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REPORT ON THE COMPATIBILITY STUDY OF THE ALBANIAN LEGISLATION WITH THE REQUIREMENTS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Tirana, October 2001

PREFACE

By Order No. 951 of 3 March 1999, the Minister of Justice set up a group of experts to prepare a Study-Report on the Compatibility of the Albanian Legislation with the standards of the European Convention on Human Rights.

From the outset, it has been clear that the primary object for the working group was to assess the degree of the compatibility of the Albanian legislation with the standards of the European Convention on Human Rights, and in examining these two sources of law to compare their compatible interpretation and offering the relevant conclusions. The results of this analysis being brought together in a report to be submitted to the Ministry of Justice and to the Directorate General of Human Rights of the Council of Europe.

In addition to reflecting the major recent evolution in the drafting of legislation by the Albanian authorities, in terms of respecting the European Convention on Human Rights and Fundamental Freedoms, the group has focused on identifying the potential gaps, contrarieties, differences or insufficiencies in the Albanian legislation. In an attempt to be as comprehensive as possible in tackling this report, the working group has taken into account, in the drafting of the Report, possible interpretations and applications of the existing Albanian legislation that might raise issues of human rights under the European Convention. The experts have taken the liberty to make suggestions in respect of legislative modifications, with the sole purpose of enhancing the conformity of the Albanian legislation with the European Convention.

It should, nevertheless, be emphasised that this report does not pretend do give an opinion as to the possible existence of human rights violations resulting in practice from the actions or omissions of Albanian state bodies. Instead, it limits itself, in conformity with its purpose, to the legislative evaluation. Further, it should be noted that the ideas and opinions expressed by the members of the group in the report represent their personal opinions, based on their professional experience, and not those of the Albanian Government or of the Council of Europe. Nevertheless, it is hoped that the report will stimulate discussion on the fundamental issues it tackles not only in respect of the legislative conformity but more importantly, in the circumstances of Albania, with regard to its practical application.

For this reason, the group of experts considers the report as a document to stimulate debate and is open to an exchange of ideas, debate and constructive criticism on the issues dealt with in the report. Each member of the group is prepared to further elaborate and explain the analysis and ideas expressed in each chapter of the report. Indeed, apart from its direct purpose of assessing the compatibility of Albanian legislation with the European Convention, the report has been considered as an opportunity to provide a forum for discussions, research and thoughts on the interpretation and application of the Albanian legislation by the legal practitioners in the country.

Organisation of the work:

The first few months of the project were taken up with the organisation and functioning of the working group, including the division of tasks and the development of a close co-ordination with the Human Rights Co-operation and Awareness Division of the Directorate General of Human Rights of the Council of Europe. In dividing the work among the experts of the working group due consideration was taken of each person's specialisation and experience in order to ensure that the relevant Articles of the European Convention were covered appropriately. To a certain extent it could be claimed that the group of experts was composed with the purpose of bringing together competent

professionals in each of the main sources of law relevant to the Articles being covered under the Convention.

The research and the collection of the Albanian normative acts to be examined by the group was started in June 1999.

The group was composed by:

- Sokol Berberi .....Lecturer of Legal Writing at the Tirana Faculty of Law, Executive Director of Albanian Centre for Democracy and Parliamentary Practices (local NGO).

- Ledi Bianku .....Lecturer of Public International Law, EU Law and Human Rights Law and the Tirana Faculty of Law and Albanian School of Magistrates. Executive Director of European Centre (local NGO).

- Halim Islami .....Lecturer of Criminal Procedural Law at the Tirana Law Faculty and Albanian School of Magistrates, Public Notary.

- Arta Mandro[1].....Lecturer of Roman Law at the Tirana Law Faculty and Albanian School of Magistrates, former vice Minister of Justice.

- Ilir Panda.....Practising Lawyer, Lecturer of Criminal Procedural Law at the Albanian School of Magistrates, former Minister of Justice.

- Riza Poda[2].....Former Government Agent.

- Valentina Zaçe[3] .....Former Professor of Family Law at the Tirana Law Faculty and Albanian School of Magistrates.

- Perikli Zaharia .....Judge at the High Court, Lecturer of Constitutional Law at the Albanian School of Magistrates.

Mr. Bianku and Mr. Zaharia were appointed to act as the co-ordinators of the group of experts and hence as the intermediaries with the Council of Europe.

The drafting of the Report was enriched by the stimulating and thought provoking comments, suggestions and exchanges that took place with the Council of Europe experts: Mr. Karoly Bard (Hungary), Mr. Patrick Dillon-Mallone (Ireland), Mrs. Nuala Mole (United Kingdom), and Mrs. Michele Picard (France). The group of experts has been constantly assisted by Mr. Hugh Chetwynd and Ms. Maggie Nicholson from the Human Rights Co-operation and Awareness Division, Directorate General of Human Rights of the Council of Europe, through their direct participation in the co-ordination of the group of experts and in providing the group with relevant reference materials, indispensable for the completion of the report. The group was assisted during its work by Mr. Hasan Bylyku, interpreter.

Throughout the exercise the successive Ministers of Justice of Albania have facilitated and encouraged the work of the group of experts, ensuring that the project retained the necessary government support.

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[1] Mrs. Arta Mandro left the working group on October 2000.

[2] Riza Poda was posted to the Embassy in Canada in January 2001 and thus had to leave the working group.

[3] Mrs. Valentina Zaçe left the working group on October 2000.

During the course of its work the working group has faced a number of difficulties. The first difficulty, which could equally be considered a positive development, has been the tremendous increase in the amount of legislation drafted by the Albanian government and Parliament. This increase was the result of the entry into force of the new Albanian Constitution in November 1998. The regulation of a number of issues in a completely different way from the previous constitutional set-up required the experts to reconsider and modify many aspects of their initial report. In this respect mention should be of the interpretative work of the Albanian Constitutional Court which has addressed, on several occasions during the preparation of this report, questions covered by the European Convention and, therefore, by the report as well. Issues such as death penalty, criminal and civil procedural rights, right to form political parties, aliens and asylum rights etc. have been reconsidered by the Albanian legislation in the course of the preparation of our Report.

Second, the group has been confronted with the difficulties of consulting the Albanian courts' jurisprudence, due to the lack of organised information in this regard, with the exception of the case-law of the Constitutional Court. Similar problems arose in respect of consulting the administrative acts of the government.

These difficulties have been the root causes behind the delays in the attainment of the different stages of the presentation of the draft-reports and the organisation of the meetings with the Council of Europe experts, as well as the submission of this final Report. The final Report includes the Albanian legislation adopted until the end of the previous legislature of the Albanian government (date).

The group of experts presented the first draft of the report in March 2000. Thereafter a meeting was held in Albania on 22-24 of May 2000 with the experts of Council of Europe to discuss and assess this draft. The meeting resulted in a number of recommendations on the report as well as the proposal to add a separate Chapter – on Article 13 of the Convention. In the meantime the experts had to include in the report the legislative changes made by the Albanian Parliament on many points considered by the report. After the total review of the report a second meeting was held in April 2001, which gave the final observations on the report and opened the way for the final editing.

The report is arranged in 8 Chapters, in accordance with the division of the work among the experts of the group. This division follows, in general, the structure of the topics of the rights and freedoms of the Convention.

In conclusion it should be borne in mind that this report is intended to serve as a discussion tool both for evaluating the current state of compatibility of Albanian legislation with the European Convention on Human Rights as well as raising a number of issues which require further attention by the Albanian authorities. Further, the work of the group of experts should be considered as a first step in a continual effort by the Albanian government and Parliament to ensure that all new legislation takes account of the norms of the European Convention and that all public bodies apply the said legislation in a manner that conforms with the principles of the Convention, given its particular status within the Albanian legal order.

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CHAPTER 1

HUMAN RIGHTS BACKGROUND AND EVOLUTION IN ALBANIA AND COMPATIBILITY OF THE ALBANIAN LEGISLATION WITH ARTICLES 1, 14, 15, 16, 17, 18 OF THE CONVENTION, ARTICLE 3, PROTOCOL 1, ARTICLES 2, 3 & 4 PROTOCOL 4 AND ARTICLE 1 PROTOCOL 7 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BY LEDI BIANKU

I. THE PROCESS OF RECOGNISING AND IMPLEMENTING HUMAN RIGHTS IN THE REPUBLIC OF ALBANIA

A. Parameters of this Report

1. The subject matter of this report is no less than the process of recognising and implementing human rights in Albania. From the widest perspective, a full treatment of this vast question would require an analysis of modern historical developments in Albania, including the development of Albania's leading political principles, as well as an in-depth study of Albanian sociological conditions. In the light of such an analysis, the present Albanian Constitution and laws might be more fully described and understood. However, for obvious reasons, a thorough analysis of these first two elements would exceed the goal of this study. Instead, the first two elements will be briefly presented in the introductory part with a view to informing the legal analysis which follows of the compatibility of Albanian legislation with the European Convention of Human Rights.

2. It should also be emphasised at the outset that, in common with other compatibility reports undertaken in respect of other countries, which have recently acceded to and ratified the Convention, this report does not attempt or purport to identify all defects in practice or all laws and regulations, which might offend or give rise to a violation of the Convention. It is necessarily a very broad analysis, and is designed to identify the most obvious potential violations arising from possible conflicts between the primary provisions of applicable Albanian laws, on the one hand, and the principles of the Convention, on the other.

B. Historical, Political and Sociological Background

3. When one takes into account the very severe starting point for recent democratic reforms in Albania, the achievements of Albanian society are impressive. That starting point was a totalitarian regime where the individual was a victim of the political will of the ruling communists and of the class struggle. This struggle was the *raison d'être* of the communist regime, and for as long as it continued, human rights were uniquely understood within a framework whereby the rights of one class were deemed to wholly prevail over all others. As a result, any person could become a victim, and individual rights were eclipsed by the ruling political will. Furthermore, under the 1976 Constitution of the SPRA (Socialist People's Republic of Albania), only those persons, who were citizens of Albania, were recognised to be the holders of rights, a position that was wholly inconsistent with the building of a society based on principles of universal human rights and fundamental freedoms.

4. Such a social and governing philosophy had certain logical consequences for state institutions and instruments. In particular, the abolition of the Ministry of Justice and of the entire institution of the defence lawyer for nearly 25 years, between 1966 and 1990, were two of the most absolutist and destructive measures in the field of law, designed to obliterate the most

elementary procedural safeguards and standards for protecting and guaranteeing human rights. In addition, the role of lawyers and the values of the legal profession were completely undermined. The structures established to protect the state impaired the principles of the rule of law, and when necessary the law made by these structures was similarly breached. Furthermore the country was totally isolated from the outside world and contacts in the field of law, as well as with universal organisations such as the United Nations, of which Albania has been a member since 1955, were utterly lacking.

5. Despite these and other problems which Albanian society suffered during the dictatorship period, it was the wider contacts with the outside world which made possible the shaping of a political and social awareness that led to massive protests of students and intellectuals in December 1990. The protests were followed by the creation of the first opposition parties that brought about the overthrow of communist rule and paved the way for democratic transformation. In defining the future of the country, progressive forces mainly referred to the universal doctrine of a free and democratic society, led by new principles that were conditioned by developments in Albanian society. The 1948 Universal Declaration of Human Rights, as well as other documents of the United Nations, OSCE (at the time CSCE) and the Council of Europe that collectively represent the international catalogue of human rights, served as the 'blueprint' for the construction of a new system. Thus, the establishment and consolidation of pluralist democracy was recognised as the most stable guarantee for the implementation of human rights in practice. In particular, respect for human dignity and the due attention paid to the free autonomy of the individual constituted the main goal of the new democratic state system.

6. Subsequent progress in implementing these principles, politically, may be traced to certain key moments in the process of political democratisation, as follows: the establishment of opposition parties; the first pluralist elections of 22 March 1992 followed by other elections; the pluralist election of organs of local government; the consolidation of democratic institutions at both national and local level; the creation and strengthening of NGO-s; the increase in the number and role of political subjects in the political life of the country; and the ongoing enhancement and expansion of relations between the Republic of Albania and other democratic countries and with international organisations based upon human rights principles.

C. Legal and Institutional Developments

7. These political and social developments were naturally reflected in constitutional and legal reforms including reforms affecting the judicial system. The re-establishment of the Ministry of Justice and of the institution of the Defence Lawyer in May 1990 paved the way for significant reforms especially after the 1991 elections. Legislative reforms sought to achieve three main objectives: first, to clearly proclaim and guarantee human rights and fundamental freedoms through constitutional provisions; second, to create a body of law to make concrete the rights envisaged by the Constitution; and third, to establish legal mechanisms to implement and guarantee these rights. The following developments may be highlighted:

   i. In relation to the first objective, the approval by parliament of the Law 'On the Main Constitutional Provisions' of 29 April 1991, and additional amendments, especially Law No. 7693 of 31 March 1993 'On the Amendment of Law No. 9791 dated 29 April 1991 On the Main Constitutional Provisions' that included the Chapter 'On fundamental human rights and freedoms'.

   ii. The work required to achieve the second objective has been colossal, the required reforms being both fundamental and at times radical. Particular mention may be made of the Law 'On the Institution of the Defence Lawyer in the Republic of Albania' and the initial amendments, commenced in 1991, of the Civil Procedure Code, the Criminal Procedure Code, the Civil Code and the Criminal Code as well as the Family Code. These legal

developments were followed in 1994 and 1995 by the approval of entirely new consolidated criminal and civil codes on both the substantive and procedural side. The work proceeded with the redaction and approval by Law 8485 date 12.05.1999 of the 'Code on Administrative Procedures'. Other important steps comprised special legislation concerning particular fields.

iii. The Law 'On Political Parties' of 25 July 1991, the Law 'On Trade Unions in the Republic of Albania' of 7 October 1991, the Law 'On the Status of Albanian Radio-Television' of 19 November 1991; the Law 'On the Division and De-politicisation of Certain State Organs' of 8 June 1991; the Law 'On the Organisation and Functioning of Local Government' of 10 June 1992, and the Law 'On the Election of Organs of Local Government' of 16 June 1992. The Family Code is still in the process of being drafted. In relation to the third objective of establishing effective mechanisms for the enjoyment of basic rights, the most important and fundamental concern has been the creation of independent and impartial courts. This most sensitive and difficult process presents one of the greatest challenges, and continues to produce some of the most evident shortcomings, of the new organisation of Albanian society. However, from a legislative point of view considerable steps have been taken in this regard, notably by the Law 'On the Division and De-politicisation of Certain State Organs' of 8 June 1991, the Law No. 7379 'On the Institution of Defence Lawyer in the Republic of Albania' and 'On some changes in the Law on the Public Prosecutor in the Republic of Albania' of date 08.05.1990, the Law 'On the Investigation Office in the Republic of Albania' of 18 December 1991, the Law 'On the Organisation of the National Information Service' of 2 July 1991, and the Presidential Decree 'On the Use of Weapons by the Border and Police Forces, and on the Maintenance of Public Order by Military and Civil Forces' of 5 January 1991. The Law No. 7574 'On the Organisation of the Judicial System and on Some Changes in the Criminal and Civil Procedure Codes' of 24 June 1992 is sign of the attention directed to the judicial system as such. The periodical evolutions in this direction has lead up to the recent regulations of the judicial system in the Republic of Albania and especially on the clarification of the organisation and relationship between the courts of different levels and on the strengthening of the role of the High Court.

In addition, the establishment of the Constitutional Court has been of significant value. This Court, especially after the approval of the Law 'On Fundamental Human Rights and Freedoms' of 31 March 1993, has a special competence to adjudicate upon the interpretation of human rights and freedoms in Albania.

D. The Constitution

8. Important developments in the legal and social fields were reflected in the process of drafting and approving the new Constitution of the Republic of Albania. In particular, a new practice of political co-operation emerged during the constitutional process, and although not fully realised in the difficult conditions of Albanian political reality, this practice carried some traces of a negotiated and consensual procedure for the drafting of the final version of the Constitution. This led in turn to the adoption of the Constitution by popular referendum held on 22 November 1998.

9. The new Constitution of the Republic of Albania provides for the organisation of State institutions and guarantees the rights, freedoms and duties of all legal persons within and subject to the jurisdiction of the Albanian State. The main achievement of the new Constitution lies in its more modern, ample and accurate regulation of basic legal and institutional norms at the constitutional level, and especially in its Part II on fundamental human rights and freedoms. Furthermore, after its entry into force, the Albanian Parliament, following consideration of proposals and suggestions put forward by the government and by its own constituent committees,[4] determined

[4] The Ministry of Justice is fully reviewing the four Codes and is in the process of drafting the Family Code.

to dedicate a great part of its legislative role to the approval, change or abrogation of applicable laws in compliance with the Constitution. In addition, by virtue of Article 178[5] of the Constitution, all previous legislation must henceforth be interpreted in conformity with the Constitution.

10. Among the values of the new Constitution are, first, the Preamble, which envisages that the Constitution is established by *'The People of Albania ... to build a democratic and social state based on the rule of law, and to guarantee the fundamental human rights and freedoms...'* In addition, the text stipulates one of the fundamental principles in Part I *'...the dignity of the person, his rights and freedoms...'* are the basis of the Albanian State that is bound to respect and protect them.[6]

11. Part II of the Constitution is dedicated to fundamental human rights and freedoms. In providing for the constitutional recognition, guarantee and protection of human rights, it adopts an interesting and significant classification of the categories of human rights and freedoms. Thus, according to their special characteristics, human rights and freedoms are arranged in six chapters, as follows: the first Chapter provides for the general principles governing human rights and freedoms recognised by the Constitution; the second Chapter, which is the most important, provides for personal freedoms and rights; the third is entitled 'Political Rights and Freedoms', while the fourth comprises economic, social and cultural rights; the fifth Chapter, which is also a novel innovation, sets out a series of social objectives; and the sixth Chapter sets out the provisions governing the Ombudsman. This classification is of significant value and takes due account of the characteristics of fundamental human rights and freedoms, as well as the international practice related to their classification in different international documents.

E. General Principles

12. This section of the analysis will focus on some general considerations concerning the principles, characteristics and constitutional mechanism for the protection of human rights. It is then followed by other sections that include a study of the relationship between these general considerations and the European Convention on Human Rights.

13. Article 15 § 1 of Part II of the Constitution describes the fundamental characteristics of the rights protected by the Constitution. According to this Article these characteristics are: indivisibility, inalienability and inviolability.[7] These follow the example of many international instruments on human rights, and constitute, in the ultimate analysis, the very core of the notion of human rights. It is worth emphasising that other Articles of the Constitution outline other characteristics whose roots stem from the overall conception of human rights under the Constitution. Thus, the Constitution considers human rights not only as rights and freedoms, but also as clearly defined obligations, which are binding on all State organs, which for their part have a duty to contribute to

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[5] According to Article 178 of the Constitution of the Republic of Albania:
"1. Laws and other normative acts approved before the effective date of this Constitution shall be applied as long as they have not been repealed.
2. The Council of Ministers submits to the Parliament the necessary draft-laws for the implementation of this Constitution".

[6] Article 3 of the Constitution of the Republic of Albania.

[7] According to Article 15(1):
"The fundamental human rights and freedoms are & and stand at the base of the entire legal order"

[5] Article 15(2) states:
"The organs of the public power, in fulfilment of their duties, shall respect fundamental rights and freedoms as well as contribute to their realisation.

their implementation.[8] In addition, one of the principal and most valuable constitutional guarantees is to be found in the constitutional rule that limitations and restrictions on human rights and freedoms must be certain and clearly and accurately defined. Thus, Article 17 provides for clear limitations that, however, are justified only if they do not breach basic principles set out in the Constitution. These principles are also stipulated in the European Convention on Human Rights and constitute the main pillars of its Court jurisprudence. More concretely, according to Article 17(1) these principles are public interest,[9] the protection of the rights of others[10], legitimacy[11], and the principle of proportionality.[12] Article 17(1) thus provides as follows:

> *"Limitations on the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it".*

14. At this point, it is important to highlight the standardisation provided by Article 17 (2) of the Constitution concerning human rights restrictions. First, this paragraph, when read in conjunction with paragraph 1, stresses that these restrictions should above all not be such as *'to infringe the essence of the rights and freedoms'* provided for in the Constitution. Second, taking into account the Constitutions of different States, the Albanian Constitution marks a particular positive achievement by setting out minimum standards for the respect of fundamental human rights and freedoms, as defined in the European Convention on Human Rights[13] and its decision-making and interpretative bodies. Article 17(2) thus provides:

> *"These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights".*

15. It follows that the proper interpretation of the Albanian Constitution requires that certain widely accepted principles on the interpretation of international instruments, particularly provided by relevant rules of public international[14] law as well as the jurisprudence of the European Court of

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[9] About public interest as a justification ground for human rights limitations see the case law of the European Commission and European Court of Human Rights: Decisions and Judgments of Vereiniging Weekblad Bluff v. Netherlands, Klass and others v. Germany, Leander v. Sweden, Vogt v. Germany, Kosiek v. Germany, Funke v. France, Cremieux v. France, Handyside v. UK, Dudgeon v. UK, Sunday Times v. UK, Müller v. Switzerland, Silver and others v. UK, Campbell v. UK, Malone v. UK, Kruslin v. France, Huvig v. France, etc. In addition see the complainants Ochennsberger and Piermont v. France, X v. UK, X v. Austria, etc. See also Article 11 of the Constitution of the Republic of Albania.

[10] About the protection of third parties interests see the judgments of the European Court of Human Rights, for example Lingens v. Austria, Prager and Oberschlick v. Austria, Haes and Gijsels, Jersild v. Denmark, Otto Preminger-Institut v. Austria, Hendyside v. UK, Gaskin v. UK, Leander v. Sweden, etc.

[11] On the concept of legitimacy see judgments of the European Court of Human Rights of Sunday Times v. UK, Kruslin v. France, S.W. v. UK, Observer and Guardian v. UK, Huvig v. France, Silver and others v. UK, etc.

[12] About the proportionality principle see judgments of the European Court of Human Rights of Dudgeon v. UK, Sporrong, and Lönroth v. Sweden, James and others v. UK, Olsson v. Sweden, Campbell v. UK, Beldjoudi v. France, Niemietz v. Germany, Kokkinakis v. Greece, Sigurjonson v. Iceland, etc.

[13] See European Convention on Human Rights; Articles 18-11, 14, 15, 17

[14] See Vienna Convention on the Law of the Treaties, Article 31, which is ratified by Albania with Law no. 8696 of November 11, 2000. Furthermore in relation with this Convention, European Court of Human Rights has considered this documents *'as containing principles of international law accepted by civilized nations'*, Judgment of Loizidou v. Turkey.

Human Rights[15], should be taken into consideration. For example, Article 18 of the Constitution, the equality and non-discrimination clause, which was subject to strong debate during the process of drafting and discussion of the draft text, should be interpreted in the light of the European Convention on Human Rights.

16. More importantly (and subject only to what is said below about the precise status of the Convention pending its publication in the Official Journal), by Law No. 8137 of 31 July 1996 Albania has ratified the European Convention on Human Rights and its Protocols and has since deposited its instruments of ratification on 2 October 1996. The great importance of this ratification for the protection of human rights in Albania lies in the primacy accorded to the Convention as a ratified international agreement under the new Albanian Constitution: in particular, Article 122 provides that *'Any ratified international agreement constitutes part of the internal legal system...'* and that *'An international agreement ratified by law has priority over the laws of the country that are incompatible with it'*.[16]

17. The following Articles of the Constitution emphasise another characteristic of fundamental human rights and freedoms – equality (non-discrimination). This basic principle is stipulated in Article 18 of the Constitution, which should be read in conjunction with Article 16 that relates to foreigners and stateless persons, as well as Article 20 on national minorities. The exceptions to the principle of equality for human rights and freedoms, that are set out in Articles 18(2) and 18 (3), triggered extensive debate and were given particular attention during the preparatory work. In interpreting these exceptions, particular regard may be had to the judgments of the European Court of Human Rights in *Belgian Linguistic Cases*,[17] *Abdulaziz, Cabales and Balkalandi v. UK*,[18] as well as *Engel and Others v. Netherlands*.[19] In accordance with the Court's established case law, certain objective conditions must be satisfied in order to justify a 'discriminatory' treatment. These conditions are the respect for the principles of legitimacy, objectivity, proportionality and justice as described above.

18. One of the most innovative and important elements of the constitutional regulation of human rights and freedoms is included in Article 4(3). According to this provision: *'The Provisions of the Constitution are self executing, unless the Constitution provides otherwise'*. This wording connotes the idea that the constitutional provisions, including those on fundamental human rights and freedoms, have direct effect or are directly applicable in all administrative and judicial bodies,[20] and serve as guidelines for the legislative process.[21] Certainly, this is the case when a constitutional provision has direct effect, as provided by Article 4(3).

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[15] See European Court on Human Rights judgment on the case of Golder v. UK.

[16] About the position of the international rule in the Albanian domestic legislation see Ledi Bianku 'Relationship between International Law and Domestic Legislation – the New Albanian Constitution', 'Tribuna Juridike', No.24, November 1998.

[17] See Paragraph 10 of the judgment.

[18] See Paragraphs 721, 78, 82 and 83 of the judgment.

[19] See Paragraph 72 of the judgment.

[20] Relating to this statement, due account should be given to Article 52(2) of the Constitution.

[21] Certainly, all Constitution provisions serve as guideline for the legislator, as is stipulated by Article 178. However the provisions that have direct effect, being 'enough clear, accurate and meticulous' bring about a better and more exact orientation of the legislative process.

19. It is also important at this stage of the analysis to consider the horizontal effect of the constitutional provisions on human rights and freedoms, that is, their potential application among private subjects. The Constitution does not explicitly provide for such an effect of its provisions, however some Articles of the Constitution imply it. First, as already mentioned, Article 4(3) provides for the direct effect of the Constitution's provisions. Second, Article 16 stipulates *'...the duties contemplated in this Constitution for Albanian citizens are also valid for foreigners and stateless persons'*. Despite the concept of equality, this Article includes the concept of obligations conferred upon individuals. Third, Article 17 (1) provides for restrictions on human rights, which are justified *'for the protection of the rights of others'*. And, fourth, the formulation of the Constitution's provisions on human rights set out particular exceptions to the general rule.[22]

20. Clearly, the horizontal effect of any particular constitutional provision will depend on the nature and character of the respective rights and freedoms.[23]

21. After reading the provisions of Chapter II governing personal rights and freedoms, one takes notice of the very detailed wording of these provisions, to the extent that in some instances these rights are very broadly drawn, even beyond the scope of application of the relevant provisions in well-known international instruments. This expansion follows current case-law developments in this field. Thus for example, the right to information, which is stipulated as a human right in Article 23 of the Constitution, does not have this status in the Universal Declaration on Human Rights,[24] or in the International Covenant on Civil and Political Rights (ICCPR)[25] or in the European Convention on Human Rights.[26] This is also the case of the right not to publish personal data, stipulated in Article 35 of the Constitution.

