisht në strehim social të tyre dhe në evidentimin e familjeve rome që kanë nevojë për strehim. Komuniteti rom jeton në kushte të vështira ekonomike, gjë që ka ndikuar drejtpërdrejt në lëvizjen migratore brenda vendit.

Megjithatë, ka pasur familje të cilat pavarësisht se kanë patur një vendqendrim stabël nuk ishin pjesë e skemës që të përfitonin nga strehimi social, duke u mohuar atyre të drejtën për strehim. Problematikat që lidhet me strehimin social të familjeve rome janë të lidhur drejtpërdrejt me ekonominë, të ardhurat mujore që ata zotërojnë dhe mosregjistrimi në regjistrat e gjendjes civile si pasojë e lëvizjeve të vazhdueshme dhe mungesa e arsimimit. Gjendja ekonomike është faktor kufizues në plotësimin e kriterëve për të përfituar nga strehimi social, sepse kjo kategori punon pa siguracione ose volumni i të ardhurave nga puna e kryer mund të jetë nën normën e parashikuar për të përfituar nga skema për strehim.

Mosregjistrimi i familjeve rome në regjistrat e gjendjes civile vjen si pasojë, sepse janë në lëvizje të vazhdueshme, ky problem do të gjente zgjidhje nisur nga rekomandimi i Avokatit të Popullit në vitin 2012. Me ngritjen e Regjistrit Kombëtar të Gjendjes Civile, u lehtësua dhe u shpejtua

¹⁵ Plani Kombëtar i Veprimit 2010-2015, fq.20.

¹⁶ Avokati i Popullit, Raport, Tiranë, korrik 2012, fq.2.

https://www.avokatipopullit.gov.al/media/manager/ëebbsite/reports/Raporti_per_romet_13.07.2012.pdf

procedura e ndryshimit të vendbanimit. Shtetasit rom duhet të paraqiteshin pranë nëpunësit të shërbimit të gjendjes civile ku kërkonin të vendoseshin në vendbanimin e ri, duke dorëzuar dokumentacionin e kërkuar nga ligji për ndryshimin e vendbanimit. Kjo procedurë e miratuar siguron dhe sanksionon barazinë pa krijuar asnjë lloj diskriminimi për të gjithë shtetasit që jetojnë në territorin e Republikës së Shqipërisë¹⁷.

Konkluzione

Nga komunitet që jetojnë në Shqipëri kemi konstatuar se strehimi është problematikë për komunitetin Rom. Ndër vite janë miratuar ligje për strehimin social, me motivin për t'i dhënë një zgjidhje çështjes së strehimit për romët. Në kuadër të anëtarësimit të vendit në Bashkimin Evropian ishte e nevojshme integrimi i komunitetit Rom, pjesë e të cilit ishte dhe problematika e strehimit të tyre.

Në mënyrë periodikë u miratuan masa që kishin për qëllim zgjidhjen e këtij problemi. Legjislacioni shqiptar pësoi ndryshime pozitive duke lehtësuar kriteret që komuniteti Rom të përfitonte nga strehimi social, me përjashtim të rasteve ku këto banesa sociale do të ndërtoheshin për t'u ardhur në ndihmë individëve ose grupeve në nevojë. Pavarësisht kësaj, strehimi i familjeve romë ngelet problematikë e cila do të vijojë dhe në të ardhmen, sepse këto familje nuk kanë një vendbanim të qëndrueshëm dhe të ardhura minimale. Ato janë në lëvizje të vazhdueshme dhe nuk figurojnë të regjistruar pranë njësive administrative përkatëse për të përfituar nga programet e strehimit, si dhe nuk gëzojnë një titull pronësie të truallit ku ngrenë tenda ose ndërtojnë baraka.

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**CONTROL OF EFFICIENCY AND QUALITY IN THE DELIVERY
OF JUSTICE THROUGH THE SCHEME OF ETHICAL AND
PROFESSIONAL EVALUATION OF THE JUDGE.
A COMPARATIVE OVERVIEW OF JUDICIAL EVALUATION
PRACTICES IN EU MEMBER STATES, AND THE ROLE OF THE
COUNCIL IN THE APPROXIMATION OF STANDARDS**

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Abstract

The purpose of this study is to conduct an analysis of the current system of individual evaluation of judges in Albania, by international standards, particularly EU standards "On the evaluation of judges' work, the quality of justice delivery, and respect for judicial independence."

The reform in the judicial system introduced a new conception of the system for evaluating judges. Designed as a fundamental criterion for the career development of judges, this process aims to establish a sustainable standard of quality in the delivery of justice, continuously improving the ethics and professional ability of the judge, as well as identify judges who have special professional skills for the justice system.

In addition to highlighting the principles, sources of evaluation, and criteria for determining the professional level of judges, this study will present some findings regarding the need to reassess the legal framework for certain specific indicators.

Keywords: *evaluation scheme, regular legal process, directive, efficiency, meritocracy.*

1. Introduction

The diversity of judicial evaluation practices within the European Union member states and beyond has led to concrete initiatives focusing on harmonizing models for measuring quality in judicial systems, as well as measuring the performance of judges' work. The Consultative Council of European Judges plays a key role in assessing situations related to every aspect affecting the status of judges and also in initiating efforts to guide member states, and not only them, toward creating approximate standards

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for the administration of the judicial system.

If we observe the European map of judicial systems, we can note that the way the administration of the system is conceived, the measurement of quality, accountability, career development, responsibilities in function, and even the consequences arising from holding the status of a judge, differ from one state to another. Despite this, almost all states converge on the importance of maintaining judicial independence and integrity in the delivery of justice.

The evaluation of judges is a fundamental element of a responsible system that goes beyond the concept of accountability, being closely linked to the quality, efficiency, effectiveness, and integrity of the judicial system. Identifying specific methods and criteria for measuring and evaluating the work of judges has led to the drafting of opinions and recommendations that constitute guiding standards for member states, as well as for states such as Albania, which is taking concrete steps to finalize the integration process².

The assessment regarding the components that determine the level of professional and ethical skills during the exercise of the function is a complex process that must be directed toward methodologies that do not jeopardize the constitutional principle of the judge's independence in judicial decision-making³. Considering this principle, the ethical and professional evaluation scheme for judges is applied under conditions that guarantee maintaining the balance between the principles applied during the evaluation process and the guarantee of not violating the constitutional principle of judicial independence.

Judicial decision-making thus enjoys a status of untouchability in the sense that it is subject to review only through a single process—that of appeal at higher levels of the judiciary. In terms of the ethical and professional evaluation procedure of the judge, this decision-making constitutes the primary source on which the level of evaluation and scoring of the judge is determined.

Albanian legislation has almost integrated new norms for evaluating the professional activity of judges. The evaluation scheme is modeled in a way that allows verification of the judge's performance in terms of quality at work and integrity. Based on the standard that models the judge's behavior on the foundations of moral qualities and professional competencies, the

² Opinion No. 17 (2014), "Evaluation of Judges' Work, the Quality of Justice, and Respect for Judicial Independence," the Consultative Council of European Judges (CCJE)

³ Law No. 76/2016, "The Constitution of the Republic of Albania," in Article 145, stipulates: Judges are independent and subject only to the Constitution and the laws.

law thus ensures guarantees a judicial system with integrity and capable of delivering true justice to citizens.

The perception of citizens regarding the quality of justice delivery is not left in an abstract state but is indirectly formed as an opinion. The tendency to orient the law toward educating citizens and consequently assisting in forming an accurate opinion regarding the public perception of the judiciary in Albania is a process that has just begun, even under absolutely unfavorable conditions, considering the emergency caused by the vetting process, the depletion of the system due to the inability of magistrate judges to meet vetting standards, and the extremely high number of unresolved cases due to the departure of judges from the system⁴.

The orientation of citizens toward a rational approach to forming opinions about judiciary is also an experience that has been lacking. In countries with already consolidated legal systems, public opinion is such that it constitutes the primary source for evaluating judges' performance. Some countries base the evaluation of judges and the entire system on opinion-based assessments. Moreover, the very bodies that administer the judicial system have created special structures for measuring the performance of the judicial system, the work of the judiciary, and the judges themselves⁵. Providing information by the law regarding the activities of judicial system bodies in these countries constitutes the core of the paradigm of educating public opinion. This process has certainly not evolved in isolation but in coherence with other factors that have influenced the creation of an uncompromised stage in the evolution of collective thought.

When it comes to Albania, a country with specific characteristics regarding the evolution of institutions, the methods for evaluating the work of justice institutions have been designed in such a way that they remain an exclusive competence of the bodies designated in the Constitution.

Thus, the evaluation of a judge's work has not gone beyond the limits of a documentary description, whose primary function was almost exclusively restricted to facilitating career promotion for judges. On the other hand, public opinion has not been considered significant enough to be treated as

⁴ Law No. 84/2016, "On the Transitional Re-evaluation of Judges and Prosecutors in the Republic of Albania."

⁵ The High Judicial Councils of Spain, Portugal, etc., operate through survey statistics to measure the level of public trust in the judicial system and in the High Judicial Council within the framework of judicial administration. In the Kingdom of Spain, 85% of citizens believe that the judicial system is independent and impartial, while 56% of them trust the good work of the General Council of the Judiciary regarding the governance of the system.

an evaluative component alongside other indicators that form the judge's evaluation scheme.

The need to consider public opinion as a crucial evaluative factor in the work of the judiciary serves the fundamental purpose of judicial activity—the delivery of independent and impartial justice. The justice reform, driven by the vision of an impartial, transparent, and independent judiciary, placed special emphasis on accountability, ranking it among the fundamental principles of an effective judiciary. Accountability and transparency are valued as key indicators in shaping public opinion and perception regarding the image of judges and their judicial activities.

2. Fundamental Principles in Designing the Judge Evaluation Scheme

The purpose of the ethical and professional evaluation of judges is to ensure the continuous improvement of judges in two key components essential to their judicial function: I. Integrity and II. Professional Competence. Integrity in the fulfilment of duties is linked to adherence to the standardized rules in the Code of Ethics, which shape the judge's behaviour both in the workplace and outside. A judge is obligated to act responsibly in performing duties and to uphold the dignity of the judicial profession in the eyes of the public.

Periodic evaluations of judges also serve the purpose of establishing stable standards regarding the quality and quantity of judicial activity. Defining quantitative and qualitative criteria for assessing a judge's work lays the objective foundation for evaluating their efficiency and performance.

In most countries, judicial evaluations are conducted periodically and systematically. Member states have adopted various evaluation systems and procedures. Albania has approved a formal evaluation system that is documented through official acts, like most EU member states⁶.

These are measurable standards that assess the improvement of the judge both in terms of updating competencies and in their engagement in inter-institutional activities. The modeling of the evaluation scheme in function of improving the judicial system, developing the judge's career, and increasing public trust in the human values and competencies of judges ranks evaluation as a very important indicator of good judicial system administration.

⁶ Albania, Austria, Croatia, France, Cyprus, Spain, Portugal, Bosnia and Herzegovina, Montenegro, etc., have adopted formal evaluation systems. Countries such as the United Kingdom, Finland, the Netherlands, etc., have informal systems for the evaluation of judges.

From this perspective, the constitutional duty of proper judicial administration has assigned the High Judicial Council the responsibility of constructing an evaluation scheme that legally regulates all aspects of the judge's evaluation process.

The Law on the Status of Judges has outlined the general principles of evaluation, the purpose of the judge's evaluation, the subjects of evaluation, the criteria, sources, and level of evaluation. The procedure for ethical and professional evaluation of judges is also subject to legal regulation. In the case of formal evaluation, the objectives of the evaluation, the criteria used, the composition of the evaluating body, the evaluation procedure, and its consequences are all clearly defined before the evaluation procedure begins. The rights and duties of the evaluated judge and the evaluating body are regulated by primary or secondary legislation.

On the other hand, an informal evaluation does not use structured evaluations or formalized criteria. Typically, there are no formal consequences for the judge evaluated. The evaluation process in this case is conducted through discussions with the court president or department head, who holds regular meetings (once or twice a year) with each judge. Issues discussed include matters such as compliance with delivering justice within a reasonable time, setting career goals, the number of resolved cases, the judge's need for training, and their satisfaction with salary, work, and workplace conditions. However, it should be emphasized that informal evaluation does not provide any guarantees against the misuse of the evaluation process⁷.

3. Principles of Judicial Evaluation

3.1 The Principle of Independence

The evaluation of judges must not compromise judicial independence. Based on this reasoning, formal evaluation systems have established that maintaining the judge's independence is a fundamental duty of the evaluators. Listing the principles of judicial evaluation aims to guide the functioning of the evaluation process, the values that support this process, and the determination of standards in accordance with which the entire legal framework of evaluation will be built.

The principles of judicial evaluation constitute the fundamental guidelines that direct the evaluation process as a whole. Their legal definition serves as a legal guarantee for conducting a process that respects the protection of

⁷ European Commission for the Efficiency of Justice, Guidelines on the evaluation on the quality of work of judges, CEPEJ Strasburg 2025

the judge's status and the fundamental principles that complete this status. Judicial independence is the most sensitive aspect that can come into question during an evaluation procedure. The question of whether the evaluation process can compromise aspects of the principle of judicial independence finds its answer in how the law presents guarantees regarding independence. The fundamental principle that guides the ethical and professional evaluation process is the principle of independence.

According to this principle, the evaluation process cannot interfere with the independence of the judge⁸. Judicial independence in the interpretation and analysis of law and judicial facts serves the obligation of an independent and impartial judiciary. The authority of the judge in decision-making is dictated solely by the law. Independence, as a fundamental principle for an efficient judicial system, best serves the interests of citizens by ensuring access to justice and fair decision-making. Given the importance of judicial independence as a fundamental principle, the legal merits of individual judicial decisions cannot be the subject of evaluation⁹. The only procedure that assesses legality, both substantively and professionally, is the appeal procedure. For this reason, the evaluation of the indicator referring to judicial decisions is based on aspects related to the judge's work methodology, assessing legal knowledge and reasoning.

3.1.1

The principle of meritocracy evaluates the merits of the judge concerning indicators of professional skills, organizational abilities, ethics and commitment to professional values, personal skills, and professional engagement. Based on these components, the judge's performance during the exercise of their function is assessed, serving, firstly, to highlight standards for fulfilling judicial duties and, secondly, to evaluate the judge in the process of career promotion. The principle of meritocracy guarantees the career development of judges based on merit, both in terms of professional qualifications and behavior while fulfilling judicial duties. Meritocracy, as a fundamental principle of career development, is the key criterion that ensures efficient and high-performing judicial systems in terms of judicial integrity. Thus, even in systems that do not base judicial evaluations on formal models, when the evaluation of a judge is carried out for career development purposes (promotion), a highly formal evaluation procedure is applied.

⁸ Law No. 96/2016 "On the Status of Judges and Prosecutors in the Republic of Albania," Article 69.

⁹ The scoring methodology for determining the level of judicial evaluation, approved by Decision No. 193, dated 12.05.2021, of the High Judicial Council.

3.1.2

Efficiency, as a key principle in the judicial evaluation procedure, aims to ensure a swift evaluation process. Through simple procedures and within reasonable timeframes, it becomes possible to gather evaluation data quickly, which serves as the basis for the assessment process. Efficiency is particularly important in expediting procedures related to the movement of judges within the judicial system, as well as their assignments to key justice institutions where magistrates are required to provide professional expertise. These assignments are made by the decision of the competent body, which is the High Judicial Council. Efficiency, as a principle in the evaluation process, ensures the activation of specific promotion mechanisms for judges, as well as the improvement of judicial performance. In certain cases, efficiency is a crucial indicator since the speed of evaluation supports mechanisms that contribute to the proper administration of the judicial system. Parallel movements and any procedure related to judicial career advancement are based on the data generated by the evaluation process. The speed of evaluation directly translates into efficiency in managing human resources in key positions related to career progression.

3.1.3

Being an evaluation procedure that is directly related to the fundamental elements of the judge's status, such as the right to promotion, it is essential to implement all components of the principle of a fair legal process. The evaluation procedure is guided with due consideration for respecting these elements in defense of the judge's subjective right to participate in the administrative evaluation process. Thus, in addition to the rights derived from the Law on Status, the judge is also protected by administrative provisions that guarantee a regular procedure based on the principle of adversarial proceedings. The judge is informed of every action that contributes to their evaluation, has the right to access the documents, and the right to review the evaluation file. The judge is informed and has the right to be heard, to defend themselves, and to appeal the evaluation decision. The principle of a fair legal process guarantees the judge's fundamental and procedural rights, while also ensuring the quality of the evaluation procedure in terms of objectivity and impartiality.

3.1.4

Confidentiality as a principle in the evaluation process primarily serves to protect the data related to the judge. In addition to personal data, the process may also involve sensitive data categories that the evaluator may become aware of, particularly when assessing indicators related to ethics or

commitment to professional values. Guarantees provided by the principle of confidentiality, affirmed as a fundamental principle throughout the evaluation process, obliges the evaluator to remain discreet regarding the judge's personal data obtained during the evaluation¹⁰. The Albanian state has ratified the amending protocol to the Convention "On the Protection of Individuals with Regard to Automatic Processing of Personal Data"¹¹ and is undergoing the process of aligning its data protection legislation with GDPR standards. Under these conditions, the principle of confidentiality follows this standard also within the framework of the ethical and professional evaluation process of judges. The implementation of these principles ensures an objective, transparent, and swift evaluation procedure, effectively serving the administration of the judicial system both in terms of the quality of judicial service delivery and the quality of career development standards.

4. The Evaluation of Judges as a Necessary Process

Evaluating one's work as a judge from the perspective of how others perceive and assess one's professionalism and integrity in the exercise of duty represents an approach that is both emancipatory and valuable in terms of fulfilling the judicial function. The realization of this process may seem almost abstract when viewed in relation to other social, cultural, political, historical, and anthropological factors. The question of how a judge is perceived by others serves as a key element in shaping solutions for a judicial system that places the rule of law at the service of citizens' guarantees for justice. Mel Dickstein, considering the evaluation of judges as a necessary process affirms that a judge must be assessed to understand how they are perceived¹². Perception, as a form of recognition related to human consciousness, can represent the most absolute model of evaluation in cultures where mass public opinion tends to assess institutional trust with rationality. In other cultures, lacking a strong institutional heritage or with unprogressive histories that have been shaped by the exercise of political authority by certain elites, public perception as a standard for evaluating the

¹⁰ Law No. 96/2016, Article 69/d, "On the Status of Judges and Prosecutors in the Republic of Albania," stipulates that the evaluating entity is exempt from this obligation only in cases where the information is provided to the magistrate being evaluated or to bodies that, by law, have the right to request this information due to their official duties.

¹¹ Law No. 49/2022 "On the Ratification of the Amending Protocol to the Convention 'On the Protection of Individuals with Regard to Automatic Processing of Personal Data'."

¹² Judge Dickstein, Evaluating judges: a difficult but necessary process, MINNPOST journal Jan. 14.2016

work of judges is likely to be unreliable. For this reason, it is important that in countries with emerging democracies, where the rule of law as the fundamental concept of state-building navigates through uncontrolled waves of cultural factors, judicial system reforms follow a progressive approach. In such cultures, public perception as an evaluation standard should be approached with caution, and this very fact dictates the necessity of a formal evaluation system for judges' work. It should be taken into account that the formation of public opinion depends on many factors, among which the judge's own work and performance are considered key. Interacting factors such as media, non-governmental organizations, civic movements as forms of reaction, educational institutions, universities, and others play a crucial role in the emancipation of public opinion and its authenticity in responding to societal concerns. The judiciary effectively fulfills its mission only when the public develops trust that courts, even when they make mistakes, operate with complete independence.¹³ In a country with a 110-year history of the rule of law, this definition—both optimistic and mission-driven—places the duty of informing the public and shaping a positive perception of judicial work entirely on the judiciary. It is precisely citizens, those who have direct contact with court proceedings, who form a particular opinion about a judge's work. On the other hand, it is also the evaluation bodies that monitor and periodically assess the work of judges. The former are likely to shape their perception of the judge based on how their case was resolved, and from this perspective, party dissatisfaction with judicial outcomes may lead to the manipulation of public opinion regarding the judge's performance. The latter, typically bound by law to evaluate the judge's work, can objectively identify the strengths and weaknesses of a judge, their professional level, and their integrity. This monitoring system provides a clearer perspective on the authenticity of a judge's ethical and professional values. Judicial systems that have undergone reforms in administration¹⁴ and control of judges' work promise a fairer evaluation of judicial performance. This is because evaluation schemes refer to concrete data on a judge's work. Such data serve as evaluation sources that shed light on the judge's conduct in relation to fulfilling their duties.

¹³ Sokol Sadushi, presentation at the International Conference "110 Years of the High Court," Tirana, 10.05.2023; <https://lnkd.in/dqdyQUKt>

¹⁴ The body responsible for administering judicial power in Albania has not followed the classical composition model. The aim of this approach is to achieve full independence in the administration of the judiciary, enhance accountability, and increase transparency within the system.

It is important for a judge to understand the level of their professional competencies and to know what needs improvement in relation to public expectations, as well as in relation to the standards for an efficient justice system. Some evaluation schemes provide the possibility for judges to self-evaluate certain indicators of their work¹⁵. There are cases where the evaluation conducted by the Councils significantly differs from the judge's self-evaluation report. In other cases, both reports may be closely aligned. In both situations, the judge should consider opportunities to improve their performance at work. In light of this reasoning, the primary objective of judicial evaluation is to enhance the judge's professional skills and conduct in the exercise of judicial duties, in line with public perception expectations. Evaluation primarily ensures judicial accountability and the quality of judicial service.

5. The Judge Evaluation Scheme. The Albanian Model

Ethical and professional evaluation is a right derived from the legal provisions regulating the status of judges. Judges are evaluated once every three years during the first fifteen years of professional experience, including their experience as assistant magistrates or seconded magistrates¹⁶. After the first fifteen years of professional experience as a judge, the evaluation is conducted once every five years.

The evaluation scheme refers to the set of ethical and professional evaluation rules derived from legal acts regulating the status of judges, the functioning and organization of the body administering the judicial system, and other secondary legislation issued in implementation of the law. The High Judicial Council is the body with the constitutional competence for the proper administration of the judicial system and, in this regard, also holds the responsibility for evaluating judges. To fulfill this purpose, the Council has developed a special package of normative acts that have completed the judge evaluation scheme. Judicial evaluation is designed to serve the development of a merit-based career system, where judges who receive the highest evaluations, both professionally and in terms of integrity, are promoted to the highest levels of the judiciary. As a process, judicial evaluation in Albania follows the report-based model and, in terms of the responsible evaluation body, adheres to the Council model.¹⁷ The

¹⁵ Law No. 96/2016 "On the Status of Judges and Prosecutors in the Republic of Albania," in Article 77, stipulates that the sources of evaluation include the assessment conducted by the magistrate and the judicial decisions or acts drafted by them.

¹⁶ Magjistrati

¹⁷ The ethical and professional evaluation report of the judge is approved by the High

Albanian model of judicial evaluation, and consequently of judicial promotion, prioritizes professional competencies, integrity, and contributions within the judicial system rather than seniority (as long as the judge seeking promotion meets the mandatory tenure and special jurisdiction criteria) or hierarchical positions. Under these conditions, the presence of a rigorous evaluation scheme and its objective implementation is essential to achieving the ultimate goal of a high-quality judiciary. The career system is based on legal criteria that outline the general and specific conditions for a judge to be promoted. In Albania, all judges are subject to the evaluation scheme, except for judges of the High Court, who are not evaluated during their nine-year term. During the competitive procedure, a judge seeking promotion to the highest judicial instance undergoes an ethical and professional evaluation process, which is a prerequisite for their ranking in the selection process. Evaluation is also a requirement for a judge's selection for the position of court president.¹⁸ Since the evaluation of judges aims to maintain the quality of their work both in terms of professionalism and integrity, the question that arises concerns the effectiveness of measuring the performance of High Court judges and which indicators are used to assess this performance.

In general, judicial evaluation schemes are designed based on certain standards established by the European Network of Councils for the Judiciary (ENCJ) regarding the purpose of judge evaluations, which include:

- Improving judicial service for the public
- Professional development of judges and enhancing work quality
- Judicial system efficiency and measuring judges' performance as a key role in this aspect
- Updating judges' competencies through continuous training¹⁹
- Motivating judges to continuously engage in professional activities

Ensuring compliance with these standards is the responsibility of the board entrusted not only with the evaluation of judges but also with the overall

Judicial Council and is an integral part of the decision that determines the judge's evaluation level and scoring.

¹⁸ Article 51 of the Law on Status

¹⁹ The School of Magistrates is responsible for developing continuous training programs for judges. Law No. 96/2016 "On the Status of Judges and Prosecutors in the Republic of Albania," in Article 76, stipulates that the participation of magistrates in continuous training at the School of Magistrates should not exceed 40 days per year and no more than 200 days over five years. This participation is considered an indicator for engagement in other activities.

administration of the system. The conceptualization of the High Judicial Council as a body with constitutional competence for overseeing judges' work, in the perspective of ensuring the proper functioning of the system, led to a heterogeneous composition of its membership.

The Council is composed of both judge and non-judge members, who come from academia, the legal profession, and civil society. The presence of non-judicial members in decision-making related to judicial evaluations and careers is considered a safeguard for the independent administration of the judiciary, ensuring approaches that prevent influences leading to biased evaluations. Justice reform²⁰ resulted in the establishment of an independent structure responsible for organizing the judiciary and ensuring the independent administration of the judicial system. The evaluation of judges, as a process that concludes with the Council's decision-making, presupposes monitoring the quality of work in the judiciary through a collegial decision-making process, which also reflects the perceptions of stakeholders represented in the Council²¹.

The High Judicial Council exercises its constitutional functions through Permanent Committees and the Plenary Assembly. In terms of judicial evaluations, the Ethics and Professional Activity Evaluation Committee is responsible for conducting the evaluation procedure and analyzing evaluation sources from which data on judges' work performance are derived. Performance indicators are clearly defined in the Law on the Status of Judges and in detail in the Judge Evaluation Methodology. Based on these indicators, the rapporteur, who is part of the Evaluation Committee, drafts the preliminary evaluation report, which presents all the data derived from evaluation sources, as well as the scoring and assessment level for each criterion.

There are four key criteria for assessing the professional activity and integrity of judges:

- i. Professional skills,
- ii. Organizational skills,
- iii. Ethics and commitment to judicial professional values,
- iv. Personal skills and professional engagement.

All four criteria are evaluated according to their respective components,

²⁰ Justice Reform

²¹ The High Judicial Council consists of 11 members. Justice reform replaced the ex-officio membership in the Council and restructured it according to broader representation models, including members selected from fields that are essential to the justice system, such as professors from law faculties, distinguished legal professionals from civil society, and experienced lawyers.

which are designed to comprehensively analyse and assess all aspects related to the judge's work, both in terms of professional level and integrity.

Although the evaluation scheme is entirely formal and based on documentary evidence, the sources of evaluation also include elements that reflect public perception regarding the judicial activity of magistrate judges and their integrity. The evaluation scheme is designed to incorporate the assessment of components related to ethics and commitment to professional values.

Integrity is one of the most important components in evaluating a judge. As a concept that relates to a judge's adherence to certain moral and human principles that should be clearly reflected during the exercise of their judicial duties, integrity significantly influences public perception and trust in the judicial system.

Workplace ethics is associated with responsibility in office and presupposes careful, rational, self-restrained, and mature behavior by the judge in the execution of their duties. Ethical standards²², conceptualized in accordance with the fundamental and universally accepted principles of Bangalore, should guide the judge's professional conduct.²³ Of course, ethical rules cannot be viewed and analyzed solely in a completely formal context, nor can their implementation be purely procedural. They are the product of a particular mindset that is closely linked to the judge's education.

Education is another aspect that affects the judge's approach to duty. A variety of circumstances shape a judge's behavior, which, from a broader perspective, is a product of a particular culture. What is crucial in such an analysis is the judge's ability to demonstrate models of conduct and action about the law that transcend the cultural norms in which they have operated. It is precisely these universally accepted ethical rules that aim to establish such ethical and behavioral standards for judges, thereby enhancing their public image and reshaping judicial systems toward the fundamental values of independence and transparency.

Legal theorists today place fundamental importance on the human values that judges must embody in respecting their profession and their proper adherence to the law. Sensitivity, as a virtue without which justice cannot be conceived, is increasingly being promoted as an element that ensures a genuine approach to law enforcement.

Judicial ethics and integrity which include avoiding inappropriate conduct and maintaining honor and dignity in the exercise of duty—are values of professional commitment that uphold the fundamental principle of justice: impartiality in the exercise of judicial functions.

6. With the aim of establishing an efficient judicial system capable of delivering quality judicial services, the evaluation scheme also includes a set of indicators as measurable criteria for judges' work in terms of professional development and engagement in inter-institutional activities.

The Law on the Status of Judges has provided several aspects of career

²² The Rules of Ethics approved by the High Judicial Council.

²³ The Bangalore Principles of Judicial Conduct.

progression and evaluation, which are also influenced by the judge's involvement in other institutions within the justice system.²⁴ Recognizing the fundamental role of judges in improving judicial services, the law emphasizes the importance of their contribution to activities that serve the justice system as a whole. A key role in the continuous professional development of judges is played by the School of Magistrates, which, in cooperation with the High Judicial Council, is responsible for improving the curriculum of continuous training by updating developments in jurisprudence and fully integrating unified judicial practice. This process is designed to involve all judges, who identify training needs themselves and actively participate in training sessions.

The law mandates judges to participate in the continuous training programs of the School of Magistrates to update their professional knowledge and remain aligned with the judicial practices of the High Court, the European Court of Human Rights (ECtHR), and any other relevant legal developments affecting judicial work. The contribution of judges to teaching is also considered valuable, whether at the School of Magistrates or universities where law students are trained. Legal and academic publications, participation in scientific conferences in an active role, and roundtable discussions on legal issues are regarded as added value in the professional evaluation of judges.

The new judicial evaluation scheme, in addition to quantitative and qualitative performance indicators, has also introduced indicators measuring judges' engagement in other activities. This scheme envisions the role of a judge not just in the courtroom but also in activities related to professional development and personal engagement. It is important to analyse such indicators in relation to the judge's actual ability to respond to these engagements. To balance the primary duty of delivering justice with the obligation of professional development, the High Judicial Council and other relevant actors are responsible for monitoring the full implementation of these standards. These standards should also be assessed in relation to judges' objective capacities to meet the mandatory criteria evaluating their performance. Setting minimal quantitative and time-based standards for judicial activity should be done in a way that enables judges to fulfill their legal obligation to engage in extracurricular activities, scientific research, mentoring, and training, all of which contribute to their professional evaluation.

Recommendations

The evaluation of judges is a process that serves the purpose of building an efficient judicial system capable of delivering high-quality justice while ensuring accountability. The evaluation scheme aims to improve judicial performance, identify areas for improvement within the judicial system, and recognize judges

²⁴ Check the Law on Status, the secondment scheme, and its impact on the career development of judges. The ethical and professional evaluation scheme and the importance of judges' engagement in inter-institutional activities.

who demonstrate high professional competence and integrity.

The Albanian law on the status of judges provides for a formal evaluation based on documents that measure judges' performance in terms of professional skills, organizational abilities, workplace ethics, and personal engagement. The formal system of judicial evaluation is an increasing trend in other EU member states as well. Documented evaluations are considered to be closer to objectively assessing a judge's work. However, the Consultative Council of European Judges (CCJE) encourages all member states to include informal evaluation procedures that help improve judicial skills and, in turn, enhance the overall quality of the judiciary.²⁵ The judicial evaluation scheme in Albania includes self-assessment reports from judges as well as reports from court presidents.

The evaluation process should be based on objective criteria, minimizing subjectivity as much as possible. The role of evaluating bodies is crucial in this regard. In Albania, this responsibility is entrusted to the High Judicial Council, which collectively approves the judicial evaluation reports. The law on the status of judges provides for periodic evaluation without imposing restrictions based on years of service. In contrast, some EU member states prohibit judges with less than 15 years of experience from receiving an "Excellent" rating. This ensures additional safeguards for a merit-based career system.²⁶

As the primary legal framework, the law on the status of judges defines the principles, criteria, data sources, and procedures for evaluation. Qualitative and quantitative indicators should be designed while considering a judge's ability to integrate professional development activities into their work. The nature of judicial duties should allow judges to fulfill all obligations required for the evaluation process. Evaluation rules should also take into account exceptional circumstances that may have prevented a judge from meeting all performance indicators. Judges should not be penalized for factors beyond their control. In any case, the evaluation criteria should enable assessors to consider all aspects of judicial performance.

To balance the primary duty of delivering justice with the obligation for professional development, the High Judicial Council and other stakeholders must monitor the full implementation of the established standards. These standards should also be assessed in relation to judges' objective ability to meet the mandatory criteria used in their evaluations. The determination of minimum quantitative and time-based standards for judicial activities should be designed in a way that allows judges to fulfil their legal obligation to engage in additional professional activities, such as academic research, mentoring, and training, for which they are evaluated.

The law on judicial status grants judges the right to be informed about every aspect of the evaluation process and to access all evaluation-related documentation. Judges undergoing evaluation have the right to be present at the

²⁵ Opinion No. 17 of 2014 by the Consultative Council of European Judges (CCJE)

²⁶ Check the judge evaluation scheme under Portuguese law.

plenary session where their evaluation decision is made. A key issue for discussion is whether a judge can access the evaluation records of other judges competing in the same procedure. It is important to remember that evaluation forms the basis for career advancement. The evaluation results are published on the official website of the High Judicial Council. Does a judge have the right to challenge the evaluation decision of the Council, especially in cases of indications of unequal treatment?²⁷ On this issue, it is widely accepted that the principles and procedures governing judicial evaluations should be publicly available. However, individual evaluation processes and results should generally remain confidential to ensure judicial independence and the security of judges.²⁸

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²⁷ Under the meaning of Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms,

²⁸ Opinion No. 17 (2014) CCJE

ALIGNING EU STANDARD IN ALBANIAN DATA PROTECTION LEGISLATION

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Abstract

To achieve its ambition towards integration into the European Union, which has been often a complex process, Albania has undertaken significant initiatives towards the fulfillment of the objectives set in 2006 through the signing of the Stabilization and Association agreement and the annual recommendations of the European Commission. In July 2022, Albania officially opened negotiations to become part of the EU, thus materializing the efforts started 16 years ago. Among the key objectives of this process is the alignment of local legislation with EU *acquis*, a process guided by the recommendations of the European Commission.

This paper will focus on the process of approximation of legislation in the field of personal data, which is a well-known and consolidated concept in the European Union, through the General Data Protection Regulation (GDPR). The GDPR guarantees the highest processing security and the use of personal data for European citizens, as well as Directive 2016/680 of the Parliament and of the European Council. The process of approximation of the legislation in this sector is also dictated by the recommendations made by the European Commission, which has emphasized that Albania should improve the process of personal data protection by taking the necessary legal measures to revise the legislation in force in full compliance with the EU *acquis*.

Secondly, through this study we aim to address the concept of “*the right to be forgotten*”, a concept enshrined in EU law but not yet incorporated into Albanian legislation. This right allows individuals to request the deletion of their personal data when it is no longer necessary for the purposes for which it was collected, or when they withdraw consent. The absence of this provision in Albanian law poses challenges for individuals seeking to

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exercise this right and creates inconsistencies with the EU's data protection standards.

Another topic that this paper presents is the treatment of penal data under Albanian law that is also connected with the right to be forgotten, a subject of significant concern given its implications for privacy and data protection. Penal data, which includes information related to criminal convictions and offenses, is subject to stringent rules under EU law to prevent misuse and ensure adequate safeguards. The study highlights how Albanian legislator need to adapt those standards, not only in the new data protection law, but also by amending certain articles of the Criminal Code and Criminal Procedural Code, to guarantee its individuals' privacy and rights.

Finally, the paper analyzes relevant EU case law that addresses the aforementioned topics. Key cases are reviewed to elucidate the interpretation and application of the right to be forgotten and the handling of penal data within the EU legal framework, that will serve as a benchmark for assessing Albania's legislative gaps and to prepare it for the implementation of the new law that is going to be adopted by the Parliament.

Keywords: *Right to be forgotten, penal data, EU caselaw, legislation approximation, GDPR.*

1. Introduction

Albania's drive to join the European Union has required substantial alignment with EU regulations, including data protection standards that protect individual rights across all sectors. The GDPR and Directive 2016/680, central to EU data protection, introduce stringent rights and obligations for data controllers, particularly in areas like the right to be forgotten and penal data processing. As Albania formalized its EU accession process in 2022³, data protection became a focal point, particularly in light of evolving digital practices and EU demands for robust privacy standards. This paper aims to evaluate Albania's progress toward EU data protection alignment with a focus on the right to be forgotten and penal data. It identifies the gaps and limitations of Albania's data protection framework in force, explores relevant EU case law, and shows the need to

³ European Commission, 2022, *First Intergovernmental Conferences with Albania and North Macedonia to kick-start the accession negotiation*, retrieved from: https://neighbourhood-enlargement.ec.europa.eu/news/first-intergovernmental-conferences-albania-and-north-macedonia-kick-start-accession-negotiation-2022-07-19_en

undertake the necessary legislative measures to strengthen these rights and enhance Albania's EU accession, aiming for the adherence to these standards, as well as in alignment with the recommendations of the European Commission⁴ towards the European aspirations of the Republic of Albania.

Albania's data protection framework evolved gradually, beginning with its initial recognition of privacy rights in the late 1990s⁵ and early 2000s⁶. Although general privacy concerns were acknowledged, and foreseen in the Albanian constitution in 1998⁷, dedicated legislation addressing data protection was not introduced until 1999, with the enactment of Law no. 8517, dated 22.7.1999, "On the protection of personal data". Later this law was repealed by the new law no. 9887, of 2008 "On the protection of personal data". This law represented Albania's first comprehensive approach to data privacy, modeled after the EU's Directive 95/46/EC, which established fundamental protections for personal data in the European Union. With Albania's commitment to aligning its laws with EU standards as part of the Stabilization-Association Agreement (SAA) in 2006⁸, the country embarked on a series of reforms to ensure compliance with EU data protection standards. The SAA as well as repeated suggestions of the European Commission placed data protection on

⁴ European Commission, 2022, *Albania 2022 Report*, retrieved from: https://neighbourhood-enlargement.ec.europa.eu/document/download/dde85556-8061-41f3-ba0c-5e921158bc53_en?filename=Albania%20Report%202022.pdf,

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European Commission 2024, *Albania 2024 Report*, retrieved from: https://neighbourhood-enlargement.ec.europa.eu/document/download/a8eec3f9-b2ec-4cb1-8748-9058854dbc68_en?filename=Albania%20Report%202024.pdf

⁵ Law no. 8137, date 31.7.1996, "*For the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms*", retrieved from Albanian official Journal: <https://qbz.gov.al/eli/ligj/1996/07/31/8137/bffaa86c-7ecc-48c8-a7f9-8e812cd0a799>

⁶ Law no. 8517, dated 22.7.1999, "*On the protection of personal data*", repealed, retrieved from Albanian official Journal: <https://qbz.gov.al/eli/ligj/1999/07/22/8517/1c6ad472-ebfd-417c-89ea-a20291d930e2>

⁷ Article 15, point 1, article 17, article 35 of the Constitution of the Republic of Albania, adopted in 1998.

⁸ Law no. 9590, date 27.7.2006, "*On the ratification of the Stabilization-Association Agreement between the Republic of Albania and the European Communities and their member states*", retrieved from Albanian official Journal: <https://qbz.gov.al/eli/ligj/2006/07/27/9590/92c1cfc1-2743-4c3f-9750-e36fdd90a9cc;q=stabilizim%20asociimit>

Albania's legislative agenda, emphasizing the need to harmonize its legislation with EU *acquis*.

More concretely Albania laid the foundation stone towards EU, with the adoption of the Law No. 9887, that outlined the rights and obligations of data controllers and processors and foresaw the role of the Commissioner for Data Protection, tasked with overseeing compliance and enforcing data protection rules. However, Albania's law, while significant in setting foundational standards, is outdated with the expectations imposed by the EU General Data Protection Regulation (GDPR) and Directive 2016/680. The primary areas covered by the 2008 law included data subject rights, the need for data controllers to obtain consent, and broad principles of data security and confidentiality. Still, these provisions are relatively general, and enforcement mechanisms are limited compared to recent EU standards. On the other hand, replacing Directive 95/46/EC, EU presented the General Data Protection Regulation (GDPR) that took effect in 2018. GDPR introduced a robust, standardized framework for data protection across the EU and influenced global privacy standards. It addressed the exponential growth in personal data collection and the increasing complexity of data processing in the digital era. Unlike Directive 95/46/EC, which allowed for considerable variation in national implementations⁹, the GDPR is directly applicable, mandating compliance across all member states without additional legislation, which ensured a uniform standard of data protection across the EU¹⁰. The GDPR's significance lies in its core focus on enhancing individual rights, increasing transparency, and implementing strict data processing requirements.

⁹ Article 5 of the Directive 95/46/EC provided that Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful. Also in Recital 9 of the GDPR it is stated that the objectives and principles of Directive 95/46/EC remain sound, but it has not prevented fragmentation in the implementation of data protection across the Union, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons, in particular with regard to online activity. Differences in the level of protection of the rights and freedoms of natural persons, in particular the right to the protection of personal data, with regard to the processing of personal data in the Member States may prevent the free flow of personal data throughout the Union. Those differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law. Such a difference in levels of protection is due to the existence of differences in the implementation and application of Directive 95/46/EC.

¹⁰ Recitals 5-8 of the GDPR clearly state the need for an strong, consistent and more coherent data protection framework

Key innovations of the GDPR include the “right to be forgotten”, data portability, and detailed conditions for obtaining consent. It also introduced significant penalties for non-compliance, with fines reaching up to €20 million or 4% of global revenue, of the breacher of the regulation. This shift to a more enforceable and punitive framework reflected a broader EU goal of establishing data protection as a fundamental right, requiring all entities handling personal data of EU citizens to uphold high standards of data security and privacy. As for the Police Directive it mandates strict limitations on the processing of penal data and sensitive personal information, introducing specific principles such as purpose limitation, data minimization, and security safeguards tailored to criminal justice contexts. Additionally, the directive sets boundaries on data sharing between law enforcement agencies within and outside the EU, ensuring that such transfers do not compromise the data protection rights of individuals.

Albanian data protection law foresees the data subject the right to request the erasure of its personal data, but with some limitations compared to the right to be forgotten, provided for in article 17 of the GDPR which we are going to present in this study¹¹ that enables individuals a wide range of their rights, especially in the online world. As for the other topic, Directive 2016/680¹² mandates strict handling of penal data to protect individuals’

¹¹ European Union, 2016, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*. Official Journal of the European Union, L 119, 1-88. <https://eur-lex.europa.eu/eli/reg/2016/679/oj>, article 17, par. 1 “The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies: a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing; c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2); d) the personal data have been unlawfully processed; e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).”.

¹² European Union, 2016, *Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal*

rights within law enforcement and judicial contexts that Albania's current legislation,¹³ partially aligns with but fails to address in its legislation.

2. Challenges of Albanian data protection legislative framework

Comparison: The Right to Be Forgotten (RTBF) vs. the Right to Request Data Erasure in Albania

Analyzing the GDPR, the RTBF provides individuals with the right to request the deletion of their personal data under GDPR's guidelines, emphasizing control over personal data in both digital and physical realms. However, Albania's current data protection law lacks specific provisions that allow individuals to request the deletion of personal data with the same scope and authority as the GDPR.

On the other hand, article 13, par. 1 of Law no. 9887, states that the data subject has the right to request blocking, correction or erasure of its personal data, in cases when he encounters that its personal data aren't clear, real, are incomplete or they are collected or processed in violation with the provisions of the law. Saying so, the Albanian legislation guarantees minimal standards to Albanian data subjects, but fails to address issues concerning:

- i) the speed of the procedure that par. 1 of the article 17 of GDPR guarantees data subject the erasure of its personal data¹⁴, to address and provide clear criteria's¹⁵ and so the decision-making process falls into the discretion of the data processor.
- ii) applicability and restriction of data subject rights when data is necessary for exercising the right to freedom, a legal obligation which

penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (Law Enforcement Directive). Official Journal of the European Union, L 119, 89-131. <https://eur-lex.europa.eu/eli/dir/2016/680/oj>

¹³ Law no. 9887, dated 10.3.2008, "*For the protection of personal data*", as amended, retrieved from Albanian official Journal: <https://www.qbz.gov.al/preview/c946dd62-a51a-44e3-9aa5-cb96525f3dbf/cons/20231030>, article 13, par. 1., "1. Every data subject has the right to request the blocking, correction or deletion of data, free of charge, when it becomes known that the data about him is not regular, true, complete or has been processed and collected in violation with the provisions of this law."

¹⁴ *op. cit.*, Regulation (EU) 2016/679, Art. 17, par. 1, "[...] the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay [...]."

¹⁵ Criteria as mentioned in article 12, par. 3, of the GDPR, that state that the normal procedure lasts one month, that can be extended by two further months when necessary, considering the complicity and the number of requests and article 20, par. 3, that

requires the processing of data to which the controller is subject, or for the performance of a task carried out in the public interest, and for reasons of public interest in the area of public health, as well as for achieving purposes in the public interests, scientific or historical research purposes or statistical purpose¹⁶;

iii) providing clear criteria as those mentioned in art. 17, par. 1, let. “a” to “f”, when the data subject can request the erasure of its personal data.

iv) the coordinating role of the controller that takes all reasonable steps to inform controllers which are processing the personal data of the data subject.

The Albanian framework provides for a more limited right to request data deletion, primarily covering situations where data is incorrect or unlawfully processed, but it lacks the comprehensive protections and flexibility of GDPR’s RTBF. Saying so, in Albania, there is no explicit protocol for removing data from online platforms or third-party processors, nor is there a legal obligation for these entities to notify other parties who may have accessed the data to delete it as well. This limitation restricts Albanian citizens’ control over their digital presence, a core tenet of GDPR’s RTBF, and leaves Albania’s privacy protections behind EU standards.

In this regard there is a strong need to review where Albania stands in the implementation of the RTBF not only in terms of legislative framework but also on what it is needed to ensure full alignment and implementation of this very important data subject right.

2.1 Case Law Analysis

The European Union’s Court of Justice (ECJ) jurisprudence has produced key judgments that significantly impact data protection practices, especially in areas like the right to be forgotten, international data transfers, and penal

¹⁶ *op. cit.*, Regulation (EU) 2016/679, Art. 17, par. 3, “Paragraphs 1 and 2 shall not apply to the extent that processing is necessary: a) for exercising the right of freedom of expression and information; b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3); d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or e) for the establishment, exercise or defence of legal claims.”.

data processing. These cases not only shape EU member states' interpretations of the GDPR and Directive 2016/680 but serve as valuable references for Albania not only to fully comply its legislation with EU standards, but also to guarantee its citizens with the same rights as those of the EU, before entering the European Union as a member state.

In the case *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (Case C-131/12)¹⁷, the Grand Chamber of the EJC ruled that individuals have the right to request the delisting of outdated or irrelevant information from search engine results, as long as it does not override the public interest. This right is now enshrined in GDPR Article 17, allowing individuals to request data erasure under specific conditions. As Albania incorporates the right to be forgotten in its data protection law, *Google Spain* provides a critical precedent for balancing personal privacy with public access to information. The ruling emphasizes the need for Albania to develop clear protocols for handling requests to erase data, especially in cases involving online information and creating the needed expertise, that impacts the individual's life and reputation. Establishing criteria for assessing the public interest versus privacy will be essential, as Albania aims to protect both personal privacy and freedom of information.

As for data transfer between states, regarding the application of the directive 95/46/EC¹⁸, in the case *Schrems II, Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* (Case C-311/18)¹⁹, the EU-U.S. Privacy Shield, which previously allowed for data transfers between the EU and the U.S., due to inadequate protection of personal data. The Grand Chamber on July 2020, stated that data transfers to non-EU countries must ensure an equivalent level of protection as provided within the EU, placing stricter requirements on international data transfers and emphasizing the importance of protecting EU citizens' data. Highlighting the importance of secure international data transfer standards, Albania, which increasingly participates in global data exchanges, must implement robust safeguards for cross-border data transfers, especially in

¹⁷ Court of Justice of the European Union., 2013, Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*. ECLI: EU: C: 2014:317. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0131>

¹⁸ Repealed by the GDPR

¹⁹ Court of Justice of the European Union, 2019, Case C-311/18, *Data Protection Commissioner v. Facebook Ireland Ltd and Maximillian Schrems* ("Schrems II"). ECLI:EU: C:2020:559. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62018CJ0311>

cases involving non-EU countries and non-secure courtiers that request the data transfer. Following *Schrems II*, Albania may consider adopting standard contractual clauses (SCCs) and binding corporate rules (BCRs) to ensure that international transfers meet EU standards. Moreover, ensuring that public authorities understand these requirements will be essential to foster compliance and secure cross-border exchanges.

*Tele2/Watson*²⁰ ruling reinforced the principle of data minimization in the context of data retention. The ECJ ruled that blanket data retention laws, which do not distinguish between individuals, are incompatible with EU data protection standards. Data retention practices must be limited in scope and applied only where strictly necessary for specific purposes. For Albania's law enforcement and telecommunications sectors, *Tele2/Watson* highlights the importance of implementing targeted data retention policies. As Albania drafts policies on data retention for law enforcement or security purposes, it will need to ensure these practices meet EU standards by applying retention only where justified and establishing strict conditions for data access and use. This decision also reinforces the importance of privacy in mass data collection efforts, a consideration as Albania strengthens its digital security policies.

These ECJ rulings offer Albania valuable insights into shaping its data protection framework in alignment with EU standards, guiding both immediate legislative reforms and the establishment of sustainable, adaptable data governance practices. As Albania integrates these principles, several future legislative directions emerge in the direction of classification of data subject's rights and enforcement mechanisms, strengthening international data transfer frameworks, developing targeted penal data handling regulation as well as the refining data retention policies to protect privacy.

Given that EU case law continues to evolve, Albania could benefit from introducing a formal mechanism that enables its data protection framework to stay updated with ECJ rulings and emerging EU guidance. This mechanism could involve regular assessments of Albanian laws following new EU case law developments, facilitating adjustments to Albanian regulations as necessary. This approach would not only ensure compliance but also demonstrate Albania's proactive commitment to EU integration by consistently adapting to the latest standards and judicial interpretations.

²⁰ Court of Justice of the European Union, 2016, *Tele2 Sverige AB v. Post- och telestyrelsen* (Case C-203/15). ECLI: EU: C: 2016:970. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0203>

3. Legislative Approximations and Recommendations

On the official website of the Assembly of the Republic of Albania is published the draft of a new law “On personal data protection”, the aim of which is to align the Albanian legal framework with the *acquis* of the European Union, respectively with the aforementioned acts. The consultation of this draft with the public lasted until 13.07.2022, according to the provisions of law no. 146/2014 “On public notification and consultation”²¹, where citizens and interest groups from civil society submitted their comments. Among the main submissions of the civil society were the issues related to the handling and transfer of criminal data, as well as the expansion of the mechanization of the right to forget and delete the data subject's data.

As for the content, in its introductory part it is foreseen that the draft law is aligned with the regulation (EU) no. 679/2016 of the European Parliament and of the Council of April 27, 2016, for the protection of natural persons in relation to the processing of personal data and for the free movement of these data and the repeal of directive 95/46/EC, and the directive no. 680/2016 of the European Parliament and of the Council dated April 27, 2016, for the protection of natural persons in relation to the processing of personal data by the competent authorities, for the purpose of prevention, investigation, detection, prosecution of criminal offenses or the execution of criminal sentences and for the free movement of this data and the repeal of the Council's framework decision 2008/977/JHA, number CELEX 32016L0680, thereby taking the fundamental step towards addressing the recommendations of the European Commission²².

Analysing the core of the draft law, alignment with these acts of the European Union is only the first step to reach EU standards, as the draft law will extend its full effects only two years after its approval by the Parliament, according to the provisions of the transitional provisions of the draft law²³, giving space to Albanian legislator and bodies to develop and

²¹ Law no. 146/2014 “On public notification and consultation”, retrieved from Albanian official Journal: <https://www.qbz.gov.al/eli/ligj/2014/10/30/146/3923aec7-2287-4909-9119-ea5dcee6245e>

article 15, par. 2: “2. *For particularly complex or important acts, according to the decision of the public body, the deadline for sending comments can be extended up to 40 working days from the date of notification.*”.

²² European Commission, 2024, *Albanian 2023 report*, p. 17: “[...] On data protection, Albania should upgrade its regulatory framework to align with EU standards.”.

²³ Assembly of the Republic of Albania, draft law “*On the protection of personal data*”, article 100, par. 2: “Exceptionally, articles 29, point 3, 31, 32, 35, 36, 64, 65 and 67,

implement the appropriate infrastructure according to those of the EU member states, in order to not only guarantee the same rights of data subjects, but also to facilitate the transition when Albania will be part of the EU with full rights, as well as creating a legislative practice for the treatment of personal data of Albanian citizens and businesses.

Also, the key importance in relation to Albania's integration into the European Union, of the Albania's data protection efforts and the approval of the new law is demonstrated by the explicit provision for its adoption in several strategic documents, such as the National Plan for European Integration 2024–2026²⁴ and the Rule of Law Roadmap²⁵ adopted by the Council of Ministers.

4. Conclusion and future perspectives

Improved data protection is essential for Albania's path toward European Union (EU) membership, as data privacy is a core element of the EU *acquis* communautaire. Aligning with EU data protection standards, particularly through the adoption of the GDPR and Directive 2016/680, demonstrates Albania's commitment to upholding individual rights, enhancing digital security, and building trust in its governance structures. The legislative acts and the proposed data protection law reviewed from the documents provided reveal specific areas where Albania is strengthening its data protection framework to meet EU expectations. This discussion will examine how these improvements facilitate Albania's EU accession.

The proposed Albanian data protection law includes newly introduced provisions for data subjects, such as the right to data portability, the right to object to data processing, and the right to restrict processing. These rights, modeled after the GDPR, are not only safeguard personal privacy, but also establish Albania as a country with legal protections compatible with EU

points 2, 3 and 5, of this law, enter into force 2 (two) years after its publication in the "Official Journal".", retrieved from:

<https://www.parlament.al/dokumentacioni/aktet/829cdb12-7d68-469e-8a23-a9ad02aa7881>

²⁴ Decision No. 16, dated 11.01.2024, of the Council of Ministers "On the Approval of the National Plan for European Integration 2024–2026" retrieved from Albanian official Journal: <https://qbz.gov.al/eli/vendim/2024/01/11/16/4df7d8c4-1e9e-48a0-86d5-788315a1c735>

²⁵ Decision No. 736, dated 13.12.2023, of the Council of Ministers "On the Approval of the Rule of Law Roadmap" retrieved from Albanian official Journal: <https://www.qbz.gov.al/eli/vendim/2023/12/13/736/a53e6796-bf25-47e7-b157-0607b1aab777>

standards. The commitment to providing citizens control over their data reflects an important step in building public trust in the Albanian legal framework, an essential factor for successful EU integration. The proposed law bolsters the Commissioner for Information Rights and Data Protection's authority, empowering it to impose penalties, conduct audits, and enforce compliance measures²⁶. EU membership requires effective oversight mechanisms to ensure that data protection laws are applied consistently and fairly. The expanded role of the Albanian Commissioner aligns closely with the enforcement powers of data protection authorities across the EU, demonstrating Albania's intent to implement an independent, robust oversight body that can maintain high standards in data processing.

Additionally, the law introduces more stringent penalties²⁷ for data

²⁶ *op. cit.*, draft law "On the protection of personal data", Art. 82, "Relevant duties and powers for their implementation 1. Regardless of other duties defined under this law, the Commissioner is responsible for: [...] g) supervision, regulation and authorization of the international transfer of personal data in accordance with chapter IV, of part II, and chapter V, of part III, of this law, including, in particular, decisions on suitability and standard data protection clauses; [...] h) guaranteeing the exercise of the rights of data subjects, as provided for in chapter II, of part II, and in chapter III, of part III, of this law, including informing and advising the subjects of data in this direction; [...] k) imposition of administrative sanctions and other penalties, according to chapter II, part V, of this law, and supervision of their execution; l) to take appropriate steps in relation to foreign countries and international organizations for: i. develop mechanisms of international cooperation to facilitate the effective execution of legislation for the protection of personal data; ii. provide mutual international assistance in the implementation of personal data protection legislation, including through notification, referral of complaint, assistance in investigation and exchange of information, subject to appropriate guarantees for the protection of personal data and rights and freedoms other basic; iii. engaged the relevant actors in discussions and activities aimed at further international cooperation in the implementation of legislation for the protection of personal data; iv. encouraged the exchange and documentation of legislation and practice for the protection of personal data, including jurisdictional conflicts with foreign countries. [...]."

²⁷ *op. cit.*, draft law "On the protection of personal data", Art. 94, par. 1-2, "1. 1. Based also on the circumstances defined in point 2 of article 93 of this law, they constitute administrative offenses and are punished with a fine of up to 1 000 000 000 (one billion) lek, or in the case of a commercial company, up to 2 (two) % of the total annual global turnover for the previous financial year, whichever is higher, the breaches of obligations: [...] 2. Based also on the circumstances defined in point 2 of article 93, constitute administrative offenses and are punished with a fine of up to 2,000,000,000 (two billion) ALL, or in the case of a commercial company, up to 4 (four) % of the total annual global turnover for the preceding financial year, whichever is higher, the following offences: [...]."

breaches, which closely mirror GDPR sanctions that provide a safeguard for data subject rights. This adoption of a strong enforcement framework addresses EU concerns over accountability and establishes a regulatory environment where violations are met with appropriate measures. These provisions are essential for instilling trust in Albania's digital ecosystem, both domestically and internationally, as Albania positions itself to participate in the EU's digital single market.

Aligning with GDPR standards, Albania makes itself a more attractive location for foreign investment and business partnerships within the EU that helps the country to take a step ahead toward EU market. A crucial aspect of EU data protection law is the requirement for high standards in cross-border data transfers. Under the GDPR, data can only be transferred to countries that ensure an adequate level of protection, and Directive 2016/680 applies similar standards for law enforcement data exchanges. Albania's alignment with these standards in its proposed law reduces barriers to data exchange with EU businesses and governments, facilitating trade and collaboration with EU entities. The proposed provisions for international data transfers include mechanisms like "standard contractual clauses" and "binding corporate rules", which are well-established tools under the GDPR to enable lawful data flows. By implementing these mechanisms, Albania meets EU requirements for data transfers, positioning itself to become a compliant participant in cross-border data flows, critical for economic integration into the EU market. This alignment not only boosts Albania's appeal as a secure data partner but also ensures the protection of EU citizens' data when exchanged across Albanian borders.

Albania's adoption of specific provisions for processing penal data in its proposed law signifies its readiness to comply with EU security protocols, enabling it to engage more easily in law enforcement collaborations with EU member states. Given the EU's emphasis on joint efforts in combating crime and terrorism, Albania's compliance with Directive 2016/680 demonstrates its commitment to shared security goals. The new Albanian provisions provide a legal framework that handles sensitive penal data securely, and addressing issues of purpose limitation, data minimization, and data subject rights within the criminal justice system. Establishing these safeguards Albania is one step closer with EU law enforcement practices, allowing it to participate more fully in information exchanges and joint investigations with EU counterparts. Such alignment is a critical aspect of accession, as it underscores Albania's adherence to mutual security commitments, further reinforcing its position as a trusted partner in EU law enforcement collaborations.

Public trust in digital governance is a cornerstone of EU data protection standards, especially as digital transformation accelerates in various sectors. By introducing a data protection by design and by default approach, the proposed Albanian law ensures that data protection is integrated into systems and processes from the outset. This approach helps Albania manage personal data responsibly, promoting ethical practices that the EU views as critical for digital governance.

Furthermore, by enhancing transparency obligations and clarifying data subjects' rights, the proposed law improves public understanding of data practices, thus building public trust in Albania's institutions. The improved transparency aligns with GDPR standards and assures the EU of Albania's commitment to protecting citizens in the digital era. This alignment with EU values and practices not only solidifies Albania's commitment to accession requirements but also enables Albania to progress in its own digital transformation agenda, providing a secure environment that supports both individual privacy and technological growth.

4.1 Future Directions

The implementation of Albania's data protection law presents a dynamic opportunity for the nation to refine and enhance its approach to privacy, security, and individual rights. While the current draft law makes significant strides in aligning with the EU General Data Protection Regulation (GDPR) and Directive 2016/680, there are areas that could benefit from ongoing research, legislative adjustments, and a closer study of EU practices and case law.

To support the full alignment with GDPR and Directive 2016/680, further research could examine the best practices in implementing these frameworks across EU member states, especially those that faced similar transition challenges. Studies could focus on specific EU countries, such as Poland and the Baltic states, which have implemented GDPR under comparable socio-economic contexts. Such research can offer insights into effective enforcement mechanisms, resource allocation for data protection authorities, and the impact of public awareness campaigns on compliance. EU case law provides an evolving body of interpretations that continually shape data protection practices. Landmark cases such as *Google Spain v. AEPD* and *Schrems II* illustrate how courts balance individual rights with broader privacy concerns. Albania could benefit from examining these cases, focusing on their implications for the right to be forgotten, data transfer safeguards, and cross-border data exchanges. Analyzing the

European Court of Justice's (ECJ) decisions offers valuable lessons for Albania in structuring clear, enforceable protections while preparing for potential judicial reviews under similar circumstances.

Future research should evaluate how the Albanian Data Protection Authority (DPA) can best develop and maintain strong enforcement mechanisms that match GDPR standards. This could involve studying enforcement actions in EU states, where DPAs have levied substantial fines and demonstrated the effectiveness of audits, compliance reviews, and responsive penalties. Research could also explore how to structure fines in Albania's economic context, balancing deterrence with the practicalities of local business capacities. Integrating GDPR principles like data protection by design and by default into standard business practices in Albania requires ongoing research and guidance. Albania could benefit from case studies in EU member states that showcase how public and private entities have embedded these principles in their operations. Developing practical frameworks and resources for compliance will aid Albanian businesses in integrating data protection at the initial design phase, ensuring a proactive approach to privacy that aligns with GDPR's philosophy.

Given the growing influence of digital platforms in personal data processing, Albania could focus research on how EU member states have addressed data subject rights, such as the right to be forgotten, in relation to major tech companies. This could include examining how EU countries enforce RTBF requests on social media platforms and search engines, especially given the complexities of global data flows and the involvement of third-party data controllers. Studying enforcement strategies for large platforms will equip Albania to handle similar challenges, particularly in cases where data crosses international boundaries.

Legislative Opportunities: Learning from EU Practice and Case Law

EU case law and the GDPR's guidelines will continue to evolve, especially as digital practices expand and technology advances. Albania's legislation could incorporate provisions for periodic reviews and updates that account for new EU directives, judicial interpretations, and emerging privacy technologies. This iterative approach will help Albania remain agile, adjusting its framework in response to new legal precedents and innovations in data protection. Inspired by *Schrems II* and related EU guidance, Albania could consider introducing additional safeguards for cross-border data transfers. This could include clearer protocols for assessing third-country protections, particularly when handling penal data or sensitive personal information. Ensuring compliance with GDPR

standards for international data transfers will support Albania's integration with the EU's digital economy and enhance its reputation as a trusted data handler.

As Directive 2016/680 is highly specific to the criminal justice sector, Albania could benefit from EU examples of best practices in law enforcement data handling, particularly regarding data minimization, purpose limitation, and secure cross-border collaboration. The importance of strictly regulated access to penal data, serving as a model for Albania in creating effective law enforcement guidelines that respect individual rights while promoting public safety.

To assist Albanian lawmakers, regulators, and data controllers, Albania could develop a centralized platform that regularly updates stakeholders on relevant EU case law, legal interpretations, and guidance from the European Data Protection Board (EDPB). By making EU resources accessible and relevant, this platform could support continual alignment and foster a proactive compliance culture.

In conclusion, Albania's data protection framework has significant potential to evolve in alignment with EU standards through targeted research, legislative amendments, and systematic learning from EU practices and case law. By leveraging EU experiences and jurisprudence, Albania can create a resilient data protection system that upholds privacy rights, adapts to new challenges, and strengthens its integration with the European Union.

Implementation challenges

Albania's proposal introduces the "right to be forgotten" (RTBF) as a new provision in the draft-law²⁸, but challenges exist in fully integrating this right, especially considering the complexity of digital ecosystems. Implementing RTBF requires creating mechanisms to enable individuals to request the removal of personal data and obliging controllers to notify third parties who have accessed the data. The challenge here is twofold: (a) establishing robust enforcement that ensures RTBF is actionable, and (b) maintaining a balance between RTBF and freedom of expression,

²⁸ *op. cit.*, draft law "On the protection of personal data", Art. 16, "1. When the controller has published personal data and, according to Article 15, of this law, is obliged to delete them, based on the applicable technology and the cost of implementation, takes reasonable steps, including technical measures, to inform the controllers that are processing this personal data, that the data subject has requested the deletion of any link, copy or reproduction of this personal data. 2. At the request of the data subject, the operators of Internet search engines are obliged to delete from the results that appear after a search carried out on the basis of the name of the data subject, the information, which is no longer current with over time, but which, when found, has a significant negative impact on the reputation of the data subject."

especially concerning data shared online by news outlets and public entities. The new law aims to bring Albania in line with the Police Directive, regulating penal data used by law enforcement agencies. However, integrating penal data standards poses substantial difficulties, particularly in ensuring (a) strict limitations on purpose, minimizing unnecessary data processing, and (b) implementing high security and accountability for data exchanges with international partners. The creation of confidentiality mechanisms and additional oversight is necessary to prevent misuse or unauthorized access to sensitive penal data. While the new proposal expands the powers of the Commissioner for Data Protection, challenges persist in ensuring this authority has adequate resources to enforce the law. Effective enforcement requires technical and organizational capacity for investigations, audits, and responding to breaches. Further, the law mandates the Commissioner to supervise compliance, but the implementation of these provisions requires adequate measures to be taken for assessing complex data processing requests, potentially affecting oversight efficacy. Implementing GDPR rights such as data portability, RTBF, and consent standards involves challenges in educating both the public and data controllers. The proposal includes obligations for data controllers to communicate transparently with data subjects, but ensuring understanding and application of these rights will require widespread training and awareness campaigns across sectors. These challenges highlight the need for Albania to invest in capacity-building measures, technical resources, and procedural clarity to effectively implement GDPR and Directive 2016/680 within its data protection framework.

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INCLUSIVE EDUCATION AS A HUMAN RIGHTS ISSUE

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Abstract

Inclusion and inclusive education are at the heart of worldwide politics. At the international level, more attention is focused both on the improvement of the legal basis and on the improvement of the methods and strategies for its successful implementation. Now it is accepted that inclusive education is based on ethical, social, educational, and economic principles. Since 1948 when education became a human right, there have been continuous efforts to improve the quality of education and to include all children. At the Salamanca Conference emphasis was placed on inclusive education and since then, there has been a growing awareness around the world regarding its successful implementation. The 2030 Agenda for Sustainable Development also emphasizes inclusive education. Inclusive education is at the heart of Albanian education policy, too. The paper aims to highlight the efforts that are made at the international level and at the Albanian level towards the successful realization of this process. Albania has the national objective EU integration and has become a signatory to a number of international and European covenants, conventions and recommendations and in terms of education, Albania has advanced significantly, despite various challenges. The paper is qualitative and, mainly, it is based on the analysis of the international and Albanian legislation in this regard. The paper concluded that inclusive education has been promoted as a human right issue in many legal documents, conventions, statements, etc. and that there are ongoing efforts to improve the implementation of it.

Keywords: *Inclusive education, human right, international legislation, Albanian legislation.*

Introduction

Inclusive education for all learners is a right that has been increasingly recognised in international law in recent years (Waddington L., Toepke C.,

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2014, p.8) and has gradually received recognition as a human rights issue at the international level, resulting, at the first instance, in the adoption of several non-binding international instruments (de Beco G. et al., 2019, p.2).²

Inclusive education is promoted by UNESCO as a human rights-based approach to education in order to ensure equal educational opportunities for all without discrimination or exclusion (Carr J.R., 2016).³

The definition of inclusive education has evolved over the last few decades. Inclusive education was originally associated with improving access for students with Special Educational Needs (SEN) to mainstream education. The definition has developed more recently beyond this initial focus on 'access' and now also considers the 'participation' and 'progress' of students.

Inclusive education is one dimension of a rights-based quality education which emphasizes equity in access and participation and responds positively to the individual learning needs and competencies of all children. Inclusive education is child-centered and places the responsibility of adaptation on the education system rather than the individual child. Together with other sectors and the wider community, it actively works to ensure that every child, irrespective of gender, language, ability, religion, nationality or other characteristics, is supported to meaningfully participate and learn alongside his/her peers, and develop to his/her full potential (Save the Children (2014) (cited by Save the Children, 2016, p.6).⁴

According to the United Nations (2016) "Inclusive Education is.. ...the result of a process of continuing and proactive commitment to eliminating barriers impeding the right to education, together with changes to culture, policy and practice of regular schools to accommodate and effectively include all students (...) Inclusion involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and the environment that best corresponds to their requirements and preferences" (cited by United

² De Beco G., Quinlivan Sh., Lord J. E. (2019). *The Right to Inclusive Education in International Human Rights Law*. Cambridge University Press.

³ Carr J.R. (2016). *A conceptual and legal framework for inclusive education*. ARCH Disability Law Center. Canada.

⁴ Save the Children (2016). *Inclusive Education: What, Why, and How. A Handbook for Program Implementers*. London.

Nations, 2020, p.8).⁵

Inclusive education is based on ethical, social, educational and economic principles. It is a means to realize the right to high quality education without discrimination and having equal opportunities. It is a means to advance towards more democratic and fair societies. It is a means to improve the quality of education and the professional development of teachers. It is a means to learn to live together and build our own identity. It is a means to improve the efficiency and cost-benefit relationship of the education systems (Acedo C., Amadio M., Operti R., 2008, f.15-18).⁶

Methodology

The paper aims to highlight the efforts that are made at the international level and at the Albanian level towards the successful implementation of inclusive education process. The paper is qualitative and, mainly, it is based on the analysis of the international and Albanian legislation in this regard. The method used, the documentary research method, has enabled the presentation of the picture of the legal basis and the efforts made towards the realisation of inclusive education.

Kayode-Sanni A. (2024) defines documentary research as a form of research that uses records to get accurate information about a particular subject and as a systematic investigation and analysis of existing records or documents, whereas Mr Edwards (2024) defines it as a form of qualitative research that aims to explore and understand social issues by analyzing existing documents.

Theoretical treatment

Inclusive education is an outgrowth of several social and political movements that have emerged since the middle of the 20th century. In the United States, the Civil Rights movement of the 1950s and 1960s intensified awareness that even in liberal democratic societies, many individuals were still being excluded from social institutions, including schools (Kirschner S.R., 2015, p.3).⁷

The roots of inclusive education go back to 1948 when education became a

⁵ United Nations (2020). Policy Guidelines for Inclusive Sustainable Development Goals. Quality Education

⁶ Acedo C., Amadio M., Operti R. (2008). Defining an Inclusive Education Agenda: Reflections around the 48th session of the International Conference on Education. UNESCO. Geneva, Switzerland.

⁷ Kirschner S.R. (2015). Inclusive Education. W. George Scarlett (Ed.) Sage Encyclopedia of Classroom Management.

human right within the Universal Declaration of Human Rights (UN, 2015), followed by steps towards non-discrimination within education by the Convention Against Discrimination in Education (UNESCO, 1960) and the Convention on the Rights of the Child (UN, 1989) among others. A significant international step was made by the Salamanca Statement and Framework for Action on Special Needs Education (UNESCO, 1994) (Sander A-M., 2021, p.2).⁸

By the late 1960s and 1970s, movements such as second-wave feminism, gay rights, and disability rights arose in order to also combat other forms of exclusion such as those due to gender, ethnicity, sexual orientation or disability. One significant outcome of these movements, both in the United States and in many other countries, was the passage and implementation of laws and policies designed to ensure citizenship rights and opportunities of all kinds, including access to education (Kirschner S.R., 2015, p.3).⁹

The Universal Declaration of Human Rights (UDHR), adopted in 1948, states in Article 26: “Everyone has the right to education” (cited by Ast F. 2018, p.6).¹⁰

The European Convention on Human Rights (adopted in 1950 and entered into force in 1953)¹¹ states in Article 14 (p.13) “Prohibition of discrimination” that “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

The Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952),¹² Article 2 “Right to education”, states that “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and

⁸ Sander A-M. (2021). Inclusive education in Europe A systematic literature review about the benefits of inclusive education for primary school aged children with intellectual disabilities.

⁹ Kirschner S.R. (2015). Inclusive Education. W. George Scarlett (Ed.) Sage Encyclopedia of Classroom Management.

¹⁰ Ast F. (2018). Study on inclusive education in Europe and in the Republic of Moldova: reasonable accommodation, access to education and non-discrimination. Council of Europe.

¹¹ European Court of Human Rights. Council of Europe. European Convention on Human Rights. Strasbourg, France.

¹² Council of Europe (1952). Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Paris.

teaching in conformity with their own religious and philosophical convictions”.

According to UNESCO (2024), The Convention against Discrimination in Education (1960) is recognized as the first legally binding international instrument which is entirely dedicated to the right to education and as a cornerstone of the Education 2030 Agenda and is a powerful tool to advance inclusive and equitable quality education for all.¹³

The Convention, among other things, recalls that the Universal Declaration of Human Rights asserts the principle of non-discrimination and proclaims that every person has the right to education and considers discrimination in education as a violation of rights enunciated in the Universal Declaration of Human Rights.

The Convention calls on the States Parties to undertake furthermore to formulate, develop and apply a national policy which will tend to promote equality of opportunity and of treatment in the matter of education.¹⁴

The article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)¹⁵ states that “The States Parties to the present Covenant recognize the right of everyone to education. They agree that education should be directed to the full development of the human personality and the sense of its dignity and should strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all people to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace”.

In order to achieve the full realization of this right, the covenant in question defines some duties for the States Parties, as follows: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued,

¹³ UNESCO (2024). Convention against Discrimination in Education.

¹⁴ UNESCO (1960). Convention against Discrimination in Education. Paris.

¹⁵ United Nations (1966). International Covenant on Economic, Social and Cultural Rights.

an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved (Article 13).

World Program of Action concerning Disabled Persons was adopted by the General Assembly on 3 December 1982.¹⁶ According to the United Nations, “The World Program of Action (WPA) is a global strategy to enhance disability prevention, rehabilitation and equalization of opportunities, which pertains to full participation of persons with disabilities in social life and national development. The WPA also emphasizes the need to approach disability from a human rights perspective”.

An important place in this Program is the education of disabled children and it was noted that they have the same right to education as non-disabled persons, and they require active intervention and specialized services. The Program also emphasizes the need for high quality education for persons with disabilities and brings to attention the lack of legislation which deals with their needs and a shortage of teaching staff and facilities

Articles 28 and 29 of the Convention on the Rights of the Child (1989) are dedicated to the right of the child to education.¹⁷

The United Nations Convention on the Rights of the Child (1989) further strengthens and broadens the concept of the right to education, in particular through the obligation to consider in its implementation the Convention’s four core principles: nondiscrimination; the best interests of the child; the right to life, survival and development of the child to the maximum extent possible and the right of children to express their views in all matters affecting them and for their views to be given due weight in accordance with their age and maturity. These underlying principles make clear a strong commitment to ensuring that children are recognized as active agents in their own learning and that education is designed to promote and respect their rights and needs. The Convention elaborates an understanding of the right to education in terms of universality, participation, respect and inclusion. These underlying principles make clear a strong commitment to ensuring that children are recognized as active agents in their own learning and that education is designed to promote and respect their rights and needs. The Convention elaborates an understanding of the right to education in terms of universality, participation, respect and inclusion (United Nations Educational, Scientific and Cultural Organization & Unicef, 2007).¹⁸

¹⁶ United Nations (1982). World Programme of Action concerning Disabled Persons.

¹⁷ United Nations (1989). Convention on the Rights of the Child. General Assembly resolution 44/25.

¹⁸ United Nations Educational, Scientific and Cultural Organization & Unicef (2007). A

The Salamanca Statement in 1994 was a main step producing awareness among European countries regarding the high meaning of inclusive education for all children (Haug, 2017) (cited by Sander A-M, 2021, p.4-5).¹⁹

In June 1994 representatives of 92 governments and 25 international organisations formed the World Conference on Special Needs Education, held in Salamanca, Spain. They agreed a dynamic new Statement on the education of all disabled children, which called for inclusion to be the norm. In addition, the Conference adopted a new Framework for Action, the guiding principle of which is that ordinary schools should accommodate all children, regardless of their physical, intellectual, social, emotional, linguistic or other conditions. All educational policies, says the Framework, should stipulate that disabled children attend the neighborhood school 'that would be attended if the child did not have a disability.'

The Statement begins with a commitment to Education for All, recognizing the necessity and urgency of providing education for all children, young people and adults 'within the regular education system.' It says those children with special educational needs 'must have access to regular schools' and adds: Regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all; moreover, they provide an effective education to the majority of children and improve the efficiency and ultimately the cost-effectiveness of the entire education system (CSIE, 2021).²⁰

The Salamanca World Conference on Special Needs Education (UNESCO, 1994) can be seen internationally as one of the most important standpoints for the development of inclusive education. Soon after the conference the word inclusion began to appear in almost all major international documents and reports of most supra-national bodies (OECD, 1997, 1999; Meijer et al, 2003; UNESCO, 2003, 2008). Clearly, the word inclusion has been transformed into a 'buzzword' on the international agenda and is often associated with the education of pupils with special educational needs (D'Alessio S., Watkins A., 2009, p.235).²¹

Human Rights-Based Approach to Education for All. France.

¹⁹ Sander A-M. (2021). Inclusive education in Europe A systematic literature review about the benefits of inclusive education for primary school aged children with intellectual disabilities.

²⁰ CSIE (2021). The UNESCO Salamanca Statement.

²¹ D'Alessio S., Donnelly V., Watkins A. (2010). Inclusive education across Europe: the

The European Union is anchored in values of equality, social fairness, freedom, democracy and human rights (European Commission, 2021, p.1).²²

The EU Charter of Fundamental Rights contains a prohibition of discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. The Charter binds the institutions of the European Union but also apply to the Member States when they are interpreting and applying EU law. According to Treaty on the Functioning of the European Union, “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” (art. 10) (cited by Ast F, 2018, p.8).²³

In September of the year 2000, leaders of 189 countries met at the United Nations in New York and endorsed the Millennium Declaration, a commitment to work together to build a safer, more prosperous and equitable world. The Declaration was translated into a roadmap setting out eight time-bound and measurable goals to be reached by 2015, known as the Millennium Development Goals.²⁴

A significant part of the goals was related to education. The Goal number 2 was “Achieve universal primary education” where was cited that all boys and girls complete a full course of primary schooling. The Goal number 3 “Promote gender equality and empower women” stated the elimination gender disparity in primary and secondary education preferably by 2005, and in all levels of education no later than 2015.

Within the EU the European Commission adopted the European Disability Action Plan 2004-2010 (Commission of the European Communities, 2003) and the European Disability Strategy 2010-2020 (European Commission, 2010) to facilitate inclusive education especially for people with disabilities. Also, the Council of Europe, a human rights organisation,

move in thinking from integration for inclusion. *Revista de Psicología y Educación*. Vol. 1, Núm. 5, pág. 109-126.

²² European Commission (2021). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030.

²³ Ast F. (2018). Study on inclusive education in Europe and in the Republic of Moldova: reasonable accommodation, access to education and non-discrimination. Council of Europe.

²⁴ United Nations (2015). The Millennium Development Goals.

adopted the Disability Action Plan 2006-2015 (Council of Europe, 2006) and the Strategy on the Rights of Persons with Disabilities 2017- 2023 (Council of Europe, 2017). The European Social Charter, a treaty by the Council of Europe to address social and economic rights, was also an important step (Council of Europe, n.d.) (cited by Sander A-M, 2021, p.4-5).²⁵

The CRPD (Convention on the Rights of Persons with Disabilities) became the first legally binding international legal instrument to proclaim the right to inclusive education (De Beco, 2018).²⁶

The principles of the CRPD²⁷ are: a)Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; b)Non-discrimination; c)Full and effective participation and inclusion in society; d)Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; e)Equality of opportunity; f)Accessibility; g)Equality between men and women; h)Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 24 secures the right to an inclusive education in international law. However, the CRPD does not simply recognize the right to inclusive education as an entitlement. It presents a framework of goals for inclusive education systems. It establishes obligations for governments and international agencies to provide the supports and conditions required to make quality inclusive education successful for all children and youth with disabilities (Instituto Universitario de Integración en la Comunidad, 2009, f.37).²⁸

The 48th session of the International Conference on Education (ICE), convened by the Director General of UNESCO in accordance with the 34 C/Resolution 4 adopted by the General Conference at its 34th session, was held at the International Conference Centre, in Geneva, from 25 to 28 November 2008 on the theme “Inclusive Education: The Way of

²⁵ Sander A-M. (2021). Inclusive education in Europe A systematic literature review about the benefits of inclusive education for primary school aged children with intellectual disabilities.

²⁶ De Beco (2018) The right to inclusive education: why is there so much opposition to its implementation? *International Journal of Law in Context*, 143 (3). pp. 396-415. Cambridge University Press.

²⁷ United Nations (2006). *Convention on the Rights of Persons with Disabilities*.

²⁸ Instituto Universitario de Integración en la Comunidad (2009) “Better Education for All: When We’re Included Too - A Global Report”, Salamanca, Spain.

the Future”.

At the conclusion of the conference, participants recalled Article 26 of the United Nations Declaration of Human Rights that states that everyone has a right to education. The participants also affirmed that inclusive quality education is fundamental to achieving human, social and economic development and agreed that governments as well as all the other social actors have an important role in providing a quality education for all and, in doing so, should recognize the importance of a broadened concept of inclusive education that addresses the diverse needs of all learners and that is relevant, equitable and effective. The Conference called upon Member States to adopt an inclusive education approach in the design, implementation, monitoring and assessment of educational policies as a way to further accelerate the attainment of Education for All (EFA) goals as well as to contribute to building more inclusive societies. To this end, a broadened concept of inclusive education can be viewed as a general guiding principle to strengthen education for sustainable development, lifelong learning for **all** and equal access of all

levels of society to learning opportunities so as to implement the principles of inclusive education.²⁹

The international conference on ‘Inclusive Education: A way to promote Social Cohesion’ held in Madrid under the Spanish Presidency of the European Union on March 11th and 12th, 2010 also brought to the fore the crucial role played by education - and in particular by inclusive education - for the development of contemporary societies. The conference conclusions highlighted that inclusive education is a universal right that should ensure that quality, equity and excellence are safeguarded according to principles such as equal opportunities, non-discrimination and universal access. By taking into account the individual needs of those people who are at risk of social exclusion, unemployment and low achievement, inclusive education contributes to the development of a society that is characterized by social cohesion, democracy and active citizenship (D’Alessio S., Donnelly V., Watkins A., 2010, p.110-111).³⁰

At EU level, inclusive education has been put high on the education agenda (European Commission, 2021, p.15).³¹

²⁹ UNESCO (2008). International Conference on Education, 48th session Inclusive education: the way of the future: final report. Geneva, Switzerland.

³⁰ D’Alessio S., Donnelly V., Watkins A. (2010). Inclusive education across Europe: the move in thinking from integration for inclusion. *Revista de Psicología y Educación*. Vol. 1, Núm. 5, pág. 109-126.

³¹ European Commission (2021). Communication from the Commission to the European

Much of the research into supporting children with SEN in Europe centers on the concept of inclusive education – defined by Booth (2000) as ‘the process of increasing participation and decreasing exclusion from the culture, curriculum and community of mainstream schools.’³⁵ Inclusive education is supported by European Commission funding and promoted jointly by EADSNE and UNESCO. Implementing inclusive education is high on the agenda of many Member States, though the policy is approached from differing historical and structural perspectives. The core underlying assumption of this policy for children with SEN is that these children would benefit most from education alongside neurotypical children in mainstream schools, as opposed to special schools catering specifically for those with special needs (Drable S, 2013, p.11).³²

At the European Union level, the European Commission’s Education and Training Monitor 2015 report argues that: ‘Effective education is about inclusiveness, ensuring every citizen has an opportunity to develop their talents and to feel part of a shared future. Building effective education and training systems requires a focus on³³ inclusion as part and parcel of the broader quest for excellence, quality and relevance.’ (European Commission, 2015, p. 7) (cited by Ramberg J., Watkins A., 2020, p.86).

This argument is built upon in the Education and Training Monitor 2018 report, that states: ‘EU Leaders proclaimed in 2017 the European Pillar of Social Rights, as a guide towards upwards employment and social convergence, and towards promoting better opportunities for youth in Europe. The very first principle of the Social Pillar identifies inclusiveness and relevance of education as a key element to impact on people’s lives and enables to support the European construction in the 21st century’ (European Commission, 2018, p. 26) (cited by Ramberg J., Watkins A., 2020, p.86).

Later in 2018, the Council Recommendation on Promoting Common Values, Inclusive Education, and the European Dimension of Teaching argues that: ‘Ensuring effective equal access to quality inclusive education for all learners, including those of migrant origins, those from disadvantaged socio-economic backgrounds, those with special needs and

Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030.

³² Drabble S. (2013). Support for Children with Special Educational Needs (SEN).

³³ Ramberg J., Watkins A. (2020). Exploring Inclusive Education across Europe: Some insights from the European Agency Statistics on Inclusive Education. DOI:10.32865/fire202061172.

those with disabilities - in line with the Convention on the Rights of Persons with Disabilities - is indispensable for achieving more cohesive societies' (European Union, 2018, p. 6) (cited by Ramberg J., Watkins A., 2020, p.86).

The New Strategic Agenda for the EU for 2019 – 2024 adopted by the European Council on 20 June 2019 stresses that Member States “must step up investment in people’s skills and education”. At their first-ever joint policy debate on 8 November 2019, Ministers of Education and Ministers of Finance agreed that investing in education, skills and competences is a necessity for all Member States and it should be a strategic priority for the EU (European Commission, 2020).

In March 2021, the European Commission adopted the Strategy for the rights of persons with disabilities 2021-2030. The Strategy builds on the results of the previous European Disability Strategy 2010-2020, which paved the way to a barrier-free Europe and to empower persons with disabilities so they can enjoy their rights and participate fully in society and economy. Despite the progress made in the past decade, persons with disabilities still face considerable barriers and have a higher risk of poverty and social exclusion.

The objective of this Strategy is to progress towards ensuring that all persons with disabilities in Europe, regardless of their sex, racial or ethnic origin, religion or belief, age or sexual orientation

- enjoy their human rights
- have equal opportunities, equal access to participate in society and economy
- are able to decide where, how and with whom they live
- move freely in the EU regardless of their support needs
- and no longer experience discrimination (European Commission).³⁴

The 2030 Agenda for Sustainable Development is “a plan of action for people, planet and prosperity”. It comprises of 17 Sustainable Development Goals (SDGs). These goals are indivisible and encompass economic, social and environmental dimensions (UNESCO, 2024).³⁵

The fourth Sustainable Development Goal (SDG) declares that, by 2030, the world ought to "ensure inclusive and quality education for all and promote lifelong learning “(Rambla X., Langthaler M., 2016).³⁶

³⁴ European Commission (2021). Union of Equality. Strategy for the Rights of Persons with disabilities 2021-2030. European Union. Brussels.

³⁵ UNESCO (2024). Sustainable Development Goal 4 (SDG4) is the education goal.

³⁶ Rambla X., Langthaler M. (2016). The SDGs and inclusive education for all. From

Goal number 4³⁷ is dedicated to Education and sets many targets to be achieved by 2030, such as the completion by all girls and boys of free, equitable and quality primary and secondary education, the access to quality early childhood development, care and preprimary education, the equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university, the elimination of gender disparities in education and equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations, to the acquisition of needed knowledge and skills by all learners in order to promote sustainable development, building and upgrading education facilities that are child, disability and gender sensitive and provide safe, nonviolent, inclusive and effective learning environments for all.

Albanian legal framework in support of inclusive education

The Albanian government and its international organizations counterparts have long recognized that the educational system is of great importance in enhancing the economic and social development of the country. Under these circumstances, a great importance is given to the strengthening of the status of the Albanian education aiming at the transformation of schools into schools for all children. Continuous efforts have been made to provide an intensive professional commitment within educational institutions, and to ensure an equal educational system for all students (World Vision, 2012, p.4).³⁸

According to UNESCO (2017, p.28)³⁹ “Since 2000, Albania has become a signatory to a number of international and European covenants, conventions and recommendations that directly or indirectly impact the country’s education sector, as well as provide a supra-national normative framework for ongoing policy reforms”.

Albania’s relations with the European Union, based on the national objective of EU integration, are strategic and a priority of the foreign policy. The primary interest of Albania in relation to the EU is the future

special education to addressing social inequalities. Briefing Paper. Vienna.

³⁷ United Nations. Transforming our world: The 2030 Agenda for Sustainable Development (sustainabledevelopment.un.org).

³⁸ World Vision (2012). The right to inclusive education for children with disabilities.

³⁹ UNESCO (2017). Albania Education Policy Review: Issues and Recommendations. Section of Education Policy. Paris.

EU accession.⁴⁰

Albania – along with other Western Balkans countries – was identified as a potential candidate for EU membership during the Thessaloniki European Council summit in June 2003.⁴¹

Following the signing of the Stabilization and Association Agreement and the entry into force of the Interim Agreement (December 2006) Albania entered a new and more advanced stage in its EU integration process (Vurmo Gj., 2008, p.4).⁴²

Albania submitted its official application for EU membership in April 2009 (Malaj A. et al., 2016, p.7)⁴³

The Council of EU welcomed on 24 June, the Commission's report of 4 June 2014 and, in light of its examination of Albania's continued progress, decided to grant Albania candidate status, subject to endorsement by the European Council. The European Council meeting on 26-27 June 2014 decided that Albania was a candidate country (European Movement Albania, 2024).⁴⁴

In its journey to becoming a member of the large European family, Albania makes continuous efforts to build a society that respects fundamental human rights and freedoms and that prohibits discrimination (Ministria e Shëndetësisë dhe Mbrojtjes Sociale, 2021, p.9).⁴⁵

Albania has made significant progress in revising and adopting new laws and regulations to align its legal system with that of the European Union. Key areas of intervention include justice, security, human rights, the environment, and the economy (Dhamo I., Dhamo A., 2024, p.199).⁴⁶

As the European Commission (2024) affirmed, “When it comes to Albania, the Commission welcomes the opening of negotiations on the fundamentals cluster at the second intergovernmental conference held on 15 October

⁴⁰ Ministria per Evropën dhe Punët e Jashtme. Relations between Albania and the EU.

⁴¹ European Commission. Albania Membership status: candidate country.

⁴² Vurmo Gj. (2008). Relations of Albania with the EU. CEU.

⁴³ Malaj A., Maho A., Tepelia A., Sefa B., Baka B., Balla B., Tuci B., Rruplli Ç., Jashari D., Cici D., Jano D., Osmani E., Gezka E., Madhi G., Peshkëpia I., Rragami J., Papaproko J., Seferaj K., Lita L., Pullumbi L., Qesaraku M., Lleshaj S., Ndrepepaj V. (2016). Anëtarësimi i Shqipërisë në Bashkimin Evropian: Manual për Qytetarët. Tiranë. Shqipëri.

⁴⁴ European Movement Albania (2024). Albania's EU Membership Process.

⁴⁵ Ministria e Shëndetësisë dhe Mbrojtjes Sociale (2021). National Action Plan for Persons with Disabilities 2021-2025. Approved by Decision of the Council of Ministers No. 276 dated 12/ 05/ 2021 and published in the Official Journal No. 75, dated 20/05/2021.

⁴⁶ Dhamo I., Dhamo A. (2024). Albania and the European Integration. *Interdisciplinary Journal of Research and Development*. Vol 11 No 1 S 1. DOI: 10.56345/ijrdv11n1s130.

2024. It is crucial for the authorities to further intensify the pace of EU oriented reforms, notably on the rule of law, consolidating the track record on law enforcement, on effectively fighting corruption and organised crime, and the promotion of fundamental rights, including media freedom, property rights, and minorities” (European Commission, 2024).⁴⁷

The right to education is embodied in the Constitution of the Republic of Albania, specifically Article 57, item 1 states that “Everyone has the right to education”.⁴⁸

Another valuable document is the Disability Legal Package, approved in December 2004. In this document are sanctioned the basic human rights and freedoms, in general, and the personal rights and freedoms of persons with disabilities. This document also provides the laws on the Statute of disabled employees, the laws on the Statute of paraplegic and quadriplegic persons, the laws on the Statute of blind persons, etc. This document also contains a number of laws on care and social assistance, laws on disability benefits, laws related to the payment of persons with disabilities, laws related to the placement of persons with disabilities in residential institutions. social care, laws related to professional education and training, etc. The Disability Legal Package was updated in 2011⁴⁹ and in 2015.⁵⁰

In January 2005 the Council of Ministers approved also the National Strategy on People with Disabilities. The overall objective is to ensure significant improvement in the status and life quality of people with disabilities in the Republic of Albania in accordance with UN Standards and Equal Opportunity Acts.⁵¹

One of the objectives of the Strategy is dedicated to education, specifically objective 3 “Provide the best education for People with Disabilities”. This objective focuses on the access to the regular school, on the supporting the development of effective communication, on the inclusive education, on the equitable access for disabled students, families, teachers and other educators to the resources available, etc.

As the document in question also underlines, the main areas of intervention

⁴⁷ European Commission (2024). Commission adopts 2024 Enlargement Package.

⁴⁸ KUSHTETUTA E REPUBLIKËS SË SHQIPËRISË

(Ndryshuar me ligjet: nr. 9675, datë 13.1.2007; nr. 9904, datë 21.4.2008; nr. 88/2012, datë 18.9.2012; nr. 137/2015, datë 17.12.2015; nr. 76/2016, datë 22.7.2016; nr. 115/2020, datë 30.7.2020; nr.16/2022, datë 10.2.2022).

⁴⁹ Fondacioni Shqiptar për të drejtat e pesonave me aftësi të kufizuara (2011). Disability Legal Package. Tiranë.

⁵⁰ Fondacioni Shqiptar për të drejtat e pesonave me aftësi të kufizuara (2015). Disability Legal Package. Tiranë.

⁵¹ Republic of Albania (2006). National Strategy on People with Disabilities.

were defined, respectively: 1) Accessibility for People with Disabilities; 2) Services for People with Disabilities; 3) Education, vocational training, employment; 4) Institutional capacity building; 5) Research and legal framework.

The chapter 3 "Policies on strategic priorities", point 1 (p.18) of the National Strategy of Pre-University Education, 2009 – 2013 is devoted to "Increasing access to all levels of the pre-university system". It is expressly stated there: "In considering the increase of access to school, the implementation of a study is firstly required with regard to the current quality of marginalized children and service of disabled pupils. Other elements include collection of data for each category of pupils that quit school and the disabled ones, creation of an effective and functional database for the purpose of ensuring full information on identification of problems and situation, and further with formulation of policies and taking of measures to upgrade the quality and offer equal opportunities to each pupil or student".⁵²

The Law "On the Protection of Children's Rights" no. 10347, dt 4.11.2010, defines the rights of children in coherence with the UN Convention on the Rights of the Child. The law sets the foundation for the establishment of appropriate institutional mechanisms that will guarantee and ensure the respect of children's rights by individuals, the family, and the state. The law provides all the necessary measures to guarantee the life, well-being and development of the child through a coordinated approach between different actors working in the field of child rights and protection.⁵³

Among other things, the Law on protection against discrimination (LAW No. 10 221, dated 04.02.2010) defines as "Discrimination" any distinction, exclusion, limitation or preference on the basis of any of the grounds referred to in Article 1 of this law whose purpose or consequence is hindering or rendering impossible the exercise, in the same manner as with others, of fundamental rights and freedoms recognised by the Constitution of the Republic of Albania, international acts ratified by the Republic of Albania as well as the laws in force. (Article 3).⁵⁴

The Action Plan for Children, 2012-2015 (p.8) draws attention to two main points: a. The need to strengthen institutional structures designed to

⁵² Ministry of Education and Science (2008). National Strategy of Pre-University Education, 2009 – 2013. Tirana.

⁵³ Këshilli i Ministrave (2010). Ligj për mbrojtjen e të drejtave të fëmijëve. Tiranë.

⁵⁴ Republic of Albania (2010). Law No.10 221 dated 4.2.2010 On protection from discrimination (Available from: <https://rm.coe.int/lmd-updated-version-english-translation/1680a0c1fc>).

monitor and report on the implementation of children's rights at both national and regional level, b. The need to promote, coordinate, and harmonize inclusive policies on children's protection and social inclusion.⁵⁵ Chapter 4 is dedicated to the right to development and education, where, among others, these strategic goals were determined to be achieved: 1. Creation of an environment conducive to child development from an early age; 2. Inclusive and quality education for all children; 3. Increased participation by children in decision making in the school and outside the school.

The right to education is also elaborated in the Law No. 69/2012 "On the pre-university education system in the Republic of Albania".⁵⁶ The Article 5 "The right to education", item 1 stresses that "The right to education in the Republic of Albania shall be guaranteed to the Albanian citizens, foreign citizens and those without citizenship, without discrimination in terms of gender, race, color, ethnicity, language, sexual orientation, political or religious convictions, economic or social status, age, residing location, disability or other grounds being referred to in the Albanian legislation".

Article 10 talks about education for national minorities and stresses that "the persons, belonging to national minorities, shall be provided the opportunity to learn and be taught in their mother tongue, to learn their history and culture in accordance with the teaching plans and syllabuses" (Item 1).

Article 63 cites the principles in educating the disabled children, where, among others, it is emphasized that "The involvement and integration of the disabled children in kindergartens and ordinary schools of the initial education shall be a priority".

Article 64 deals with the following of educational institutions by disabled children and Article 65 deals with the organization of the education for the disabled children.

Of great interest is Article 68, *Following the mandatory education*, which states that " Failure to register and unjustified absences of the students from classes in more than 25 per cent of the teaching classes during an academic year shall be evaluated as a case of parental negligence and it shall be dealt with in accordance with the Law no 10 347, dated 04.11.2010, "On protection of the rights of children".

One of the guiding principles of the Pre-University Education Development Strategy, 2014-2020

⁵⁵ Republic of Albania (2012). Action Plan for Children, 2012-2015.

⁵⁶ Republika e Shqipërisë (2012). Ligji Nr. 69/2012 "Për sistemin arsimor parauniversitar në Republikën e Shqipërisë", i azhurnuar.

is Quality and inclusive education that stated: “The reform provides students with the fulfillment of the right to quality education, equal opportunities to be educated and the right to be different”.⁵⁷

The National Strategy for Development and Integration 2015-2020 was approved by the Council of Ministers, dated 11.5.2016 and published in Official Gazette No. 86.

The National Strategy for Development and Integration (NSDI) represents the core strategic document that combs the EU integration agenda with the country’s sustainable economic and social development, including the correlation with the Sustainable Development Goals. NSDI II is the document that presents the vision for the development of democracy, social and economic development for the timeframe 2015-2020, while highlighting the aspirations for the EU integration. NSDI 2015-2020 is a depiction of how this vision is going to be translated into policies and priorities, as follows: Promoting country’s development rates, by fostering sustainable economic growth through macroeconomic and financial stability; Achieving standards regarding the citizens’ services, ensuring better quality of life and protection of their rights; Transforming Albania into a country whose standards would enable its EU membership; Establishing policies that enhance competitiveness and foster the country’s economic growth, compared to the countries of the region and beyond (p.9).

The National Strategy for Development and Integration 2015-2020 is the main national strategic document that supports the sustainable social and economic development of the country, ensuring the fulfillment of standards and progress in the European integration process.⁵⁸

One of the pillars of the National Strategy for Development and Integration 2015-2020 is the investment in human capital and social cohesion, where emphasis is placed, among others, on: Improving access and increasing enrollment in pre-university education; Improving "Quality Education for All" service; Improving decision-making relations between central and local levels of education institutions; Improving effectiveness and efficiency of financial resources (127-128).

Key policy areas of Social Inclusion Policy Document 2016-2020⁵⁹ include inclusive education; quality child care; inclusive healthcare; expanded

⁵⁷ Këshilli i Ministrave (2016). Vendim Nr.11, Dt.11.1.2016. Për miratimin e Strategjisë së zhvillimit të arsimit pauniversitar, për periudhën 2014-2020.

⁵⁸ Këshilli i Ministrave (2016). Strategjia Kombëtare për Zhvillim dhe Integrim 2015-2020. Tiranë.

⁵⁹ Republic of Albania (2016). Social Inclusion. Policy Document 2016-2020. Approved by Decision of Council of Ministers No. 87, on 3 February 2016.

opportunities for training and skills development; job-search assistance and employment assistance; rehabilitation and reintegration of vulnerable groups, such as persons with disabilities, survivors of trafficking, gender-based violence and domestic violence; affordable social housing; and social justice. Such policies should be directed to all people, and with special regard to vulnerable groups (p.3).

The Action Plan for the Social Inclusion Policy Document is also clarified, where the main pillars are: a) Sustainable systems for social inclusion, b) Effective systems for the governance of social inclusion, c) Improved policy dialogue, also defining relevant actions.

In May 2021 the Albanian Government approved the National Action Plan on Disability 2021-2025.

In its journey to becoming a member of the large European family, Albania makes continuous efforts to build a society that respects fundamental human rights and freedoms and that prohibits discrimination (Ministria e Shëndetësisë dhe Mbrojtjes Sociale, 2021), p.9).⁶⁰

The vision of the Albanian Government on disability policies that are embedded in this document is: “to advance the rights and status of persons with disabilities by enabling their inclusion and participation in all spheres of life on an equal basis with others, and by ensuring that persons with disabilities enjoy the greatest possible level of independence and freedom of choice, in line with the international standards”.

The policy goal 4 “Ensure inclusive and qualitative education and lifelong learning for persons with disabilities” states that “Education for persons with disabilities is a priority in the context of social inclusion”. The specific objectives are as follows: Increase opportunities to participate in inclusive education for children with different types of disabilities; Transform specialized schools into resource centers, by including and by supporting lifelong learning.

In terms of education, Albania has advanced significantly, despite various challenges. After dismantling the communist and authoritarian structures in its educational system and pursuing a continuous path of alignment with wider international norms and standards, the education sector is now poised for success with greater levels of social inclusion and higher student achievement. The latest educational reforms and strategies must be fully implemented and sustained in order to see measurable improvements on issues related to equity, efficiency, quality, access, and inclusion in

⁶⁰ Ministria e Shëndetësisë dhe Mbrojtjes Sociale (2021). National Action Plan for Persons with Disabilities 2021-2025. Approved by Decision of the Council of Ministers No. 276 dated 12/ 05/ 2021 and published in the Official Journal No. 75, dated 20/05/2021.

education (UNESCO, 2017, p.38).⁶¹

In October 2021 the National Education Strategy for the period 2021 - 2026 was approved with the Decision of the Council of Ministers no. 621, dated 22.10.2021. The vision of the Albanian National Education Strategy 2021-2026 is: Quality education system based on the principles of inclusiveness and lifelong learning, which enables the development of the individual's potential, contributing to his personal well-being, as well as to the strengthening of democracy and the integration of the country into the European Union.⁶²

Even though the principle of inclusive education is widely accepted in educational institutions and legislation, its implementation faces many barriers. The schools' transformation in an inclusive environment calls for multiplanning activities and it is a process that depends on society's support, curriculum reform, schools' organization, teachers' trainings and supportive specialized service provision (Duci V. et al., 2016, p.8).⁶³

Conclusions

Inclusive education has been promoted as a human right issue in many legal documents, conventions, statements, etc. and there are ongoing efforts to improve the implementation of it.

Inclusive education is one of the main priorities in the field of education in Europe, as well as around the world. There are ongoing efforts to improve this process.

In Albania have been made continuous efforts to transform the schools into schools for all children. The national objective is EU integration. Albania has become a signatory to a number of international and European covenants, conventions and recommendations that directly or indirectly impact the country's education sector and makes continuous efforts to build a society that respects fundamental human rights and freedoms and that prohibits discrimination.

It is accepted that Albania has made significant progress in revising and adopting new laws and regulations to align its legal system with that of the

⁶¹ UNESCO (2017). Albania Education Policy Review: Issues and Recommendations. Section of Education Policy. Paris.

⁶² Këshilli i Ministrave (2021). Vendim Nr. 621, datë 22.10.2021 Për miratimin e Strategjisë Kombëtare për arsimin 2021–2026 dhe të planit të veprimit për zbatimin e saj. Tiranë.

⁶³ Duci V., Ndrio M., Drafoti E., Agolli I., Ismaili E. (2016). Facing the challenges of inclusive education in Albania. Tirana.

European Union. Key areas of intervention include justice, security, human rights, the environment, and the economy.

The right to education is embodied in the Constitution of the Republic of Albania. There are many documents where the basic human rights and freedoms of people with disabilities are sanctioned, including education, especially inclusive education, the basic rights of children, the right to development and education, inclusive and quality education for all children, increased participation by children in decision making in the school and outside the school. Now it is accepted that in terms of education, Albania has advanced significantly, despite various challenges.

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TË DREJTAT VIRTUALE

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Abstract

Virtual rights are at the heart of human rights in the internet age. The right to privacy and freedom of expression online, for example, are truly extensions of the equal and inalienable rights outlined in the Universal Declaration of Human Rights by the United Nations. According to the UN, disconnecting people from the internet violates these rights and is contrary to international law. The British Prime Minister, David Cameron, recently pledged to provide high-speed internet access (broadband) to all homes and businesses in the UK by 2020, adding that internet access "should not be a luxury, it should be a right."

The analysis of the impact of the internet on human rights cannot be limited solely to uncovering new challenges or any shortcomings in the protection system of these rights in relation to ongoing technological progress. In this regard, scholars must examine how the existing model of human rights, as outlined or enshrined in constitutions, responds to the spread of the internet. In a phase where no solution can be predicted with certainty, this will appear as a praiseworthy endeavor in the effort to define the conditions of relationships between a fundamentally postmodern event, such as the birth and development of the internet network, and those values that have been transposed and are recognized in republican constitutions, heirs of Enlightenment modernism.

The hybrid nature of the internet, on the one hand an instrument and tool of freedom, and on the other a looming threat, raises the problem of legal consistency between the new possibilities for action offered by the internet and the new demands for the protection of rights that individuals present to the legal system as a result of the rapid developments of virtual reality. After determining whether these new rights, in relation to the development of technologies, are subjective rights, the status of their constitutional rights

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remains unclear, and whether a formal update of the catalog of human rights outlined in the Constitution is necessary.

Keywords: *virtual rights, human rights, internet, etc.*

Hyrje

Në 200 vitet e fundit, të drejtat e njeriut janë shndërruar nga një koncept perëndimor i të drejtës civile dhe politike, në sistemin e vetëm të njohur universalisht të kohës sonë. Ideja themelore e të drejtave të njeriut është se çdo person zotëron dinjitet, për vetë faktin se ai ose ajo është një qenie njerëzore. Koncepti i të drejtave të njeriut qëndron mbi një sistem vlerash universale të përbashkëta nga të gjithë popujt çka janë të ndërlidhura, të ndërvlarura dhe të pandashme³. Nga një përmendje e shkurtër e historisë së të drejtave të njeriut është e qartë se përmbajtja e këtyre të drejtave ka evoluar me kalimin e kohës dhe mund të mendojmë se ky zhvillim do të vazhdojë. Të drejtat e njeriut nuk janë kategori dhe koncepte statike, por ndryshojnë me ndryshimin e kushteve historike, politike ekonomike dhe shoqërore.

Kuptimi i të drejtave dhe lirive ka përballur disa herë edhe përpjekjen për të hierarkizuar të drejtat dhe liritë themelore, nisur nga kriteret e ndryshme duke i ndarë ato në rangje dhe në shkallë⁴. Në këtë drejtim studiuesit që merren me të drejtat e njeriut kanë identifikuar gjenerata reale të të drejtave, të ndara në bazë të kontekstit historik në të cilin ata janë zhvilluar, por jo në bazë të rëndësisë së tyre. Në ditët tona identifikojmë katër gjenerata të të drejtave të njeriut të cilat janë si më poshtë:

Gjenerata e parë e të drejtave të njeriut është ajo e të drejtave tradicionale civile dhe politike të sanksionuara në kushtetutat liberal-demokratike. Lindja e këtyre të drejtave daton rreth vitit 1789, një kohë kur, me fundin e Revolucionit Francez, ndërhyr miratimi i Deklaratës së të Drejtave të Njeriut dhe qytetarit. Bëhet fjalë për të drejta dhe liri negative. Të tilla të drejta individuale, kërkojnë nga të tjerët, duke përfshirë dhe autoritetet publike, detyrime thjesht negative: përmbajtjen nga sjellje të caktuara, moskufizimin e një sjelljeje të caktuar etj. Ishin të drejta që rrjedhin nga kërkesa për një numër të lirive themelore deri atëherë të përjashtuara për shtresa të gjera të popullsisë, të tilla si: e drejta për jetën

³ Shih www.kdnj.al/sq/content/të-drejtat-e-njeriut.

⁴ Omari Luan, Anastasi Aurela, “*E drejta kushtetuese*”, Shtëpia botuese ABC, Tiranë, 2010, faqe 87.

dhe integritetin fizik, të drejtat që lidhen me lirinë e mendimit, besimit, shprehjes, të tubimit dhe organizimit, të pjesëmarrjes politike, e drejta e votës aktive dhe pasive. Me këto të drejta reklamoheshin edhe një sërë lirish të lidhura me aspekte të pjesëmarrjes politike, dhe për këtë arsye, ajo quhet matricë e të drejtave liberale.

⁵Ato shfaqen si një interes i mbrojtur drejtëpërdrejt nga rendi juridik shtetëror. Subjekti pasiv i raportit që krijojnë këto të drejta është shteti ose të paktën një pushtet publik.

Gjeneratës së dytë i përkasin të drejtat ekonomike, sociale dhe kulturore. Ky brez i dytë e ka zanafillën në Deklaratën Universale të të Drejtave të njeriut të vitit 1948 dhe përfshin të drejtat ekonomike, shoqërore dhe kulturore (të tilla si: e drejta për arsimim, punë, strehim, shëndetësi, e drejta për të marrë pjesë në jetën shoqërore dhe kulturore etj) edhe pse në Kushtetutën franceze të vitit 1791 janë përmendur për herë të parë të drejtat sociale, edhe pse në formë embrionale. Të drejtat e gjeneratës së dytë përbëhen nga kërkesa specifike të drejtuara shtetit, jo vetëm thjesht në liri të dhënë nga ky fundit. Në këtë rast nuk vlen vetëm kërkesa që pushtetet publike të mos ndërhyjnë në sferën e autonomisë private, por edhe kërkesa që këto pushtete të bëhen aktive, duke vepruar pozitivisht, duke marrë një angazhim më të madh, sepse nuk ishte më e mjaftueshme thjesht shpallja apo njohja e të drejtës në një tekst kushtetues, duke qenë shteti i detyruar t'i zbatojë, duke vënë në dispozicion mjetet e duhura. Edhe për të drejtat e gjeneratës së dytë, jemi ende në perspektivën e shtetit, pasi janë arritje të qytetarëve përballë shtetit.

Krahas të drejtave sociale, u shfaqën të drejtat e gjeneratës së tretë, gjeneratë e të drejtave të solidaritetit. Përsa i përket të drejtave të kësaj gjenerate, Norberto Bobbio⁶ ka argumentuar se “*kjo është një kategori heterogjene dhe e paqartë, në të cilën autorë të ndryshëm bëjnë pohime të ndryshme, të tilla si të drejtat e solidaritetit, e drejta për paqe, e drejta për zhvillimin ekonomik dhe cilësisë së jetës, e drejta për një mjedis të mbrojtur, të drejtat e konsumatorëve*”.

Këto të drejta janë kolektive, që do të thotë se mbartësit e tyre nuk janë individët, por kombet. Këto janë të drejta solidariteti, sepse çdo komb ka përgjegjësi ndaj popujve të tjerë, sidomos ndaj atyre që janë në situata të vështira. Mendoni, për shembull, problemin e zhvillimit: shumë vende janë në kushte varfërie të tilla që janë në pamundësi të furnizimit me ushqim për

⁵ Omari Luan, Anastasi Aurela, *E drejta kushtetuese*, shtëpia botuese ABC, Tiranë 2010, f 93.

⁶ Norberto Bobbio ka qenë një filozof, jurist, historian, politikan, dhe senator i përjetshëm në Itali. Shih <http://www.juragentium.org/topics/rights/it/bobbio.htm>.

të gjithë banorët apo, me ilaçe për ata që janë prekur nga sëmundjet dhe nuk janë në gjendje të kurohen për shkak të mungesës së burimeve ekonomike për blerjen e ilaçeve. Përballë këtyre situatave nxitet ose duhet të nxitet detyra e solidaritetit e vendeve më të pasura kundrejt vendeve të ndryshme në nevojë. Bëjnë pjesë të drejtat e gjeneratës së tretë madje edhe ato të drejta që mbrojnë kategoritë e personave, të cilët konsiderohen të dobët dhe të ekspozuar ndaj rreziqeve të shkeljes së të drejtave të tyre si për shembull të drejtat e fëmijëve dhe të drejtat e grave.

Të drejta të reja janë shfaqur në horizont si pasojë e marrëdhënieve të pushtetit publik me qytetarët, por sidomos, e rolit të progresit të teknologjisë së informacionit dhe komunikimit (TIK) dhe bioetikës⁷, fenomen ky i kohëve të fundit.

⁸Risite shkencore dhe teknologjike kanë ndikuar në dimensionin e të drejtave themelore dhe ky ndikim është i destinuar të vazhdojë edhe në të ardhmen. Është një gjeneratë e re e të drejtave që ka gjetur tashmë njohje në dokumente ndërkombëtare dhe mbikombëtare, në kushtetuta dhe ligje. Kjo është arsyeja që janë identifikuar gjeneratat e të drejtave të njeriut: kategori që lejojnë skematizimin e evolucionit në kohë të të drejtave të njeriut.

Të drejtat e reja që janë krijuar gradualisht karakterizohen nga fakti i të qenit gjithnjë e më shumë specifike (domethënë të përcaktuara deri në detajet më të vogla) dhe natyrën gjithnjë e më kolektive (domethënë që nuk u përkasin një individ të vetëm, por gjithë komunitetit botëror si një i tërë). Kohët e fundit, së bashku me tri gjeneratat tradicionale të të drejtave, besohet të ketë lindur një gjeneratë e katërt, ajo e të drejtave të reja⁹. Kjo kategori ende nuk është zhvilluar plotësisht, ajo është një fenomen i kohëve të fundit:

Të drejtat e gjeneratës së katërt, që në fakt, janë ato që lidhen, me zhvillimin e teknologjive të reja të inovacionit dhe komunikimit, me fushën e manipulimit gjenetik, dhe bioetikës. Lindja e këtyre të drejtave të reja është rezultat i drejtpërdrejtë i zbulimeve që pasojnë përdorimin e

⁷ Bioetika është përkufizuar si një fushë kërkimi që në sajë të disiplinave të ndryshme mbi të cilat mbështetet, ka si objekt të studimeve të saj kqyrjen (ekzaminimin) sistematik të sjelljes njerëzore në fushën e shkencës, jetës dhe shëndetit. Shih Luciana Rita Angeletti, Valentina Gazzaniga, *Storia, Filosofia ed etica generale della medicina*, terza edizione faqe 163, Elsevier Masson, 2008.

⁸ Rodota Stefano, *Diritti umani e nuove tecnologie*. Shih <http://www.infoleges.it/NewsLetter/Articoli/>.

⁹ Le generazioni dei diritti umani, scheda sui diritti umani, per le scuole medie inferiori, a cura di Elena Perla Simoneti. Shih www.volint.it/scuolevis/diritti2/generazione.htm.

teknologjive të reja. Në këtë kuptim, kërkesa për të drejtat e reja rrjedh nga kërcënimi i shkaktuar nga përdorimi i të njëjtave teknologji që kanë një ndikim të rëndësishëm dhe në mënyrë të pashmangshme në kuadrin e të drejtave themelore.

Të drejtat e gjeneratës së katërt, sot njihen gradualisht në dokumente ndërkombëtare, në kushtetuta dhe ligje kombëtare.

Në Kartën e të Drejtave Themelore të Bashkimit Evropian¹⁰ në nenet 3 (e drejta e integritetit të personit) dhe 8 (mbrojtja e të dhënave personale) të saj, iu dha statusi i të drejtave themelore situatave të reja që u shfaqën në bioetikë dhe informatikë.

Çdo person ka të drejtën për integritet fizik dhe mendor. Në fushën e mjekësisë dhe biologjisë, duhet të respektohen në mënyrë të veçantë pëlqimi i lirë dhe e drejta e informimit të personit në fjalë, në mënyrën e përcaktuar me ligj, ndalohen praktikatat eugjenike, ndalohen praktikatat për ta bërë trupin e njeriut dhe pjesët e tij burim të fitimit financiar, ndalohet klonimi riprodhues i qenieve njerëzore (neni 3).

Çdo person ka të drejtën e mbrojtjes së të dhënave të tij personale. Këto të dhëna duhet të jenë të përpunuara në bazë të parimit të besimit, për qëllime të caktuara dhe me pëlqimin e personit në fjalë apo në një bazë tjetër legjitime të përcaktuar me ligj. Çdo person ka të drejtën për të hyrë në të dhënat e mbledhura në lidhje me të dhe të kërkojë korrigjimin. Respektimi i këtyre rregullave është subjekt i kontrollit nga një autoritet i pavarur (n 8).

1. Të drejtat virtuale

Të drejtat virtuale janë në thelb të drejtat e njeriut në epokën e internetit. E drejta për privatësi dhe liria e shprehjes në internet, për shembull, janë me të vërtetë zgjerime të të drejtave të barabarta dhe të patjetërsueshme të parashikuara në Deklaratën Universale të të Drejtave të Njeriut të Kombeve të Bashkuara. Sipas OKB-së, shkëputja e njerëzve nga interneti shkel këto të drejta dhe është në kundërshtim me ligjin ndërkombëtar¹¹. Kryeministri britanik, David Cameron, kohët e fundit u zotua të lidhte në të gjitha shtëpitë dhe bizneset në Mbretërinë e Bashkuar aksesin e shpejtë në internet (broadband) deri në vitin 2020, duke shtuar se aksesin në internet "nuk duhet të jetë një luks, ai duhet të jetë një e drejtë".

Analiza e ndikimit të internetit tek të drejtat e njeriut nuk mund të kufizohet vetëm në zbulimin e sfidave të reja apo të ndonjë mangësie në sistemin e mbrojtjes të këtyre të drejtave në raport me progresin e vazhdueshëm

¹⁰ Carta dei Diritti Fondamentali dell'Unione Europea (2000/C 364/01). Në dipozicion në http://www.europarl.europa.eu/charter/pdf/text_it.pdf.

¹¹ Shih <https://www.weforum.org/agenda/2015/11/what-are-your-digital-rights-explainer/>. Aksesin i fundit 20.11.2015.

teknologjik. Në lidhje me këtë aspekt, studiuesit duhet të verifikojnë mënyrën e reagimit të modelit ekzistues të të drejtave të njeriut, të parashikuar apo të sanksionuar në kushtetuta, në raport me përhapjen e internetit.¹² Në një fazë ku asnjë zgjidhje nuk mund të parashikohet me siguri, kjo do të duket një sipërmarrje e lavdërueshme tashmë në përpjekjen për të përcaktuar kushtet e marrëdhënieve ndërmjet një ngjarjeje në thelb postmoderne, si lindja dhe zhvillimi i rrjetit të internetit, dhe atyre vlerave të transpozuar dhe të njohura nga kushtetutat republikane, bija të modernizmit iluminist.

Natyra hibride e internetit, nga njëra anë një instrument dhe mjet i lirisë, dhe në anën tjetër një kërcënim kanosës, ngre problemin e konsistencës ligjore si të mundësive të reja për veprim të ofruara nga interneti, si të kërkesave të reja të mbrojtjes së të drejtave që individi i parashtron sistemit ligjor si pasojë e zhvillimeve të vullshme të realitetit virtual. Pas përcaktimit nëse këto të drejta të reja në raport me zhvillimin e teknologjive janë të drejta subjektive mbetet ende i paqartë statusi i tyre, nëse janë të drejta kushtetuese dhe a duhet një përditësim formal i katalogut të të drejtave të njeriut të parashikuara nga Kushtetuta?

Përsa i përket kësaj qasjeje ka studiues që besojnë se interneti ka përfshirë në sistemet ligjore situata të reja subjektive të tilla, si p.sh., e drejta e aksesit në internet¹³. Ky orientim doktrinor e konsideron të drejtën për akses në internet, një të drejtë sociale, e cila detyron autoritetet publike që t'i sigurojnë individit mjetet materiale për të patur akses me brez të gjerë (broadband) dhe lidhje të shpejtë¹⁴.

Normat evropiane lidhur me çështjen e **aksesit në internet** (e cila do të trajtohet më gjerësisht në një kapitull më vete), me **neutralitetin e rrjetit**¹⁵,

¹² Caruso Corrado, *L'individuo nella rete: i diritti della persona al tempo di internet*, fq 5, në dispozicion në www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0406_caruso.pdf.

¹³ Frosini E. Tomasso, *il diritto costituzionale di accesso a internet*, RIVISTA AIC N°: 1/2011. Në dispozicion në <http://www.rivistaaic.it/>.

¹⁴ Caruso Corrado, *L'individuo nella rete: i diritti della persona al tempo di internet*, fq 9, në dispozicion në www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0406_caruso.pdf.

¹⁵ Neutraliteti i rrjetit është parimi që ofruesit e shërbimeve të internetit dhe qeveritë duhet të trajtojnë të gjitha të dhënat në internet në të njëjtën mënyrë, jo duke diskriminuar apo ngarkuar në mënyrë të ndryshme sipas përdoruesve, përmbajtjeve, faqeve, platformës, zbatimit ose mënyrës së komunikimit. Termi është shpikur nga profesori Tim Wu në Universitetin Columbia në 2003, si një zgjatje e konceptit shumëvjeçar të bartësit (përhapësit) të përbashkët.

me **alfabetizimin digjital** dhe, më shumë në përgjithësi, lidhur me çështjen e digjitalizimit të shoqërisë, duken të drejtuara në promovimin e përfshirjes së kulturave të ndryshme dhe në përforcimin e atij pluralizimi që është prezent në shoqërinë evropiane.

Neutraliteti i rrjetit¹⁶ (i njohur edhe me termin anglez *network neutrality*, *net neutrality*, *internet neutrality*, apo NN), është një parim ligjor, duke iu referuar rrjeteve me brez të gjerë¹⁷ që ofrojnë akses në shërbimet e internetit, telefonisë dhe televizionit. Sipas motorit më të madh të kërkimit google, neutraliteti i rrjetit është parimi për të cilin përdoruesit e internetit duhet të kenë kontroll mbi çfarë duhet të shikojnë dhe cilat aplikime duan të përdorin në internet.

Alfabetizimi digjital përkufizohet si aftësia për të përdorur mediat e reja, e cila të jep mundësi për të marrë pjesë në mënyrë aktive në një shoqëri gjithnjë e më të digjitalizuar. Një shembull që përdoret shpesh për alfabetizimin digjital është aftësia për të përdorur mjete të reja të teknologjisë së informacionit dhe komunikimit për të marrë informacion nëpërmjet kanaleve të ndryshme që janë në dispozicion sot¹⁸, duke favorizuar jo vetëm fitimin e aftësive instrumentale të lundrimit në internet, por edhe aftësitë digjitale si njohuri dhe përdorim të konteksteve dhe hapësirave institucionale dhe jointitucionale, që ofron web. Alfabetizimi digjital është i rëndësishëm për të qenë në gjendje të përdoren me lehtësi dhe në mënyrë efektive mediat digjitale për qëllime punësimi, edukimi dhe gjatë kohës së lirë. Bëhet fjalë për aftësinë për të pasur akses në median digjitale dhe teknologjinë e informacionit dhe komunikimit (TIK), si dhe për të kërkuar, kuptuar dhe vlerësuar në mënyrë kritike aspekte të ndryshme të mediave digjitale dhe të përmbajtjeve të tyre. Pa patur aftësi bazë

¹⁶ Dell'Aversana Fabio, *Le libertà economiche in Internet: competition, net neutrality e copyright*, Roma, Aracne editrice - Collana Diritto e policy dei nuovi media, 2014.

¹⁷ Termi brez i gjerë (në anglisht *broadband*) ka për qëllim të tregojë një lidhje të shpejtë interneti. Teknologjia zhvillohet çdo ditë dhe nuk ka rregulla për të përcaktuar se sa e gjerë duhet të jetë për ta përcaktuar si të tillë. Termi brez i gjerë apo *broadband* ka lindur me ardhjen e teknologjisë ADSL, dhe kjo do të thotë se ka një evolucion në rrugën e transmetimit të sinjalit të dhënave. Sot mund të përcaktohet si e tillë fibra optike ose teknologjitë më moderne të transmetimit të të dhënave nga valët e radios, si për shembull 4G, e cila e kalon pragun prej 100 Mbit/s. Sektori i Standardizimit të Telekomunikacionit është përpjekur të përcaktojë një standard që do të përdoret ndërkombëtarisht, për të shmangur konfuzionin e ofertave dhe pajisjeve në treg. Për Evropën ka vendosur një minimum prej 2 Mbit/s, ndërsa SHBA është 1,5 Mbit/s. Në dispozicion në <http://www.facile.it/adsl/glossario/banda-larga.html>.

¹⁸ Commissione europea, Società dell'informazione: Alfabetizzazione digitale - Competenze per la società dell'informazione, në dispozicion në <http://ec.europa.eu>.

digjitale është e vështirë të marrësh pjesë plotësisht në shoqëri.

Parlamenti Evropian në një raport të 25 marsit 2010 nxjerr në pah praninë e teknologjisë së informacionit dhe komunikimit pothuajse në të gjitha aspektet e jetës së qytetarëve, si në aspektin administrativ dhe ekonomik, atë të marrëdhënieve shoqërore, dhe organizimit të shkollës. Kjo shoqëri e re informacioni (e digjitalizuar) nuk mund të lërë mënjatë formimin e çdo individi në përdorimin e teknologjisë, duke pasur parasysh se ajo ofron potencial të madh ekonomik¹⁹ dhe shoqëror në luftën kundër pabarazive të vendeve në botë, duke sjellë një përfitim të madh në rritjen kulturore dhe shkëmbimin e njohurive. Alfabetizimi digjital bëhet gjithashtu i nevojshëm për të nxitur përfshirjen e njerëzve në nevojë, si të moshuarit, të papunët, njerëzit në varfëri dhe me aftësi të kufizuara, për të zhvilluar aftësitë që mbushin pabarazitë sociale.

Institucionet evropiane tregojnë kështu një vëmendje të madhe drejt revolucionit informatik dhe drejt ndryshimeve thelbësore të ekuilibrave tradicionale shoqërore të prodhuara prej saj dhe, nën këtë profil specifik, tregojnë largpamësi dhe vullnet për t'u përballur me problemet e reja dhe komplekse që vijnë nga shoqëria globale, duke i dhënë ndjesinë e shfrytëzimit të plotë të kthesave pozitive lidhur me integrimin juridik, politik e kulturor.