22. Chapter III includes in its three constituent articles a set of political human rights and freedoms, based on the UN International Covenant on Civil and Political Rights of 1966. Article 46 on the right to elect and be elected is of particular interest. The wording of this Article deprives of their effect the Law No. 8001, dated 22 September 1995 'On Genocide...' as well as the Law No. 8043, dated 30 November 1995 'On the examination of public officials...' which deprives from the right to be elected those persons who are serving their sentences of imprisonment.

23. Chapter IV follows the scheme of the UN International Covenant on Economic, Social and Cultural Rights of 1966, and reflects the latest developments in the relevant jurisprudence.[27] Chapter V includes in its Article 56 a list of the Social Objectives to implement and guarantee so far as possible fundamental human rights and freedoms. Within the limits of its constitutional powers and the means at its disposal, the State has a duty to accomplish these objectives, but the objectives are not in themselves rights capable of being enforced in a court of law.

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[19] The exceptions are provided by those provisions that stipulate that the respect for human rights and freedoms is completely ensured by administrative and judicial procedures. See for instance Articles 22(4), 23(2) § (3), 28-34, 41(2), 41(3) of the Constitution.

[23] See the judgment of the European Court of Human Rights in the Case X and Y v. Netherlands, especially paragraphs 23 and 30 of judgment.

[24] See Article 19 of the Universal Declaration on Human Rights.

[25] See Article 19 of ICCPR.

[26] See Article 10 of European Convention on Human Rights, and judgment of European Court of Human Rights in Sunday Times v. UK.

[27] See for instance the judgment of the European Court of Human Rights in the Case Marckx v. Belgium, in the light of Article 54 of the Constitution.

II. INTERNATIONAL LAW AND THE ALBANIAN DOMESTIC LEGAL ORDER

A. Preliminary Considerations

24. It is obvious that one of the first questions to deal with during the preparation of a report on the compatibility of the Albanian legislation with the European Convention on Human Rights is the consideration of the relationship between domestic law and international law.[28] This question requires much more attention, if the unclear position, low impact and the lack of implementation of international law by Albanian legislation in the past decades are taken into consideration. As against this, the new level of international undertakings i.e. potential international responsibility of the Republic of Albania has required an innovative legislative and analytical treatment of this question. This level of international undertakings requires, as Permanent Court of International Justice[29], International Court of Justice[30] and the Strasbourg bodies,[31] in one hand, and international documents[32], on the other, have made clear, that the necessary internal legislative measures should be adopted to ensure the complete efficiency of the application of duly accepted international norms.

B. The Place of International Law in the Albanian Domestic Legislation

25. The new Constitution of the Republic of Albania has adopted a completely innovative approach to defining the relationship between international law and domestic law, when compared to the pre-existing constitutional position. Whereas space does not allow for a full theoretical analysis of monist and dualist doctrine in the domestic recognition and implementation of international law, it suffices to state that the solution favoured by the 1998 Constitution of the Republic of Albania departs from the traditional and less certain dualistic solution in favour of a much more certain monistic solution to this question. Thus, by way of further confirmation of this deliberate and positive change, an entire section of the Constitution, the second of Part VII, is given over to the relationship between international law and domestic law. Furthermore, the implementation of international law is among the fundamental constitutional principles forming the basis of the Constitution. In particular, Article 5, set out in Part I on Basic Principles, declares that:

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[28] See Janis, Kay & Bradley in 'European Human Rights Law' - Text and Materials - Oxford, 1995; page 429.

[29] The PCIJ on its advisory opinion of February 1925 delivered in relation to the exchange of the Greek and Turkish populations affirms that a State *'which has duly undertaken international obligations is required to make on its internal legislation the necessary modifications in order to secure the implementation of the accepted obligations'*. The PCIJ., A.C., 21 February 1925, serie B, no.10. The same also in its first case Wimbledon (1923), in Mavromatis (1926), in German Interests in Upper Silesia (1926), Factory of Chorzów (1928) and Danzig Tribunal Competencies (1928).

[30] See for example ICJ on Anglo-Norwegian Fisheries case (1951) and Nottebohm case (1955) Liechetenstein v. Guatemala].

[31] European Commission on Human Rights on De Becker v. Belgium *'Selon les principes généraux du droit international, corroborés par l'esprit de la Convention ainsi que par les travaux préparatoires, les Parties contractantes ont l'obligation de veiller à ce que leur législation interne cadre avec la Convention et, le cas échéant, de prendre les mesures d'adaptation qui se révéleraient nécessaires à cette fin, la Convention s'imposant à toutes les autorités de ces Parties, y compris le pouvoir législatif'*

[32] Article 27 of the 1969 Vienna Convention on the Law of Treaties provides:
'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.
See also Article 13 of the International Law Commission's Draft Declaration on the Rights and Duties of State of 1949.

"The Republic of Albania applies international law that is binding upon it".[33]

26. This constitutional principle is reflected in and carried over to the operative provisions of the Constitution regulating the conduct of state organs within the framework of legal norms, including those deriving from an international source. In other words, the principle of the rule of law extends to respect for applicable rules of international law. This provision declares a principle and does not clarify how the Republic of Albania applies international law binding upon it.

27. Although this point is clarified to certain extend below, on the analysis of Articles 116, 121, 122 and 123 of the Albanian Constitution still we are not clear on the position of the international customary law on the Albanian legal order. This, even more in the reality of the total absence of reference or application on the principles of international customary law by Albanian legislator or courts[34].

28. As to the international agreements the situation is quite clear. In order to provide for coherence among such rules of international source and the once on domestic source, the Albanian Constitution offers, through the articulation of a Kelsen pyramid, a ranking of the normative acts having the force of law throughout the territory of the Republic of Albania. This is apparent from the wording of Article 116 paragraph 1 of the Constitution, which provides as follows:

> *"1. Normative acts that are effective in the entire territory of the Republic of Albania are:*
> *a. the Constitution;*
> *b. ratified international agreements;*
> *c. the laws;*
> *ç. normative acts of the Council of Ministers".*

C. Conclusions

29. This ranking[35] leads to two reciprocally correlated conclusions:

    i. that international agreements only have normative effect in the domestic legal sphere by virtue of their ratification; and

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[33] Having regard to the following paragraphs of this analysis (see next pages) we see that the operating dispositions of the Albanian Constitution deals only with international agreements (ratified by Albania) and, as a consequence of these, acts of international organisation. Does this Article 5 of the Albanian Constitution understands by the term 'binding international law' also general principles of international law or international custom. To this extend, we can say that the formulation into consideration would stand only if we consider it as a re-proclamation of a generally accepted international law principle - *pacta sund servanta* and not with regard to other general principles of international law. We take this position in consideration of the Constitutional Court practice, which does reflect the consideration by this Court only of the above mentioned *pacta sund servanda* general principle of international law (see Albanian Constitutional Court Decision No. 65 of December 10, 1999). It has not taken in none of its decisions, at least up to the moment of drafting this report, any position in relation the position in relation to any other general principle of international law and as to the point of their legal effect for the Republic of Albania.

[34] And this may constitute a breach of international law as Judge Morelli says in Barcelona Traction case (1970) (Belgium v. Spain).

[35] For a quite identical ranking see Article 11 of the Labour Code (adopted by Law No. 7961 of 12.07.1995)

ii. that the hierarchical position of ratified international agreements is second only in their normative effect to the Constitution. Thus, in the event of incompatibility between a ratified international agreement and an ordinary domestic law, the international treaty norm will prevail.

30. These two conclusions lead in turn to a better understanding of the following articles, included in the Second Chapter of Part VII. The first conclusion, at (i) above, is confirmed by Article 122(1) which expressly provides that *'any ratified international agreement constitutes part of the internal legal system'*, thus precluding any other international agreement from having the force of law in Albania. In common with solutions already adopted by several constitutions of Council of Europe member countries, for example the French Constitution,[36] the Albanian Constitution in the same Article 122 (1) lays down two precise preconditions for international agreements gaining normative effect in Albanian legal system; first, as already indicated, the ratification[37] of the agreement by the Republic of Albania; and second, the publication of the agreement in the Official Journal of the Republic of Albania.[38]

31. The second conclusion, in paragraph (ii) above, follows much clearly from the second paragraph of Article 122, which expressly states as follows:

> *"An international agreement ratified by law has priority over the laws of the country that are incompatible with it".*

An additional constitutional guarantee, contained in the competencies foreseen for the Constitutional Court by Article 131 of the Constitution, helps to ensure that the supremacy of international agreements over domestic laws is maintained in practice.[39]

32. With a view to ensuring the formal procedural regularity of the process the third sentence of the same paragraph of Article 122 continues:

> *"The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement".*

The purpose of this provision might have been the concern of the legislator to insure the procedural legitimacy on the case of the amendment and repeal of laws as well as in case of ratification of agreements providing membership of Albania into international organisations[40]. In this late regard 2nd paragraph of Article 123 of the Constitution, foresees:

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[36] Article 55 of the Constitution of the V French Republic of 1958.

[37] Article 122 paragraph 1 says in its first sentence:
"Any ratified agreement constitutes part of internal legal system after it is after it is published in the Official Journal of the Republic of Albania".

[38] Id. Previous Footnote.

[39] Article 131 paragraphs a), b) and c) of the Constitution foresees:
"The Constitutional Court decides on:
a. the compatibility of a law with the Constitution or with international agreements as provided in Article 122;
b. the compatibility of international agreements with the Constitution, prior to their ratification;
c. the compatibility of normative acts of the central and local organs with the Constitution and international agreements;... "

[40] Jurisprudence Costa v. E.N.E.L. (case 6/64 of ECJ) and Van Gend & Loos (case 26/62 of ECJ) might have been specifically taken into consideration in drafting this provision.

"2. The law that ratifies an international agreement as provided in paragraph 1 of this article is approved by a majority of all members of the Assembly".

33. Articles 122 § 3[41] and 123 § 1 of the Constitution are very interesting, and could be considered as forerunners, as they respectively provide:

> *"3. The norms issued by an international organisation have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organisation is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein".*
>
> and
>
> *"1. The Republic of Albania delegates to international organisations, state powers for specific issues on the basis of international agreements".*

34. From a consideration of the above arguments as a whole, we are in a position to affirm, from a formal viewpoint, the supremacy of international ratified agreements over prior and subsequent domestic ordinary legislation.

III. SOME PROCEDURAL CONSIDERATIONS ON THE APPLICATION OF INTERNATIONAL LAW INTO DOMESTIC SYSTEM

A. Conclusion of international treaties

35. Certain questions remain over the due procedure for the adoption of international acts. This in the sense that the Albanian State institutions should remain always aware of the level of responsibility they are undertaking by an international treaty. If this procedure is not duly followed in the ratification of a treaty, it cannot have the status foreseen by the above-mentioned Article 116 paragraph 1 and 122 paragraph 2 and as a consequence it cannot have the appropriate status in domestic law for its effective application.

36. If we take into consideration Article 92, on the competencies of the President of the Republic, its paragraph *ë)* foresees that the President of the Republic has the competence to *'conclude international agreements in accordance with the law'*. According to Article 2(b) of Law No. 8371, of 9 July 1998 'For the conclusion of international treaties and agreements', by ratification is understood *'the act by which the Assembly or the President of the Republic accords the final approval to an international treaty or agreement, bilateral or multilateral, signed by the Republic of Albania'*. If by these two Articles is meant that the President of the Republic has the competence to ratify international treaties, could we say that the principle set out in Articles 116(1) and 122(2) applies equally to treaties so ratified by the President? If this is the case, the position of international agreements in domestic law is much stronger, and arises irrespective of the organ that has ratified them. However, in such an eventuality the President would formally have a supra-legislative power on matters regulated by international agreements ratified by himself, a circumstance that could eventually come into conflict with and contradict domestic laws adopted by the Assembly.

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[41] This has not been the solution of previous Constitutional Dispositions. Although the Constitutional Court has had the opportunity to refer to acts of international organisations (see Decision No. 15 of June 03, 1997 and Decision No. 43/99 of the Constitutional Court) but not the chance, for constitutional jurisprudence value, of considering inconsistent Albanian legislation with acts of international organisations.

37. To our mind any such formal conflict is avoided by the division of material competence to ratify international agreements, as specified in Article 121 of the Constitution, which in its first paragraph lists those international agreements to be ratified and promulgated by law i.e., by the Assembly, as follows:

> *" ... when they involve:*
> *a. territory, peace, alliances, political and military issues;*
> *b. human rights and freedoms, and obligations of citizens as provided in the Constitution;*
> *c. the membership of the Republic of Albania in international organisations;*
> *ç. the assumption of financial obligations by the Republic of Albania;*
> *d. the approval, amendment or repeal of laws".*

38. In addition, Article 17(2) of the same Law 'On the conclusion of international treaties and agreements' supports the clarification of the situation by providing that the *'President of the Republic ratifies, decides on the adhesion and denounce the treaties, which are not under examination of the Assembly, according to the definitions of the constitutional law'.*

39. An additional guarantee is provided by the fact that the ratification of any international human rights treaty, in accordance with the above-mentioned paragraph 1(b) of Article 121, has to be done by law. Nevertheless the condition made by the wording - *as provided in the Constitution* - could be considered as a restriction if an international agreement might foresee human rights and freedoms additional to those provided for in the Constitution and this agreement be eventually ratified by a sub-legal act[42]. This concern could be even more serious in the absence in the Albanian Constitution of a minimum standard clause for the recognition of human rights and freedoms, as found in the principal international treaties and conventions on human rights.[43]

B. Direct applicability of international treaties into the domestic legal system

40. Moving on to another important element in the consideration of this issue, namely the direct applicability of international law, the second sentence of Article 122(1) continues:

> *"...It (the ratified international agreement) is directly applicable, except when it is not self-executing and its application requires the adoption of a law".*

This provision shows clearly that Albanian legislation accepts the possibility of the direct application of international provisions. But in practice this seems to be difficult for Albanian legal operators. This, on one hand, for the reasons explained in the following Section IV, and, on the other, for the lack of familiarity of this concept in the traditional Albanian legal thought and education[44]. Anyway, being optimistic, we might say that this provision would open extensive possibilities for the due application of the provisions (naturally those having self-

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[42] In the Albanian normative theory and practice the term 'sub-legal' means a normative act with general effect of application which is hierarchically under the 'law'. See Article 116 of the Constitution of the Republic of Albania.

[43] As it is the case of the European Convention of Human Rights (Article 53), Universal Declaration of Human Rights (Article 30), International Covenant on Civil and Political Rights (Article 5), International Covenant on Economic, Social and Cultural Rights (Article 5), etc.

[44] Naturally the famous concept coming out from the IPCJ on Competence of Dantzig Tribunals case of March 3, 1928 (Série B, No. 15) and elaborated further on the jurisprudence of the Hague, Strasbourg and Luxembourg Courts, would have to be respected in these cases. But, it seems quite improbable that the test of *'sufficiently clear, precise and particularised'* would find application before Albanian administration and courts.

executing character) of the European Convention on Human Rights in Albanian legal solutions.

IV. PUBLICATION IN THE OFFICIAL JOURNAL

41. However, both above mentioned constitutional guarantees - the incorporation into domestic law and the direct applicability clause - could be seriously compromised by the Albanian authorities' practice of not publishing the full text of ratified international agreements in the Albanian Official Journal. In fact, except in certain, very rare cases, only the title of the agreement ratified or adopted is published in the Official Journal, to the exclusion of the agreement's articles. This fact, besides compromising the constitutionally required incorporation of international agreements into the domestic legal system,[45] as well as the constitutional and legal requirement to publish international agreements, may also provoke a violation of the general principle of law, the principle of so-called *sécurité juridique*,[46] and thus engages the international responsibility of the Republic of Albania.[47] This concern becomes even greater in cases where the Republic of Albania ratifies international agreements of a self-executing character.

42. Article 117(3) of the Constitution provides for a precise constitutional obligation to publish international agreements. Such agreements, when ratified by law, *'...are promulgated and published according to the procedures contemplated for laws'*.[48] The consequences of a failure to follow this procedure are stated in Article 117(1) which provides as follows:

> *"The laws and the normative acts of the Council of Ministers, ministers and other central state institutions acquire legal effect only after they are published in the Official Journal".*[49]

43. Thus, the practice of not publishing international agreements in the Official Journal disregards both the obligation deriving from Article 122(1), for the incorporation of ratified international agreements into the Albanian domestic legal system, and the obligation deriving from Article 117 (1) and (3). In these circumstances, the application of ratified international agreements, which are not part of the Albanian legal system, depends solely on the use of the *renvoi* procedure or of the transformation procedure – typical for dualist systems. Unfortunately, Albanian administrative and judicial bodies have so rarely applied the *renvoi* procedure that it would be too optimistic to say that this manner of implementation of international law is ensured in the Albanian legal

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[45] Required by Article 116 and Article 122 of the Constitution, considered above.

[46] We consider as a component of rule of law principle, the provisions of Albanian Constitution providing on its preamble:

"with the determination to build a democratic state based on the rule of law"(preamble)

by Article 4 paragraph 1:

"The law constitutes the basis and the boundaries of the activity of the State".;

by Article 122 considered above and Article 117, paragraphs 1 & 3, of the Constitution these late paragraphs providing:

"1. The laws and the normative acts of the Council of Ministers, ministers and other central State institutions acquire legal effect only after they are published in the Official Journal.

2. &.

3. International agreements that are ratified by law are promulgated and published according to the procedures contemplated by law. The promulgation and publication of other international agreements is done according to law".

[47] Articles 26, 27 and 46 of the 1969 Vienna Convention on the Law of Treaties.

[48] Article 117, paragraph 3 of the Constitution of the Republic of Albania.

[49] Article 117, paragraph 1 of the Constitution of the Republic of Albania.

system[50]. On the other hand by reading the Constitution we might say that opting for incorporation of international agreements into domestic legal system, the transformation seems to useless, i.e. normally inapplicable in practice.

44. The establishment of the Official Publications Centre by Law N° 8502 of 30 June 1999 will naturally have an impact on the question of publication of ratified international agreements. Furthermore, Article 17(4)[51] of the above-mentioned Law No. 8371, of 9 July 1998 'For the conclusion of international treaties and agreements' offers an additional guarantee in this regard by specifying the authority that signs the instruments of ratification, adhesion or denunciation. In this indirect manner, the official version of the agreement must be translated into Albanian as the official language of Albania.[52] However, this guarantee appears to be limited only to bilateral agreements by Article 18 of the same Law.

45. Thus, especially in the case of multilateral international agreements, the lack of procedures for determining an official copy in Albanian as well as the Albanian practice of publishing only the title of the ratified international treaty compromise the effective required application of international law into the Albanian domestic legal system.

V. THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE ALBANIAN DOMESTIC LEGAL SYSTEM

A. Preliminary Considerations

46. As has already been accepted by the European Court of Human Rights,[53] the European Convention on Human Rights is itself a source of international law, and its interpretation is governed by all the basic rules of interpretation of international law including the 1969 Vienna Convention on the Law of Treaties. This consideration should be borne in mind both for the purposes of the above discussion, and in the discussion that follows.

47. Following the debate of 29 June 1995 of the Parliamentary Assembly of the Council of Europe, the Assembly adopted Opinion No. 189[54] on the same date recommending to the Committee of Ministers that Albania be invited to become a member state of the Council of Europe. Among the considerations, which led to this recommendation, was the statement of the Republic of Albania:

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[50] We find it applied only in Constitutional Court decisions. See for instance Constitutional Court Decision No. 14 of May 29, 1997, with reference to Article 10 of the European Convention on Human Rights, Constitutional Court on its Decision No. 15 of June 3, 1997, with reference to Resolution No. 40/146 of the UN General Assembly, the 'Death Penalty' Decision No. 65 of December 12, 1999 with reference to the European Convention on Human Rights its Protocols as well as to the European Convention on Extradition, Decision No. 11/2000 in relation to Vienna Conventions on Diplomatic Relations, Decisions No. 45 and No. 47 on European Charter on Local Autonomy, and then Decisions No. 16/2000, 17/2000, 33/2000, 48/2000, 77/2000, 4/2001, 5/2001, 9/2001, 17/2001 and 53/2001, where reference is made to the European Convention on Human Rights.

[51] Article 17 alinea 4 foresees:
"The President of the Republic signs the instruments of ratification, adhesion or denunciation and the Minister of Foreign Affairs countersigns these".

[52] According to paragraph 1) Article 14 of the Albanian Constitution:
"The official language in the Republic of Albania is Albanian".

[53] Judgment of the European Court of Human Rights in the case of Loizidou v. Turkey, § 43. The same also in the judgment of European Court of Human Rights in Golder v. UK, §§ 29-30.

[54] Opinion No. 189, (22nd sitting) (1995 session), on the application by the Republic of Albania for membership to the Council of Europe.

"to sign the European Convention on Human Rights at the moment of accession; to ratify the Convention and protocols Nos. 1, 2, 4, 7, and 11 within a year; to recognise, pending the entry into force of Protocol No. 11, the right of individual application to the European Commission of Human Rights and the compulsory jurisdiction of the European Court of Human Rights (Articles 25 and 46 of the Convention)"

48. Pursuing this undertaking the Republic of Albania signed the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols 1, 2, 4, 7 and 11 on 13 July 1995, the same date as it acceded to its membership of the Council of Europe. In a separate document signed on the same date, the Republic of Albania undertook to ratify the Convention and its additional protocols within one year from the date of the signature. In complying with these undertakings, the Republic of Albania ratified the European Convention on Human Rights by Law No. 8137 of 31 July 1996[55] and deposited the instruments of ratification with the Secretary General of the Council of Europe on 2 October 1996. On the same date the Republic of Albania deposited the declaration recognising the competence of the European Commission of Human Rights (on the basis of former Article 25) and that of the European Court of Human Rights under the condition of reciprocity (on basis of the former Article 46(2) of the Convention).

B. European Convention on Human Rights as part of the domestic legal system in Albania

49. With the accomplishment of these procedures it became possible for the European Convention on Human Rights to become source of law applicable for the Republic of Albania. If we consider the above considerations especially in relation to Article 122 of the Constitution and also its Article 180 § 1[56], we might also say that it became, after the entry into force of the new Constitution, part of the Albanian domestic legal system. However, the particular requirement of this Article for the publication of the international agreement in the Official Journal as a condition for becoming part of the Albanian domestic legal system has not been fulfilled in the case of the European Convention on Human Rights.[57] It is true that this procedure was not a condition under the previous Principal Constitutional Provisions - Law No. 7491 of 29 April 1991. But under the provisions of that constitutional setting, international agreements as such could not become part of the Albanian domestic legal system. If we accept that they were applicable within the domestic legal system of the Republic of Albania they could only have been so via transformation of the international agreement by a domestic legal act (law, decree, decision of the Council of Ministers) as part of the domestic system. Thus only by other provisions, such as the amending ones, dealing with the competencies of the Constitutional Court, it could be said that Albanian law affirmed the prevalence of international agreements over the ordinary laws of Albania[58].

50. Thus, the problem persisting to a certain extent even under the new Constitution has been and continues to be the publication of the text of the Convention, whether introduced into the Albanian domestic system by a law (in accordance with the previous Principal Constitutional Provisions) or by virtue of its ratification as an international treaty (Articles 116 and 122 of the new Constitution). Obviously, the second option would be the appropriate one after the entry into

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[55] Official Journal of the Republic of Albania - Year 1996, Volume 20, Page 724.

[56] This provision foresees:
"1.International agreements ratified by the Republic of Albania before the effective date of this Constitution are deemed ratified according to this Constitution."

[57] Id. Pages 724-727.

[58] Or by specific regulations such as Law No. 7961 of June 12, 1995 on 'Labor Code' – see its Article 11.

force of the new Constitution. Thus, we still have a procedural obstacle to the effective application of the European Convention on Human Rights as an international agreement in Albanian law.[59]

51. It follows that our conclusion in relation to international agreements generally applies also in this case. In our view, the *renvoi* procedure remains the only mechanism by which Albanian administrative and judicial bodies can presently apply the European Convention on Human Rights in their day-to-day legal and administrative practice.

C. The Special Position of the Convention on the Actual Constitutional Setting

52. Nonetheless, the special place of the European Convention of Human Rights within the category of international agreements seems to have been firmly within the minds of the drafters of the Albanian Constitution and of the voters who adopted it. In particular, apart from the general provisions of the Part One and Part Seven of the Constitution, applying to the overall category of international agreements, Chapter Two and especially Article 17(2) of the Constitution confers a special status on the European Convention on Human Rights within the Albanian legal system. Differing from the general position afforded to other international agreements by Articles 116, 122, 131 of the Constitution, i.e., a supra-legal but under-constitutional status, Article 17(2) confers, we might say, a constitutional status upon the European Convention on Human Rights.[60] It provides as follows:

> *"These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights".*

53. Thus, it follows from this wording that the type of constitutional status conferred by Article 17(2) on the European Convention of Human Rights is not a formal-procedural status but more a material one. In other words, the threshold of rights and freedoms provided by the Albanian Constitution is the threshold of the rights and freedoms provided by the European Convention of Human Rights. This conclusion is much more obvious if paragraph 2 of Article 17 is read in correlation with paragraph 1. Thus, the provisions of the Albanian Constitution providing for human rights and freedoms must be interpreted in function of the provisions of the European Convention providing the same rights, as long as Article 17 § 2 requires that the first ones does not exceed the limitation provided for in the late ones. But, on the other hand it is clear that this constitutional status of the European Convention on Human Rights applies only in the case of limitations on *'...the rights and freedoms provided for in this Constitution...'*[61]. So, the European Convention on Human Rights standards are considered by our Constitution as the minimum

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[59] In relation with the previous Fundamental Constitutional Provisions Article 23 foresaw:
"Laws are promulgated no later than 15 days after the approval and came into force 15 days after their publication on the Official Journal, except the cases when another term is provided in the law itself or on the case on organic law".
This meant, according to our opinion, that if the text of the international agreement i.e. of the law ratifying it was not published on the Official Journal this law (ratifying an international agreement) did not enter into force. This was the case of the European Convention of Human rights as well. Furthermore in the case of the new Constitution, the publication of the international agreements at the Official Journal is a basic precondition for the international agreement to become part of the Albanian domestic legal system, as especially required by Article 122 § 2 of the Constitution.

[60] This choice offered by Article 17 of the Albanian Constitution in relation to the European Convention on Human Rights status - differing from the one opted by Constitutional Articles 116 and 122, would avoid the eventual problem of ratification by Albania of subsequent international agreements incompatible with the European Convention on Human Rights. (Question taken into consideration by the European Commission of Human Rights of the application D235/56.)

[61] Article 17, paragraph 1, of the Albanian Constitution.

required standard for limitations on human rights and freedoms provided by the Constitution itself. Therefore, presumably, if additional rights and freedoms will be added to the European Convention on Human Rights and do not figure among those provided for in the Constitution, these rights would not have the constitutional status provided for the rights and freedoms already set forth in the Albanian Constitution. Although it falls outside the object of this report and might be not pertinent to be treated here, the contrary situation is true as well. Thus, rights and freedoms provided for in the Albanian Constitution but not in the European Convention do not, and cannot in fact, have the latter as the minimum standard for their application and interpretation.