Përdorimi gjithnjë e më i përhapur i instrumenteve teknologjike prodhon të drejta të reja si e drejta për akses në internet që gjithmonë e më shumë po konfigurohet, të paktën në nivel teorik si një e drejtë e gjeneratës së fundit dhe prodhon gjithashtu një mënyrë të re në shfaqjen e të drejtave dhe lirive themelore tanimë të garantuara e të mbrojtura nga traditat kushtetuese të shteteve anëtare. Megjithatë, në epokën e globalizimit dhe, në veçanti, në dritën e nevojës për integrimin mes shteteve anëtare të Bashkimit Evropian, mbrojtja e të drejtave dhe lirive themelore të lidhura me përdorimin e teknologjive të reja nuk mund të kufizohet brenda kufijve “të ngushtë” të normave kushtetuese të shteteve, por ka nevojë, në anën tjetër, për një ndërhyrje në nivel të Bashkimit Evropian që të mund të rregullojë e zgjidhë në mënyrë uniforme problemet juridike të lidhura me përhapjen e teknologjive informatike²⁰.

Në këndvështrimin e sapopërmendur, fillimisht duhet marrë në konsideratë aksesit teknologjik, tanimë jo si është konsideruar për një kohë të gjatë, si

¹⁹ Consiglio europeo di Lisbona 23 e 24 marzo 2000. Predisporre il passaggio ad una economia competitiva, dinamica e basata sulla conoscenza, në http://www.europarl.europa.eu/summits/lis1_it.htm.

²⁰ Della Cananea Giacinto, Al di là dei confini statuali. Principi di diritto pubblico globale, serie “Studi e Ricerche” il Mulino, Bologna, 2009.

një kërkesë personale (një nevojë individuale jodomethënëse në raport me kolektivin), por si një e drejtë universale e garantuar në nivel kombëtar dhe evropian (si edhe në nivel ndërkombëtar për më shumë përgjithësim) me qëllim reduktimin, eliminimin, e atij përjashtimi shoqëror që, në disa aspekte, mund të përcaktohet nga *analfabetizmi digjital*²¹ dhe nga *hendeku digjital (digital divide)* që ende ekziston, në nivel të shoqërisë globale, lidhur me aksesin dhe përdorimin e teknologjive të shoqërisë së informacionit dhe komunikimit²².

Hendeku digjital, pengesat, sfidat për të ardhmen dhe e-demokracia

*Hendeku digjital*²³ ose ndarja digjitale është hendeku midis atyre që kanë akses në teknologjitë e informacionit dhe atyre që janë të përjashtuar, pjesërisht ose plotësisht. Arsyet për përjashtim përfshijnë disa elemente: kushtet ekonomike, niveli arsimor, cilësia e infrastrukturës, dallimet në moshë apo gjini, përkatësia në grupe të ndryshme etnike, prejardhja gjeografike etj. Përveçse tregon hendekun aktual të aksesit në teknologji, përkufizimi përfshin gjithashtu pabarazi në përvetësimin e burimeve ose aftësive të nevojshme për të marrë pjesë në shoqërinë e informacionit. Hendeku digjital mund të përdoret për t'iu referuar qoftë hendekut midis njerëzve të ndryshëm apo grupeve shoqërore në të njëjtën zonë, qoftë hendekut midis rajoneve të ndryshme brenda të njëjtit shtet ose midis shteteve (ose rajoneve të botës) globalisht.

Risitë teknologjike shpalosin potencialin e tyre të plotë vetëm nëse konteksti shoqëror dhe kulturor është në gjendje t'i mirëpresë ato. Pengesa e parë në prezantimin e çdo formë të teknologjisë është analfabetizmi, i cili privon pothuajse një miliard njerëz nga mjetet gjuhësore për të shkruar, lexuar dhe komunikuar përvojat e tyre. Pengesa e dytë është shpërndarja e burimeve të energjisë²⁴. Pa energji, të gjitha format e telekomunikacionit do

²¹ Analfabetizmi digjital i referohet paaftësisë së njerëzve për të punuar në një kompjuter, të lexojnë, të shkruajnë dhe të marrin informacion në internet. Shkalla e analfabetizmit mund të ndryshojë në varësi të moshës, gjinisë, fesë, zakoneve dhe shtetit. Një analfabet dixhital nuk është vetëm ai që është i panjohur me teknologjinë, por edhe individ i cili injoron terminologjinë e sektorit, duke qenë se kjo përdoret gjerësisht nga të gjitha mjetet e komunikimit masiv. Një faktor që mund të rrisë analfabetizmin digjital është technophobia ose frikë, ose refuzim i paarsyeshëm kundrejt çdo pajisje teknologjike.

²² Sartori Laura, *Il divario digitale, Internet e le nuove disuguaglianze sociali*, Il Mulino, Bologna, 2006.

²³ IATE, banca dati multilingue dell'UE. Digital divide(en)-divario digitale(it), në dispozicion në <http://iate.europa.eu>.

²⁴ ICT tecnologie informatiche, në dispozicion në www.unimondo.org/temi/informazione-

të jenë të papërdorshme dhe për fat të keq edhe sot një e treta e popullsisë botërore nuk ka në dispozicion asnjë lloj energjie elektrike, dhe një e treta tjetër ka energji në mënyrë sporadike. Edhe pse aksesit në rrjetin telefonik po zhvillohet me shpejtësi në sajë të telefonisë celulare, mbetet i pazgjidhur problemi i kostove të infrastrukturës të telekomunikacionit. Më pak të dukshëm, por po aq të vështirë për të kapërcyer janë dhe pengesat e larta nga tarifat ndërkombëtare, standardet teknologjike dhe pronësia intelektuale e softuerit të zgjedhur.

Termi hendek digjital u shfaq midis viteve 1995 dhe 1998 nga raportet e National Telecommunications and Information Administration, për të nxjerrë në pah dallimin midis zonave rurale dhe qendrave urbane amerikane përsa i përket disponueshmërisë dhe përdorimit të mjeteve të tilla, si: radio, telefon dhe kompjuter.

Më pas, ky term është miratuar dhe nga organizatat ndërkombëtare për të përshkruar diferencat e midis Veriut dhe Jugut në botë, në përhapjen e rrjeteve dhe internetit. Aktualisht koncepti i hendekut digjital është përdorur për t'iu referuar fenomeneve të ndryshme, për të cilat disa studiues kanë preferuar të flasin për hendekun dixhital, për të dalluar linjat e ndryshme në lidhje me përhapjen e teknologjisë së informacionit dhe komunikimit (TIK), në shtresat e ndryshme të popullsisë. Për këtë arsye është e nevojshme që të merren masa në drejtim të alfabetizimit digjital, sikurse është dhe objektivi prioritar i Lisbonës²⁵.

Padyshim një nga mjetet efektive për të luftuar hendekun digjital duhet të jetë, edhe para arsimit, informimi, sa më i gjerë dhe më i detajuar që të jetë e mundur. Shumë qytetarë dhe biznese (në përgjithësi të vogla), shpesh nuk e dinë dhe, për këtë arsye, nuk përfitojnë nga shërbimet në rrjet të ofruara nga administrata publike, duke rrezikuar që të rrinë jashtë shoqërisë së informacionit, vetëm për shkak të mungesës së vetë informacionit.

Axhenda Digjitale Evropiane ka për qëllim të ndihmojë qytetarët evropianë

&-media/ICT-tecnologie-informatiche..

²⁵ Në Këshillin evropian të Lisbonës në mars të vitit 2000, Bashkimi Evropian ka vendosur një objektivi të ri strategjik për dekadën e ardhshme: "për t'u bërë ekonomia më konkurruese dhe më dinamike e bazuar në dije, në botë, e aftë për rritje të qëndrueshme ekonomike e mbështetur me më shumë vende të reja pune më të mirë dhe me kohezion më të madh social". Për këtë qëllim, ajo ka identifikuar tri fusha prioritare për të cilën Strategjia e Lisbonës ka vendosur të japë një impuls vendimtar: 1) zhvillimi i strategjive për punësim, me vëmendje të veçantë në reformat e tregut të punës; 2) Lidhja Evropës me tregjet e tjera; 3) krijimi i një zone evropiane të dijes. Në objektivin e tretë, përfshihet dhe alfabetizimi digjital, që do të ndiqet përmes "investimeve në rritje në kërkim dhe dije, në sektorin e inovacionit, arsimimit dhe të trajnimit në një optikë më të integruar.

dhe bizneset për të marrë maksimumin e teknologjisë, dhe për këtë arsye i kushton një nga shtatë shtyllat e tij alfabetizimit digjital, aftësisë dhe përfshirjes. Kjo shtyllë përfshin 13 veprime konkrete për të adresuar hendekun digjital duke e bërë çdo qytetar evropian një qytetar digjital.

²⁶Szilárd Molnár përcakton tri lloje të hendekut digjital: (a) hendeku digjital që lidhet me aksesin, (b) hendeku digjital që lidhet me përdorimin, i cili përshkruan dallimin midis përdoruesve dhe jopërdoruesve, dhe (c) hendeku digjital që lidhet me cilësinë e përdorimit. Përveç kësaj, edhe pse interneti mund të ndihmojë për të zbutur efektet te personat në disavantazh, këto grupe kanë mundësi më të vogla për të përdorur internetin, veçanërisht personat me arsim të kufizuar, personat joaktivë nga pikëpamja ekonomike dhe të moshuarit. Pa një angazhim efikas për aksesin në internet, rritet rreziku i mëtejshëm i përjashtimit social. Kjo është arsyeja pse Axhenda digjitale gjithashtu ka një objektiv kyç të ofrimit të përdorimit të rregullt të internetit, të 60% të personave në disavantazh deri në vitin 2015.

Në qershor të vitit 2000, Bashkimi Evropian, ka miratuar *Planin e Veprimit "e Europe 2002"*. ²⁷Në dokument parashikohen kërkesa politike të nevojshme për rritjen e rajoneve të prapambetura dhe një angazhim të jashtëzakonshëm në reduktimin e hendekut digjital mes vendeve të pasura dhe të varfra. Plani i veprimit përcakton optimizimin e kapitalit njerëzor, dhe veçanërisht të të rinjve, në qendër të veprimeve konkrete që duhen ndjekur nga BE-ja dhe nga çdo shtet anëtar. Linjat e veprimit të përcaktuara në planin evropian synojnë arritjen e tre objektivave prioritare:

1. Realizimin e një aksesit më pak të kushtueshëm, më të shpejtë dhe më të sigurt në internet;
2. Investimin në burimet njerëzore, duke inkurajuar pjesëmarrjen e të gjithëve në ekonominë e dijes;
3. Nxitjen e përdorimit të internetit, në administratë dhe shërbimet publike, duke përshpejtuar e-commerce (tregtinë elektronike) dhe duke zhvilluar përmbajtjet digjitale për rrjetet globale.

Ngushtësisht i lidhur me problemin e hendekut digjital, është koncepti i *e-demokracisë*, gjithnjë e më i përhapur, i cili mund të përkufizohet si pjesëmarrja e drejtpërdrejtë e qytetarëve në procesin e vendimmarrjes mbështetur nga teknologjitë e reja të komunikimit²⁸. Ushtrimi i pjesëmarrjes

²⁶ Shih <http://www.openeducationeuropa.eu/it/paper/alfabetizzazione-digitale-e-competenze-informatiche>.

²⁷ e-Europe 2002, "Una società dell'informazione per tutti", në dispozicion në http://www.edscuola.it/archivio/norme/circolari/comue330_00.pdf.

²⁸ "E-democracy. Modelli e strumenti delle forme di partecipazione emergenti nel panorama italiano", Rapporto del Ministro per l'Innovazione Tecnologica, Formez –

demokratike është realizuar në tri mënyra të ndërveprimit midis qeverisë dhe qytetarëve: transmetimi i informacionit nga qeveria te qytetarët; konsultimi i qytetarëve në fazën e formulimit të politikave; pjesëmarrja aktive e qytetarit. Një nga mjetet e-demokracisë është, votimi elektronik që mund të përmirësojë marrëdhëniet midis përdoruesve dhe organeve përfaqësuese, duke vendosur në lëvizje një lloj aktiviteti të kontrollit mbi mandatin e besuar sipas të zgjedhurve të tyre. Vota elektronike u prezantua si për të përmirësuar procedurat e shprehjes së preferencës, si për të minimizuar gabimet në numërimin dhe përpjekjet e manipulimit të preferencave elektorale nga votuesit.

Me qëllim arritjen e barazisë digjitale dhe, kështu, të asaj që mund ta përkufizojmë si një lloj **e-demokracie**²⁹, nevojitet kështu të procedohet me miratimin e masave konkrete dhe të akteve normative të drejtpërdrejta për garancinë dhe mbrojtjen efektive të atyre të drejtave virtuale të gjeneratës së fundit që nuk njohin dhe nuk duan të njohin kufij dhe që, nën profilin teorik dhe thjesht deklarativ, njihen në nivel evropian³⁰.

Të drejtat e përdoruesve në internet

Me rëndësi strategjike për rajonin tonë është Udhëzuesi³¹ për të drejtat e përdoruesve në internet në kuadër të Këshillit të Evropës i cili, në një

Progetto CRC, Roma, 2004. Në dispozicion në <http://www.regione.toscana.it/documents/10180/23652/E-Democracy>.

²⁹ Demokracia digjitale apo demokracia elektronike, është një formë e demokracisë së drejtpërdrejtë, e cila përdor teknologjitë moderne të informacionit dhe komunikimit në konsultime publike apo në pjesëmarrjen politike. Flitet për e-demokraci në lidhje me çdo lloj përdorimi ose testimi të teknologjive (internetit në mënyrë të veçantë, por edhe telefonisë së lëvizshme) të ofruara nga institucionet për qytetarët në lidhje me pjesëmarrjen politike për zgjedhjen e institucioneve të çdo niveli (lokal, kombëtar, mbikombëtar). Estonia ka një rekord në këtë fushë, pasi, është vendi i parë në botë që ka eksperimentuar votimin elektronik, e gjithë kjo që në vitin 2005. Qytetarët estonezë mund të votojnë nëpërmjet internetit si për zgjedhjet dhe për referendume.

³⁰ Papa, Il principio di uguaglianza (sostanziale) nell'accesso alle tecnologie digitali, in *federalismi.it*, n.12, 2008, që, në faqen 16, thekson "rëndësinë e procesit të alfabetizimit digjital (arsimimit kompjuterik) me qëllim perfitimin nga sa më shumë njerëz të aftësive të nevojshme për të hyrë dhe për të përdorur forma të reja të komunikimit dhe informimit, duke u angazhuar në të njëjtën kohë në të gjithë sistemin e edukimit me përmbajtjet e reja, lidhur me format e reja të informacionit dhe komunikimit, pra e bazuar në njohuritë dhe përdorimin e teknologjive të reja". Në dispozicion në <http://federalismi.it/document/11062008140836.pdf>.

³¹ Recommendation CM / Rec (2014) 6 of the Committee of Ministers to member states on a guide rights for Internet users.

kontekst të fragmentuar si Evropa, nga prilli 2014 rreshtohet kundër mbikëqyrjes pa dallim të përdoruesve të internetit duke argumentuar se vetëm një gjykatë mund të kufizojë të drejtat e përdoruesve në internet dhe lirinë e tyre të shprehjes.

Interneti ka vlerën e shërbimit publik. Individët, komunitetet, institucionet publike dhe organizatat private mbështeten në internet për të ushtruar biznesin e tyre dhe kanë të drejtë të presin që shërbimet online të jenë të aksesueshme, të ofrohen pa diskriminim, të përballueshme, të sigurta, të besueshme dhe të vazhdueshme. Përveç kësaj, gëzimi i të drejtave të njeriut dhe lirive themelore të përdoruesve të internetit nuk duhet të jetë objekt i çfarëdo kufizimi të paligjshëm, të panevojshëm ose disproporcional. Udhëzuesi është i bazuar në të drejtat dhe liritë që përmban Konventa Evropiane e të Drejtave të Njeriut dhe interpretimin e këtyre të drejtave nga Gjykata Evropiane e të Drejtave të Njeriut, si dhe në instrumente të tjera dhe tekste ligjore të Këshillit të Evropës, dhe është miratuar në 16 prill 2014 nga Komiteti i Ministrave. Udhëzuesi nuk krijon të drejta të reja ose liri të reja. Ai është i bazuar në standardet dhe mekanizmat ekzistues të zbatimit.

Në përgjithësi, Këshilli vë në dukje që “të drejtat e përdoruesve përcaktohen në kushtet e shërbimit të kompanive të internetit, të cilat janë kryesisht kushtet kontraktuale, shqyrtime të gjata ligjore mbi këtë temë, të cilat rrallë lexohen, dhe gjithnjë e më rrallë janë të kuptueshme”. Udhëzuesi që është zhvilluar nga një konsultim i shumë palëve të interesuara me qeveritë, kompanitë private dhe ofruesit e shërbimeve të komunikimit online, organizatat e shoqërisë civile dhe përfaqësues të komunitetit teknik dhe botës akademike, fokusohet në disa të drejta themelore si më poshtë:

- *E drejta e aksesit dhe e mosdiskriminimit*: interneti është një mënyrë e rëndësishme për të ushtruar të drejtat dhe liritë, dhe për të marrë pjesë në demokraci. E drejta e aksesit është një mjet për të ushtruar të drejtat e tjera njerëzore. Si rregull i përgjithshëm, përdoruesit nuk duhet të jenë “të shkyçur” nga interneti kundër vullnetit të tyre, përveç kur është vendosur nga një gjykatë.
- *Liria e shprehjes dhe informacionit*: përdoruesit kanë lirinë për të shprehur veten e tyre në internet dhe të drejtën e përdorimit të informacioneve dhe mendimeve të tjerëve, duke përfshirë dhe ato që mund të ofendojnë ndjenjat e të tjerëve, në respekt të reputacionit dhe jetës private të të tjerëve. Autoritetet publike kanë për detyrë të respektojnë dhe mbrojnë këtë të drejtë. Çfarëdo kufizimi në këtë liri duhet të ndjekë një qëllim legjitim në përputhje me Konventën Evropiane të të Drejtave të Njeriut, siç është rasti i sigurisë kombëtare

ose rendi publik, dhe duhet të respektojë të gjitha rregullat në fushën e të drejtave të njeriut. Kufizimet mund të zbatohen për shfaqjen e mendimit që nxit diskriminimin, urrejtjen dhe dhunën. Përdoruesit mund të zgjedhin të mos zbulojnë identitetin e tyre në internet, por duhet të jenë të vetëdijshëm se mund të merren masa nga autoritetet kombëtare në mënyrë që të çojnë në zbulimin e identitetit të tyre.

- *Liria e mbledhjes, organizimit dhe pjesëmarrjes*: përdoruesit kanë lirinë për të zgjedhur çdo faqe elektronike, aplikim apo shërbim tjetër me qëllim organizimi dhe tubimi. Ata gjithashtu kanë të drejtë të protestojnë në mënyrë paqësore në internet. Megjithatë, përdoruesit duhet të jenë të vetëdijshëm se mund të përballen me pasojat ligjore nëse protesta në internet, sjell bllokim, ndërprerje të shërbimeve ose dëmtim të pronës nga të tjerët.
- *Privatësia dhe mbrojtja e të dhënave personale*: të dhënat personale, duhet të përpunohen vetëm kur përdoruesit e internetit janë dakord ose përpunimi i tyre parashikohet me ligj. Përdoruesit duhet të informohen për të dhënat personale që janë përpunuar apo transferuar palëve të tjera, kur, nga kush, për çfarë qëllimi dhe duhet të ushtrojnë kontroll mbi ta (për të verifikuar saktësinë e tyre, të kërkojnë ndreqjen ose fshirjen). Përdoruesi nuk duhet të jetë subjekt i masave të përgjithshme të vëzhgimit dhe përgjimit, me përjashtim të rrethanave të veçanta të parashikuara me ligj, si në rastin e ndjekjes penale.
- *Edukimi dhe arsimimi*: përdoruesit duhet të kenë të drejtën e aksesit të internetit për edukimin dhe arsimim e tyre on line.
- *Mbrojtja e fëmijëve dhe të rinjve*: fëmijët dhe të rinjtë kanë të drejtë për një mbrojtje dhe përkrahje të veçantë kur përdorin internetin. Nëse përmbajtja e publikuar prej tyre rrezikon dinjitetin, sigurinë apo privatësinë ose mund të jetë e dëmshme për ta në të ardhmen, me kërkesën e tyre, duhet të eliminohet brenda një periudhe të shkurtër kohe. Ata duhet gjithashtu të jenë të mbrojtur nga ndërhyrjet me zhvillimin e tyre fizik, mendor dhe moral, në veçanti përsa i përket abuzimit dhe shfrytëzimit seksual.
- *E drejta për mjete efektive ligjore për shkeljet*: përdoruesit kanë të drejtë për mjete efektive ligjore kur të drejtat e tyre janë kufizuar ose shkelur. Mjetet efektive ligjore mund të sigurohen direkt nga ofruesit e shërbimeve të internetit, nga autoritetet publike dhe/ose institucionet kombëtare për të drejtat e njeriut, dhe në varësi të shkeljes në fjalë, mund të kryejnë hetime, të japin shpjegime, përgjigje, korrigjime, të kërkojnë ndjesë, riintegrim, rilidhje të linjës së internetit dhe kompesim.

Ofruesit e shërbimeve të internetit, ofruesit e aksesit në përmbajtje dhe shërbime interneti apo bizneset të tjera dhe agjencitë qeveritare duhet t'u ofrojnë përdoruesve informacion lehtësisht të arritshëm në lidhje me të drejtat e tyre dhe mjetet juridike të mundshme për shkelje. Autoritetet kombëtare kanë detyrimin për të mbrojtur përdoruesit nga aktivitete kriminale të kryera përmes përdorimit të internetit. Në përcaktimin e të drejtave dhe detyrimeve të tyre, në qoftë se janë akuzuar për një krim të kryer nëpërmjet internetit, përdoruesit kanë të drejtën për gjykim të drejtë brenda një afati të arsyeshëm nga një gjykatë e pavarur dhe e paanshme, si dhe të drejtën për ankim individual në Gjykatën Evropiane të të Drejtave të Njeriut, pasi ka shterur të gjitha mjetet ligjore të brendshme.

*"Qeveritë, ndërmarrjet private dhe aktorët e tjerë në shoqëri kanë detyrimin për të respektuar të drejtat e njeriut në internet dhe jashtë internetit (online dhe offline)- u shpreh Sekretari i Përgjithshëm Thorbjørn Jagland, Sekretari i përgjithshëm i Këshillit të Evropës - do t'i ndihmojmë të gjithë këta aktorë në përpyekjet e tyre për të zbatuar rregullat e parashikuara në këtë udhëzues dhe për të siguruar që përdoruesit e internetit të kenë qasje në mjete efektive, kur ata besojnë se të drejtat e tyre janë kufizuar apo shkelur"*³².

E drejta për të ditur

Mes këtyre të drejtave të reja, një nga më të rëndësishmet është sigurisht *e drejta për të ditur*, një e drejtë pa kufij hapësinorë e territoriale ngushtësisht e lidhur me realitetin virtual dhe me hapësirën e re publike ku, kushdo ka mundësinë të shprehë opinionet e veta, të ushtrojë të drejtën për të bërë kritikë, të marrë informacione dhe të shfaqë idetë e tij dhe, së fundmi, por jo më pak, të marrë dije³³. Ajo përmbledhet në tri fjalë që gjejmë në Deklaratën Universale të të Drejtave të Njeriut të Kombeve të Bashkuara "të kërkos, të marrësh, të shpërndash informacion". Këto tri fjalë na tregojnë për një përmbajtje minimale të të drejtës për të ditur dhe na tregojnë se ka njohuri shoqërore që ne perceptojmë që nuk i përkasin më të tjerëve, por janë të përbashkëta dhe shpërndahen, dhe pastaj në lidhje me të cilën, ne kemi të drejtë të dimë.

Ngjarjet që ne i njohim si *Wikileaks* dhe *Datagate*, përmbledhur simbolikisht në emër të dy personave, Julian Assange dhe Edward Snowden, treguan se si ishin shfytëzuar të gjitha mundësitë teknologjike

³² <http://www.coe.int/en/web/internet-users-rights/guide>.

³³ Valvo Anna Lucia, *Diritti umani e realta virtuale*, Amon Edizione, 2014

për të rritur në mënyrë të pakufizuar mbledhjen e informacionit dhe ruajtjen e tij në bazat e të dhënave gjithnjë e më shumë gjigande, ku informacioni është bërë lehtësisht i disponueshëm, i prekshëm nga shumë, dhe i lehtë për t'u përhapur.

Veçanërisht, zbulimi i Snowden ka çelur një debat global në atë se cila është e drejta për të ditur e shteteve mbi shtetet e tjera, e qeveritarëve mbi të qeverisurit e vendeve të tjera, e agjencive të shteteve të veçanta që ushtrojnë sovranitetin përtej kufijve të tyre. Ky zbulim ka rihapur një temë të lirisë në nivel global, por në të njëjtën kohë, ai që ka zbuluar të gjithë këtë konsiderohet autori i një krimi, dhe ne po përballemi me një kontradiktë të re. Në këtë rast e drejta për të ditur është e drejta e të gjithë qytetarëve të botës që të dinë se si mbajtesit e pushteteve të mëdha, të cilat tashmë kalojnë edhe kufijtë e shteteve, mund të ushtrojnë këto pushtete dhe se si ata mund të kontrollohen.

Nga ky këndvështrim, duhet rënë dakord për aspekte të caktuara të pohuara nga Oranghi³⁴, i cili duke u nisur nga supozimi i përbashkët se *“dije do të thotë të kuptosh të dhënat, faktet e informacionet në dritën e kriterëve të afta për t'i rregulluar përmbatje të tilla në një bashkësi sa më shumë koherente”*, nënvizon mundësinë për të dalluar mes dijes dhe posedimit të thjeshtë të informacionit, duke theksuar ndryshimin mes shoqërisë së dijes dhe shoqërisë së informacionit dhe, në përballjen mes të dyjave, i jep kësaj të dytës një karakter sipërfaqësor, por jo negativ.

Nga ana tjetër, mungesa e informacionit, nuk bën tjetër veçse përjashton përfundimisht kalimin e mëtejshëm të dijes dhe pjesëmarrjes, në disa raste, në jetën politike të vendit të vet dhe në format e reja të organizimit shoqëror.

E drejta për t'u harruar

E drejta për t'u harruar në internet e cila mund të përkufizohet si mundësia për të hequr, edhe pas disa vitesh nga arkivat online, materiale që mund të jenë të papërshtatshme dhe të dëmshme për individët të cilët kanë qenë të përfshirë në historitë e kaluara të lajmeve. Shprehja³⁵: *"E drejta për t'u harruar"* do të thotë, një formë e veçantë garancie e cila parashikon mos

³⁴ Fjalimi i mbajtur nga Prof. Ornaghi në Konferencën “Europa e Americhe insieme per uno sviluppo integrale e solidale”, e zhvilluar në Romë 28 shkurt-1mars 2008 pranë Universitetit Papnor Gregorian. Në dispozicion në www.zenit.org.

³⁵ Shih http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf.

shpërndarjen, pa arsye të veçanta, të paragjytimeve të mëparshme për nderin e një personi, duke nënkuptuar precedentët gjyqësorë të një personi. Sipas këtij parimi nuk është e ligjshme, për shembull, shpërndarja e informacionit në lidhje me dënimet e kryera ose të dhëna personale sensitive të tjera për një rast të ngjashëm, përveç se kur bëhet fjalë për raste të veçanta që lidhen me aktualitetin, dhe në këto raste publiciteti i faktit duhet të jetë në proporcion me rëndësinë e ngjarjes dhe me kohën që ka kaluar nga ngjarja (fakti).

Në nenin 11 të saj, Deklarata italiane e të drejtave në internet, parashikon të drejtën për t'u harruar si *“e drejtë e çdo personi për të kërkuar fshirjen e indekseve në motorët e kërkimit të referencave ndaj informacionit që, për shkak të përmbajtjes së tij apo kohën e kaluar nga koha e mbledhjes, nuk ka më rëndësi publike”*.

E drejta për t'u harruar nuk mund të kufizojë lirinë e kërkimit dhe të drejtës së publikut për t'u informuar, të cilat janë kushte të domosdoshme për funksionimin e një shoqërie demokratike. Kjo e drejtë mund të ushtrohet nga persona të njohur ose që janë të ngarkuar me funksione publike, vetëm nëse të dhënat në lidhje me ta janë të parëndësishme në lidhje me aktivitetet ose në ushtrimin e funksioneve publike.

E drejta për t'u harruar është përcaktuar nga Guido Scorza³⁶, si: *“E drejta që askush të mos nxjerrë në të tashmen një episod për jetën tonë të kaluar, që secili prej nesh do të donte, për arsye të ndryshme, të mbetet thjesht në histori”*. Pra është e drejta e një individi që të mos kujtohen më për fakte të cilat në të kaluarën kanë qenë objekt i lajmeve. Në thelb, një individ, i cili ka kryer një vepër penale në të kaluarën ka të drejtë të plotë që të kërkojë që vepra të mos shpaloset nga shtypi dhe kanalet e tjera të informacionit; me kusht që publiku të jetë plotësisht i informuar për faktin, dhe se ka kaluar kohë e mjaftueshme nga ngjarja, e tillë që të zvogëlojë interesin publik të informimit për rastet më pak spektakolare. Natyrisht që një e drejtë e tillë mbron në mënyrë të tërthortë dhe personat e dëmtuar nga kryerja e veprës penale (p.sh., viktimat e abuzimeve seksuale), sa herë që kjo e fundit kujtohet.

Përse e drejta për t'u harruar është veçanërisht e rëndësishme në kohën e internetit? Për një arsye të thjeshtë dhe teknologjike: për shkak se është më e lehtë për të gjetur informacion, përmes internetit se sa nëpërmjet mediave tradicionale (shtypit, televizionit, radio dhe mjeteve të tjera të komunikimit).

³⁶ Artikulli në dispozicion në <http://www.unacitta.it/newsite/altritest.asp?id=213>.

Ishte 13 maj 2014 kur Gjykata Evropiane e Drejtësisë³⁷, duke iu përgjigjur ankesës së një qytetari spanjoll, Mario Costeja González, ka deklaruar se “*në mungesë të një përgjigjeje nga një faqe interneti, i përkiste motorëve të kërkimit të merreshin me ndalimin e lidhjes (linkut) me përmbajtje të palëve të treta, që konsiderohen fyese apo të tepruara në lidhje me të drejtat e personit*”.³⁸ U përcaktua kështu ajo që u quajt e drejta për t'u harruar për qytetarët evropianë, që është, e drejta e individëve për të rifilluar jetën e tyre pa u shqetësuar nga një e kaluar që interneti e riprodhon vazhdimisht. Ndryshe nga vendet anëtare të Bashkimit Evropian në Shtetet e Bashkuara të Amerikës nuk ekziston akoma mundësia për të bërë kërkesë për eliminimin e indeksimit të përmbajtjeve që i përkasin informacioneve personale dhe imazheve fyese.

Duke u mbështetur në të drejtën për t'u harruar, motorët e kërkimit duhet të largojnë përmbajtjen si rezultat i kërkesës së çdo individi dhe mund të tregojnë vetëm rezultate të caktuara që janë me interes publik. Gjykata nuk ka saktësuar se çfarë kuptohet me pjesën e fundit duke i lënë motorëve të kërkimit barrën për të vendosur se çfarë është në interes të publikut.

Një vit e gjysmë pas vendimit të Gjykatës Evropiane të Drejtësisë, të së drejtës për t'u harruar, e cila garanton të drejtën për të fshirë në motorët e kërkimit lidhjet (linket) me lajme në lidhje me një person që konsiderohen “të papërshtatshme ose nuk janë më të rëndësishme”, Google një nga motorët më të mëdhenj të kërkimit ka hequr rreth 440 mijë lidhje. Kjo u njoftua nga kompania në Raportin e saj të transparencës, në të cilën shpjegon se nga maji 2014 deri më dhjetor 2015 ka marrë 348 mijë kërkesa nga qytetarët evropianë.

Shtirja e së drejtës për t'u harruar në botën e internetit ka rezultuar një detyrë më e vështirë nga sa pritej, burim i debatit dhe polemikës. Është e vështirë për të vendosur deri pas sa vitesh distancë nga fakti, mund të ushtrohet e drejta e individit për të kërkuar fshirjen e të dhënave të tij dhe cilët janë elementet që, edhe pas një kohe të gjatë, mund të justifikonin vazhdimin e këtyre të dhënave në arkivat online.

Konkluzione

Risitë shkencore dhe teknologjike kanë ndikuar në dimensionin e të drejtave themelore dhe ky ndikim është i destinuar të vazhdojë edhe në të

³⁷ Shih http://curia.europa.eu/juris/document/document_print..

³⁸ Shih http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf.

ardhmen. Është një gjeneratë e re e të drejtave që ka gjetur tashmë njohje në dokumente ndërkombëtare dhe mbikombëtare, në kushtetuta dhe ligje.

Të drejtat e gjeneratës së katërt, që në fakt, janë ato që lidhen, me zhvillimin e teknologjive të reja të inovacionit dhe komunikimit, me fushën e manipulimit gjenetik, dhe bioetikës. Lindja e këtyre të drejtave të reja është rezultat i drejtpërdrejtë i zbulimeve që pasojnë përdorimin e teknologjive të reja. Në këtë kuptim, kërkesa për të drejtat e reja rrjedh nga kërcënimet e shkaktuar nga përdorimi i të njëjtave teknologji që kanë një ndikim të rëndësishëm dhe në mënyrë të pashmangshme në kuadrin e të drejtave themelore.

Të drejtat virtuale janë në thelb të drejtat e njeriut në epokën e internetit. Analiza e ndikimit të internetit tek të drejtat e njeriut nuk mund të kufizohet vetëm në zbulimin e sfidave të reja apo të ndonjë mangësie në sistemin e mbrojtjes të këtyre të drejtave në raport me progresin e vazhdueshëm teknologjik. Në lidhje me këtë aspekt, studiuesit duhet të verifikojnë mënyrën e reagimit të modelit egjistues të të drejtave të njeriut, të parashikuar apo të sanksionuar në kushtetuta, në raport me përhapjen e internetit.

Natyra hibride e internetit, nga njëra anë një instrument dhe mjet i lirisë, dhe në anën tjetër një kërcënimin kanosës, ngre problemin e qëndrueshmërisë ligjore si të mundësive të reja për veprim të ofruara nga interneti, si të kërkesave të reja të mbrojtjes së të drejtave që individit i parashtron sistemit ligjor si pasojë e zhvillimeve të vrullshme të realitetit virtual.

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PROTECTION OF CHILDREN'S RIGHTS FROM FAMILY VIOLENCE

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Abstract

A wide range of factors influence the appearance of criminality in general, but also of all forms of violence, including violence against children.

In my study on child abuse, some of the causes and forms of the appearance of this phenomenon will be examined, as well as state and international instruments for the prevention of child abuse and the reaction of the competent bodies in the Republic of North Macedonia to this quite existing phenomenon where, unfortunately, the number of abused children is increasing.

Also, in this paper, statistical data on domestic violence will be presented, especially violence against children, as well as cases from judicial practice. The family undoubtedly plays an important role in the prevention of crime. The family, as an institution and a microsocial community, must properly fulfil its role by educating minors and guiding and preventing anti-social behaviour.

The protection of the child is carried out through the adoption of protection measures, the implementation of interventions to respect the rights of the child, and the provision of services, according to needs, that aim at the development and well-being of the child in his family environment or by placing him in alternative care when the child is temporarily or permanently deprived of parental care or when, due to his best interest, he cannot be left in parental care.

Keywords: *domestic violence, protection, prevention.*

Introduction

Every society today faces the abuse of the human rights of certain groups of people, and it is a proven fact that social violence exists in all segments of society.

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In the contemporary world, there is a great increase in all criminal behavior that is manifested by the application of aggression and violence against individuals, families, certain ethnic and national groups, etc. Among the most expressed forms of criminal violence in today's society is also considered violence against children, both within the family and outside it, which can be manifested in different forms.

The problem of domestic violence includes violence against the elderly, violence against women, and violence against children. Recently, based on various statistics, it has been observed that more and more children are victims of violence, including physical violence as well as psychological violence.

The Convention on the Rights of the Child defines children as all human beings under the age of eighteen, except where national laws recognize an earlier age of majority.

It is high time that the people who perpetrate violence against children understand that it is not a private matter as it was in the past, but today it has found itself in the criminal law and in the civil law.

With the aim of protecting the rights of children, the state must take measures with the aim of prevention, increasing the awareness of citizens, changing the culture of citizens, as well as informing citizens that the acts of violence taken by any of them against children represent a criminal offense.

1. Some causes and forms of presentation of this phenomenon

According to the opinion of some authors, the presentation of several factors has the greatest impact on the appearance of criminality. One of the main factors that influence children to take steps in their lives is the family as a social community.

The family as a social community has multiple tasks and functions when it comes to children in terms of their formation and development. In addition to material security and other objective conditions of children's lives, the family is also one of the primary groups where the process of education and socialization of children is carried out.² The family and healthy family relationships are fundamental prerequisites for a successful new generation and for a stable society with a secure perspective for the future. Family conflicts, husband-wife conflicts, parent-child conflicts, multiple divorces, family abandonment, and child abandonment increase the number of victims every day.

² .Ž.Jashović, *Kriminologija maloletničke delikvencije*, Beograd, 1991, p.236

The family as a social community represents the most important factor in the development and formation of human personality. As a special social institution, it has always had and now has multiple functions and tasks in the formation, education, raising, development, and affirmation of its members, especially children and young people.³ The freedoms and rights of the child are violated with methods of physical violence as well as psychological violence, both of which are harmful and endanger the right development of the child by violating their basic rights.⁴ From this study, it appears that the child's father appears as the perpetrator twice as much as the mother. The most frequent forms of abuse and violence against children are different forms of beating, such as slapping, beating with a stick, beating with a belt, banning going out of the house, and banning company with other children.

The family, as the highest instrument of social control, can constantly take care of children and young people, strengthen their psychological stability, and develop in them a sense of responsibility.⁵ The family, as an institution and micro-social community, must properly fulfill its role by educating minors and guiding and preventing anti-social behavior. In most cases, when the family suffers various economic crises, cultural or political conflicts, lack of conditions for normal living, problems that endanger existence, unemployment, and many other causes that appear, it loses its effect on the proper education of the child by neglecting or mistreating them, behaviors that damage the child's physical and mental health, leaving serious consequences in his biopsychic development that are reflected even later in their lives.

A special problem in terms of the education and training of young people and children is presented by the so-called degraded, destroyed, or disordered families. We are talking about families in which certain ethical, moral, social, and religious properties and virtues do not come into expression in daily communication, in daily relationships between parents, between parents and children, and between other family members. For this reason, the family and the behaviors in that family are also considered the main factors for the presentation of violence as a phenomenon first within the family. Family relationships are based on equality, mutual respect, help, and obligation for mutual food and protection of children's interests.⁶ Violence against children is a frequent occurrence even in schools and other

³ Ragip Halili, *Kriminologjia*, Prishtinë, 2016, p. 276;

⁴ *Ibidem*

⁵ Vesel Latifi, *Politika Kriminale*, Prishtinë, 1998, p. 187;

⁶ Article 3 of Family Law of the Republic of North Macedonia

collective environments, where many children intentionally or unintentionally face this phenomenon, and from the moment that behaviour and signs of violence are observed, concrete measures must be taken to avoid it.⁷ First of all, we must agree with the fact that violence among children at school is present; therefore, awareness must be raised to avoid this. It is also important for teachers to follow this phenomenon and be trained to detect cases and prevent them, and this is especially important in the detection and treatment of physical and emotional violence. The main measures that must be taken are: avoiding situations that encourage violence, controlling children's behaviour and reactions, and giving directions, advice, and support to improve behavior. To prevent violence and aggressiveness among students at school, serious cooperation between the school and the family, between parents and teachers, and with the active participation of the pedagogical service is needed.

What are some of the causes of violence?⁸ More causes can be counted for the appearance of violence between children, students, and peers, but as more general causes we can count: jealousy, need for care or lack of care, bitterness, momentary bitterness, desire to control others, force towards others. Meanwhile, the signs that speak of experienced violence are:⁹ depression, loneliness, lack of self-confidence, decline in success at school, laziness, isolation from society, loss of friends, destruction of personal belongings, etc.

2. Statistical data

To prevent domestic violence, it must be presented to the competent authorities to stop the perpetrator, process the case, and then punish it.

Violence against children as a global phenomenon appears both in developed countries and in developing countries.¹⁰ In many societies,

⁷ Xheladin Murati- Dhuna tek fëmijët, shkaqet dhe parandalimi, Koha, 19.10.24

⁸ Xheladin Murati- Dhuna tek fëmijët, shkaqet dhe parandalimi, Koha, 19.10.24

⁹ Ibidem

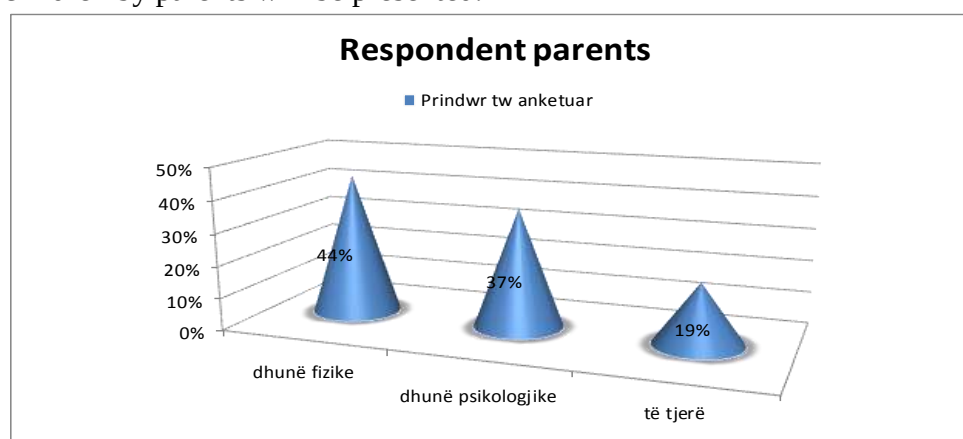
The children involved in the process of violence clearly show shame, absence from school, learn less and harder, express emotional imbalance, are not ready for companionship, isolate themselves, and the like. The consequences of violence of any form are great and harmful to the life of the child and the formation of his personality. Violence is presented as a factor that has consequences in several directions, such as hindering the child's socialization, disturbing the emotional development, accordingly making the child's life emotionally unstable, and slowing down intellectual development. Sometimes it also reflects on the biopsychosocial stability of the child.

¹⁰ Vedije Ratkoceri & Albana Metaj, Dhuna në familje në prizmin e së drejtës, Tetovo, 2023, p. 98

including Albanian society, violence against children is seen as a form of discipline; in this case, we are talking about mild violence, where the parent aims to educate the child. It has been proven that this form of education is not efficient, so even as such, it should not be applied.

The data on the presentation of domestic violence in general and violence against children is alarming. These data show that this phenomenon has affected all countries regardless of their economic development, whether rich or poor.

In the following, through the graph, data on the violence used against children by parents will be presented.



From the above data in the table, we will notice that 44% of parents have used physical violence against children.

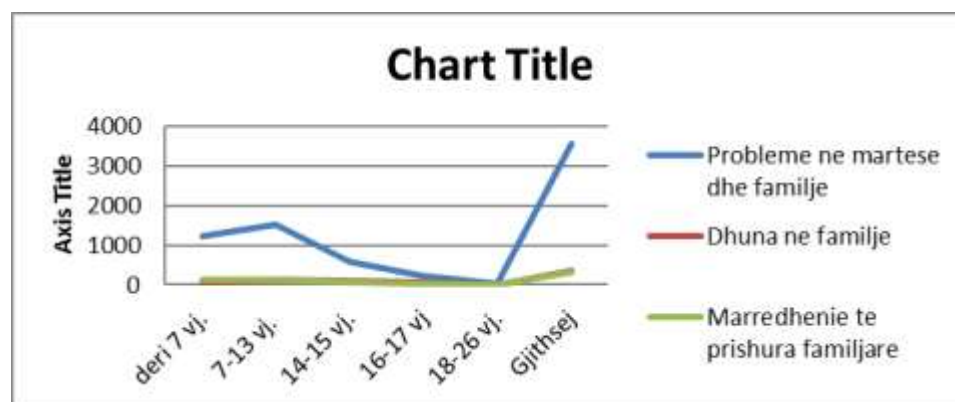
In the following table, data by age for children using social assistance who are victims of domestic violence, broken family relationships, and problems in the family for the year 2016 will be presented.

Child beneficiaries of social assistance, 2016¹¹

	Total	Younger than 7 years	7-13 y.	14-15 y.	16-17 y.	18-26 y.
Problems in marriage and family	3569	1229	1503	584	226	27
Domestic violence	340	56	125	108	48	3
Broken family relationships	337	123	131	55	24	4

¹¹ Статистички преглед 2.4.17.11/884, СОЦИЈАЛНА ЗАШТИТА НА ДЕЦА, МЛАДИ И ВОЗРАСНИ ЛИЦА, 2016

Through graph



From the above data, we will note that domestic violence against children for the year 2016 is most expressed in the age group, 7–13 years, with a total of 125 cases.

In the following, we will present the data obtained from the Ministry of Environmental Affairs of the Republic of North Macedonia for the criminal offence of rape against a child under the age of 15 from the period 2016-2023 according to organisational units.¹²

Organisational Units	2016	2017	2018	2019	2020	2021	2022	2023
SIW Skopje	5	6	5	6	7	4	3	13
SIW Bitola	8	2	12	4	3	9	4	4
SIW Veles	2	2	3	1	/	1	1	3
SIW Kumanovo	2	4	2	3	5	2	/	0
SIW Ohrid	1	3	2	3	1	1	2	5
SIW Strumica	5	4	3	5	7	4	9	1
SIW Tetovo	2	1	2	1	7	2	/	4
SIW Shtip	5	4	3	6	8	6	6	4

Until 2022, this act was entitled sexual assault on a child, while from 2023 the name of the article was changed to child abuse who has not reached the age of 15.

3. Cases from practice

Case 1

In the following, we will present a case from judicial practice (Civil Court) in

¹² Ministry of Internal Affairs, Analysis and statistics for the period 2010-2023

Skopje. On 18.10.2018, the plaintiff A.Z. filed a lawsuit to the Basic Civil Court of Skopje against the defendant E.S. for domestic violence, where the victims of domestic violence in this case are the plaintiff A.Z. and his son M.Z. Former spouses A.Z. and E.S. have been married for 3 years, and during the marriage, the so-called child M.Z. was born. During the marriage, the respondent developed psychological problems. On 16.11.2016, the defendant, under the influence of seizures and nervous diseases, threw her child M.Z. from the balcony of the 4th floor of the apartment where the family lived. Fortunately, the child was saved because he was received by the father, respectively the plaintiff in this case, and immediately the child was sent to receive the necessary medical assistance. Due to mental problems and the risk of repeating the crime, the Basic Criminal Court of Skopje has imposed a security measure on the defendant: mandatory psychiatric treatment in the Psychiatric Hospital in Skopje. In this period, at the same time in the Basic Civil Court in Skopje, the marriage between spouses A.Z. and E.S. was divorced. Also, by the decision of the Centre for Social Work in Skopje, confirmed by the decision of the Ministry of Labour and Social Affairs, and at the request of the plaintiff A.Z., the defendant E.S. was deprived of parental rights, respectively, the rights of motherhood.

Case 2

The second case has to do with school violence, which happened to a student at a primary school in the city of Tetovo (Primary School I... all) in April 2024, where some students physically abused a classmate, throwing him up, and after falling to the ground he suffered serious injuries. The case of violence against the child was presented and made public by the student's parents. The parents of student L criticize the school leadership for not taking the pedagogical measures in the school as defined by the law and, after the incident, why the ambulance was not called immediately, as well as for not notifying educational institutions such as the State Inspectorate of Education and Ministry of Education and demanding from the institution's responsibility for their child's injuries.

In connection with this case, SPB Tetovo has filed a criminal report against three minors from Tetovo due to the existence of reasons for suspecting a criminal offense—serious bodily injury.

4. Prevention

Regarding the prevention of domestic violence, the state must undertake preventive and repressive measures to reduce and combat this phenomenon. As part of these measures, many countries have adopted several acts related to the protection of human rights, including here also documents for the protection of children's rights from any kind of violence.

Regarding all human rights, such as civil, cultural, economic, political, and social, the state has three types of obligations:¹³

¹³ Human Rights and Fundamental Freedoms, Published by the Organization for Security

- The obligation to respect rights, which means the state must not interfere and violate them.
- The obligation to protect rights, which means that the state must prevent non-state actors from interfering with their enjoyment.
- The obligation to enable the realisation of rights, which means that the state must act actively so that the rights are fulfilled and enjoyed by individuals.

Conclusion

Children's rights are guaranteed by the Constitution, while they are protected by law, which is realized for the child through the adoption of protection measures, the implementation of interventions to respect the rights of the child, and the provision of services according to the needs of the best development of the child in the environment, his family, or placing him in institutional care.

There should be more preventive projects in schools, as in primary schools as well as in secondary schools. Students will need to be informed as much as possible about violence as a dangerous and very present phenomenon, that it is a problem that requires urgent solutions, and then they must be informed about the causes of violence against children, the reporting of violence, the alarming figures, etc.

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A HOLISTIC LEGAL FRAMEWORK THAT PREVENTS AND PROTECTS WOMEN AND GIRLS FROM ALL FORMS OF VIOLENCE ON DEMAND IN ALBANIA

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Abstract

Violence against women and girls is a grave human rights violation. It is a threat to the enjoyment of a good health, including mental health, physical integrity, social and economic well-being of women and girls. Violence against women and girls can prevent them from full realization of all their human rights and their autonomy in their everyday life in families and communities. The article aims to provide recommendations for the harmonization of the Albanian legislation in order to prevent and protect victims from all forms of gender-based violence against women and girls, in accordance with the Istanbul Convention, the GREVIO Group recommendations, the CEDAW Convention and the recommendations of the CEDAW Committee as well as ILO Convention 190. The methodology used is desk research, taking stock of the conclusions and recommendations from studies and relevant reports on Albania on this topic.

The keen focus is arguing on the need of a holistic legal framework that provides prevention, protection, and policies that would address in a comprehensive way all forms of violence against women and girls in the civil and administrative domain. Some key recommendations relate to the need to review the Albanian legislation with the aim to ensure effective mechanisms for the prevention and protection of victims of violence from other forms of violence, beyond violence in family relationship which is regulated by a dedicated law. The existing mechanisms for prevention and protection against domestic violence, with some improvements and adaptations, can also be used for other forms of gender-based violence. Prevention, treatment and re-integration are three important elements that this integrated law needs to include in order to respond to the needs of victims of gender-based violence.

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Keywords: *violence against women and girls, integrated law, holistic prevention and protection against gender-based violence .*

1. Introduction

Violence against women and girls is a grave human rights violation. It is a threat to the enjoyment of a good health, including mental health, physical integrity, social and economic well-being of women and girls. Violence against women and girls can prevent them from full realization of all their human rights and their autonomy in their everyday life in families and communities. The article aims to provide recommendations for the harmonization of the Albanian legislation to prevent and protect victims from all forms of gender-based violence against women and girls, in accordance with the Istanbul Convention, the GREVIO Group recommendations, the CEDAW Convention and the recommendations of the CEDAW Committee as well as ILO Convention 190. The methodology used is desk research, taking stock of the conclusions and recommendations from studies and relevant reports on Albania on this topic.

The keen focus of the article is arguing on the need of a holistic legal framework that provides prevention, protection, and policies that would address in a comprehensive way all forms of violence against women and girls especially in the civil and administrative domain. Some key recommendations presented in the article relate to the need to review the Albanian legislation with the aim to ensure effective mechanisms for the prevention and protection of victims of violence from other forms of violence, beyond violence in family relationship which is regulated by a dedicated law. The existing mechanisms for prevention and protection against domestic violence, with some improvements and adaptations, can also be used for other forms of gender-based violence. Furthermore, the article argues that prevention, treatment and re-integration are three important elements that this holistic legal framework needs to include in order to respond to the needs of victims of violence.

The following are the hypothesis questions that the article explores:

1. Does the Albanian legal framework need an integrated law in all civil, administrative, criminal areas for an effective prevention and protection from violence against women and girls?
2. Is there a need for a law that includes not only family subjects, but all subjects, victims of gender-based violence?

3. Is there an urgent need for some new changes in the Criminal Code?
4. How can existing laws improve so that they offer better prevention, treatment, re-integration and protection against violence against women and girls?

The section on the legal background presents the main findings on the national legal framework exposing gaps and challenges in implementation while referring to the need for specific legal improvements aiming at full compliance with the international and regional standards in this area. The next section focuses on the relevant law implementation and challenges encountered in practice in Albania. The section on the Europe case related to effective protection against violence against women and girls exposes the readers to the good practices of the European countries' legal framework and their implementation in practice. The article concludes with some key recommendations for Albania to fully comply with the international and regional standards for effective protection of victims of violence.

2. Legal background

Stalking, sexual harassment, sexual violence, including rape, physical, and psychological abuse forced marriage, and forced sterilization are deeply traumatizing acts of violence against women and girls and these forms of violence unfortunately happen in private and public domains/relations of women and girls.

The following paragraphs will summarize the relevant national legal framework which provides for prevention, protection, persecution and integrated policies against all forms of discrimination and violence against women and girls aiming at presenting the need to further legal improvements of the main legal acts providing for a holistic and comprehensive legal framework in full compliance with the international and regional standards.

Ratification of several international and regional conventions has strongly improved the Albanian legal framework through different conventions such as:

The International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)² which is an international legal

2 UN, *Convention on the Elimination of all forms of Discrimination against Women (CEDAW)*. <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>; in Albanian: <https://hrrp.eu/alb/docs/CEDAW-a.pdf>

instrument that requires countries to eliminate discrimination against women and girls in all areas and promotes women and girls' equal rights including access to justice, the rights of rural women, the right to education, elimination of gender-based violence, harmful practices, and gender-related dimensions of disaster risk reduction to mention a few.

Convention on the Rights of Persons with Disability (CRPD)³ and other mechanisms addressing intersecting forms of discrimination. Albania's ratification of the CRPD in 2012 requires revisions of legislation that would include provisions on protection of women facing intersecting forms of discrimination such as women with disabilities or other disadvantaged groups (e.g., Roma women, women from the LGBTI+ community).

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)⁴ describes gender-based violence as both the cause and the result of unequal power relations between women and men that lead to women's subordinate status in public and private spheres.⁵ Albania ratified this Convention in 2014, which sets comprehensive standards for preventing violence, protecting victims, and prosecuting offenders. The Istanbul Convention requires Albania to take specific steps in the areas of prevention, protection, prosecution, and integrated policies.

ILO Convention on Violence and Harassment in the Workplace (190)⁶ was ratified by the Albanian Parliament in February 2022, and its provisions need to be integrated in the Albanian legislation.

The Constitution of the Republic of Albania (RA) (1998) guarantees fundamental rights and freedoms, including the right to life, dignity, and protection from inhumane or degrading treatment, which forms the basis for legal protection against gender-based violence, including violence

3 UN, *Convention on the Rights of Persons with Disability (CRPD)*. <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>;

https://www.un.org/disabilities/documents/convention/crpd_albanian.pdf

4 Council of Europe *Convention on Preventing and Combating Violence Against Women and Domestic Violence*. <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=210>;
<https://rm.coe.int/168046246b>

5 Council of Europe, *Key facts about the Istanbul Convention*. <https://www.coe.int/en/web/istanbul-convention/key-facts>

6 ILO *Convention on Violence and Harassment in the Workplace (190)* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190

against women. Special protection of the state is enjoyed by the family, children, young people, pregnant women and new mothers. In the general principles of basic human rights and fundamental freedoms, the Constitution has defined them as indivisible, inalienable and inviolable, placing them at the foundation of the entire legal order. The obligation lies with the public authorities to fully respect basic human rights and fundamental freedoms, as well as contribute to their realization. Everyone is equal before the law and no one can be unfairly discriminated against on grounds of gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic, educational, social or parental status, unless there is a reasonable and objective legitimate reason.

The Electoral Code of the RA⁷ has undergone several amendments, addressing gender equality in elections, providing gender quotas requiring a 50 percent gender quota for candidates of local councils. In 2020, gender equality principles were strengthened with the introduction of a 30 percent gender quota for elective bodies of principal local government units and for all levels of the electoral administration. The amendment included the rejection of candidate lists that fail to comply with gender quotas, replacing the previous ineffective fines system. Despite of these improvements, the Electoral Code fails to address violence against women in politics.

The Criminal Code of the RA (amended 2012, 2013 and in 2020) has several provisions that criminalize various forms of violence against women, including domestic violence, sexual violence, trafficking, and exploitation. The legal amendments expanded the scope of criminal offenses related to domestic violence and enhanced penalties for crimes committed against family members, including intimate partners. Stalking, harassment, and sexual assault are also addressed under the Criminal Code, with provisions for punishment based on the severity of the crime.

Despite progress marked with the legal amendments of the Criminal Code, there is an urgent need to change the definition of rape of adult women, so that this definition is based on the "lack of freely expressed voluntary consent" for each of the sexual acts provided for by Article 36 of the Istanbul Convention, and which does not require the demonstration of the use of force by the perpetrator or resistance by the victim. Furthermore, there is a need to amend the definition of rape with minors aged 14 - 18 years, so that this definition is based on the lack of freely given consent and

⁷ Parliament of the Republic of Albania, 2008, *Law No. 10019/2008 "On the Electoral Code of the Republic of Albania"*, Tirana, QPZ. as amended <https://qbz.gov.al/preview/75122d2e-9ebc-45de-b0ea-b5efde2f6836>

does not require the demonstration of the use of force by the perpetrator or resistance by the victim. For the evaluation of the full and free consent of the child, the age gap between the perpetrator and the victim should be taken into account. In addition, the review of the minimum age of consent is needed. There is also the need to detail the behaviors that constitute rape aiming at provided a comprehensive definition of sexual relations with violence (rape). The Criminal Code considers sexual harassment a criminal offence, still amendments are needed to provide as a qualifying circumstance "when sexual harassment is carried out in the work environment". Furthermore, specifications are needed to include violence and harassment in the world of work. Having this said, there is a need to review all CC dispositions related to sexual violence harmonizing it with the international and regional standards⁸.

The Code of Criminal Procedure (amended in 2017) provided for new legal provisions, which significantly improve the position of the victim in criminal cases, as well as special procedural rights for the minor, sexually abused victim and the victim of human trafficking human⁹. Nevertheless, there is a need to foresee that the provision of services shall not depend on the victim's willingness to press charges or testify against any perpetrator as required by the Istanbul Convention¹⁰.

Law No. 9970 on Gender Equality in Society (2008) ensures equal treatment of men and women and mandates affirmative measures to combat gender-based discrimination and promote gender equality. It also emphasizes the need for awareness-raising and educational campaigns to prevent violence against women. Public institutions are required to take measures to ensure gender equality and eliminate violence against women, particularly through preventive actions and gender-sensitive policies.

The GE law is currently under legal revision to bring it in full compliance with international standards, including the private sector obligation to promote and ensure gender equality, provision of measures to prevent and protect women and men from all forms of violence, safeguards against harassment and sexual harassment in the world of work for both public and

8 UNDP Albania, 2024, *Assessment of the legal and sublegal acts for the prevention and protection of women victims of violence in compliance with the CEDAW and Istanbul Convention*- unpublished study.

9 UNDP Albania, 2022, *Analysis of the approach of Albanian legislation to the Istanbul Convention. Protection and support of victims of violence. Suggestions for improvements. Chapter IV. Protection and support of victims of violence*, unpublished document.

10 Chapter IV, article 18.

private entities, provisions addressing unpaid care work, reversal of the burden of proof in court complaints and those submitted to the Anti-Discrimination Commissioner, strengthening the monitoring of the GE law and empowering the gender equality machinery to mention a few. As earlier mentioned, the law is in the process of being amended and it will be seen at the end if all these suggested amendments will be part of the approved version of the improved law.

The law On Protection from Discrimination (LPD)¹¹ was improved in 2020. These amendments introduced several provisions to approximate with EU anti-discrimination legislation, including expansion of gender-related grounds for discrimination, such as gender identity, sexual orientation and sex characteristics. The Commissioner is entrusted to monitor the implementation of the Gender Equality Law, though further details are needed to ensure the full realization of this mandate. Furthermore, this law needs full harmonization with the ILO 190 Violence and Harassment Convention.

Law on the Rights and Protection of the Child¹² stipulates equality and non-discrimination as a fundamental principle of the realization and protection of child rights, while refraining from providing a definition of these. Legal revisions are required to specify that the purpose, definitions, oversight, protective measures and remedies provided for, apply equally to boys and girls, in addition to women and men.

Law on Legal Aid Guaranteed by the State¹³ enables persons whose rights have been infringed through an action or inaction that constitutes discrimination, including gender-based discrimination to benefit state free legal aid regardless of their financial status.

There are several pieces of Albanian legislation such as the Civil Code, Family Code, Labor Code, Civil Servant law, law on Social Assistance, law on Social Housing, law on Social Care Services, law on Public Health, law on Local Self-Governing Bodies, law on Self-Governing Financing, law on Labor Inspection which need legal improvements aiming at providing

11 Parliament of the Republic of Albania, 2010, *Law 10221/2010 "On Protection from Discrimination", as amended*, Tirana, QPZ <https://www.kmd.al/wp-content/uploads/2021/05/2.pdf>

12 Parliament of the Republic of Albania, 2017, *Law No. 18/2017 "On the Rights and Protection of the Child"*, https://www.drejtesia.gov.al/wp-content/uploads/2017/11/04_Ligj_18_2017_23.02.2017_Per_te_drejtat_dhe_mbrojtjen_e_femijes.pdf, Tirana, QPZ

13 Parliament of the Republic of Albania, 2017, *Law no. 111/2017 "On the Legal Aid Guaranteed by the State"*, <https://www.drejtesia.gov.al/wp-content/uploads/2019/02/LIGJ-nr.-111-2017-date-14.12.2017.pdf>, Tirana, QPZ

prevention and protection of all forms of violence as required by the international and regional standards.

Law on “Measures against violence in family relations”, hereafter the DV Law 125/2020¹⁴ since 2006 till 2020 underwent several amendments in the effort to bring it in compliance with the international standards and more concretely with the Istanbul Convention. The purpose of the law is to prevent domestic violence, combat it, as well as protect victims of domestic violence in all its forms. These objectives are expected to be fulfilled through special measures, which are measures provided by the law itself or other necessary measures that are taken on a case-by-case basis by the relevant institutions. Categories that require special protection by this law are women, girls, children, the elderly and persons with disabilities. The legal changes of 2020 brought to attention women and girls as special categories, which the law protects in a special way. The law provides for legal measures (emergency barring orders, immediate protection orders and protection orders) and other necessary measures to be taken by the responsible judicial and administrative authorities charged with the implementation of this law which aim at putting an end to the occurred violence, preventing domestic violence, educating society, supporting victims of domestic violence and perpetrators with rehabilitation measures¹⁵.

Decision of the Council of Ministers (DCM) 327/2021 “The mechanism of coordination of work between the authorities responsible for the referral of cases of violence in family relations, as well as its procedure for the support and rehabilitation of violence victims” point 26/c and ç state for the first time that the Coordinated Referral Mechanism (CRM) at the municipal level, which primarily deals with prevention and handling of cases of violence in family relations, coordinates with all relevant local public and non-public bodies regarding the referral and management of cases of domestic violence, including violence against women¹⁶. This DCM also

14 Parliament of the Republic of Albania, 2006, *Law 9669/2006/2010 “On Measures against Violence in Family Relations”*, Tirana, QPZ. <https://qbz.gov.al/preview/272c20be-0265-46b4-a716-723597629225/cons/20201111>

15 UNDP Albania and School of Magistrate, 2021, *Commentary of the Law “On Measures against Violence in Family Relations”*, Tirana, Gent Grafik.

https://admin.magjistratura.edu.al/uploads/Komentari_Ligji_Dhuna_ne_Familje_4c2bf6fe39.pdf

16 Council of Ministers (DCM), 327/2021 “*The mechanism of coordination of work between the authorities responsible for the referral of cases of violence in family relations, as well as its procedure for the support and rehabilitation of violence victims*” Tirana. <https://shendetesia.gov.al/wp-content/uploads/2021/07/VKM-Nr.-327->

widens the scope of coordination of assistance for domestic violence, including violence against women, which is evidenced in cases of civil emergencies and natural disasters, as well as violence against foreign citizens and those without citizenship. DCM 327/2021 provides for the foundation of coordinated and multi-sectorial work of the local response mechanism that work to prevent violence against women and girls in family relations and effectively handle each DV case. Point 2 of the DCM 327/2021 sets forth the multisectoral composition of the CRM which consists of: steering committees for coordinating the activities of institutions of responsible authorities at the local level, and the referral of cases of domestic violence by the Interdisciplinary Technical Teams (ITTs) and Local Coordinators (LC). Despite its novelties with the amendments which occurred to this DCM in 2021 in paving the way to widen the scope of the work done by each CRM, the DV Law 125/2020, which in the hierarchy of the legal framework stands higher than the DCM 327/2021, does not include other forms of violence beyond family relations.

Complementary to these legal initiatives, national developments, such as the 4th National Strategy on Gender Equality and its Action Plan 2021-2030 (NSGE 2021- 2030), highlight the commitment to a comprehensive approach in addressing domestic violence and all forms of violence against women, prominently featured in its third strategic objective. However, despite advancements in the legal, policy and institutional frameworks, the response to domestic violence, let alone other forms of violence encounter challenges. It remains underfunded, with limited-service offerings, primarily concentrating on domestic violence rather than encompassing a broader spectrum addressing all forms of gender-based violence¹⁷.

3. Efficiency of protection of victims of violence

Till at present there is no official mechanism established to measure the efficiency of the national laws as part of an accountability system of the parliament over the executive bodies responsible for the relevant law implementation. Parliament takes initiatives to put in motion hearing sessions with all relevant public and non-public bodies to mark progress, share challenges and present recommendations for improvement in law implementation over different aspects that relate to gender equality and

datë-2.06-00000002.pdf

17 UNDP Albania, 2023, *Analysis of the functioning of the coordinated referral mechanism to domestic violence at the local level in Albania*. Tirana, unpublished report.

gender-based violence, including domestic violence, but this does not suffice as this is not a consolidated and sustainable tool of accountability. Therefore, this part of the analysis takes stock of this lacking mechanism and is based on the official data on violence against women and girls and conclusions of the studies and reports produced by different development agencies and/or civil society organizations, active in this area as well as government's reports to different international and regional committees and platforms.

The efficiency of the laws on the prevention and protection of victims of violence family relations in Albania has improved over time, but several challenges persist. While Albania has established a strong legal framework, supported by international conventions like the Istanbul Convention and CEDAW, the practical implementation and enforcement of these laws are often less effective¹⁸.

Despite the legal protections, many cases of violence against women go unreported. Cultural and social norms, fear of retaliation, and lack of trust in institutions contribute to underreporting. In rural areas, women are less likely to seek help due to stigma and isolation. The law allows for immediate protection orders; enforcement is often weak. There are reports of delayed responses from law enforcement and insufficient follow-up, which can leave victims vulnerable to further violence. Courts often fail to impose appropriate sanctions on perpetrators. Victims may face lengthy legal processes, inadequate punishment of offenders, or even cases being dismissed. The lack of specialized training for judges and prosecutors in handling gender-based violence cases further weaken the judicial response. Data analysis of cases of domestic violence reported to the police in 2023 shows that 5,064 cases of violence were reported, 2,730 Protection orders (Pos) or Immediate Protection Orders were released (counting for 53.9% of the total cases reported), and 1,911 cases were referred to the prosecutor (26.4% of the total cases reported and 70% of the cases that were accompanied by a protection order). These figures show no improvement in the number of cases of violence against women reported during the last years: in 2022, 5,214 cases of domestic violence and other crimes within the family were recorded, and 5,312 in 2021. The difference between the number of reports and the number of POs issued continues to be significant, and a lower proportion of cases were directed to the prosecutor compared to 2022 (when 34% of the total cases reported were handled by

18 UN Country Team in Albania, 2023, *UN in Albania Position Paper on Gender Equality Law*, Tirana.

the prosecutor)¹⁹.

The Coordinated Referral Mechanism (CRM) for prevention and protection of victims of domestic violence, initiated in 2007, emerged as a linchpin for service coordination, but sustainability remains a significant challenge due to heavy dependence on international organizations and external expertise. The CRMs and response assessment in 42 municipalities²⁰ paints a multifaceted picture, showcasing commendable strengths alongside pressing challenges. Discrepancies in data capture regarding service mapping and variations in service definitions emphasize the imperative for standardization and centralized reflection to foster a more cohesive and effective approach. While strides have been made in institutionalizing data collection for coordinated case management through REVALB²¹, there is a need for further enhancement in the process. Specifically, ensuring greater cohesion in regular data collection and harmonizing with other data management framework in the sector.

In addition, pursuant to DCM No. 327/2021, Local Government Units should take immediate measures to provide a basket of services to victims of gender-based violence (women and children) according to their needs. Currently, all municipalities in the country are lacking this basket of services dedicated to gender-based violence victims. The services currently provided in some municipalities are often not adapted or in line with the needs of gender-based violence cases. The social services budgets in municipalities lack a dedicated line for the domestic violence victims' basket of services, let alone a broader basket of services for all victims of violence against women and girls²².

The landscape is dotted with challenges in financial resources, infrastructure inadequacies, and budget planning uncertainties, underscoring the imperative for enhanced support mechanisms. Bridging service gaps demands collaborative efforts, strategic planning, and increased government backing, especially as the shift in donor approach

¹⁹ Official data provided by Albanian State Police for year 2022 and 2023.

²⁰ UNDP Albania, 2023, *Analysis of the functioning of the coordinated referral mechanism to domestic violence at the local level in Albania*. Tirana, unpublished report.

²¹ A web-based platform that records and follows up DV cases managed by the CRM members, coordinated by the Local DV Coordinator at municipal level with oversight from the Ministry of Health and Social Protection.

²² Monitoring Network Against Gender Based Violence, 2024, *Report of the Stakeholders to the United Nations Conference of the Parties, developed by the for the fourth Review Cycle / 47th Session of the Universal Periodic Review Working Group*, 4 - 15 November 2024, Tirana, UN Women Albania. https://rrjetikunderdhunesgjimore-monitorime.al/en/wp-content/uploads/2024/05/Report_per-publikim.pdf

highlights the urgency for sustainable domestic violence services. The collective response to these challenges is paramount to building a robust framework across municipalities for effective domestic violence intervention²³.

The relevant reports highlight that several forms of violence such as digital violence, harassment and sexual violence need to be addressed with all the appropriate means that ensure the necessary protection. The key issue is that the national legislation has gaps in the areas of security in the use of the Internet and what is more important is that there are no legal provisions for the protection of victims of other criminal offences other than domestic violence (such as stalking, harassment or sexual assault). Therefore, CRMs, despite the latest DCM 327/2021 improvements, are not obliged by the DV Law 125/2020 to handle such cases. Cultural resistance to change and the existence of multiple and intertwined gender discrimination limit access to justice for victims of gender-based violence belonging to various groups, including the Roma and Egyptian community, rural and migrant women and men, women and men refugees, the LGBTIQ+ community, persons with disabilities (women and men) and the elderly (women and men), as well as children (girls and boys) who are victims of crime or in conflict with the law²⁴.

4. Europe case – protection of victims of violence against women and girls

Several European countries have implemented innovative and effective practices to protect victims of violence, particularly in cases of domestic violence and gender-based violence. These good practices reflect an emphasis on prevention through education, victim support, and enhanced and holistic coordination among authorities.

Some of these countries²⁵ have chosen to have special laws on domestic violence or special laws for different forms of violence and some others do

²³ UNDP Albania, 2023, *Analysis of the functioning of the coordinated referral mechanism to domestic violence at the local level in Albania*. Tirana, unpublished report.

²⁴ Ministry of Health and Social Protection, 2024, *Comprehensive National-Level Review for Implementation of Beijing Declaration and Platform for Action Beijing+30*, Tirana. <https://unece.org/sites/default/files/2024-08/Albania-Report.pdf>

²⁵ Timmer, Alexandra and Senden, Linda, 2019 *Gender equality law in Europe How are EU rules transposed into national law in 2018?* European Commission, Brussels. <https://op.europa.eu/en/publication-detail/-/publication/9b101483-3a44-11e9-8d04-01aa75ed71a1>

have comprehensive law on protection from gender-based violence and/or criminalization of all forms against violence against women in full compliance with the Istanbul Convention standards.

Some examples are provided below:

Country	Prevention and protection legal safeguards
<i>Spain</i>	The Organic Law on Integrated Protection Measures against Gender-Based Violence (2004) - comprehensive legal and institutional framework to combat gender violence. The Law provides for: • a coordinated response to domestic violence, including prevention, support, and legal measures; • specialized courts that handle cases of gender-based violence ensuring that victims receive specialized and expedited treatment, addressing both civil and criminal matters (e.g., divorce, child custody). • a Delegation against gender, whose function is the protection and defense of gender victims. • The State Observatory against Gender Violence. • a framework of collaboration and information created so that the police know how to act in cases of gender violence, so that they know how to act before and after an aggression has been committed against the victim²⁶; • electronic bracelets to monitor offenders in domestic/gender-based violence cases, helping to enforce restraining orders and ensuring that offenders stay away from victims.
<i>Sweden</i>	• multi-agency cooperation²⁷ and protective legislation, a national hotline that provides 24/7 support for women who are victims of violence. • victims of domestic violence obtain restraining orders and, in some cases, even change their personal

²⁶ González-Costa, José Antonio, 2023 *The law and gender-based domestic violence in Spain – legal backgrounds, efficiency and problems*, University in Olsztyn, Poland <https://czasopisma.uwm.edu.pl/index.php/sp/article/download/9431/7268/33576>

²⁷ The service is supported by a network of agencies, including the police, healthcare providers, social services, and women's shelters, ensuring coordinated victim care.

	identification numbers and a secret address to ensure safety and avoid being tracked by abusers. • long-standing feminist policy on gender equality includes a focus on reducing violence against women through education, gender-sensitive training for professionals, and funding for victim support services.
<i>Austria</i>	• police officers to issue immediate eviction orders against perpetrators of domestic violence. The offender to leave the home for 14 days, giving the victim time to access further support or legal remedies. • specialized anti-violence centers that provide counseling and legal assistance to victims established. These centers work in close cooperation with police, social services, and courts. • continuous training for police officers and social workers on recognizing and responding to domestic violence.
<i>Germany</i>	• Violence Protection Act (2002) allows courts to issue protection orders, such as barring offenders from returning to the family home or contacting the victim. • clear legal mechanisms for victim protection and a nationwide 24/7 helpline for victims of violence providing free counseling in multiple languages. • coordinated community response systems that involve collaboration between police, social services, healthcare providers, and non-governmental organizations (NGOs) to ensure that victims receive comprehensive and timely support. • over 350 specialized counseling centers for victims of domestic violence across the country.
<i>Denmark</i>	• holistic support for victims through well-funded, easily accessible shelters for victims of domestic violence. • counseling services to both victims and perpetrators as part of a broader strategy to prevent repeated violence. • a state-funded victim compensation scheme that ensures financial support for victims of violent crimes, including domestic violence, to cover medical expenses, legal fees, and psychological counseling.

	• victims of violence are entitled to flexible work arrangements and time off from work to attend court proceedings or receive medical care without facing employment penalties.
<i>Finland</i>	• multi-disciplinary threat assessment teams, which bring together police, social workers, healthcare providers, and NGOs to assess high-risk cases of gender based and domestic violence. • victims of domestic violence are proactively notified when offenders are released from custody or prison, allowing them to take additional protective measures. • municipalities are legally obligated to provide shelter and support services to victims of domestic violence. This ensures that all victims, regardless of their location, have access to necessary resources.
<i>Netherlands and United Kingdom</i>	• domestic violence protection notices and orders and safe at home programs established as well as prevention programs through education.

Common to all these examples is that the national legal framework of these countries provides a holistic approach especially in the civil and administrative domain which allows victims of all forms of gender violence have unhindered and accessible support through a combination of legal measures and integrated social care services that aim at their rehabilitation and reintegration. In addition, these examples show that these countries have put a lot of efforts in having in place preventive programs and continuous capacity building programs for all relevant professionals that support victims of gender-based violence and domestic violence.

5. Conclusions

The arguments under the legal background section presented a clear overview of the legal gaps that hampers an effective prevention, treatment, re-integration and protection for all victims of violence especially in the public domain all civil, administrative and penal areas. Albania has marked a good progress especially in the development of a legal framework that focuses on domestic violence seen from the perspective of the international and regional gender equality standards and safeguards against gender-based

violence in family relations.

The article also presented findings that argued that law implementation shows several challenges and presents the need to choose which course of institutional action will be taken, aiming at fully complying with the European legal framework and international standards in this area, namely: a) development of an integrated law in all civil, administrative, criminal areas for an effective prevention and protection from violence against women and girls or b) expansion of the scope of the existing DV law to include not only family subjects, but all subjects, victims of gender-based violence and provide for prevention, effective treatment, re-integration and protection against gender violence victims. Additionally in the criminal area, there is an urgent need for some new changes in the Criminal Code.

Considering the European countries legislative experience and practice, as well as the obligations for compliance with the international and regional standards in this area, Albania needs to take prompt actions to improve its national legal system aiming at ensuring the following:

- Legal regulations that provide for a holistic policy and program on gender equality which includes a focus on reducing violence against women through education and effective prevention measures.
- Integrated services and multi-agency collaboration: effective protection often relies on the cooperation of multiple services, including police, healthcare, social services, and NGOs, to provide holistic support to victims of violence.
- Specialized training for law enforcement and support services for victims of all forms of violence: ensuring that professionals who interact with victims of violence are properly trained is crucial for improving victim protection and reducing re-victimization.
- Proactive measures for victims of all forms of violence: immediate intervention, such as police-issued protection orders and electronic monitoring, has proven to be highly effective in protecting victims from further violence.
- Accessible shelters and support for victims of all forms of violence: the availability of safe spaces, financial support, and psychological counseling is vital in helping victims of violence recover and rebuild their lives.
- Sustainable and resourceful public institutional structures for implementation and independent oversight through consolidated financial and human resources for both law implementation and oversight.

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KODI I RI PENAL I SHQIPËRISË DHE HARMONIZIMI I TIJ ME KUADRIN LIGJOR TË BE-së

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Abstract

During its 30 years, our criminal code has been changed many times. In most cases, these changes have come from external requests or have been a copy of a foreign Criminal Code or international criminal legislation without considering our criminal tradition or studying the country's cultural, economic, and social reality. Just recently, the draft of a new Criminal Code was drawn up. The drafting of a new Criminal Code has been a necessity since then. First, they have endangered unity, spirit, and legal technique, which has influenced its unfair interpretation and, consequently, his attack several times in the Supreme and Constitutional Court. Secondly, it must be adapted to all the international acts to which Albania adheres or to the reflection of many directives of the European Union. The purpose of this article is to analyze this new draft. In other words, we will explore the text of this draft code; we aim to remark on whether it responds to the requirements of the time, harmonization with the European legal framework, and the nature of its durability/longevity. To realize the purpose of this paper, the hermeneutic method and the interpretative method, such as the comparative, linguistic, and logical methods, were used. As the final product of this article, we intend to have an overview of the draft of the new criminal code, how it is, and above all, how it should be in the context of EU integration.

Keywords: *Draft, Penal Code, Albania, EU.*

Hyrje

Kodi ynë Penal gjatë 30 vjetëve të jetës së tij është ndryshuar shumë herë. Këto ndryshime, të cilat në të shumtën e rasteve, kanë ardhur si rezultat i kërkesave të jashtme apo pa marrë në konsideratë traditën tonë penale dhe pa studiuar realitetin kulturor, ekonomik dhe social të vendit. Në pamje të parë, ndryshimet e shumta, shprehin karakterin evolutiv dhe dinamik të së

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drejtës penale, pasi në të vërtetë ndryshon në varësi të zhvillimeve historike, ekonomike dhe teknologjike. Mirëpo, duhet të ruhet karakteri i vazhdueshmërisë dhe sigurisë juridike. Për të shmangur këtë shqetësim, së fundmi, është hartuar drafti i një Kodi të ri Penal, që ka ardhur si nevojë, së pari, pasi, ndryshimet e shpeshta kanë rrezikuar unitetin, frymën dhe teknikën e njëjtë ligjore të Kodit, çfarë ka ndikuar në interpretimin e tij jo të drejtë; e për pasojë në goditjen e tij disa herë në Gjykatën e Lartë dhe Kushtetuese. Së dyti, për përshtatjen e tij me të gjithë aktet ndërkombëtare ku Shqipëria aderohet, apo me reflektimin e shumë direktivave të Bashkimit Evropian. Sipas, materialeve shoqëruese, ky draft kod vjen i harmonizuar me 52 direktiva të Bashkimit Evropian, si edhe në të janë përfshirë praktikat më të mira penale të shteteve evropiane².

Qëllimi i këtij artikulli është të analizohet ky draft i ri. E thënë ndryshe, të analizohet teksti i këtij drafti kod, me synimin, nëse ai i përgjigjet kërkesave të kohës, harmonizimit me kuadrin ligjor evropian, si dhe nevojës të qëndrueshmërisë. Për të realizuar qëllimin e këtij punimi është përdorur metoda hermeneutike, metodat interpretative, - si ajo krahasimore, gjuhësore, logjike. Ne, synojmë që si produkt përfundimtar të këtij artikulli, të kemi një panoramë të draftit të kodit të ri penal, si është, dhe mbi të gjitha si duhet të jetë, edhe në raport me të drejtën e BE-së.

Pavarësisht disa problematikave që do të vërehen, në respekt të parimit të qëndrueshmërisë në kohë të ligjit penal, vlerësohet pozitivisht, hartimi i një drafti për një kod të ri, duke e kthyer të drejtën penale shqiptare në një të drejtë të avancuar dhe rezistente ndaj kohës.

1. Analizimi i Draftit Kodit të ri Penal dhe harmonizimi i tij me kuadrin ligjor të BE-së

1.1 Përse një Kod i ri Penal?

Kodi Penal në fuqi është miratuar në janar 1995, i cili për t'iu përgjigjur nevojave të ardhura prej tranzicionit të gjatë që ka kaluar Shqipëria apo globalizimit dhe lëvizjeve të mëdha e/migratore, i është nënshtruar mbi 30 herë ndryshimeve dhe shtesave të vazhdueshme. Për shkak të këtyre ndryshimeve të herëpashershme që kodi penal ka pësuar ndër vite, është vërejtur një mungesë e harmonizimit në përmbajtje të tij, veçanërisht për sa i përket llojeve dhe masave të dënimeve penale për çdo vepër penale bazuar në rrezikshmërinë e saj.

Ndaj, hartimi i një Kodi Penal të ri, lindi si nevojë për përshtatjen e tij me të gjithë aktet ndërkombëtare ku Shqipëria ka aderuar apo dëshiron të

² <https://www.drejtesia.gov.al/ndryshime-thelbesore-ne-politiken-penale/>.

aderojë. Po ashtu, pas reformës në drejtësi kemi një organizim dhe funksionim të ri të organeve të qeverisjes së sistemit të drejtësisë. Për këtë arsye, duhet një kod që garanton standardet e reja kushtetuese dhe ligjore të subjekteve në proceset penale. Së treti, zhvillimet sociale, politike dhe ekonomike, sollën faktorë të rinj kriminogjenë, me pasojë depenalizimin e disa sjelljeve në shoqëri, si edhe kriminalizimin e disa të tjerave. Së katërti, nevoja për reflektimin e një sërë vendimesh të Gjykatës Kushtetuese apo të Gjykatës së Lartë, të cilat kanë dhënë vendime për shfuqizimin e neneve të ndryshme të kodit penal në fuqi. Le të shohim me radhë tekstin e këtij drafti.

1.2 Analizimi i Draft Kodit të ri Penal

Në hartimin e pjesës së përgjithshme të këtij Drafti, që përfshin institutet e së drejtës penale dhe parimet mbi të cilat mbështetet ajo, vëmë re një tipar të rëndësishëm, në krahasim me Kodin Penal në fuqi, si integrimin në tekstin e tij të kontributeve të dhëna ndër vite nga doktrina apo jurisprudenca. Kjo vihet re, së pari, në një shtjellim më të thellë të neneve respektive të mëparshme, i.e., sqarimi i dallimit ndërmjet krimeve dhe kundravajteve penale, përkufizimi i kohës dhe vendit të kryerjes së veprës penale, lidhjes shkakësore, rastet e kryerjes së veprës penale me mosveprim etj. Së dyti, në shtimin e dispozitave të reja, si: gabimi në fakt, lajthitja në ligj, shtrëngimi fizik, burimet e përgjegjësisë për veprim etj.

Më konkretisht, drafti fillon me parimet e ligjshmërisë³ dhe mosdënimit pa ligj⁴. Për të kaluar në nenin 3 - ndarja e veprave penale⁵, ku shpjegohen kriteret e klasifikimit të veprave penale në krime dhe kundravajtje penale, dhe më pas kriteret e klasifikimit në krime të rënda apo të lehta. Vërehet se, si kriter klasifikimi është përcaktuar një kriter formal objektiv si masa dhe lloji i dënimit, dhe nuk lihet në diskrecionin e prokurorit apo gjyqtarit. Po ashtu, qëllimi i shpjegimit të këtij klasifikimi është për orientimin e prokurorit apo gjyqtarit për individualizimin e dënimit dhe për përcaktimin e mënyrës së vuajtjes së dënimit. Pra, ky draft, kujdeset për standardet ndërkombëtare dhe kombëtare të trajtimit të personit të dënuar apo të paraburgosur, si edhe ato të ekzekutimit të vendimeve penale.

Kurse, qëllimi i ligjit penal⁶, zbatimi i tij⁷, apo parimet e tjera,⁸ janë në

³ Neni 1 - Ligji penal përcakton veprat penale, dënimet dhe masat e tjera që merren ndaj autorëve të tyre.

⁴ Neni 2 - Askush nuk mund të dënohet penalisht për një fakt që më parë nuk është parashikuar shprehimisht në ligj si vepër penale.

2. Askush nuk mund të dënohet me një lloj dhe mase dënimi të parashikuar në ligj.

⁵ Neni 3 Draft Kodit të ri Penal.

⁶ Neni 6 Draft Kodit të ri Penal.

tërësinë e tyre të bazuar në kodin aktual penal, me disa ndryshime specifike, të cilat në hartimin e tyre janë bazuar dhe në legjislacionin e Bashkimit Evropian apo legjislacionin tjetër të brendshëm, si: Kodin e Drejtësisë Penale për të mitur, Kodin e Procedurës Penale. Kjo jo vetëm, me qëllim jo vetëm parandalimin/ luftimin e kryerjes së veprave penale, garantimin e mbrojtjes së individit, shoqërisë dhe shtetit të së drejtës, por edhe garantimin e qëndrueshmërisë së kodit të ri penal dhe minimizimin e iniciativave të panevojshme të ndryshimit të tij, edhe në hipotezën e anëtarësimit të Shqipërisë në BE. Pasi për herë të parë theksohet se, *Kodi Penal ndërtohet mbi parimet e Kushtetutës së Republikës së Shqipërisë, mbi parimet e përgjithshme të së drejtës penale ndërkombëtare, mbi marrëveshjet ndërkombëtare të ratifikuara nga shteti shqiptar dhe legjislacionin e Bashkimit Evropian*. Po ashtu, për herë të parë theksohet se, *Kodi Penal mbështet ... dhe viktimave të veprës penale ...*

Këto parashikime tregojnë për vizionin e hartimit të këtij kodi dhe njohjen e karakterit të ndjeshëm të së drejtës penale, e cila nuk është statike, por as nuk mund/ duhet të ndryshohet shpesh.

Në këtë drejtim, disa ndryshime me rëndësi janë, si neni 8 - Koha e kryerjes së veprës penale, ku për herë të parë në Kod sqarohet se kur quhet vepra penale e kryer, pra koha juridike dhe fizike e kryerjes së veprës penale, i.e., *Vepra penale vlerësohet të jetë kryer në kohën kur autori ka vepruar ose mbaruar së vepruari dhe, në rastin e mosveprimit, kur duhej të kishte vepruar*. Po ashtu, për herë të parë në Kod sqarohet kuptimi i veprës penale të qëndrueshme, si kur shkelja e ligjit është e zgjatur në kohë, nuk përfundon në një çast të vetëm, autori kufizon të drejtën e viktimës në mënyrë të pandërprerë duke bërë që pasoja të shfaqet përgjatë gjithë kohës së kryerjes së veprimeve prej tij. Një përkufizim i tillë ka rëndësi, pasi edhe në doktrinë, edhe në praktikë, ka diskutime mbi koncepte të tilla, si: vepër penale e atypëratyshme, vepër penale e qëndrueshme dhe vepër penale e vazhdueshme. Diskutime, si mbi faktin se çfarë lloj dhe mase dënimi duhet të caktohet në secilin rast, por shpeshherë edhe ngatërrimin e veprës penale të qëndrueshme me veprën penale të vazhdueshme.

Në rastin e dhënies së përkufizimit të kuptimit të veprës penale⁹, për herë të

⁷ Neni 7 Draft Kodit të ri Penal.

⁸ Neni 5 Draft Kodit të ri Penal.

⁹ Neni 18 - 1. Vepër penale është çdo veprim apo mosveprim shoqërisht i rrezikshëm i parashikuar nga ligji penal, i kryer me faj dhe, që cënon Kushtetutën e Republikës së Shqipërisë, të drejtat dhe liritë e shtetasve, dhe objekte të tjera të mbrojtura nga ligji penal.

parë, pranohet koncepti i veprës penale me rëndësi të vogël. Kjo do të thotë se, në rastin kur vlerësohet se veprimi apo mosveprimi, pavarësisht se kualifikohet si vepër penale nga ligji penal, nëse ka rrezikshmëri të ulët, gjyqtari i seancës paraprake vendos pushimin e procedimit. Marrja e opinionit të viktimës, për vazhdimin ose jo të procedimit, është e detyrueshme. Pra, do të konsiderohet rrezikshmëri e ulët kur vepra është e parëndësishme për shkak të natyrës ose peshës së saj, mungesës së pasojave ose pranisë minimale të tyre, rrethanave rastësore në të cilat është kryer, shkallës së ulët të përgjegjësisë penale të autorit, rrethanave personale të tij që e kanë çuar në kryerjen e veprës ose kur shpenzimet e procedimit penal kalojnë vlerën e objektit material të dëmtuar. Në këtë nen ka rëndësi edhe përkufizimi i viktimës së veprës penale, çdo person fizik apo grup i tillë personash të formuar për mbrojtjen e të drejtave themelore, që kanë pësuar lëndime fizike apo shpirtërore, vuajtje emocionale, humbje ekonomike apo çdo dëmim thelbësor të të drejtave të tyre, nga kryerja e një vepre penale. Viktimë vlerësohet të jetë edhe anëtar i familjes së një personi, vdekja e të cilit është shkaktuar nga një veper penale, si:

- a. bashkëshorti ose personi që bashkëjeton me viktimën në një shtëpi të përbashkët në mënyrë të vazhdueshme;
- b. është i paralinduri apo i paslinduri;
- c. vëllezërit dhe motrat e viktimës;
- c. personi në ngarkim të viktimës nga pikëpamja financiare.

Ky parashikim paraqet dy problematika, e para keqkuptimi i konceptit person fizik. Sipas ligjit për shoqëritë tregtare, *tregtari është personi fizik, sipas kuptimit të Kodit Civil, i cili ushtron veprimtari ekonomike të pavarur, që kërkon një organizim tregtar të zakonshëm. Personi fizik, i cili ushtron një profesion të pavarur (si avokat, noter, kontabilist, mjek, inxhinier, arkitekt, artist etj.), vlerësohet tregtar, nëse një ligj i posaçëm i ngarkon këtë status. Personi fizik, i cili ushtron veprimtari bujqësore, blegtorale, pyjore e të ngjashme, vlerësohet tregtar, nëse veprimtaria e tij përqendrohet kryesisht në përpunimin dhe shitjen e produkteve bujqësore, blegtorale, pyjore (agrobiznes).*¹⁰

Termi i saktë ligjor do të ishte person apo individ. Së dyti, kufizimi i radhës së viktimave. Kjo do të thotë, a do të ketë statusin e viktimës një shoqëri tregtare, ofj etj., e për pasojë të ketë të drejta dhe detyrime në procesin penal. Një shqetësim i tillë vjen, pasi edhe në Kodin e Procedurës Penale mungon një përkufizim i tillë. Pavarësisht kësaj, kemi një doktrinë të

¹⁰ Neni 2, i Ligjit.

zhvilluar në këtë drejtim dhe një strategji ndërsektoriale për mbrojtjen e viktimave të krimit 2024–2030, e cila përfshin masa e veprime që synojnë fuqizimin e pozitës së viktimave të krimit në sistemin e drejtësisë penale, nëpërmjet angazhimit institucional në mënyrë që viktimat të informohen për të drejtat e tyre, të mund të raportojnë krimin, të marrin pjesë dhe të dëgjohen në procedurat penale, të kenë qasje pa diskriminim në sistemin e drejtësisë penale, të garantohet qasje tek shërbimet për viktimat, t'u garantohet e drejta e kompensimit të dëmit nga autori dhe/ose shteti në procesin penal dhe mes procesit civil, bazuar në nevojat për mbrojtje specifike, të marrin shërbimet e nevojshme me qëllim rehabilitimin e tyre. Parandalimi i riviktimizimit dhe viktimizimi dytësor i viktimave është një nga synimet e kësaj strategjie.¹¹

Po ashtu, vlerësohen risi, përcaktimi i veprës penale të kryer me mosveprim, - kur personi me dashje nuk kryen detyrën e tij për të parandaluar dëmtimin e një interesi të ligjshëm të mbrojtur nga ligji penal, dhe burimet nga rrjedh përgjegjësia për vepruar, si: përgjegjësia që rrjedh nga ligji, kontrata¹², marrë përsipër vullnetarisht¹³, për shkak të natyrës së aktivitetit të kryer¹⁴, përgjegjësia prindërore ose të kujdestarisë ndaj fëmijëve të mitur apo të paaftë kur përmbushja e tyre është rezultat i kujdesit të zakonshëm prindëror^{15,16}. Së dyti, në rastin e përgjegjësisë

¹¹ VENDIM Nr. 729, datë 13.12.2023, Për miratimin e strategjisë ndërsektoriale për mbrojtjen e viktimave të krimit 2024–2030, të planit të saj të veprimit dhe të pasaportës së treguesve.

¹² Neni 25 - Subjektet që kanë marrë përsipër sipas kontratës detyra specifike për ruajtjen a mbrojtjen e personave të caktuar, apo të sendeve të caktuara, në kuadër të ushtrimit të detyrës së tyre, kanë përgjegjësinë për të penguar vepra penale të kryera nga të tretë në dëm të personit apo të sendit për ruajtjen apo mbrojtjen e të cilit janë të ngarkuar.

2. Subjektet që kanë marrë përsipër sipas kontratës detyra specifike, me çfarëdoqë titulli, mbi kontrollin e sendeve të rrezikshme ose burimeve të rrezikshme, kanë përgjegjësinë për të penguar ardhjen e pasojave të dëmshme apo të rrezikshme për jetën apo tërësinë e shëndetit, apo të ngjarjeve që përbëjnë vepra penale kundër sigurisë publike, apo kundër mjedisit.

¹³ Neni 26 - Subjektet që, në aktivitete sportive, edukative, shkollore kanë marrë përsipër në kuadër të ushtrimit të detyrës apo, sipas natyrës të aktivitetit, detyrën e udhërrëfyesit, apo të mbikëqyrësit, në fusha të veprimtarive, të cilat mbartin një rrezik, kanë përgjegjësinë për të penguar veprime që çenojnë jetën, shëndetin apo integritetin e personit të cilin kanë marrë në ngarkim apo pasoja që këta persona mund t'u sjellin të tretëve.

2. Ky detyrim rëndon mbi personat përgjegjës pavarësisht nëse detyra është marrë përsipër vullnetarisht apo kryhet prej tyre në mënyrë të përhershme.

¹⁴ Idem.

¹⁵ Neni 27 - 1. Prindërit që ushtrojnë autoritetin prindëror për të miturit kanë përgjegjësinë ligjore për të penguar çdo veprim që çënon jetën, integritetin fizik, lirinë personale, si

penale të personave juridikë, shtimin e radhës së personave që mbajnë përgjegjësi penale për veprimet ose mosveprimet e tij, si individët, të cilët edhe pse nuk kanë të drejtën formale për të udhëhequr, drejtojnë *de facto* personin juridik në mënyrë të vazhdueshme dhe mbizotëruese¹⁷. Sa i përket, kësaj, përmendet edhe koncepti i personit juridik me përmasa të vogla, që do të konsiderohen persona juridikë që, sipas legjislacionit në fuqi kanë përgjegjësi tatimore të thjeshtuar¹⁸.

Së treti, në rastin e institutit të Tentativës, për herë të parë, përdoret koncepti *tentativë e padënueshme*. Ky nen i draft kodit penal është i ngjashëm me dispozitat në legjislacionin penal të disa vendeve, por formulimi i tij mund të ndryshojë nga një vend në tjetrin. Për shembull:

Rasti i Gjermanisë¹⁹: SECTION 23 Criminal liability for attempt

(3) If the offender fails to realise, due to gross ignorance, that the attempt could under no circumstances have led to the completion of the offence on account of the nature of its object or the means by which it was to be committed, the court may dispense with imposing a penalty or may mitigate the penalty at its discretion (section 49 (2)).

(3) Nëse shkelësi nuk arrin të kuptojë, për shkak të injorancës së madhe, se përpjekja në asnjë rrethanë nuk mund të kishte çuar në përfundimin e veprës për shkak të natyrës së objektit të saj ose mënyrat me të cilat do të kryhej, gjykata mund të heqë dorë nga vendosja e një dënimi ose mund ta zbusë dënimin sipas gjykimit të saj (neni 49 (2)).

Pra, që të jemi përpara këtij rasti, duhet që gjatë fazave të përgatitjes së kryerjes së veprës, të mungojë një element i anës objektive të saj, si: mjeti i papërshtatshëm, pasojat etj. Një situatë e tillë, mund të ngjajë me të ashtëquajturën shakaja kriminale, por i diferencon një element i anës subjektive, - qëllimi.

Së katërti, disa ndryshime, vërehen edhe sa i përket institutit të përgjegjësisë penale, pasi për efekt të zbatimit efikas të disa parimeve të rëndësishme të së drejtës penale, si: humanizmi, individualizimi, proporcionaliteti dhe respektimi i interesit më të lartë të të miturit, - përveç parashikimit se *ka përgjegjësi penale personi që ka mbushur moshën*

dhe paprekshmerine seksuale të të miturit. 2. Personat që kanë marrë për sipër sipas ligjit ose kontratës rolin e kujdestarit të të miturit, të një personi të paaftë apo të një personi të moshuar, qoftë edhe përkohësisht, kanë përgjegjësinë për të penguar çdo veprim të përmendur në paragrafin e mësipërm.

¹⁶ Neni 22.

¹⁷ Neni 24.

¹⁸ Shiko nenin 59.

¹⁹ https://ëëë.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

katërmbëdhjetë vjeç në kohën e kryerjes së një krimi apo ka mbushur moshën gjashtëmbëdhjetë vjeç në kohën e kryerjes së një kundërvajtje penale, parashikohen edhe 3 nivele grupmoshe, si:

I mituri i grupmoshës 12 deri 14 vjeç që kryen një krim nuk ka përgjegjësi penale, por nëse përbën rrezik për veten apo për shoqërinë, i nënshtrohet zbatimit të masave edukuese, dhe nëse rezulton i paaftë mendërisht për të kuptuar veprimet e tij...

Për personat e moshës 14-16 vjeç që kryejnë krim, gjykata duhet të vlerësojë nivelin e dashjes të të miturit bazuar në aftësinë e tij për të kuptuar rëndësinë e faktit dhe pasojën e veprës, në mënyrë që të arrijë jashtë çdo dyshimi bindjen rreth pjekurisë përkundër faktit të kryer dhe fajësisë së tij ...

Personi madhor i ri i grupmoshës nga 18 deri 21 vjeç, nëse ka kryer vepër penale kur ka qenë i mitur apo, nëse ka kryer vepër penale përgjatë periudhës kohore nga 18 deri në 21 vjeç, trajtohet si i mitur ...

Ky klasifikim, duke marrë si indikator moshën dhe për pasojë pjekurinë biologjike dhe psikologjike, e sjell të drejtën tonë penale në të njëjtën linjë me kuadrin ligjor penal në vend, - Kodi i Drejtësisë Penale për të Mitur, dhe garanton zbatimin e një drejtësie miqësore më të miturit.

Në anën tjetër, në kuadër të zbatimit efikas të parimeve të mësipërme të rëndësishme të së drejtës penale, dhe shmangies së praktikave abuzive për përcaktimin e përgjegjësisë penale, kemi edhe përkufizimin në vetë kodin të disa instituteve të së drejtës penale, si: pakujdesia, e cila do të ndahet në të vetëdijshme dhe pavetëdijshme, gabimi në fakt, lajthimi në ligj.²⁰ Apo, shtohen rastet apo situatat e përjashtimit nga përgjegjësia penale, si: shtrëngimi fizik²¹, dhënia e pëlqimit nga titullari i së drejtës, përdorimi i ligjshëm i armëve, raportimi i sinjalizuesit.

Së pesti, në rastin e institutit të bashkëpunimit, drafti i ri paraqet disa risi dhe ndryshime. Së pari, përkufizohet kuptimi i marrëveshjes, si një element i rëndësishëm i kryerjes së veprës penale në bashkëpunim. Në fakt, ky është një përkufizim i huazuar nga doktrina e së drejtës penale. Por, me interes është parashikimi i një formë të re bashkëpunimi, të cilin mund ta quajmë bashkëpunim *i hamëndësuar (në dukje)*, ku një person ka dijeni për përputhjen e qëllimeve të tij me autorin që kryen veprën dhe, ai kontribuon fshehtas duke shfrytëzuar veprimet e ekzekutorit për të realizuar qëllimin e tij²². Edhe Kolegjet e Bashkuara të Gjykatës së Lartë, në vendimin unifikues nr. 4, datë 15.04.2011, kanë vlerësuar se që të ndodhemi në

²⁰ Shiko nenet 36-38.

²¹ Shiko nenet 41-47.

²² Shiko nenin 48.

kushtet e bashkëpunimit duhet të bashkekzistojnë si kushte sine qua non:

1. dy ose më shumë subjekte (pluralitet personash);
2. realizimi i faktit kriminal në të gjitha elementet e tij materiale;
3. dhënia e një kontributi relevant në kryerjen e veprës penale nga secili prej bashkëpunëtorëve;
4. ana subjektive, të paktën në formën e saj minimale, që është dijenia e të paktën njërit prej bashkëpunëtorëve për të bashkëpunuar me të tjerët në kryerjen e faktit kriminal.

Së dyti, edhe vetë marrëveshja për të kryer veprën do të kualifikohet si vepër penale, dhe jo vetëm element cilësues i bashkëpunimit. Kjo për disa arsye, e para, që një vepër penale të konsiderohet e kryer në bashkëpunim ekzistenca e një marrëveshjeje paraprake në kryerjen e saj nuk është e domosdoshme, por mjafton edhe marrëveshja e paparashikuar, e cila mund të shfaqet gjatë kryerjes së veprës penale, me kushtin që secili prej autorëve të jetë i ndërgjegjshëm për veprimet e të tjerëve. E dyta, marrëveshja për të kryer veprën penale tregon shkallën e lartë të rrezikshmërisë së veprës penale dhe të autorëve të organizimit të saj.

Së treti, parashikohen disa role të reja në bashkëpunim, si: përkrahësit, provokuesit, inkurajuesit dhe bashkëpunëtorët e jashtëm. Bashkëpunëtor i jashtëm do të quhet personi që në mënyrë të pjesshme merr pjesë në kryerjen e veprës penale, në njërin prej roleve anësore të bashkëpunëtorëve më lart, për shkak të cilësive të veçanta që ka, profesionit apo dijenisë rreth mekanizmit të kryerjes së veprës.

Ndërhyrjet e bëra në këtë institut, tregojnë për një ashpërsim të kodit penal dhe për aplikimin e një modeli luftimi dhe parandalimi të tolerancës zero të kriminalitetit.

Në vijim të risive të këtij drafti, përmendim edhe ato rreth institutit të dënimit, si:

- parashikimi i konceptit *masa penale*²³;
- përcaktimi i qëllimit të dënimit;²⁴
- shtimi i disa llojeve të reja të dënimeve plotësuese dhe ndarja e tyre përkatësisht në dënime plotësuese për krime dhe kundravajtje penale: *Moslejimi për të marrë pjesë në gara për vende pune publike apo për të përfituar fonde publike, Ndalimi për t'iu afruar viktimës, të afërmeve të saj apo komunikuar me ta; përjashtimin e*

²³ Në nenet 62, 63.

²⁴ Neni 61.

autorit të veprës penale nga e drejta e trashëgimisë që rrjedh atij prej viktimës dhe humbjen e së drejtave për të përfituar kujdesin prej saj, në rastet kur ky detyrim ekziston për shkak të ligjit apo marrëdhënies gjinore etj. (për krimet)²⁵;

- koncepti i *masave plotësuese*²⁶;
- përjashtimi nga vuajtja e dënimit me burg të përjetshëm i të rinjve deri në 21 vjeç²⁷;
- ndryshimi (rritja e minimumit dhe ulja e maksimumit) i masës së dënimit me burgim për krimet, nga 30 ditë deri në 30 vjet;²⁸
- ndryshimi (rritja e minimumit) të masës së dënimit me burgim për kundravajtjet penale, nga 15 ditë deri në 2 vjet.²⁹

Ky lloj konceptimi i institutit të dënimit vlerësohet pozitivisht, pasi krijon më shumë mundësi për zbatimin e disa parimeve të rëndësishme mbi të cilat duhet të ngrihet e drejta penale, si: *humanizmi, proporcionaliteti dhe individualizimi i dënimit, të drejtat e viktimës në procesin penal; luftimi dhe parandalimi i kriminalitetit* - status i veçantë për të rinjtë, viktimën e krimit, uljen e maksimumit të dënimit me burgim (krime dhe kundravajtje penale) etj. Mirëpo, shfaq edhe disa problematika në drejtim të parimit të ligjshmërisë, si: kemi një regres në përcaktimin e qëllimit të dënimit, - Denimi penal ka për qëllim të *ndëshkojë veprën penale të kryer, të izolojë fajtorin për kohën që nevojitet për arritjen e sigurisë publike, të ndikojë në riintegrimin e tij në shoqëri përmes mënyrës së vuajtjes së dënimit, të synojë parandalimin e kryerjes së veprave penale në shoqëri, kompesimin e mbrojtjen e viktimave, të miturve dhe subjekteve të tjerë nga shfrytëzimi ...* Në të vërtetë, dënimi dhe trajtimi i të burgosurit synon rehabilitimin për riintegrimin e tij në jetën familjare, shoqërore dhe ekonomike. Madje, përgatitja për riintegrim fillon në paraburgim, vazhdon gjatë kryerjes së dënimit si dhe pas lirimit nga institucioni i ekzekutimit të vendimeve penale. Sigurisht, që heqja e lirisë së lëvizjes, sjell automatikisht, ndëshkim dhe izolim, por ky nuk është qëllimi i institutit të dënimit. Nuk duhet të harrojmë se, pavarësisht rrezikshmërisë së veprës penale apo të autorit të saj, duhen garantuar kushtet për trajtimin me dinjitet të të paraburgosurve dhe të dënuarve me burgim, respektimin e të drejtave dhe të lirive themelore të tyre dhe parandalimin e sjelljeve ose trajtimit mizor, çnjerëzor,

²⁵ Nenet 64 dhe 66.

²⁶ Neni 67.

²⁷ Neni 68.

²⁸ Neni 69.

²⁹ Neni 69.

poshtërues apo degradues.³⁰

Së dyti, parashikohet se, në përmbushjen e qëllimeve të dënimit penal, gjykata vendos dënimet kryesore, plotësuese ose *ndërmerr masa penale* ndaj personave që kryejnë krime apo kundërvajtje penale. Në përzgjedhjen e tyre ajo i përmbahet nevojës së kontrollit të kriminalitetit, bazohet në rëndësinë e veprës penale, në parimet e individualizimit ... dhe parimeve të përgjithshme të këtij Kodi. Pra, kemi parashikimin e një koncepti të ri *masa penale*, por jo përkufizimin e tyre dhe llojet apo masat e tyre. Kjo shkel parimin e ligjshmërisë, pasi ndaj askujt nuk mund të merret një lloj dhe masë e paparashikuar në ligj.

Së treti, parashikohet se, për personat që kryejnë veprë penale jepen edhe disa masa plotësuese, si më poshtë:

- a. pagimin e dëmit të shkaktuar;
- b. pagimin e kostove të procedimit;
- c. regjistrimin, shkëmbimin dhe ruajtjen e të dhënave;
- c. kufizimin e lëvizjeve;
- d. kthimin e gjendjes së mëparshme;
- dh. kompesimin e viktimës.

Ka një paqartësi nëse, masat penale janë masat plotësuese, dhe ka një lapsus në terminologji dhe së dyti, në raport me të pasurit një kod eficient, efikas dhe produktiv, parashikon disa masa që kanë një rregullim, si në kodin e procedurës penale apo në ligjin e ekzekutimit të vendimeve penale (pagimi i dëmit të shkaktuar, pagimi i kostove të procedimit, kthimin e gjendjes së mëparshme, kompesimin e viktimës) dhe parashikon faktin se mund të jepen edhe *masa plotësuese të tjera, të cilat vlerësohen të domosdoshme të jepen nga gjykata kur ajo synon të zbusë ndikimin e pasojës penale, të evitojë a pakësojë dëmtimin e pasurisë publike apo cënimin e interesave themelore të shtetasve dhe, të ndikojë thelbësisht në parandalimin e kryerjes së veprave penale të ngjashme me atë që ka për gjykim dhe, të përfshijë në procesin e parandalimit të përgjithshëm organet publike për të ndjekur zbatimin e masave penale, të cilat parashikohen rast pas rasti në pjesën e posaçme të këtij kodi. Pra krijohet një konfuzion në drejtim të qartësisë së kodit dhe kuptimit të tij prej qytetarëve, duke vështirësuar kthimin e tij në një instrument për parandalimin e kryerjes së veprave penale në shoqëri.*

Së katërti, ka përdorim të gabuar të disa koncepteve, si p.sh., dënimet ndaj personave fizikë supra, prokurori i shtetit etj. Terminologjia e dënimit ndaj

³⁰ Shiko LIGJin Nr. 81/2020, Për të drejtat dhe trajtimin e të dënuarve me burgim dhe të paraburgosurve dhe ligji nr. 79/2020 për ekzekutimin e vendimeve penale.

personave fizikë, është e gabuar pavarësisht faktit se në draft parashikohet një kre i veçantë për dënimet penale ndaj personave juridikë³¹.

Po ashtu, edhe masat edukuese në draftin e ri kanë një ndryshim rrënjësor. Pasi, përcaktohet qartësisht qëllimi, kushtet e aplikimit, llojet dhe masat e tyre si dhe strukturat përkatëse për zbatimin e tyre. Duke siguruar kushtet për zbatimin e parimit të rëndësishëm të mbrojtjes së interesit më të lartë të miturit, individualizimin e masës, rehabilitimin dhe integrimin e tij dhe përafrimin e kuadrit tonë ligjor me standardet ndërkombëtare.

Më konkretisht, masat edukuese synojnë që të sigurojnë/garantojnë zhvillimin fizik, mendor, shpirtëror, moral dhe shoqëror të të miturit të grupmoshës 12-14 vjeç nën moshën për përgjegjësi penale, që ka kryer krim, të të miturit që ka përgjegjësi penale dhe përjashtohet nga dënimi, apo të të miturit që përbën rrezik për veten dhe të tjerët. Ato synojnë të trajtojnë dhe përfshijnë këto kategori të miturish në programe konkrete për korrigjimin, risocializimin, rehabilitimin dhe parandalimin e aktivitetit të mëtejshëm kriminal, duke i ofruar të miturit vëmendje, kujdes, ndihmë dhe mbikëqyrje si dhe, duke siguruar edukim, aftësim profesional, zhvilluar ndjenjën e përgjegjësisë së tij personale dhe përfshirjen e ardhshme të tij në një rol sa më të dobishëm në shoqëri.³²

Për caktimin e masës edukuese ndaj të miturit do të vlerësohen:

- a) kushtet, të cilat lehtësuan përfshirjen e fëmijës në krim;
- b) nivelin e rrezikshmërisë shoqërore dhe veprën e kryer;
- c) mjedisin, në të cilin është rritur dhe ka jetuar fëmija;
- ç) rrezikun apo mundësinë që fëmija të kryejë një vepër tjetër penale;
- d) çdo faktor tjetër, i cili mund të ndihmojë për të kuptuar dhe

vlerësuar situatën e fëmijës.

Llojet e masave edukuese që do të mund të caktohen nga gjykata ndaj të miturve janë:

- a. këshillimi i të miturit;
- b. mbikëqyrja e veçantë e të miturit nga ana e prindit, prindit birësues ose kujdestarit;
- c. mbikëqyrja e të miturit në përkujdesje alternative;
- c. vendosja e të miturit në një institucion të përkujdesjes edukativo-korrigjues.

Në anën tjetër, në caktimin e dënimit, për herë të parë si burim i së drejtës parashikohet edhe praktika gjyqësore (precedenti), pasi gjykata, pavarësisht

³¹ Shiko nenin 116.

³² Neni 100.

nga rrethanat lehtesuese të përmendura në draft, mund të marrë në konsideratë edhe rrethanat të tjera për sa ky Kod ka parashikuar në dispozita të tjera ose, nëse praktikat gjyqësore i kanë pranuar si të tilla që justifikojnë lehtësimin e dënimit³³. Po ashtu, për herë të parë në këtë draft, për një caktim sa më objektiv, proporcional dhe të individualizuar të dënimit, jepet përkufizimi i konkurrencës të veprave penale, caktimi i dënimeve për një veprim, caktimi i dënimit për disa veprime, krimi vazhdues etj. Në fakt, si e kemi theksuar më lart, këto janë përkufizime të huazuara nga doktrina e së drejtës penale.

Edhe dënimet alternative, kanë pësuar disa ndryshime, si për shembull, llojet e tyre. Më konkretisht, kur Gjykata, vëren se janë plotësuar kushtet e kriteret përkatëse për zëvendësimin e dënimit me burgim, jep një nga këto dënime alternative: *liria e kontrolluar*, gjysmëliria, qëndrimi në shtëpi, Pezullimi i ekzekutimit të dënimit me burgim dhe venia në provë e të dënuarit, *kushti detyrues për të hequr dorë nga përdorimi i alkoolit ose drogës*, pezullimi i ekzekutimit të vendimit me burgim dhe detyrimi për kryerjen e një pune në interes publik, *pezullimi i procedimit dhe venia në provë e të pandehurit, pagimi i gjobës për kundërvajtjet penale, qortimi gjyqësor*.³⁴

Edhe te *llogaritja e paraburgimit*³⁵ kemi ndryshime që konsistojnë në përllogaritjen e

- *Një ditë paraburgim baras me një ditë burgim, (ndryshe nga kodi aktual që ka një ditë e gjysmë),*
- *Një ditë paraburgim baras me shtatë mijë lekë gjobë.*
- *Një ditë paraburgim baras me njëzet orë punë në interes publik.*
- *Një ditë arrest shtëpie është e barabartë me një ditë burgim.*
- *Një ditë arrest shtëpie është i barabartë me 3 mijë lekë gjobë.*
- *Një ditë arrest shtëpie është i barabartë me 15 orë punë në interes publik.*

Por, kjo formulë aplikohet edhe duke u bazuar tek neni 132 i cili citon faktin që “Gjykata, në rastet kur është kryer një vepër penale e lehtë dhe autori i saj përmbush të gjitha kriteret e tjera të pershkrjuara në paragrafin e parë të nenit 123, me kërkesë të tij, mund të vendosë zëvendësimin e dënimit me burgim me pagimin e një shume të hollash në favor të shtetit, duke llogaritur një ditë burgim me gjashtë mijë lekë. Pagesa e të hollave në favor të shtetit paguhet përpara dhënies së vendimit gjyqësor”. Për të blerë

³³ Neni 124.

³⁴ Neni 145.

³⁵ Neni 134 Draft Kodit të ri Penal

ditët e burgut gjykata fillimisht duhet të dëgjojë viktimën e veprës penale në ka ose prokurorin si përfaqësues të interesit shtetëror dhe publik, ndërsa asnjë nga *veprat penale të kryera nga nëpunësit publikë, veprat penale të korrupsionit, kundër drejtësisë, atyre të trafikimit dhe kundër personit apo dhunës në familje, s' do të mundë të blejë dot burgun me parapagim.*

Ndërkohë neni 144 *“Zëvendësimi i dënimit me burgim për personat e rinj”*, na sjell risinë e burgut të fundjavës deri në përfundim të dënimit ose punë në interes të komunitetit për persona deri në 21 vjeç.

Në rastin e pezullimit të ekzekutimit të dënimit të dhënë, kodi parashikon një zgjerim të viteve, pasi edhe dënimet deri në 4 vite burg mund të konvertohen në shërbim prove sipas nenit 149 të Draft Kodit të ri Penal. Afati i provës me përjashtim për dënimet deri në dy vjet burgim të pezulluara nga gjykata, është sa dyfishi i kohës së dënimit të dhënë me burgim, por përherë jo më pak se sa 3 muaj. Me përjashtim të paragrafit të sipërpërmendur afati i provës është është 25 muaj deri në 5 vjet.

Në konceptin e gjysmëlirisë, e cila aplikohet edhe në kodin aktual, drafti i ri parashikon një zgjerim të dënimit duke përfshirë vepra që dënohen deri në 3 vite. Sipas nenit 147 burgu do të bëhet me orar dhe dënimi do të zëvendësohet me gjysmëliri duke caktuar fasha qëndrimi në burg *nga ora 20.00 deri në orën 7.00, ose në një periudhë kohore të përafërt të përcaktuar nga gjykata*. Për 21 vjeçarët gjysmëliria fillon të zbatohet prej dites së premte ora 19.00 deri të hënë ora 09.00.

Ndërkohë, nga ana tjetër, personat që njihen si përsëritës nuk ju lejohej lirim me kusht parakohe edhe pse ata mund të kenë një sjellje të lirë në burg apo plotësojnë disa kushte të njohura nga ligji³⁶.

Një dispozitë tjetër, e shtuar Draft Kodit të ri Penal është *“Zëvendësimi i dënimit me burgim për personat e rinj”*³⁷, ku cilësohet fakti që *“grykatas në dhënien e dënimit vlerëson të caktojë një dënim me burgim deri në tre vjet, për personat e rinj deri në 21 vjeç, mund ta zëvendësojë burgimin me lloje të tjera dënimi zëvendësues, si puna në interes publik e konvertuar me ditët e burgimit ose qëndrimi në burgim vetëm në fundjavë deri në përfundimin e periudhës së parashikuar të dënimit me burgim”*. Kjo është një dispozitë e përafuar me legjislacionin Evropian.

³⁶ Neni 163 *“për të dënuarin përsëritës për krime të kryera me dashje, si dhe për të dënuarit për kryerjen e veprave penale të vrasjeve që përmbajnë motiv apo paramendim, krimeve të rënda terroriste, në veprat penale me forma të veçanta të bashkëpunimit si kërër të organizimit, drejtimit dhe ekzekutimit, krimit të marrëdhënieve seksuale ose homoseksuale me të mitur, kur ka sjellë si pasojë vdekjen ose vetëvrasjen e fëmijës së mitur”*.

³⁷ Neni 144 Draft Kodit të ri Penal.

Konkluzione

Ky lloj konceptimi i draftit të Kodit të ri vlerësohet pozitivisht, pasi krijon më shumë mundësi për zbatimin e disa parimeve të rëndësishme mbi të cilat duhet të ngrihet e drejta penale, si: *ligjshmëria, humanizmi, proporcionaliteti dhe individualizimi i dënimit, të drejtat e viktimës në procesin penal; luftimi dhe parandalimi i kriminalitetit, rehabilitimi dhe riintegrimi i të dënuarit dhe viktimës* - status i veçantë për të rinjtë, viktimën e krimit, uljen e maksimumit të dënimit më burgim (krime dhe kundravajtje penale), vepra penale e rëndësisë së vogël, dënime të reja alternative, kategorizime të reja sipas moshës, përkufizim i instituteve kryesore të së drejtës penale etj. Mirëpo, shfaq edhe disa problematika në drejtim të teknikës legjislative, si: përdorim të një terminologji të pasaktë, referime të shpeshta të jashtme, disa nocione të reja, si p.sh.: tentativa e padënueshme, precedenti, qëllimi i dënimit etj.

Ndaj do të sugjerohet, të rishihet me vëmendje drafti, në drejtim të qartësisë dhe ekonomisë së tij.

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BASIC RIGHTS OF THE DEFENDANT IN THE CRIMINAL PROCESS

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Abstract

The Constitution guarantees fundamental human rights and freedoms, which form the cornerstone of a nation's legal system. Each individual enjoys the right to life and the right to respect for his physical and mental integrity.

Anyone who is arrested has the right to be brought to trial within a reasonable time or to be released pending trial, except when the judge finds that the person poses a danger to the community or there is a risk of his/ her escape before trial.

Anyone accused of a criminal offense is presumed innocent until proven guilty, in accordance with the law.

The defendant is the central subject in the criminal procedure because the procedure is initiated and developed in the case where there is a well-founded suspicion that he has committed a criminal offense. As a procedural subject, he has certain obligations and rights, while certain coercive measures may be applied to him under the conditions defined by law.

The capacity of defendant in criminal proceedings can be acquired by any natural person who possesses the ability to act. The ability to act of the defendant, like the ability to act of natural persons in general, is manifested through his certain age and state of health and spirituality.

Keywords: *defendant, procedural subject, criminal procedure*

Introduction

In order to appear as a party in a criminal process, the defendant must possess the so-called *legitimatio ad causam*- the ability to appear as a procedural-criminal party in a criminal case or to be the holder of the rights and duties that belong to him as a procedural-party criminal.

In order to act in the procedure personally and competently, in addition to

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legitimatio ad causam, the party must also possess *legitimatio ad processum*- the ability to undertake the procedural actions that belong to it. While the legitimatio ad causam must be possessed by each criminal procedural party, the public prosecutor and the defendant must have the legitimatio ad processum.

The person against whom the investigation is conducted must be protected and enjoy the rights and guarantees that are provided for the defendants.

The Constitution and the Criminal Procedure Law guarantee several rights for the defendant. Thus, for example, in Article 13 of the Constitution of the Republic of Macedonia, the right of the defendant is guaranteed that a person indicted for an offence shall be considered innocent until his/her guilt is established by a legally valid court verdict. In Article 14- No person may be punished for an offence which had not been declared an offence punishable by law, or by other acts, prior to its being committed, and for which no punishment had been prescribed. No person may be tried in a court of law for an offence for which he/she has already been tried and for which a legally valid court verdict has already been brought. Or, in Article 15, the right to appeal against individual legal acts issued in a first instance proceeding by a court, administrative body, organization or other institution carrying out public mandates is guaranteed.

In article 3 of the Criminal Procedure Law of RMV, it is stated that: prior to passing a valid and final verdict, the freedoms and rights of the defendant and other persons, proportional to the severity of the criminal offense and the degree of suspicion may be limited only to the extent that is necessary and under circumstances as provided for in the Constitution of the Republic of Macedonia, international agreements that have been ratified in accordance with the Constitution of the Republic of Macedonia and this Law.

1. Regulation of Criminal Procedure and realization of human rights

The European Convention on Human Rights (Article 6, Paragraph 1) provides that every person in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. (Article 2, paragraph 1 of Protocol No. 7).

No one can be tried for a criminal offense for which he was previously

acquitted or sentenced by a final decision (*ne bis in idem -res iudicata*) in accordance with a state's law and criminal procedure. However, the law allows for reviewing or repeating the criminal process when new facts come to light. The human rights commission and court in Strasbourg interpret Article 6 broadly because it is of fundamental importance for the functioning of democracy.

Every person has the right to an independent and impartial tribunal to decide within a reasonable time all matters relating to his rights and obligations and the criminal charge brought against him³.

In the case of the legal regulation of the criminal procedure, two very important requirements (trends) for society and the individual are presented to the legislator:

- 1) the requirement for the efficiency of the criminal procedure and
- 2) the request for the protection of human rights.

The trend of the efficiency of the criminal procedure must ensure that through the legal regulation of the procedural activity and through the authorizations that must be given to the authorities that act in the criminal procedure, the efficiency of the criminal procedure is ensured. This trend is aimed at regulating the criminal procedure in such a way as to ensure that no perpetrator of the criminal offense remains undetected and that the responsible perpetrator of the criminal offense is pronounced and the deserved sanction is applied to him⁴. Since the criminal procedure is conducted against the defendant, whose responsibility must be proven during the criminal procedure, the consequent application of this trend does not exclude the possibility that during the development of the procedure, certain precautionary measures will be taken or the freedom of the innocent defendant will be limited.

Despite the trend of the efficiency of the criminal procedure, as I said before, there is another trend, which requires that the citizens against whom the criminal procedure takes place, who are probably innocent, should not be restricted in their freedom and protection or those who do not punished. This trend is also of great importance in the procedure because no democratic society is interested in judging people except under the conditions provided by substantive criminal law⁵. So, the basis for the regulation of criminal procedure should be the humanity of contemporary

³ Neni 6 al. 1 e KEDNJ.

⁴ Ejup Sahiti&Ismail Zejneli, E drejta e procedures penale e Republikes se Maqedonise, Shkup, 2017

⁵ Ejup Sahiti&Ismail Zejneli, E drejta e procedures penale e Republikes se Maqedonise, Shkup, 2017

human society based on international standards on human rights. The solutions in this direction should ensure that, to a reasonable extent, the two above-mentioned tendencies find space without emphasizing one tendency and without leaving one tendency in the shadow of the other.

Criminal proceedings are conducted against the person who is accused of having committed a criminal offense—the defendant⁶. He receives this capacity with a certain act during the preliminary investigations and precisely with the act of notification, which is made known to him before his questioning begins. The act of notification of the charge must be communicated to the defendant and his defense counsel.

The issue of the development of the investigation into positive rights is regulated in different ways, so that sometimes it is developed by the investigating judge as a subject belonging to the court, and elsewhere the investigation is under the competence and supervision of the public prosecutor. Even the defendant's right to defend during this preliminary stage, the opportunity to look at the case documents and to be notified of the evidence that burdens him during the implementation of this type, may have been somewhat limited⁷. Such limitations were justified by the need to prevent the defendant from jeopardizing the development of the investigation by misusing the right to defense. But today it is required that the restrictions be in accordance with the international standards on human rights.

It is necessary to emphasize that Article 1, paragraph 1, of the CPL of the Republic of North Macedonia states: this law shall establish the rules that provide for an objective and fair criminal procedure, thus ensuring that no innocent person is ever convicted and the perpetrator of the criminal offense is criminally sanctioned according to the terms provided in the

⁶ Halim Islami&Artan Hoxha&Ilir Panda, *Procedura penale*, Tirane, 2003, p.120

Historically, the time and manner of notification of the indictment change from one legislation to another. In some legislation, it is accepted that this act can be done at any stage of the preliminary investigation, based on sufficient data to prove the accusation, while in some it is otherwise, the act of notification of the indictment is done at the end of the investigation, after the prosecution has concluded that the matter should go to trial. Up to this point, the person charged with the criminal offense is considered a person under investigation, enjoying all the rights of the defendant. There is also a change related to the body that makes the act of notification of the accusation. Sometimes the act was done by the prosecutor, sometimes by the investigating judge, by the investigator, or by the police officer authorized by the prosecutor.

The capacity of the defendant is preserved until the end of the proceedings, that is until the decision of dismissal, acquittal, or conviction has taken its final form.