D. Guiding Constitutional Principles and ECHR Principles

54. If two provisions, laws or pieces of legislation are inspired by different aims, the risk of incompatibility among their provisions becomes greater. Furthermore, as the European Court on Human Rights has had occasion to emphasise, *'...is necessary that the domestic law conforms itself with the Convention, including here the general principles enounced or implied by it'*[62]. The Preamble to the European Convention on Human Rights sets out the general scope and objectives of the Convention, and a very important body of principles has been developed by the European Court of Human Rights to give contextual interpretation to its provisions[63]. To the extent that this could also be the approach of Albanian courts, and insofar as the interpretation of the minimum standards of human rights within the meaning of Article 17 paragraphs 1 and 2 of the Constitution may require it, we consider it appropriate to consider if Albanian legislation is inspired by the same aims as the European Convention on Human Rights. This analysis will contribute in turn to a better assessment of whether other provisions of Albanian law are conceived in compliance with the principles, purposes and aims of the Constitution and therefore also with those of the Convention.

55. In our opinion it seems clear from the Preamble of the Albanian Constitution that the Albanian normative system is widely inspired by the same principles contained in the Preamble to the European Convention on Human Rights. Both proclaim the protection of human rights and fundamental freedoms as a foundation of the respective legal systems that they govern.[64] They also both affirm the intention to create societies governed by the rule of law with the object, among others, of protecting and developing human rights and fundamental freedoms.[65] Furthermore Article 3, which belongs to Part One of the Constitution dealing with its Basic Principles, expressly provides that:

> *"...the dignity of the person, his rights and freedoms, social justice, the constitutional order, pluralism, national identity and inheritance, religious coexistence, and coexistence with, and understanding of Albanians for minorities are the bases of this state, which has the duty of respecting and protecting them".*

56. More concretely, Article 15, the first provision in Part Two - dedicated to Fundamental Human Rights and Freedoms - provides that:

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[62] European Court of Human Rights – Judgment on the case Winterwerp v. Netherlands, § 45.

[63] Previous footnote. The same principle also in the case Golder v. UK. Regard to the Vienna Convention on the Law of Treaties - Artt. 5, 32 and 33.

[64] Paragraphs 2 and 4 of the Preamble of the Albanian Constitution and *considerandum* 3, 4 and 5 of the Preamble of the European Convention on Human Rights.

[65] Paragraph 2 of the Preamble and Articles 3 and 4 of the Albanian Constitution and *considerandum* 5 of the Preamble of the European Convention on Human Rights.

"1. The fundamental rights and freedoms ... stand at the base of the entire legal order.
2. The organs of the public power, in fulfilment of their duties, shall respect the fundamental rights and freedoms as well as contribute to their realisation".[66]

57. These Articles of the Albanian Constitution provide a fundamental duty and objective for the activity of the state and its organs and demonstrate the importance that fundamental human rights and freedoms have for the Albanian normative system. Having regard to their wording and their position in the Constitution, we believe that these are leading interpretative provisions for the application, implementation and interpretation of all other articles of the Constitution and other normative acts within the Albanian legal system. In our view, paragraph 2 of Article 15 seems to mirror, in combination with Paragraph 2 of Article 17 *(see next page)*, the demand made by the European Convention on Human Rights and its mechanisms for positive obligations[67] of all state organs to ensure an effective protection of human rights provided for in the Convention.

58. In addition, the general principle underlying the Convention that the State must ensure an effective[68] and real protection of human rights and fundamental freedoms, and not just a theoretical or illusory degree of protection, seems to have also been embodied in the Albanian Constitution. In particular, Article 17 provides that:

"1. Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of the others. A limitation shall be in proportion to the situation that has dictated it.
2. These limitations may not infringe the essence of the rights and freedoms..."

59. Thus, the Albanian Constitution expressly affirms the principle of legality in the specific context of limitations on fundamental rights.[69] In addition, the prerequisite of the public interest,[70] or alternatively the protection of the rights of others,[71] as a mandatory condition for the justification

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[66] The wording of the second paragraph of Article 15 could be interpreted as granting an evolutive interpretation of the fundamental human rights and freedoms as provided on the constitution - considered as one of the principal interpretative criterion of the European Convention on Human Rights by the Strasbourg bodies (See the European Court of Human Rights judgments in relation with the cases of Tyrer v. UK, Marckx v. Belgium, Dudgeon v. UK, Guzzardi v. Italy, Johnston and others v. Ireland, Soering v. UK, Sigurjónsson v. Iceland, Lawless v. Ireland, Burghartz v. Switzerland, etc).

[67] The European Court of Human Rights especially on the cases of Marckx v. Belgium and Airey v. Ireland. On specific rights provided on the Convention also in Johnston and others v. Ireland, Kroon v. Netherlands, X and Y v. Netherlands, Artico v. Italy, Gaskin v. UK, Mathieu-Mohin and Clerfayt v. Belgium.

[68] As a principle on human rights instruments interpretation European Court of Human Rights on Sunday Times v. UK, Golder v. UK, B. v. France, Loizidou v. Turkey, Brogan and others v. UK, Artico v. Italy, Soering v. UK, McCann and others v. UK, R.M.D. v. Switzerland, Wemhoff v. Germany.

[69] European Court of Human Rights on the cases of Dudgeon v. UK, Rieme v. Sweden, Campbell v. UK, Klass v. Germany (especially on rule of law), Sunday Times v. UK, Kruslin and Huvig v. France, Malone v. UK (on the term -'law'), Leander v. Sweden, M. and R. Andersson v. Sweden, Barthold v. Germany, Müller and others v. Switzerland, Kokkinakis v. Greece.

[70] Principle stressed out by the European Court of Human Rights during its judgments on the cases of Klass v. Germany, Soering v. UK, Young, James and Webster v. UK, Vereniging Weekblad Bluf v. Netherlands, Brogan and others v. UK, Fox, Campbell and Hartley v. UK.

[71] European Court of Human Rights judgments on the cases of Lingens v. Austria, Prager and Oberschlick v. Austria, Haes and Gijsels, Jersild v. Denmark, Otto Preminger-Institut v. Austria, Hendyside v. UK, Gaskin v. UK, Leander v. Sweden, etc.

of any such limitation is clearly outlined. Similarly, the principle of proportionality,[72] considered to be one of the cornerstones of the interpretation of the European Convention, especially in relation to limitations and restrictions over the rights and freedoms of individuals, has not been neglected by the drafters of the Constitution. The second sentence of the first paragraph of Article 17 clearly proclaims the observance of the proportionality principle in the imposition of any limitation on human rights.

60. The wording of these paragraphs of Article 17, and of other Articles of the Constitution,[73] therefore appears to a great extent to be in conformity with and to mirror the scope and object as well as the leading principles and rules of interpretation of the European Convention on Human Rights. It follows that the purpose and meaning of all Albanian legislation must be construed in accordance with the fundamental aim of protecting and guaranteeing the effective enjoyment of fundamental human rights and freedoms.

VI. ARTICLE 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ALBANIAN LEGISLATION

A. The Concept of Article 1 for the Purposes of our Report

61. Article 1 of the European Convention on Human Rights provides:

> ***"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".***

Under this Article the States party to the European Convention undertake to change their internal legislation and to ensure that it conforms to Convention standards.[74] In this connection, the present compatibility study has an important function in attempting to identify the potential discrepancies between the two sets of legal standards.

62. At the outset, it is important to emphasise that the words 'everyone' and 'jurisdiction' have been interpreted in a broad manner by the Strasbourg authorities. This has followed particularly from the teleological approach adopted by the Court in interpreting different articles of the Convention. In this respect, a full consideration of the scope of Article 1 requires an examination of all four aspects of a state's jurisdiction - *ratione materiae, ratione temporis, ratione personae* and *ratione loci.*

B. Analysis of Albanian Legislation vis-à-vis the Basic Components of Article 1

a. *ratione materiae*

63. First, in respect of jurisdiction *ratione materiae,* relating of course to the rights and freedoms defined in Section I of the Convention, in our view all the rights and freedoms included in the Convention and in its additional Protocols as categories of rights and freedoms are also incarnated in Part Two of the Albanian Constitution. Thus there is no apparent formal incompatibility between the two systems *in prima facie.* However, for a detailed examination of the compatibility

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[72] Principle of proportionality - European Court of Human Rights judgments on Golder v. UK, Silver v. UK, Dudgeon v. UK, Norris v. UK, Sunday Times v. UK, Observer and Guardian v. UK, Barfod v. Denmark, Thorgeir Thorgeirson v. Iceland, Castells v. Spain, Handyside v. UK.

[73] Especially the continuation of the second paragraph of Article 17, Article 3, Article 4, Article 5, Article 7, Article 15, Article 116 and Article 145 of the Albanian Constitution.

[74] European Commission of Human Rights decision in De Becker v. Belgium.

of each of these categories of rights and freedoms, as defined in the Albanian Constitution with the reciprocal guarantees of the European Convention on Human Rights, we refer on the reservation question and on the specific consideration of the compatibility on each of these categories *(see below on the specific rights and freedoms parts).*

b. *ratione temporis*

64. Second, regarding jurisdiction *ratione temporis*, being governed by general rules of international law the European Convention on Human Rights does not have retroactive effect. Thus it does not apply to events occurring before its entry into force for the Republic of Albania, on 3 October 1996. Despite this general rule, the European Commission and Court have had occasion to point out that, in certain exceptional circumstances, their competence *ratione temporis* may extend also *ex tung* beyond the date of entry into force of the Convention in a particular State party.[75] This arises in cases where the effects of the violation committed before that date persist and continue to produce effects subsequent to that date. This principle could prove to be very important in an Albanian context especially in respect of unlawful deprivations of property rights[76], which may have never been validated by any subsequent law. Also this question could raise concerns in relation to the extraordinary measures taken under Article 15 of the European Convention and especially on the period of application of these measures directly or of their effects indirectly.

c. *ratione loci*

65. Third, regarding jurisdiction *ratione loci*, it may be noted that when ratifying the Convention the Republic of Albania did not make any declaration in respect of the territorial application under Article 56 (former Article 63) of the Convention. From this it follows that the Republic of Albania accepts that the Convention applies to all the territory for which it is responsible as a matter of international law, i.e., the territory in which it ensures the 'the rights and freedoms defined in Section I of the Convention' is co-extensive with its full territorial jurisdiction.

d. *ratione personae*

66. Fourth, regarding jurisdiction *ratione personae*, it appears at first sight that the Albanian Constitution guarantees to everyone 'the rights and freedoms defined in Section I of this Convention' without distinction. This appears especially from its Preamble (second *considerandum*),[77] as well as from Article 3,[78] Article 15,[79] and particularly Article 16 which provides in full as follows:

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[75] See specially judgements of the European Court of Human Rights in De Becker v. Belgium, Yaci and Sargin v. Turkey.

[76] See for instance the judgement of the European Court of Human Rights in Vassilescu v. Romania.

[77] Second and Fourth Considerandums of the Preamble of the Albanian Constitution points out the *'determination to guarantee the fundamental human rights and freedoms,' and the 'pledge to protect human dignity and personhood'.*

[78] Article 3 of the Albanian Constitution foresees:
"the dignity of the of the person, his rights and freedoms, social justice, the constitutional order, pluralism, national identity and inheritance, religious coexistence, and coexistence with, and understanding of Albanians for minorities are the bases of this state, which has the duty of respecting and protecting them".

[79] Article 15, the first of the Part Two - dedicated to the Fundamental Human Rights and Freedoms, provides that:
"1. The fundamental rights and freedoms & stand at the base of the entire legal order.
2. The organs of the public power, in fulfilment of their duties, shall respect the fundamental rights and freedoms as well as contribute to their realisation".

"1. The fundamental rights and freedoms and the duties contemplated in this Constitution for Albanian citizens are also valid for foreigners and stateless persons in the territory of the Republic of Albania, except for cases when the Constitution specially attaches the exercise of particular rights and freedoms with Albanian citizenship.

2. The fundamental rights and freedoms and the duties contemplated in this Constitution are valid also for legal persons so long as they comport with the general purposes of these persons and with the core of these rights, freedoms and duties".

67. However, we consider that Article 16 is capable of a limited interpretation that would restrict the equal enjoyment of rights by all persons subject to Albanian law. Its primary effect is to provide for equal treatment in respect of their rights, freedoms and duties for Albanian citizens, foreigners, stateless persons and legal persons, in the last category, of course, within the limits of their legal personality. But the problem here is the term *'in the territory of the Republic of Albania'* which seems to be much more restrictive than the term *'within their...*(i.e. in this case 'Albania's')*...jurisdiction'* used by Article 1 of the European Convention.

68. The European Court of Human Rights has had the opportunity to express the opinion that the term 'jurisdiction' cannot be limited in the sense of territory. The international responsibility of States party to the Convention could be engaged even by a conduct whose effects are produced outside the internationally recognised territory of that state or even on the territory of another State, whether or not that third state is itself a State party to the European Convention on Human Rights. It is enough for engagement of responsibility under the Convention that the act, whose effects constitute a violation of the Convention, irrespective of the precise territorial location of those effects or of the citizenship of the victim of the violation, is attributable to the authority of that state.[80]

69. In contrast to this Convention position, although the rights and freedoms protected by the Albanian Constitution are also enjoyed by foreigners and stateless persons within the territory of the Republic of Albania, the same cannot be said for foreigners or stateless persons outside the territory of Albania. On the other hand, the same limitation does not appear to apply to legal persons if, as seems to be the case, the term 'in the territory of the Republic of Albania' appearing in paragraph 1 of Article 16 has no application to paragraph 2 of the same Article. It must therefore be concluded that in cases where the rights and freedoms of foreigners or stateless persons outside Albanian territory may have been prejudiced by the Albanian state, it appears that the constitutional protection is removed only in respect of such persons, and not in respect of legal persons and Albanian nationals. This could especially raise concerns in the case of refugees or asylum seekers and of expulsion or extradition cases as well.

70. Thus, in our opinion, there is an incompatibility between the scope of protection *ratione personae* of the Albanian Constitution with the *ratione personae* application of the European Convention on Human Rights under its Article 1. This restricted application of the term jurisdiction might raise problems as to the application of the different Articles of Section I of the Convention, especially of Articles 2[81], 3, 6, 7, 8.

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[80] The European Court on Human Rights has stressed out this way of understanding the term jurisdiction in various judgments of which more important, Loizidou v. Turkey, Soering v. UK, Drodz and Janousek v. France and Spain, Cruz Varas and others v. Sweden, and Abdulaziz, Cabales and Balkandali v. UK. In relation to the extension in special areas (airports) of the term jurisdiction see European Court on Human Rights judgments in Amuur v. France and SM and MT v. Austria.

[81] A potential violation of this Article from Albania is possible if we consider the ratification of Protocol 6 of the Convention by the Republic of Albania.

e. the positive obligations question

71. Although it might have been considered within the *ratione materiae* paragraph above, another question, the positive obligation one, merits a specific attention in dealing with Article 1 of the European Convention on Human Rights. This is relevant also in view of the Albanian administrative and judicial practice on perception of human rights international obligations. To our opinion this has been taken into consideration by Albanian Constitutions drafters in two moments. First, with the provision of the above-cited Article 15 § 2 of the Constitution, according to which:

> *"2. The organs of the public power, in fulfilment of their duties, shall respect the fundamental rights and freedoms as well as contribute to their realisation".*

72. Thus requiring actions, within their duties and competencies for the respect of fundamental rights and freedoms. The second important moment is the provision of Article 44 of the Constitution, which foresees:

> *"Everyone has the right to be rehabilitated and/or indemnified in compliance with law if he has been damaged because of an unlawful act, action or failure to act of the state organs".*

73. This provision seems to offer to individuals the right of rehabilitation or compensation for damages resulting from unlawful failures to act of the state organs. Expressed in other words, the Constitution recognises the fact that the state organs in certain cases must act, eventually promptly, for not causing damages to individuals or legal persons, i.e. for not violating their rights but for contributing in their realisation as Article 15 § 2, on the other hand, requires.

f. reservations and interpretative declarations issue

74. On a final point arising under Article 1 of the Convention, separate consideration may be briefly given to the question of reservations. In this connection, it is significant that Albania has entered a reservation on the basis of Article 57 (former Article 64) of the Convention only in relation to Article 3 of Protocol N° 1. From its wording, this reservation could be considered to be more in the nature of an interpretative declaration than a reservation, in that it intends merely to modify and not to exclude the application of Article 3 of Protocol N° 1 in respect of Albania. Although the relevance of this theoretical consideration may appear tenuous in the light of well-established doctrinal opinion on this point,[82] the formal procedures followed by the Republic of Albania for making the reservation appear to have been in conformity with the conditions laid down by paragraphs 1 and 2 of Article 57[83] of the European Convention on Human Rights and by Articles 19 and 20 of the 1969 Vienna Convention on the Law of Treaties. Thus, only referring to this «fundamental right» there is a *ratione materiae* restriction of the Convention application vis-à-vis Republic of Albania. It has to be also underlined that this *ratione materiae* restriction is itself done for a limited «period of five years from the date of deposit of the instrument of ratification.»[84]

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[82] See G. Cohen Jonathan & J.P. Jacqué, 1982 in 'Annuaire Français du Droit International' and P.H. Imbert, 1983 in 'Revue Générale du Droit International Public'.

[83] Article 57 § 1:
"a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision..".
Article 57 § 2:
"Any reservation made under this Article shall contain a brief statement of the law concerned".

[84] See Instruments of Ratification of the European Convention on Human Rights by the Republic of Albania.

Therefore, at the actual stage of editing of this report (October 2001), we can say that this reservation is no longer legally operative.

75. Beyond this formal question, our views on the substantial limitation and its compatibility with the Convention are presented below in our discussion of Article 3 of Protocol N° 1, to which separate reference may be made.

VII. ARTICLE 14 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ALBANIAN LEGISLATION

A. Preliminary considerations

76. Article 14 of the European Convention on Human Rights provides as follows:

> ***"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".***

77. These equality and non-discrimination issues were for many years the subject of very heated debate and controversy in Albanian society, and have now found a wide space and treatment in domestic legislation. There are several Articles of the Albanian Constitution covering this question. First of all there is Article 18 of the Constitution providing that:

> *"1. All are equal before the law.*
> *2. No one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic, condition, education, social status, or parentage.*
> *3.No one may be discriminated against for the reasons mentioned in paragraph 2 without a reasonable and objective justification".*

78. This seems to be a general anti-discrimination clause, more similar to Article 26 of the ICCPR[85] than to Article 14 of the European Convention on Human Rights as described above. This, because paragraph 1 of Article 18 of the Albanian Constitution clearly proclaims the principle of equal protection by the law, without focusing only on the narrow question of equal enjoyment of rights and freedoms provided for in the Constitution. This is confirmed further by paragraph 2 of the same Article. Despite this consideration, which is to be considered an advantage in relation to the limited *ratione materiae* impact of Article 14 of the European Convention on Human Rights[86], some points need to be raised concerning the non-discrimination issue in the Albanian Constitution.

B. Grounds of forbidden discrimination

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[85] Article 26 of the International Covenant on Civil and Political Rights (ratified by the Popular Assembly of the Republic of Albania on November 4th, 1992) foresees:
"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

[86] Naturally this issue would have to be considered also under the Protocol 12 perspective once it is going to enter into force.

79. First, in relation to the criteria for non-discrimination, an accurate comparative terminological analysis might raise some concern over the criterions adopted for prohibiting discrimination by the two legal acts under analysis. In particular, Article 18 of the Albanian Constitution omits certain grounds that are considered as prohibited grounds for discrimination under Article 14 of the European Convention on Human Rights. For example the grounds of sex or colour are not mentioned in Article 18 of the Albanian Constitution, although expressly foreseen by Article 14 of the Convention. However, Article 18 of the Albanian Constitution uses the term 'gender' which, in our opinion, for the purposes of the Albanian language[87] is sufficiently synonymous with the term 'sex', but is this enough for the interpretative requirements of the Convention, particularly in relation to the question of sexual orientation?[88] We think that the answer must be yes. The question of whether the term 'colour' has the same meaning as the term 'race' probably cannot be answered with the same degree of confidence.[89] The same question could be raised comparing the term '...or other status', figuring in Article 14 of the European Convention with the term '...social status...' used by the Albanian Constitution. The latter category again appears, in our opinion, to be more restricted.

80. Despite these arguments, as a matter of first principle the compatibility of the two sets of anti-discrimination standards appears to be confirmed if the indicative character of the criterions used by Article 18 of the Albanian Constitution is taken into consideration. This seems to be clear from the statement 'any ground such as' *('notamment - fr'.)*[90] in the text of Article 14 of the European Convention on Human rights and of 'for reasons such as' in the text of Article 18(2) of the Albanian Constitution. Thus, despite the possibly more limited character of the rights and freedoms expressly covered by its provisions, the Constitution by its Article 18 seems to prohibit, in a manner similar to Article 14 of the Convention, a residual, undefined category of further unacceptable grounds of discrimination. In addition, the rest of the indicative reasons provided for in Article 18 of the Albanian Constitution are very similar to those of Article 14 of the European Convention.[91]

C. Justifiable 'discrimination'

81. The second point of concern arises from the provisions of the third paragraph of Article 18, which provides:

> *"No one may be discriminated against for the reasons mentioned in paragraph 2 without a reasonable and objective justification".*

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87 The Albanian Language Dictionary (ed. 1980), on page 620 [referring to 'gender' *(-alb. 'gjini')*] and on page 1739 [referring to 'sex' *(- alb'.seks')*].

88 Regarding this moment: Report of the European Commission on Human Rights in the case of Sutherland v. U.K. and judgment of European Court on Human Rights in Salgueiro da Silva Mouta v. Portugal.

89 The term colour is considered by the Albanian Language Dictionary (ed. 1980) as one of the external indicatory features for race [See page 1264 (for colour - *alb. ngjyrë*) and page 1627 (for race - *alb. racë*)]. The same on the Random House Webster's College Dictionary (ed. 1997); page 1071 (for race) and page 259 (for colour).

90 In this regard the European Court on Human Rights clarifications in its jurisprudence of Engel and others v. U.K., or James and others v. U.K. referring to the *'Indicative character of discrimination hypothesis'*.

91 Naturally in this floor they have to be considered the terms used by all the Articles dealing with 'Human Rights and Freedoms' on the Albanian Constitution. Terms like 'Everyone', 'No one', show the non-discrimination inspiration of the Albanian Constitution. Furthermore, in some case the terminology is even more precise like in the case of Article 54 of the Constitution foreseeing (under Marckx jurisprudence effect we suppose) 'Children born out of wedlock have rights equal to those born within marriage'.

Our concern in this connection relates to the wording *'...for the reasons...'*, which seems to indicate that the prohibition applies only to the grounds expressly listed in paragraph 2. If so, it could then be argued that the indicative character of the provision in paragraph 2 of Article 18 is transformed into a more limited guarantee by paragraph 3. According to this line of analysis, it would be possible to discriminate without any reasonable or objective justification on other grounds, but to be bound by this principle when discriminating on any of the grounds expressly foreseen in paragraph 2 of Article 18.

82. In our opinion, any such surprising interpretation must also be rejected. The inclusion of paragraph 3 of Article 18 in the Albanian Constitution seems to have deliberately followed, in the absence of the same statement in Article 14 of the European Convention, the well-established jurisprudence of the European Court of Human Rights on all discrimination issues.[92] Although a distinct interpretation can and should be given to the two particular categories of potential measures of discrimination covered by Article 16 and Article 20 of the Constitution (see below), our impression is that these criteria for justifying distinctions and measures of discrimination apply to all cases as a general prerequisite of Albanian constitutional law and apply in particular to all other Articles of Chapters II, III, IV and V of the Second Part of the Albanian Constitution.

83. As has already been stressed in this report, the existence of paragraph 2 of Article 17 of the Albanian Constitution could be interpreted, in this regard, as providing a higher guarantee, which would, in any event, avoid these last two concerns. But this provision too has not yet gained status in jurisprudential terms as an Article affecting the interpretation of all the other Articles of the Constitution providing for limitations on human rights and freedoms of non-absolute character. This Article could be compared with Article 18 of the Convention, which is treated below.

84. In addition to Article 18, the Constitution of the Republic of Albania expounds in two other Articles of the same Chapter I - General Principles – on two particular non-discrimination questions. These are Article 16 of the Constitution, referring to the case of non-Albanian citizens[93] and moral persons, and Article 20, concerning persons belonging to national minorities. Article 16, which has been set out above, recognises the equal enjoyment of fundamental rights and freedoms for non-citizens as for Albanian citizens and effectively prohibits discrimination on the ground of nationality or citizenship. This follows from the words 'are also valid' in Article 16(1).[94] However, it follows too that our conclusion in this report regarding the *ratione personae* application of Article 1 of the European Convention, in cases on non-citizens and stateless persons outside the territory of Albania, applies also to the protection against discrimination. Thus, a discrimination issue appears for the foreigners outside the territory of the Republic of Albania on Article 16 of the Albanian Constitution as for this category/location there are not valid the same fundamental

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[92] The European Court on Human Rights has clearly embraced the margin of appreciation doctrine in cases related to Article 14 of the Convention (especially on Abdulaziz, Cabales and Balkandali v. UK, Rasmussen v. Danmark and Inze v. Austria). Although the leading standards of this margin on the jurisprudence of the Court remain objective and reasonable justification of the differential treatment (also in Abdulaziz, Cabales and Balkandali v. UK, and, as well, in Belgian Linguistic Cases, Fredin v. Sweden, Spadea and Scalabrino v. Italy, Inze v. Austria, McMichael v. U.K., Lithgow and others v. U.K.)

[93] Probably is the case to clarify that the term citizenship on the Albanian legal terminology has the meaning of nationality legal term in English *(nationalité en français)* and not the meaning of the term citizenship used by the EU Treaty (Artt. 17-22).

[94] Although the theoretical contestable character of this disposition; recognising to non-Albanian citizens the same rights - by reference and not as human beings - of the Albanian citizens the legislative protection for the first ones, we think, is at the final analysis the same.

rights and freedoms in a specific situation, in which the jurisdiction of the Albanian state might be exercised, i.e. outside the national territory.

D. National minorities issue

85. Although not protected as a category by Article 14 of the European Convention on Human Rights, it was considered to be worthy an evaluation of the regulation of this issue by the Albanian legislation as issues of discrimination might especially arise in this framework. Article 20 of the Albanian Constitution is wholly dedicated to national minorities, as a category of persons, who are collectively vulnerable to measures of discrimination.[95] Article 20 expressly provides:

> *"1. Persons who belong to national minorities exercise the human rights and freedoms in full equality before the law.*
> *2. They have the right freely to express, without prohibition or compulsion, their ethnic, cultural, religious and linguistic belonging. They have the right to preserve and develop then, to study and to be taught in their tongue, and to unite in organisations and associations for the protection of their interests and identity".*

86. Leaving aside any theoretical argumentation, which could arise in relation to this complex issue,[96] we can say that this provision ensures an adequate degree of constitutional protection for members of national minorities. In particular, it appears clear from the terminology of Article 20 that the recognition of the rights of members of national minorities is extended to them as individuals and not just as a collective right - which is also the position under general international law and under the European Convention as well.[97] Although the most important and undiminished affirmation in Article 20 could be the declaration in its first paragraph that such persons enjoy full equality before the law, in the case of national minorities this protection is not fully developed and has been considered only to represent half of the solution to the problem.[98] Article 20 therefore very clearly covers the most important specific inherent rights and freedoms of persons belonging to national minorities to express their identity. Particular mention may be made of the right to education in one's mother tongue, freedom to express their characteristics and freedom of association for the purposes of protecting their interests and identity.