⁷ Ejup Sahiti& Rexhep Murati, *E drejta e procedures penale*, Prishtine, 2016, p. 319

Criminal Code and on the basis of a lawfully conducted procedure. However, the duty of the law and the bodies that implement it should not be limited only to ensuring that no one innocent is punished and that the guilty are given the deserved criminal sanction, but also to ensure that the innocent are not the criminal procedure is developed so that the defendant is not exposed to the difficulties of proving his innocence.

1.1 Presumption of innocence

The presumption of innocence is provided in favor of the defendant and serves as a counterweight to his equality with the authorized plaintiff⁸. We first encounter the presumption of innocence in Article 11 paragraph of the UN General Declaration on Human Rights of 1948 with this wording: "Everyone charged with a penal offense has the right to be presumed innocent until proven guilty according to the law in a public trial at which he has had all the guarantees necessary for his defense.

According to Article 6/2 of the European Convention on Human Rights (ECHR), everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Whereas, according to Article 6/3 of the European Convention on Human Rights (ECHR). Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The Constitution of the Republic of Macedonia, in Article 13, paragraph 1, and the Criminal Procedure Law of the Republic of Macedonia, in Article 2, paragraph 1, regulate the presumption of innocence. According to them, every person accused of a criminal offense shall be presumed innocent until his or her guilt is established by a valid and final court verdict. However, before the defendant is declared guilty by a final judgment, a criminal

⁸ Ejup Sahiti & Ismail Zejneli, *E drejta e procedures penale e Republikes se Maqedonise*, Shkup, 2017, p. 42

procedure is conducted against him as a person suspected of committing a criminal offense, in which case, with the aim of its successful development, the defendant can also be detained. Therefore, the presumption of innocence does not exclude the possibility of criminal proceedings against the defendant, who is suspected of having committed the criminal offense.

Also, in Article 2 of the Law on Criminal Procedure, it is stated that a person accused of a criminal offence is considered innocent until his guilt is proven by a final verdict. The other effect of the manifestation of the presumption of innocence consists in the fact that, if guilt cannot be proven in the criminal procedure, *the court must release* the accused. The court has such an obligation also for the reason that according to the *in dubio pro reo* principle, the aggravating or mitigating fact, which, despite the efforts to prove it correctly, remains at a doubtful level, is interpreted in favour of the defendant⁹. Article 4 of Criminal Procedure Code of the Republic of Albania also states that the defendant shall be deemed innocent until his guilt has been established by a final judgment of the court. Any doubts regarding the charge shall be evaluated in favour of the defendant. The court shall issue a decision of conviction if the defendant is found guilty of the criminal fact attributed to him beyond any reasonable doubt.

Whereas in Article 9 of Criminal Procedure Code of the Republic of Albania it is stated that Every minor in conflict with the law is presumed innocent, until his guilt is proven by a final court decision. Any doubt about the charge against the minor is evaluated in his favor.

1.2 In dubio pro reo

From the principle of the presumption of innocence originates the well-known rule of interpretation of doubts in favour of the defendant (*In dubio pro reo*), according to which when the facts and circumstances of the case allow different evaluations and interpretations, the most favourable interpretation for the defendant¹⁰.

The CPL in Article 4 in the *in dubio pro reo* principle is raised to the level of a legal principle. According to it, the Court shall decide on the predicament of the existence or non-existence of the facts that characterize the criminal offense on which the application of a certain provision of the Criminal Code depends, in a manner more favorable for the defendant.

According to Article 15 of the CPL of the Republic of North Macedonia, the objective of the criminal procedure is to find the material truth. The establishment of the truth is done through the verification of relevant facts.

⁹ Ejup Sahiti, *E drejta e procedurës penale*, Prishtine, 2006,

¹⁰ Azem Hajdari, *Procedura penale- Komentar*, Prishtine, 2010, p. 47

Therefore, the court must accurately and completely prove the facts are important for making a legal decision. It must, with attention and maximum professional commitment, and with the same care, verify the facts against the defendant as well as those in his favour. The other effect of the manifestation of the presumption of innocence consists in the fact that, if guilt cannot be proven in the criminal procedure, the court *must release* the accused¹¹.

The court has such an obligation because, according to the *in dubio pro reo* principle, the aggravating or mitigating fact, which, despite efforts to prove it correctly, still remains at a doubtful level, is interpreted in favor of the defendant.

According to Article 5, paragraph 1 of the Criminal Procedure Code of the Republic of Albania, the liberty of an individual may be restricted by means of precautionary measures only in cases and forms provided by law. Whereas in paragraph 2 it is decisively stated that no one may be subjected to torture, punishment or cruel treatment.

1.3 The rights and obligations of the defendant

The defendant is the procedural subject to whom the procedural request was directed¹². The defendant is the central subject in criminal procedure because the procedure is initiated and developed in cases where there is a well-founded suspicion that he has committed a criminal offense. As a procedural subject, he has certain obligations and rights, while, under the conditions defined by law, some coercive measures can be applied against him.

The capacity of a defendant in criminal proceedings can be acquired by any natural person who possesses the ability to act. The ability to act of the defendant, like the ability to act of natural persons in general, is manifested through his certain age and state of health and spirituality. Age as a characteristic of the capacity of the defendant is determined by substantive criminal law¹³. Consequently, the person who, at the time of committing the criminal offense, was under 14 years of age is considered a child, and criminal proceedings cannot be conducted against him. The defendant's health and mental state are also related to the responsibility of the perpetrator of the criminal offence.

In addition to the ability to act that the defendant must possess, which in

¹¹ Sahiti, Ejup, 2006

¹² Vasiljević, op. cit., p. 154

¹³ Article 12 of the Juvenile Justice Law of the Republic of Macedonia contains different definitions for the age groups of juveniles who commit criminal offenses, which will be discussed when dealing with the procedure against juveniles.

terms of age means the defendant who has reached 14 years of age, for the successful development of the criminal procedure, the individualisation of the defendant's personality must be done¹⁴.

Determining the defendant's physical personality is crucial. Two persons cannot be sued alternatively so that the court can determine which person is the perpetrator of the criminal offense if that criminal offense can only be committed by one of them.

Persons under the age of 14 are considered criminally irresponsible and, as such, are outside the scope of criminal law¹⁵. This category of persons cannot be held criminally responsible regardless of what criminal offense they have committed.

In the criminal procedure law of the Republic of Macedonia, the defendant is a party- subject equal to the plaintiff. The defendant may be subject to certain restrictions of rights and freedoms, especially given the coercion measure. He has three obligations: a) to be released in the procedure; b) to respond to the summons of the prosecuting body; c) to tolerate interference with his rights, i.e., tolerate being the subject of evidence (the so-called evidentiary obligation); and d) implementation of procedural measures (e.g., arrest or detention). The legislator provides the defendant with certain rights and a certain advantage (*favour defensisonis*) with which he tries to reduce the real imbalance of his position with the plaintiff (*in dubio pro reo*, prohibition *reformatio in peius*, *beneficium cohaesionis*, ranking in the final decision, action with the incomplete complaint in favour and to the detriment of the defendant, etc.)¹⁶. He has certain obligations and rights. His basic obligation is to respond to the summons of the procedural body. If he does not answer the summons without reason, the order of arrest-companion follows. The obligation of the defendant to be present in criminal proceedings is intended to enable the procedural bodies to question him¹⁷.

According to Article 206 Paragraph 1, Subsection 1 of the CPC, the defendant, during the first questioning, must be informed about the type and causes of the charge against him in a language he understands and be asked what he has to say for his own defense, and also it is communicated that there is no obligation to present its defense or to answer the questions posed. The defendant must be given the opportunity to state all the facts and evidence against him and present all the facts and evidence in his favor.

¹⁴ Ejup Sahiti, p. 97

¹⁵ Azem Hajdari, *Procedura Penale-Komentar*, Prishtine, 2010, p. 156

¹⁶ Pavišić, Berislav dhe bashkëpunëtorët, *Kazneno postupovno pravo*, Rijeka, 2011, p. 112.

¹⁷ *Ibidem*, cited work

According to the Criminal Code of the Republic of Macedonia (Article 12, paragraph 1), "The perpetrator is not responsible who, when committing the criminal offence, was unable to understand the importance of his offence or was unable to guide his actions due to permanent or temporary mental illness or due to other serious mental handicaps (irresponsibility).".

According to Article 70 of Criminal Procedure Law every defendant shall have the following **basic rights**:

- a-** to be informed on time and in detail, in a language that he or she understands, about the crimes that he or she is accused of and any evidence against him or her;
- b** to have enough time and possibilities to prepare his or her defense, and especially to have access to the case file and be familiar with any available incriminating or exculpatory evidence, as well as to communicate with a defense counsel of his or her own choice;
- c-** to be tried in his or her presence and to defend in person or with the assistance of a defense counsel of his or her own choice, and if the person is indigent, to get a defense counsel free of charge when that is required by the interest of justice;
- d-** to freely present his or her defense;
- e-** not to be coerced into testifying against himself or herself and people that are close and plead guilty;
- f-** to have a possibility to speak about the facts and the evidence that he or she is charged with and to present all facts and evidence that would support his or her defense case;
- g-** to examine the witnesses of the prosecution on his or her own or through the defense counsel, as well as to be able to ensure the presence and examination of the defense witnesses, under the same conditions as is the case with the prosecution witnesses; and
- h-** during the main hearing to be able to consult with his or her defense counsel, but not to be able to discuss the way he or she will answer individual questions.

As the basic subject of the criminal procedure, the defendant himself exercises the function of defense. The defendant has the right to testify, and he must be allowed to testify about all the facts and evidence that incriminate him and present all the facts and evidence that are in his favor. He has the right to interrogate or request to be interrogated by the witnesses against him and to request the presence and interrogation of witnesses in his favor under the same conditions that apply to witnesses against him¹⁸.

¹⁸ Ejup Sahiti& Rexhep Murati, *E drejta e procedures Penale-Prishtine*, 2016, p.156

However, the defendant's personal defense is his option, not his obligation, and it depends on him to what extent he will present it. In this direction, by presenting his defense, he can accept the facts that the accusation accuses him of, declare regarding the claims of the accusation, and ask questions to witnesses, experts, etc.

The defendant further has the right to challenge the court decision with an appeal and extraordinary legal remedy¹⁹. For the benefit of the defendant, the prohibition *reformatio in peius* is also provided, which enables the defendant to freely use the legal remedy against the court decision, without fear that he will worsen his position with an appeal, and *beneficium cohaesinis* (benefit of attachment).

Conclusion

A criminal process will be developed against any defendant who, according to criminal law, has committed a criminal offense and is responsible.

The defendant is considered the person who is charged with a criminal offense by means of the indictment when there is sufficient information to obtain the defendant. The responsible defendant maintains his quality until the court decision- the judgment of conviction or acquittal.

The defendant's guilt, whether he has committed a criminal offense or not, must be proven in criminal proceedings by the court and in this way bring a meritorious judicial decision based on the evidence process.

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¹⁹ Ibidem

EXTRADITION AND HUMAN RIGHTS

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Abstract

Human rights are an important part of the theories of law; all people are born free and equal in dignity and rights, are equal before the law, and have the right without any discrimination to be protected equally by the law. No one shall be subjected to torture, cruel, inhuman, or degrading treatment or punishment.

Extradition is possible only for those types of criminal offenses that are defined by international agreements or domestic legislation. The extradition of citizens of a country is allowed if it is not in conflict with the national laws of the country requesting the person's extradition. Therefore, extradition as an institution is not necessarily applied, especially in those cases where there are circumstances that prohibit its application.

There are some cases of impossibility of extradition due to the nature of the criminal offense for which a person is requested to be extradited, as well as cases where the extradition of a person threatens that the person will be subjected to humiliating, degrading, and inhumane treatment, including the death penalty.

This paper will refer to the national acts of the states as well as international acts such as the European Convention on Human Rights as well as the Convention on Extradition.

Keywords: extradition, criminal offense, detention, obstacles.

Introduction

Extradition means transferring a person, suspected, accused, or convicted from one state to another. Thanks to the international cooperation between the states, extradition enables the persons criminally responsible for committing criminal offenses to answer in a criminal court process.

The extradition of a convicted or wanted person will be extradited if there are no obstacles to extradition, that is, if it is not in conflict with the positive law of the state requesting the extradition.

The state that is requested to extradite is not obliged to extradite and will

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decide to extradite or refuse extradition. The Constitution of the Republic of Kosovo for this matter in Article 9/4 provides for the freedom of movement of every individual and that the citizens of the Republic of Kosovo cannot be extradited from Kosovo against their will, except in cases whereby law and international agreement it is otherwise defined.

Extradition is carried out through bilateral and multilateral agreements and based on national legislation. The entire procedure for extradition is regulated according to local procedural norms. Thus, according to the Code of Criminal Procedure of the Republic of Kosovo (Article 291/1), international requests for extradition are as follows: the state prosecutor or the competent judge, as soon as possible, initiates requests for extradition, requests for the transfer of prisoners, or requests for the execution of judgments.

1. Meaning of extradition

Human rights are opportunities that allow each person to protect his freedom and dignity, thanks to the existence of institutional guarantees². The concept of human rights is very early in human history; it can be found in the English Carta Magna of June 12, 1215.

Extradition is an act by which a state hands over a person accused or convicted of a criminal offense to another state to undergo criminal proceedings or to serve a prison sentence³. When it is believed that the person for whom the extradition letter was issued is located abroad, the competent body can also issue an international extradition letter, in which case a statement is given that if the person is found, his extradition will be requested.

The transfer of a person to a foreign country to execute an imprisonment decision or the delivery of an act, which proves his proceedings for a criminal offence, can be made only by means of extradition. (Article 488 of Criminal Procedure Code of Albania)

Extradition is carried out in cases where a person commits a criminal offense and, before being discovered, during the criminal procedure, or after the sentence has been pronounced, escapes to another country in order to avoid the sentence⁴. Extradition can also be done in cases where a person in a foreign state commits a criminal offense against another state or a foreign state.

² Joan Pradel, Geert Corsttens&Gert Vermeulen, *E drejta Penale Evropiane-perkthim-*, Tirane, 2009, p. 20.

³ Sahiti, Zejneli, p. 339.

⁴ Ismet Saliu, *E drejta Penale nderkombetare*, Prishtine, 2016, p. 165.

European Convention on Human Rights (ECHR) in Article 5/1 entitled; the right to liberty and security - it is foreseen that everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

2. Historical extradition treatments

The history of extradition is divided into three periods: from the earliest times to the end of the 17th century, from the 18th century to the first half of the 19th century, and from the second half of the 19th century to the present day⁵.

In the period from the 18th century to the beginning of the 19th century, there were significant changes in how extradition was understood as an instrument for improving the international cooperation of states, with the aim of protecting social values, and thus states began to hand over military deserters and later the perpetrators of ordinary criminal offenses. For the purpose of legal regulation, international agreements also began to be practiced, and the first extradition agreement in today's sense was concluded between France and the Netherlands in 1736⁶.

Whereas, according to Bisouni, the entire history of extradition can be divided into four periods:⁷

1. From the oldest times until the 17th century (in which the surrender of political criminals generally rules),
2. The 17th century and the first half of the 19th century (which is dominated by bilateral agreements for extradition between states, mainly for crimes during the war),

⁵ Davor Krapac-Medjunarodna krivično pravna pomoc-. Zagreb, 1987, p. 25.

⁶ Zlatarić B. "Medjunarodno krivično Pravo", Zagreb, 1979, p. 341.

⁷ Davor Krapac "Medjunarodni seminar o ekstradiciji, Zbornik pravnog fakulteta u Zagrebu, Zagreb, 1984, p. 4.

3. The period 1833-1948 (where the common concern for the elimination of general crime is expressed) and
4. The period from 1948 onwards—where the flowering of consciousness to protect human rights and the affirmation of the balance and independence of international relations is underlined.

In the Roman state, there was a developed practice of extradition, and in the feudal period more bilateral agreements were presented, including the agreement between the Count of Benavente and the city of Naples in 836 and the agreement between Carlo VI, Count of Savoy, in 1377. While extradition was first legally regulated in the French Penal Code of 1971, it is believed that the oldest written source in which extradition is mentioned is the peace agreement between the Egyptian pharaoh Ramses II and the king of Haiti in 1280⁸.

3. Request for extradition

In the law of the Republic of Macedonia, according to Article 16 of the Law on International Cooperation, in order to carry out the extradition of a foreign defendant or convict from the Republic of Macedonia to a foreign country (passive extradition), a judicial-administrative procedure must be developed. The procedure for the extradition of foreign defendants or convicts begins according to the request of the foreign state, which is presented to the Ministry of Justice or through diplomatic channels.

According to Article 52 of the Law on International Cooperation in Criminal Matters of the Republic of Macedonia the preconditions for authorising extradition shall be the following:

- 1) the person whose extradition is requested shall not be citizen of the Republic of Macedonia;
- 2) the identity of the person whose extradition is requested shall be determined;
- 3) the offence for which extradition has been requested shall not be committed in the territory of the Republic of Macedonia against it or against one of its citizens;
- 4) the offence for which extradition has been requested shall be a criminal offence both according to the domestic legislation and according to the legislation of the state where it was committed and which requested the extradition;

⁸ Ibidem

- 5) the criminal prosecution or the enforcement of the sentence shall not become time-barred;
- 6) the person whose extradition is requested shall not be sentenced for the same criminal offence by a domestic court or effectively released by a domestic court for the same criminal offence or the criminal proceeding against him or her shall not be effectively stopped or the accusation shall not be effectively rejected or no proceedings shall be initiated for the same criminal offence in the Republic of Macedonia or against it or against a citizen of the Republic of Macedonia, unless a guarantee has been provided for the exercise of the right to legal claim on property of the injured party;
- 7) there shall be sufficient evidence for the reasonable doubt that the person whose extradition is requested committed a certain criminal offence, or that there exists another final judgment;
- 8) the person whose extradition is requested shall have committed the criminal offence after the age of 14; and
- 9) the person whose extradition is requested was tried in absentia, and the requesting foreign state shall provide a guarantee that the person will be tried in his presence.

In the Republic of Kosovo, according to the Article 18, the extradition procedure begins based on a written request to the Ministry. The request for extradition should indicate criminal offences the extradition is requested for and it will be accompanied by the following documents⁹:

- an accurate description of wanted person along with other data that would assist in the verification process of person's identity, citizenship and location.
- original or verified copy of the order for arrest issued by competent authorities of requesting country or if the person is sentenced for any offence, the original judgment or the verified copy of the judgment or any other document which indicates the imposed sentence, the fact that the sentence is executable and duration of the remaining sentence to be served.

These documents should contain time and place where the criminal offence was committed, his/her role in the criminal offence, legal classification. In certain cases documents that do not contain data under this paragraph, should be accompanied with a declaration where the data regarding the

⁹ N.18, p.1&2, e Ligjit.

criminal offence are prescribed;

- an extract of criminal law of requesting country relevant to the matter in question;
- if wanted person has been sentenced in absence for another offence, there should be attached as well a statement showing that the suspect was personally summoned or have been notified about the date and place of the main hearing where the decision was issued, or specifying legal remedies available to the person in question in order to get ready for the trial or for the retrial in his presence.

Extradition is possible only for those types of criminal offenses that are defined by international agreements or domestic legislation¹⁰. Usually, a general clause excludes the possibility of extradition for minor criminal offenses. The exclusion of perpetrators of minor criminal offenses from the possibility of extradition is foreseen because the extradition procedure is complicated, long, and expensive; therefore, extradition for minor criminal offenses is contrary to economic reasons.

The Ministry of Justice is competent to request from a foreign state the extradition of a person prosecuted or criminally convicted, against whom a measure that limits personal freedom must be executed. For this, the prosecutor at the court in whose territory the sentence is being processed or the sentence was given makes a request to the Ministry of Justice, sending the necessary acts and documents. When it does not accept the request, the ministry notifies the authority that made it. (Article 504 of the Criminal Procedure Code of Kosovo)

4. Obstacles to extradition

A frequent form of international legal-criminal assistance is the surrender of defendants and convicted persons—extradition. This activity is developed in order to create the conditions for the development of the criminal procedure, namely to enable the implementation of the punishment for those persons who committed a criminal offense in one state and then fled to the other state¹¹. The extradition of defendants and convicted persons is required and carried out according to the provisions of the Law on International Cooperation in Criminal Matters, provided that it is with an international agreement ratified in accordance with the Constitution of the Republic of Macedonia or with a legal act that regulates criminal procedures in an international court whose competence has been accepted

¹⁰ Ismet Salihu , “E drejta penale ndërkombëtare”, Prishtinë,p. 161.

¹¹ Sahiti, Zejneli, p. 359.

by the Republic of Macedonia and has not been determined otherwise.

According to Article 66 of the Law on International Cooperation, The Minister shall give a decision for extradition allowing or denying extradition. The Minister may decide to postpone the extradition if the person whose extradition is requested has criminal proceedings pending in a domestic judicial authority for another criminal act, or if the person whose extradition is requested is serving a prison sentence in Macedonia. The Minister shall not allow extradition of the person, whose extradition is requested if there are serious reasons to doubt that he or she might be subjected to torture and other cruel, inhuman or degrading actions, including the death penalty.

While we are dealing with the issue of extradition, the conditions for its permission, and the possibility of rejecting the request for extradition, we must also emphasize the fact that when a person, regardless of whether he is a foreigner or a citizen of the country, is accused of genocide, crimes of war, and crimes against humanity, as well as for other criminal offenses for which, according to international law, the statute of limitations by the International Criminal Court does not apply, extradition cannot be refused¹².

According to Ismet Salihu, the obstacles to extradition are also referred to:

1. Perpetrators of the criminal offense
2. Type of criminal offense
3. Territorial principle of operation of the criminal law
4. Procedural obstacles (causes) for the development of criminal proceedings¹³

A type of criminal offense that is an obstacle to extradition is also a political criminal offense. In jurisprudence, but also in practice, political criminal offenses are mainly considered all offenses that violate the internal and external security of the state, constitutional regulation, sovereignty, independence, and territorial integrity¹⁴.

Conclusion

The procedure for the extradition of defendants and convicts, the procedure for granting international legal-criminal assistance and the execution of international agreements in criminal matters, and procedures against minors in some countries are no longer regulated by the Criminal Procedure Law

¹² Ibidem p. 363.

¹³ Ismet Salihu, "E drejta penale ndërkombëtare", Prishtinë, fq. 166.

¹⁴ Ibidem p. 171.

because they are regulated by separate laws.

During the extradition procedure, the strengthening of the concept of human rights must be taken into account. International cooperation between the states should be started with the respect of human rights and not from the preservation of the interest of the sovereignty of the states, even in cases where extradition should be rejected in those cases where it is suspected that the person in the requesting state may be subject to abuse, political imprisonment, etc.

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LA DIRETTIVA UE N. 1203/2024 SULLA TUTELA PENALE DELL'AMBIENTE E IL SUO IMPATTO NELLA LEGISLAZIONE PENALE ALBANESE

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Abstract

Different countries are facing numerous challenges related to environmental protection, as the means available through administrative or civil legislation are insufficient to protect the environment adequately and effectively. In recent decades, European countries have considered implementing criminal legislation to prevent and safeguard the environment. The European Union's recent Directive No. 1203/2024 on environmental protection through criminal law replaces Directives 2008/99/EC and 2009/123/EC in this field. This change also indirectly affects the legislation of candidate states such as Albania, based on the latter's obligation to comply with the *acquis communautaire*.

The new Directive introduces new types of environmental crimes and more severe penalties, providing detention measures, fines, and the obligation to restore the environment. Another significant issue concerns the appropriate investigation tools that member states must make available to the competent authorities to ensure effective enforcement action.

This study aims to analyze the influence of European Directive No. 1203/2024 on the protection of the environment through criminal law on Albanian criminal legislation, considering also the reform of the criminal code carried out in 2019, which introduced numerous criminal offenses in the environmental field, finalized at the partial harmonization of Albanian legislation with the EU directive No. 2008/99/EC on the criminal protection of the environment.

Keywords: *Environment, criminal law, environmental offenses, fundamental rights, European Union*

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1. Introduzione
2. La direttiva UE n. 1203/2024 sulla tutela penale dell'ambiente e le novità introdotte nella normativa europea
3. I possibili cambiamenti nella legislazione penale albanese nel processo di armonizzazione con l'ultima direttiva dell'Unione europea
4. Considerazioni conclusive
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1. Introduzione

La tutela dell'ambiente² presenta oggi una delle sfide più impegnative della società contemporanea. I dati relativi ai reati ambientali a livello internazionale sollevano preoccupazioni significative, e posizionano tali reati tra gli otto reati con una crescita notevole negli ultimi dodici mesi³. I reati ambientali generano profitti che raggiungono il valore di centinaia di miliardi di dollari e sono spesso connessi con la criminalità organizzata⁴, gruppi criminali transnazionali ben strutturati o aziende apparentemente legittime specializzate nel settore ambientale⁵. Sulla base dei dati raccolti dall'INTERPOL e UNEP i reati ambientali a livello globale risultano con una crescita del 5 e il 7 % all'anno negli ultimi decenni, rappresentando una grave minaccia non solo per gli ecosistemi e le specie protette, ma anche per l'intera società⁶.

La necessità di affrontare in modo efficace questi fenomeni con conseguenze pregiudizievoli sulla salute e la vita degli esseri umani, e su interi ecosistemi ha influenzato profondamente le scelte politiche e sociali degli stati. Questa nuova consapevolezza si evidenzia anche nella comunità

² L'ambiente rappresenta: "lo spazio che circonda una cosa o una persona e in cui questa si muove o vive", o "l'insieme delle condizioni fisico-chimiche (quali la temperatura, l'illuminazione, la presenza di sali nell'acqua e nel terreno, i movimenti eventuali del mezzo) e biologiche (presenza di altri organismi) che permette e favorisce la vita degli esseri viventi". Così, voce *Ambiente*, in *Enciclopedia europea*, Milano, I, 1976, p. 340.; Secondo una diversa concezione l'ambiente viene considerato "il complesso delle condizioni sociali, culturali e morali nel quale l'essere umano si trova, si forma e si sviluppa". In tal senso si veda F. Giunta, *Il diritto penale dell'ambiente in Italia: tutela di beni o tutela di funzioni?*, in *Rivista italiana di diritto e procedura penale*, 1997, Milano, p. 1100.

³ INTERPOL, *Annual Report 2023*, in: <https://www.interpol.int>.

⁴ (A cura di) M. C. Meliá, L. Cornacchia, *Ecomafie: Crimine organizzato business e ambiente*, FrancoAngeli, Milano 2024, pp. 9 ss.

⁵ INTERPOL, *Annual Report 2023*, p. 11.

⁶ L. Colantoni, G. S. Sarno, M. Bianchi, "Fighting Environmental Crime in Europe. An Assessment of Trends, Players and Action", Istituto Affari Internazionali, 2022 in: https://www.iai.it/sites/default/files/ambitus_report.pdf.

internazionale negli ultimi 40 anni, dove si notano diversi interventi attraverso l'adozione di convenzioni internazionali che hanno come scopo principale la tutela dell'ambiente. In questa direzione si considera di rilievo fare riferimento all'introduzione del diritto fondamentale all'ambiente⁷ iniziando dalla Dichiarazione di Stoccolma del 1972, in seguito nella Convenzione di Aarhus⁸, dove è stato affermato e riconosciuto un diritto fondamentale dell'uomo: **“il diritto alla libertà, all'eguaglianza e a condizioni di vita soddisfacenti, in un ambiente che gli consenta di vivere nella dignità e nel benessere, ed è altamente responsabile della protezione e del miglioramento dell'ambiente davanti alle generazioni future”**⁹. Questo riconoscimento riconduce il diritto all'ambiente tra i beni giuridici meritevoli di tutela giuridica, tra cui anche la tutela penale¹⁰.

Il diritto all'ambiente in quanto diritto fondamentale è stato più volte affermato anche dalla Corte Europea dei Diritti dell'Uomo a partire dagli anni '90¹¹. A tal proposito, La Corte EDU ha affermato che il diritto all'ambiente, anche se non esplicitamente previsto dalla Convenzione Europea dei Diritti dell'Uomo (CEDU), rappresenta un prerequisito essenziale per il godimento di tutti gli altri diritti previsti dalla Convenzione, tra i quali il diritto alla vita e il diritto al rispetto della vita privata e familiare¹², rispettivamente previsti dagli artt. 2 e 8¹³. Attraverso

⁷ Cfr. S. Nespore, *Il governo dell'ambiente. La politica e il diritto per il progresso sostenibile*, Milano, 2009, p. 231.; N. Bobbio, *L'età dei diritti*, Torino, 1990, XIV.; Cfr. L. Ramacci, *I reati ambientali ed il principio di offensività*, in *Giurisprudenza di Merito*, 2003, p. 4, ed in *Banca Dati Lexambiente*, 2003, pp. 2-41.

⁸ *Convenzione sull'accesso alle informazioni, la partecipazione del pubblico ai processi decisionali e l'accesso alla giustizia in materia ambientale*, Aarhus, Danimarca, 25 giugno 1998.

⁹ Dichiarazione delle Nazioni Unite sull'ambiente umano, Stoccolma, 1972.

¹⁰ E. Mazzanti, *La protezione dell'ambiente come diritto umano*, in *La legislazione penale*, 25.6.2019, p. 2. (URL www.lalegislazionepenale.eu/); G. Fiandaca – E. Musco, *Diritto penale, parte speciale*, Zanichelli, Bologna, 2007, pp. 526 ss.; G. Fiandaca – E. Musco, *Diritto penale, parte generale*, Zanichelli, Bologna, 2007, pp. 703 ss.; Baldassarre, voce *Diritti sociali*, in *Enciclopedia giuridica Treccani*, 1989, vol. XI.; F. Modugno, *I nuovi diritti nella giurisprudenza costituzionale*, Torino, 1995.

¹¹ Corte Europea per i Diritti dell'Uomo, 9 dicembre 1994, n. 16798/90, *López Ostra c. Spagna*; *Idem*, 19 febbraio 1998, n. 14967/89, *Guerra e altri c. Italia*; *Idem*, 2 novembre 2006, n. 59909, *Giacomelli c. Italia*.

¹² L. Cornacchia, *Diritto penale dell'ambiente: Diritto penale d'impresa e reati ecologici*, Zanichelli Editore, Torino 2024, pp. 8 ss.

¹³ A tal proposito si veda Corte Europea per i Diritti dell'Uomo, *Lopez Ostra c. Spagna* (n. 16798/1990); *Guerra e altri c. Italia* (n. 14967/1989); *Taskin e altri c. Turchia* (n. 46117/1999); *O'neryildiz c. Turchia* (n. 48939/1999); *Fadeyeva c. Russia* (n. 55723/2000); *Giacomelli c. Italia* (n. 59909/2000); *Martinez e Mari'a Pino Manzano c.*

questa interpretazione estensiva, la Corte EDU ha considerato che il godimento effettivo dei diritti espressamente previsti dalla Convenzione, tra cui quelli previsti dagli artt. 2 e 8, dipende dalla qualità dell'ambiente in cui l'individuo vive¹⁴. In questo modo, il "*diritto all'ambiente*" si inserisce tra i diritti fondamentali della persona, la cui tutela diventa essenziale per la tutela della vita e del benessere dell'individuo. Tale diritto rappresenta, quindi, un fondamento imprescindibile per l'esistenza di tutti gli altri diritti umani, sia per l'individuo che per la collettività¹⁵.

Considerata la rilevanza del diritto all'ambiente da più strumenti internazionali, è stata ritenuta necessaria la tutela penale dell'ambiente, comportando di conseguenza la trasformazione del diritto penale da *ultima ratio* a un effettivo ed efficace strumento di tutela dell'ambiente¹⁶. In questa direzione troviamo la Convenzione del Consiglio D'Europa, *Sulla protezione dell'ambiente attraverso il diritto penale*, adottata a Strasburgo nel 1998, la quale fa richiamo alla tutela penale dell'ambiente particolarmente nei casi di gravi danni all'ambiente cagionati da persone fisiche e giuridiche¹⁷. Lo stesso orientamento si nota nell'ambito dell'Unione Europea, dove diverse iniziative si sono tradotte in direttive e dove la tutela dell'ambiente presenta una necessità. In questa direzione si

Spagna (n. 61654/2008); *Tătar c. Romania* 67021/01, in *ECHR Annual Report 2009*; Decisioni più recenti della Corte EDU Sez. I, 24.1.2019 *Cordella e altri c. Italia*, ric. nn. 54414/13 e 54264/15 e CEDU Sez. I, 5.5. 2022 *Ardimento e altri c. Italia* ric. 4642/17; Si veda S. Zirulia, *Alla Corte Costituzionale una nuova questione di legittimità della disciplina c.d. 'Salva-Ilva'*, in *Diritto penale Contemporaneo*, 14 Febbraio 2019: <https://archiviodpc.dirittopenaleuomo.org/d/6486-alla-corte-costituzionale-una-nuova-questione-di-legittimita-della-disciplina-cd--salva-ilva>.

¹⁴ N. De Sadeleer, *Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases*, in *NordJIntLaw*, 2012, pp. 60 ss.; E. Ruozzi, *La tutela dell'ambiente nella giurisprudenza della Corte europea dei diritti umani*, Napoli, 2011, pp. 63 ss.; A. Saccucci, *La protezione dell'ambiente nella giurisprudenza della Corte europea dei diritti umani*, in G. Cataldi – A. Calogiuri – N. Napoletano (a cura di), *La tutela dei diritti umani in Europa*, Padova, 2010, p. 493.

¹⁵ E. Furramani, *La nuova riforma penale sui reati ambientali in Albania: Nuove sfide nella tutela dell'ambiente*, in 2° Interdisciplinary International Conference UNIKART on «Management, Tourism And Development Of Territory », Dubrovnik (Croatia), 6-7 April 2020, p. 114.

¹⁶ E. Furramani, *La nuova riforma penale sui reati ambientali in Albania*, cit. p. 112.; Cfr. F. Sgubbi, *Il diritto penale totale*, Bologna, 2019, pp. 33-35.; Cfr. A. Di Leandro, *L'abusività della condotta nei reati ambientali. Questioni de iure conditio e de iure condendo*, in (A cura di) M. C. Meliá, L. Cornacchia, *Ecomafie: Crimine organizzato business e ambiente*, FrancoAngeli, Milano 2024, p. 103.

¹⁷ *Convention on the Protection of the Environment through Criminal Law Council of Europe*, Strasbourg, 4.XI.1998.

trovano le direttive 2008/99/EC e 2009/123/EC *sulla tutela penale dell'ambiente e all'inquinamento provocato dalle navi e all'introduzione di sanzioni per violazioni*, le quali rappresentano il fondamento del nuovo diritto penale europeo¹⁸.

Tenuto conto della complessità dei reati ambientali e la necessità di contrastarli in modo efficace¹⁹ ed effettivo²⁰, la normativa europea fa ricorso alla tutela penale dell'ambiente²¹, oltre alla tutela amministrativa. In questa linea, di recente l'Unione Europea ha adottato la direttiva n. 2024/1203 *sulla tutela penale dell'ambiente* la quale introduce elementi innovativi sia per quanto riguarda le fattispecie d'illecito che per quanto riguarda le sanzioni penali da applicare e le pene accessorie, lasciando agli stati membri tempo fino al 21 maggio 2026 per il recepimento della direttiva.

In questo quadro, la nuova direttiva dell'UE sulla tutela penale dell'ambiente sicuramente influenzerà anche il diritto penale albanese, in quanto l'Albania è paese candidato all'UE, in processo di negoziazione con l'Unione Europea, e che ha l'obbligo di conformarsi con l'*acquis communautaire*. L'armonizzazione della legislazione penale dell'Albania con la normativa dell'Unione Europea si nota anche nei precedenti ammendamenti del Codice Penale dell'Albania, come quello avvenuto con la legge n. 44 del 2019, con il quale sono stati introdotti nel Codice Penale diverse fattispecie d'illecito riguardanti i reati ambientali, non previste precedentemente, caratterizzate dall'obiettivo principale del ravvicinamento parziale della legislazione penale albanese con la direttiva 2008/99/EC *sulla tutela penale dell'ambiente*.

¹⁸ E. Furrmani, *La nuova riforma penale sui reati ambientali in Albania*, cit., p. 112.

¹⁹ M. Catenacci, *I reati ambientali e il principio di offensività*, in *Rivista quadrimestrale di diritto dell'ambiente*, 2010, p. 58.

²⁰ Considerando 3, "*L'esperienza dimostra che i sistemi sanzionatori vigenti non sono sufficienti per garantire la piena osservanza della normativa in materia di tutela dell'ambiente. Tale osservanza può e dovrebbe essere rafforzata mediante la disponibilità di sanzioni penali, che sono indice di una riprovazione sociale di natura qualitativamente diversa rispetto alle sanzioni amministrative o ai meccanismi risarcitori di diritto civile*". Direttiva 2008/99/CE del Parlamento Europeo e del Consiglio, del 19.11.2008, *Sulla tutela penale dell'ambiente*, Gazzetta Ufficiale dell'Unione Europea, L 328/28, 6.12.2008.

²¹ P. Severino, *Il nuovo diritto penale ambientale. Problemi di teoria del reato e profili sanzionatori*, in *Diritto Penale Contemporaneo*, 2018, 1, p. 191.

2. La direttiva UE n. 1203/2024 sulla tutela penale dell'ambiente e le novità introdotte nella normativa europea

La nuova direttiva dell'Unione Europea in tema di tutela penale dell'ambiente adottata l'11 aprile 2024 che modifica le precedenti direttive 2008/99/CE²² e 2009/123/CE²³ *sulla tutela penale dell'ambiente e all'inquinamento provocato dalle navi e all'introduzione di sanzioni per violazioni*, introduce nuove tipologie di reati ambientali, aumentando in contemporanea anche le sanzioni²⁴. La direttiva è finalizzata a migliorare e rendere più efficace la lotta contro i reati ambientali, in linea con il diritto ambientale dell'Unione europea²⁵.

Uno degli aspetti innovativi che introduce è l'art. 3 denominato *Reati* il quale effettua una qualificazione delle diverse fattispecie di reati ambientali. Le condotte vengono considerate illecite se svolte in violazione di un atto legislativo dell'Unione Europea in materia ambientale o di atto legislativo dello stato membro che attua la legislazione dell'Unione europea. Sulla base della direttiva, la condotta verrà considerata illecita anche nel caso della presenza di un'autorizzazione dell'autorità competente di uno stato membro che è ottenuta in *modo fraudolento, attraverso corruzione, estorsione o coercizione*²⁶.

Il paragrafo 2, dell'art. 3, prevede una serie di condotte illecite in modo molto dettagliato, e inoltre, l'obbligo per gli Stati membri di prevedere nella legislazione penale interna simili condotte. Per quanto riguarda l'elemento soggettivo, la direttiva prevede la punibilità dei reati quando questi ultimi sono commessi con il dolo intenzionale o la grave negligenza²⁷.

I reati ambientali previsti dalla direttiva risultano 20 fattispecie d'illecito²⁸ riguardanti:

²² Direttiva 2008/99/CE del Parlamento Europeo e del Consiglio, del 19 novembre 2008, *sulla tutela penale dell'ambiente*, GU L 328 del 6.12.2008, pp. 28–37.

²³ Direttiva 2009/123/CE del Parlamento Europeo e del Consiglio, del 21 ottobre 2009, che modifica la direttiva 2005/35/CE relativa all'inquinamento provocato dalle navi e all'introduzione di sanzioni per violazioni, GU L 280 del 27.10.2009, pp. 52–55.

²⁴ Cfr. L. Cornacchia, *Diritto penale dell'ambiente*, pp. 12 ss.

²⁵ Articolo 1, Direttiva UE n. 2024/1203 *sulla tutela penale dell'ambiente*.

²⁶ Articolo 3, Direttiva UE n. 2024/1203 *sulla tutela penale dell'ambiente*.

²⁷ Articolo 4, Direttiva UE n. 2024/1203 *sulla tutela penale dell'ambiente*.; Relativamente alla grave negligenza si veda *Considerando 27*, Direttiva UE n. 2024/1203 *sulla tutela penale dell'ambiente*.

²⁸ Cfr. L. Cornacchia, *Diritto penale dell'ambiente*, pp. 12 ss.

- danni rilevanti alla qualità dell'aria o delle acque, a un ecosistema, alla fauna o alla flora²⁹;
- attività come la fabbricazione, l'immissione, la messa a disposizione sul mercato, o l'esportazione di mercurio, materiale radioattivo, sostanze radioattive o altre sostanze pericolose³⁰;
- la raccolta, il trasporto, trattamento o la spedizione di rifiuti³¹;

²⁹ Articolo 3, par. 2, lett. a e b, Direttiva UE n. 2024/1203 sulla tutela penale dell'ambiente: "a) lo scarico, l'emissione o l'immissione di un quantitativo di materie, sostanze, energia o radiazioni ionizzanti nell'aria, nel suolo o nelle acque che provochino o possano provocare il decesso o lesioni gravi alle persone o danni rilevanti alla qualità dell'aria, del suolo o delle acque, a un ecosistema, alla fauna o alla flora; b) l'emissione o l'immissione di un quantitativo di materie, sostanze, energia o radiazioni ionizzanti nell'aria, nel suolo o nelle acque e che provochi o possa provocare il decesso o lesioni gravi alle persone o danni rilevanti alla qualità dell'aria, del suolo o delle acque, a un ecosistema, alla fauna o alla flora."

³⁰ Articolo 3, par. 2, lett. c, d, j e l, Direttiva UE n. 2024/1203 sulla tutela penale dell'ambiente: "c. la fabbricazione, l'immissione o la messa a disposizione sul mercato, l'esportazione o l'uso di sostanze, sia allo stato puro che all'interno di miscele o articoli, compresa la loro incorporazione negli articoli, se tale condotta provoca o può provocare il decesso o lesioni gravi alle persone o danni rilevanti alla qualità dell'aria, del suolo o delle acque, a un ecosistema, alla fauna o alla flora; d. la fabbricazione, l'impiego, lo stoccaggio, l'importazione o l'esportazione di mercurio, composti del mercurio, miscele di mercurio e prodotti con aggiunta di mercurio, se tali condotte non sono conformi ai requisiti di cui al regolamento (UE) 2017/852 del Parlamento europeo e del Consiglio (23) e provocano o possono provocare il decesso o lesioni gravi alle persone o danni rilevanti alla qualità dell'aria, del suolo o delle acque, a un ecosistema, alla fauna o alla flora.; j. sostanze o miscele pericolose, se tali condotte, tale attività pericolosa e tale sostanza o miscela pericolosa rientrano nel campo di applicazione della direttiva 2012/18/UE del Parlamento europeo e del Consiglio (27) o della direttiva 2010/75/UE del Parlamento europeo e del Consiglio e se tali condotte provocano o possono provocare il decesso o lesioni gravi alle persone o danni rilevanti alla qualità dell'aria, del suolo o delle acque, a un ecosistema, alla fauna o alla flora; l. la fabbricazione, la produzione, la lavorazione, la manipolazione, l'impiego, la detenzione, lo stoccaggio, il trasporto, l'importazione, l'esportazione o lo smaltimento di materiale radioattivo o di sostanze radioattive, se tali condotte e tale materiale o tali sostanze rientrano nell'ambito di applicazione delle direttive 2013/59/Euratom (30), 2014/87/Euratom (31) o 2013/51/Euratom (32) del Consiglio e se tali condotte provocano o possono provocare il decesso o lesioni gravi alle persone o danni rilevanti alla qualità dell'aria, del suolo o delle acque, a un ecosistema, alla fauna o alla flora."

³¹ Articolo 3, par. 2, lett. c e d, Direttiva UE n. 2024/1203 sulla tutela penale dell'ambiente: "f) la raccolta, il trasporto o il trattamento dei rifiuti, la sorveglianza di tali operazioni e il controllo dei siti di smaltimento successivo alla loro chiusura, nonché l'attività effettuata in quanto commerciante o intermediario, se tale condotta: 1. riguarda i rifiuti pericolosi quali definiti all'articolo 3, paragrafo 2, della direttiva 2008/98/CE del Parlamento europeo e del Consiglio (25) e concerne quantità non trascurabili di tali rifiuti; oppure 2. riguarda rifiuti diversi da quelli di cui al punto i) e

- la distruzione di habitat naturali e il traffico illegale di specie selvatiche³²;
- riciclaggio delle navi o scarico di sostanze inquinanti dalle navi³³;
- violazioni della normativa sulle sostanze che riducono lo strato di ozono o dei gas effetto serra³⁴;

provoca o può provocare il decesso o lesioni gravi alle persone o danni rilevanti alla qualità dell'aria, del suolo o delle acque, a un ecosistema, alla fauna o alla flora; g) la spedizione di rifiuti ai sensi dell'articolo 2, punto 26, del regolamento (UE) 2024/1157 del Parlamento europeo e del Consiglio (26), se tale condotta concerne una quantità non trascurabile in un'unica spedizione o in più spedizioni che risultino fra di loro connesse;

³² Articolo 3, par. 2, lett. n, o, q e r, Direttiva UE n. 2024/1203 sulla tutela penale dell'ambiente: “n) l'uccisione, la distruzione, il prelievo, il possesso, la commercializzazione o l'offerta a scopi commerciali di uno o più esemplari delle specie animali o vegetali selvatiche elencate nell'allegato IV o nell'allegato V, se le specie che figurano in quest'ultimo sono assoggettate alle stesse misure adottate per le specie di cui all'allegato IV, della direttiva 92/43/CEE del Consiglio (34) e di uno o più esemplari delle specie di cui all'articolo 1 della direttiva 2009/147/CE del Parlamento europeo e del Consiglio (35), salvo laddove tale condotta riguardi una quantità trascurabile di tali esemplari; o) il commercio di uno o più esemplari, o parti o prodotti derivati di essi, di specie animali o vegetali selvatiche elencati negli allegati A e B del regolamento (CE) n. 338/97 del Consiglio (36) e l'importazione di uno o più esemplari o parti o prodotti derivati di essi, di tali specie elencati nell'allegato C di detto regolamento, salvo laddove tali condotte riguardino una quantità trascurabile di tali esemplari; q) qualsiasi condotta che provochi il deterioramento di un habitat all'interno di un sito protetto, o la perturbazione delle specie animali elencate nell'allegato II, lettera a), della direttiva 92/43/CEE all'interno di un sito protetto, rientranti nell'ambito di applicazione dell'articolo 6, paragrafo 2, di detta direttiva, se tale deterioramento o tale perturbazione sono significativi; r) l'introduzione nel territorio dell'Unione, l'immissione sul mercato, la detenzione, l'allevamento, il trasporto, l'utilizzo, lo scambio, il permesso di riproduzione, crescita o coltivazione, il rilascio nell'ambiente o la diffusione di specie esotiche invasive rilevanti al livello dell'Unione”

³³ Articolo 3, par. 2, lett. h e i, Direttiva UE n. 2024/1203 sulla tutela penale dell'ambiente: “h) il riciclaggio delle navi che rientrano nell'ambito di applicazione del regolamento (UE) n. 1257/2013, se tale condotta non rispetta i requisiti di cui all'articolo 6, paragrafo 2, lettera a), del medesimo regolamento; i) lo scarico di sostanze inquinanti effettuato dalle navi rientranti nell'ambito di applicazione dell'articolo 3 della direttiva 2005/35/CE in una delle aree di cui all'articolo 3, paragrafo 1, di detta direttiva, tranne nei casi in cui tale scarico soddisfi le condizioni per le eccezioni di cui all'articolo 5 della medesima direttiva, che provoca o è probabile che provochi un deterioramento della qualità dell'acqua o danni all'ambiente marino;

³⁴ Articolo 3, par. 2, lett. s e t, Direttiva UE n. 2024/1203 sulla tutela penale dell'ambiente: “s) la produzione, l'immissione sul mercato, l'importazione, l'esportazione, l'uso, o il rilascio delle sostanze che riducono lo strato di ozono, allo stato puro o sotto forma di miscele, di cui all'articolo 2, lettera a), del regolamento (UE) 2024/590 del Parlamento europeo e del Consiglio, o la produzione, l'immissione

- estrazione di acque³⁵;
- deforestazione³⁶.

La direttiva prevede, inoltre, che nel caso della presenza di eventi quali la distruzione degli ecosistemi o danni significativi all'ambiente³⁷, gli Stati sono tenuti a includere nella legislazione interna la qualificazione di “*reato qualificato*”. La direttiva, in questo senso, prevede la configurazione del “*reato qualificato*” (art. 3, par. 3, lett. *a* e *b* della direttiva) nei casi di distruzione di un ecosistema di dimensioni considerevoli, o di un habitat all'interno di un sito protetto o danni diffusi e rilevanti irreversibili o duraturi all'ecosistema, agli habitat, alla qualità dell'aria, del suolo o delle acque³⁸.

Un altro aspetto innovativo riguarda le pene detentive minime previste per le fattispecie d'illecito sopraelencate, le quali variano sulla base della gravità del reato, nel rispetto del principio di proporzionalità. Nei casi di reati previsti dall'art. 3, paragrafo 2, lettere da a) a d), lettere f), j), k), l) e r) quando come conseguenza del reato deriva il decesso di una persona, la

sul mercato, l'importazione, l'esportazione o l'uso di prodotti e apparecchiature, e di loro parti, che contengono le sostanze che riducono lo strato di ozono di cui all'articolo 2, lettera b), di detto regolamento o il cui funzionamento dipende da tali sostanze; t) la produzione, l'immissione sul mercato, l'importazione, l'esportazione, l'uso, o il rilascio dei gas fluorurati a effetto serra, allo stato puro o sotto forma di miscele, di cui all'articolo 2, lettera a), del regolamento (UE) 2024/573 del Parlamento europeo e del Consiglio o la produzione, l'immissione sul mercato, l'importazione, l'esportazione o l'uso di prodotti e apparecchiature, e di loro parti, che contengono i gas fluorurati a effetto serra di cui all'articolo 2, lettera b), di detto regolamento o il cui funzionamento dipende da tali gas, o la messa in funzione di tali prodotti e apparecchiature.”

³⁵ Articolo 3, par. 2, lett. m, Direttiva UE n. 2024/1203 sulla tutela penale dell'ambiente: “m) l'estrazione di acque superficiali o sotterranee ai sensi della direttiva 2000/60/CE del Parlamento europeo e del Consiglio (33), se tale condotta provoca o può provocare danni rilevanti allo stato o al potenziale ecologico dei corpi idrici superficiali o allo stato quantitativo dei corpi idrici sotterranei”.

³⁶ Articolo 3, par. 2, lett. p, Direttiva UE n. 2024/1203 sulla tutela penale dell'ambiente: “p) l'immissione o la messa a disposizione sul mercato dell'Unione o l'esportazione dal mercato dell'Unione di materie prime o prodotti pertinenti, in violazione del divieto di cui all'articolo 3 del regolamento (UE) 2023/1115, salvo laddove tali condotte riguardino una quantità trascurabile.”

³⁷ L. Siracusa, *La nuova direttiva europea sulla tutela penale dell'ambiente: ragioni della riforma e struttura offensiva delle fattispecie previste*, in *Lexambiente, Rivista Trimestrale di Diritto Penale dell'Ambiente*, Fasc. 2/2024, p. 56: https://www.lexambientetrimetrale.it/Rivista/23-2024/siracusa_2-2024.pdf.

³⁸ Articolo 3, par. 3, Direttiva UE n. 2024/1203 sulla tutela penale dell'ambiente.

direttiva prevede la pena detentiva di dieci anni³⁹, non escludendo la possibilità per gli stati membri di prevedere pene più severe. Negli altri casi viene prevista la pena detentiva di 5 anni e nei casi di reati qualificati la pena è di otto anni di reclusione⁴⁰.

Oltre alle pene detentive, la direttiva prevede misure accessorie tra le quali:

- *l'obbligo di ripristinare l'ambiente entro un determinato periodo, se il danno è reversibile, oppure risarcire il danno all'ambiente⁴¹, se il danno è irreversibile o se l'autore del reato non è in grado di procedere al ripristino;*
- *l'esclusione dal godimento di un beneficio o di un aiuto pubblico;*
- *l'esclusione dall'accesso ai finanziamenti pubblici, comprese procedure di gara, sovvenzioni, concessioni e licenze;*
- *l'interdizione temporanea o permanente di esercitare un'attività commerciale;*
- *il ritiro dei permessi e delle autorizzazioni per le attività che hanno portato al reato⁴².*

Oltre alla responsabilità penale delle persone fisiche, la direttiva prevede una serie di sanzioni anche per le persone giuridiche le quali possono essere dichiarate responsabili di tali reati, se commessi a vantaggio delle stesse da *soggetti in posizione preminente in seno alla persona giuridica interessata*⁴³ sia individualmente che collettivamente. Le sanzioni pecuniarie previste per le persone giuridiche variano fino al 5 % del fatturato mondiale totale della persona giuridica nell'esercizio finanziario precedente quello in cui è stato commesso il reato a un importo corrispondente a 40 000 000 EUR nel caso dei reati più gravi⁴⁴ e negli altri casi fino al 3 % del fatturato mondiale totale o un importo corrispondente a 24 000 000 EUR⁴⁵.

Con la finalità principale quella di prevenire e contrastare i reati ambientali la direttiva richiede a tutti gli stati membri dell'Unione Europea di prevedere una strategia per la lotta contro i reati ambientali entro il 21

³⁹ Articolo 5, par. 2, lett. a, *Id.*; R. Pereira, *A critical evaluation of the new EU environmental crime directive 2024/1203*, op. cit., p., 160.

⁴⁰ Articolo 5, par. 2, lett. b, c, d, *Id.*

⁴¹ Articolo 5, par. 3, lett. a, *Id.*

⁴² Articolo 5, par. 3, lett. c-e, *Id.*

⁴³ Articolo 6, par. 1, Direttiva UE n. 2024/1203 *sulla tutela penale dell'ambiente*.

⁴⁴ Articolo 7, par 3, lett. a, Direttiva UE n. 2024/1203 *sulla tutela penale dell'ambiente.*; R. Pereira, *A critical evaluation of the new EU environmental crime directive 2024/1203*, op. cit., p. 160.

⁴⁵ Articolo 7, par 3, lett. b, Direttiva UE n. 2024/1203 *sulla tutela penale dell'ambiente*.

maggio 2027⁴⁶. La strategia nazionale, da quanto previsto dall'art. 21 della direttiva deve riguardare gli obiettivi e le priorità della politica nazionale in materia di reati ambientali anche con riferimento a quelli transfrontalieri, ruolo e responsabilità delle autorità competenti nel contrasto alla criminalità ambientale, e inoltre le modalità di sostegno, e la stima delle risorse destinate alla lotta alla criminalità ambientale⁴⁷.

Criticità sono state sollevate da parte della dottrina⁴⁸ in relazione alla direttiva UE sulla tutela penale dell'ambiente, particolarmente relative alla definizione delle fattispecie d'illecito che la direttiva introduce, le quali vendono considerate poco chiare, cosa che comporterà di conseguenza anche delle difficoltà nella loro perseguibilità⁴⁹. Le criticità si sollevano anche riguardo alle sanzioni previste dalla direttiva considerandole *non sufficientemente efficaci*⁵⁰ e al processo d'investigazione e processo degli illeciti ambientali⁵¹. Una parte delle critiche si riferisce anche al fatto che la direttiva non ha incluso nelle fattispecie criminali i reati di pericolo astratto⁵².

3. I possibili cambiamenti nella legislazione penale albanese nel processo di armonizzazione con l'ultima direttiva dell'Unione europea

Nella legislazione albanese il richiamo al diritto alla salute si nota in primo luogo nella Costituzione albanese, nel capitolo V dedicato agli obiettivi sociali. Nell'art. 59 della Costituzione si prevede che: “*Lo Stato, nell'ambito dei poteri costituzionali e dei mezzi di cui dispone, nonché in completamento dell'iniziativa e della responsabilità privata, mira a: (...) d) un ambiente sano ed ecologicamente adatto per generazioni di oggi e del futuro*”.

Un secondo richiamo viene effettuato nel Codice penale albanese nella parte dedicata ai principi generali del diritto penale. A tal proposito l'articolo 1/b, (aggiunto con la Legge n. 8733/2001) denominato *Doveri*

⁴⁶ Articolo 21, Direttiva UE n. 2024/1203 *sulla tutela penale dell'ambiente*.

⁴⁷ *Ivi*.

⁴⁸ L. Cornacchia, *Diritto penale dell'ambiente*, op. cit., pp. 12 ss.; R. Pereira, *A critical evaluation of the new EU environmental crime directive 2024/1203*, in *EUCRIM: European Law Forum: Prevention, Investigation, Prosecution - Protection of the Environment*, 2, 2024, pp. 158-16: <https://doi.org/10.30709/eucrim-2024-012>.

⁴⁹ L. Cornacchia, *Diritto penale dell'ambiente*, op. cit., pp. 12 ss.; R. Pereira, *A critical evaluation of the new EU environmental crime directive 2024/1203*, op. cit., p., 159.

⁵⁰ L. Cornacchia, *Diritto penale dell'ambiente*, op. cit., pp. 12 ss.

⁵¹ *Ibid.*

⁵² R. Pereira, *A critical evaluation of the new EU environmental crime directive 2024/1203*, op. cit., p. 159.

della legislazione penale dichiara che “la legislazione penale della Repubblica d'Albania è tenuta a proteggere l'indipendenza dello stato e l'integrità del suo territorio, la dignità dell'essere umano, i suoi diritti e libertà, l'ordine costituzionale, la proprietà, l'ambiente, convivenza e comprensione degli albanesi con le minoranze nazionali, così come la convivenza religiosa dai reati e la loro prevenzione”⁵³. I reati ambientali sono collocati nel capitolo IV della parte speciale del Codice penale Albanese, dall'articolo 201 fino all'articolo 207/ç, il quale è stato riformato con la legge n. 44 del 2019⁵⁴ prevedendo diverse fattispecie d'illecito in tema di reati ambientali in parziale ravvicinamento con la direttiva 2008/99/CE del Parlamento europeo e del Consiglio, del 19.11.2008, *sulla tutela penale dell'ambiente*.

La novella del 2019 ha riformato in modo significativo il Capitolo IV dedicato ai reati ambientali, introducendo nuove fattispecie di reato⁵⁵. Tra le fattispecie penali introdotte vi sono:

- L'inquinamento dell'aria, acque e suolo, art. 201 c.p.
- Gestione di rifiuti, art. 201/a c.p.
- Trasporto di rifiuti, art. 201/b c.p.
- Attività pericolose, art. 201/c c.p.
- Materiali nucleari e sostanze pericolose radioattive, art. 201/ç c.p.
- Danni a specie protette di flora e fauna selvatiche, art. 202 c.p.
- Commercio di specie protette di flora e fauna selvatiche, art. 202/a c.p.
- Danni agli habitat nelle aree protette dell'ambiente, art. 202/b c.p.
- Sostanze che riducono lo strato di ozono, art. 203 c.p.
- L'abbandono dell'animale da compagnia, art. 207/a c.p.
- L'uccisione intenzionale dell'animale da compagnia, art. 207/b c.p.
- Maltrattamento di animali, art. 207 /c c.p.
- Combattimenti tra animali, art. 207/ç c.p.⁵⁶.

Nonostante le modifiche introdotte già dal 2019, l'attuazione della legislazione relativa ai reati ambientali rimane ancora problematica. Sull'attuazione ed effettività della legislazione penale albanese in tema di reati ambientali ci possiamo riferire al rapporto sull'Albania presentato dalla Commissione nell'ottobre 2024 al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni⁵⁷. Nel

⁵³ Art. 1/b, *Doveri della legislazione penale*, Codice penale albanese.

⁵⁴ Legge n. 44/2019, *Sulle modifiche nella legge n. 7895, data 27.1.1995, "Codice penale della Repubblica dell'Albania"*, modificato.

⁵⁵ E. Furramani, *La nuova riforma penale sui reati ambientali in Albania*, cit., p. 116.

⁵⁶ *Codice Penale della Repubblica dell'Albania* approvato con la legge n. 7895, data 27.1.1995, aggiornato.

⁵⁷ EUROPEAN COMMISSION, *Albania 2024 Report*:

Capitolo 27 del rapporto, il quale si riferisce al Ambiente e cambiamenti climatici si evidenzia che l'Albania deve garantire un monitoraggio ambientale in linea con gli standard dell'Unione Europea e un'adeguata capacità amministrativa per l'attuazione e l'applicazione dell'*acquis* ambientale⁵⁸. Dalle raccomandazioni della Commissione Europea nel rapporto si evidenzia, altresì, la necessità di raggiungere il pieno allineamento con la direttiva sulla responsabilità ambientale. Inoltre si sottolinea la necessità di migliorare e rafforzare la capacità di applicazione della normativa e quella investigativa⁵⁹. La Commissione evidenzia la necessità di ulteriori sforzi per “(...) *allinearsi all'acquis dell'UE sulla qualità dell'aria, allineamento con l'acquis dell'UE in materia di acque, protezione della natura, e anche l'allineamento completo con l'acquis dell'UE del quadro giuridico per la gestione dei rifiuti*”⁶⁰.

Il rapporto mette in evidenza che ci sono state delle misure per affrontare il cambiamento climatico, però le ultime risultano insufficienti a garantire il completo allineamento con l'*acquis* dell'UE in materia ambientale. Questa inadeguatezza si nota anche nelle strategie o piani settoriali relativi ai cambiamenti climatici⁶¹.

Da quello che si nota nei Rapporti degli ultimi tre anni presentati dalla Commissione Europea l'Albania bisogna rafforzare le capacità d'ispezione e di applicazione della legislazione per far fronte ai reati ambientali in modo più efficace, particolarmente in relazione al principio di derivazione comunitaria “*chi inquina paga*”⁶² introdotto anche nella legislazione albanese con la Legge n. 10431 del 9.6.2011, *Sulla tutela dell'ambiente*. Sulla base di questo principio “*La persona fisica o giuridica, le cui azioni od omissioni influiscono sull'inquinamento dell'ambiente, si assume la responsabilità finanziaria, sopportando i costi causati da tale danno o*

https://neighbourhood-enlargement.ec.europa.eu/document/download/a8eec3f9-b2ec-4cb1-8748-9058854dbc68_en?filename=Albania%20Report%202024.pdf. Nella stessa linea sono anche i rapporti precedenti tra cui: EUROPEAN COMMISSION, Albania 2023 Report:

https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_690%20Albania%20report.pdf. e EUROPEAN COMMISSION, Albania 2022 Report:

<https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/Albania%20Report%202022.pdf>.

⁵⁸ EUROPEAN COMMISSION, Albania 2024 Report, pp. 85 ss.

⁵⁹ EUROPEAN COMMISSION, Albania 2024 Report, pp. 85 ss.

⁶⁰ *Ivi*, pp. 85 ss.

⁶¹ *Ivi*, p. 87.

⁶² Legge n. 10431 del 9.6.2011, *Sulla tutela dell'ambiente*.; Articolo 191 del Trattato sul funzionamento dell'Unione europea.

*rischio di danno all'ambiente. Tali costi comprendono i costi per la valutazione del danno ambientale, la valutazione delle misure necessarie, nonché i costi per evitare il danno ambientale, compresi i costi di riabilitazione e risarcimento delle persone fisiche o giuridiche lese*⁶³.

Da come sopra esposto la nuova direttiva n. 2024/1203 dell'Unione Europea sulla tutela penale dell'ambiente ha ampliato di nuovo la tipologia delle fattispecie d'illecito penale contro l'ambiente. Questa normativa sicuramente rimodellerà in modo significativo le legislazioni penali dei paesi europei i quali hanno tempo per adeguarsi fino al 21 maggio 2026, ma possibili cambiamenti sono da aspettarsi anche nella legislazione penale albanese, considerato il processo d'integrazione dell'Albania nell'Unione Europea e l'apertura del primo capitolo della negoziazione.

4. Considerazioni conclusive

Considerando il processo d'integrazione in cui si trova la Repubblica d'Albania, si ritiene necessaria una completa armonizzazione della legislazione penale con la normativa dell'Unione Europea in materia ambientale. Bisogna tuttavia sottolineare che questo allineamento non è l'unico elemento da tenere in considerazione. La dovuta attenzione deve essere data all'effettiva attuazione e applicabilità⁶⁴ della normativa, tenuto conto che molto spesso i reati ambientali non vengono affrontati con la dovuta serietà e spesso ricondotti nella categoria di "crimini senza vittime"⁶⁵.