87. Article 9 of the Albanian Constitution, in its two first paragraphs, provides as follows:

> *"1. Political parties are created freely. Their organisation shall conform with democratic principles.*
> *2. Political parties and other organisations, the programs and activity of which are based on totalitarian methods, which incite and support racial, religious, regional or ethnic hatred, which use violence to take power or influence state policy, as well as those with a secret character, are prohibited pursuant to the law".*

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[95] By adopting this solution the Albanian Constitution seems to reflect the one of the International Covenant on Civil and Political Rights (I.C.C.P.R.) on its Articles 26 and 27. Although the content of Article 20 (especially) of the Albanian Constitution seems to go much further than the one of Article 27 of the ICCPR.

[96] Regarding for example on the terminology - *national minorities* v. *ethnic minorities*, or in some seemingly legal tautological statements *('They have the right freely to express, without prohibition or compulsion')*.

[97] Article 14 of the European Convention on Human Rights maintains this same position as well as other legal texts of the Council of Europe in this respect. The Framework Convention for the Protection of National Minorities (especially Section I and Section II - Artt. 1-19), ratified by the Republic of Albania Assembly on June 3rd, 1999.

[98] Nguyen Quoc Dinh, Alain Pellet, Patric Daillier – 'Droit International Public' - L.G.D.J., 1994. Page 655.

88. This Article followed by the new Law No. 8580 of 17.02.2000 'On political parties' effaces our concern at the initial stage of drafting of this report [99]. This despite of the fact that Article 9 of the Constitution does not expressly state whether the foundation of parties on religious, ethnic and regional basis is allowed or not.

89. It is true that recently, the jurisprudence of the European Court on Human Rights has sufficiently evolved in this field to allow us to reach a clear position on this question. Our impression is that, considering the European Convention on Human Rights and especially the case law under Article 11,[100] as well as other documents of the Council of Europe,[101] such a specific right is presently not foreseen as belonging to national minorities collectively. Thus, although there must remain a doubt under the Convention, just as under Albanian Law, as to whether the right to create parties in minority basis. Therefore at present state of evolution of European Convention jurisprudence leads to an affirmative answer on the compatibility of Albanian legislation with the Convention standards in this point.

VIII. ARTICLE 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ALBANIAN LEGISLATION

90. Article 15 of the European Convention on Human Rights foresees:

> ***"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.***
> ***2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, of from Articles 3,4 (paragraph 1) and 7 shall be made under this provision.***
> ***3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed".***

A. Reasonable derogations

91. In principle, the review of Albanian legislation from the perspective of Article 15 of the Convention has to be based on Part Sixteen of the Albanian Constitution on 'Extraordinary

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[99] One concern consisted in relation to the previous Law No. 7502, of 25 July 1991 'On the Political Parties'. The third paragraph of Article 6 of this late Law provides that:
"The foundation of parties on religious, ethnic and regional basis is not allowed".
This Law is actually abolished by the new Law No. 8580 of 17.02.2000 'On political parties' (see its expressed provision of Article 28)

[100] Judgment of the European Court on Human Rights on United Communist Party v. Turkey (30 January 1998) and Socialist Party v. Turkey (25 May 1998). See also ÖZDEP v. Turkey (decision of Dec. 8th, 1999)

[101] The Framework Convention for the Protection of National Minorities (Article 7). Its Article 8 seems to recognise to *'every person belonging to a national minority the right to establish religious institutions, organisations and associations'* - what the Law No. 7502 'On the Political Parties', above-mentioned, expressly prohibits by its Article 6. Also the Recommendation 1201 *(1993)* of the Parliamentary Assembly on 'Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights'.

Measures'[102]. The articles of this Part of the Constitution, in our opinion, show that the principles of the Convention have been fully taken into consideration. The first and most important such principle is the reasonableness of derogations. Paragraph 1 of Article 170 of the Albanian Constitution foresees in this regard:

> *"Extraordinary measures can be imposed because of a state of war, a state of emergency, or a state of natural disaster and last for as long as these conditions continue".*

It thus appears that the reasons for imposing extraordinary measures are strictly limited to these eventualities.

B. Proportionality principle

92. The second principle is the principle of proportionality. The text of this above-cited provision and that of paragraph 4 of the same Article 170, which provides that 'Actions taken as a result of extraordinary measures shall be in proportion to the level of risk...', both reflect and embody the principle of proportionality - in the first case proportionality *ratione temporis*, in the second *ratione personae, ratione materiae* and *ratione loci*. The application of the second sentence of paragraph 1 of Article 17 of the Constitution, as well as its paragraph 2, could be used as an additional argument in this regard.

C. Legality of derogatory measures

93. Third, mention should be made of the additional guarantee provided by the application of the principle of legality to any imposition of extraordinary measures. This guarantee is secured by the provisions of paragraph 2 of the same Article 170 of the Albanian Constitution, as follows:

> *"The principles of operation of public organs, and the extent of the restriction of human rights and freedoms during the existence of the situations that require extraordinary measures, are defined by law".*

An additional safeguard arises under paragraph 5 of Article 170:

> *"During situations that require the imposition of extraordinary measures, none of the following acts may be changed: the Constitution, the laws on the election of the Assembly and of local government organs, and the laws on extraordinary measures".*

D. Non-derivable rights

94. In compliance with the spirit of paragraph 2 of Article 15 of the European Convention on Human Rights, Article 175 of the Albanian Constitution assumes the same role, by providing:

> *"1. During a state of war or a state of emergency, the rights and freedoms contemplated by Articles 15; 18; 19; 20; 21; 24; 25; 29; 30; 31; 32; 34; 39, paragraph 1; 41; paragraphs 1, 2, 3 and 5; 42; 43; 48; 54; 55 may not be restricted.*
> *2. During a state of natural disaster, the rights and freedoms contemplated by Articles 37; 38; 41, paragraph 4; 49; 51 may be restricted.*
> *3. Acts declaring a state of war, emergency or natural disaster shall specify the rights and freedoms that are restricted according to paragraphs 1 and 2 of this Article".*

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[102] Albanian Constitutional Court has had previously the opportunity to deliver a decision in this question. (See Decision No. 14 of May 29th, 1997.)

95. In our opinion this provision goes much further in respect of the core non-derogable rights and freedoms than Article 15 of the European Convention. At the same time, the organisation in two separate paragraphs of the different states of emergency, the dissimilar respective categories of restrictions, and particularly paragraph 3 of Article 175 as cited above, each confirm once again the inspiration of the principle of proportionality and legality underlying the manner in which the Albanian Constitution regulates this issue.[103]

96. In conclusion, we believe that, formally, the detailed provisions of the Albanian Constitution amply comply with the conditions set out in Article 15 of the European Convention on Human Rights.

IX. ARTICLE 16 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ALBANIAN LEGISLATION

97. Article 16 of the European Convention on Human Rights foresees:

> ***"Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens".***

98. In this respect too, mentioned needs to be made of the relation between this Article and Article 16 of the Albanian Constitution. As already stated, this latter Article recognises that foreigners and stateless persons in the territory of the Republic of Albania enjoy *'the fundamental rights and freedoms and the duties contemplated in this Constitution for Albanian citizens...except for cases when the Constitution specially attaches the exercise of particular rights and freedoms with Albanian citizenship'*. An analysis of the cases in which Albanian law attaches special rights and freedoms to Albanian citizens shows that only a narrow category of rights and freedoms is so reserved, and is not so extensive as might be permitted under Article 16 of the European Convention. Under the Albanian Constitution the reserved categories of rights are as follows: the right to be granted Albanian citizenship automatically and not to lose it other than by relinquishment (Article 19); the absolute right not to be expelled from the territory of Albania (Article 39, paragraph 1); the right to free elections (Article 45); the equal right to health care from the state (Article 55, paragraph 1); and the right to fulfilment of housing needs (Article 59, paragraph (1)(b).

99. Thus, our understanding is that the Albanian Constitution in some degrees is much more permissive that the European Convention on Human Rights regarding the rights of aliens, with particular reference to their political rights. This is specified even more by Article 59 of the Law No. 8492, Date 27.05.1999 'For Foreigners' which regulates Rights and prohibitions for certain activities of foreigners. According to this Article:

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[103] The events following the spring 1997 uprising in Albania make us in a more concrete position for evaluating the respect by the Republic of Albania of the undertakings on this ground towards the Council of Europe. By Law No. 8195 of March 3rd, 1997, 'On some measures in the framework of extraordinary situation', and its amending Laws No. 8199 and No. 8200 of March 20th, 1997, derogation on some rights and freedoms were adopted. In spite of the fact that these derogations were contrary to the dictum of Article 41 of the Fundamental Constitutional Provisions (in force at that time), there concerned the right to life, the freedom of statement, the freedom of assembly and the liberty of movement. According to the data's received by the Ministry of Foreign Affairs the Secretary General of the Council of Europe has been informed on the initiation of the extraordinary situation and on the rights derogating from, by the Republic of Albania Mission in Strasbourg on March 23, 1997. The derogation, as from the information made by the Republic of Albania Mission at the Council of Europe, concerned Articles 10, 11, 15, and Article 2 of Protocol 4. On July 24, 1997 the Law No. 8225 'On the revocation on the extraordinary situation' was adopted, removing all the measures adopted by the above mentioned Laws for the purposes of the extraordinary situation. A note in this regard have been prepared by the Ministry of Foreign Affairs on July 26, 1997, which was sent to the Secretary General on August 14, 1997.

"Foreigners can engage in social, political, economical, cultural and charity only in accordance with Albanian legislation in power. This activity is not allowed to them if it:

1. *infringes the national security or the public order;*
2. *infringes the interests or the relations of the Republic of Albania with other States;*
3. *puts in danger or damages the relations between the Albanian and the foreigner citizens, or between different groups of foreigners in the territory of the republic of Albania;*
4. *instigates or applies the use of the violence as a means to reach political, religious interests, etc".*

100. Nevertheless, Article 1 of the above-referred Law No. 8580 of 17.02.2000 'On political parties' provides that:

> *"Political parties are voluntary unions of nationals founded on the basis of common political ideas, convictions, opinions or interests, which aim to influence on the country's life through the participation in elections and representation of the people in elected bodies of governance ".*

The term 'unions of nationals' leads us to the conclusion that only Albanian nationals can found and participate in political parties. Thus, foreigners are excluded from the enjoyment and exercise of this right[104].

101. Naturally electoral rights (active and passive) and certain social rights as mentioned above remain, as is usual in the practice of other countries,[105] reserved to nationals/citizens of Albania[106].

X. ARTICLES 17 AND 18 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ALBANIAN LEGISLATION

102. Article 17 of the European Convention on Human Rights foresees:

> ***"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in this Convention".***

103. This is a classic 'non-abuse' provision[107]. Although no similar provision is expressly included in the Albanian Constitution, its spirit may be detected in a number of its articles. Whereas, generally, Article 15 of the Albanian Constitution urges respect for and contribution to the realisation of the indivisibility, inalienability and inviolability of human rights and freedoms, Article 17 is clearer in this regard. By providing that *'limitations of the rights and freedoms...may be*

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[104] This legal position would have to be revised at the occasion of the EU membership of Albania, under the light of Piermont jurisprudence and EU Treaty provisions. *(see the two following footnotes).*

[105] Exception made of course to the Member States of the European Union, regarding right to vote [see for instance the Decision of April 9th, 1992 (so-called Decision Maastricht I) and of October 2nd, 1992 (so-called Decision Maastricht II) of the French 'Conseil Constitutionel'].

[106] See also, as to the evolutive interpretation of this Article by the Strasbourg bodies the Report (§§ 58 & 59) of the European Commission of Human Rights in the case of Piermont v. France and the following European Court of Human Rights judgment of 1995 on the same case. See also Articles 17 and especially 19 of the Treaty of the European Community (consolidated version as amended by Amsterdam Treaty).

[107] See European Court of Human Rights judgments on Lawless v. Ireland, De Becker v. Belgium, Lehiduex and Isorni v. France or the European Commission of Human Rights Report on Kuhnen v. Germany.

established... in the public interest or for the protection of the rights of others' in its first paragraph, and, in paragraph 2, that *'these limitations may not infringe the essence of the rights and freedoms'*, it implicitly prohibits the use of the human rights and freedoms provided for in the Constitution as an abusive justification for restricting such rights.

104. These provisions together with the second sentence of the first paragraph of Article 17 of the Constitution could be considered as operating in the same sense as the provision in Article 18 of the European Convention, which foresees:

> ***"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed".***

105. First we have to consider the limited area of application of this Article of the Convention, by having regard to the reference it makes to the other Articles of the Convention[108]. So, if we consider their (other articles of the Convention to which Article 18 refers) allowed specific purposes for restrictions, we can say that only purposes for which the Albanian Constitution allows restrictions by Article 17, paragraph 1, comply with the *'any purpose other than those for which they have been prescribed'*. Thus we can say that it fully complies with the Article 18 of the Convention assuring also the same interpretation of other provisions of a lower range, and offering a complete conformity of the Albanian legislation with the Convention standard.

XI. ARTICLE 3 OF PROTOCOL 1 AND ALBANIAN LEGISLATION

106. Article 3 of Protocol 1 to the European Convention on Human Rights foresees:

> ***"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free statement of the opinion of the people in the choice of the legislature".***

A. Albanian legislation on the right to vote

107. In our view, three points of discussion arise in relation to this provision. The first is a general consideration – how is this right reflected by the Albanian legal system. Article 1 of the Constitution, in its third paragraph sets forth:

> *«3. Governance is based on a system of elections that are free, equal, general and periodic.»*

This provision, belonging to Article 1, Part One - Basic Principles of the Constitution, expresses very clearly the fact that the organisation of elections is crucial for governing.

108. Taking into account the fact that this provision constitutes part of the General Principles of the Constitution, it follows that it is the duty of the government to organise free, equal, general and periodic elections, is more than just a passive obligation. As stated by the European Court of Human Rights in *Mathieu-Mohin & Clerfayt v. Belgium*:

> *"...the primary obligation in the field concerned is not one of abstention or non-interference, as with majority of the civil and political rights, but one of adoption by the state of positive measures to 'hold' democratic elections".*

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[108] As European Commission of Human Rights confirms on its Report in relation with Kamma v. Netherlands.

a new Albanian Electoral Code regulating specifically particular issues such us, candidates, political parties, procedures of voting including the hours, electoral zones and commissions as well as the composition and competencies of the late ones, appeals against the decisions of the electoral commissions, financing of the electoral campaign, has been adopted by the Albanian Parliament on May 8th, 2000, by Law No.8609.

109. Article 3 of this law offers a quite extensive list of general principles governing the holding of elections in the Republic of Albania. In its first paragraph it confirms the principle of 'free, secret and direct voting'. In its second, fifth and sixth paragraphs it emphasises the equality principle in relation to the particular personal situation (§ 2), to the division of electoral zones (§ 5) and to the weighting of the single votes (§ 6). It is important to stress out that Albanian Electoral Code regulates quite meticulously some boiling points of the electoral process such as, modalities for setting the date of voting, the hours of voting, the registration of candidates and political parties for election, the appointment and organisation of election commissions, procedures before, during and after the voting. It makes a direct and binding relationship between the civil status registries, the national registry of voters, its ways of compilation, and the issuance of a voter's card. The Code also regulates the issues of electoral campaign, such as financing of political parties and the position of media during the campaign.

110. To our consideration the regulation of all these issues goes in the direction of the appropriate fulfilment of the requirements of Article 3, Protocol 1. Although as it is not clear and might allow space for abuses and unequal conditions on an electoral campaign, we would recommend for this Code to cover the issue of the impossibility to use public funds, except for those expressly allowed by law, for financing electoral campaigns.

111. Article 45 of the Albanian Constitution foresees:

> *"1. Every citizen who has reached the age of 18, even on the date of the elections, has the right to vote and to be elected.*
> *2. Citizens who have been declared mentally incompetent by a final court decision do not have the right to vote.*
> *3. Convicts who are serving a prison sentence have only the right to vote.*
> *4. The vote is personal, equal, free and secret".*

112. This last provision of the Constitution seems to fulfil the other prerequisite of Article 3 of the First Protocol that voting should be 'by secret ballot'. Furthermore, this provision classifies the right to vote as a subjective right of the citizen,[109] which *'the organs of public power, in fulfilment of their duties, shall respect ... as well as contribute to...(its)...realisation'*.[110] As the European Court on Human Rights has had the opportunity to hold in the two cases cited above and in others as well,[111] this subjective right to vote is not absolute and there is a wide margin of appreciation given to Contracting States on this issue. Nevertheless, although the European Court has not yet adopted a closed list of possible grounds for limiting or derogating from this subjective right, the Albanian Constitution seems to offer some indicative ones, at least as to the capacity of citizens to vote and to be voted for. These conditions are expressly mentioned in paragraphs 1 (age limit), 2 (mental incompetence declared under judicial supervision) and 3 (imprisoned persons in respective of their right to be voted for) of Article 45 of the Constitution. In relation to this last category, the question arises as to the required character of the sentence - is the ban triggered by the sentence of any court of the Albanian judicial system or only by a final

[109] See European Court on Human Rights on the case of Gitonas and Others v. Greece.

[110] Article 15 of the Albanian Constitution - above mentioned.

[111] In Golder v. UK, and Ireland v. United Kingdom.

sentence? What happens in the case of the positive answer to the first alternative? Thus, what if a citizen, declared guilty and imprisoned by a sentence that could be quashed in other courts, pretends to stand for elections, is later declared innocent?[112] Would this amount to a violation of Article 3 of Protocol 1?

113. It should also be noted that the Albanian Penal Code provides for 8 separate penal infractions for actions constituting obstacles or other violations of the principle of free elections.[113] The adequate application of these articles, recalling again the Convention's positive obligations conceptions and Article 15 § 2 of the Albanian Constitution, seems to offer a solid guarantee for the free, equal and democratic elections.

B. 'Lustration laws' issue

114. The second point relates to the often-discussed so-called 'Lustration laws'. The adoption of Law No. 8001, dated 22 September 1995 'On genocide and crimes against humanity committed in Albania during the communist regime for political, ideological and religious motives' as well as Law No. 8043, dated 30 November 1995 'On the verification of the public officials figures and other individuals related to the protection of the democratic state' has already raised concern and prompted the intervention of international experts. To our knowledge, the position has not changed since April 1998 when the latest comments from Council of Europe experts on these laws were received. Considering the actual status of the above-mentioned laws and taking into account the entire expertise of the Council of Europe experts, we would therefore limit our observations to the following comments.

    i. the exclusion of persons from the right to be voted under these laws is directly related to their functions during the former regime and not to their individual concrete actions;

    ii. to our opinion, the exclusion does not respect the right of all persons to effective remedies in respect of alleged violations of their human rights;

    iii. the exclusion does not operate as a consequence of a final court decision but only by administrative decision, which leaves room for arbitrariness in this regard[114].

115. Besides the problems arising under the European Convention on Human Rights, in our view these laws give rise to incompatibilities with the above-cited Articles of the Albanian Constitution.

116. Article 45 of the Constitution, just as the new Albanian Electoral Code in its above mentioned Article 10, neither refer to nor include one of the conditions provided for in the Lustration Laws, for exclusion from the right to stand for elections. These provisions cause concern if we consider them together with Article 160 of the same Electoral Code with does not say that the Lustration Laws, on the points 'in conflict with this Code' are repealed. Our concern would raise at least a legal certainty question.

C. Central Elections Commission

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[112] Judgment of European Court of Human Rights in H. v. Netherlands.

[113] Articles 325-332 of the Albanian Penal Code.

[114] Therefore it might be a violation under the consideration of the European Court of Human Rights jurisprudence in the case of Gitonas v. Greece and Fryske Nasjonale Partij v. Netherlands.

117. The third consideration relates to the latest developments concerning the Central Elections Commission. The controversies here relates to the composition of the Commission foreseen by Article 154, paragraph 1 of the Constitution, as follows:

> *"The Commission consists of seven members elected for a 7 year term. Two members are elected by the Assembly, two by the President of the Republic, and three other members by the High Council of Justice".*

118. The Albanian Electoral Code clarifies further this question. Its Article 16 defines the conditions for being a member of the Central Elections Commission. Article 17, on the other hand, further clarifies the Constitution on the procedure for the selection of the members of the Central Elections Commission. Following the same structure as in Article 154 of the Constitution, Article 17 adds on its second paragraph that the President of the Republic shall consult 'groups representing a broad spectrum of the society'. As there is no proposing structure or entity for these candidates, it leaves it to the discretion of the President to propose and select Central Elections Commission members. The third and fourth paragraph of the same article go further in relation with the members to be 'elected' by the Assembly and by the High Council of Justice. In both cases, the bodies proposing the candidates to be elected as members of Central Elections Commission are determined. In the case of the Assembly, although the majority and the opposition may equally propose candidates, there is no guarantee to ensure that that the two elected members shall be one from either group.

119. Thus the question to be assessed, in view of the remarks made in the above subparagraph is whether the competencies of the organs electing the members of the Central Elections Commission are of an absolutely discretionary character or whether these organs have to reflect on the decision by adopting the principles of the European Convention and of the Albanian Constitution. These principles provide that the state organs should be fair to the parties when electing this Commission. Should the state organs, in this regard, take into account the interests of the actual political minority in the country, although they enjoy a wide margin of appreciation?[115]

120. An improvement to the election system in Albania should be considered with regard to articles 145-148, Part XII, of the Albanian Electoral Code. These articles regulate responsibilities and sanctions on violation of election rules. The provisions of Chapter X of the Albanian Criminal Code, covering 'Criminal Acts Affecting Free Elections and the Democratic System of Elections',[116] have to be viewed in the same perspective. In our opinion, all these provisions would have, in principle, a good impact on a normal and responsible running of elections and comply with the wide provision of Article 3 of Protocol 1 of the Convention[117]. It remains, therefore, that their applicability be attained in practice.

XII. PROTOCOL N° 4 (ARTICLES 2, 3, AND 4) TO THE EUROPEAN CONVENTION AND ALBANIAN LEGISLATION

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[115] In this regard we refer to the concept of free election as a necessary fundamental feature of a democratic state and society (Judgment of the European Court of Human Rights in the Greek case).

[116] These Articles consider as criminal infractions actions such as 'Prevention of electoral subjects from election to representative bodies' *(Article 325)*, 'Falsification of documents and election results' *(Article 326)*, 'Violation of voting secrecy' *(Article 327)*, 'Payments and promises' *(Article 328)*, 'Threat to the voter' *(Article 329)*, 'Threat to the candidate' *(Article 330)*, 'Violation of election rights' *(Article 331)*, 'Abuse of military authority' *(Article 332)*.

[117] Especially with the European Court of Human Rights judgment on Moureaux v. Belgium.

A. Article 2

121. Article 2 of the European Convention of Human Rights titled 'Freedom of movement' provides:

> *"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
> *2. Everyone shall be free to leave any country, including his own.*
> *3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
> *4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".*

a. freedom of movement *(paragraph 1)*

122. This article of the 4th Protocol to the Convention, dedicated to the freedom of movement, is fully reflected in the principles of Albanian legislation. Referring to its first paragraph foreseeing that 'everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to chose his residence', the Albanian Constitution responds with a quite similar provision. It is provided in paragraph 1 of Article 38 of the Constitution that:

> *"Everyone has the right to choose his place of residence and to move freely to any part of the territory of the state".*

123. This right, according to Article 41 of the Albanian Penal Code, may be limited only by a court decision for a time limit of five years and only if public security is threatened. This limitation therefore seems even more restrictive in terminology than that foreseen by paragraph 3 of Article 2 of the Protocol. Nevertheless, this Article of the Albanian Penal Code does not seem to impose any proportionality principle criterion for defining the exact time limit in each case. It remains to the Albanian state organs to apply this as a general principle of the Convention or of the Constitution.

b. freedom to leave any country *(paragraph 2)*

124. Similarly, the right recognised by the second paragraph of Article 2 of Protocol N° 4, that 'everyone shall be free to leave any country, including his own', finds a synonymous reflection in the second paragraph of Article 38 of the Albanian Constitution, as follows:

> *"No one may be hindered to go freely out of the state".*

125. Thus, the only difference appears in the positive formulation in the first case and in the negative formulation in the second, but these are minor distinctions that have no impact on the substantive guarantees. It might be the case to underline again that it is Article 17 of the Constitution, the one that operates as the, eventually, limiting provision for the rights referred above. It is indeed this Article, the one that clearly reflects the respect of the proportionality principle on cases of derogation or exemptions of Constitutional rights. *(see paragraph 14 of this Chapter)*

126. In more detailed terms Article 13 of the Law 8492 of May 27th, 1999 'On foreigners' provides:

"Each foreigner is free to leave the Republic of Albania, with the exception of the cases when:
1. is requested by the Albanian authorities because he has committed or is suspected that he has committed a criminal offence;
2. requests to leave toward another state and does not have a visa or permit to enter in this state".

127. Although the execution of this last exception by the Albanian authorities vis-à-vis foreigners might raise controversies as to the competence of Albanian authorities to require visa or entry permit to another state, in our view the respect for Article 3 of Protocol N° 4 is adequately ensured by this provision.

B. Article 3

128. Article 3 of Protocol N° 4 prohibits the expulsion of nationals. It foresees:

"1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the state of which he is a national".

129. This same right for Albanian nationals is foreseen by the first paragraph of Article 39 of the Albanian Constitution, as follows:

"No Albanian citizen may be expelled from the territory of the state".

130. Although this provision could possibly be interpreted as operating also in the case of the right to enter, recognised by the second paragraph of Article 3 of Protocol N° 4, the Albanian Constitution does not contain any such express equivalent guarantee. This is simply because the right to not be expelled, to our understanding, is not equivalent as concept to the right to enter, as far as it might be interpreted under the light of a different concrete situation – being out or inside the territory. The provision of the second alinea of Article 42 of the Albanian Criminal Code, which provides another guaranty in this direction[118] is very interesting.

C. Article 4

131. Article 4 of Protocol N° 4 prohibits in absolute terms the collective expulsion of aliens by providing:

"Collective expulsion of aliens is prohibited. "

To the same end, Article 39 paragraph 3 of the Albanian Constitution provides:

" The collective expulsion of foreigners is prohibited".