Nonostante il parziale allineamento della legislazione penale albanese in materia di reati ambientali con la direttiva UE del 2008 *sulla tutela penale dell'ambiente*, si rileva una scarsa efficienza e applicazione della stessa, e inoltre l'azione preventiva e/o repressiva da parte delle autorità competenti risulta inadeguata per un contrasto efficace alla criminalità ambientale, particolarmente nei casi in cui quest'ultima è svolta nel contesto della criminalità organizzata.

Un'altra questione problematica da tenere in considerazione riguarda la fase

⁶³ Art. 12, Legge n. 10431 del 9.6.2011, *Sulla tutela dell'ambiente*.

⁶⁴ In questo senso M. Faure, *Environmental criminal law research*, in (A cura di) M. C. Meliá, L. Cornacchia, *Ecomafie: Crimine organizzato business e ambiente*, FrancoAngeli, Milano 2024, p. 430.

⁶⁵ S. Zirulia, *I riflessi del danno ambientale sulla salute umana*, in *Diritto penale contemporaneo* n. 1, 2018, pp. 213 ss.; G. M. Vagliasindi, *Targeting transnational environmental crime through a multifaced approach: Towards an inclusive governance of serious threats to sustainable development*, in V. Mitsilegas et al. (ed.), *Transnational crime. European and Chinese perspectives*, Routledge 2019, p. 199.; (A cura di) M. C. Meliá, L. Cornacchia, *Ecomafie: Crimine organizzato business e ambiente*, cit. p. 10.

dello svolgimento delle indagini relative ai reati ambientali. Maggiori sforzi sono necessari per migliorare le modalità con le quali vengono svolte le indagini, le quali richiedono necessariamente un coordinamento istituzionale a vari livelli⁶⁶ nonché cooperazione e coordinamento a livello internazionale. Simile problematica si rileva anche nei dati rapportati dalla Relazione del Procuratore Generale sullo stato della criminalità in Albania per il 2023⁶⁷, dove il numero di crimini ambientali che arrivano in tribunale è molto più basso in relazione al numero totale delle denunce effettuate⁶⁸, principalmente a causa della mancanza delle prove. In questa direzione, si ritiene necessaria la creazione delle sezioni specializzate nell'investigazione dei reati ambientali e la formazione specializzata degli ufficiali che si occuperanno del contrasto alla criminalità ambientale, accompagnata da una maggiore sensibilizzazione della società e istituzioni.

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⁶⁶ E. Furramani, *La nuova riforma penale sui reati ambientali in Albania*, cit., p. 120.

⁶⁷ *Relazione del Procuratore generale sullo stato della criminalità in Albania per il 2023*, pp. 117 ss.; *Relazione del Procuratore generale sullo stato della criminalità in Albania per il 2022*, p. 144.

⁶⁸ *Ibid.*

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PLEA AGREEMENT UNDER THE CRIMINAL PROCEDURE LAW OF NORTH MACEDONIA

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Abstract

In the constant search to find a permanent solution and facilitate the criminal procedure in order to be more efficient and better serve the purposes of justice, the legislators in the countries with Continental law are determined to implement the concept of mixing instruments from Common law tradition as a trend that is quite present in the European area and that are driven by the efficiency of criminal justice in the USA, on the one hand and on the other hand, the struggle with the pressure of backlog of cases, as well as with the criticism of the inefficiency of the judicial system in the Continental countries with a mixed system of criminal procedure, which leads to the incorporation of Plea agreement in the legislation of the respective countries.

With the implementation of these legal instruments, it is expected that the standard procedures will be shortened and certainly the expenses will be reduced for everyone involved in them. Such a procedure is made possible with the help and implementation of the instrument Plea bargaining, and with which the suspect in a procedure can make an agreement to reduce the sanction, simply only if he admits that he is guilty of the offense for which is suspected.

Key words: *criminal procedure, plea deal, plea agreement, sanction, efficiency.*

Introduction

Criminal procedure is regulated by the Criminal Procedure Law and as such has some characteristics that derived from other judicial and non-judicial procedures. The criminal procedure is binding for the court and the parties because it is regulated by mandatory law (*ius cogens*). The criminal procedure is instrumental in the sense that it is not an end in itself, but a

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tool that serves to implement substantive criminal law. This procedure is complicated and consists of a large number of actions which are grouped into several stages and phases of action. The criminal procedure in a legal democratic state must be regulated by law and implemented in such a way that the defendant is guaranteed the right to a fair trial provided for by the provisions of Article 6 of the European Convention for the Protection of the Rights and Fundamental Freedoms of human rights and the provisions of Article 14 of the International Covenant on Civil and Political Rights.²

The criminal procedure is determined by the historical, social and political circumstances of the society of the respective state and as such they bear the characteristics of the state - the society in which it is applied. Therefore, the correct understanding of the criminal procedure is possible only with the recognition of the conditions and circumstances in which it is applied. In this context, the law of criminal procedure, like any other legal branches, is formed and developed in accordance with the concrete historical conditions of the development of social relations. Thus, the entire historical development so far has shed light on three basic forms of criminal procedure, namely: adversarial accusatory (plaintiff) criminal procedure, non-adversarial inquisitorial (investigative) criminal procedure and mixed accusatory-inquisitorial forms.

The accusatory-adversarial procedure constitutes a dispute that takes place between the parties - the plaintiff and the accused before an independent and impartial court. On the other hand, the inquisitorial procedure is characterized by the greater intervention of the state power (through its organs) in the resolution of the dispute between the perpetrator of the criminal offense and the injured person. The contemporary procedure is characterized as a mixed procedure and contains elements of one and the other form of criminal procedure.

In the new Law on criminal procedure which was adopted in 2010 and entered into force in 2013³, many new and different instruments were foreseen and framed, namely procedures and mechanisms that originate from adversarial systems. The possibility of a plea agreement was included among them.

Plea bargaining is defined as a procedure in which the accused and the prosecutor reach a mutually accepted decision on the criminal case, which is then approved by the court⁴.

² Ejup Sahiti, Rexhep Murati: *E drejta e procedures penale*, Prishtine, 2013, fq 27

³ Law on criminal procedure, Official gazette of Rep. of North Macedonia no.150/2010

⁴ Definicion sipas : West's encyclopedia of American Law

In fact, the purpose of the plea agreement is to allow the entire case to be resolved in a shortened procedure, or, instead of going to a court procedure, for which a lot of time is needed, and above all a lot of resource, the suspect agrees consciously and with free will to accept the guilt for the criminal offense for which he is suspected to have committed, with the full understanding that for this he receives a much more favorable punishment, compared to that of which he would receive if convicted in ordinary court proceedings.

1. Plea agreement according the Criminal Procedure Law of 2010

With the new law on criminal procedure (LPP), which was adopted in 2010 and entered into force in December 2013, the previous concept of the inquisitorial procedure designed as an official court investigation was completely changed.

The abandonment of judicial formality was more than just a change in the appearance of the existing model; in essence the goal was that this reform represents relief for all involved parties and the shortening of the standard duration of judicial processes as well as the reduction of expenses which somehow present a burden for all parties.⁵

As for the new Law on criminal procedure, it is very important to understand that the new system is not just a simple change of judicial investigation to that of the prosecution. According to the new Law on Criminal Procedure, the public prosecutor will not do the same thing that the investigating judge did. Then, the police investigation and that of the prosecution in the new system are completed and merged, while the judicial investigation is practically ignored, and in no case is it replaced by any formal investigation of the prosecution.

The new solutions which were brought and which are essential and in essence are solutions which reform the procedural action and based on them present Anglo-Saxon institutes which have many years of tradition in the states with customary law or common law with mandatory adaptation to European legislative practice.

The law of traditional criminal procedure and judicial practice, which are characteristic of the European space, for many years opposed and avoided

⁵ Никола Матовски, Гордана Лажетиќ Бужаровска, Гордан Калајџијев, Казнено процесно право, второ изменето и дополнето издание, универзитетски учебник, Академик, Скопје, март 2011 Дивна Илиќ, Казнено процесно право,(учебно помагало), Скопје, 2015

the framing in the judicial practice of the agreement for admission of guilt or consensual justice, starting from the determination that the criminal sanction is defined in such a way defined by law and does not recognize any kind of dialogue, compromise, or agreement, considering the fact that the main goal is the protection of fundamental social values.⁶

In the literature of the criminal procedure for a long period we can come across attitudes and accusations that the mixed criminal procedure is characterized by slowness, pronounced formalism, inflexibility and unnecessary waste of time and money, while as a result of all this, inefficiency and parties dissatisfied in this criminal procedure.

With the reforms that were introduced in the law on criminal procedure of North Macedonia, but also in general in the European practice, it is expected that with the implementation of the plea agreement, in a large part, these remarks will be overcome and criminal justice will be made possible. It is carried out in the shortest possible time so that the parties do not have additional obligations nor are they obliged with additional deadlines and hearings.

1.1 Basic characteristics of plea agreement procedure

The law on criminal procedure of 2010 foresees a procedure for bringing the judgment based on the agreement of the public prosecutor and the suspect, which for the first time allows for an agreement between the parties, with the sole purpose of reaching an acceptable joint solution. This procedure is regulated in Section D in the part of accelerated procedures, chapter XXIX from article 483-490 of the law in question.

This procedure has the following basic characteristics:⁷

- Severity of the criminal offense – the agreement is permissible for all criminal offenses, regardless of the severity of the prescribed criminal sanction;
- Mitigation-reduction of the punishment - when determining the criminal sanction, the competent judge is obliged to bring it according to the type and height, based on the legal framework for the specific criminal offense, but not below the limits for mitigation-reduction of the punishment determined by the Criminal Code;
- Consent from both parties – proposal – the agreement is an expression of prior consent from both parties and it is not allowed for this

⁶ Здружение за кривично право и криминологијана Македонија, „Македонска ревија за казнено право и криминологија“, 2-ри август Штип, 2013

⁷ Gordana Buzharovska, Majkl G. Karnavis, Dejvid Re, Plea bargaining, Guidelines for professionals, Skopje, OSCE, 2010

type of agreement to be submitted by only one party. It is not at all important from which side the beginning of the agreement procedure has been initiated, but it is important that both parties (the parties and the defender) are willing to participate in the agreement procedure;

- When the agreement is possible - for criminal proceedings there are no restrictions regarding the phase of the procedure when the agreement is allowed, so from there the agreement is allowed at any moment from when the public prosecutor will bring an order to start the investigative procedure until in the assessment of the indictment;

- The model of the agreement - the Macedonian legislator has accepted the model for the agreement for criminal sanctions (sentence bargaining), but not for the criminal offenses that will be included in the charge. Indeed, the proposed agreement may include all the criminal offenses or a part of them for which an order for investigative procedure has been brought, but for the offenses included in the ordinance for which no agreement has been reached, the procedure must definitely continue;

- Is admission a prerequisite for a plea agreement – a plea is not a prerequisite for the initiation of the plea agreement procedure during the investigative procedure, which is not the case for a plea agreement at the indictment assessment stage when the plea is a necessary prerequisite for the initiation of the plea agreement procedure ;

- Protection of the injured party - in order to protect the interests of the injured party, it is a prescribed obligation of the public prosecutor to the proposed agreement, together with all the provided evidence, he must attach a written statement signed by the injured party regarding the type and the height of the property - legal claim. It is possible that during the agreement, compliance is reached for a part of the claim of the injured party or it is not at all the subject of consideration during the procedure for agreement, during which the injured party is not left without protection and in the case when his legal property claim is not at all has not been the subject of review or has only been partially accepted, it can be invoked in the judgment brought with trigger of the proposal - the agreement accepted as a basis to realize his rights in a civil dispute;

- Mandatory presence of a defense attorney - suspects must have a defense attorney of their own choosing or assigned to them according to their official duties from the moment of the initiation of the agreement procedure. In this way, the possibilities for mandatory protection during the criminal procedure are expanded, which aims to ensure the same forces and enable the suspect, who according to the rule is a layperson for justice, to participate in the procedure for agreement without having the opportunity

for protection and evaluation of the compliance goal from the beginning and the final result of this procedure;

- Prohibition of the participation of the court in the agreement - it is clearly foreseen the non-participation of the court in the procedure for the agreement, which aims to prevent the court from influencing the parties and the defense in any way regarding the decision or to be involved in the procedure for agreement as well as regarding the choice of the type and height of the criminal sanction.

1.2 Subject of the agreement

The type and level of the sanction, which must be included in the proposal - agreement, is subject to agreement. In the agreement- proposal, the exact sanction that is proposed and determined according to the type and level, which is determined in the legal framework for the specific criminal offense, must always be correctly stated, but the same must not be below the limits for mitigation -reduction of the punishment determined by the Criminal Code.

The type and the scope of legal claim can often be the subject of an agreement, but only when the suspect has agreed during the agreement procedure to consider and discuss the legal claim requested by the injured party. This means that even in this case there is certain relief and talks between the parties in the procedure, namely they can talk about the subject for agreement.

1.3 Elements of the agreement proposal

Article 485 of the Law on Criminal Procedure clearly defines the elements of the proposal - agreement, which can be divided into several categories: ⁸

- input data:
 - data on the participants in the settlement procedure (the public prosecutor, the suspect and his defense counsel) and
 - description and legal qualification of the criminal offenses with which the proposal - the agreement is concerned (it may be about all or a part of the criminal offenses for which the investigative procedure is developed);
- the subject of the agreement;
- the proposed sanction according to the type and height (main penalty, secondary penalty, security measure, alternative measure or other measures provided for in the KP);

⁸ Law on criminal procedure, Official gazette of Rep. of North Macedonia no.150/2010

- the type and amount of the property-legal claim and the method of its realization, if the suspect has agreed that it be the subject of an agreement;
- statements from the parties:
 - the suspect's statement that he consciously and voluntarily accepts the agreement proposal and the consequences arising from it and
 - statement from the public prosecutor and from the suspect that they waive the right to appeal if a judgment is brought by which the proposal - agreement will be accepted;
- the method of compensating the costs of the procedure
- final part:
- the signature of the public prosecutor, the suspect and his defense and
- date and place where the agreement proposal was concluded.

1.4 The plea bargaining process

The plea agreement represents a very important task for the defense lawyer. At first glance, it seems that this process goes in favor of the prosecutor, because a guilty verdict can easily be reached, without going through a long court process, while the defense lawyer has the most difficult task of reaching the most favorable conclusion and result possible for the client, without going to trial and risking a conviction, accompanied by a very heavy and serious penalty.⁹

The basic goal of the defense lawyer is to achieve the best possible result for his client in order to protect him and ease his punishment due to the admission of the criminal offense committed.

It should be noted that there is no single formula for determining the action of the defense lawyer because each case has its own individual facts and specifics, and his action is also determined by objective factors such as: the prosecutor he cooperates with, his strengths and the weaknesses of the assertions - namely the charges of the prosecution, the nature of the accusation itself, then the nature of the circumstances of the case, the previous history of the parties and they are: the accused person and the victims, the judge who examines the case, the place where the criminal

⁹ Gordana Buzharovska, Majkl G. Karnavis, Dejvid Re, Plea bargaining, Guidelines for professionals, Skopje, OSCE, 2010

offense took place which guilt is accepted and the location where the judicial procedure for the specific case takes place.¹⁰

All of these factors are beyond the control of the defense attorney, and they are still known as immutable facts. In certain cases, it could be argued that a certain prosecutor or judge should be disqualified, due to an unavoidable conflict of interest, but other than that there is nothing more to be done than to accept the facts as such and to see how they can be used to obtain ideal and beneficial plea deals for the accused person.¹¹

In any case, the defense attorney should begin to prepare for the case in exactly the same way as he would prepare for trial, namely by analyzing the case and examining it down to the smallest elements. Then the theory for the specific case can be developed, determines which investigative activities should be implemented, analyze the position of the prosecution, namely the strengths and weaknesses of their argumentation.

In essence, the concrete case must be analyzed in the same way as if it were to go to trial. Only if the defense attorney thoroughly prepares the case for trial will he or she truly possess both sufficient knowledge and data to make a reasonable assessment of the particular case and be able to advise his or her client on relevant way of whether I should accept and start the procedure for plea agreement or not.

All that follows within the framework of criminal procedure, which possesses elements of the accusatory system, such as, for example, the right to collect evidence, cross-examine witnesses and plea bargain, is based almost entirely on the identification and choosing the most appropriate theory of the case.

Taking into account that it is known that in each case - due to the unchanged facts - there is no specific theory of the case, which can result in an absolute acquittal, it can be said that in the largest number of cases, the plea agreement in some way represents a possible future solution. Considering this fact, it should be noted that the plea agreement, as an instrument, does not represent a possible theory of the case.¹²

¹⁰ Здружение на судии на Република Македонија, Основни стандарди и практична примена за спогодувањето за кривична санкција во кривична постапка, ноември, 2013

¹¹ Gordana Buzharovska, Majkl G. Karnavis, Dejvid Re, Plea bargaining, Guidelines for professionals, Skopje: OSCE, 2010

¹² Здружение на судии на Република Македонија, Основни стандарди и практична примена за спогодувањето за кривична санкција во кривична постапка, ноември, 2013

Although, perhaps the circumstances in the present case present a more suitable solution for a plea agreement - because it would be more appropriate at the beginning of the procedure to request more favorable treatment from the judge - the theory of the case must still be prepared, if not for any other reason, then so that the case can be prepared for trial, if the agreement is not reached or not allowed, at the end of the plea agreement procedure.¹³

After the detailed analysis of the case, each party must draw its own conclusion, that for the specific case there should be a new and complete judicial procedure, namely is it worth risking in the specific case for that criminal offense committed or should go to trial or, again, the matter is suitable for negotiations, that is to think seriously about the attempt to reach a plea agreement, and the perpetrator admits the guilt, which would save the parties from the loss of additional time and material resources.

The answer to this situation always depends on the specific case, namely: the facts available as well as the circumstances that dictate in which of these two categories the specific case will be found - even though a certain degree of objectivity: anyway in the end it is essential and important to be realistic, always taking into account the best interest of the client.

The final decision on whether the plea agreement will be entered into the procedure even if it is carried out, whether the prosecution's final offer will be accepted, is brought by the accused person, namely the client.

Of special and exclusive importance is that the same is understood and respected by the defense lawyer, in each particular case.

Just for that, before I realize the contact with the prosecutor, as well as before thinking about the eventual plea agreement, the defense lawyer must obtain the corresponding authorization from his client that he has the complete permission to start the plea agreement procedure.

In order for the client to give informed consent based on all available information - the defense lawyer is obliged to explain to his client:¹⁴

- What is that plea agreement;
- How does the plea deal work;
- Positive and negative elements of the plea agreement;
- Strengths and weaknesses of defense arguments in the specific

case;

¹³ Gordana Buzharovska, Majkl G. Karnavis, Dejvid Re, Plea agreement; Guidelines for professionals , Skopje: OSCE,2010

¹⁴ Gordana Buzharovska, Majkl G. Karnavis, Dejvid Re, Plea agreement; Guidelines for professionals , Skopje: OSCE,2010

- Potential pitfalls and negativities, which the trial carries with it, despite the resolution of the case through the plea agreement.

During the consultations with the client, the defense lawyer must explain in detail the process through which he will communicate in cooperation with the public prosecutor, all this with the sole purpose of reaching a plea agreement.

The client must be clearly and fully explained and he must be convinced that he will be notified of each separate offer, which would come from the prosecution and that the prosecutor will not be given any counter-offer with to which additional damage would be caused, unless the same has not been notified and the same is not allowed by the customer.

In other words, the defense lawyer fully assumes the responsibility that nothing will happen, without the knowledge and permission of the client, during the duration of the procedure.

In order to ensure the best practice, it is recommended to prepare a standardized memorandum or notification which will be given to the client, so that he can be informed in detail and more concretely and learn the steps in the procedure and during the course of the achievement of the plea agreement. For that and in a complementary way, when any kind of offer is received from the prosecutor, it is better that such information is provided in written form and the same is delivered personally to the client for whom it is concerned.¹⁵

Of particular importance is the existence of transparent evidence, regarding what was offered, answered, rejected, accepted, etc.

In certain jurisdictions, where the plea agreement is allowed, the prosecutor is expected, and in some cases is required to provide proof that all the plaintiff witnesses or victims have been notified of the procedure.

But it does not mean that the prosecutor must ask for and receive permission from the prosecuting witness or the victim, so that he can make a plea deal. It is common for the prosecution witness or the victim to be notified in time of the court hearing regarding the plea agreement and the same to be properly invited, participate and eventually give a statement in court.

From the perspective of transparency and accountability, it is recommended that the prosecutor inform the witness, plaintiff or victim about the agreement process in time. Obtaining additional information in time and

¹⁵Здружение на судии на Република Македонија, Основни стандарди и практична примена за спогодувањето за кривична санкција во кривична постапка, ноември, 2013

consulting with the witness - plaintiff or the victim can be quite useful when assessing the amount of punishment accepted for the perpetrator in the specific case. In that way, also, plaintiff-witnesses or victims are enabled to be part of the overall process.¹⁶

As for the plea bargaining process, it begins with a certain sentence that would be acceptable to the client and realistic enough to be accepted by the judge. Determining the level of the penalty, as mentioned above, depends on many factors.

First, certain research must be done in order to see if there are known cases with similar circumstances and accusations, which fall under the same powers, as well as the concrete criminal-legal event, so that the punishment determined in the case preliminary can serve as an example in the concrete case of the client: as a way to establish the relevant starting point.

Such research may obviously require background research, especially if the defense attorney does not act regularly in the competent court. In such circumstances, the quickest way of obtaining such information is to contact local members of the bar. It can also be useful to understand the daily personal habits and the way of action of the prosecutor and the judge, who acts in the concrete case.

The more information provided, the better. Bearing in mind that no judicial process can be developed and placed in complete separation and isolation, it is important to know the environment in which the people who bring the final decision work and the influences they have effect on them.

The prosecutor must be flexible and open enough to agree that the case be resolved, without going to a public trial, however, the judge is responsible for accepting the concrete plea agreement, only if he is convinced that the community where the headquarters is located of the court will be satisfied with the final solution of this case.¹⁷

The negotiation procedure ends with the signing of the proposal-agreement by the prosecutor and the suspect and his lawyer.

1.5 The judge of the preliminary procedure and the hearing for the evaluation of the agreement proposal

When a agreement proposal will be submitted to the court and the same has been signed by both parties, then the second phase of the procedure for the

¹⁶Здружение на судии на Република Македонија, Основни стандарди и практична примена за спогодувањето за кривична санкција во кривична постапка, ноември, 2013

¹⁷Здружение на судии на Република Македонија, Основни стандарди и практична примена за спогодувањето за кривична санкција во кривична постапка, ноември, 2013

agreement, which has to do with judicial evaluation of the proposal of the agreement, officially begins. Considering the fact that agreement proposal can be presented at the beginning of the investigation procedure, in the process of evaluation of the agreement proposal, role and active status in the investigation phase has the judge of the preliminary procedure. According to Article 488 of the LPP, the agreement proposal is examined in a special hearing which is scheduled by the judge of the preliminary procedure within 3 days after the receiving of the agreement proposal. From this predetermined deadline, it appears that the legislator insists that the action be developed quickly and efficiently. The submitters of the agreement proposal, respectively the parties and the defender, are invited to the hearing.¹⁸

The judge in the hearing first investigates the following circumstances:¹⁹

- is the agreement proposal submitted voluntarily and
- is the suspect aware of the legal consequences of their admission,
- Is the suspect aware of the consequences related to the legal claim

and

- Is the suspect aware of the costs of the procedure?

It is necessary for the judge to carry out a real dialogue with the suspect (with a set of questions), to assess the legality of the plea and the agreement and not only to formally ask questions that will fulfill only the formal legal aspect, research all the circumstances that will lead to the conclusion that the legal conditions for the agreement have been met.

If it is established that the statement for acceptance of guilt is incomplete or brought under pressure or for other reasons such as: hiding the true perpetrator, desire for publicity, mental state, etc., then the judge should not accept the proposed agreement.

After investigating the highlighted circumstances, the judge of the preliminary procedure is obliged to instruct the parties and the defender:²⁰

- that they can withdraw from the submitted agreement until the decision is made by the court, and it will be counted as if it was not submitted at all and all documents will be returned to the public prosecutor for further action and

¹⁸ Gordana Buzharovska, Majkl G. Karnavis, Dejvid Re, Plea bargaining, Guidelines for professionals, Skopje: OSCE, 2010

¹⁹ Никола Матовски, Гордана Лажетиќ Бужаровска, Гордан Калајџијев, Казнено процесно право, второ изменето и дополнето издание, универзитетски учебник, Академик, Скопје, Март, 2011

²⁰ Article 488

- acceptance of the draft - agreement is considered as a waiver of the right to appeal in the brought judgment by which the proposal - agreement submitted is accepted in its entirety.

The parties may withdraw from the proposed agreement, and the withdrawal may be:²¹

- explicit - if the public prosecutor, the suspect and his defense until the decision is made, give up the proposal - the agreement presented or
- implicit - if the public prosecutor, the suspect and his defense during the session submit a request for the assignment of a sanction different from the sanction foreseen in the agreement proposal.

1.6 Judgment according to the draft agreement

If the draft-agreement will be evaluated as acceptable, the competent court will issue a judgment based on the agreement proposal and during the execution of this judgment the court may not impose a criminal sanction different from the criminal sanction proposed in the agreement proposal. From this determination, it appears that the court does not dare to make any changes in the proposed sanction (main or secondary measure or penalty) that the parties have agreed upon.²²

If it assesses that the proposed sanction is not completely acceptable, it brings a decision to reject the proposal - the agreement with which the documents are returned to the prosecutor (in the case when the agreement is developed during the investigative procedure) or continues with the action (when the agreement is developed in any of the stages of later in the procedure).

The judgement, which is brought on the basis of the agreement proposal, contains all the elements of the criminal verdict in accordance with the Law on criminal procedure. It is announced immediately, and is prepared in written form within 3 days from the announcement.²³

The judgement is handed over to the public prosecutor, the suspect and his defense, as well as the injured party, who, if he is not satisfied with the decision on the type and amount pronounced for the property-legal claim, can realize his right in a contested procedure. With the conduct of the judgment in a meritorious manner, it is decided in the specific criminal case; it has the character of a final judgment and is enforceable.

In this way, it is possible to finish the procedure at the earliest possible stage from its beginning, and the impossibility of appealing the judgment

²¹ Ibid

²² Law on criminal procedure, Official gazette of Rep. of North Macedonia no.150/2010

²³ Law on criminal procedure, Official gazette of Rep. of North Macedonia no.150/2010

brought leads to the final result that is fast, efficient, fair and acceptable to both parties, which is calculated as special situation in procedural criminal law.

1.7 Rejection of the agreement proposal

The court brings the negative decision in the form of a decision to reject the agreement proposal, if:²⁴

- it will be proven that the evidence provided for the important facts for the determination and measurement of the criminal sanction do not justify the imposition of the proposed criminal sanction which is included in the agreement proposal or

- the public prosecutor, the suspect and his defense counsel during the hearing submitted a request for the assignment of a different criminal sanction from the criminal sanction proposed in the agreement proposal.

Against the decision which was brought by the court and with which the agreement proposal is rejected, no appeal is allowed and it is not foreseen by law.

In the event of a ruling rejecting the agreement proposal, the preliminary judge submits the documents to the public prosecutor, while the minutes from the session and the proposal-agreement cannot be used during the further course of the procedure because they are separated in a special sealed envelope and kept separately from other documents.

The law on criminal procedure does not contain any kind of restriction regarding the possibility that the parties may again submit a proposal - agreement to the court after it previously rejected their agreement proposal which has been assessed as inadmissible.

2. Assessment of the indictment

As regards the stage when the indictment is reviewed, the guilty plea is a prerequisite for conducting a plea-bargaining procedure between the public prosecutor and the defendant and his/her defence attorney.

Unlike the investigation procedure where both parties may initiate plea bargaining, in the stage of review of the indictment the initiative comes from the defense who is willing to admit the crimes contained in the indictment. The suspect may express his/her willingness to confess in two ways:

- by filing a written statement indicating willingness to plead guilty to all or certain crimes contained in the indictment – whereby the judge, i.e.

²⁴ Gordana Buzharovska, Majkl G. Karnavis, Dejvid Re, Plea bargaining, Guidelines for professionals, Skopje:OSCE,2010.

the chamber for review of the indictment is obliged to schedule a hearing to review the confession, or

- by making a verbal statement at the hearing for evaluation of the indictment, that he pleads guilty for all or certain crimes contained in the indictment – whereby the proceeding continues in accordance with the provisions on the conduct of a hearing when there is a guilty plea.

The ruling for acceptance of the guilty plea reached by the competent judge, i.e. by the chamber for review of the indictment is a prerequisite for initiating the procedure. If the judge or the chamber for review of the indictment does not accept the guilty plea, this is entered in the records, the parties present are informed of the ruling and the hearing for review of the indictment resumes.

The guilty plea, i.e. its adjunction in the records may not be used as evidence further in the criminal procedure and they are to be closed in a separate file and set aside from the case files. The judge, i.e. the chamber will adopt a ruling accepting the guilty plea after determining that:

- it is made voluntarily, in full mental capacity and while being fully aware of any consequences thereof, including any consequences related to the civil claim on property and the costs related to the criminal procedure, and

- there is sufficient evidence proving the guilt of the suspect.

Unlike plea bargaining during the investigation procedure where there is no time limit to plea bargaining, in the indictment procedure, the parties have only 15 days to reach an agreement for a mutually acceptable criminal sanction and to file a draft plea bargaining agreement to the judge, i.e. to the chamber for review of the indictment.

If the parties fail to file a draft plea bargaining agreement within this time period, the hearing for review of the indictment continues. When a draft plea bargaining agreement is submitted, it is followed by an assessment which might be:

- positive – the draft plea bargaining agreement is accepted, whereby the judge or the chamber for review of the indictment delivers a judgment based on the provisions on delivering a judgment based on a draft plea bargaining agreement, or

- negative – the draft plea bargaining agreement is not accepted, whereby the judge or the chamber for review of the indictment adopts a decision to reject the draft plea bargaining agreement and reaches a decision regarding the indictment. Any rejected draft plea bargaining agreement, may not be used as evidence further in the criminal procedure.

1. Statistical overview of the implementation of plea agreement in North Macedonia

In order to get a full picture of the application of plea bargaining in practice, we have to take into account the number of resolved cases using this legal instrument comparing with total number of resolved cases per year. In this regard we analyzed the statistical data of Public prosecutors' office of North Macedonia for three consecutive years, from 2021-2023.

	convictions	Plea agreement	Percentage %
2021	12856	258	2,006 %
2022	9577	252	2,63 %
2023	8549	195	2,28 %

The percentage of cases resolved through plea bargaining remains relatively low across the three years, averaging just above 2%. This indicates that while plea agreements are a part of the judicial process, they are not the predominant method of resolution. From **2021 to 2022**, the percentage of plea agreements increased slightly from 2.006% to 2.63%. This could suggest a growing reliance on plea bargaining during a year with fewer resolved cases. From **2022 to 2023** the percentage then decreased to 2.28%. This could indicate a shift back towards more trials or other forms of case resolution, as the total convictions decreased but plea agreements also dropped.

While plea bargaining is a tool used in the North Macedonian legal system, its impact as a percentage of total resolved cases remains modest. The data shows some variability in its use over the three years, with external factors potentially influencing these trends.

Conclusion

Undoubtedly, the instrument of the plea agreement that was incorporated with the new Criminal Procedure Law is an innovation in the criminal procedure system in the Republic of North Macedonia. This instrument, together with the major changes that were incorporated with the new criminal procedure law, represents a conceptual change of the criminal procedure from the inquisitorial to the accusatory, since these institutes represent features of the Anglo-Saxon systems.

Since the beginning of the implementation of the new criminal procedure law, it can be concluded that this instrument has been implemented in a

relatively satisfactory manner, with the hope that over time the number of cases that will be resolved in this way will obviously increase.

It should be emphasized that the institution of the plea agreement has great advantages for the prosecutor, the defendant and the courts, such as: freeing the courts from a part of the cases where the parties will reach an agreement, the judges have more time to focus on the most complex cases, reducing the costs of judicial procedures, ending the procedure at an earlier stage with a final and executive decision, a more proactive role, reducing public pressure, etc.

From the penological point of view, this institute enables faster resocialization of the perpetrators of criminal offenses because it avoids the prolongation of the criminal procedure as well as the stigmatization of the accused.

Another positive dimension from the implementation of this institute is the protection of witnesses and associates of justice. The prosecutor may agree to a reduction of the charge due to the admission of guilt by the accused in order for the same to testify in other cases in order to successfully raise charges against persons who have committed criminal offenses in the field of organized crime, smuggling of drugs or human trafficking etc.

However, in exceptional cases, the implementation of the plea agreement should be avoided even though there are no legal and statutory obstacles, first of all for cases that are qualified as high risk, as well as cases where people who have committed serious criminal acts, the reason for the public's interest in the epilogue of these procedures and the great criminal-legal and social importance for the punishment of these perpetrators, first of all, for the achievement of general prevention.

But these advantages should in no way violate the basic principles of procedure and criminal law that aim to achieve justice. Respectively, the principle of equality of the parties in the procedure should not be violated in any way. This principle is guaranteed by national laws and in particular by Article 6 of the European Convention on Human Rights which means equal treatment of the parties before the court, and in this regard the European Court of Human Rights in the case of *Dombo Beheer vs. Holland* gives this interpretation "each party must be given time and a reasonable opportunity to present its concept of defense or accusation, but also the evidence if it is not put in a seriously subordinate position in front of the opposing party".

Also, the European Court for Human Rights emphasizes that the rights guaranteed by Article 6 of the Convention apply from the moment the person is informed about the charge that the prosecutor intends to raise,

regardless of whether the charge has been sent to the court or has been proven - sentences from the *Deveer vs. Belgium* case.

In order to mitigate the obvious advantage that the prosecutor has in front of the accused in the phase of negotiations for an agreement for admission of guilt, the law prescribes the necessary legal assistance from the defense lawyer that can to some extent equalize the weight or the negotiating position of the parties.

The plea agreement in essence means giving up the suspect's right to a fair and public trial, before independent and impartial courts, in an adversarial procedure, where he can contest the accusations of the prosecution and propose and examine evidence in the defense his and other procedural rights that the accused has. To be valid or valid, the agreement must be clear regarding this matter. The suspect can waive the right of access to the court, but it must not have the taint of pressure or coercion. This institute should not even take the form of "corruption or state coercion".

The provisions of the Criminal Procedure Law, which regulate the institution of the plea agreement, do not provide sufficient guarantees for the accused who are not able to understand the importance of the charge and the consequences of their guilty plea, primarily for persons with low levels of education, illiterates, or people with disabilities.

Equal access to suspects by prosecutors for initiating and reaching a plea agreement must be primary and primary in the plea agreement procedure, understood by respecting the principles of the criminal procedure, internal guidelines as well as the principles of the ethical code of public prosecutors as professional morality.

Prosecutors must be motivated to initiate and reach plea agreements even for the lightest offenses with a possible sentence of up to 5 years in prison or a fine (for these offenses, the consent of the prosecutors of the higher prosecution offices is not required for the initiation and the signing of the agreement), where a criminal order cannot be submitted, since from the analysis of the implementation of this instrument explained above, it can be observed that the criminal offenses where this institute has been applied the most dominate the offense where a prison sentence of more than 5 years is foreseen , while the lighter criminal offenses are not so present, which is essentially the purpose of this institute.

The prosecution must ensure transparency of the agreement procedure that will contribute to the elimination of pressure and threat tactics, the publication of the sanctions foreseen for specific criminal offenses in order to achieve legal certainty and predictability.

Of course, in order to achieve the greatest results in the implementation of this institute, the infrastructural conditions and capacity - human resources possessed by the Public Prosecutor's Office in R.N.M. In this direction, the infrastructural conditions urgently need to be improved and the number of prosecutors and auxiliary personnel should be increased, since with the new criminal procedure law, the competences of the prosecutor's office have been significantly increased, which requires a greater and more proactive commitment of prosecutors throughout all stages of the criminal procedure.

The need to ensure the consent of the higher prosecutor's offices for the agreement procedure, may present an obstacle and discourage the prosecutors in the first instance to initiate the procedure for the plea agreement, therefore it is necessary that the consents be given in the shortest possible time and to simplify the procedure of securing them.

Even the defense lawyers must, with a high level of awareness and sincerity, inform the accused of the benefits provided by the institution of the plea agreement in a situation where the prosecution has serious evidence for a certain crime. Lawyers should, with a serious and professional approach, inform the accused about the advantages and consequences of reaching a plea agreement, even though the final decision should always be the defendant. Defense lawyers should not in any way be an obstacle to the implementation of the institute for plea agreements for various reasons, since on the contrary the accused may face harsher penalties if an indictment is filed and the main hearing is held.

Courts are guarantors of the existence of the rule of law and the application of the law in an impartial, fair, independent and efficient form, as well as guarantors of human rights in a democratic society, and their role during the control of the legality of proposals the agreement reached between the prosecutor, the suspect and the defense lawyer, should be carried out with responsibility, high awareness and professionalism. In the session assigned to evaluate the agreement, the judge of the preliminary procedure with a serious approach should evaluate the free will of the accused in order that the agreement does not take the taint of pressure or coercion, as well as to assess the ability of the accused to understand the consequences of signing the plea agreement as well as the evaluation of the agreement from the point of view of equality of arms. Judges must clearly inform the accused of all rights and consequences of the agreement by not participating and influencing the decision. In this form, judges maintain an independent and impartial position in an adversarial procedure in terms of notification and non-encouragement, or withdrawal from the agreement process.

At the same time, judges should be encouraged if they find that it is a matter of misuse of rights or a violation of the legality of the agreement procedure to reject plea agreements.

Based on the fact that the decisions of the courts should affect the citizens in increasing the reliability and credibility in the judicial system, it is certainly necessary to ensure the transparency of the agreement procedure, and the judgments brought on the basis of the agreements to be announced on the web

pages of the courts or in another form to become accessible to the public in order to achieve legal certainty and predictability.

All this with the aim that justice must not only be done, but it must also be seen to be done.

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PARTECIPAZIONE E SVILUPPO SOSTENIBILE: UNA RIFLESSIONE DAL FIUME SHUSHICË

Lorenzo TOMASSINI¹

Sommario: 1. Introduzione: turismo e conflitti socio-ambientali, modelli di sviluppo contrapposti; 2. Il significato della sostenibilità, tra impresa e comunità; 3. Partecipazione, un termine (ed una risorsa) fondamentale per l'impresa che vuole essere sostenibile; 4. Mediazione e facilitazione, istituti ed esperienze per la partecipazione; 5. Conclusione.

1. Introduzione: turismo e conflitti socio-ambientali, modelli di sviluppo contrapposti

Il turismo rappresenta un settore sempre più rilevante per l'economia albanese, in forte e costante crescita, come provato dagli arrivi internazionali nel Paese, dal 2010 più che triplicati. A questo è seguito pure l'aumento delle strutture ricettive, che negli ultimi dieci anni ha visto una crescita dei posti letto del 186%. Uno sviluppo che non si ferma al solo comparto alberghiero, ma interessa un complesso di attività e servizi ampio, come i trasporti, la ristorazione, tutta la filiera alimentare, lo sport e addirittura il settore edile e delle costruzioni, impegnato sia nel potenziamento delle infrastrutture che nella realizzazione di hotel, resort e tutto ciò che a questi è connesso².

In tale contesto, il turismo di massa balneare si dimostra quello più importante, soprattutto per la prefettura di Valona, favorita da bellezze naturali, ottime condizioni geografiche e climatiche ed anche dalla presenza di connessioni autostradali e porti³. Qui, meritano particolare attenzione

* Il presente contributo espone i risultati delle ricerche compiute nell'ambito del progetto RETURN (*multi-Risk scieEnce for resilientT commUnities undeR a changiNg climate*). Un partenariato esteso, sponsorizzato dal PNRR, che coinvolge circa 350 ricercatori e docenti da differenti università italiane. Vedi: <https://www.fondazionereturn.it/en/>;

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² v. INTESA SANPAOLO, SRM: *Albania, il comparto turistico volano per lo sviluppo*, in: <https://group.intesasnapaolo.com/it/>, 2023, Cfr. A. PRIFTI, E. ZENELAJ, *Challenges towards sustainable tourism for regional development of Vlore Region*, in "EJSD", ECSDEV, 2013, pp. 287 e ss.

³ Con riferimento alla sola prefettura di Valona, per la realtà alberghiera, come impiego, il turismo permetterebbe di occupare circa 300.000 lavoratori, per il periodo estivo e

alcune località, Palasë, Dhermi ed Himare, dove il turismo cresce pure con importanti investimenti internazionali, che stanno contribuendo ad edificare moderne strutture alberghiere e abitative. La cui particolarità, per alcune di queste, è che ambiscono, a detta degli investitori, ad un turismo (di lusso e) sostenibile, con basso impatto ambientale e ridotto consumo energetico⁴.

Un'apprezzabile attenzione verso la natura, che tuttavia contrasta con quanto avviene appena dietro le montagne sovrastanti le tre cittadine menzionate, nella valle del fiume Shushicë. Dove le comunità locali stanno insorgendo contro un progetto di acquedotto che, attingendo dalle sorgenti tra i monti, rifornirebbe tramite una *pipeline* sotterranea di diciassette chilometri proprio le strutture turistiche sulla costa⁵. L'opera è criticata perché si teme possa compromettere la disponibilità idrica della zona, mettendo a rischio l'ecosistema presente, unico e ricchissimo. Difatti, il corso d'acqua è nel complesso degli affluenti del fiume Vjosa, uno degli ultimi fiumi selvaggi d'Europa, che dalla Grecia scorre libero, fino al mare Adriatico, privo di sbarramenti o deviazioni artificiali, generando un patrimonio naturale straordinario, tutelato dal 2023 come parco nazionale⁶. Ma, oltre l'interesse ambientale stretto, le conseguenze dell'opera sarebbero pure sociali, al punto che i rappresentanti dei villaggi interessati dal corso dello Shushicë affermano che la loro stessa esistenza potrebbe venire radicalmente compromessa, a causa delle limitazioni idriche che impatterebbero sugli allevamenti e l'agricoltura, principali attività economiche in quelle valli. Di diverso avviso è invece il Ministero del Turismo e l'Ambiente Albanese, che sostiene che l'impatto dell'acquedotto sarà limitato, poiché si collegherà ad una sola fonte, esterna all'area del parco nazionale, che non devierà il flusso del fiume⁷.

Questo genere di polemiche non sono nuove nell'area, detta il “Blue Heart

75.000 in quello invernale, ivi, p. 288.

⁴ v. BALFIN, *Intesa Sanpaolo Bank Albania finances with € 26 million the construction of Green Coast Hotel – MGallery Collection*, in: <https://balfin.al/>, 2024.

⁵ v. C. ELIA, *La battaglia per la valle dello Shushica*, in “Osservatorio Balcani e Caucaso”: <https://www.balcanicaucaso.org/>, 2024. Inoltre, su un altro progetto, per la costruzione di impianti per la produzione di energia idroelettrica, sempre sullo Shushica, v. RES PUBLICA, *Nis debati gjyqësor për HEC-et në Shushicë: Komuniteti dhe shoqëria civile kundër ndërtimit të paligjshëm të HEC-eve në Parkun Kombëtar të Vjosës*, in “EcoAlbania”: <https://ecoalbania.org/>, 2024.

⁶ v. K. MCVEIGH, *The hydropower goldrush: how Europe's first wild river national park saw off the dams*, in “The Guardian”: <https://www.theguardian.com/europe>, 2023.

⁷ v. G. TALIGNANI, *Ci rubano l'acqua per il turismo di massa. A rischio uno degli ultimi fiumi selvaggi d'Europa*, in “La Repubblica”: <https://www.repubblica.it/>, 2024.

of Europe”⁸, dove già i locali si erano opposti alla costruzione di dighe per la produzione di energia idroelettrica sul fiume Vjosa, dando avvio alla prima controversia ambientale gestita dai giudici amministrativi albanesi⁹. Il cui esito è stato a favore dei ricorrenti (il villaggio di Kutë, insieme alle ONG EcoAlbania, EuroNatur e RiverWatch), sia in primo grado che in appello, con l’ultima sentenza nell’estate 2024, dove è stata rilevata l’invalidità della valutazione di impatto ambientale (VIA) e l’inadeguatezza della partecipazione pubblica nella fase di sviluppo dell’opera¹⁰.

Senza entrare nel merito delle posizioni, che interessano conoscenze idrogeologiche, climatiche, biologiche ed ingegneristiche, si può comunque ricondurre questo genere di contestazioni al termine (*genus*) *conflitti di prossimità* (o *vicinali*)¹¹. Un tipo di ostilità che si originano e radicano nella società, timorosa dell’impatto di un’opera o un’infrastruttura sul territorio in cui vive. Opposizioni, non solo riconducibili al fenomeno dei conflitti ambientali, dove comunque se ne riconoscono i maggiori esempi ma, più ampiamente, riguardanti anche interventi di urbanistica o di riqualificazione, dove le risorse naturali non sono in gioco¹². Simili fenomeni sono più noti con l’espressione giornalistica di sindromi c.d. NIMBY (*Not In My Back Yard*)¹³, con cui ci si riferisce a quelle contestazioni dove “uno o più membri di una comunità locale si oppongono all’ubicazione di un’opera di interesse generale nel proprio territorio”¹⁴.

⁸ OSSERVATORIO BALCANI E CAUCASO, *Albania: ambientalisti e comunità scientifica contro la diga sul fiume Vjosa*, in “Osservatorio Balcani e Caucaso”: <https://www.balcanicaucaso.org/>, 2020.

⁹ v. ECOALBANIA, *The Court of Appeals confirms the verdict for the cancellation of Poçëm Hydropower plant in Vjosa river*, in “EcoAlbania”: <https://ecoalbania.org/>, 2024.

¹⁰ v. Gjykata e Apelit Administrativ Tiranë, Vendimi nr. 1240/2024.

¹¹ v. M. DELSIGNORE, M. MERSINI, *Gli strumenti per la composizione dei conflitti ambientali nella realizzazione delle infrastrutture per la crescita*, in “Giustizia Consensuale”, Ed. Scientifica, 2023, n. 2/2023, p. 1.

¹² Nella realtà urbana questo genere di contestazioni possono ricondursi al fenomeno della c.d. *gentrificazione*, per cui si allontanerebbero le comunità locali dai loro spazi, riqualificando (con interventi pubblici o privati) aree delle città, per fare spazio a nuovi cittadini, più benestanti, oppure al turismo, a riguardo v. G. SEMI, *Breve manuale per una gentrificazione carina*, Mimesis, 2023; Nella dottrina sociologica tedesca, v. J. BLASIUS, *Gentrification und die Verdrängung der Wohnbevölkerung*, in R. Kecskes, M. Wagner, C. Wolf (a cura di) “Angewandte Soziologie”, VS Verlag für Sozialwissenschaften, 2004, pp. 21 e ss.

¹³ v. R. OCCHILUPO, G. PALUMBO, P. SESTITO, *Le scelte di localizzazione delle opere pubbliche: il fenomeno Nimby*, in F. Balassone e P. Casadio (a cura di) “Le infrastrutture in Italia: dotazione, programmazione, realizzazione”, Banca D’Italia, 2011, p. 319.

¹⁴ S. FANETTI, *Energie rinnovabili: politiche e normative per superare le opposizioni locali ai nuovi impianti*, in “Riv. Giur. Amb.”, Giuffrè, 2022, p. 775.

Infatti, la particolarità di questi avvenimenti è che riguardano progetti che si legano ad interessi pubblici generalmente condivisi ed incontestati, come impianti per la produzione di energia rinnovabile o la gestione delle risorse naturali (ad esempio dighe o parchi eolici), temuti quando sono in prossimità ma che non sarebbero contestati se fossero edificati altrove¹⁵. Ciò permette un'ulteriore differenziazione con altre sindromi, dette BANANA (*Build Absolutely Nothing Anywhere Near Anything*) o NIABY (*Not In Anybody's Back Yard*), che sono invece ostilità totali, indipendentemente dalla collocazione territoriale dell'opera¹⁶.

Le gravi conseguenze di questi eventi sono immaginabili e possono minacciare lo sviluppo economico, industriale ed infrastrutturale, penalizzando gli investimenti. Una preoccupazione espressa pure dalla Corte costituzionale italiana che, nel 2005, ha osservato come, questa spinta ad ostacolare i progetti, non possa *“tradursi in un impedimento insormontabile alla realizzazione di impianti necessari per una corretta gestione del territorio e degli insediamenti”*¹⁷.

Eppure, limitarsi ad un giudizio negativo su queste contestazioni, minimizzandole come egoismi locali verso opere di utilità generale, porterebbe solo ad un'analisi superficiale che non scende alle radici delle insofferenze che emergono dalla società. Perché l'origine dei conflitti di prossimità è profonda e si ritrova in istanze democratiche, tramite cui si contesta il monopolio *“della razionalità, legittimità ed informazione”*¹⁸ nelle mani del potere, pubblico o privato, che esclude dalle decisioni coloro che poi le subiranno. Spesso realtà più vulnerabili, prive delle risorse economiche per contestare¹⁹. Si legano così, in queste proteste, questioni sociali ed ambientali, per cui le preoccupazioni per le risorse naturali portano con sé il disagio che viene da situazioni di povertà ed esclusione²⁰. Ciò è più evidente se si guarda alle conseguenze delle grandi opere infrastrutturali (e non solo), che presentano due costi legati alla localizzazione, quelli di costruzione e gestione dell'edificio e le ricadute, economiche ed ambientali. Quest'ultime gravano pressoché

¹⁵ *Ibid.* Cfr. G. CERRINA FERONI, *Contesto e prospettive delle energie rinnovabili in Italia: tra diritto e politica*, in “Federalismi.it”: <https://www.federalismi.it/index.cfm>, 2014, n. 13/2014, p. 15.

¹⁶ v. R. OCCHILUPO, G. PALUMBO, P. SESTITO, op. cit., p. 319.

¹⁷ C. Cost, Sent. n. 62/2005.

¹⁸ A. AVERARDI, *Amministrare il conflitto: costruzione di grandi opere e partecipazione democratica*, in “Riv. Trim. Dir. Pubbl.”, Giuffrè, 2015, n. 4/2015, p. 1174.

¹⁹ v. G. CERRINA FERONI, op. cit., p. 15.

²⁰ Cfr. M. BAGLIANI, E. DANSERO, *Politiche per l'ambiente. Dalla natura al territorio*, Utet Università, 2011, p. 317.

esclusivamente sulle comunità locali, che raramente verranno indennizzate adeguatamente (anche perché è difficile quantificare, in termini economici, tale genere di impatti) e, tantomeno, godranno dei benefici diretti dell'opera o degli investimenti fatti²¹. Portando ad un radicato sentimento di diffidenza ed ostilità nella società, che sarà, per l'effetto, maggiormente incline al conflitto²².

Questo è quanto raccontano anche gli eventi lungo il fiume Shushicë, dove la protesta mostra una realtà rurale e tradizionale contrapposta ad una turistica ed internazionale. Dimensioni che vivono due tipi di sviluppo differenti, per valori e velocità, che tra loro non dialogano, non si confrontano e, di conseguenza, non trovano una dimensione per convivere insieme, portando al conflitto. Rendendo evidente quanto i costi (ambientali e sociali) delle opere rivolte al turismo ricadranno su chi quei territori li vive, che però mancherà di beneficiare dei ritorni positivi, che spesso saranno diretti, addirittura, ad imprese ed investitori esteri. Compiere queste osservazioni permette di porre sotto una diversa lente i fenomeni NIMBY, apprezzandone le spinte alla base, che mostrano la volontà della comunità di partecipare e contribuire alle trasformazioni che la riguardano, rivelando nel dissenso un sentimento di appartenenza ed identità sociale. Pertanto, i conflitti non vanno colti come disturbi ma quali opportunità di confronto, dialogo e, soprattutto, raccolta di informazioni e dati preziosi (a beneficio di amministrazioni ed imprese intervenenti), per sviluppare progetti e strategie più adeguati alle realtà territoriali²³.

2. Il significato della sostenibilità, tra impresa e comunità.

Ciò porta ad interrogarsi pure sul significato di sostenibilità, in particolare di fronte all'emergenza ambientale, che riduce l'accesso alle risorse naturali essenziali (come l'acqua) generando disuguaglianze. Per cui si necessitano delle attenzioni, non solo rivolte al rispetto della natura, ma

²¹ v. U. BARELLI, *I limiti alle energie rinnovabili con particolare riferimento alla tutela della biodiversità*, in "Riv. Giur. Amb.", Giuffrè, 2014, n. 1/2014, p. 24; Cfr. R. OCCHILUPO, G. PALUMBO, P. SESTITO, op. cit., pp. 320 e 321.

²² Questo si lega al termine "*Konfliktvirulenz*", elaborato nella dottrina tedesca, per cui l'animo diffidente delle comunità conduce ad una spirale del conflitto, che lo rende sempre più radicato: v. J. HELLBRÜCK, E. KALS, *Umweltpsychologie*, Springer, 2012, p. 116. Cfr. A. HARTMANN-PIRAUDEAU, *Out of the spiral of conflict*, Springer, 2022, pp. 57 e ss.

²³ v. E. KOCHSKÄMPER, et al., *Participation for effective environmental governance? Evidence from water framework directive implementation in Germany, Spain and United Kingdom*, in "JEM", Elsevier, 2016, p. 738.

propriamente sociali.

Ebbene, rivolgendo l'attenzione ad un attore fondamentale, come l'impresa, si comprende quanto sia più facile definirsi astrattamente sostenibili che impegnarsi ad esserlo realmente. Una difficoltà che non si riconduce solo ad una carenza di volontà, ma anche al termine 'sostenibile' stesso che, come spiega Campobasso *"di per sé, non significa nulla, come tutti gli aggettivi relazionali"*²⁴. Infatti, nella dimensione societaria, si possono osservare due usi del termine, tra loro spesso contrastanti: a) *sostenibilità*, intesa come successo sostenibile che l'impresa deve perseguire nel tempo, *"conservando l'equilibrio finanziario su di un orizzonte temporale (sufficientemente) lungo"*²⁵ e b) *sostenibilità*, come attenzione agli effetti sociali ed ambientali, conseguenti all'attività economica²⁶. Questa contrapposizione evidenzia interessi, valori e ambizioni differenti, in un rapporto che si presenta come *"sustainability v. sustainability"*²⁷, che porta addirittura a supporre, come sostiene Tombari, che ci sia una *"sorta di voluta ambiguità per avanzare, più o meno cautamente, in una certa direzione, senza tuttavia prendere posizione"*²⁸. Eppure, tali significati trovano entrambi valorizzazione in numerosi fonti, normative e paranormative, dove però, la sostanziale differenza tra le due espressioni, va a sfumare.

Ad esempio, osservando per prime le fonti europee, già dall'art. 3 del TUE viene posta sullo stesso piano la *"crescita economica equilibrata"* con un *"elevato livello di tutela e miglioramento della qualità dell'ambiente"*. Impostazione ripresa, per ciò che direttamente riguarda l'impresa, pure dal Libro Verde del 2001 *'Promuovere un quadro europeo per la responsabilità sociale delle imprese'*, per cui l'attenzione ambientale e sociale deve andare di pari passo con valutazioni di lungo periodo, sull'attività e la crescita economica²⁹. Un orientamento ribadito, infine, dalla Direttiva UE 2464/2022, sulla rendicontazione societaria di sostenibilità, da cui si possono evincere benefici in termini di investimenti e costo del capitale per le imprese che si impegnano nella comunicazione sui profili ambientali e

²⁴ M. CAMPOBASSO, *Gli amministratori, il successo sostenibile e la pietra di Spinoza*, in *"Banca, borsa, titoli di credito"*, Giuffrè, 2024, n. 1/2024, p. 1.

²⁵ M. STELLA RICHTER, *Long-Termism*, in *"Riv. delle Società"*, Giuffrè, 2021, n. 1/2021, p. 30.

²⁶ Cfr. M. CAMPOBASSO, op. cit., p. 2.

²⁷ M. STELLA RICHTER, op. cit., p. 32.

²⁸ U. TOMBARI, *Lo "scopo della società": significati e problemi di una categoria giuridica*, in *"Riv. Soc."*, Giuffrè, 2023, n. 2-3/2023, p. 340.

²⁹ v. Libro Verde della Commissione delle Comunità Europee, COM(2001) 366, p. 4, Cfr. G. CONTE, *L'impresa Responsabile*, Giuffrè, 2018, p. 66.

sociali interessati dal proprio operato (c.d. *report di sostenibilità*). Interagendo con i portatori di interessi³⁰ e tenendo conto pure delle prospettive di lungo termine, concernenti tutta la catena di valore della società, testando (e divulgando) la “*resilienza del modello e della strategia aziendale*” in relazione “*ai rischi connessi alle questioni di sostenibilità*” e informando su “*se e in che modo il modello e la strategia aziendali tengono conto degli interessi delle parti interessate*”³¹. Si comprende così, come ciò che viene richiesto sia, propriamente, uno sforzo di analisi ed adeguamento degli assetti organizzativi, amministrativi e contabili, per la gestione del rischio ambientale e il perseguimento del successo economico nel tempo³². Proprio per questo fine, propriamente societario, si possono registrare anche delle ulteriori voci, di *soft law*, che emergono dalla prassi dei codici di *Corporate Governance* o dalla promozione di buone pratiche, eticamente orientate³³. Che, nel generale contesto di deregolamentazione dell’attività d’impresa, intrapreso sin dall’inizio del millennio (ed in Italia, spinto dal D.Lgs. n. 6/2003), hanno rappresentato una nuova fonte di principi, sorti dal “*dialogo tra etica, diritto ed economia*”³⁴. Un significativo esempio di questi codici è quello promosso da Banca d’Italia nel 2020, rivolto a tutte le società per azioni quotate nel MTA. Da cui emerge (per ciò che interessa l’attuale trattazione) un’accezione del termine sostenibilità (‘*successo sostenibile*’) come obiettivo che guida “*l’organo di amministrazione e che si sostanzia nella creazione di valore nel lungo termine a beneficio degli azionisti, tenendo conto degli interessi degli altri stakeholder rilevanti per la società*”³⁵.

Da questa sintetica panoramica sulle disposizioni europee, nazionali e di autoregolamentazione, si può percepire come i differenti significati di sostenibilità, economica ed ambientale e sociale, siano effettivamente meno distanti di quanto potrebbe sembrare e tra loro profondamente contaminati³⁶. Per cui, ragionando di sostenibilità economica,

³⁰ Art. 19 bis Dir. UE 2013/34 e 3° e 49° *considerando*, Dir. UE 2464/2022.

³¹ 30° *considerando*, Dir. UE 2464/2022; Cfr. U. TOMBARI, op. cit., pp. 343 e 344.

³² Cfr. A. SANTONI, *Adeguatezza degli assetti organizzativi d’impresa e gestione del rischio ambientale*, in “*Questione Ambiente*”, Pacini Giuridica, 2024, pp. 117 e 118. Cfr. F. DEGL’INNOCENTI, *Rischio di impresa e responsabilità civile*, FUP, 2013, p. 119.

³³ v. G. CONTE, op. cit., pp. 96 e ss. Cfr. A. GENOVESE, *La gestione ecosostenibile dell’impresa azionaria*, Il Mulino, 2023, p. 41

³⁴ Ivi, p. 110.

³⁵ COMITATO CORPORATE GOVERNANCE, *Codice di Corporate Governance*, 2020, p. 4. Cfr. M. CAMPOBASSO, op. cit., p. 2.

³⁶ Cfr. M. STELLA RICHTER, op. cit., p. 50.

inevitabilmente, si dovrà considerare anche quella ambientale e sociale e, dunque, nello sviluppo delle strategie di investimento, crescita e produttività, proiettate nel tempo (*sostenibilità economica*), sarà opportuno interrogarsi su come queste incidano sull'integrità degli ecosistemi ed il mantenimento delle risorse naturali (*sostenibilità ambientale*) considerando, attivamente, gli interessi della società civile, che ha diritto ad essere informata sugli interventi che la riguardano così da poter intervenire, attivamente, contribuendo alla loro progettazione (*sostenibilità sociale*)³⁷. Queste riflessioni portano a comprendere come il termine 'sostenibilità', comunque inteso, conduca ad un programma operativo (tanto per le imprese quanto pure per la pubblica amministrazione) che deve considerare la globalità degli effetti possibili, bilanciandoli "in un'ideale camera di mediazione dei diritti ed interessi"³⁸, contesi tra il polo economico e le necessità di tutela ambientale e sviluppo sociale. Se manca questo confronto, il rischio è che pur valorizzando alcuni profili, gli altri verranno compromessi, determinando incomprensioni e conflitti.

Ne consegue che per poter parlare di turismo sostenibile sulla costa albanese, sarà opportuno considerare il fondamentale (e irrinunciabile) contributo di questa industria insieme agli interessi di chi quei territori li vive e che, a quella natura che gli investitori intendono tutelare (marchiando i progetti dell'aggettivo "sostenibile"), lega la sua esistenza ed identità, culturale e sociale. Finché non verranno messe insieme queste diverse posizioni, facendole proseguire allo stesso passo, la sostenibilità resterà un'ambizione, sostanzialmente imperfetta.

Le contestazioni nella valle dello Shushicë, perciò, parlano tanto all'Albania quanto pure all'Italia (ed all'Europa). Perché avvisano dell'importanza di realizzare uno sviluppo che tenga conto degli interessi di ognuno coinvolto. Dando voce alle istanze partecipative anche quando sono presenti valori differenti, apparentemente opposti³⁹. Che vanno comunque valorizzati, come elemento essenziale di ogni decisione, pubblica o privata, affinché possa, realmente, permettere una crescita sostenibile. In cui si tenga conto dei costi sociali delle attività economiche (come, appunto, il

³⁷ v. F. LUBIAN, *La sostenibilità come clausola generale: una prospettiva comparata*, in "NGCC", Cedam, 2024, n. 3/2024, p. 737. Queste declinazioni della sostenibilità si apprezzano anche dal testo della Convenzione di Aarhus del 1998, sull'accesso alle informazioni, la partecipazione del pubblico ai processi decisionali e l'accesso alla giustizia in materia ambientale.

³⁸ *Ibid.*

³⁹ Nella considerazione per cui, nessun diritto è subordinato, inferiore, ad un altro, come affermato in Corte Cost., Sent. n. 85/2013.

turismo, che con il fenomeno del c.d. *overtourism* interessa diverse città italiane) che, talvolta, comportano delle ricadute ai danni della collettività che non sono bilanciati da benefici economici o sociali⁴⁰.

3. Partecipazione, un termine (ed una risorsa) fondamentale per l'impresa che vuole essere sostenibile

Le pressioni determinate dal progressivo logoramento delle risorse ambientali e la dimensione naturale, hanno toccato tutto il mondo e, dunque, non hanno lasciato indifferente l'Albania. Interessata, dall'inizio del millennio, da una crescita economica importante, seppure inizialmente compiuta senza una particolare organizzazione⁴¹.

Attualmente, il quadro che si presenta mostra, nel Paese, una sviluppata legislazione ambientale, in progressiva espansione sia qualitativa che quantitativa. Coronamento di questo sistema è il riconoscimento costituzionale dello sviluppo sostenibile all'art. 59 della Carta fondamentale del 1998, in cui si afferma che l'iniziativa economica privata deve essere finalizzata a garantire un ambiente sano, ecologicamente adatto per le generazioni presenti e future, sfruttando razionalmente le risorse naturali, i boschi, le acque e i pascoli⁴². Disposizione affiancata e rafforzata, dal diritto all'informazione ambientale, statuito all'art. 56. Questi principi costituzionali trovano origine nelle diverse intese internazionali sottoscritte dall'Albania tra cui, innanzitutto, le Convenzioni di Stoccolma e Rio de Janeiro, sul principio dello sviluppo sostenibile, e gli accordi di Aarhus del 1998, sull'accesso alle informazioni, la partecipazione del pubblico ai processi decisionali e l'accesso alla giustizia in materia ambientale. Di più, dall'adesione alle Nazioni Unite, segue pure l'impegno per realizzare gli obiettivi dell'Agenda 2030, con i suoi diciassette *Sustainable Development Goals* (SDGs), diretti verso problemi generali e comuni, legati tra loro, che interessano tutto il mondo.