132. Very interesting is the fact that the term collective expulsion according to the European Commission on Human Rights[119] includes *'any measure of the competent authority compelling aliens*

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[118] According to this alinea:
"The court may revoke the decision through the request of the convicted, when the foreign citizen or the person without nationality gains Albanian citizenship".

[119] European Commission on Human Rights in relation to Application No. 7011/75, in 4 Decisions and Reports 235 (1975). See also Nuala Mole 'Asylum and the European Convention on Human Rights', Council of Europe Human Rights Files No.9.

as a group to leave the country, except where such measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien in the group'.

133. In addition, respect for the general principle of *non-refoulement* is embodied in Law No. 8432 of December 14, 1998 'On Asylum'. Its Article 2 makes a direct reference to the respect for the 1951 Geneva Convention relating to the Status of Refugees,[120] and Article 31 accords to all persons arriving in situations of massive fluctuation a temporary protection i.e., a guarantee that they will not be collectively expelled from the territory or repulsed from Albania's borders[121]. It is very interesting the second sentence of Article 2 of the above mentioned law according to which

> *"Asylum enshrines the rights and obligations foreseen in the Geneva Convention Related to the Status of Refugees of 28 July 1951 and the 1976 New York Protocol, in international treaties Albania is party to as well as in the Albanian legislation".*

134. This sentence could be argued, to our understanding, in line with the notion of asylum in Albanian law, which enhances the rights and freedoms foreseen in the European Convention on Human Rights, as an international treaty in which Albania is party.

XIII. ARTICLE 1 OF PROTOCOL N° 7 TO THE EUROPEAN CONVENTION AND ALBANIAN LEGISLATION

135. This Article requires procedural safeguards in cases of expulsion of aliens[122]. It provides:

> ***"1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:***
> ***a. to submit reasons against his expulsion,***
> ***b. to have his case reviewed, and***
> ***c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.***
> ***2. An alien may be expelled before the exercise of his rights under paragraph 1., a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security".***

A. Consideration of safeguards

136. For fulfilling the legality principle, provided in the provision cited above, the third paragraph of Article 39 of the Constitution provides that:

> *"The expulsion of foreign individuals is permitted under the conditions specified by law".*

137. Although we would have preferred instead the stronger formula 'is permitted only under conditions specified by law', these conditions are found in the above-mentioned Law 'For foreigners' which in its Article 46, paragraph 1, foresees:

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[120] Article 33 of this Convention prohibits the *'refoulement'*.

[121] Paragraph 1 of Article 31 provides:
> *"1. In situations of large-scale influx of civilian persons seeking international protection in the Albanian territory, the procedures provided for in Articles 21-30 of this law on the individual consideration of the asylum requests can be suspended and temporary protection shall be granted to all persons of such a group".*

[122] For the interpretation of the concept of procedural safeguards in cases of expulsion of aliens see the judgments of the European Court of Human Rights on the case of Vilvarajah v. UK, Chahal v. UK, Vijaynathan and Pushparajah v. France.

"Expulsion from the territory of the Republic of Albania of a foreigner takes place if:

1. *it exists a court decision of a final form;*
2. *the visa is refused;*
3. *the term of use and stay has terminated;*
4. *it is refused or has terminated the validity of the residence permit".*

138. This Article demonstrates the fulfilment with paragraph 1 (a., b. and c.) of Article 1, Protocol 7, to the Convention, by underlying the final form of the court decision as a condition to proceed with the expulsion of an alien. This requirement foreseen by the Albanian law 'On Foreigners', to our opinion, understands as included the guaranties of a fair court process. This is especially so when considering the first paragraph of the above-referred article, which requires the final form of the court decision in order to proceed with the expulsion. This requirement understands the possibility for an appeal. Apart from the final court decision this Article requires also one of the other conditions, foreseen by paragraphs 2, 3 and 4, to be completed in order to have the grounds for expulsion. In this regard, we suppose the relationship of paragraph 1 with paragraphs 2, 3 and 4 is a complementary and not an alternative one, for not bringing to an eventual problem vis-à-vis the European Convention.

139. Confirming this position of the Albanian legislation, Article 48 § 2 of the same law foresees that *'Against the removal or expulsion decision, the foreigner can make an administrative appeal and an appeal before the court'*. Furthermore Article 56 of the same Law underlines that: *'The expulsion order, refusal of each request, punishing measures or fines may be appealed to the bodies of the administration or to the court...'* extending the right to appeal not only against measures with negative effect, such as expulsion or removal, but also against measures neglecting access to solicited situations. This article defines also the procedural criterions for judicial appeal[123].

140. As the European Court of Human Rights has mentioned in several occasions[124], one of the most important features, these procedural safeguards must have in cases of expulsion, is the suspensive effect of the appeal against the expulsion measure or similar ones having the same effect (as it is the case of the 'removal' foreseen by the Albanian law). Albanian legislation, to a certain extend, reflects the respect of this crucial moment on the expulsion procedures. In this direction Article 51 of the aforementioned Law 'On Foreigners' provides:

"The execution of the removal order is postponed until the preparation of the travel documents, visa, etc, as well until the ending of the procedure of the appeal, if the foreigner has made it within the timeframes and the conditions foreseen in this law.

The postposal of the execution of the removal order for more than 45 days is allowed only by decision of the court that is examining the foreigner's request for the review of the decision".

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[123] This Article 56 continues:

"...The appeal of the foreigner at the administrative level is examined in a higher instance than the one that examined the matter first. During the examination of the request a consult is done with the organ that issued the removal order or the refusal decision. Except cases of the visas, for the review of a decision that has rejected the issuance of the stay permission, the foreign person pays 50 % of the tariff determined for the stay permission.

Against the decision of the refusal, or the removal order, given after the examination by the administrative organ, appeal can be done before the court within 8 days after the most recent decision, if the foreigner has been legally staying no less than one year in the Republic of Albania".

[124] See, in this relation, especially the European Court on Human Rights judgments on Chahal v. UK, Vijaynathan and Pushparajah v. France.

141. Article 49 of the law 'On Foreigners' provides the cases, and the reasons accordingly, when expulsion of foreigners[125] must not take place. Despite the fact that the reasons, included in this article, as justifying the non-expulsion, might be object of discussion in other Chapters of this Report, the concern may be expressed at this stage over the fact that paragraph 1 of Article 49 mentioned above (*see also previous footnote*) conditions with the discrimination clause the possibility of granting suspensive effect to the expulsion order even if the expulsion could open the way for potential violations of rights and freedoms protected by Articles 2, 3, 4, 5 and others of the Convention. Furthermore, the subsequent paragraph 2 of the same article is much narrower on the reasons for granting such suspensive effect, besides discrimination cases, by covering only the threat of life[126] and excluding the threat to other rights and freedoms of the persons to be expelled[127].

B. Questionable moments over the above-considered safeguards

142. Besides these guaranteeing provisions, the question of the immediate removal is somehow worrying and also surprising. Although this legal phenomenon, regulated by the Albanian law, provides the safeguard that:

> *"The removal, or the immediate execution of the removal order is not ordered, or is suspended if such a one is given, when the foreigner presents grounded reasons that this order may constitute violation of the agreements or international acts, undersigned by the Republic of Albania".*

the question of the time limits for the foreigner to be removed presenting the request for the order review and for the examination of this request to be made,[128] might be problematic. It is true that the provision, by Article 52, of the final court sentence for proceeding with the immediate execution of the expulsion or removal measure is a guarantee. But at the same time, the other reasons for the same measure seem to be much broader then the reasons 'interest of public order or... national security' foreseen by paragraph 2 of Article 1, Protocol 7 of the Convention.[129] In this situation, in order not to go on with our concerns, we prefer to assume

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[125] According to this Article titled 'Cases of exception from expulsion':
"No foreigner citizen, who has the refugee status or during the examination of the asylum request, will be removed out of the borders of the Republic of Albania towards another country, where his/her life or freedom is threatened because of race, religion, ethnic belonging, political convictions or membership of a particular social or political group.

Also it will not be removed out of the borders of the Republic of Albania those foreign persons for whom there are reasons to believe that his/her life is threatened in the country where he/she will be expelled to".

[126] In this relation we prefer to assume that in this 'threat to life' concept is included the death penalty as well.

[127] See in this regard the judgement of the European Court of Human Rights of March 6th, 2001 on Hilal v. U.K.

[128] According to this paragraph:
"For cases determined in the third paragraph of this article, the foreigner has to present within three days the request for the order review, which should be examined by the respective authority in the Ministry of the Public Order, no later than 8 days from its presentation".

[129] Article 52 provides that:
"The foreigner can be subjected to the immediate execution of a removal order, despite of article 56 of this law, or is expelled for reasons of security, when:
1. *has been punished by a final court sentence for a criminal act;*
2. *the permission has been rejected on bases of articles 4 and 5 of this law;*
3. *has not left on expire;*
4. *has no means for residing and living;*
5. *has no passport or other identification document;*
6. *has declared that will not leave despite of the decision of the competent organs;*
7. *has cheated with the documents, or has falsified documents;*

that the above referred Articles 48 § 2, 49, 51 and 56 of the same law 'On Foreigners' apply also in the case of the immediate removal, although no clear reference is found in this regard.

143. Even more problematic appears the explicit exclusion, made by paragraph 3 of Article 56[130] of the possibility of the appeal to the court of the undesiderable persons[131]. It seems evident the Albanian lawmaker has been inspired by the 1951 Geneva Convention on the Status of Refugees[132] but, in this case, comments made on the *traveaux préparatoires* seem to be pertinent[133] and raise the question of a potential double jeopardy situation. The same possibility is neglected by Article 29 Law No. 8432 of December 14, 1998 'On Asylum', which allows the appeal of the decision of the Refugees Office only before the National Commission on Refugees. Thus, after the decision of the later the asylum seeker, i.e. the foreigner can be expelled as the law 'On Foreigners' provides.

144. The Chahal jurisprudence seems to be directly pertinent in this case[134] as to the effective character of the remedy offered to foreigners in those cases. In our opinion, the fact that Article 29, paragraph 2, of the law 'On Asylum' provides for the suspension of the application[135] of the decision for removal or expulsion presents sufficient guaranties. But on the other side the composition of the National Commission on Refugees creates substantial doubts as to its independence. Furthermore the same article provides that this Commission applies the same procedures of the Office for Refugees[136], which does not seem to offer the guaranties of an effective remedy. This situation would amount to a violation if two other elements of this Commission were taken into account. First the time limit within which it has

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8. there are grounded doubts that he/she will leave in an unknown direction;
9. the reasons presented by the foreigner for the reviewing of the decision are on abusive bases".

[130] According to this paragraph:
"The persons for whom the removal order is given by an order of the Minister of the Public Order for the reasons determined in article 4 of this law, have no right to appeal before the court, except concerning the place of destination. Before giving such an order, the Minister of Public Order consults with the Consulting Committee for Foreigners. The foreign person object to this order, is given notice one week before his case is examined and is given the possibility to do the presentation of his case, to present complaint and arguments against this order to the Minister of the Public Order".

[131] In this floor it might be raised the question whether the consideration as 'undesiderable persons' of those who 'have been sentenced for crimes for which the law foresees a punishment of not less then 5 years in prison' would arrive up to a violation of Article 1 of Protocol 7, in conjunction with Article 7 of the Convention.

[132] According to Article 1 of the 1951 Geneva Convention 'On the Status of Refugees':
"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
a)...
b) he has committed a serious non-political crime outside the country of refugee prior to his admission to that country as a refugee".

[133] See P. Weis, 'The concept of the refugee in international law' (1960) according to whom *'Such a rule would seem to run counter to the generally accepted principle of penal law that a person who has been punished for an offence should suffer no further prejudice on account of the offence committed'.*

[134] Chahal v. UK, judgement of European Court on Human Rights of 15 November 1996.

[135] According to paragraph 4 of Article 29 of the Law 'On Asylum':
"The registration of the appeal request shall suspend the decision of the Office for Refugees. The asylum seeker shall be permitted to remain in the Albanian territory for the period pending the appeal".

[136] According to paragraph 6 of Article 29 the Law 'On Asylum':
" The National Commission for Refugees shall adhere to the same procedural principles guiding the Office for Refugees".

to reach a decision[137] – and this time limit does not seem to offer, especially in the situation of Albanian administration, the possibility for a professional investigation of the situation in the country to which the foreigner is being sent. And the second deficiency appears in the fact that the law provides that this Commission constitutes the last procedural remedy able to redress the situation[138]. But, on the other hand, Article 42 of the Albanian Criminal Code sets out the principle that only the court can decide on the removal of a foreigner or stateless person, who has committed a crime, from the territory of Albania. This seems, indeed, to be a considerable advantage on the application of the Albanian legislation in those cases, considering the first hand importance of the Criminal Code in legal application and interpretation, especially by Albanian courts[139].

145. The provision of Article 29 of the law 'On Asylum' might seriously compromise, the guarantees offered to foreigners by Articles, 46, 48 § 2, 51 § 2 and 52 § 2 of the law 'On Foreigners'. Unfortunately in this direction goes as well Article 52 of the law 'On Foreigners'. In this situation, a review of the both laws might be considered.

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[137] According to paragraph 7 of Article 29 of the Law 'On Asylum':
"The National Commission for Refugees shall take its decision at the latest 45 days from the day the appeal was filed".

[138] According to paragraph 8 of Artile 29 of the Law 'On Asylum':
"The decision of the National Commission for Refugees is final".
On the other side the previous Article 19 on its paragraph 2 makes clear that:
"The National Commission for Refugees is the only competent authority to decide on appeals launched against the decisions of the Office for Refugees".

[139] According to this Article entitled 'Expulsion from the territory':
"Expulsion from the territory of the Republic of Albania is decided by the court toward a foreign citizen or person without nationality who commits an offence and it is deemed that his further stay in the territory of the Republic of Albania should no longer continue.
The court may revoke the decision through the request of the convicted, when the foreign citizen or the person without nationality gains Albanian citizenship".

CHAPTER 2

THE GUARANTIES THE ALBANIAN LEGISLATION OFFERS IN FULFILMENT OF THE REQUIREMENTS OF ARTICLE 13 OF THE CONVENTION

BY LEDI BIANKU, ILIR PANDA & PERIKLI ZAHARIA

I. PRELIMINARY CONSIDERATIONS ON ARTICLE 13 OF THE CONVENTION

1. Article 13 of the European Convention on Human Rights provides that:

> ***"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."***

2. In *Klass v Germany* (1979), the Court held:

> *"Where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus, Article 13 must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated."*

3. This paragraph from the Klass judgment offers in a certain way the characteristics of the notion of the "effective remedy" as foreseen by Article 13 of the Convention.
   i. First, there shall be remedies under national law, available for all persons alleging violations of their rights and freedoms protected by the Convention, the so-called "non-autonomous character of this disposition"[140].
   ii. Second, these remedies shall be in grade of potentially offering the concrete possibility of effectively redressing the situation of the person whose rights and freedoms are violated.

4. In *Murray v United Kingdom*[141], it was noted that the applicant had had the possibility under national law of appealing to the Court of Appeal concerning her complaint about unlawful deprivation of liberty, a complaint dismissed by the Court of Human Rights. So, it is enough that an appeal system exists to decide on the applicant's complaint. It does not require that there be a remedy allowing the domestic laws to be challenged before a national authority on the grounds of being contrary to the Convention.

5. It should be mentioned that Article 13 imposes a minimum obligation for the state. Firstly, it imposes a stringent procedural obligation to provide a remedy in more particular contexts than those required by Article 13. Secondly, the state may chose to provide in its national law a higher

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[140] In *Silver v UK* (1983) case, the Court of Human Rights held that the Article 13 obligations arises only where the applicant has an 'arguable' claim that he is a victim of a violation of the Convention. Anyway In *Leander v Sweden* (1987) case, the Court accepted that the applicant had had an arguable claim even though the Court was eventually persuaded that no violation of another article had been made out.

[141] See *Murrey (Margaret and others) v. UK* judgement of October 28, 1994.

standard of procedural protection for a right than Article 13 of the Convention requires. In this sense, there is no obligation under this Article to provide for the judicial review of legislation. But, if such a remedy is provided, the local remedies rule in Article 35 requires that an applicant use it as a precondition for the admissibility of any substantive claim.

6. So, the Convention requires that individuals, whose *rights set forth under the Convention have been violated*, must use the effective national remedies before commencing an application at the Court of Human Rights.

7. Therefore, an applicant must exhaust local remedies before sending an application to the Court of Human Rights. The term "effective" does not mean that an applicant's claim must always be satisfied[142]. In such a case the national system of remedies and the powers or responsibilities of certain courts should be taken into consideration.

II. ALBANIAN LEGISLATION – CONSTITUTIONAL APPROACH

8. For considering the Albanian situation, under the light of Article 13 of the Convention, it would be reasonable to start with the Constitutional provisions analysis. Article 42 of the constitution foresees:

> *"1. The liberty, property, and rights recognised in the Constitution and by law may not be infringed without due process.*
> *2. Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law."*

9. Whereas paragraph 1 of this Article sets out the principle embodied in Article 13 of the European Convention on Human Rights, paragraph 2 of the same Article of the Constitution goes further by reminding us the stronger disposition of Article 6 § 1 of the Convention. Recalling what is already said on the Convention as part of Albanian legislation, it seems to us that, by providing *"liberty, property, and rights recognised in the Constitution and by law"* this Article of the Albanian Constitution refers also to the rights and freedoms included on the European Convention on Human Rights. Although the Convention does not require a right to appeal Article 43 of the Albanian Constitution goes up to this level by providing:

> *"Everyone has the right to appeal a judicial decision to a higher court, except when the Constitution provides otherwise."*

10. Very important, indeed, for the purposes of Article 13, in relation to the concept of "effective remedy" is the provision of Article 44 of the Constitution, which foresees:

> *"Everyone has the right to be rehabilitated and/or indemnified in compliance with law if he has been damaged because of an unlawful act, action or failure to act of the state organs."*

11. This disposition seems to offer an extended guarantee as to the effectiveness of the remedy, especially as to the right to be rehabilitated or indemnified. We might say that it fully complies with the European Court of Human Rights jurisprudence in this regard, in its decisions

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142 See European Court on Human Rights judgments in *Soering v. UK*, Observer and Guardian v. UK, Sunday Times (2) v. UK, Costello-Roberts v. UK, D. v. UK and Vilvarajah v. U.K. See also *Piney Valley Developments v. Ireland* and *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria.*

Valsamis and Efstratiou[143]. Naturally that this Article goes beyond the requirements of Article 13 of the Convention as the first one does not limit its application only to Convention or Constitution rights, or to the so-called "arguable allegations"[144]. It seems that this Article of the Constitution is applicable over any kind of damage resulting from unlawful acts, actions or omissions of the state organs. It remains to be added that in the concept of the "failure to act by state organs" seems to have considered the question of positive obligations of the Albanian state in the framework of Article 1 of the Convention[145].

III. CIVIL AND CRIMINAL REMEDIES

12. Albanian legislation has gone further in the direction described above. Title II of the Albanian Civil Procedural Code deals with the question of complaints of civil character in the Albanian legal concept. According to the first among its Articles:

> *"Filing a lawsuit is the right of a person, who raises the claim, to be heard on the foundation of such a claim, in order for the court to declare it based or not."*[146]

13. The following Article 32 of the same Code seems to complete and clarify the above-mentioned Article 44 of the Constitution and the overall question of *locus standi* in civil proceedings by stating:

> *"A lawsuit is initiated when the person has a legal interest in the acknowledgement or rejection of the claim."*

14. On the other hand, Articles 1, 6 and 16 of the same Code clarify further the effectiveness of the judicial remedy on the Albanian legal system as to civil law rights and obligations[147]. In our

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143 See European Court on Human Rights judgment of December 12, 1996 in Efstratiou v. Greece and its judgment of December 18, 1996 in *Valsamis v. Greece*, where in both cases it says: *"the Court recalls that Article 13 offers to anyone who, for arguable reasons, pretends to be victim of a violation of rights and freedoms protected by the Convention, an effective remedy before an national organ, with the purpose of having a decision upon his allegations and, if the case would be, obtain reparation".*

144 See for instance again *Valsamis v. Greece* above-referred. See also *Chahal v. UK* (judgment of November 15, 1996) and *Camezind v. Switzerland* (judgment of December 16, 1997).

145 See previous Chapter.

146 Article 31 § 1 of the Albanian Civil Procedural Code.

147 According to these Articles:
- Article 1:
  "The court cannot refuse to consider and make decisions on issues, which are presented to it for consideration, on the ground of lack of law, it being incomplete, contradictory or unclear."
- Article 6:
  "The court which tries the dispute must express an opinion on anything requested and only on what has been requested."
- Article 16
  "The court resolves the dispute in conformity with legal provisions and other norms in force, which it is obliged to apply. It makes an accurate evaluation of the facts and actions related to the dispute, without being bound to the determination, which may be proposed by the parties."

opinion it meets one of the most significant elements of Article 13 of the Convention[148], Albanian Civil Procedural Code continues on the Chapter I of the Title I of its third Part, with the appeal proceedings against court decisions. Article 442, the first of this Chapter, provides:

> *"Means of appeal against court decisions are:*
> *1) appeal to the court of appeal;*
> *2) recourse to the High Court;*
> *3) request for revision;*
> *4) objection of the third (party)."*

This Chapter also provides the detailed procedures for the appeal as well as intermediary guaranties such as the possibility of the suspension of the execution of the court judgments, in cases when the request for the appeal has been filed in[149].

15. Judicial remedies are also considered by the Code of Criminal Procedure. For example the possibility is provided to complain against the decision for pre-trial detention or other security measures[150], against the decision of the prolongation of the pre-trial detention period[151], against the decision of the prolongation of the investigation period[152], seizing measures[153], against a decision given *in absentia*[154], against a review decision[155], the right to appeal against the decisions of lower courts[156] etc.

IV. ADMINISTRATIVE REMEDIES

16. The code of Administrative Procedures offers as well the possibility for administrative complaints. Section VI[157] of the Chapter I of its Sixth Part is dedicated to the administrative complaint. According to Article 135 § 1 of this Code:

> *"1. Private persons have the right to seek the revocation, abrogation or amendment of administrative acts in conformity with the provisions of that Code."*

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148 Which is the necessity of an aggregate of remedies for complying with the requirement of effectiveness required by Article 13. See judgments of the European Court on Human Rights on Silver v. UK (judgment of March 25, 1983) and Leander v. Sweden (judgment of March 26, 1987).

149 See Articles 449, 469, 471 and 500 of the Code of the Civil Procedure.

150 See Article 249 of the Code of Criminal Procedures.

151 See Article 264 of the Code of Criminal Procedures.

152 See Article 325 of the Code of Criminal Procedures.

153 See Article 212 of the Code of Criminal Procedures.

154 See Article 410 § 2 of the Code of Criminal Procedures.

155 See Article 249 of the Code of Criminal Procedures.

156 See Articles 422 and 432 of the Code of Criminal Procedures.

157 Articles 135 – 146 of the Code on Administrative Procedures.

17. Furthermore Article 137 of the same Code continues:

> *"1. Any interested party has the right to complain against an administrative act or against a refusal to issue an administrative act..*
> *2. The administrative organ, to which the complaint is addressed, reviews the legality and the regularity of the contested act.*
> *3. In principle the interested parties may go to court only after exhausting administrative recourse."*

18. Obviously, the most important moments in the above-mentioned Article are the reasons for submitting an administrative complaint, which could be an administrative act or even a failure to deliver an act, and the possibility to following up the complaint with the judicial bodies. The third paragraph of this Article seems unclear regarding the point that in principle, the interested parties would have to exhaust the administrative complaint, before going to the court. Although the understood exceptions are not quite evident among the paragraphs, the reference would probably be at the case considered by Article 141 § 2 of the Code, which allows the judicial complaint if no decision has been taken by an administrative organ within the prescribed time limit.

19. Very important for the purpose of our analysis is also the consideration of Article 146 of the Code on Administrative Procedures, which provides the competence and therefore the possibility for the administrative organ, which considers the complaint:

> *"...*
> *b) to revoke the administrative act and to accept the complaint;*
> *c) to modify the administrative act by partially accepting the complaint;*
> *ç) to oblige the competent administrative organ to deliver an administrative act, when its delivery has been refused."*

20. The Code itself provides time limits for the delivery of the decision in relation with an administrative complaint[158] and effects of the administrative complaint[159].

21. Despite these guaranties it seems that, for justifiable reasons, the administrative complaint does not offer the "benefits" of a judicial complaint. For instance, Article 145 of the Code on Administrative Procedures considers that the interested person who has made the complaint, is notified and has the right to set forth its arguments and facts only if *"the administrative organ which considers the complaint, estimates that the abrogation, revocation or the modification of the complained act, or its delivery in the case of the compliant for omission, affects in any manner his rights and interests."* In this way the administrative organ can establish its view on the complaint, and eventually decide, without any controversial procedure or consideration of the complainant views in an oral hearing.

22. These considerations bring us to the conclusion that administrative compliant might be in certain cases an effective remedy[160], considering it under the characteristics stated at the

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[158] Which means that the administrative organs are obliged to deliver a decision. See Article 141 of the Code on Administrative Procedures.

[159] Which could be, according to the principle and exceptions laid down by Article 138 of the Code, the suspension of the application of the administrative act.

[160] As the European Court of Human Rights is expressed in *Chahal v. UK* judgement on the non-exclusivity of a judicial organ as remedy for the purposes of Article 13 of the Convention. See also judgments in relation with *Leander v. Sweden* and *Klass v. Germany* ~~above~~-referred above.

beginning of this Chapter. Thus, the fact that the administrative body can redress the situation, by also suspending the application of harmful act under consideration, brings it up to a possible effective remedy for the purposes of Article 13. Although it would be difficult to affirm that this remedy constitutes a remedy to be exhausted for the purposes of Article 35 of the Convention. The above referred and questionable paragraph 3 of Article 137 is an argument for this position we take.

23. On the other hand the law on Civil Servants considers the possibility of a complaint only before the Civil Service Commission, but we think that anyway this goes in line with the European Court of Human Rights jurisprudence[161].

24 . In relation to administrative decisions our final remark relates to the fact that although the Albanian Constitution does not provide expressly that administrative acts can be appealed before a court, its Articles 43[162] and 44[163] might be interpreted in this direction. Anyway the provision of Article 18 of the Code of Administrative Procedures expresses the general 'Principle of the internal and judicial control'[164] of the administrative act. As to the later remedy, which is effective for the purposes of Article 13, Code of Civil Procedure regulates quite extensively the procedures, *ratione loci, ratione materiae,* time limits, suspension, court decision and appeal possibilities.

V. CONSTITUTIONAL COURT AS A REMEDY UNDER THE CONVENTION MEANING

25. Is the Albanian Constitutional Court a remedy to be considered effective for the purpose of Article 13 and also of Article 35 of the Convention? Several times situations have raised this question for members of Albanian Constitutional Court and other legal experts of the field. With certainty this can be affirmed in relation with cases of fair trial, expressly referred by Article 131, paragraph *f)* [165] of the Albanian Constitution. As to other Articles of the European Convention this cannot be affirmed with certainty, at least for as long as the Albanian Constitutional Court has not

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[161] See its judgment of March 17, 1997 on Neigel v. France as to the civil servants "non-civil" right as to Article 6 § 1 to continue in their position.

[162] Article 43 of the Albanian Constitution foresees:
"Everyone has the right to appeal a judicial decision to a higher court, except when the Constitution provides otherwise."

[163] Article 44 of the Albanian Constitution foresees:
"Everyone has the right to be rehabilitated and/or indemnified in compliance with law if he has been damaged because of an unlawful act, action or failure to act of the state organs."

[164] According to this Article
"With the purpose to protect the constitutional and legal rights of private persons, the administrative activity is controlled by:
a) internal administrative control in conformity with the provisions of this Code on administrative complaint; and
b) courts in conformity with the provisions of Civil Procedure Code"

[165] According to this Article:
"The Constitutional Court decides on:
...
f. the final adjudication of the complaints of individuals for the violation of their constitutional rights to due process of law, after all legal remedies for the protection of those rights have been exhausted."

interpreted widely the term "fair trial"[166]. We say this while having also in mind the provisions of Article 134 § 1, g) and 134 § 2, according to which:

The Constitutional Court initiates a proceeding only on the request of:

...

g. individuals.

2. ...only for issues related to their interests."

26. As this provision does not make a direct reference to the provision in Article 131, f) of the Constitution, and does not clarify or specify "the interest", the limitation posed by this Article could be, in our opinion, extended to the legal interests of individuals, possibly other then fair trial, protected by the Albanian legislation or by international conventions with legal force in the Albanian legal system. In the eventuality of this potential interpretation, but which has not been accepted by constitutional case-law yet, the Constitutional Court would be definitively transformed in an effective remedy to be exhausted for the purposes of Article 35 of the Convention.

27. It is of particular importance that the Constitution of Albania has given the Convention force of domestic law. If the national authorities are concerned on Convention case-law developments, the Convention cases may be decided without addressing the Court of Human Rights.

28. Thus, the situation for the Albanian legal system in view of Young, James and Webster jurisprudence[167] is very interesting. The fact that the European Convention on Human Rights is part of the Albanian legislation[168] and directly applicable for provisions having a self-executing character[169] a remedy would be required in the Albanian legal system, which would offer the guaranty of redressing a violation ensuing from a domestic law incompatible with the Convention. This evolution, characteristic for the EC legal system, has been considered to a certain extent in the Albanian legal system as well. Thus paragraph 2 of Article 145 of the Albanian Constitution foresees:

> *"If judges believe that a law is unconstitutional, they do not apply it. In this case, they suspend the proceedings and send the question to the Constitutional Court. Decisions of the Constitutional Court are binding on all courts."*

29. This Article combined with Articles 122 § 2[170] and 131 §§ 1, 2 and 3[171], probably could bring us to the conclusion that Albanian legislation offers an extended guaranty in the framework of Article

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[166] From our analysis of the jurisprudence of Constitutional Court it results that until now only requests based on Articles 131, f) and 42 of the Constitution have been accepted for consideration by it on the basis of article 131, f) of the Constitution.

[167] Decision of European Court of Human Rights of 26 June 1981 on the case of *Young, James and Webster v. UK.*

[168] If we remember the consideration that the Convention is part of the domestic legislation. See paragraphs 47-52 of Chapter I of this Report and Articles 116, 122 & 131 of the Constitution of the Republic of Albania.

[169] See Article 122 § 1 of the Albanian Constitution.
An international agreement ratified by law has priority over the laws of the country that are incompatible with it.

[171] "The Constitutional Court decides on:
"a. the compatibility of a law with the Constitution or with international agreements as provided in article 122;
b. the compatibility of international agreements with the Constitution, prior to their ratification;
c. the compatibility of normative acts of the central and local organs with the Constitution and international agreements;..."

13 of the Convention[172]. Thus even if the violation of the Convention, which to our opinion has a supra-constitutional rang, results from a disposition of Albanian legislation, Albanian judges have the possibility of suspend[173] their application and send the case to the Constitutional Court. The latter, in application of its remit offered by Article 131, could then decide if the law is compatible or not with the Convention and the Constitution.

30. Therefore, we might argue that there are three possibilities in relation to this.

i. First, that judges directly apply, as they should - in our opinion[174], the Articles of the European Convention of Human Rights into domestic cases and for this reason the rights and freedoms could be violated exclusively in the case of a material misinterpretation of the Convention Articles. But this possibility, in our opinion, could be argued as a violation of a fair trial right, claiming that the national court has not interpreted properly the relevant applicable legislation. Accordingly, the remedy before the Constitutional Court would have to be exhausted.

ii. Second, the national judge does not take into account the application of the European Convention of Human Rights and argues his decision only on national law, eventually contrary to the Convention. In this case we would have again a fair trial issue because the national judge has not used properly the sources of the law? So, the Constitutional Court again constitutes a remedy to be exhausted.

iii. Third, the national judge suspends the process, in conformity with Article 145 § 2 of the Constitution, and refers the case to the Constitutional Court, which would have to deliver a judgment on the issue of the unconstitutionality of the law under consideration and its compatibility with the Convention. Despite the position of the Constitutional Court, which out of our field of interest in this aspect, we find it again used as an effective remedy in the sense that its opinion, according to Article 145 § 2[175] of the Constitution, is binding for all courts.

31. Therefore, in our opinion, the Constitutional Court appears a remedy to be exhausted for the purposes of Article 13 and especially 35 of the Convention, not strictly on cases related directly to fair trial issues but also in cases when procedural[176] or material misinterpretation of the European Convention on Human Rights. Considering, on the other hand, that the violation of the totality of rights and freedoms provided by the Constitution and Albanian legislation have the procedural

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[172] Although this is not required by the Strasbourg bodies on the interpretation of Article 13 of the Convention. See for instance *Sunday Times 1 v. U.K., Lithgow v. U.K., James and others v. U.K., Leander v. Sweden, Observer and Guardian v. U.K., Costello-Roberts v. U.K., Gustafsson v. Sweden, Holly Monasteries v. Greece*, etc.

[173] Naturally in EC Law the standard has gone over this stage considered by second paragraph of Article 234 (former 177) of the EC Treaty. See the evolution of the European Court of Justice jurisprudence through its cases *Van Gend & Loos* (26/62), to *Flaminio Costa v. ENEL* (6/64), Internationale Handelsgesellschaft (11/70) and finally Simmenthal (106/77).

[174] In conformity with Articles 4 § 3 and 122 § 2 of the Constitution.

[175] According to this Article:

"2. If judges believe that a law is unconstitutional, they do not apply it. In this case, they suspend the proceedings and send the question to the Constitutional Court. Decisions of the Constitutional Court are binding on all courts."

[176] Including in this procedural misinterpretation also the possibility when European Convention of Human Rights has not been taken into account at all.

right to be claimed before courts, i.e. they pass through a judicial process[177], therefore, it might be arguable before the Constitutional Court in basis of Article 131, f) of the Constitution. In fact, this has been the approach of the Constitutional Court in its decisions. It has considered the violation of other human rights through the violation of the right to a fair trial[178]. The question then remains on the interpretation by the Albanian courts, including the Constitutional one, of the specific rights in conformity with the Convention Articles.

VI. THE ALBANIAN PEOPLE'S ADVOCATE (OMBUDSMAN)

32. Last but of course not least, especially considering the Albanian reality, is the Ombudsman. This new institution of the Albanian legislation and practice has been introduced by the Constitution of 1998. Chapter VI of the Part III of the Constitution is entirely dedicated to this institution. These dispositions could generate mistakes in relation to the effectiveness of the People's Advocate as a remedy for the purposes of Articles 13 and 35 of the European Convention.

33. Article 60 of the Constitution foresees:

> *"1. The People's Advocate defends the rights, freedoms and legitimate interests of individuals from unlawful or improper action or failure to act of the organs of public administration.*
> *2. The People's Advocate is independent in the exercise of his duties.*
> *3. The People's Advocate has a separate budget, which he administers himself. He proposes the budget pursuant to law."*

Article 61 adds:

> *"...*
> *3. The People's Advocate enjoys the immunity of a judge of the High Court."*

And, as to the competencies Article 63 defines:

> *" 1. The People's Advocate presents an annual report before the Assembly.*
> *2. The People's Advocate reports before the Assembly when so requested, and he may request the Assembly to hear him on matters he considers important.*
> *3. The People's Advocate has the right to make recommendations and to propose measures when he finds violations of human rights and freedoms by the public administration.*
> *4. Public organs and officials are obligated to provide the People's Advocate with all the documents and information requested by him."*

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[177] See again Article 42 of the Constitution according to which:
"1. The liberty, property, and rights recognised in the Constitution and by law may not be infringed without due process.
2. *Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law."*

[178] See for instance Constitutional Court Decision No. 95/99 on death penalty in which the Constitutional Court has considered as well the forced labour, liberty and security of the person (in this relation see also Decision No. 6/99), the right to not be punished without law, *ne bis in idem* principle (in this relation see also Decisions No. 17/98 and 59/98), personal data protection, right to respect for home, protection of property (in this relation see also Decisions No. 56/98 and 59.98, right to appeal (although not included as such on the Convention) right to vote and to be elected.

34. Furthermore, the Law No.8454, 04.02.1999 "On the People's Advocate" elucidates further these Constitutional provisions and regulates definitely the institution. Article 2 of the above Law, entitled Duties of the People's Advocate specifies:

> *"The People's Advocate shall safeguard the rights, freedoms and lawful interests of individuals from unlawful or improper actions or failures to act of the organs of public administration or third parties acting on their behalf.*
>
> *The People's Advocate, guided by the principles of impartiality, confidentiality, professionalism and independence, shall exercise his activity for the protection of human right and freedoms as defined by the constitutional provisions and by the laws. The provisions of this Statute shall also apply to protect the rights of foreigners, whether they are residing lawfully, in Albania or not, refugees, as well as stateless persons within the territory of the Republic of Albania, pursuant to the terms set forth by law."*

35. By detailing the *locus standi* Article 12 continues:

> *"Every individual, group of individuals or non-governmental organization that claims that his/their rights, freedoms or lawful interests have been violated by the unlawful or improper actions or failures to act of the organs of public administration shall have the right to complain or notify the People's Advocate and to request his intervention to remedy the violation of the right or freedom.*
>
> *The People's Advocate shall maintain confidentiality if he deems it reasonable as well as when requested by the person submitting the complaint or notification."*

36. Alongside this procedure with the consent of the individual, the People's Advocate can also start the investigation on its own initiative[179]. In either case the People's Advocate can decide to accept or refuse[180] to deal with a case and its decision[181]. When he accepts to deal with a complaint he can decide to give it a full discretionary character and not subject it to rules governing court decisions such as their argumentation. This characteristic of his decision makes us think of the non-effective character of this institution as a remedy. We might be more persuaded on this position if we look at the authorities of the People's Advocate. After the conclusion of the investigation, when he accepts, according to Article 21 of the Law, he can proceed with the following measures:

> *"a) explain to the complainant that his rights have not been infringed;*
> *b) make recommendations on how to remedy the infringement to the administrative organ that, in his judgment, has committed the violation;*

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[179] Article 13 of the Law provides the possibilities for the "Initiation of the Proceedings":

> *"The People's Advocate, upon finding or suspecting that a right has been violated, shall initiate an investigation, upon the complaint or request of the interested or injured person, or on his own motion if the particular case is in the public domain and provided the interested or injured party consents."*

[180] Compare it for instance with Article 1 § 2 of the Albanian Civil Procedure Code.

[181] According to Article 17 entitled "Administration of Complaints and Notifications":

> *"The People's Advocate, following the review of a complaint, request or notification of a violation, shall decide to:*
> *a) accept or refuse to look into the case;*
> *b) send a reply to the interested person indicating his rights and the remedies he can pursue to protect those rights; or*
> *c) Forward the case to a competent authority.*
> *In all cases, the People's Advocate shall notify the interested person [of his decision] within 30 days from the date he received the complaint, request or notification."*

c) *make recommendations on how to remedy the infringement to the authority supervising the administrative organ that has committed the violation;*
d) *recommend to the public prosecutor to start an investigation if he finds that a criminal offence has been committed*[182]*;*
e) *upon finding serious violations, propose to the relevant authorities, including the Assembly, to dismiss officials under their jurisdiction;*
f) *in case of infringement of right by organs of the judiciary, the People's Advocate, without interfering with their procedures, shall notify the competent authorities of the violations;*
g) *recommend to the injured persons to take their case to the court."*

37. According to Article 24 of the Law, the People's Advocate can also propose legislative amendments and this could bring about the amendment of the legislation on basis of the violation that have been observed. Anyway this is a pure eventuality as we are again in the domain of a proposal for legislative action and, therefore, without binding effect for the institution to which it is directed.

38. Despite the fact that the measures described above are not mutually exclusive, none of them appears to be binding and to produce the direct result of the substantial modification of the situation of the complainant or investigated case. Even the aggregation of all these measures cannot modify the alleged situation, which constitutes a violation, and neither can it provide adequate compensation. All these measures consist only in explications, recommendations, notifications and proposals, so measures without a legal binding effect, regardless of the legal terminology used. On the other hand, by the Articles 22 and 23 [183] of the "Law on People's Advocate" we can understand that the measures taken by the People's Advocate do not have a binding effect on the institutions to which they are directed. Thus we might conclude that People's Advocate, according to his actual legal authorities[184], does not offer the features of an effective remedy for the purposes of Article's 13 and 35 of the European Convention on Human Rights[185].

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[182] This competence of the People's Advocate would be very interesting to be considered under the Egmez v. Cyprus jurisprudence (judgment of December 21, 2000).

[183]Article 22 of the Law provides "Obligation of Organs of State Administration to Respond to Recommendations of the People's Advocate" by saying:

> *"The organs to whom the People's Advocate has submitted a recommendation, request or proposal for dismissal shall review the recommendation, request or proposal for dismissal and shall reply within 30 days from the date the recommendation, request or proposal for dismissal is delivered. The reply shall include reasoned explanations on the specific case as well as the actions, omissions or measures undertaken by that organ."*

But not the obligation to fully comply with the People's Advocate opinion, which would be indeed the case of a court decision. Subsequent Article 23 of the Law provides that:

> *"If the People's Advocate does not consider sufficient the reply or measures an organ has undertaken, he shall have the right to refer the case to the higher organ in hierarchy. If [the violations] are repetitive or the respective organ does not respond to the recommendations of the People's Advocate, the latter may present to the Assembly a report, which shall include proposals for specific measures to remedy the violations."*

[184] Modifications to the Law No.8454, 04.02.1999 "On the People's Advocate" are proposed and are under consideration by the Albanian Parliament.

[185] This was also the conclusion generally accepted in the round table organised on March 15, 2001, by Albanian People's Advocate entitled "The Albanian Ombudsman and the European Convention on Human Rights" in which two of drafters of this report, Mr. Panda and Mr. Bianku, were invited as experts.

CHAPTER 3

COMPATIBILITY OF ALBANIAN LEGISLATION WITH ARTICLES 2, 3 AND 4 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

BY SOKOL BERBERI

I. INTRODUCTION

1. The present chapter has as its object a comparison and evaluation of the compliance of Albanian substantive and procedural legislation with Articles 2, 3 and 4 of the European Convention of Human Rights and with Article 2 of Protocol 1 of the Convention, as interpreted in the relevant case law of the European Court of Human Rights.

2. The main sources used for this study were:

   i) the Convention and its relevant case law;
   ii) the Constitution of Albania;
   iii) Conventions ratified by Albania;
   iv) The Criminal Code and the Criminal Procedure Code;
   v) legislation governing the police forces and the use of weapons;
   vi) legislation regulating the rights and treatment of detainees and prisoners;
   vii) relevant regulations; and
   viii) the case law of Albanian courts.

   In addition, comparative materials from the experience of other member states of the Council of Europe that have carried out similar studies were referred to.

II. COMPARISON OF ARTICLE 2, ECHR, WITH ALBANIAN LAW AND PRACTICE

A. The scope of Article 2, ECHR

3. Article 2, ECHR, provides as follows:

> *"1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force, which is no more than absolutely necessary:*
> *a. in defence of any person from unlawful violence;*
> *b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
> *c. in action lawfully taken for the purpose of quelling a riot or insurrection."*

   A number of aspects of this provision call for discussion.

4. The first issue is the scope of the positive obligation under Article 2 of the Convention to defend the right to life. As appears from the content of the first sentence of the first paragraph of Article 2, in which it is expressively provided that "everyone's right to life shall be protected by law", the lawmaker has a primary duty to issue respective laws to defend the right to life of each person.

However, the European Commission of Human Rights has long held the view that the first sentence of the first paragraph, in its opinion, is not addressed exclusively to the lawmaker, but refers to a general obligation of the authorities to take suitable measures to defend the lives of people (No. 6839/74). Although this does not mean that states are obliged to provide a policeman or a bodyguard to all persons whose life may be threatened, the European Court of Human Rights has emphatically reaffirmed this positive duty in a number of important decisions.

5. Another key question is the identification of the start and of the end of the physical life of human beings, which is defended by Article 2. When we consider the start of life, the question is whether the term "each person", used in this Article, should be understood to include the foetus or not? If so, it would follow that abortion in principle should be prohibited by the lawmaker and should be criminally prosecuted by the authorities. This question continues to be the subject of great controversy arising from the complex moral, religious, political, legal and health-related debates, which the question of abortion involves. On this issue there is clearly no consensus at either national or international level, and the Commission's opinion is that the term "each person", used in the Convention, does not recognise to the foetus the absolute right of life (Case no. 8416/79). The Court has not as yet ruled on the point, but it is perhaps significant that Article 2 of the Convention, in contrast to Article 4 of the American Convention of Human Rights, does not expressly state that life starts at conception.

6. The Commission has also held that the state can set limitations on the right of abortion without violating the right to privacy that is guaranteed to pregnant women by the article 8 (Bruggemann and Scheuten Rap. Com. 1977).

7. As regards the definition of the end of life, this question arises principally in the context of euthanasia. Viewing this question from the perspective of the defence of the right to quality of life and the prohibition on torture and suffering, even when such suffering arises independently of human conduct, the question is whether a person destined to die, who at the same time is suffering intolerably, may choose to end his or her life intentionally or, if incapable of making such a decision, whether such a decision may lawfully be taken the person's family or by a court? In this case too there is no unified standard in all the States parties to the Convention. In fact, the value of life that is defended should have priority against the other rights of the person. This opinion is based on the fact that without the right to live the other rights will have not sense.

8. Other important questions arise in relation to the scope of the exceptions to the prohibition on intentionally causing death. The first such exception, in the second sentence of the first paragraph of Article 2, is execution of a death penalty given by a court after conviction for a capital offence. As a consequence, the execution of a death penalty or extradition to a country where the death penalty is applicable is not a violation of Article 2 of the Convention. Instead, Protocol N° 6 of the Convention provides for the abolition of death penalty. For those states that have not yet ratified this Protocol, based on other provisions of the Convention, and taking into consideration that not every decision handed down by a court will be based on the Convention, it may be said that any court imposing a capital punishment should also observe certain minimum safeguards, as follows: (1) the court decision should follow a fair and public hearing, based on all the procedural guarantees, by an independent and impartial court established by law in accordance with Article 6; (2) the punishment should not be disproportionate to the crime committed, and the selection of the place and the manner of execution should not be such as to constitute inhuman and degrading treatment within the meaning of Article 3; (3) the crime should by punishable by the death sentence at the moment when it is committed, in accordance with Article 7; and (4) there should be no discrimination in the execution of the death penalty or in the granting of pardons, thus complying with Article 14.

9. The second category of exception, in the second paragraph of Article 2, recognises the lawfulness of use of lethal force when it has become absolutely necessary for any of the following purposes:

   a. in defence of any person from unlawful violence;
   b. in order to effect a lawful arrest or to prevent the escape of any person lawfully detained;
   c. in action lawfully taken for the purpose of quelling a riot or insurrection.

As interpreted by the Strasbourg authorities, this provision provides for the very limited and exhaustive circumstances in which the use of lethal force may be excused. The lawfulness of the use of such force falls to be considered independently of the question whether, in any particular case, the conduct in question in fact results in causing death. Furthermore, the words "absolutely necessary" must be interpreted as requiring a strict relationship of proportionality between the force used and the aim sought to be achieved, No. 10044/82, *Stewart v. Great Britain.*

B. Comparison of relevant Albanian legislation

10. At the outset, we should note that within the framework of recent democratic reforms, the principles on which Albanian constitutional institutions are built and a number of laws providing for respect for human rights have brought about a fundamental change in Albanian law. In particular, the approval of the new Constitution of the Republic of Albania in November 1998 has been a significant achievement in the process of establishing democracy in Albania and in guaranteeing respect for human rights. Henceforth, the compliance of Albanian laws with international law will have a constitutional base in Article 5 of the Constitution which provides as follows: *"The Republic of Albania applies the international law mandatory for it."* The meaning of this statement is laid down in a separate chapter. In a much more detailed manner than the previous constitutional provisions, the Constitution treats "International Agreements" in an entire separate chapter which includes two important principles: that every ratified international agreement is a part of the internal legal system and takes priority over conflicting domestic laws; and that such treaties shall be directly effective except in cases when their provisions are not self-executing and their implementation therefore requires the passing of laws or regulations.

11. Thus, a comparison of Albanian legislation with the Convention standards on the protection of the right to life can be undertaken in the light of these principles, and may focus on the review of the following matters: a) death penalty; b) abortion (interruption of pregnancy); c) lethal force employed in circumstances of self defence or extreme need; and d) causing death through the legal use of force by the institutions of public order.

C. Death Penalty

12. The right to life is in the first place regulated by Chapter Two of the Constitution, "Personal freedoms and rights" and in particular by Article 21 which provides: "The life of a person is defended by law." Comparing this article with Article 1 of Constitutional Law No. 7692, dated 31.3.1993 "The fundamental rights and freedoms of the person", we note that whereas the earlier Constitution provided that the taking of life could be lawful subject to the limitation that no death sentence could be imposed on minors or women, the new provisions provided for no such thing.[186] Considering this difference in the constitutional protection of the right to life, and viewed from the perspective of the

[186] See article 1 of the law no. 7692, dated 31.3.1993 "For an addition to the law no. 7491, dated 29.4.1991 "Main constitutional provisions" with this content:

"The right of each person to live is defended by law.
To none can be taken the life, except for the execution of a court decision for a grave criminal offence, done deliberately for which law provides the death penalty.
Death penalty cannot be given for the juvenile, who at the moment they committed the crime have been under 18 and women."

constitutional reforms and the technique used in its drafting, the question arose as to whether the new Constitution allows the death penalty or, to put the question in another way, whether the death penalty is in compliance with the new Constitution of Albania?

13. This question became the subject of review in the Constitutional Court, shortly after the approval of the new Constitution. The case arose from a request of the Criminal Panel of the High Court which, by decision dated 22.09.1999, based on the article 145/2 of the Constitution, decided to suspend the criminal trial of the defendants F.R., H.I., and A.T. and to refer the question to the Constitutional Court as to whether, generally, those provisions of the Albanian Criminal Code which provide for the death penalty were in compliance the with the new Constitution. The Criminal Panel of the High Court, in its decision referring the matter, stated its opinion that "the Assembly of Albania as a legislative body and the Albanian people by the referendum have expressed their will and have decided to abolish the death penalty." The Panel based its opinion on the following arguments:

    - Comparing the differences between Article 21 of the Constitution and Article 1 of Law No. 7692, dated 31.03.1993 "Fundamental rights and freedoms of persons", as mentioned above, the Panel found that the Constitution drafters did not intend to allow for any limitation on the right to life. In this connection, the Panel had regard to the principle of statutory interpretation whereby the failure to replace any pre-existing legal norm in an abolished, or any part of such a norm, in the substitute law means that the will of the lawmaker was that the particular norm (or such part of it) should be abolished.
    - In accordance with the generally accepted interpretation of Article 17 of the Constitution, the Panel concluded that the life of a person, that is his or her physical existence as such, constitutes the essence of his or her right to life. As a consequence, the execution of a death penalty is not simply a limitation on the right of a person to live, but violates directly and terminates the essence of this right.

14. In determining the matter, the Constitutional Court by Decision no. 65, dated 10.12.1999, agreed that the death penalty was in violation with the Constitution, for the following reasons:

    - The starting point was that the Republic of Albania is now part of a completely new reality whose conditions seek to comply with European legal developments;
    - Albania has undertaken the responsibility of implementing its international commitments as a part of this community;
    - The signature and ratification of Protocol No. 6 of the European Convention of Human Rights was now part of this reality;
    - This legal and political commitment has been reflected since 1998 in the new Constitution, which has been approved by the Albanian people by referendum;
    - The death penalty does not serve the essential aims of punishment and is unsuitable for defending a civilised society. In particular, the main means of effectively preventing crime should not be the execution of offenders, but the decisive factors of stabilising society and strengthening state institutions;
    - Furthermore, the political, economic, diplomatic, historic and legal-constitutional developments of Albania are consistent with and run in the same direction as all the other states and international organisations in which it is participating. The vision of the Albanian people, as provided for in the Preamble to the Constitution, is to build a democratic and social state based upon the rule of law and the defence of human dignity and personality;
    - The Constitution, as the fundamental document of the state, had been drafted in compliance with the principles of the Statute of the Council of Europe, the European Convention on Human Rights (including Protocol N° 6), and other international instruments which prohibit the death penalty in time of peace.

15. The Constitutional Court, from a consideration of Articles 3, 5, 17(2), 21, 116 and 122, together with the Preamble and more generally with the Constitution of the Republic of Albania as a whole, concluded that the not only the Constitution does not provide for the death penalty but on the contrary it does not allow for the application of the death penalty in Albania. For this reason, the Constitutional Court decided to abolish the death penalty in time of peace in respect of capital offences punishable under Articles 29(1), 31, 73, 74, 75, 77, 78, 79, 109, 141, 208, 209, 219, 221, 230 and 334 of the Criminal Code and under Articles 59(2) and 77 of the Military Criminal Code.

16. The Opinion of the European Commission for Democracy through Law (Venice Commission) dated 11 February 1999 is an additional important document relating to the compliance of the death penalty with the Constitution of Albania. In this Opinion, which was prepared at the request of the Parliamentary Assembly of the Council of Europe, the Venice Commission also considered that the death penalty was in violation with the Constitution of Albania based on:

    - the lack of any clearly expressed constitutional basis validating the death penalty;
    - the lack of any exception to the protection of the right to life in Article 21 of the Constitution, which provided only the general rule and omitted the exception in the second paragraph of Article 2 of the European Convention of Human Rights;
    - the constitutional stipulation that any limitation on rights and freedoms should not affect the essence of these rights and freedoms;
    - in the opinion of the Venice Commission, the constitutional prohibition of torture and inhuman or degrading treatment or punishment as well as the fundamental importance of the dignity of the individual declared in Article 3 of the Constitution and in its Preamble did not allow any space for the implementation in practice of the death penalty; and
    - the wider development of European public law towards the general abolition of the death penalty in time of peace.