Eppure, oltre l'adesione formale agli impegni internazionali, la tutela dell'ambiente, in Albania, appare ben lontana dall'essere soddisfacente e si presenta, addirittura, come uno dei capitoli dell'*acquis* comunitario

⁴⁰ v. G. MENEGUS, *Appunti per un governo della città turistica*, in "IPOF", CNR, 2024, n. 1/2024, pp. 79 e ss.

⁴¹ Come spiega E. HITAJ, *Environmental protection under the Albanian domestic legislation*, in "European Scientific Journal", ESI, 2015, n. 1/2015, p. 612.

⁴² Art. 59 Costituzione Albanese lett. e) e f); Una disposizione affine all'art. 41 delle Costituzione Italiana (riformato con la L. Cost. n. 1/2022) per cui l'iniziativa economica privata non può svolgersi in contrasto con la salute, l'ambiente, la sicurezza, la libertà e la dignità umana.

maggiormente critici⁴³. Tra le mancanze, ad esempio, si può menzionare l'insufficiente attuazione del principio 'chi inquina paga' (*polluter-pays principle*), insieme al carente controllo ed intervento pubblico sugli attori inquinanti⁴⁴. A queste si aggiunge anche l'inadeguata attuazione delle direttive sulla valutazione di impatto ambientale (Dir. 2011/92/UE) e la valutazione ambientale strategica (Dir. 2001/42/CE), che si è dimostrata particolarmente evidente nell'occasione di due progetti, l'aeroporto di Valona (in costruzione nell'area protetta Vjosa-Narta) e la centrale idroelettrica di Skavica, per cui si teme un grave impatto sulla biodiversità⁴⁵. Un ulteriore profilo critico emerge poi dalla gestione delle energie rinnovabili dove, sebbene sia stato raggiunto l'obiettivo, per il 2022, di una produzione di energia rinnovabile al 39% del fabbisogno nazionale, si deve però osservare come questa derivi quasi esclusivamente da impianti idroelettrici. Una mancanza di diversificazione che, a fronte del cambiamento climatico, potrebbe determinare una pericolosa fragilità per la tenuta della fornitura energetica. A cui segue, infine, anche l'insostenibilità dei contratti per l'edificazione delle centrali idroelettriche stesse, che non tengono conto degli impatti ambientali e sociali dei progetti⁴⁶. Portando a numerose proteste da parte delle comunità locali (tra cui quelle già menzionate sul fiume Vjosa), che hanno lamentato l'inadeguatezza delle valutazioni di impatto ambientale e la mancante, perché solo apparente, consultazione pubblica.

Queste insufficienze, oltre che dall'Unione Europea, sono state osservate e confermate anche dal rapporto delle Nazioni Unite sull'attuazione degli obiettivi per l'Agenda 2030. Che ha segnalato problemi nell'accesso alle informazioni ambientali, non garantito sufficientemente sia a livello centrale che locale ed aggravato da una scarsa partecipazione pubblica, tanto nell'adozione delle decisioni che per il monitoraggio⁴⁷. Oltre questo, rilevano pure la scarsa attuazione del principio 'chi inquina paga', insieme ai pochi interventi di bonifica e recupero delle aree contaminate ed un'inefficiente gestione dei rifiuti⁴⁸. Infine, si aggiungono anche le inadeguate mappature dei corsi d'acqua, mal gestiti, che si affiancano ed aggravano i numerosi problemi relativi alla rete di

⁴³ v. Rapporto UE sull'*Acquis* comunitario 2023 p. 110.

⁴⁴ v. Rapporto UE sull'*Acquis* comunitario 2023, p. 119. Cfr. E. HITAJ, op. cit., p. 617.

⁴⁵ Ivi, pp. 120 e 121.

⁴⁶ Ivi, pp. 114 – 115.

⁴⁷ UNECE, *Albania. Environmental Performance Reviews. Highlights*, United Nations, p. 6.

⁴⁸ Ivi, p. 16.

approvvigionamento idrico⁴⁹.

Pertanto, il quadro generale che emerge è tutt'altro che positivo per l'Albania e mostra serie difficoltà che devono essere gestite, nel breve termine.

Le mancanze appena segnalate, tuttavia, non possono essere rimesse esclusivamente all'impegno pubblico dello Stato, ma devono trovare una spinta pure da parte dei privati, cittadini ma soprattutto imprese⁵⁰. Con cui deve costruirsi una collaborazione ispirata al principio di sussidiarietà, per *"garantire la più ampia efficacia alle misure di protezione ambientale"*⁵¹. Innanzitutto, perché la tutela passa anche, necessariamente, dalla responsabilità ed impegno di ognuno la cui condotta impatta sulla dimensione ambientale ma, nondimeno, pure perché, come sottolinea Francesco Denozza, le norme imperative, talvolta, sono insufficienti ad intervenire su situazioni specifiche per la loro *"naturale e insuperabile incompletezza"*⁵². Così che si potranno sempre presentare eventi imprevedibili, dove saranno necessarie soluzioni bilanciate sulla circostanza. Ebbene, ciò richiede lo sforzo di attori anche di settori solo apparentemente meno inquinanti, come il turismo. Il quale, nella mancanza

⁴⁹ Ivi, p. 14.

⁵⁰ v. G. CAPO, *Libertà d'iniziativa economica, responsabilità sociale e sostenibilità d'impresa: appunti a margine della riforma dell'art. 41 della Costituzione*, in "Giustizia Civile", Giuffrè, 2023, n. 1/2023, pp. 85 e 86. Qui è opportuno menzionare la lunga evoluzione del concetto di *Corporate Social Responsibility* (CSR), che nasce dalla constatazione per cui, nel capitalismo contemporaneo, le grandi società (corporations) rappresentano *"un'istituzione economica dominante nella realtà globale contemporanea"* perché *"possiedono enormi ricchezze e influenzano l'esistenza di milioni di persone"*, mostrando *"una imponente manifestazione di potere, che gestisce (ed incide su) una pluralità di centri d'interessi eterogenei e potenzialmente conflittuali: gli azionisti, i creditori, i lavoratori, i consumatori le comunità sociali"*, come spiegato in G. B. PORTALE, *La Corporate Social Responsibility alla ricerca di effettività*, in "Banca Borsa", Giuffrè, 2022, n. 6/2022, p. 947. Cfr. U. TOMBARI, *Corporate Social Responsibility (CSR), Environmental Social Governance (ESG) e scopo della società*, in "Riv. Dir. Comm.", CEDAM, 2021, n.2/2021, p. 228.

⁵¹ M. PETRACHI, *La tutela dell'ambiente nel prisma della transizione ecologica*, G. Giappichelli ed., 2023, p. 32; Cfr. A. FARÌ, *La sussidiarietà orizzontale in materia ambientale: il ruolo dei privati e l'esercizio di funzioni pubbliche*, in "Riv. Quadr. Dir. Amb.", G. Giappichelli ed., 2015, n. 3/2015, pp. 2 e ss. e M. RENNA, *I principi in materia di tutela dell'ambiente*, in "Riv. Quadr. Dir. Amb.", G. Giappichelli Ed., 2012, n. 1-2/2012, p. 63.

⁵² F. DENOZZA, *Due concetti di stakeholderism*, in "Rivista ODC", G. Giappichelli, 2022, n. 1/2022, p. 41, Cfr. P. LUCARELLI, *Sostenibilità e benessere: un'endiadi ancora da esplorare nella realtà dell'impresa*, in P. Lucarelli, A. Santoni (a cura di) "Questione Ambiente. Itinerari giuridici per l'impresa", Pacini Giuridica, 2024, pp. 11 e 12.

di una progettazione coordinata con le comunità locali, affiancata dallo sviluppo delle infrastrutture e la cura delle risorse naturali locali, può incidere gravemente, tanto sull'ambiente che la società⁵³.

Le proteste sul fiume Shushichë si dimostrano un significativo esempio di questa insostenibilità. Mostrando un contrasto tra valori ed interessi in cui l'impresa deve spiegare un ruolo da protagonista nella risposta all'emergenza ambientale, acquisendo informazioni ed adattando i suoi investimenti e progetti al contesto sociale e territoriale. Muovendosi in un panorama dove, nell'assenza di una regolamentazione, l'organo amministrativo può operare scelte "*sostanzialmente discrezionali*"⁵⁴, che non comportano (solo) più libertà ma maggiori responsabilità. Ne risulta un problema tecnico, assegnato al giurista, il quale è chiamato ad individuare nel conflitto, nell'incertezza, soluzioni "*che massimizzano la somma delle soddisfazioni*"⁵⁵. Emergono così due distinte funzioni rivolte allo studioso del diritto. Innanzitutto, quella di interprete, al quale è richiesto di "*fare chiarezza quanto meno sui termini utilizzati nelle proposte di riforma, nelle disposizioni normative, nei discorsi propositivi o ricostruttivi e nelle argomentazioni interpretative*"⁵⁶, mettendo ordine nella complessità che inevitabilmente avvolge gli eventi come quello in esame. A cui segue il ruolo di operatore del diritto, che si deve calare nel campo, osservando dalla prospettiva orizzontale la realtà, i suoi problemi, come lo scienziato sociale (che è) sa e deve fare. Realizzando nel mondo i termini normativi e delle argomentazioni giuridiche già ordinati dal giurista studioso, coinvolgendo, ascoltando e dando voce alla platea di interessati⁵⁷.

Per assolvere questi compiti non si può prescindere dalla partecipazione, con il coinvolgimento attivo di coloro interessati direttamente dall'azione dell'impresa. Che vedono i loro interessi subordinati a progetti in grado, nel futuro, di determinare conseguenze ed oneri proprio a loro carico. Ciò è altrettanto importante anche nella comunicazione e gestione dei rischi ambientali, che difficilmente potranno essere affrontati se non tramite un

⁵³ Come si può evincere guardando i rapporti UE e dell'ONU: *Rapporto UE sull'Acquis comunitario 2023*, p. 118 e UNECE, Albania, p. 4; Cfr. A. CIRO, M. TOSKA, *Sustainable Tourism Development in Albania*, in "Annual Review of Territorial Governance in Albania", 2018, p. 90. Vedi anche G. MENEGUS, op. cit., pp. 79 e 80.

⁵⁴ Come spiega F. DENOZZA, op. cit., p. 42.

⁵⁵ F. DENOZZA, *Il conflitto di interessi tra soci e altri stakeholders*, in R. Sacchi (a cura di) "Il ruolo delle clausole generali in una prospettiva multidisciplinare", Giuffrè, 2021, p. 459.

⁵⁶ M. STELLA RICHTER, op. cit., p. 28. Si possono qui richiamare pure le riflessioni in P. GROSSI, *La cultura del civilista italiano. Un profilo storico*, Giuffrè, 2002, p. 4.

⁵⁷ Cfr. P. LUCARELLI, op. cit., p. 13.

contributo orizzontale, da parte di tutti i coinvolti, che possono partecipare offrendo idee, informazioni ma anche solo dando conto delle proprie necessità⁵⁸. Senza questo coinvolgimento l'accettazione degli interventi sarà minima, perché le soluzioni elaborate mancheranno di massimizzare (o almeno, già solo considerare) tutti gli interessi presenti⁵⁹. Queste consapevolezze sulla partecipazione, inizialmente definite dalla Convenzione di Aarhus del 1998, sembrano essere state finalmente comprese pure dal legislatore europeo⁶⁰ che, nella Dir. UE 2024/1760 sulla *Due Diligence* delle società ai fini della sostenibilità⁶¹, agli articoli 13, 15 e 16 (che rispettivamente interessano il dialogo con i portatori di interessi, il monitoraggio dei rischi, ambientali e sociali, nella filiera ed infine la comunicazione dei dati sulla sostenibilità) spinge verso una consultazione ed un'informazione con un effettivo confronto tra imprese e *stakeholders*⁶². Dove eventuali ostacoli che possono impedirlo devono essere identificati e affrontati, garantendo la riservatezza di chi interviene e la tutela da azioni di ritorsione o rivalsa⁶³.

A seguito di queste novità, la sostenibilità, per l'impresa, non può essere ridotta ad un mero essere *compliant*, di ben poca effettività, che formalmente si limiterebbe alle responsabilità individuate dalla menzionata direttiva agli articoli 27 e 29 (dove sono stabilite delle sanzioni ed i margini risarcitori per le conseguenze degli impatti derivati dalla condotta della società)⁶⁴. Giacché, salvo adottare argomentazioni quali quelle dei giudici

⁵⁸ Così P. SLOVIC, *Perception of Risk*, in "Science", AAAS, 1987, p. 285.

⁵⁹ v. T. CLARKE, T. R. PETERSON, *Environmental conflict management*, SAGE, 2016, p. 11; Cfr. E. KOCHSKÄMPER, op. cit., p. 738.

⁶⁰ Si nota come nell'ambito degli interventi del *Recovery Plan*, sebbene la partecipazione si presentasse come un valore fortemente legato ai progetti portati avanti, questa non è stata assolutamente contemplata, almeno nella fase di elaborazione degli interventi, v. E. PROFUMI, *Il Recovery Plan? Una grande occasione in cui i cittadini sono relegati a semplici spettatori*, in "EconomiaCircolare.com": <https://economiecircolare.com/>, 2021.

⁶¹ A riguardo, v. L. BOGGIO, M. PINTO, *Sostenibilità e responsabilità degli amministratori*, in "Giur. It.", Utet Giuridica, 2024, p. 1236.

⁶² Art. 13, commi 2 e 3, Dir. UE 2024/1760. A riguardo, si richiamano le osservazioni di Sabino Cassese sulla partecipazione (che valgono sia nel dialogo con il potere pubblico che con il privato), il quale individua una duplice rilevanza del confronto, verticale ed orizzontale. Per cui si permette di osservare, nella società, l'intervento sia dall'alto verso il basso che *de plano*, v. S. CASSESE, *La partecipazione dei privati alle decisioni pubbliche*, in "Riv. Trim. Dir. Pubbl.", Giuffrè, 2007, n. 1/2007, p. 14.

⁶³ Ivi, comma 5.

⁶⁴ A riguardo, si può osservare come, nell'implementazione della sostenibilità per l'impresa, la debolezza sta proprio nell'effettività, come fa notare P. LUCARELLI, op. cit., pp. 11 e 12.

olandesi in *Milieudefensie et al. v. Royal Dutch Shell*⁶⁵, che hanno sostenuto che “*le società commerciali hanno un dovere di adottare tutte le misure necessarie per il rispetto dei diritti umani, anche se non espressamente previste dalla legge*”⁶⁶, per l’esistenza di un generale obbligo di rispettare l’ambiente e i diritti umani “*indipendentemente dalla capacità e/o volontà degli Stati di adempiere i propri obblighi in materia di diritti umani*”⁶⁷, è difficile, attualmente (almeno per ciò che attiene la direzione dell’impresa), affermare che esiste “*un dovere formale degli amministratori di integrare ‘proattivamente’ nella loro azione obiettivi di sostenibilità socio ambientale*”⁶⁸. Seppure ciò non significa constatare un’assoluta libertà per “*disinteressarsi dell’impatto prodotto dalla gestione sui profili ambientali, sociali e di buon governo societario*”⁶⁹, poiché è chiaro che “*nel medio periodo solo un’impresa attenta agli stakeholders e alle esigenze complessive del pianeta potrà creare utili per i propri soci*” e, non a caso, oggi, “*il cambiamento climatico identifica uno dei maggiori rischi finanziari per le grande imprese*”⁷⁰.

In questo contesto si inserisce il valore della partecipazione, come pietra d’angolo (*Eckpfeiler*) per la società che vuole essere socialmente orientata⁷¹. La quale, negli ampi spazi di discrezionalità in cui si trova ad operare, confrontandosi con interessi ambientali e sociali per definire le strategie ed azioni, necessita di un confronto costante con i differenti *stakeholders*, per acquisire informazioni e comprendere le conseguenze delle sue iniziative. A tal fine, la partecipazione diventa funzionale all’accrescimento di un asset prezioso, il capitale relazionale, che consiste nella rete di rapporti con differenti realtà ed attori (generalmente, portatori di interessi) che si irradiano dall’impresa⁷². Il quale incide,

⁶⁵ *Milieudefensie et al. v. Royal Dutch Shell*, Hague, NL, District Court, 26 maggio 2021.

⁶⁶ L. BOGGIO, M. PINTO, op. cit., p. 1238.

⁶⁷ *Ibid.*

⁶⁸ M. CAMPOBASSO, op. cit., pp. 10 e 11. Ciò è rafforzato pure dalla constatazione per cui, immaginare un “*generico obbligo di conformità agli obiettivi di sostenibilità*”, come fatto nella sentenza menzionata, “*significherebbe imporre limiti all’iniziativa economica non fondati su disposizioni legali ma da disposizioni che, [...] non hanno diretta applicazione ai privati*”, così L. BOGGIO, M. PINTO, op. cit., p. 1240. Forse, l’unico caso di società formalmente tenute (per il D. Lgs. 254/2016) ad adottare scelte di gestione orientate verso la sostenibilità, è quello delle imprese tenute alla rendicontazione sulle informazioni non finanziarie, v. A. GENOVESE, op. cit., p. 108.

⁶⁹ M. CAMPOBASSO, op. cit., p. 17.

⁷⁰ U. TOMBARI, op. cit., p. 351. Cfr. G. CAPO, op. cit., p. 86.

⁷¹ Così T. WALKER, *Der Stakeholderansatz als Fundament der CSR-Kommunikation*, in P. Heinrich (a cura di) “*CSR und Kommunikation*”, Springer, 2018, p. 72.

⁷² v. M. MIGHELI, *Il valore degli ‘intangibili’ e del capitale relazionale per un’impresa*:

inevitabilmente, sull'immagine dell'attività ma soprattutto, pure sulla quantità di dati disponibili, determinando una ricerca e sviluppo più efficiente, con una spesa ridotta, soprattutto per le strategie commerciali⁷³. Consentendo di ottenere soluzioni realmente sostenibili, poiché ponderate sugli interessi in campo (ambientali e sociali), che non solo saranno stati ascoltati ma pure integrati ed approfonditi. A tal fine, è necessario ripensare il rapporto tra la società e gli *stakeholders* in un senso a tutti gli effetti democratico, introducendo, come suggerisce Denozza, “*meccanismi istituzionalizzati di consultazione, e magari anche di parziale codecisione*”, tramite cui le differenti voci in campo, coinvolte, possano “*indicare espressamente quelli che, nella situazione data, credono siano i loro interessi e i modi in cui vorrebbero che l'impresa ne tenesse conto*”⁷⁴. Per raggiungere questo obiettivo si deve costruire un dialogo effettivo che, come indica Paola Lucarelli, dal confronto “*generi consapevolezza, ascolto e fiducia*”⁷⁵ operando affinché vengano sviluppate soluzioni reciprocamente vincenti. Centrando l'agire dell'impresa sostenibile “*sull'ascolto e la collaborazione*”⁷⁶, nella consapevolezza che le sue operazioni e strategie si inseriscono in una rete di rapporti e relazioni, che non possono essere ignorate, ma vanno piuttosto valorizzate come opportunità di crescita. Trasponendo queste osservazioni sugli avvenimenti nella valle dello Shushicë, si rileva quanto il difetto di dialogo e partecipazione, da parte delle imprese operanti nell'area, sia all'origine delle contestazioni⁷⁷. Le quali, se lasciate ancora inascoltate, rappresenteranno pure un'occasione perduta per una riflessione costruttiva sullo sviluppo del turismo intorno

inquadramento teorico, evidenze empiriche, analisi econometriche, in “Working paper on knowledge society”, Fond. Adriano Olivetti, n. 2/2012, p. 9.

⁷³ Queste osservazioni sono confermate pure dai G20/OECD *Principles of Corporate Governance*, che mirano allo sviluppo di politiche in sostegno della sostenibilità e resilienza delle imprese, gestendo i rischi ambientali e climatici v. H. WESTLUND, E. NILSSON, *Measuring enterprises' investments in social capital – a pilot study*, 43rd Congress of the European Regional Science Association “Peripheries, Centres, and Spatial Development in the New Europe”, 27th – 30th August 2003, Jyväskylä (FI). L'importanza di queste informazioni e dati, acquisiti per un migliore sviluppo dell'attività e l'impresa, è fondamentale, anche per colmare la scarsa efficienza e produttività delle imprese, in particolari europee, evidenziata dal rapporto “*The future of European competitiveness*”, pubblicato a settembre 2024.

⁷⁴ F. DENOZZA, *Sostenibilità e Corporate Governance nel nuovo contesto geopolitico*, in “Riv. Soc.”, Giuffrè, 2023, n. 2-3/2023, p. 315. Cfr. U. TOMBARI, op. cit., p. 349.

⁷⁵ P. LUCARELLI, op. cit., p. 14.

⁷⁶ *Ibid.*

⁷⁷ Come riscontrato dai giudici amministrativi di Tirana, in appello, v. Gjykata e Apelit Administrativ Tiranë, Vendimi nr. 1240/2024.

alle località di Dhermi, Himare e Palasë. Tramite cui le attività economiche potevano costruire un legame con i territori, che non avrebbe mostrato gli investitori ed i loro progetti come creature aliene, calate in quei luoghi da chissà dove, bensì quale parte integrante del tessuto sociale ed economico locale e delle sue prospettive di sviluppo. Determinando una dinamica circolare, di benefici comuni. Si apprezza così, proprio da questi eventi, quanto la sostenibilità, facilmente ostentata dall'impresa in un mercato (apparentemente) attento, se non viene rivolta alla dimensione collettiva, con il dialogo attivo e pluridirezionale con la società civile, si presenterà solo come una struttura cava, superficialmente completa ma priva di contenuto e sostanza.

4. Mediazione e facilitazione, istituti ed esperienze per la partecipazione

Le difficoltà nell'accesso alle informazioni ambientali, insieme alla scarsa partecipazione per coloro coinvolti dai progetti o eventi con impatto sulla società o la natura, costituiscono alcuni dei profili maggiormente critici, per l'Albania, nel processo di *acquis* comunitario⁷⁸. Pertanto, facendo seguito alle riflessioni dei precedenti paragrafi, è opportuno, a questo punto, comprendere in che modo il giurista debba attivarsi, con gli istituti e strategie più adeguate, per permettere una comunicazione e gestione consensuale delle conflittualità sociali ed ambientali. Al fine di ottenere processi di sviluppo condiviso degli interventi promossi da imprese o pubbliche amministrazioni, insieme alle comunità locali.

Un significativo supporto in questa ricerca viene dall'esperienza della gestione alternativa delle controversie, tramite alcuni istituti di giustizia consensuale come la mediazione e la facilitazione ambientale. Percorsi che si sviluppino nello spazio dell'autonomia, dove gli stessi destinatari delle regole di condotta concorrono ad individuarle “*in modo per loro vincolante [...] attraverso un atto negoziale*”⁷⁹. Ottenendo una flessibilità che permette di considerare, meglio di quanto potrebbe fare il processo, l'eterogeneo orizzonte di interessi (spesso contrastanti), rapporti e legami che si presentano⁸⁰. Per giungere ad una “*lettura relazione dei conflitti, che*

⁷⁸ Rapporto UE sull'Acquis comunitario 2023 p. 115.

⁷⁹ F. P. LUISO, *La conciliazione nel quadro della tutela dei diritti*, in “Riv. Trim. Dir. e Proc. Civ.”, Giuffrè, 2004, n. 4/2004, p. 1202.

⁸⁰ v. R. MARTINOLI, *Tutela dell'ambiente e ADR: Profili ricostruttivi della mediazione e facilitazione ambientale*, in “Resp. Civ. Prev.”, Giuffrè, 2024, n. 3/2024, pp. 1009 e 1017. Cfr. P. LUCARELLI, L. RISTORI, *I contratti commerciali di durata. Crisi di cooperazione e governo del cambiamento*, UTET Giuridica, 2016, pp. 142 e 143 e C. CALABRESI, *ADR e giustizia sostenibile*, in “La Mediazione”, 2023, p. 12.

soprattutto in ambito ambientale, possono determinare la rottura dei legami sociali presenti in una comunità”⁸¹.

La mediazione, a questo fine, si dimostra efficace per gestire un conflitto già sorto (come quello, attualmente presente, lungo il corso dello Shushicè), permettendo (con l'intervento del mediatore) lo sviluppo di soluzioni capaci di considerare tutti gli interessi in gioco, quindi ponderate sullo specifico contesto in cui si è sviluppata la controversia, oltre che proiettate verso il futuro, con un'efficacia di lungo termine⁸². Questo è possibile grazie anche all'intervento delle conoscenze offerte dai partecipanti stessi, le quali potranno essere integrate reciprocamente, permettendo di superare la “ineludibile asimmetria informativa”⁸³, inevitabilmente presente. A questo si può aggiungere, inoltre, l'importanza determinante della riservatezza, tratto caratterizzante dell'intero procedimento⁸⁴, che non rileva per occultare dati o avvenimenti (andando in contrasto con l'obiettivo, necessariamente divulgativo, delle informazioni ambientali) ma perché permette un dialogo libero, specialmente nella fase esplorativa degli interessi, in cui tutte le idee possono trovare spazio, favorendo lo sviluppo della fiducia reciproca⁸⁵. L'approccio conciliativo, infine, consentendo una familiarizzazione con il conflitto, permette di ottenerne pure una sistematica prevenzione. Giacché verrà conosciuto e compreso dai partecipanti, non come avvenimento negativo ma quale circostanza necessaria ed inevitabile delle relazioni sociali, che può essere colta come opportunità per ripensare e valorizzare il rapporto⁸⁶.

Tuttavia, al fine di integrare i processi partecipativi nella pratica delle imprese (o anche delle amministrazioni pubbliche) sarà opportuno, non solo ricorrere alla mediazione una volta che il conflitto sarà sopraggiunto, ma inserire attivamente le tecniche, propriamente mediative, conciliative,

⁸¹ V. DINI, *La gestione dei conflitti ambientali: i procedimenti giudiziari e le procedure di mediazione*, in L. Musselli (a cura di) “La gestione dei conflitti ambientali. Nuove strategie e nuovi strumenti operativi, 2019, p. 32. Cfr. S. DALLA BONTÀ, *Conflitto e lite ambientale. Una definizione difficile. Mediazione e processo (civile) a confronto*, in “Riv. Giur. Amb.”, Ed. Scientifica, 2021, p. 401.

⁸² v. J. HELLBRÜCK, E. KALS, op. cit., p. 119; Cfr. DALLA BONTÀ, op. cit., p. 406 e R. MARTINOLI, op. cit., p. 1018.

⁸³ S. DALLA BONTÀ, op. cit., p. 406.

⁸⁴ v. F. DANOVI, *Per uno statuto giuridico del mediatore*, in “Riv. Dir. Proc.”, Cedam, 2011, n. 4/2011, p. 775. Cfr. D. RAVENSCROFT, *Mediation and confidentiality*, in “Asian Disp. Review”, ANHKIAC/HKIAC, 2015, p. 24.

⁸⁵ v. R. MARTINOLI, op. cit., p. 1018.

⁸⁶ Cfr. A. HARTMANN-PIRAUDEAU, op. cit., p. 7.

nella prassi della società, per gestire i rischi ambientali ed evitare i danni⁸⁷. Specialmente laddove sia necessario confrontarsi con differenti *stakeholders*. Disponendo affinché, già dalla fase di sviluppo delle strategie ed interventi, si attivino dei percorsi di confronto e progettazione condivisi, in cui possono trovare spazio ed ascolto gli interessati. Pertanto, di fronte alle sfide della sostenibilità ambientale e sociale, l'impegno del giuscommercista (ma pure di giudici e organismi di conciliazione), per comprendere in che modo l'impresa possa ingaggiare, con efficacia, tutti gli interessati dalle sue azioni, deve inevitabilmente rivolgersi verso gli approcci conciliativi⁸⁸. Determinanti per rendere concrete le manifestazioni di impegno ambientale, misurandole con chi la natura che si intende proteggere la vive, non riducendole a semplici promozioni.

In questa direzione, si può menzionare l'esperienza della facilitazione ambientale. La quale, partendo dalla consapevolezza sulle conseguenze, spesso irreversibili, dei danni ambientali, integra le tecniche conciliative (comuni con la mediazione dei conflitti) con un approccio preventivo e partecipativo, proattivo. Finalizzato, come spiega l'art. 1 del regolamento sulla facilitazione ambientale del progetto *FacilitAmbiente*, promosso dalla Camera Arbitrale di Milano (CAM), a favorire “il coinvolgimento e la partecipazione di portatori di interesse alla progettazione di interventi e iniziative”, stimolando “l'analisi e la soluzione di questioni e problemi complessi in modo condiviso”, al fine di “prevenire e trasformare i conflitti all'interno di un gruppo, di un'organizzazione o di un determinato contesto sociale e territoriale”⁸⁹. Il procedimento vede l'intervento di un soggetto “terzo ed imparziale, con adeguate abilità e competenze in materia di gestione di processi di dialogo e deliberazione in contesti multipartite”⁹⁰, il facilitatore, formato su tecniche conciliative, come un mediatore. Ma che da questo si differenzia perché opera, non su un conflitto già sorto, ma in modo preventivo su interventi (industriali, infrastrutturali o pubblici) da cui è probabile si originino controversie. Quindi, “si inserisce nel procedimento di formazione della soluzione da condividersi fra le parti in conflitto”⁹¹.

Il facilitatore, dunque, seguirà ogni progresso, sin dalla fase di sviluppo e progettazione degli interventi e monitorerà, insieme agli interessati,

⁸⁷ v. R. MARTINOLI, op. cit., p. 1024.

⁸⁸ Cfr. S. DALLA BONTÀ, op. cit., p. 414.

⁸⁹ Art. 1, Regolamento sul servizio di Facilitazione Ambientale “FacilitAmbiente”, appr. con delibera n. 44/2021, Camera Arbitrale di Milano (CAM) e Camera di commercio di Milano, Monza-Brianza e Lodi.

⁹⁰ *Ibid.*

⁹¹ R. MARTINOLI, op. cit., p. 1024.

l'esecuzione degli stessi fino alla conclusione. Curando gli incontri, moderandoli e facilitando il dibattito tra gli intervenuti, approfondendo aspetti rilevanti o critici⁹². Addirittura, la procedura, per un migliore legame con i luoghi, può svolgersi direttamente nell'area interessata, in cui possono essere condotti dei sopralluoghi⁹³. Infine, vista la natura aperta, diffusa, della partecipazione, la facilitazione richiederà necessariamente una differente (rispetto alla mediazione) gestione della riservatezza del procedimento. Che dovrà essere garantita nella fase esplorativa dei bisogni e posizioni o nelle eventuali sessioni separate con differenti gruppi di *stakeholders*, ma messa da parte nelle sedute comuni, in cui, invece, la pubblicità può favorire un più ampio coinvolgimento di tutti gli interessati⁹⁴.

Tanto la mediazione, quanto pure la facilitazione, si dimostrano due esperienze significative che potrebbero trovare applicazione per le contestazioni nella valle del fiume Shushicë⁹⁵. Dove la pubblica amministrazione che vuole portare avanti la costruzione dell'acquedotto, insieme alle imprese turistiche della costa, che beneficeranno degli interventi, con le comunità locali, possono trovare, dal confronto, comune beneficio. Per meglio definire gli interventi e le loro conseguenze, comprendendo le necessità di chi vive i territori interessati e delle attività economiche, sia turistiche che rurali, le quali possono convivere beneficiando l'una dell'altra, promuovendo una sostenibilità ambientale effettiva, perché in contatto con i luoghi. Le tecniche mediative, in questo senso, propriamente integrate nell'agire dell'amministrazione pubblica e delle società, possono favorire questo processo. Gestendo il conflitto sociale ed ambientale, permettendo l'accesso ad un patrimonio informativo ampio e costruendo una convivenza tra comunità locali ed imprese turistiche ispirata dalla ricerca di percorsi di sviluppo condivisi, per ottenere benefici comuni e diffusi.

⁹² v. L. COMINELLI, E. CISCATO, S. LATTUILLE, *Environmental mediation and facilitation in Italy*, in S. Ali (a cura di) "Comparative and transnational dispute resolution", Routledge, 2023, p. 159.

⁹³ *Ibid.*

⁹⁴ Ivi, p. 160. Cfr. R. ORSUA, *Resolving climate change-related disputes through alternative modes of dispute resolution*, in "Asian Disp. Review", ANHKIA/HKIAC, 2022, p. 33.

⁹⁵ Realizzando gli obiettivi di informazione ambientale e partecipazione pubblica fissati dalla convenzione di Aarhus del 1998 ed all'obiettivo 16 dell'Agenda 2030 delle Nazioni Unite.

5. Conclusione

Gli avvenimenti, come quelli nella valle dello Shushicë, non sono fenomeni isolati, ma tensioni ricorrenti dove si confrontano modelli (e velocità) di sviluppo, sociale ed economico, differenti. Tra una dimensione rurale, legata al territorio, ed una turistica ed internazionale. È una contrapposizione “*urbanità-ruralità*”⁹⁶ che progressivamente si va accentuando, come già nel 1968 aveva osservato il filosofo Henry Lefebvre, che nel ‘diritto alla città’ (che attualmente, in un mondo iperconnesso, può leggersi anche, più generalmente, come ‘diritto al territorio’) criticava la conversione degli spazi (sia urbani che rurali) in “*valore d’uso*”⁹⁷. Perché plasmati sulle necessità dell’industria e la produzione, dunque su una domanda economica, e quindi progressivamente sottratti a chi li vive. Rendendo l’abitare una mera costruzione di *habitat*, funzionalizzati a necessità di profitto che non tengono in considerazione degli interessi sociali⁹⁸.

Queste riflessioni si dimostrano attualmente ancora valide se si osserva l’impatto del turismo sui territori e le città. Pertanto, il conflitto sullo Shushicë è generalmente significativo, non solo per l’Albania (ma pure per l’Italia e l’Europa), e mette in guardia sul rischio di uno sviluppo economico che non tiene conto delle comunità, dei loro interessi e bisogni. Le quali vengono private degli spazi di vita, facendo entrare i luoghi dell’abitare e l’ambiente “*nel valore di scambio e nelle merci*”⁹⁹. Ne risulta un processo che spezza i legami che uniscono la società, compromettendo la relazionalità e generando, di conseguenza, fragilità sociale e povertà, esclusione e marginalizzazione. Che sono i critici presupposti dei conflitti di prossimità, troppo spesso incompresi e che rappresentano una minaccia all’efficace sviluppo industriale, infrastrutturale ed economico.

Il diritto alla città pensato da Lefebvre, perciò, si presenta come la necessità di riappropriarsi della capacità progettuale e creativa sui territori per coloro che li vivono, chiedendo che si costruisca uno spazio di confronto comune, in cui possono incontrarsi differenti idee, interessi e necessità¹⁰⁰. Una dimensione in cui l’impresa che intende essere socialmente orientata, sostenibile, deve necessariamente inserirsi, affinché le sue azioni possano essere condivise, beneficiando dal confronto con la società civile.

⁹⁶ H. LEFEBVRE, *Il diritto alla città*, Ombre Corte, 2014, p. 74.

⁹⁷ Ivi, p. 85.

⁹⁸ Ivi, p. 66.

⁹⁹ H. LEFEBVRE, op. cit., p. 112.

¹⁰⁰ Ivi, p. 113. Cfr. G. MENEGUS, op. cit., p. 100.

Per tutte queste ragioni, gli eventi ripercorsi rappresentano una preziosa opportunità di riflessione per il giurista. Che si trova coinvolto direttamente (più di quanto possa immaginare) da queste tensioni, in cui si manifesta l'evoluzione, proiettata nello spazio sociale, del diritto che, come ha insegnato il maestro Tullio Ascarelli, “non è mai un dato, ma una continua creazione della quale è continuo collaboratore l'interprete e così ogni consociato”¹⁰¹. Così, l'impegno per la sostenibilità, nella sua duplice declinazione ambientale e sociale, chiede una lettura giuridica che sia capace di interpretare il rapporto e le differenze nello sviluppo tra le comunità locali, le amministrazioni e le imprese (turistiche, per gli avvenimenti qui in esame, ma non solo). Immaginando, per la loro esistenza e crescita comune una relazione differente. Anche grazie ad approcci ed istituti che favoriscano il dialogo e la progettazione condivisa.

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¹⁰¹ T. ASCARELLI, *Antigone e Porzia*, in “Riv. Int. Fil. Dir.”, Giuffrè, 1955, p. 765.

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**PUBLIC-PRIVATE PARTNERSHIP PROJECTS: THE
POSSIBILITY OF A GREATER ADAPTATION OF THE
ALBANIAN PSU SYSTEM TO THE EUROPEAN UNION
CRITERIA THROUGH CERTAIN INSTRUMENTS OF THE
ITALIAN CONTRACTS CODE. THE PROPOSAL FOR AN
INTEGRATED MODEL**

Francesca Andò¹

Abstract

The research project concerns the so-called "unsolicited proposals" (USPs) in the context of Public-Private Partnerships (PPPs), with reference to the policies of simplification and acceleration of public procurement procedures, in line with the reforms promoted by the Next Generation EU, aimed at improving the efficiency and effectiveness of the use of public resources.

USPs are a potentially innovative tool for the realisation of infrastructure and services of public interest, however little used in EU legal systems.

The research aims to explore how USPs can stimulate economic growth and improve the efficiency of public procurement procedures in order to stimulate the participation of private initiative.

The main objective of the study is to verify whether and to what extent the USP model can constitute a faster and more effective alternative to the traditional public tender, albeit in the modalities of the competitive dialogue and the negotiated procedure; this alternative, on the other hand, must not consume the indecisive latitudes proper to transparency and competitiveness, promoted through a rigorous qualification system of both contracting authorities and private economic operators, while at the same time maintaining high standards of protection of the public interest responding to the requirements of simplification and innovation. This is an even more relevant objective, since it is aimed at favouring, through the use of simplified and innovative procedures, the achievement of the "result", a goal expressly indicated as a principle of public contracting in the Italian legal system, the pursuit of which implies the reduction of the exclusively bureaucratic moment, supplemented and partly replaced by forms of public-private collaboration that are more dynamic and oriented towards

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the common objectives of the public administration and the private operator.

In this sense, it is particularly important to identify best practices that enable the role of USPs in PPP that guarantee both the protection of the public interest and the transparency of the collaboration between the various actors involved in such a way as to prevent the occurrence of any corrupt phenomena.

The research will undertake a comparative analysis between the Italian and Albanian USP models useful for considering the appropriateness of adopting an integrated model that draws from the best practices of both countries for the improvement of Public-Private Partnerships (PPPs) and Unsolicited Proposals (USPs).

Keywords: *Public Private Partnerships, Unsolicited Proposals, simplification, transparency, competition*

Introduction

Public-private partnership projects represent an innovative model of collaboration between public administrations and private actors, which has proved useful in addressing infrastructure development and public service needs. This model, which is widespread on an international scale, particularly in developing countries, can lead to innovative and efficient organisational and strategic solutions, thanks to the resources, skills and technologies offered by the private sector, capable of responding more rapidly to the need to implement these infrastructures and services of collective interest, even in contexts characterised by limited public resources.

Compared to the traditional procurement method, the PPP allows for a fairer sharing of risks between the parties, placing significant operational and financial responsibility on the private operator. This mechanism, if properly regulated, guarantees better value for money and optimisation of the use of public resources. Also not to be overlooked is the opportunity that the implementation of this form of collaboration offers to increase management quality and efficiency, while minimising project risks. The lack of clear standards on risk management and transparency mechanisms, however, may foster corruption and inefficiencies.

There is no universally accepted definition of Public-Private Partnership (PPP), a term that in some jurisdictions can encompass a broad spectrum of types of collaborative contracts between a public body and a private entity and, in other jurisdictions, is clearly differentiated from concessions.

There are various definitions of PPPs. The PPP Knowledge Lab defines a PPP as 'a long-term contract between a private entity and a government agency, for the provision of a public good or service, in which the private party assumes significant risk management responsibility and payment is performance-related'²

Another operational definition of a PPP is that it represents a type of long-term contract involving the involvement of the private sector in the construction, maintenance or operation of works (but also in the distribution of goods and services) or generally supported by the public sector, the common feature of which is the transfer of risk from the public entity to the private sector. This transfer takes place on the basis of an agreement designed to outline the rights and obligations of each party as well as the mechanisms for financial adjustments arising from unforeseen events or from the possible failure of the parties to meet their obligations.³ Another doctrinaire position worth mentioning is the one that describes the PPP as a dynamic relationship between different actors, based on mutually agreed objectives and characterised by transparency, mutual accountability and respect for the autonomy of the parties.⁴

This definition relates closely to the theme of unsolicited proposals (USPs), which could represent innovative tool capable of stimulating private initiative through a 'dynamic relationship' by effectively integrating it with public priorities while reducing bureaucratic rigidities

USP qualify as an instrument through which private operators can propose projects directly to the public administration even in the absence of a prior public tender or invitation

At the international level, the UN's 2030 Agenda for Sustainable Development promotes the use of public-private partnerships to achieve the Sustainable Development Goals, in particular Goal 17, which encourages

² World Bank, (2014), Retrieved from PPP Knowledge Lab:
<https://pppknowledgelab.org/ppp-cycle/what-ppp>

³ *PPP/Public-PrivatePartnership: Advantages and disadvantages*. 2018. Retrieved from
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⁴ Brinkerhoff, J. M.. *Partnership for International Development: Rationale and Practice*.
Public Administration and Development, 22, 1-14 . 2002

"Partnership is a dynamic relationship between different actors, based on mutually agreed objectives, pursued through a common understanding of the most rational division of labour based on the respective comparative advantages of each partner. Partnership implies mutual influence, with a balance between synergy and respective autonomy that includes mutual respect, equal participation in decision-making, mutual accountability and transparency".

cooperation between the public and private sectors to promote sustainable and inclusive infrastructure⁵. The UNCITRAL (United Nations Commission on International Trade Law) recommendations also reinforce the importance of regulating PSUs, emphasising the need to ensure transparency and competition in public procurement processes.

Many developing countries still lack basic infrastructure, and to achieve this, governments have therefore increased the use of PPP for the construction and management of public infrastructure. A paradigmatic example is the Republic of Albania where, because of the changing socio-economic system, the dividing line between public and private is becoming increasingly blurred, a feature found in most post-socialist cities. However, the public-private partnership model, widely used in this country, poses several challenges in terms of transparency and competition, with implications for compliance with European standards.

The paper analyses the Albanian PPP regulatory system, comparing it with the Italian model, to identify regulatory and procedural tools that can improve the balance between efficiency and legality.

The Public-Private Partnership in Albania: development, criticalities and prospects for reform

Albania is a state in which PPPs have grown significantly, especially after 2000, through the adoption of a flexible and widespread approach in which unsolicited proposals (USPs) have been widely used even in the absence of a formal invitation by the contracting authority.

Albania's approach to the use of USPs has fostered rapid and significant infrastructure development, particularly in the road, energy and health sectors, contributing to an average Gross Domestic Product (GDP) growth of 4% per year⁶. The total value of PPP contracts in the country is around 31% of GDP, and data indicate an increase in public-private partnership (PPP) projects aimed at implementing infrastructure interventions. Albania, moreover, sets a record in Europe in terms of commitments outside the ordinary budget of the government, which has invested for concessions in the form of PPPs sums equal to 9.5% of Gross Domestic Product (GDP); a percentage at least three times higher than that of the country that spends the most on PPPs in Europe, Slovakia.⁷

⁵ Winfried Huck, Nomos/Hart. *Transforming our world: the 2030 agenda for sustainable development*. Sustainable Development Goals. 2022

⁶ Data from the Ministry of Finance and Economy of the Republic of Albania, 2022.

⁷ according to Monitor's calculations, based on data from the Ministry of Finance's draft budget 2021 and Eurostat data for EU countries.

The analysis of the Albanian legislation on Public Private Partnerships makes it possible to verify how the adoption of USP can be used to stimulate economic development, but, at the same time, to point out the criticalities that can be encountered, especially linked to the lack of adequate control and corruption prevention tools, which have raised significant concerns regarding transparency and governance. In particular, the Albanian example allows for comparative reflection on how a more flexible use of USP can be combined with the adoption of a system of guarantees and accountability that preserves the public interest, while guaranteeing an effective balance between private initiative and collective protection.

A comparison of the Albanian system with the Italian one shows that, unlike in Albania, where the selection procedure is often based on direct invitations and non-competitive procedures, in Italy emphasis is on the publication of notices and generally on the principle of transparency, through a process that is more rigorous and better in line with European directives.

The use of USP in the Italian legal system is mainly regulated within the framework of project financing (Art.193 of Legislative Decree No. 36/2023), the institute being activated mostly through the inclusion of the project in the three-year planning tools of public entities and only if it responds to a significant public interest.⁸

The use of the USP model, however, remains limited due to multiple other factors such as the traditional public control-oriented cultural background, the lack of adequate incentives for private operators, and a certain resistance to adopting innovative instruments. Although three-year planning is a useful tool to ensure that proposals are aligned with the administration's strategic priorities, it naturally limits the proactive autonomy of private actors to come up with innovative proposals. It follows that the adoption of a more autonomous initiative-oriented approach in the use of USP could, therefore, stimulate private initiative, especially about complex infrastructure projects.

A wider use of USP in Italy could bring significant advantages, especially considering the new paradigm of the result principle expressly introduced by the new Public Contracts Code (D.lgs. n. 36/2023). A 'result' oriented approach, in fact, while not re-proposing the traditional emphasis on formal compliance of procedures, implies a reduction in external controls and

⁸ Although the redrafting of Art. 193 by the corrective measure set out in Legislative Decree No 209/24 has well differentiated between the two types of unsolicited proposals, public and private initiative.

privileges a more robust system of internal controls, with consequent greater accountability of public managers⁹, with reference to the effectiveness of the results obtained¹⁰. On the other hand, the analysis of certain instruments foreseen in the Italian legal system may provide cues to complement the Albanian legislation, thus proposing a more balanced model that is able to make use of the best practices of the two systems, capable of combining transparency and speed of implementation.

The Regulation of Unsolicited Proposals in the Republic of Albania

The Albanian approach to Unsolicited Proposals (USPs) is based on a procedural flexibility, enshrined in Article 10 of Law No. 125/2013, which allows accelerating the implementation of projects in strategic sectors, reducing the time of traditional public tendering procedures. This regulatory flexibility has facilitated the intervention of private investors, promoting innovative solutions that, as mentioned, have improved the quality of public services and stimulated the country's economic growth with benefits in the road infrastructure and energy sectors. Areas and sectors in which the direct involvement of the private sector has been instrumental in achieving greater efficiency and quality than in traditional public tendering processes, although the extensive use of such partnerships has led to potential liabilities for off-balance sheet PPP commitments¹¹, presumably in no small part due to a lack of transparency and institutional oversight.¹²

With the entry into force of the Interim Agreement between the European Union and Albania in 2005 and the ratification of the Stabilisation and Association Agreement in 2009, Albania assumed the obligation to align its legislation with European regulations, including the principles governing PPPs¹³. The Albanian legal system has made significant progress in aligning its regulations with the European Union directives and international best practices, in particular through the adoption of Law No.

⁹ Pisauro, G. *La pubblica amministrazione italiana: il punto di vista di un economista pubblico*. Rivista Italiana Di Public Management, 1(1), 60-67, 2018.

¹⁰ Carfagno M.: "L'evidenza pubblica tra diritto nazionale e diritto eurounitario. I principi di buona amministrazione e di concorrenza" in *Economia Pubblica*, 2023.

¹¹ *Albania, record in Europe for public private partnership (PPP) concessions, risks*. 2020. Monitor.

¹² International Finance Corporation), *Creating Markets in Albania: Country Private Sector Diagnostic*, 2022. Washington DC.

¹³ Gentjan Skara, Bojana Hajdini: *Enforcement of the European Union Law before the Albanian constitutional court and the high court*- Journal of Liberty and International Affairs Institute for Research and European Studies – 2021.

162/2020 on Public Procurement and the aforementioned Law No. 125/2013 "On Concessions and Public-Private Partnerships" as well as the regulation "for the adoption of rules for the evaluation and award of concessions /PPPs" adopted by Decision No. 575 /2013 as amended by Law No. 50 of 18.07.2019.

Unsolicited proposals are defined, pursuant to Article 3, Paragraph 15 of Law No. 125/2013, as proposals for the acquisition of concession projects that are not received in response to a request submitted by the contracting authority in a competitive selection procedure. USPs (Article 8 of Law No. 125/2013), can be submitted in several sectors considered strategic for the country's development that include energy, transport, waste management, health and other essential infrastructure services. Article 13 of the same law specifies that the selection of the sector must be consistent with national, regional or local strategic priorities, and each proposal must be assessed based on its compatibility with the country's development plan, including through the projections made by the political priorities.¹⁴

The procedure for awarding USPs consists of several stages involving different institutions, including ATRAKO (Agency for the Processing of Concessions), the Ministry of Finance and ad hoc appointed commissions. The procedure is boosted by the submission of a proposal by the private operator to the Ministry of Finance, which must include a detailed description of the project, technical specifications and an economic-financial feasibility analysis. The proposal (Art. 11 of Law No. 125/2013) must be preliminarily assessed to ascertain its compliance with the public interest, consistency with national objectives and technical feasibility. The Ministry of Finance upon the positive outcome of this preliminary analysis determines, in cooperation with ATRAKO (the Concession Processing Agency, a kind of Albanian ANAC)¹⁵, whether to proceed with the detailed evaluation of the project.

If the decision is taken to proceed, the contracting authority appoints the evaluation commission, which includes representatives of the Ministry of Finance, ATRAKO and other experts in the field with specific technical and economic expertise, to ensure a comprehensive and impartial examination of the proposal in detail, through an in-depth analysis of the proposal for the purpose of assessing economic viability, cost-effectiveness and risk distribution. In the event of a positive review of the project the negotiation

¹⁴ Art. 3 Decision No. 575/2013

¹⁵ the Agency for the Processing of Concessions (ATRAKO), is responsible for assisting and monitoring all stages of the preparation and implementation of PPP projects, ensuring that contractual obligations are met.

phase begins between the private operator and the contracting authority to define the details of the contract, including the risk management mechanisms, the financing plan, and the project execution modalities. Following the negotiation and the favourable opinion of the Ministry of Finance, ATRAKO verifies that the project complies with the regulations in force and proceeds to publish the project (Art. 19) to evaluate any other competing bids. If alternative proposals emerge, a public tender is held to select the most advantageous offer and, in the event of failure, the original proposer is awarded a percentage of value as compensation for the work done in the preliminary project development phase. If no equivalent proposals emerge, the project may be approved without a tender.

The tender publication phase provides for a limited time between its publication and the date set for submitting bids, which in some cases can reduce effective competition.

After final approval, the contract is concluded between the private operator and the relevant administration. ATRAKO continues to play a supervisory role during the project execution phase, *inter alia*, by verifying compliance with the contractual terms. The Ministry of Finance, together with other monitoring agencies, is responsible for fiscal control and the actual implementation of the intervention. The lack of a system of independent monitoring bodies and, above all, of effective sanctions in case of non-compliance is often considered one of the critical aspects of the Albanian system.

Relationship between European Directives and USPs in Albania

Unsolicited Proposals (USPs) offer public administrations the opportunity to reduce the upfront costs of project development, allowing for a focused assessment of the most promising initiatives. However, these instruments can also present significant risks, such as conflicts of interest, reduced competition and potential corruption that cannot be adequately addressed by regulatory means alone.

Unlike states where market opening is more recent, countries such as Chile, South Korea and the United States have developed a framework with adequate availability of qualified human and technological resources to manage USPs and introduce legislation designed together to ensure transparency, competition, and satisfaction of private interests aligned with public interests. These include centralised processes for the evaluation and approval of USPs, market benchmarking to ensure economic value, and the involvement of external consultants to enhance transparency and competitiveness.

USPs, in Albania, a country recently opened to the free market, therefore represent a challenge in terms of governance and adaptation to European standards. The amendments introduced in 2019 by Law No. 50/2019 marked an important step towards aligning that country with European Union standards by introducing mechanisms to improve transparency in concessions. Despite such progress, the effectiveness of the Albanian legislative framework in ensuring transparency and competition, although increased, nevertheless remains under scrutiny in the EU.

Although the Albanian Public Procurement Agency (PPA) has implemented an e-procurement system designed to improve the transparency of the procurement process, allowing for a secure and efficient management of tender documents¹⁶, the actual functioning of the system continues to encounter some obstacles, including a lack of specific preparation of the managers of the P.A., especially in the 'smaller' contracting stations, and not always sufficient awareness among the stakeholders regarding the procedures for submitting unsolicited proposals.

As a result, legal provisions support competition but, in practical reality, monopolistic tendencies often emerge, undermining the competitive landscape.

On the other hand, the maintenance of market freedom and competition remain fundamental requirements of European law, and the observance of selection procedures that guarantee competition, transparency and proportionality is a key element for the proper functioning of public-private partnerships.

Arguments have raised concerns about the lack of effective risk management, insufficient control and monitoring of projects, lack of transparency in the negotiation of PPP contracts and in the definition of the conditions for their renewal; factors that could, if not quickly corrected, create the risk of a closed and uncompetitive market and increase the risk of failure or inefficiency.¹⁷

The fact that the PPP contracts had a significant and unforeseen impact on Albanian public finances raised concerns about the potential increase in public debt and the reduction of availability for other national and local budget items.

¹⁶ S. Teka, S. Doçi: *Corruption in Public Private Partnerships as a Barrier to Sustainable Development: The Case of Albania in FEB International Scientific Conference: strengthening resilience by sustainable economy and business - 2023*, University of Maribor press.

¹⁷ Kullolli, B. *Contract law of Albania in the context of public-private partnerships*. Social & Legal Studios, 6(4), 105-113. 2023. doi: 10.32518/sals4.2023.105.

Other factors that can jeopardise the success of a PPP include the poor organisational efficiency and excessive bureaucratisation of the public partner, which often hinder the success of the project. Other critical issues arise from the misalignment of expectations between the public and private parties, limited information sharing between government and private partner, and uncertain sustainability of revenues. In addition, an unbalanced distribution of risks, lack of internal capacity, poor planning—which includes regulatory and political aspects—and inadequate attention to the operational phase, such as the maintenance and long-term management of infrastructure, can undermine the effectiveness of the partnership.

Fragile regulatory frameworks, insufficient institutional capacity and ineffective risk-sharing mechanisms therefore make PPPs vulnerable. To address these issues, it is crucial to develop a clear and transparent management model, including sound strategic planning, fair risk allocation and effective monitoring and evaluation tools to ensure long-term project sustainability and success.

In 2018, the Ministry of Finance and Economy in Albania established a Fiscal Risk Unit to manage risks arising from PPPs, to mitigate transparency and governance issues. One of the next goals ahead could be to ensure further investment on the qualification of human resources in the P.A., to strengthen its role in the supervision and control of PPP projects.

To improve the framework of PPPs in Albania, it has been suggested in doctrine that PPP contracts should be updated to include more precise provisions for risk management, mechanisms for greater transparency, and the involvement of civil society and its exponential articulations, to ensure that projects are effectively aligned with the country's development goals. Furthermore, strengthening institutional capacity, through collaboration with external consultants, and improving the quality of the judicial system could contribute to a more effective implementation of public-private partnerships in Albania.

Critical issues - The example of the Fier, Tirana and Elbasan waste-to-energy plants

Emblematic of the critical issues to be addressed is the case of PPP management in the waste sector, in which the Albanian government signed three Public-Private Partnership (PPP) contracts for the construction of the Tirana, Fier and Elbasan waste-to-energy plants. These contracts were all awarded to the only companies that had submitted bids, without, therefore, any real competition. The lack of transparency in the awarding procedures, as well as accusations of corruption, are among the main criticisms

levelled at these projects.¹⁸

The contract for the construction of the Tirana incinerator was signed in 2017, but to date the plant has still not been built. The tendering procedures have been widely criticised for a lack of transparency, and several public officials have been accused of corruption in connection with the project. Direct state support for the project has not been accompanied by a clear framework of responsibilities and supervision mechanisms. Similar critical issues were found for the Fier incinerator project, awarded in 2016. Again, the lack of transparency and links to politicians and high-ranking officials raised suspicions of favouritism. Despite significant public funding, the Fier plant showed significant delays and difficulties in implementation, highlighting problems of governance and quality control of the work.

The most emblematic case to understand the criticality of PPPs in Albania is the case of the Elbasan waste-to-energy plant. The company Albtek Energy was awarded the contract, the project of which was advanced through an Unsolicited Proposal (USP), in which no public tender was held. The company was established shortly before the contract was awarded, raising doubts about its technical capacity and transparency. The plant was completed and went into operation in 2016, but the contract was characterised by a lack of specific risk management clauses, leaving most of it to be borne by the public authorities. Furthermore, there were no adequate control, monitoring and accountability tools for the private operator's activities, which increased the risk of inefficiencies and non-transparent management. Following financial problems, the company awarded the contract went bankrupt, and the management of the incinerator was transferred to the municipalities involved without a clear long-term management strategy, raising doubts about the sustainability and effectiveness of the project in providing lasting benefits to the community. The example of the three waste-to-energy plants shows how shortcomings in transparency, risk management mechanisms and monitoring capabilities can jeopardise the success of PPP projects. Insufficient regulatory frameworks and dubious links between public officials and contracting companies have led to trials and sometimes convictions by the judicial system for these three projects, highlighting the need for stronger supervision and accountability mechanisms¹⁹

¹⁸ Transparency International. *High level corruption cases in the Western Balkans and Turkey*, 2020

¹⁹ Soana Tekla, Silvana Doci. *Corruption in Public Private Partnerships as a barrier to development: the case of Albania*. University of Marbror press. 2023 DOI <https://doi.org/10.18690/um.epf.3.2023.30> ISBN 978-961-286-736-2

In order to better align with EU standards, the Albanian legislation should include more stringent requirements for the publication of PSU notices and their opening to public tenders, albeit in the forms of competitive dialogue and negotiated procedure. In addition, strengthening the role of ATRAKO and the Ministry of Finance to monitor compliance with contractual obligations on the one hand, and to supervise the integrity of the tendering process on the other, could ensure greater compliance with EU transparency and competition standards.

The Albanian Government has declared its readiness to formulate a new law on the granting of public-private partnerships, with the aim of mitigating the problem that is arising with the existing contracts of public relations and private companies. In the document 'Priority Measures under the Public Administration Reform 2023-2030' released for public consultation, it is noted that the law, which is expected to be passed at the end of 2025, will be preceded by the drafting and approval of the methodology for inventory, commentary and depreciation of assets in the public sector, which will be ready by mid-2025. It is also expected to be the methodology for the approval of concession/PPP projects - until the end of 2026. These regulatory changes aim to synchronise contract monitoring data and track the process of monitoring the continuation of concession/PPP contracts; Strengthen and integrate the Government's capacity for monitoring ongoing concession/PPP contracts; and create efficient mechanisms related to the monitoring of concession/PPP contracts, so that the risks of the contracting parties are as low as possible to ensure benefits.

Tools to reconcile the need for speedy project implementation with the need to ensure transparency and competitiveness are foreseen and regulated in the Italian legal system, from which the Albanian legislation could draw, with specific reference to the new Contracts Code. Tools that, if properly utilised, would help increase control and trust in the PSUs, ensuring that all project phases are documented and accessible to the public, significantly reducing the risks of favouritism.

Legislation and regulation of PPPs in Italy

Italian legislation aims to subordinate the use of PSUs to a strict evaluation of the public interest and a framework of controls to avoid abuse, ensuring transparency and accountability. The comparison between Italian and Albanian legislation on Public-Private Partnerships (PPPs) and Unsolicited Proposals (USPs) reveals significant differences in procedure and approach. The tendency to accelerate approval processes and reduce bureaucracy with

the aim of fostering economic recovery was already evident in the so-called Simplification Decrees (Decree-Law No. 76/2020 and Decree-Law No. 77/2021), which allowed for a wider use of unsolicited proposals²⁰. This has raised a few concerns regarding the possible erosion of competition and transparency in public procurement²¹ and the quality and sustainability of public works realised through PPPs. To improve the management of the risks associated with PPPs, the decrees therefore provided that public authorities could take extraordinary measures to manage the risks associated with the execution of contracts, including the possibility of renegotiating contractual terms in response to significant changes in market conditions or community needs. The measures to simplify procurement procedures were confirmed by the New Code (Art. 50 D.lgs. n.36/2023), which reiterated the possibility of using the negotiated procedure without publication of a contract notice for contracts below the thresholds and for works considered to be of strategic interest, with specific limitations that include the need to ensure the transparency of the process, compliance with the principles of rotation of invitations, and the maintenance of competition for contracts of significant value.

In summary, while Albania is characterised by flexibility in the use of USPs and a direct approach to negotiation, Italy emphasises transparency, competitiveness and participation through more structured regulatory and procedural instruments. This difference reflects different priorities: in Italy, the objective is to ensure that each project is selected in a competitive and transparent manner, while in Albania the emphasis is on attracting private investment and the rapid realisation of the necessary infrastructure.

Unlike in Albania, where USPs are used as a general PPP model, in Italy this instrument ended up being limited to a specific and strictly regulated sphere. USPs were then regulated, pursuant to Article 193 of Legislative Decree No. 36/2023, in a restrictive manner, limiting their admissibility mainly to project financing and subjecting them to a rigorous assessment of the public interest (the S.A. is required to highlight the expected benefits in terms of efficiency and innovation) and specific controls, including the publication of a notice to verify the presence of any competing proposals. The possibility of pre-emption for the promoter has also been confirmed,

²⁰ Zoppolato, M). *Le procedure negoziate e l'esclusione automatica delle offerte anomale, è davvero una accelerazione e una semplificazione del sistema?* 2023 *Economia Pubblica*, (2), 253-264.

²¹ Decarolis, F., Giorgiantonio, C., & Giovanniello, V.. *The awarding of public works in Italy: an analysis of the mechanisms for the selection of contractors*, (2010) SSRN Journal

but with more stringent and transparent criteria to avoid distortions of competition, also considering the findings of the Court of Justice. In Albania, on the other hand, Article 10 of Law No. 125/2013 allows a wider use of USPs, which can be submitted directly by private operators without necessarily going through a public tender. A significant difference lies in the competitive procedure. In Italy, after the preliminary evaluation of USP, a traditional public tender is generally carried out according to the criterion of the economically most advantageous offer. The use of the competitive dialogue is not expressly excluded by the legislation, but in practice, and especially due to the cultural tradition of this country oriented towards public control, it almost always proceeds because of an invitation from the contracting station and, subsequently, with a traditional tender. In contrast to Albania, where the procedure may involve direct negotiation if no equivalent alternative proposals emerge, thus reducing lead times but lending itself to possible corruption risks. Risks that could be mitigated through the adoption of the tools provided by the Italian legislator without, however, running the different risks of the speed of execution of contracts and works.

Towards a More Flexible and Competitive Model in PPPs and Unsolicited Proposals

The evolution of Italian law and jurisprudence on public-private partnerships highlights the need for a rethinking of the methods for selecting the contractor, to ensure greater openness to the market and fairer competition among economic operators. Project financing, in its declination of unsolicited proposals, requires a more dynamic and flexible approach that allows administrations to identify the most advantageous solution without excessively rigid procedural limitations.