17. This document does not have direct legal effects and is not mandatory for the internal legal system in Albania, but is important in assisting to identify the positions of the Council of Europe organs and to define the obligations that Albania should respect as a member of the Council of Europe.

18. On basis of the legal obligations ensuing from the decision of the Constitutional Court in relation to the death penalty, the Assembly approved law no. 8733, dated 24.01.2001 "On some amendments to law no. 7895, dated 27.01.1195 "The Criminal Code of the Republic of Albania". This law abrogated the provisions of the Criminal Code on the possibilities to apply the death penalty.
    These must be noted here if only for the purposes of describing the historical development of the law in this field. Thus, under Article 29 of the Criminal Code, the death penalty was listed in general terms as one of the permitted measures of punishment for crimes, as opposed to misdemeanours. The Code had provided elsewhere possibilities to apply the death sentence, which have been abrogated, for any of the following criminal offences:

    i) Genocide - article 73
    ii) Crimes against humanity - article 74
    iii) War crimes - article 75
    iv) Intentional murder related to another crime - article 77
    v) Intentional murder - article 78
    vi) Intentional murder of special categories of victim - article 79.
    vii) Kidnapping - article 109(2)
    viii) Robbery causing death - article 141
    ix) Surrendering territory - article 208
    x) Surrendering armed forces - article 209
    xi) Assassination – article 219, section 11 "Crimes against the Constitution"
    xii) Riot - article 221, second paragraph

xiii) Terrorist acts - article 230
xiv) Certain crimes by armed gangs and criminal organisations - article 334.

19. In addition, the Military Criminal Code, approved on 28.9.1995, provides that the death penalty may be imposed for the following offences:

i) Surrendering military forces and ammunition to the enemy – article 25
ii) Passing secret information - article 26(2)
iii) Assisting the enemy - article 28
iv) Desertion - article 34
v) Disobeying the order of a superior - article 47
vi) Obligation to violate the duties - article 50
vii) Stealing military property - article 59
viii) Intentional murder of military personnel - article 77.

20. In the Code of Criminal Procedure that entered into force on 1 August 1995, apart from the above-mentioned rights it was provided that persons sentenced to death have the right to request a pardon. So, in Article 462(3) it was stated that:

> *"Any person sentenced to death is entitled to present a request for mercy to the President of the Republic. The submission of the request suspends the execution. The case is reported to the President of the Republic even ex-officio from the court where the decision has become final."*

The Assembly approved the relevant changes in the Code of Criminal Procedure in relation to the abolition of death penalty by law no. 8570, dated 20.01.2000 "On some amendments to law no. 7905, dated 21.03.1995 "the Code of Criminal Procedure of the Republic of Albania".

According to the records of the Office of Petitions at the President's Office, there were three cases of persons sentenced to death that had asked for mercy from the President as of 1 November 1999 (the date of the Constitutional Court's decision). In practice, before that date, the pardon provisions operated as the most significant procedural guarantee for persons sentenced to death. Following the decision by the Constitutional Court, the above-mentioned persons had their sentence commuted to life imprisonment.

D. Abortion

21. Abortion in Albania is regulated by law no.8045, dated 7.12.1995 "For the interruption of pregnancy", in which the right of voluntary interruption of a pregnancy is recognised in certain conditions. In effect, the law enshrines the general principle of respect for every human being from the moment of the origin of life, subject however to the principle can be violated only in the cases provided by this law, which are:

a) When by examination and consultation it is found that the continuation of the pregnancy and/or the birth of the child threaten the life or the health of the woman;
b) When the commission finds that the foetus has malformations that are not agreeable with life or a disabling illness with unsafe treatment;
c) In cases when the woman evaluates that pregnancy creates psycho-social problems.

Concerning the implementation of the clause "b" it could potentially raise discrimination issues regarding disabled persons. In practice, this clause has to be implemented only when there is a real danger to the life of the foetus. Even in these cases the law provides for special mandatory procedures to be followed and respected by both the doctor and the mother. In all these cases the

law defends the family, the mother and the child. We think that this law is not in violation of the Convention.

E. Death resulting from self-defence or circumstances of extreme necessity

22. Albanian legislation provides for certain defences related to the use of force including lethal force. Thus, Article 19 of the Criminal Code of the Republic of Albania approved by law no. 7895, dated 27.1.1995, provides for the defence of "Necessary Defence" in the following terms:

> *"A person bears no criminal responsibility if he commits the act while being compelled to protect his or somebody else's life, health, rights and interests from an unjust, real and accidental attack, provided that the defense is proportionate to the dangerousness of the attack.*
> *Obvious disproportion between them constitutes excess of the limits of necessary defence."*

23. As appears from this article, even if the harm done to the victim is sufficiently serious to be fatal or to threaten life or cause serious injury, its author, who acts under circumstances of necessary defence, does not have criminal responsibility because the conduct in question is deemed not dangerous, but useful. Thus, the defence of necessary defence requires that the original attack should fulfil certain conditions, as follows:

a) It should be unlawful;
b) It should be immediate, which means that the attack has started but has not ended;
c) It should be a real attack.

While the defence:

a) Should be directed against the attacker and not against third persons;
b) Should be directed in order to repel an attack against the interests of an individual or someone else;
c) Should not exceed the limits of necessary defence

Theory and practice have stressed that the intensity of the defence should be in proportion to the threat of the attack and failure to respect this principle means that the limits of necessary defence are exceeded.

24. In addition, Article 20 of the Criminal Code provides for the defence of "Extreme Necessity", as follows:

> *"A person does not bear criminal responsibility if he commits the criminal act because of the necessity to confront a real and imminent danger threatening him, another person or property from a serious damage, unavoidable through other means, unless it has been instigated by him and the damage incurred is greater than the damage avoided. "*

In order for the conduct to be considered within the conditions of extreme necessity, the defendant must have acted so as to confront a real and immediate danger. This danger should threaten him or another person with serious injury or threaten serious damage to property, and in addition the circumstances must be such that the damage or injury cannot be avoided by other means. Furthermore, the defendant himself should not provoke this threat of injury and the consequences of his own conduct should not be greater than the injury that is avoided.

25. It follows from the analysis of the scope of these two defences that Albanian legislation and case law contain sufficient cumulative safeguards to comply with Article 2(2)(a) of the Convention. The sub-articles are considered below.

F. Cause of death through the legal use of force by law enforcement authorities

26. One of the most important and delicate problems arising under Article 2 of the Convention arises from any use of force by law enforcement authorities, which results in death. In Albania, the fundamental legal provisions are those of the law no. 8290, dated 24.2.1998 "On the use of the weapons by the forces." From the analysis of the provisions of this law we note that:

This law aims to regulate the circumstances, manner and conditions for the use of weapons and to define the subjects that have the right to use them.

i) The subjects that have the right to use weapons are: the Armed Forces of the Republic of Albania, other police forces established by law, which are not a part of the Armed Forces, and the civil armed guards (article 2).

ii) The fundamental criteria on the use of weapons are the existence of conditions of necessary defence and/or conditions of extreme necessity (article 2).

iii) However, we are of the opinion that Article 3 of this law, which allows for the use of weapons by the public order police, border police, forces of the Ministry of Defence and civil guards, in circumstances that do not justify the use of weapons as "absolutely necessary" may violate the provisions of the second paragraph of Article 2 ECHR.

iv) In addition, article 7 of the law, could potentially raise serious concerns in practice, which are not allowed under the Convention. In that it provides: "Before use of weapons, the persons, against whom weapons would be used, should be warned loudly and clearly. When the person does not obey the order but tries to escape or react, the person is shot at without any warning aiming in the lowest parts of the body. When the circumstances do not allow in any way the implementation of the above-mentioned rules, the weapons are used without warning."

27. Thus, a consideration of this law generally in the light of Article 2 ECHR leads to the conclusion that its implementation in practice might result in death by intentional use of force in a situation that was not absolutely necessary for the use of force. In practice we have not seen any judicial case where the proper interpretation of these provisions has been tested. However, the importance of this doubt appears also from a consideration of law no. 8293, dated 26.2.1998 "On the Criminal Police", law no. 8292, dated 25.2.1998 "On the Special Forces and those of the Rapid Intervention Forces", law no. 8342, dated 6.5.1998 "On the Border Police", in that each of these police forces has as the legal basis for the use of weapons the same law no. 8290, dated 24.2.1998 "On the use of weapons."

G. Accidental deaths

28. The Code of Criminal Procedure, Chapter II, "Receiving Notice on the Criminal Act", articles 281-287, provide for the obligation of various persons: citizens, public officials, medical personnel to report the cases when there is suspicion on a criminal act. This general rule serves as guidance also in cases of accidental death. There is no specific rule to provide for the start of criminal prosecution in every case of accidental death.

29. Medical personnel is legally obligated, in conformity with article 282 of the Code of Criminal Procedure, to report to the prosecution, when, during a medical intervention or assistance, they receive knowledge of a criminal act. In cases of accidental death, on which there is suspicion on a criminal act, proceedings start by the prosecutor and they are investigated by on the initiative of the prosecution office.

30. The Code of Criminal Procedure, Chapter VI, articles 58-68, regulate the right and the procedures related to the damaged person and the civil claimant. In the criminal process, article 59 provides for

some acts, among which also those that have death as a consequence, which the person damaged by the criminal act is entitled to submit a request to the court and to participate in the hearings to prove the charges and to demand compensation for the damage.

31. The Criminal Code has a specific article on cases of suicide, against the person, who has influenced to cause the suicide. In cases of death caused during police activity, the prosecution starts criminal prosecution in all cases. Law no. 5840, dated 20.2.1979 "On registering Acts in the Civil Status Office", law that continues to be in effect, articles 12-16 regulate the manner of registering births and deaths. Article 14 provides that "Directors of hospitals, military units, prisons, re-education centres and other institutions are obligated to report in writing the nearest civil status office within 24 hours of any death occurring within their institutions". Article 15 provides "Deaths resulting from murder, suicide and accidents and on which a criminal case starts, are registered on the request by the investigation authority or the court not later than three days from death or the finding of the corpse. If the corpse is not identified, the three day term starts from the moment of identification". From a linguistic interpretation of this provision, we may say that the initiation of a criminal case is compulsory for the cases mentioned above.

32. An important role on safeguarding the right to life would also play the Ombudsman, a new institution set up by the Constitution approved in November 1998.

H. Conclusions

33. Regarding use of weapons we think that law no. 8290, dated 24.2.1998 "On the use of weapons from forces" is not compliant with the criteria developed under the case law of the European Court of Human Rights. In particular, articles 3 and 7 of this law should be reviewed in the light of the criteria and principles mentioned above. From the above analysis of other legislation in force, relevant to the right to life, we have not identified any other evident incompatibility with the ECHR. With regard to accidental deaths, we assess that there is a need for legal coverage, specific to these cases and that the proceeding body should be informed regardless of there is suspicion or not on a criminal act.

III. Comparison of Article 3 ECHR with Albanian Law and Practice

34. The right not to be tortured and not to suffer inhuman or degrading treatment or punishment is one of the most fundamental human rights because it is related to the personal integrity and the human dignity of the individual. The high position that this right occupies in the international hierarchy of human rights gives it a special status in this respect. From this perspective, Article 15(2), which relates to the possibility for a State to avoid its obligations under the Convention during a period of emergency, provides a particularly important safeguard for the rights defended by Article 3: a State cannot in any case or circumstances avoid its obligations under this Article.

A. The scope of Article 3 ECHR

35. Article 3 of the Convention provides simply as follows:

> ***"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."***

We will mention below some of the principles and main interpretations of this Article under the case law of the European Commission and European Court of Human Rights as it has developed from a historical point of view.

36. The meaning of the essential concepts contained in Article 3 and the difference between them may be illustrated by reference to two main cases. In the case of Denmark, Norway, Sweden, Holland

and France v Greece (Greek case, 1969), the Commission described the difference between the severity of the types of forbidden conduct as follows:

- Torture: Inhuman treatment that aims to take information or to admit things or to give a punishment.
- Inhuman treatment or punishment: treatment that intentionally causes grave mental or physical suffering and that in this special situation cannot be justified.
- Humiliating treatment or punishment: treatment that openly humiliates the individual in front of another person or persons or that obliges him to act against his conscience.

37. In the case of Ireland against the United Kingdom (1978) the Court made a slight change to these definitions.

- Torture: deliberate inhuman treatment causing very serious and cruel suffering.
- Inhuman treatment or punishment: the infliction of intense physical and mental suffering.
- Degrading treatment: ill-treatment designed to arouse in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[187]

38. Following the above-mentioned definitions we can say that there is a "progression" from treatment that is humiliating, to that which is inhuman and, at the end of the scale, treatment of such severity as to amount to torture. A related question is what is the minimum threshold of severity to come within the scope of Article 3. In this connection, the Court has said:

> *"The maltreatment should reach a minimal level of harshness to fall in the "space" of the article 3. The assessment of this minimum, based on the nature of the things, is relative; it depends in all the circumstances of the cases, such as the duration of maltreatment, his physical and mental effects, and in some cases, sex, age and the health state of the victim."*[188]

39. Recently, in the case of *Selmouni v France*, there has been a development in the Court's case law on the assessment and difference of the forms of maltreatment under Article 3. There, the Court adopted the following formulation:

> *"some acts, which are classified in the past as "inhuman and humiliating" differing from the "torture" can be classified in different way in the future. The high standards that are being searched in the field of human rights and the fundamental freedoms in a correspondent and inevitable way requests for determination in assessing the violations of the fundamental values of democratic societies."*[189]

40. Thus, it is clear that a significant number of preliminary conditions must exist in order to justify a finding of torture under the Convention:

a) There should exist evidence of physical and mental suffering and pain;
b) the treatment should be effected by a person that acts in the capacity of an official person or appointed by law;
c) this pain or suffering should be caused on purpose or for a reason, as for example to extract information or to force a confession of guilt;
d) the level of "suffering and pain" should be "grave".

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[187] Council of Europe Publishing "Guidelines of the European Convention of Human Rights" with author Donna Gomien, researcher at the Norwegian Institute of the Human Rights, page 20.
[188] *Ireland v United Kingdom*, Trial, 18 January 1978, Ser. A, No. 25, paragraph 162.
[189] *Selmouni v France*, Trial, 28 July 1999, paragraph 101.

41. Regarding persons in detention, the Court has established two essential elements that should be taken into consideration in the assessment of any alleged maltreatment of detainees:

    a) In relation to any person whose freedom is limited, the use of any physical force, which is not necessary on account of his behaviour, violates human dignity and in principle is a violation of Article 3.[190]
    b) When an individual is in detention and in good health, and it is noted that such person is physically injured at the moment he is set free, it is the state's responsibility to present a credible explanation as to how such injury was caused.[191]

42. Another question arises in relation to those circumstances in which the state may be held responsible for maltreatment, which is caused by non-governmental "actors". It is important to stress in this regard that this development in the Strasbourg case law is relatively recent, and is connected to the relationship between Article 3 and Article 1 of the Convention, which requires the state to ensure to everyone within its jurisdiction the rights and freedoms set out in the Convention. The case of *Soering v United Kingdom* established the principle that a state's international responsibility can be engaged under Article 3 in cases where the state returns or deports a person to a place where such person risks being exposed to maltreatment of a nature which, if caused in the sending state, would be considered to be a violation of Article 3 of the Convention. In such cases, the state is adjudged to be responsible under Article 3 ECHR for putting a person in a position where he or she can be maltreated.

43. In the case of *HLR v France*, the Court decided that this principle applies not only when the danger can result from the actions of state officials in the country to which they have been returned, but also when the danger may come from private persons in circumstances in which the state authorities in the receiving state cannot defend them against such violence. This raises the issue of the responsibility of the state for maltreatment between private persons. In general, even though the Convention does not apply to the actions of private persons, it has now been clearly decided that the state will be considered responsible for its failure to prevent maltreatment in situations where it has or has taken over a regulatory function (as might be the case of the school).[192] Similarly, *Kurt v Turkey* is one of those cases in which the state was declared responsible for its failure to investigate complaints made to it of treatment contrary to Article 3 in an adequate, complete and impartial manner.[193]

44. By way of conclusion to these considerations, the common thread in the Court's case law has always been that there can never be any justification for acts that violate Article 3 of the Convention.

> *"Even in the most difficult circumstances, such as in the war against organised crime and terrorism, the Convention prohibits in absolute terms torture or inhuman and degrading treatment...even in the cases of events of a public emergency for the defence of Nation from a threat"*[194]

B. The Albanian Constitution

45. The Constitution of the Republic of Albania approved on November 1998 to a very large extent adopts a scheme for the protection of fundamental human rights and freedoms based on the European Convention of Human Rights. Respect for human dignity and personality is considered to be one of the fundamental values set out in the Preamble to this Constitution. This is declared also in

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[190] *Ribitsch v Austria*, Trial, 9 June 1998, paragraph. 53; *Selmouni v France*, paragraph. 90.
[191] *Tomasi v France*, Trial, 27 August 1992, Ser. A, no. 241-A, paragraph. 108-111
[192] *A v United Kingdom*, Trial 23 September 1998.
[193] *Kurt v Turkey*, Trial 25 May 1998.
[194] *Aksay v Turkey*, Trial 18 December 1996, paragraph. 62.

Article 3 in which *"the dignity of a person, his rights and freedoms are defined as the base of the Albanian state."* Article 25 provides that: *"No one may be subjected to torture, cruel, inhuman and degrading treatment or punishment."* This definition is almost identical to the definition in Article 5 of the Universal Declaration of Human Rights adopted within the framework of the United Nations.

46. In this context, it is important that the new Constitution, in the chapter entitled "International Agreements", gives priority to the implementation of such international agreements ratified by Albania. This is because Albania has ratified both Conventions that are related to the prevention of torture:

    a) In 1993 it ratified the UN Convention against the Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"; and

    b) In 1998 it ratified the European Convention for the Prevention of Torture.

C. Criminal procedure

47. The basic principles governing the fairness of criminal proceedings including the rule of law and the detailed rights of the defence are set out in the Code of Criminal Procedure that came into effect on 1 August 1995. The provisions of the Criminal Procedure Code prohibiting illegal behaviour or actions during the proceedings and those defining the obligations of the prosecuting authorities are of special importance in this context. So, for example in article 5 of the Criminal Procedure Code it is provided that no one can be subjected to torture, punishment or degrading treatment; to persons in detention and also to those sentenced to terms of imprisonment, has to be ensured the human treatment and moral rehabilitation.

48. The Criminal Procedure Code also provides for those cases when a person can be stopped and arrested in flagrantia. In our view, this safeguard is very important to prevent violations of the rights protected by Article 3 of the Convention, in that the implementation of criminal procedural safeguards plays a special role in protecting against more serious violations arising from ill-treatment at the hands of investigating authorities. So, for example, the requirements of notification of family or relatives, notification of one's right to be assisted by a defence attorney and notification of one's right to remain silent are each very important safeguards in practice. When a person is stopped or arrested the prosecutor should be notified immediately. The prosecutor, as soon as he receives such notification, must verify the basis for the arrest and the legitimacy of the detention or arrest and within 48 hours must decide to set the detainee free or, alternatively, to request the court to review the security measure. The judge must decide within 48 hours from the time he receives the request of the prosecutor to set the person free or to approve the measure requested by the prosecutor. When the case is reviewed, the prosecutor, the person in detention (or arrested) and his defence attorney must all be summoned to be present. The decision of the judge can be appealed to the Court of Appeal or directly to the High Court. The person who performs the arrest as well as the prosecutor and the judge should respect the rights mentioned above.

49. The legal time limit for detention provided for in Article 263 of the Criminal Procedure Code is also a provision, which may have possible implications for safeguarding detainees against violations of their rights under Article 3 of the Convention. In particular, the detention ceases to be valid in cases where the following time-limits have expired and the proceeding acts has not been submitted to the court:

    a) three months, when proceedings are on criminal contravention;
    b) three months, when proceedings are on criminal offence,
    c) twelve months, when proceedings are on organised crime and crimes committed by gangs.

The definitions of criminal contravention and criminal offence are provided in the Penal Code. The difference is based on the level of social danger. The criminal contravention presents a lower social danger. The above time- limits refer to the pre-trial detention period and to proceedings carried out by the prosecutor. Regarding the detention time-limits, there are two articles in the Criminal Procedure Code (264 and 265), for which in practice, there have been cases of different judicial interpretations, which as a consequence can damage the interests of the defendants prolonging the conditions of limitation of their freedom in an unfair way.

D. Criminal offences

50. The new Criminal Code that came into effect in 1995 provides for two criminal offences of torture in Articles 86 and 87 of the Code. Article 86 provides that "Torture, as well as any other degrading or inhuman treatment, is punishable by five to ten years of imprisonment", whereas Article 87 provides for a more severe punishment for offences of torture bringing about serious consequences. It provides:

> *"Torture, like any other degrading or inhuman treatment, when it has inflicted a disability, mutilation or any permanent harm to the well-being of a person, or death, is punishable by ten to twenty years of imprisonment."*

E. Execution of criminal sentences

51. The Law No. 8331 dated 21.04.1998 on the Execution of Criminal Sentences is a follow up to Article 462 of the Criminal Procedure Code of the Republic of Albania. The object of the law, as provided in its article 1, is to regulate the execution of criminal sentences and other legal orders including the manner in which such sentences should be served, excluding imprisonment which is regulated by the separate law "On rights and treatment of persons convicted to prison " no. 8328, dated 16.04.1998.

52. The statutory definition of 'execution' as provided in article 2 is the implementation of the orders set out in a final penal decision and of those decisions based on the Criminal Procedure Code that call for immediate execution. The policy aims of the law are towards re-educating defendants, restoring the rights of persons who have been adversely affected or damaged by criminal offences, and attempting to prevent the commission of offences. The principle of equality is provided for in article 4, whereas article 5 stresses the special treatment required both as to the place and the manner of execution of decisions for juvenile offenders and women. Article 7, read together with article 3, guarantee the free communication of the defendant with the competent bodies, his right of appeal to the Court, and his right to freely communicate with his defence attorney in any case when he thinks it is necessary for the conduct and preparation of his defence and/or for the protection of his rights.

53. In addition, the defence attorney has the right to ask the prosecutor to intervene for the purposes of taking measures within the competence of the bodies responsible for the execution of the decision and, if obstacles arise, to petition the court for appropriate orders. The dignity and the rights of the defendant should be respected by the bodies and persons that execute criminal sentences, and in no case should they exceed their competencies. On the contrary, under article 8 of this law, disciplinary measures and even criminal proceedings can be taken against persons who fail to discharge their duty in this regard.

54. Under article 9, the prosecutor is responsible for taking all measures for the execution of the decision in compliance with court orders, to check the correctness of execution, to intervene before the competent bodies or to petition the Court to remedy any violation and to punish those responsible.

F. Treatment of detainees

55. Treatment of detainees is governed generally by Regulation No. 1075 dated 15. 09. 1999 of the Ministry of Public Order on treatment of the detainees. It is important to stress at the outset that, in terms of formal regulation, there is a difference of treatment as between the conditions of detainees, on one hand, and prisoners, on the other, which may violate the accepted standards of the Council of Europe. The first important problem is on the institutional side, whereby, in principle, the system of detention generally should pass on under the responsibility of the Ministry of Justice, specifically under the supervision of the General Directory of Prisons, Ministry of Justice. In addition, it should be noted that the above Regulation contains a limitation on the rights and the conditions of treatment of detainees, which could be considered inconsistent with article 75 of the law no. 8328, dated 16. 4. 1998 "On the rights and the treatment of prisoners", which provides that: "The provisions of this law are applied also to the arrested and to the detained persons, respecting the limitations established for them by other laws."

56. Furthermore, the Regulation appears to contain a further important omission, it does not provide for complaints. Also, the prohibition of detainees from keeping paper or pens/pencils is a violation of the constitutional right to challenge actions of state bodies or officials, which the detainee may consider to be unlawful. This obstacle also violates the right of correspondence protected by Article 8 ECHR. These rights are also recognised in the minimum standard rules elaborated in relevant UN instruments on treatment in detention as well as in the Prison Rules of the Council of Europe.

57. In our view, article 8 of law no. 8328 providing that: "Prisoners can address any state body or NGO inside and outside the country", as well as article 49 providing that "The complaints can be done orally or in writing and even in a closed envelope" should apply also to detainees. This conclusion is based on article 75 of the law as cited above.

G. Treatment of prisoners

58. Law No. 8328 dated 16. 4. 1998 "On the rights and treatment of the prisoners" respects human rights and establishes a new philosophy on treatment of prisoners. The law aims to ensure that a prison sentence is executed in a manner that respects the dignity and integrity of the person convicted. For example, under article 5 the treatment of convicted persons is impartial and without discrimination as to sex, nationality, race, economic or social status, or political or religious convictions. More generally, the law aims to ensure that prisoners should have living conditions that minimise the prejudicial effects of prison and of the differences of life from other citizens.

59. Regarding the convicted person, the law aims at a treatment that has as its principal objective the re-education of the prisoner and his or her reintegration into normal social life with all other persons. This process also aims towards a degree of individualisation, taking into consideration the environment where the prisoner lived, the conditions under which he or she grew up and the circumstances that made him or her deviate from a normal way of life.

60. Under the provisions of the law, the health service in prisons should ensure:

    i) The supply of medicines and medical equipment;
    ii) The diagnosis and treatment of diseases;
    iii) The prevention of diseases and especially of contagious diseases; and
    iv) A hygienic environment and the sanitary education of prisoners.

61. The law further provides that, in cases that cannot be cured inside the institution, the affected prisoners should be sent to the prison hospital and, when necessary for the purposes of special intervention or special treatment, also outside the prison system. In addition, it provides for the establishment of special medical institutions for the treatment of prisoners suffering from psychiatric diseases.

62. According to the law, prisoners should have healthy and adequate food suited and adapted as appropriate to age, health conditions, climate, season etc. The law obliges prison institutions to secure clothes and other individual items in sufficient amount and repair to meet the demands of normal living. According to the law, the organisation of schooling is mandatory for juveniles, and provision is also made for access to higher education and vocational training by correspondence.

63. In addition, the law provides that employment of prisoners should not be viewed as a source of profit for the state or as a form of punishment but as an activity that has an educational effect for prisoners and encourages their re-integration in society. Prisoners have all basic employment rights enjoyed by all other citizens. Thus, work is compensated, working conditions approximate those existing in free society, the period of time worked is included in the calculation of working time for retirement purposes, and its duration cannot exceed the limits provided for in the labour code. In addition, prisoners may be employed not only within prisons but also outside when there are jobs, which meet their professional qualifications, and within the limits of practical possibility.

64. The law also provides for the organisation of cultural activities that aim to preserve and develop the ability of prisoners to integrate in society. In particular, prison staff has a statutory duty to preserve a prisoner's normal relations with his or her family. In this way, the family may be prepared for the return home of the prisoner following his or her release from prison, thus avoiding the potential crises which frequently arise on such occasions. Four meetings per month are permitted, with one of these being specially reserved for married prisoners.