The doctrine has extensively discussed the importance of more adaptable instruments in the contract award phase, highlighting how the rigidity of traditional competitive procedures may be inadequate in the presence of complex contractual structures, in which the public administration needs more structured interactions with economic operators to identify the most advantageous technical and economic solution.²²

The generalisation of public evidence, in fact, risks sterilising any possibility of comparison on the individual case, reducing the effectiveness of the procedures and compromising the solution most suited to public

²² Cintioli F., *Per qualche gara in più. Il labirinto degli appalti pubblici e la ripresa economica*, Soveria Mannelli, Rubettino. 2020
Carfagno M., *Io stato banditore, Gare e servizi locali*, 2001 Milano, Giuffrè.

needs. The tightening of the competition rules around concessions, if not commensurate with the purposes of the discipline, runs the risk of thwarting the selection process, preventing a substantial comparison between proposals that takes into account not only economic aspects, but also qualitative and innovative elements that are essential to ensure the effectiveness and sustainability of the project. In fact, a lack of flexibility in the procedure could lead to a limitation of the overall evaluation of bids, hindering the administration's ability to choose the most appropriate solution for the specific context. Too rigid a model risks debasing the very function of public evidence, which should guarantee the achievement of the best possible result in terms of public benefit, rather than merely formal compliance with tendering procedures.

It does not appear that the new regulatory formulation by Legislative Decree No. 209/2024 (corrective to the Public Contracts Code) is satisfactory in this sense.

Article 193 of the Code now distinguishes between private and public proposal initiatives, with a simplified feasibility project to encourage the participation of economic operators. While the changes made by the corrective have introduced greater transparency and regulation, the risk of a rigid and bureaucratic approach by administrations in the selection of contractors remains. The regulatory intervention has strengthened the role of the PPP as a strategic instrument for the realisation of public works, improving the allocation of risk between the public and private sectors and fostering competition. On this point, however, it would perhaps have been appropriate to develop the indications provided by the European Commission's soft law²³ and the provisions of Directive 2014/23/EU, perhaps with an explicit reference to the figures of the competitive dialogue, the negotiated procedure, and the innovation partnership as reference models. Procedures characterised by a wide margin of discretion on the part of contracting authorities, which are hesitant to adopt more flexible instruments for fear of exposing themselves to censure and litigation and, for this reason, are scarcely used. In fact, contract selection procedures are often the place of choice for a defensive administration, which prefers rigidly regulated schemes rather than more flexible but potentially more effective solutions.

Recent case law of the Italian Council of State has further reinforced the need to rethink the entrustment model in PPPs and unsolicited proposals. With Order No. 9449 of 25 November 2024, the V Section of the Consiglio

²³ Interpretative communication on concessions in Community law 2000/C 121/02.

di Stato raised a preliminary question before the Court of Justice of the European Union, asking it to assess the compatibility of the right of pre-emption granted to the promoter with the principles of competition and equal treatment enshrined in EU law. This intervention is part of a series challenges by the European Commission, which in the past has opened infringement proceedings against Italy for its national project financing regulations. These jurisprudential elements highlight the need for a systematic reform, which would ensure greater alignment of Italian regulations with EU principles. The adoption of the competitive dialogue and the negotiated procedure in unsolicited proposals and project financing could solve some of the current critical issues. These instruments would ensure a more structured evaluation of the offers, and a selection of the contractor based not only on price, but also on the overall quality of the offer and the innovative capacity of the proposer. The regulatory changes represent a step forward, but there remains a need for clearer and more systematic regulation for the use of negotiation tools. An improvement in procedural discipline could include greater use of flexible contracting schemes, with specific guidelines clarifying the criteria for the adoption of innovative instruments. In this respect, a systematic analysis of unsolicited proposals globally has shown an increase in evaluation criteria over time, including key elements such as innovation, value for money and transparency²⁴. This is the only way to ensure administrative efficiency, competitiveness and full compliance with European legislation.

The experience of the Albanian model, which provides for greater procedural flexibility, may offer food for thought for the evolution of the Italian regulatory system. A broader recourse to negotiation tools would make it possible to improve the effectiveness of public-private partnerships by introducing the possibility of modulating the procedure according to the complexity of the project, ensuring that the selection of the operator takes place based on qualitative and value-added criteria, rather than on a mere economic comparison.

In light of these considerations, the need for an adjustment of Italian regulations in a more open and flexible sense, overcoming the rigidities that still characterise the awarding of PPPs, seems evident. The integration of advanced negotiation tools would not only meet the requirements of compliance with European legislation and the findings of case law, but would also make the concessions market more attractive, encouraging

²⁴ Nyagormey, J. J., Baiden, B., Nani, G., & Adinyira, E. (2020). *Review on criteria for evaluating unsolicited public-private partnership PPP proposals from 2004 to 2018*. International Journal of Construction Management, 22, 2243-2257.

greater participation of economic operators and promoting more innovative and efficient solutions for the management of infrastructures and public services.

For the purposes of the sustainability of an integrated model that at the same time guarantees transparency, competitiveness and flexibility, it appears necessary to refer to certain provisions contained in the Italian Contracts Code. Of clear importance is the introduction in the new Code of the provision of the mandatory digitalisation of the contract life cycle (Arts. 19-36, D.lgs. no. 36/2023). The reference to the lifecycle includes the management, monitoring and publication of all the phases of the contract, from awarding to conclusion, including the virtual file of the economic operator (instituted by d.l. 77/21 and completed with the vision of the digital ecosystem of e-procurement) which allows (also through the use of the A.I.) the verification of the absence of the causes of exclusion under Articles 94 and 95 and of the requirements under Article 103, automatically updated. The consequent effect is the guarantee of transparency (emphasised in Art. 28) and effective control by the competent authorities and citizens, thus also reducing corruption risks. The digitisation of the contract lifecycle could be a crucial element in improving the traceability of operations, ensuring that all project phases are documented and accessible to the public, thus increasing the level of control and confidence in the management of USPs.

The qualification of contracting stations and economic operators is another relevant aspect in the comparison between the two countries. The qualification system of contracting authorities and economic operators has been strengthened in Articles 38-40 of D.lgs. n. 36/2023, the strictness of which aims to ensure that only reliable operators can participate in projects. The qualification of contracting stations is also regulated in Art. 62 of D.lgs. n. 36/2023, which imposes stringent requirements to ensure the technical and organisational capacity of public administrations. Only qualified entities will be able to manage PPP and USP projects, ensuring that those involved have the necessary skills and capabilities. This system, together with the digitisation of procedures, helps to raise the standards of quality and reliability in the realisation of public works. The National Anti-Corruption Authority (ANAC) plays a key role in monitoring and regulating procedures, through monitoring systems defined by guidelines (Resolution No. 318 of 28 March 2018). A form of control aimed at ensuring that the risks transferred to the private operator remain borne by it throughout the duration of the relationship, thus strengthening the governance of the project and mitigating the risk of management failures as

well as ensuring transparency and compliance with current regulations. In Albania, on the other hand, the control system is less structured, as provided for by Article 13 of Law No. 125/2013, relying mainly on the direct assessment of the competent authorities, with fewer guarantees of transparency and equity.

It is worth highlighting a crucial aspect of the evolution of PPPs in Italy, represented by the growing focus on corporate social responsibility (CSR) and social and environmental sustainability, in line with European directives and the Sustainable Development Goals. This paradigm shift reflects a greater awareness of the importance of integrating economic, social and environmental dimensions in the management of public services. The new code has, in this sense, further developed the public debate ex art.40, already introduced in the 2016 Code (Legislative Decree no. 50/2016), a crucial mechanism to foster citizen participation and ensure that PPP decisions are aligned with collective needs, which has become mandatory for projects of particular social, economic and environmental relevance. This ensures that local communities can actively contribute to the decision-making process, increasing transparency and consensus around infrastructure projects. This tool, initially introduced in 2016 by Legislative Decree No. 50/2016, could be further promoted for its use in the context of Unsolicited Proposals (USPs), thus contributing to improving transparency and public participation in private initiative projects as well. In Albania, there are no formal tools to foster public participation, making the decision-making process more centralised and less inclusive than other models.

About subcontracting (Arts. 119 and 105, D.lgs. n. 36/2023), the new Code, while allowing for cascade subcontracting, makes its admissibility subject to authorisation by the contracting authority, for each subcontractor, with the aim of ensuring control over the quality of performance and preventing the risk of entrusting to unqualified parties. Although, compared to the previous Code, there are no longer any quantitative limitations on subcontracting, an agreement entrusting third parties with the entire performance of the services as well as the prevailing category is rendered null and void. In Albania, in contrast, there are no specific limitations on subcontracting, leaving economic operators' greater discretion in the management of works and supplies, with fewer guarantees of quality control and transparency. To obviate the risks resulting from the liberalisation of subcontracting, one could suggest the introduction, along the lines of Legislative Decree No. 50/2016, of quantitative limitations on subcontracting, in the amount of 50% of the contract value.

The New Public Contracts Code of 2023 is therefore a further step towards

a more flexible, transparent and result-oriented public procurement management model. The integration of digital tools, the simplification of procedures, public debate and the promotion of innovative partnerships with the private sector are the key elements to improve the efficiency of public works and to respond to the modernisation needs of the country's infrastructure. Recent reforms have tried to balance the need to simplify procedures with the need to ensure transparency and competitiveness, but challenges remain, especially in a changing economic environment. The future direction of PPP regulation will have to address these challenges, ensuring that public-private partnerships are not only efficient, but also fair and sustainable. This is on the condition that innovation is accompanied by the introduction 'ab origine' of certain evaluation mechanisms and guidelines for the identification and approval of infrastructure projects of pre-eminent public interest, while at the same time strengthening regulatory and institutional frameworks, also to maintain a high level of transparency, ensuring a more robust legal framework and better governance for PPPs in Albania, in order to attract investment, ensure sustainable economic development and protect public interests.

Conclusions. Reflections and ideas for an integrated PPP model

The Italian and Albanian experience offers an opportunity to consider the adoption of a model inspired by the regulations of both countries for improving the framework of Public-Private Partnerships (PPPs) and Unsolicited Proposals (USPs), while respecting the principles of European legislation. This model aims to reconcile the flexibility of the Albanian system with the robustness of the guarantees offered by the Italian system, integrating best practices that could promote greater efficiency and transparency in operations. One of the possible fields of integration could concern the introduction of USPs in Italy with greater openness compared to their current limitation, which confines them mainly to the sphere of project finance. In this logic, it might make sense to extend the eligibility of USPs also for smaller contracts and local infrastructure, to stimulate private initiative also for medium- and small-scale works. It is understood that the eligibility of USPs must always be accompanied by a rigorous verification of technical and economic feasibility and a preliminary assessment of the public interest. Where the characteristics of the project permit, the competitive dialogue instrument seems to be favoured, especially for complex and innovative projects, since it allows direct interaction between the administration and economic operators, with the aim of developing solutions that better meet public needs. All this while respecting the logic of

European law and its principles and thus favouring freer negotiations, to pursue efficiency by overcoming formal stereotypes. This means adapting the procedures for selecting contractors to the individual underlying economic transactions, the characteristics of the candidates, the specifics of the market and the peculiarities of the different sectors. Essential, to avoid the risks associated with the accentuated role of discretion, is the recourse to the principles set out in the first part of the New Italian Public Contracts Code, composing them through appropriate balancing operations and obviously updating the professionalism of the administrative bureaucratic departments involved.

Fundamental to this framework is the complete digitisation of the contract lifecycle, a key element in realising the value of transparency. Every stage of the project, from initial proposal to implementation, will have to be documented and accessible to ensure continuous monitoring and traceability of transactions. Of particular interest will be the use of artificial intelligence in law enforcement.²⁵ Computers have demonstrated the ability to collect huge amounts of data for subsequent analysis, yet turning information into useful knowledge requires the analysis of experienced practitioners and intelligent tools that provide facts and alternative solutions. The introduction and active use of Big Data technology will not only help combat tax evasion and fraud but also simplify procedures for the implementation of projects in the field of contract law through the prism of the PPP.²⁶

Public debate (ex art. 40 Legislative Decree no. 36/2023) could be used for USPs even under the thresholds, in order to guarantee the active participation of citizens in the decision-making process, thus reducing the risk of arbitrary discretion in defining the public interest and ensuring that proposals are in line with the real needs of the community.

The qualification system of economic operators and contracting authorities is fundamental to guarantee the quality and reliability of operators involved in PPPs. Its further strengthening is instrumental in ensuring that only entities with proven experience and financial soundness have access to

²⁵ Chunling, L., Memon, J., Thanh, T., Ali, M., & Kirikkaleli, D. (2021). *The impact of public-private partnership investment in energy and technological innovation on ecological footprint: The case of Pakistan*. Sustainability, 13(18), article number 10085.

²⁶ W. Wang and M. Ma argue that the risks listed in the context of PPPs are not unique to this type of partnership but are characteristic of most projects in various sectors. They can appear in both purely private and public projects. As such, risks must be considered in any investment activity and are not exclusively related to PPPs. in Wang, N., & Ma, M. (2020). *Public-private partnership as a tool for sustainable development - What literatures say?* Sustainable Development, 29, 243-258.

procedures. Qualification must be based on stringent criteria and periodic checks, in line with the provisions of art. 38-40 and 62 of D.lgs. n. 36/2023, thus ensuring that both contracting stations and economic operators are adequately prepared to manage complex projects.

The limitations on subcontracting, provided for in art. 119 and 105 of D.lgs. n. 36/2023, are to be applied to USPs, admitting in the Albanian system a maximum limit of 50 per cent of the project amount and the obligation of authorisation by the contracting authority. This limitation is intended to prevent the control of executive activities from being delegated to unqualified third parties, thus increasing the control over the quality of the works, the protection of workers and the direct responsibility of the main operator.

The above arguments are intended as a contribution to the reflection on the perspectives of USPs and in particular on the possibility of their extension to sub-threshold contracts and capacity for greater flexibility in negotiations. It remains the case that the objective and condition of the ideas offered above is the maintenance of a high level of transparency and competitiveness, which the instruments indicated can usefully ensure.

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RAINBOW FAMILIES. LEGAL CHALLENGES FACED BY LGBTIQ INDIVIDUALS REGARDING THE BEST INTERESTS OF THE CHILD

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Abstract

This paper explores "the best interests of the child" as one of the most crucial and overarching principles concerning children's rights. Emerging trends in the conceptualization and formation of families raise various legal and social issues related to the best interests of the child, particularly regarding the adoption of children by same-sex couples.

The journey for LGBTIQ individuals to form families and become parents is often complex and at times challenging or even impossible. Over the years, 'rainbow families' have encountered numerous obstacles while exercising their rights, especially concerning free movement rights within the EU, which can directly or indirectly impact their children's lives. Family law matters are the exclusive responsibility of EU Member States; however, it appears the EU has limited authority in these areas. Nonetheless, the European Union is making important strides to address the rights of 'rainbow families.'

Recent amendments to the Constitution of the Republic of Albania aimed to include the phrase "Sexual orientation" in Article 18, changes that could pave the way for same-sex marriages and, consequently, the adoption of minors.

Keywords: family, adoption, LGBTIQ, best interests of the child, free movement rights

Introduction

Family is the oldest social group³, it is the fundamental and most important cell of society that plays a major role in children's well-being,

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³ Stych, Marek. 2021. "The definition of family in international and EU law." Edited by Zoran Cekerevac. MEST Journal (MESTE) 9 (1): 192-198.
doi:10.12709/mest.09.09.01.22, p.192

development, and education. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State⁴. According to Article 8 of ECHR, 'Family life' can include the relationship between an unmarried couple, an adopted child and the adoptive parent, and a foster parent and fostered child⁵. In *Schalk and Kopf v. Austria*, the ECtHR noted that cohabiting same-sex couple living in a stable relationship constitutes "family life". In the first cases examined in the light of the European Convention on Human Rights concerning homosexual couples whether they constituted "family life" under the Convention, the Commission in *X and Y v. The United Kingdom* argued that 'despite the modern evolution of attitudes towards homosexuality' such relationship 'did not fall within the scope of the right to respect for family life'⁶.

The concept of the family has been in a constant state of evolution. Nowadays, the family is facing essential changes in its structure. With single-parent households, varying family structures, and fewer children, the modern family defies categorization⁷.

Are these new forms of family legally protected? What will be the effects on society in a few decades if we are reformulating the concept of family?

Humanity must know how to determine whether it is essential for its future to continue with the traditional family model only or whether a healthy society stems from a healthy and happy family, regardless of the form of family formation.

In recent decades, different countries have been trying to give the right legal form to families created by homosexual couples.

In general, parental rights are legally recognised through biology, adoption, and marriage⁸. For both LGBTIQ and non-LGBTIQ people alike, families are made in many different ways, and so there need to be multiple ways for

⁴ Universal Declaration of Human Rights (UDHR), Article 16, paragraph 1

⁵ Article 8: Respect for your private and family life, Equality and Human Rights Commission,
<https://www.equalityhumanrights.com/human-rights/human-rights-act/article-8-respect-your-private-and-family-life> 11.11.2024

⁶ *The European Court of Human Rights: Advancing Legal Recognition of Same-Sex Couples across Europe?*, European Institute of Public administration,
<https://www.eipa.eu/blog/the-european-court-of-human-rights-advancing-legal-recognition-of-same-sex-couples-across-europe/> accessed 04.12.2025

⁷ The Evolution of American Family Structure, CSP Global
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accessed 12.11.2024

⁸ Presumption of paternity

the parent-child relationship to be legally secured⁹.

Legal challenges faced by same-sex parents regarding the best interests of the child

Among the most debatable issues regarding homo-parenting is the best interest of the child. BIC as a threefold concept includes a substantive right, a fundamental and interpretative legal principle, and a rule of procedure that is aimed at ensuring the full and effective enjoyment of all the rights recognised in the UNCRC¹⁰. In all actions concerning children, BIC must be a primary consideration and applied to all aspects of the child's life. Parents have the right and obligation to care for their children's lives and support their healthy growth and harmonious personal development.

Parental rights reflect the child's rights as a human being and can never be against the basic human rights of a child, as governed by national and international legislation¹¹. Under no circumstances should the parents' interests not outweigh the child's interests.

In the case of rainbow families, the best interest of the child is more widely discussed due to the legal impossibility of granting certain rights to homosexual couples regarding parental responsibility. Rainbow families face more obstacles while exercising parental rights.

In some countries, parental rights for same-sex couples may be recognised through adoption, artificial insemination, in vitro fertilization, etc. These couples are unable to have children who are biologically related to both partners. Because of artificial insemination, the biological mother automatically gains parental status, while the non-biological parent must seek out legal parentage¹². The new parental relationship established in one of these forms aims to imitate the natural parent-child relationship. In these cases, the child is deprived of the figure of a mother or father and is raised by two mothers or two fathers.

Should adoption by homosexual parents be considered the second 'best option' for an abandoned child when it is not possible to find heterosexual adoptive parents, or should the assessment of good parenting not be based

⁹ Parental Recognition Laws <https://www.lgbtmap.org/equality-maps/recognition/parenting> accessed 09.10.2024

¹⁰ Best interests of the child (BIC) https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/best-interests-child-bic_en accessed 24.12.2024

¹¹ Parental rights https://eige.europa.eu/publications-resources/thesaurus/terms/1169?language_content_entity=en accessed 24.12.2024

¹² Emily Daskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 2 (1999).

on sexual orientation, making this type of adoption a first option as well? In cases, *X and Others v. Austria and E.B. v. France*, the ECtHR recognised the equal rights of homosexuals to adopt children, and that adoption decisions should not be based on the grounds of sexual orientation, affirming that to meet the best interests of the child principle, a stable and loving home environment, regardless of the parent's sexual orientation, is a priority.

The legal nature of the lesbian partnership directly impacts parental determination, which in turn impacts child custody/visitation and support¹³. The legal challenges faced by homosexual couples regarding parenthood established through adoption can be divided into two phases: the first phase is related to the difficulties these couples have in becoming adoptive parents and the second phase is related to the period after the adoption of the child is approved, where the recognition and exercise of parental responsibility may be limited.

Albania does not recognize same-sex marriages, consequently, couples cannot adopt jointly, but as single parents, homosexuals can adopt a child if they prove they can be good parents. Also, second-parent adoption is only allowed for heterosexual couples.

A single homosexual individual can adopt a minor since the sexual orientation of the adoptive parent is not a legal restriction. Still, during administrative procedures where, among other things, the ability of the adoptive parent to be a good parent is examined, sexual orientation can influence the selection phase if there are other applicants on the waiting list.

Free movement rights for rainbow families in the EU.

On the global spectrum, the EU appears comparatively LGBTI-friendly¹⁴. There are 14 EU countries that allow same-sex marriage, civil partnership, and full joint adoption by same-sex couples¹⁵. The countries in question

¹³Jason C. Beekman, *Same-Sex Marriage: Strengthening the Legal Shield or Sharpening the Sword? The Impact of Legalizing Marriage on Child Custody/Visitation and Child Support for Same-Sex Couples*, 18 Wash. & Lee J. Civ. Rts. & Soc. Just. 215 (2012), pg.221.

¹⁴David de Groot, *The rights of LGBTI people in the European Union*, European Parliament, May 2023.

¹⁵Same sex marriage and civil partnership: the Netherlands (2001), Belgium (2003), Spain (2005), Sweden (2009), Portugal (2010), Denmark (2012), France (2013) Luxembourg (2015), Ireland (2015), Finland (2017), Malta (2017), Germany (2017), Austria (2019) and Slovenia (2022).

Adoption: the Netherlands (2001), Sweden (2003), Spain (2005), Belgium (2006), Denmark (2010), France (2013), Malta (2014), Luxembourg (2015), Austria (2016),

have recognised these rights at different periods, separate from each other, where it is noted that some countries have initially allowed marriage for same-sex couples, some cohabitation, and some adoption. Family law is the competence of EU countries, and EU rules apply only in cross-border cases¹⁶.

One of the main legal obstacles that rainbow families suffer is the recognition of parental rights while traveling/living in countries that do not recognise these rights for same-sex couples. Same sex couples that adopt or bring in life a child through in vitro fertilization or artificial insemination in a country that its legislation allows homoparenting, problems arise when they return to their country of origin or to another EU country to live as a family. While children born to same-sex couples face problems with birth registration and obtaining a birth certificate, also the refusal by the relevant authorities to issue civil status documents in some cases limits or prevents the possibility of gaining citizenship, leaving the child stateless. The refusal to recognise parenthood can, among others, lead to the refusal to the parent to grant permission for a medical procedure for the child in a hospital or to register the child in a school, or also separate children of one of their parents in cases of child abduction¹⁷. An estimated 2 million children may currently face a situation in which the recognition of their parenthood as established in one Member State is not recognised for all purposes in another Member State¹⁸.

And while the European Court of Justice has ruled that same-sex marriages and parenthood established for same-sex couples have to be recognised in all EU Member States for the purpose of free movement, this case law is still very unclear, due to mixed concepts, which has led to consistent Member State violations¹⁹.

Regarding rainbow families, the European Court of Justice recognised same-sex family relationships in cross-border situations in the cases *Coman*

Ireland (2016), Portugal (2016), Finland (2017), Germany (2017) and Slovenia (2023). Estonia (2016).

¹⁶ 'Overview of family matters. Family law is the competence of EU countries, and EU rules apply only in cross-border cases', European Commission, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/overview-family-matters_en, accessed 15.01.2025

¹⁷ LEGISLATIVE TRAIN 12.2024 3 supporting people, strengthening our societies and our social model, European Parliament.

¹⁸ Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions, and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood.

¹⁹ See *D. de Groot, 2023, pg. 1*

(2018) and Pancharevo (2021).

On June 24, the Court of Justice issued a reasoned order²⁰ establishing that when an EU country has recognised two persons of the same sex as parents of a child, then the EU country of which that child is a national should issue identity documents to that child with both parents on them, and that all EU countries should protect the right to freedom of movement of the child and their family²¹. In the case *Stolichna obshtina, rayon 'Pancharevo'* (the 'VMA' case), the ECJ held that EU Member States are required to recognise for the purposes of EU free movement law the familial ties established in another EU Member State between a child and her parents who are a same-sex couple²². This case is considered the most important step for recognizing rainbow families' children in the EU. The European Court of Justice has ruled that parenthood established in one of the EU member states has to be recognized in all EU member states pursuant to Article 81(3) TFEU.

In the State of the Union 2020, Commission President Ursula von der Leyen stated: 'If you are parent in one country, you are parent in every country.'

In 2021, the European Parliament declared the EU an LGBTIQ Freedom Zone and in December 2022, the Commission proposed a regulation on the recognition of parenthood²³.

Until any legislative solution gets adopted, rainbow families have to rely

²⁰ See *CJEU-ORDER OF THE COURT (Tenth Chamber) 24 June 2022* (In the case of a minor child who is a citizen of the Union and whose birth certificate, issued by the authorities of a Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national (i) is obliged to issue to that child an identity card or a passport without requiring the prior transcription of a birth certificate of that child into the national register of civil status, and (ii) is obliged to recognise, as is any other Member State, the document from another Member State that permits that same child to exercise without impediment, with each of those two persons, his or her right to move and reside freely within the territory of the Member States).

²¹ Annual Review of the Human Rights situation of lesbian, gay, bisexual, trans and intersex people in Europe and central Asia, ILGA-Europe, 2023, pg.15

²² Alina Tryfonidou, *The Cross-Border Recognition of the Parent-Child Relationship in Rainbow Families under EU Law: A Critical View of the ECJ's V.M.A. ruling*, <https://www.europeanlawblog.eu/pub/the-cross-border-recognition-of-the-parent-child-relationship-in-rainbow-families-under-eu-law-a-critical-view-of-the-ecjs-v-m-a-ruling/release/1> accessed 06.01.2025

²³ *'Free movement rights of rainbow families'*, Think Tank European Parliament [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2023\)749768](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)749768) accessed 15.01.2025

only on their free movement rights guaranteed by the Treaties and the Citizens' Rights Directive²⁴.

Conclusions

Rainbow families with children, as a new or alternative form of family, have been facing legal challenges for decades, especially over the recognition of parenthood. In cases of adoption of children by homosexual couples, even though they prove that they can be good parents, facing various legal situations regarding the recognition of parental rights can be considered as instability in the child's life, violating the child's best interests. The best interests of the child is a very broad legal concept, which must be interpreted on a case-by-case basis, as otherwise interpreting different cases based on general concepts and standards that represent the best interests of the child may lead us to erroneous practices that violate the best interests of the child. As a principle, the goal for abandoned children is to deinstitutionalize them and find an adoptive family when returning to the biological family is not possible, so adoption in one of its forms is the best possible option for the child to grow up in a warm and harmonious family environment. The parent-child relationship is sacred, regardless of the form in which it is established, as long as it exists, it should not at any time limit the child's fundamental rights.

Although at first glance it seems that at the international and European Union level same-sex couples have gained some rights regarding parenthood, they still face many obstacles while exercising their parental rights in cross-border situations. On the international level, similar initiatives to those of the EU have been undertaken regarding the recognition of parental ties, especially concerning surrogacy.

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²⁴ Lenka Kříčková, *Same-sex families' rights and the European Union: incompatible or promising relationship?*, *International Journal of Law, Policy and the Family*, Volume 37, Issue 1, 2023, ebad001, <https://doi.org/10.1093/lawfam/ebad001> accessed 10.01.2025.

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HARMONIZATION OF ALBANIAN LAW WITH EU LAW: ANALYZING MAIN INTEGRATION ASPECTS OF ALBANIAN SOCIAL PROTECTION SYSTEM

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Abstract

Issues of social protection are seen as an area where from all the countries of the Balkans Western still has a lot of work to do and improve. Regarding social policies, the European Commission specifically proposes two main directions including an increased focus on employment and social reforms through greater monitoring of relevant policies, including in the context of the economic reform programs. The European Commission emphasizes that integration should not be considered as an issue purely technical. Social policy issues are considered a more important issue in recent years within the framework of the EU and it declares that the goal of the EU will be to "Provide more financial assistance in the social field in the Western Balkans including on health and social protection.

In this article, I identify and analyze the main Integration aspects of the Albanian Social Protection System based on the analytical and comparative methods. This paper aims to identify not only these main aspects of integration and harmonization but also to provide possible keynotes and solutions that might be suggested so that the impact of this long process might be stronger and more effective.

Keywords: *Social Protection System, Social Policy, European Commission, Harmonization, Integration Process.*

Introduction

The years of Albanian integration in the European Union (EU) have been full of major political, economic, and legal changes. Since obtaining EU candidate status in 2014, Albania has achieved significant reform advancements in its legal systems and policies concerning key areas for its membership bid. Among these areas, the social protection system is key in demonstrating Albania's readiness to meet the EU's legal and social criteria. As a component of social policies, the EU has put in place policies in the

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social protection arena, aimed at providing the minimum necessary living standard, eradicating poverty and social exclusion. Thus, it could be noticed that the reforms in the sphere of social protection of Albania are not only the legal necessity for the country's compliance with the EU legislation but also the requirement for the proper improvement of the well-being of the population and sustainable economic development. The legal approximation of the Albanian social protection system needs to be done because the EU values social protection and inclusion in its accession process. Albania inherited the current social protection system from the times of communism and is still insufficient in terms of coverage, financing, and new governance. For example, the pension system in Albania is a major concern of the country, which experiences pension coverage with only one-third of the population, and a large informal employment that continues to be excluded from the social security schemes. Welfare healthcare and unemployment benefits are below the EU levels, which has led to aggravated inequality and socio-economic risks. Failing to fill these gaps, Albania will unlikely meet the EU socio-economic criteria needed for membership, further prolonging the integration process and weakening the reforms. Therefore, the integration of the Albanian social protection system with the EU law is crucial for making Albania's EU membership benefits-inclusive for the nation's most needy and deprived populations³.

The purpose of this paper is to review the major features of Albania's attempts at aligning its social protection system with EU law. More concretely, it analyses how compliant Albanian legislation is in the domains of pensions, health care, and unemployment benefits with EU legislation. And what obstacles does Albania face in its effort to join the EU in a full sense? This study will offer an analysis of the legal and institutional frameworks implemented in Albania in the integration of the social protection system, challenges such as limited financial sources, political opposition, and institutional capacities of the country. The paper will also analyse the extent and direction of these efforts in the context of Albania's socio-economic development and on the welfare of Albanian citizens. This will enlighten this study, which will in turn present a research analysis of procedural advancement made so far as well as indicate sectors that require further effort, leading to the appreciation of the multifaceted process of EU

³ Erisa Xhixho and Henris Balliu, "Money Laundering-Harmonization of Albanian Legislation in the Framework of EU Membership," *Balkan Journal of Interdisciplinary Research* 10, no. 1 (2024): 63-76.

integration as well as the need for the reform of social protection⁴. In this paper, I argue that Albania has made significant strides towards aligning its social protection system with EU law, but numerous challenges persist especially in the realm of financing, capacity, and political commitment. The harmonisation process has had its joy rides; this is especially in aspects such as pension legislation reforms and healthcare reforms. Nevertheless, there are still deficiencies in implementation, particularly in rural setting and marginalised communities. The research assumes that increased financial and technical assistance from the EU is essential to support these reforms, but that Albania must also enhance its institutional capacity, further public debate, and resolve political and economic obstacles to reforms in the sphere of unemployment insurance, care for the elderly, and other topics.

Analytical and comparative research methodologies are involved in the conduct of this study. Analytical approach will consider Albania's legal reforms as to meet the EU requirements as well as the directives and regulations of this organisation and the social protection system in which it is included. For the comparative analysis, Albania will be compared to the other EU candidate countries of the Western Balkan region that also share common issues with reference to alignment of social protection system to EU law including North Macedonia and Montenegro. Instead, it will do so by centering on legal reform, social policy, and conditions for EU integration, allowing this paper to provide specifics about Albania's context and opportunities in its quest for EU admission. In addition, it will present practical strategies for improving the system of social protection in the country even more.

Literature review of Albanian Social Protection System

General Description of Albania's Social Protection System

Albania's social protection system encompasses a range of services to safeguard its citizens' well-being in times of need. Health care insurance, social security benefits, Unemployment insurance compensation and even social safety nets for vulnerable persons. The scheme of social security is the main welfare support plan in Albania which offers pensions. This is mainly through employee and employer's cheque-offs and supplementation by the government. Currently, the pension system of Albania reaches little more than one-third of the country's population, although the coverage is

⁴ Rezarta Tahiraj, "Opportunities and Challenges of Harmonisation and Coordination of Legal Rules on Customs Controls with Acquis Communautaire: The Case of Albania," ECCE-European Common Customs Evaluation (2021-2022): 223.

not uniform across the territories, especially the rural ones. Albania's health care delivery system is nearly entirely government-funded, and all services are mandated by the Ministry of Health, although, in recent years, private sectors have been expanding. This basic human right is supposed to be enjoyed by all people around the globe, but inequities continue to exist when it comes to the quality and availability of healthcare services, especially beyond the capital city of Tirana. In relation to unemployment benefits, Albania runs an earnings-related system provided that contributors contribute a particular number of months of social insurance to receive unemployment benefits. Nonetheless, unemployment is persistently high, with 12.4 % of the labour force being unemployed in 2020 and the informal sector is a contributing factor to this⁵. The government has also tried to increase access and efficiency of the unemployment benefits system. However, factors like; bureaucracy hitches and very high level of informality in labour market persists. Albania delivers social services to more deprived groups of the population including one parent families, the elderly and disabled. This is essentially done through the Social Assistance Programme (PMS), which has been expanded over the years but which continues to have congruence problems and now the question of adequacy in targeting⁶.

Even with these legal frameworks, the social protection system in the country is poorly resourced, lacks a proper administrative capacity, and has missing links. In the case of Social Protection, there is very little interphase between the different sectors making it cumbersome for an individual to obtain social protection services. Moreover, the system is still highly faulty in terms of service delivery and governance with corruption and bureaucracy hindering service delivery.

Summary of Previous Studies

Many contributions have looked at the effects of the EU integration process on candidate countries in terms of legal reforms with a special focus on the Western Balkan countries. Therefore, Dharmo and Dharmo, in their study conducted in 2024, offer a comprehensive assessment of Albania's harmonisation with EU legislation across sectors by focusing on the aspect of legal approximation in trade, environmental law and human rights.

⁵ Mirjam Reci and Kristinka Jance, "Albania's European Integration and Civil Society Impact," *Studia Europejskie-Studies in European Affairs* 28, no. 3 (2024): 315-335.

⁶ Sonja Ndrejoni, "Legal and Economic Aspects of Albania's Integration in the EU" (2023).

However, social protection has many grey areas which have not been researched as much even though it is central to the Albanian EU membership goal. In this article, prolific research is conducted by Garunja (2024) that revolves around the general process of EU integration in Albania particularly with regard to the employment of Albanian workers abroad, profile, and trends of Albanian migrants, and Albanian labour market policies and social protection framework to match with that of the EU. In addition, according to Tahiraj (2021), Albania has struggled to align legal requirements with EU customs legislation and reveals the institutional and financial challenges that affect social protection reform. In the sphere of social policy Xhixho and Balliu (2024) discuss the general economic absorption of Albania in the EU. The authors emphasise that financial nuances and institutional vulnerabilities prevent Albania from effectively applying EU norms in such spheres as pensions and medical care. They indicate that an apparent lack of public confidence in the reform process further aggravates these challenges. As beneficial as the existing literature on Albania's legal harmonisation process with the EU is, research studies on social protection integration are rare. Therefore, this paper intends to complement this gap by presenting an analytical overview of Albania's social protection system and its attempts towards EU concordance, in the light of exploring social policy change in relation to EU expansion.

Historical Context: Evolution from the Communist Era to Present-Day

Historically, Albania has evolved a social protection system from a central economy during its communist regime to a market economy in its present system. Before the change of regime in Poland, the welfare state was very pronounced with the state being fundamentally responsible for nearly all forms of welfare, which include pensions and health care as well as the guarantee of employment. It was an entirely state run centrally planned economy, and private enterprise was negligible as was the freedom of choice. The government of Albania offered free medical care and pensions to every citizen, and the state regulated employment by owning enterprise. Social protection system was created to support full employment where most people worked in state owned enterprise. It was roughly rudimentary as has been defined by modern trends but was primarily founded on compulsory social insurance remittances by employees in the formal sector. The phase of radical transformation followed the early 1990s shake up that came with the dismantling of communism. The transition to a market economy was characterised by mass privatisation, high unemployment and the undermining of the financial base on which the former system has

depended. As the employment ratio in the formal labour market decline, state owned enterprise-based pension system gets erode gradually. The same issues affected the system of healthcare, which had been centralised and directly controlled from the state. By the end of 1990s, Balkan country of Albania has a deficient social protection system and it can barely fund the system⁷.

It was during early 2000 that Albania begins to liberalise its social protection systems as a measure towards integration into the European Union (EU). Reforms were performed and gradually the pension system changed from the Pay-As-You-Go to the contributory system, which met the international standards. The social insurance was expanded to cover more person in the formal waged employment while the government started to react to problems of the informal economy. The healthcare system also started evolving toward decentralisation with insurance and tried to update its conditions and facilities. Nevertheless, Albania is still far from achieving satisfactory coverage and service quality for a number of reasons rooted in its socialist past and slow pace of reforms.

Research gap

Despite slight enhancements in the two past decades, several issues that Albania encounters in the social protection system may slow its growth and its convergence with EU counterparts. The financial sustainability of the system is one of the biggest problems currently faced by healthcare systems around the world. The pension system as has already been established reaches only 35 % of the population, and thus apart from being underfunded, it faces an ageing population, which puts pressure on the budget. This has a big implication for the status of funding at the moment and places the pension system under threat of sustainability throughout the next few decades. In the same context, Albania's facilities are pioneered by chronic shortages of such necessities. There is a lack of employment opportunities for professionals within the public health care sector, and Albania invests only 3.5% of its GDP in health care, or less than the EU 9.8%. Despite the nominal universal availability of health care, the quality is special in remote regions. All Albanians have access to free health care but the majority still seek private health facilities, which include expensive hospitals. The problem is compounded by the absence of adequate

⁷ Evis Garunja, "Albanian Legal Standards in Guaranteeing the Freedom of Movement of Workers in Alignment with the Regulation (EU) No 492/2011," in *EU Enlargement and Acquis Adoption Burden: State of Art and Proposals for a Correct Adoption of the Acquis for Albania* (2024): 287.

specialised service delivery and modern health equipments. The Albanian government has tried to bring changes in the provision of health care services; recent policies include decentralizations of services and health insurance plans. Although some progress has been made in the actual supply of services and in making the public aware of equality of opportunities for service delivery the region still has a long way to go in the enhancement of quality services.

Other topics are one, high youth and rural population unemployment rates. According to World Bank, the unemployment rate in Albania in the fiscal year of 2020 was around 12.4 % still it has a low position in the rural area where informality is high. I also found that the unemployment benefits system is a failure to support the unemployed population adequately. Despite this, the government has implemented several interventions that can be used to fight unemployment, including vocational training and labour market policies, and a number of times they have failed to adequately meet the demands of the problem⁸.

Methodology

Using a qualitative research approach, this study discusses the processes of aligning Albanian law with EU law regarding Albania's social protection system. The policy brief adopts a mix of legal exegesis and comparative legal research and case study approaches to determine the extent of compliance of Albanian social protection laws to EU regulations and the real-world challenges of achieving full compliance.

Document and Legal Analysis

The main approach of data collection is a documentary, comparing the Albanian national legislation and the EU legislation in the field of social protection. Particular emphasis lies on the principal legislative documents, including the Albanian Social Protection Law, legal provisions of insurance and labour relations, as well as EU Directives and Regulations regarding minimum standards of social protection systems in the member countries. This comparative method will give emphasis to the conformity or otherwise of the Albanian laws with the EU legislation. In particular, the analysis will reveal the extent to which Albania has adopted the EU pension policies and endeavoured to harmonise unemployment benefits with the EU standard. Legal documents will be analysed with the goal of pointing out gaps,

⁸ Arlind Cara, "Harmonization of State Legislation with EU Legislation - The Case of the So-Called Anti-Defamation Media Law in Albania," Thesis 10, no. 1 (2021): 161-188.

contradictions or possibly some topics that need further legislation to fulfil the EU standard in a given domain, namely the eligibility criteria, the benefit programmes, and the position of private actors in the social security systems⁹.

Comparative Legal Research

The application of comparative legal research method will also add to the richness of the research by identifying how other EU member states have experienced similar harmonisation processes particularly those in Central and Eastern Europe and the Balkans. Croatia to Romania, states in the European Union that joined the union in years past will be of particular focus. Consequently, the study will compare the social protection systems in Albania with the previously listed states with a view of coming up with the common trends, challenges and the model that could be embraced by Albania in its way towards a better association. This comparative framework will answer a set of questions such as the level of satisfaction regarding the speed at which Albania has accustom itself to EU law as compared to other countries and where Albania stands on the index of the implementation of EU directive in social protection. This will give a better view to how the harmonisation processes are implemented in the region and a glimpse into the challenges that Albania would have in attaining a full legal convergence¹⁰.

Case Study Analysis and Expert Interviews

The use of case studies as part of the research method enables the assessment of how particular legal reforms have been adopted and practiced in Albania. The reforms that will be analysed in the framework of the case studies will encompass among the others the changes in the pension laws and the unemployment benefits, and the process of adaptation of Albanian legislation to the EU labour rights. In these case studies, attention will be paid to the legislation activity, political and economic conditions and the actions of such bodies as European Commission and the World Bank related to the mentioned reforms. Further, the study will use interviews with legal professionals, policymakers, and international

⁹ Pranvera Beqiraj and Dorina Gjipali, "Stabilization and Association Agreement in the Jurisprudence of the Albanian Constitutional Court," *Juridical Tribune-Review of Comparative and International Law* 14, no. 3 (2024): 452-464.

¹⁰ Andrea Kokomeci, "The Impact of EU Commercial Law on the Economic Transformation of Albania: A Legal Analysis of Business Environment and the Establishment of Legal Entities" (PhD diss., A. Kokomeci, 2023).

organisations representatives. These interviews will give real life experiences of practical difficulties and political factors involved in the harmonisation process. Opinions of experts will be employed to evaluate Albania's improvements and to get opinion about problematic sectors. Such research approach that will include documentary analysis, comparative legal study, case studies and expert interviews will give a clearer and all-round view on how the Albanian legal order has integrated with EU legal order with focus on social protection. In this way, this multi-method approach, the research will establish where the process of legal harmonisation stands and where Albania is in terms of the progress made towards achieving better alignment with EU policies and legislation.

EU Social Protection and Policies

The European Union (EU) has a well-established social protection framework designed to The European Union or EU possesses a fully developed social protection system for the purpose of caring for the people and building a unified EU social fabric in each member country. Social protection within the EU relates to a broad concept of. Measure that involves the provision of social services. Some of the intervention measures provided by inclusive social protection include health care provision and support for families and unemployment, especially during difficult times. The study of the EU's general principles of law concerning social protection emanates from the use of binding legal measures inclusive of directives, regulations as well as recommendations that set principles and guidelines for member countries. Another document which is part of this concept is the Minorities Social Protection and Social Inclusion Guidelines that was adopted in the EU Council in 2006. Here it is possible to find a list of priorities and goals for member countries to update the social protection system, social services, employment policies, and income security measures. It is worth mentioning that they pay special attention to the guaranteed protection of all members of society, but particularly, the weak and the helpless population, including the elderly, children, and individuals with disabilities.

EPSR adopted in 2017 is another significant legal act that outlines the basic principles of social protection in the EU. The Pillar is not legal and regulatory, but it outlines various norms on social rights including a right to health, income maintenance, and decent work. It also seeks to solve problems such as social isolation, joblessness, and the lack of social resources. Referring to the EPSR, underlines that all EU citizens should be granted these basic rights, which is fully consistent with the EU's aim of

economic and social cohesion. Besides these overarching principles, EU social protection laws are supported by specific regulations that address issues relating to mobility, and the organisation of the social security systems between/across the member states of the EU. An example is Regulation (EC) No.883/2004 which deals with the coordination of the systems of social security because the citizens of the EU can gain rights in one state and lose them when they transfer to another EU member state. This regulation is important to facilitate the mobility of workers within the EU, and the WB, as they tend to harmonise their systems with those of the EU¹¹.

EU's Impact on Social Policy Reforms in the Western Balkans and Albania

The European Union therefore has a direct influence on shaping further reform of social policies in the Western Balkans from which Albania is a member. Social protection reforms are an important part of the EU's accession process, through which the candidate country is prepared for integration into the EU. Not only the EU is willing to donate the amount of money, but the EU also aims at offering the countries of the region the orientation needed for the reform of the social protection systems based on the EU model. These changes are considered to be necessary initially, because only their completion would guarantee Albania and other countries of the Western Balkans' compliance with the EU's requirements for social cohesion and welfare, which objectively predetermine their joining the Union. Albania's compliance with the EU standard of social protection policies has been best illustrated in the pension reform. As Albania aims at meeting conditionality of the EU in the pension reforms, several technical cooperation programmes have been donated by the EU. For example, action point 16 of the EU-Albania Stabilisation and Association Agreement (SAA) signed in 2006 is dedicated to enhancing SSWs in the country. EU directives especially those on pensions, that encourage, inter alia, the move away from state funded pensions to contributory, more sustainable pensions have featured prominently in Albania's reform plan. Also, the EU has been supportive of Albania in the process of reforming the unemployment benefits payment system and strengthening the country's health care in which the EU emphasis on health insurance and universal health care coverage.

¹¹ Bledar Abdurrahmani, "Data Protection in Albania: A Challenge Towards Improving Legislation on the Way to EU Integration," BJES (2021): 104.

In addition, the EU rewards/promotes social protection reforms through accession conditionality as Albania's compliance to EU standards is assessed. EU's progress reports on Albania, including those on social protection, reveal major deficiencies between the Albanian system and EU standards. These reports provide a review of the social protection system in Albania and make recommendations on ways forward; recommendations that touch on the gaps in pension coverage and adequacy, access to health care, and the high incidence of informal employment in the country.

EU Financial Assistance: Support for Social Protection in the Western Balkans

The EC has at its disposal a range of mechanisms that offers financial tools for funding reforms of social protection in the Western Balkan countries including Albania. The Instrument for Pre-Accession Assistance (IPA) is one of the principal sources of revenue for the Applicant Countries. The IPA gives candidate and potential candidate countries in the Western Balkans and Turkey a framework within which to prepare to meet the obligations of EU membership across a range of policy areas, including social protection reform. During IPA, Albania has benefited from substantial funds to finance its social protection changes. For instance, money has been provided for the purpose of supporting the process of the country's bringing its social insurance systems up to date, reformation of the healthcare sector, and increasing the effectiveness of the social security schemes. IPA 2017 programme was focused on developing Albania's pension system as it helped in putting into operation the e-registration pension systems to minimise the workload of employees¹²

Besides, under other regional sources, such as the EU Neighbourhood Instrument (ENI), the EU offers money for enhancing social services, employment policies, and fighting social marginalisation in the region. These programmes have allowed Albania to build a health care infrastructure, such as an increase in primary health care services delivery, and implementation of the reforms on the introduction of basic health insurance for all citizens. Another priority area for the EU is social inclusion which tends to fight against poverty and to improve vulnerable groups of people's accessibility to social services including Roma people, elderly and people with disabilities. EU aid does not begin and end with budgetary assistance. For example, the EU's Twinning Project involves the

¹²Andrea Kokomeci, "The Impact of EU Commercial Law on the Economic Transformation of Albania: A Legal Analysis of Business Environment and the Establishment of Legal Entities" (PhD diss., A. Kokomeci, 2023).

sharing of ideas and practices between EU member countries and Albania. Such exchanges assist in enhancing Albania's technical skills in the development and implementation of strong social protection policies¹³.

Harmonization of Albanian Social Protection System with EU Law

Legal Framework for Harmonization

Harmonizing Albania's social protection system with European Union (EU) law involves aligning the country's national laws, regulations, and practices with the legal standards set by the EU. It is crucial on the way toward accession, as the EU insists on the convergence with common policies in the fields of priority importance such as social protection including pensions, health care and labour market mobility. As previously indicated, Albania's legal framework for harmonisation has to be based on different EU legal instruments which offer either suggestions or prescriptions. The main legal act regulating the EU social protection system is the Treaty on the Functioning of the European Union (TFEU), including part on the social policy and part on economic governance.

Other contents also contribute significantly to processes of harmonising the existing social protection regimes, and these include regulations and directives. The Social Security Coordination Regulation (EC) No. 883/2004 is crucial in order to align the Albanian social protection system with EU requirements especially for those people that are frequently transferring from one Member State to another. This regulation guarantees that the patterns of social security keep an eye on and avoid either over or under coverage with regards to mobile employees. Albania also needs to ensure that pension schemes conform with EU directives including Directive 2014/50/EU that seeks to enhance cross borders movement of workers within EU through enhanced pension rights transferability. Besides, such regulations Albania's harmonisation process of laws with the EU legislation is closely regulated by the Stabilisation and Association Agreement (SAA) with the EU both in the social protection, labour market policies, and public administration reforms¹⁴.

Key Areas of Harmonization

Pension Schemes:

Albania has been facing serious pension problems such as; low coverage,

¹³ Arlind Cara, "Harmonization of State Legislation with EU Legislation - The Case of the So-Called Anti-Defamation Media Law in Albania," Thesis 10, no. 1 (2021): 161-188.

¹⁴ Arlind Cara, "Harmonization of State Legislation with EU Legislation - The Case of the So-Called Anti-Defamation Media Law in Albania," Thesis 10, no. 1 (2021): 161-188.

low pensions paid and high informality for a long time. Albania's pension schemes integration with the EU legislation does imply the adaptation of pension schemes to EU directives that promote sound, equitable and transferable pension systems. The effectiveness of the public pension system is a major policy concern in the EU; the union supports a solidarity-based pension system that ensures adequate income for the elderly and other susceptible groups of the population. For instance, Albania is obliged to raise the pension coverage rate, which is still low, due to the large number of employees with informal employment status. As of 2020, pension insurance was filled, in fact, only 50% of the working-age population, whereas in the majority of the EU countries – 90%¹⁵. Albania must also initiate the process of changing the pension system towards a multi-pillar system is already prescribed by EU legislation and consists of public pension systems and funded pension schemes. In this case, there will be a more sustainable and diversified system through which the retirees can be accorded adequate income¹⁶.

Healthcare:

Another area which needs dramatic changes to fit the EU requirements is the healthcare system of Albania. By recommendation of the EU, all member states are supposed to create access to all health care which means that citizens of those states should not be charged any cash when they require medical assistance. Albania still struggles with some of the following issues; Low health care expenditure per capita, inadequate coverage, and insufficient funding of the public health sections. A part of the harmonisation procedure, Albania has had to raise its healthcare expenditure to EU standards which call for spending of at least 7-8% of the Gross Domestic Product on health. Also, another important aspect for Albania is to provide equal availability of the services for the people with the fewer opportunities, such as the deprived Romany population that even face the difficulties in the access to the primary healthcare services. To achieve this, Albania could take a step in the direction as made by Germany and Austria by adopting a format of the universal health insurance. In 2008, about 70% of the population has been captured through the SHI and the programme has to be active to cover the remaining 100% of

¹⁵ Sonja Ndrejoni, "Legal and Economic Aspects of Albania's Integration in the EU" (2023).

¹⁶ Iris Dhamo and Ana Dhamo, "Albania and the European Integration," *Interdisciplinary Journal of Research and Development* 11, no. 1 S1 (2024): 198.

the population¹⁷.

Labor Market Integration:

One of the most important of those measures is synchronisation of the Albanian labour market policies with the EU standards. Some of the EU measures that support EG is the implementation of active labour market policies, those reverse policies which facilitate reintegration of citizens into the world of work and capacity building. Albania has to steer towards policies that address particularly a high level of youth unemployment. In 2020 Albania's youth unemployment rate stood 29.7%, a figure that is over double the EU average. There are policies that encourage youths' transition into the Europe labour market through professional course, traineeship and employment. Albania has to enhance more labour market adjustment so that the citizens of Albania can easily find employment across the EUROPEAN UNION and should maintain social security rights as well. This envisages integrating provisions of the labour law relating to equality of workers, employment safety and anti-discrimination with the directives of the EU¹⁸.

Challenges and Obstacles

Albania has set the course to integrate the policy and legal framework for social protection in the country with the European Union legislation, although, there are quite a number of challenges that the country experiences in so doing.

- **Financial Constraints:** Lack of financial capital is perhaps the largest challenge that Albania faces as it tries to get to par with the rest of Europe. The costs of required reforms in social policies and insurance, with focus on issues such as pension and health care systems and labour market integration are very high. For instance, Albania's budget must rise public spending for pensions to extend the coverage and raise pension standards. Albania has very little room for fiscal movements and raising expenditure on social protection without compromising the fiscal soundness of the country is quite challenging.

¹⁷ Rezarta Tahiraj, "Opportunities and Challenges of Harmonisation and Coordination of Legal Rules on Customs Controls with Acquis Communautaire: The Case of Albania," ECCE-European Common Customs Evaluation (2021-2022): 223.

¹⁸ Evis Garunja, "Albanian Legal Standards in Guaranteeing the Freedom of Movement of Workers in Alignment with the Regulation (EU) No 492/2011," in EU Enlargement and Acquis Adoption Burden: State of Art and Proposals for a Correct Adoption of the Acquis for Albania (2024): 287.

- **Political Resistance:** Another important obstacle is political one; The government and different stakeholder may hinder the process of development in order to protect their interests. For instance, workers through their trade unions and employers tend to oppose changes in pension arrangements such as increased contributions or moving towards the multi pillar system. Like it, political insecurity and the change of governments contributes to the emergence of new social protection reforms that slow down or change the direction of the harmonisation process¹⁹.
- **Institutional Capacity:** Albania's institutional ability to deliver social protection reforms is sometimes weak. The technical capacity and management skills of the Ministry of Social Welfare and Youth which is actually the ministry in charge social protection in the country are a challenge. Also, the tendency towards a labour informality market means the challenges with data collection on workers, and their enrolment into the formal social protection.

Case Studies: Successful Harmonization Examples

However, there are positive experiences from other countries which can be useful for Albania, despite numerous challenges the country has. A good example is the Bulgaria case in pension reform. So, the example of a candidate country of the Bulgaria in the mid of 2000s also revealed the main challenges in terms of pension system modernization in EU. With the help of EU funds, Bulgaria introduced the three-tier approved pension system based on public pensions, funded and mandatory and/or voluntary pension schemes. This system was also useful in handling sustainability problems and increasing coverage. Likewise, another good example for Albania to follow is the healthcare reform implemented in Croatia, which tried to reorient the health system according to the norms of the EU. Lifting the public healthcare expenditure, the insurance density and the general framework of the healthcare system dominated Croatia's healthcare strategies for the period under consideration. It was accomplished while, for example, enhancing the public health protective factors, emphasizing the prevention instead of treatment, and providing the EU standard of universal access to health care services. These examples demonstrate that although steps towards harmonisation are difficult to achieve,

¹⁹ Mirjam Reci, "Assessing the Impact of Civil Society on Albania's EU Membership Progress: A 2023 Perspective," *Revue Européenne du Droit Social* 65, no. 4 (2024): 124-138.

implementing corresponding financial, technical, and political reforms, Albania can fulfil EU requirements for modernization of its social protection system treatment.

Role of the European Commission and Other Stakeholders

European Commission's Role

Due to the influence of the European Commission in the Albanian state, it has the main responsibility of pushing forward social policy reform within Albania especially with regards to the European Union. Playing a central role within the EU, the Commission oversees the compliance and assessment of the candidate states with the EU social protection standards. This is to ensure that the Commission provides the necessary technical support, sets timelines for implementation of changes and even sources for funding of the same. There are periodic progress reports that the European Commission uses to evaluate Albania's performance on reforms in the social protection agenda in relation to pensions, health care and policies in regard to labour markets among others. It is also important to note such reports have become more crucial for the EU to decide whether Albania is capable of assimilating with or meeting the Bucharest criteria fully or not. The Commission also checks that Albania is implementing the necessary changes not only through signing the Memorandum, but also through the provision of certain standards and goals. Besides its evaluative functions, the Commission also contributes to financing the Albanian performance by IPA (Instrument for Pre-Accession Assistance). These funds are applied to make a necessary range of social protection reforms including pension system enhancements, healthcare system improvement, and labour market policies' creation²⁰.

International Organizations

Other players in harmonisation are also important, and these include world bank and the United Nations Development Programme (UNDP). The World Bank, as before, has remained a major source of funds and ideas on how to, for instance, reform the health sector or pension fund systems. For example, the Bank has assisted Albania in the formulation of policies to enhance the resilience of its pension system and expand access to health care services by the needy and the most vulnerable. Albania is recognised as an excellent candidate for the Integrated UNDP programme to increase

²⁰ Mirjam Reci and Kristinka Jance, "Albania's European Integration and Civil Society Impact," *Studia Europejskie-Studies in European Affairs* 28, no. 3 (2024): 315-335.

social inclusiveness and decrease poverty, with special concern to the most vulnerable groups like the Roma people. These international organisations offer important sources of knowledge, funds, and services that are important in order for Albania to implement its social protection reforms in conformity to the international standards²¹.

National Institutions

Implementation of the EU acquis and the harmonisation process is led by the government institutions of Albania. The Ministry of Finance and Economy is also providing sufficient tax funding for the social protection reforms. This involves the monitoring of the public resources needed in funding pension reforms, health insurance, and any other social that we may wish to achieve. Social protection policies are implemented by the Ministry of Social Welfare and Youth cooperating with other bodies of the government to successfully integrate the EU standards. Further, the Social Insurance Institute, which is ISS, undertakes the responsibility of reforming the pension system and proper centralization of the contributions collected. Thus, there is a possibility for Albania to harmonise its social protection systems with the EU – by enhancing its data collection instruments and thus bringing its administrative capacities up to the spirit of the Lisbon Treaty²².

Impact of Harmonization on Albanian Society and Economy

Social Impact: Assess the Effects of EU-Driven Social Protection Reforms on Albanian Citizens, Particularly Vulnerable Groups

Albania's social protection system has undergone some changes towards the EU standards and these changes have affected the lives of citizens especially the vulnerable ones. Previously the social protection system in Albania was almost non-existent and many citizens especially the elderly, unemployed and minorities remain with little protection. EU inspired measures to extend the social protection base have led to a higher coverage of social benefits, but concerns persist, however. Probably one of the most significant changes that has been established is in the pension system. The EU has encouraged Albania through structural reforms to adopt better and optimised pension policies and this will benefit the citizens especially civil

²¹ Sonja Ndrejoni, "Legal and Economic Aspects of Albania's Integration in the EU" (2023).

²² Erisa Xhixho and Henris Balliu, "Money Laundering-Harmonization of Albanian Legislation in the Framework of EU Membership," *Balkan Journal of Interdisciplinary Research* 10, no. 1 (2024): 63-76.

retirees who hope to secure employers from government after retiring from service. However, there are some limitations to this approach, and Albanian pension system still does not cover the large number of informal economy employees that are especially sensitive to fluctuations in the economy. A study conducted by the European Commission on Albanian workers established that over one third of Albanian workers are within the informal economy hence unable to access social protection. However, because of some infrastructural constrain, the vulnerable groups including those in the remote or rural areas, experience a lot of challenges in accessing these quality compounded healthcare services. New discussions surrounding healthcare are at the centre of the EU's vision, but this vision has not reached all the Albanian citizens, and the disparities in healthcare that still exist by region.

Economic Impacts: Evaluate the Economic Implications of Aligning Albania's Social Protection System with EU Standards

The correct orientation of the Albanian social protection system with the EU standards has specific fiscal and economic consequences – both advantages and disadvantages. From a fiscal point of view the trend of harmonisation has resulted in more government outlay for social gain and social causes. Thus, the Albanian Ministry of Finance reported that over the recent years because of the EU reforms the expenditure in social protection has increased by about 2.5 percent of GDP, putting pressure on the national budget. But EU integration will bring medium and long-term positive effects on the economy to create stability, attract foreign investors, and reform labour market. For instance, improving employment rights and worker protection in Albania according to the EU standards in the institution of labour market has increased the working conditions to guarantee employees have increased job security. This is a steady way of developing structure competitiveness within labour market and promoting the place for investment by multinational companies operating in the region. Unfortunately, for Albania, the enforcement of EU labour laws remains a major problem due to the stubborn nature of the informal labour market which negates any labour market reforms²³.

²³ Mirjam Reci and Kristinka Jance, "Albania's European Integration and Civil Society Impact," *Studia Europejskie-Studies in European Affairs* 28, no. 3 (2024): 315-335.

Public Opinion: Explore the General Public's View of Social Protection Reforms and EU Integration in the Context of Albania

The public has both positive and negative attitudes towards social protection reforms and EU integration. On the one hand, it is recognised that reforms promoted by EU have brought some positive changes in some spheres like health care and pension systems. The polls show that more than 60% of Albania population thinks that membership in EU will enhance the standard of living particularly social services and financial assistance to the needy. But the same public also voices a pessimism on adequacy of these reforms especially in this era of economic adversity. Some citizens of Albania argued that these reforms are insufficient to meet people's requirements now. For instance, a survey conducted in 2023 by the Albania Institute of statistic discovered 45% of the citizenry believed that what they received from social protection were inadequate to cover existence necessities²⁴. This dissatisfaction is regrettable given the fact that there is general lack of confidence in the government in delivering the reforms the more in the rural and other hard to reach areas efficiently. In addition, the extended process of the EU integration due to the multilevel structure of the process, has culminated in public fatigue concerning the EU integration process. Quite a number of citizens are still asking themselves the question how the above reforms will affect their day-to-day lives while others have viewed the above as a package of conditions that have been externally set without enough consultation and consideration of the situation on the ground.

Future Outlook and Recommendations

As for the future development of social protection in Albania, its link to the EU integration process seems to be rather tight. In the further economic reforms of social protection, it will be necessary to deepen and expand the existing measures taking into account the needs of all the population, first of all, the rural population and workers of the informal sector. The EU's long-term goal is to ensure that Albania's social protection system is fully integrated with EU standards, which could lead to more sustainable and equitable outcomes for the population. However, doing so will entail substantial investment in infrastructure, public goods, and governance. For instance, Albanian government will require to enhance its spending on social protection so that the system can be financially sustainable given the

²⁴ Adelina Cela, "Tensions and Interactions between Europeanization and Statebuilding in Kosovo—An Example of EU Normative Power" (2024).

growing population of the people that requires the social protection services. Also, as with many other countries, Albania needs to strengthen its capacity in data collection and monitoring in order to more effectively assess the impact of different social protection programmes as well as to direct the funds allocated to them²⁵.

Regarding further improvement of the Albanian social protection system with a view to its increasing convergence with EU standards, several recommendations are possible: Albania has to build up institutional capacities for social protection, primarily in MSDSW and Ministry of Finance. This will mean therefore staff development, and enhancement of data processes which in turn will enhance transparency in the distribution of resources. Hence, there is a need to shift to a broader public debate about Social Protection Reforms advantages and disadvantages. In this process, direct participation of citizens will assist in the eradication of concerns, enhancement of citizens' confidence in the reforms' execution, as well as the incorporation of more vulnerable citizens' requirements. Albania has to depend on the EU funding for the financial requirement to facilitate the aforesaid social protection reforms. This could include the use of the IPA or any other European union money channeling funds that may be available for encouraging the type of changes envisaged for the social policy. In order to counteract the difficulties of integrating the Albanian social protection system, the following solutions should be taken into consideration such as the substantive reform of pensions that comprise informal sector and sustainability of pension programmes. Albania's policymaking process of extending coverage in the framework of social protection should take reference from what has been done in other EU member states like Estonia and Poland.

Conclusion

In conclusion, the alignment of Albanian social protection system with the EU legislation and regulations has its advantages and disadvantages. Reforms spearheaded by the EU have brought better health care, pension and unemployment benefits but problems like inadequate coverage, disparities and fiscal issues are still there. Albania needs to pursue further EU conformity in its Social Protection System, where all reforms must

²⁵ Erisa Xhixho and Henris Balliu, "Money Laundering-Harmonization of Albanian Legislation in the Framework of EU Membership," *Balkan Journal of Interdisciplinary Research* 10, no. 1 (2024): 63-76.

benefit all the citizens of the country but more so the needy and the most marginalised in the society. Albania can lift a more sustainable and inclusive social protection configuration that will complement its EU integration process when it fortifies the institutional capabilities, comes into public discussions and seeks higher EU funds. Future of social protection systems in Albania can be viewed by how those challenges are eliminated to enable all Albanians to benefit from the opportunities that flows with EU membership.

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