65. The right of prisoners to make requests and complaints for the implementation of the law and internal regulations, not only to the competent state bodies but also to the different non-governmental organisations inside and outside the country, represents an important safeguard against violations and especially against maltreatment.

66. Prisoners must be afforded the possibility to have access to news through newspapers, radio and television etc. Foreign prisoners are allowed to have contact with the representatives of the diplomatic corps of the country they belong to. The law also recognises the contribution of the different local and foreign non-governmental organisations on safeguarding human rights.

    Each prisoner is allowed to fulfil the needs of his religious, spiritual and moral life and to follow the services and meetings organised within the institution. Prisoners are also permitted to keep books and relevant literature in their rooms.

67. According to the law, prisoners should be subject to such conditions that minimise the prejudicial negative effects of prison and of differences of life compared with other citizens. The law requests that the prison buildings or those of the institutions destined to be used by prisoners should be built in a manner that fulfils the demands of a normal life in conditions of imprisonment and that ensures the accomplishment of the rehabilitation program. Apart from this, existing buildings must be gradually adapted with a view to ensuring that prison cells are used by a small number of prisoners. In relation to the construction of new prisons, the law provides for a mandatory maximum number of four prisoners per cell and for full respect for requirements of space.

68. Regarding the environment where prisoners live, it is mandatory to provide space with sufficient light to ensure adequate living conditions including the possibility of carrying out ordinary

activities within each cell. Law no. 8328 provides that "minimum standards for the surface area, space, lighting and ventilation of the environment for prisoners shall be provided in the prison regulations, based on recommendations by the Ministry of Health." As will be mentioned below, an obstacle in defining these standards arises from the failure so far of the Council of Ministers to issue such a Regulation. At all events, prison institutions are also obliged to take the necessary measures to ensure a hygienic environment throughout the institution in question.

69. The law also provides that women and juvenile offenders should be imprisoned only in special institutions adapted for them.

70. Finally, and importantly, article 76 of this law provides for an obligation for the Council of Ministers to approve the prison regulations and other necessary regulations within three months from the day when this law entered into force. This obligation has not been fulfilled and, as a consequence, the Minister of Justice has not yet approved the internal regulations for each institution and their respective rules and guidelines.

- **Disciplinary measures against detainees and prisoners**

a. Detainees

71. In Regulation No. 1075 dated 15. 09. 1999 of the Ministry of Public Order regarding the treatment of detainees, regulation 3 of Chapter VIII provides for the following measures:

    - The supervisor of the detention rooms has the right to give a warning for the interruption of access to cigarettes for up to three days.
    - The Chief of public order police has the right to interrupt access to cigarettes for up to three days and to stop meetings with relatives twice (i.e., on two occasions).
    - The Chief of the Police Commissariat has the right to take all the above-mentioned measures and, in addition, to stop meetings with relatives for up to one month.
    - All such measures (except the warning) must be registered in the logbook, which must also contain a written statement of the reasons for taking the measure and identify the person who ordered it. In cases where the detainee reacts positively, the right to revoke the measure is vested only in the person who ordered it.
    - In ordering a measure, consideration must be given to the previous behaviour of the detainee and to the circumstances of the breach.
    - The prosecutor must be notified of the detainee's breach and of the measure ordered against him.

72. As mentioned above, we believe that the regime of pre-trial detention should not be different from the prison regime in respect of disciplinary measures. The interruption of access to cigarettes might cause psychological or physical distress to persons who are regular smokers, and a disciplinary measure should in principle not be transformed into a mechanism for imposing physical suffering.

73. In addition, there is a serious omission in the regulation of disciplinary measures during detention. There are no provisions for an appeal procedure to a higher authority outside the institution that ordered the measure.

b. Prisoners

74. Recommendation No. R (87) 3, approved by the Committee of the Ministers of the Council of Europe on 12 February 1987, known as the "European Prison Rules", article 35, on disciplinary measures provides:

"Legislation or rules by competent authorities will provide for and define the following:
1. Behaviour that constitutes disciplinary violation
2. The type and the duration of punishment that can be given
3. The competent authority which gives the punishments
4. The possibility and the authority to make an appeal."

75. Articles 51 and 52 of the above mentioned law provide for a disciplinary regime, which is designed to stimulate a sense of responsibility and self-control. This regime should be adapted to the sex, age, physical and psychological characteristics of individual prisoners. It is important to note as well that "Prisoners cannot be punished for conduct that is not considered to be a legal violation of prison regulations or of particular rules of the institution, and that punishment can be ordered only after hearing the prisoner and carrying out a proper investigation on his claim. Punishment must also correspond to the type and importance of the violation, the prisoner's attitude towards it and to the individual characteristics and integrity of prisoners.

76. The disciplinary measures for disciplinary violations in the prison system are provided for in article 53 of the above mentioned law, as follows:

(a) Individual criticism
(b) Criticism in the presence of other prisoners
(c) Exclusion from special joint activities for up to 10 days
(d) Exclusion from group walks for not more than 20 days
(e) Exclusion from all joint activities for up to 20 days
(f) Interruption of permissions (the law provides that in case of good behaviour, aiming at the integration in society, the prisoner can get permission to spend up to 20 days per year outside the prison).

For juveniles and women prisoners the measures provided in points c, d, and e can be ordered for up to half of the stated time-limit. Pregnant women, or those who are allowed to keep a child with them, can only be subjected to the disciplinary measures provided in points a and b of the above-mentioned article, naturally depending on the category of prisons, which means prisons of high security, ordinary prisons, or low security prisons (based on article 12). These measures are reflected in a different way but always without passing the maximum levels provided for in article 54.

77. It should be emphasised also that when the disciplinary measure to exclude a prisoner from joint activities or open air group walks is ordered, it cannot be applied without a written document issued by the prison doctor certifying that the prisoner is able to undergo such punishment and, in addition, the prisoner undergoing this measure of punishment must be submitted to continuous medical checks. In implementing article 54 of the law No. 8328 dated 16.04.1998 " On the rights and treatment of prisoners", almost all penitentiary institutions will have disciplinary councils on the disciplinary decisions provided for in article 53 of this law. Such a commission consists of the Director or Deputy Director, acting as chairman, the doctor, the educator and the chief officer of the internal regime. However, in the case of warnings and criticism, the competent body to order the disciplinary measure is the Director of the Institution or any other person appointed by the Director.

78. The prisoner has the right to present to the prosecutor of the district or to the appropriate district court a special petition for the review of his complaints or requests. When the latter fall within the competence of bodies within the prison system, the prosecutor must order the termination of the review within a certain time-limit; in all the other cases the court issues the order. It appears from article 49 that the prisoner can submit an oral or a written complaint to the department of prison institutions and to the Minister of Justice as well as to the district court and prosecutor. The

department of prison institutions is obliged to check such complaints and to arrive at a solution, for which there exists a special register.

79. Apart from the measures of a disciplinary character mentioned above, a prisoner can be submitted to a special regime of supervision in accordance with article 55 in the following circumstances:

(a) Constitutes a threat for the security or order of the institution.
(b) Interferes with the activity of other prisoners through violence or threats.
(c) Attempts to coerce other prisoners for purposes of profit.
(d) Incites others to violate the rules either individually or in a group.

In these cases a prisoner may be sent to a high security prison or to other sections of the prison for not more than 3 months. In urgent cases the General Director of Prisons can issue an order subjecting prisoners to such a special supervision regime while notifying the prosecutor, who must present the request to the court within 24 hours, and the court should decide to confirm or annul the temporary measure in question. This punishment can be prolonged for the prisoner during the period of special supervision for up to 3 months for any repeated case that fulfils the conditions of article 55.

80. Punishment by isolation and any other punishment that might harm the physical and psychological state of a prisoner may be ordered only if the doctor certifies in writing that the prisoner is able to undergo such punishment.

H. Conclusions

81. From the above analysis the following conclusions may be drawn:

(a) Responsibility for the system of detention should be transferred from the Ministry of Public Order to the General Directorate of Prisons under the authority of the Ministry of Justice. This is a very important institutional reform that is directly related to the treatment of detainees and the prevention of maltreatment. This transfer should take place through a transparent process, based on a decision that clearly defines the steps to be taken and is supported by the necessary budgetary provisions.

(b) Regulation No. 1075 dated 15. 09. 1999 of the Ministry of Public Order regarding the treatment of detainees should be reviewed, especially in relation to the limitation of rights of detainees and disciplinary measures. In particular, this regulation should be revised so as to comply with the law and with the new principles governing treatment of all detainees and prisoners.

(c) The treatment of prisoners and detainees should be harmonized.

(d) The right of appeal and correspondence should be sanctioned by law and should apply also to places of detention. Securing effective access to appeals mechanisms includes ensuring certain practical possibilities, such as the right to keep a pencil and paper, which are presently not allowed.

(e) The opening of a special institution for juveniles should be given priority, in view of the high percentage of juvenile offenders within the prison system and to the particular demands of their education and rehabilitation.

IV. Comparison of Article 4 ECHR with Albanian Law and Practice

A. Scope of Article 4 ECHR

82. Article 4 of the Convention guarantees freedom from slavery or servitude and from forced or compulsory labour. It provides in full as follows:

> *"1 No one shall be held in slavery or servitude.*
>
> *2 No one shall be required to perform forced or compulsory labour.*
>
> *3 For the purpose of this article the term "forced or compulsory labour" shall not include:*
> *a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;*
> *b. any service of a military character or, in case of conscientious objectors in countries where this is recognised, service exacted instead of compulsory military service;*
> *c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;*
> *d. any work or service, which forms part of normal civic obligations."*

83. This provision aims at regulating of two fundamental issues: the prohibition of slavery and the prohibition of forced labour under threat of violence or other compulsion. These two issues are treated in distinct terms, and in order to have a more clear view of the content of this provision it should be noted first that the notion of "slavery" and "enslavement" refers to the status of the person. So, the expression "slavery" indicates that the person is in complete legal possession of another person. On the other hand, the term "servitude" constitutes a complete form of limitation and refers to the entirety of the working conditions and/or the obligations to work or provide other services, which the person cannot change or avoid. Whereas, "forced or compulsory labour" does not refer to the whole situation of the concrete person, but only to the character of the work or other services performed by him against his will that might, and usually does, have a temporary character.

84. Referring to the concrete content of Article 4, paragraph 1 of Article 4 provides for the absolute prohibition of slavery or servitude. The difference between these concepts has been clarified above. In European legal practice, this paragraph is mainly invoked by detainees in respect of complaints directed against obligations to work in prison. The European Commission has expressed the view that the notions of "slavery" and "enslavement" are not applicable in this situation. Furthermore, Article 4(3)(a) recognises that the obligation of detainees to work is a recognised exception to the ordinary freedom from forced or compulsory labour. In the *Van Droogenbroeck* case, the Commission held that subjecting convicted prisoners to obligatory work regimes under the supervision of state authorities is not servitude, because such a measure is for a limited time, is subject to judicial review and does not violate the legal status of the individual in question.

85. In another case, *X.Y.Z.* the Commission held that although military service was exempted from paragraph 2 of Article 4, it was not necessarily so exempted from paragraph 1. In all cases, however, the Commission stressed that we cannot talk about the existence of servitude in cases where the persons concerned have freely consented, either themselves or through their legal representatives, to submit to this regime. Regarding Article 4(2), the Convention definition of the notion of "forced or compulsory labour" is informed by the categories provided for in Convention No. 105 of the International Labour Organisation (ILO): "as a means of obligation and political education or as punishment for expressing political opinions or opinions that are ideologically against the political, social or economic system; as a method of mobilization and using the labour for purposes of economic development; as a method of establishing discipline at work; as a means of punishment for participating in strikes; and as a means of racial, social and religious discrimination." In addition, the definition is informed by that given in article 2 of ILO Convention No. 29, as follows: "all the work or service that is done by a person under the threat of a punishment and that this person did not volunteered himself."

86. Thus, the main elements of "forced or compulsory labour" are its non-voluntary character, which means that the work or the service is done by the worker against his will. Secondly, the request to perform the work or the service must be unfair in that it exploits the work or service and includes a measure of suffering that can be avoided. Regarding the first element the Commission has expressed the opinion that an immediate acceptance of such work or service may be evidence of its obligatory character. For the second criterion, the oppressive or unjustified character of the work may be identified from a number of elements that allow broad limits for judgement to the national authorities of each country. For example, in the *Iversen* case, a new Norwegian doctor presented a complaint in Strasbourg arguing that his appointment against his will to serve in a remote area, on the grounds that the authorities could not locate another doctor there, was a violation of this provision. The *Van der Mussele* case is another example that offers valuable interpretation in this direction. The Applicant, a Belgian trainee lawyer, was appointed by the Office of Defence Attorneys to defend appeal proceedings in circumstances where he was obliged to provide such services for free. In answer to his complaint that this constituted compulsory labour, the Commission reasoned that this could not be the case in circumstances where the service was provided for a limited time, was compensated at first instance level, was in compliance with the rules and regulations of his chosen profession, was not implemented in an arbitrary or discriminatory way, was not unreasonable, and where the obligations were part of the normal exercise of the profession in question.

87. In relation to Article 4(3), exception (a) does not exempt all work by detainees, but only such work as is "required to be done in the ordinary course of detention" and that aims at the rehabilitation of the detainee. Furthermore, it is not limited to detainees or prisoners who are so detained or imprisoned by a court decision, but extends to all cases of deprivation of liberty within the meaning of Article 5'1) ECHR. As indicated above, several complaints to Strasbourg (*Grussenbauer, Arrowsmith*) have been directed against low payment for the work that detainees have performed in places of detention. The exception in paragraph (b) is completely clear, in that it refers to obligatory tasks carried out in the course of compulsory military or substitute military service. However, even here, national authorities have certain discretion in taking action. Exception (c) raises the usual difficulty of defining the circumstances in which "an emergency or calamity threatening the life or well-being of the community" may be said to exist, and in this regard it appears that only an immediate crisis with a temporary character will suffice. The last exception, in Article 4(3)(d), relates to any work or service "which forms part of normal civic obligations", which, according to the interpretation given within the framework of the ILO, probably corresponds to "any work or service of local character provided by law or as a tradition known by the population or the community in general, for the maintenance of the communications, preserve food, provide water, protect from fire, flooding..."

88. It should be noted that each of the above exceptions will not be permitted if the measure in question is discriminatory in nature.

89. Under the provisions of Article 15 (2) of the Convention, Article 4(1) may not be derogated from in any circumstances. Derogation from paragraph 2, except in the cases mentioned in paragraph 3, may be permitted only in compliance with the conditions and limitations specified in Article 15 of the Convention. A review of the decided cases under the Convention reveals that the few cases in which a Article 4 has been considered have been as follows: the obligation of detainees to work in prison; imposition of continuous supervision by the administrative authorities on a recidivist offender; forbidding persons engaged in a service from leaving such service; appointing a person against his will to work in a remote and difficult location; obliging a person to provide services for free or for a very low price; forbidding a person to be engaged in a certain activity without first discharging all financial obligations arising from a previous engagement, etc. It is in these areas that we will concentrate our attention in reviewing relevant Albanian law and practice.

B. Comparison with Albanian law and practice

a. Generally

90. The legislation of the Republic of Albania regulates in several ways the prohibition of slavery and compulsory work. The democratic processes started in the 1990s have completely changed our understanding of this prohibition, and indeed the entire legislative activity in this direction has a point of reference in the standards of international conventions and the legal experience of developed democracies. As a result, Articles 2 and 11 of the Labour Code provide that legislation in this field give priority to such international standards. According to Article 2:

> *"(1) The Labour Code respects international conventions ratified by the Republic of Albania.*
> *(2) The Labour Code is based on norms generally accepted by the international law"*

And under Article 11:

> *"(1) The rights and obligations related to the work relations are regulated primarily from these sources:*
> *(a) Constitution*
> *(b) International conventions ratified from the Republic of Albania*
> *(c) Labour Code approved by law no. 7961, dated 12.7.1995 and its sublegal acts*
> *(d) Collective work contract*
> *(e) Individual work contract*
> *(f) Internal regulation*
> *(g) Local and professional traditions."*
>
> *(2) The sub legal acts are issued for the completion and the implementation of the provisions provided by this Code. They cannot define working conditions less favourable for the employers than those provided by this Code, except when expressively provided by the latter."*

91. Thus, it should be stressed that the priority international standards enjoy in this area over internal laws and regulations represents an additional guarantee of respect for the rights of individuals in this area in compliance with present international standards.

92. In the process of reviewing and evaluating our legislation relating to slavery and forced labour, first of all it should be recognised that several provisions of Albanian law clearly prohibit such treatment. In particular, Article 26 of the Constitution provides that "No one may be required to perform forced labour...". In further application of this prohibition, Article 8(1) of the Labour Code provides that forced labour is prohibited in all its forms. Regarding the prohibition of slavery the case is a bit different. In our legal acts we do not find a special definition, clearly expressed, for the prohibition of this phenomenon. Instead, the prohibition of slavery is indirect, ensuing from an interpretation of articles 3, 17, and 27 of the Constitution. So, when we talk about not violating the freedom and security of the person, his dignity, these are very broad notions, which include the entirety of the conditions of the legal status of the individual that without doubt include the prohibition of slavery as well. The lack of a special definition owes more to the fact that the legislator has judged that under present conditions, when the constitutional framework guarantees the freedom of the individual in many lesser respects, it is unnecessary to provide a special provision prohibiting slavery in express terms.

93. In fact Albanian legislation goes farther, by establishing a special offence in the terms of article 74 of the Criminal Code which provides: "Murder, mass murder, slavery, the sending of persons to camps and deportation, as well as any kind of torture or other inhuman violence for political, ideological, racial, ethnic and religious motives shall be punished with not less then fifteen years or life imprisonment or the death penalty."

94. As already indicated, another important element to assess in comparing international standards and Albanian laws on forced labour is to consider the scope of the permitted exceptions to the prohibition. In domestic law, the matter is governed in the first instance by Article 8(2) of the Labour Code which provides: "By forced labour is understood any work or service that is requested of the individual against his will, threatening him with any kind of punishment." Even a superficial view would be enough to reach the conclusion that the content of this provision is a very faithful reflection of Article 2 of ILO Convention 29, which contains and serves as the classical definition of the concept. Apart from this, Albanian law details the particular elements of the definition of forced labour in the same provision of the Labour Code, article 8 (2), which continues as follows:

"The use of forced labour as:

(a) a measure or sanction against the persons that have or express opinions contrary to the political, economic, and social regime in power;

(b) a method of mobilisation or use of the labour for purposes of the economic development;

(c) a disciplinary measure at work;

(d) punishment for participating in strike;

(e) racial, social, national and religious discriminatory measure

is prohibited."

95. These elements are identical to those provided in ILO Convention No. 105 and together they provide a comprehensive definition of the notion of forced labour. Therefore, compliance of these definitions with international standards is obvious. In addition, the scope of the rights guaranteed and the manner of protecting them is well established, because exceptions are determined by constitutional law, in the chapter "Personal freedoms and rights" of the Constitution. Its Article 26 provides that: "No one may be required to perform forced labour, except in cases of the execution of a judicial decision, the performance of the military service, or for a service that results from a state of war, a state of emergency or natural disaster that threatens human life or health." In further application of this prohibition, article 8(3) of the Labour Code provides:

"Forced labour is not considered:

(a) any work or service, requested on the basis of the law, for the compulsory military service or for work of a simply military character;

(b) any work or service requested of the individual as a punishment given by the court and during which the person is not under the service of the citizens or private legal entities, except for the cases provided in paragraph 2 of this article;

(c) any work requested in case of war or as cause of force majeure, natural disaster especially fire, floods, hunger, earthquake, epidemic diseases or all circumstances that threaten life or normal conditions of life of all the population or a part of it."

96. The language of this provision is not quite identical to the relevant international standards, but after a careful reading, it may be concluded that the above provisions fully correspond to and meet the definitions in the applicable international conventions. Thus, subparagraphs "a" and "c" of article 8(3) of the Labour Code are completely identical with the content of subparagraphs "b" and "c" of Article 4(3) of the European Convention of Human Rights. Furthermore the definition of the legislation in point "c" is more detailed, complete and inclusive than the one set out in the European Convention. It seems too that the more delicate issues and in reality the most problematic ones in Albanian legislation arise from two aspects of article 8(3)(b) of the Labour Code and from the failure to reflect the content of Article 4(3)(d) of the European Convention. These call for more detailed analysis.

97. First, the content of article 8 (3)(b) of the Labour Code is based upon and has a coherent relation with the definition in Article 26 of the Constitution that *inter alia* provides: *"No one can be required to perform forced labour, in cases of execution of a judicial order..."* In our opinion, however, these two provisions do not achieve complete coherence. The definition in the Constitution refers to the process of execution of court decisions and not a special category of punishment that can be imposed by the court. In this respect, it is established that the notion "execution of a judicial decision" represents a concept that includes the process of imprisonment in a place of detention as well as any conditional release. In this understanding the constitutional definition is in compliance with the European Convention, in that the detainee or prisoner may perform certain forced labour during the period of detention, but not as a special punishment. It is relevant that, being a constitutional law, the content of its provisions is more concentrated and defines the fundamental orientations that should be developed more correctly and in detail by supplementary legislation like codes, laws, decrees and regulations. On this analysis, the constitutional definition is correct and acceptable. However, it is difficult to have the same conclusion on article 8 (3)(b) of the Labour Code, which permits "every work or service requested of the individual as part of a sentence imposed by the court..."

98. Thus, it would appear that one of the usual punishments provided for in Albanian legislation is the obligation to perform "every work or service" imposed by the court. However, in our opinion, based on a comparative review of the European Convention and our law, is that this possibility is not otherwise supported as a matter of law. First of all, articles 29 and 30 of the Criminal Code, which define the various possible punishments on conviction of a crime or misdemeanour, make no reference to the performance of any forced labour or service. It is true that under article 30 of the said Code the court is empowered, in special cases where the principal form of punishments (up to 3 years) is deemed to be unsuitable, to impose an exceptional sentence which may include an obligation to perform work in the public interest, this is quite clearly an exceptional and substitute penalty which, under Article 57 of the Criminal Code, is calculated by reference to tariffs which precisely correspond to the appropriate fine or term of imprisonment, as follows:

    (a) One day of detention is equal to one day and a half of prison.
    (b) One day of detention is equal to one thousand Lek penalty.
    (c) One day of detention is equal to eighteen hours of work in public interest

    Thus, the court, in view of the reduced threat posed by the person and the circumstances of the commission of the offence, may decide to suspend the execution of the decision to imprison and order instead the prisoner to perform work in public interest. However, this is quite clearly an exceptional case, which does not feature as a common or principal punishment in Albanian law. Furthermore, in reality it is only the suspension of the execution of the punishment and not "the punishment" as is provided for in article 8(3)(b) of the Labour Code.

99. The same reasoning applies to the second conclusion that "every work or service that is requested of the individual" who is detained can be provided only as a special decision of the court, and not as an activity that he can perform in the place of detention. It follows from Article 4(2) and 4(3) ECHR that a person in detention can be asked to work during the lawful period of such detention and that such a measure does not require the sanction of the court.

100. For these reasons, we conclude that the content of article 8 (3)(b) of the Labour Code does not correspond exactly to the standards of the European Convention of Human Rights. Furthermore, it is misleading in two respects: first it suggests that there exists an exemption from the prohibition on "forced labour" for such work as may be imposed as part of a judicial sentence, which means that one of the forms of punishment can be forced labour, which in fact is completely contrary to ILO Convention no. 105; secondly, it unnecessarily limits the scope of permissible forced labour during the ordinary course of detention in that the exemption from the prohibition is conditioned by a judicial decision.

101. The second serious concern arises in relation to Article 4(3)(d) of the European Convention, which exempts from the prohibition on forced labour "any work or service which forms part of normal civic obligations." This exemption finds no counterpart or reflection in Albanian law. However, in our view, the lack of any such formula in domestic legislation does not create problems. In particular, the Convention standard relates to an exemption and, as such, if anything Albanian law provides for a higher standard of protection. In addition, there exists a special law governing "public work" which adequately defines such civic obligations in a manner that preserves a clear distinction between compulsory and non-compulsory work.

b. Discrimination

102. Regarding the clause that guarantees against the discrimination, article 9 of the Albanian Labour Code provides:

> *"1. Any kind of discrimination in the employment and professional field is prohibited.*
> *2. Discrimination means every difference, exclusion or sympathy that is based on race, colour, sex, age, religion, political opinion, nationality, social origin, family relation, physical or mental disability that violates the right of the individual to be equal in employment and treatment. The differences, exclusions or sympathies that are required for a certain work position are not considered as discriminations. Special measures to defend the employees are provided by this Code, decisions of the Council of Ministers or collective contracts that are not discriminatory.*
> *3. With employment and profession is understood the professional orientation and experience, employment in a different profession, and the conditions of employment that are related to the work distribution, its performance, payment, social help, working day or the termination of the work contract."*

103. The compliance of this definition with international standards is obvious, and there is therefore no need for a further detailed review of this point.

c. Other specific laws

104. Apart from reviewing and assessing these general aspects concerning the basic prohibition of "slavery" and "forced labour", it is necessary to consider certain specific laws and practices that are directly related to these prohibitions in the light of European Convention case law. The first such law is the law "On public work", No.7933, dated 17.5.1995. Its article 1 provides that members of families who benefit from economic assistance may be offered participation in public work of general interest. Under article 2, public work, within the meaning of this law, is temporary work performed by members of such families, organised by the state for the construction of simple elements of infrastructure or for the repair, cleaning or maintenance of public objects. Under article 3, those families who benefit from economic assistance and whose members refuse to participate in the public work offered, will have their economic assistance interrupted. Finally, under article 4, the definition of wage, working time, and social security of those persons who perform the public work are regulated on the basis of contracts between employers and employees in the public sector.

105. Naturally that the most problematic point in this law is article 3. Its actual definition seems to represent a form of obligation for the persons to whom a job is offered, because if they do not accept their economic assistance will be interrupted. And in this case the punishment is not a light measure, but has serious consequences on the basic means of livelihood. In this way, this provision is in violation of Albanian law, concretely the Labour Code, article 8(2)(b), which in its turn correctly reflects the definitions of ILO Convention no. 105. In our view this provision also violates Article 4 ECHR.

106. The second specific instrument calling calls for comment is Decision N° 228 of the Council of Ministers, dated 19.5.1993, "On the procedure of payment for work carried out by prisoners." This instrument aims at regulating the working terms and conditions of persons in detention including the procedure for determining the amount of compensation payable to such persons for work carried out by them in the ordinary course of their detention. There can be no doubt that the enactment of this special legislation was a correct and necessary measure, which has filled a sensitive gap in this very delicate field. In its provision for transparency and fairness of treatment this decision appears to fully correspond to international standards. The decision recognises that persons whose freedom is limited can nonetheless work in locations and jobs sanctioned by the administration of the institution.

107. The only point of discussion is whether the limitations expressly set out in the Decision comply with the law "On the rights and treatment of prisoners". Concretely, article 34 provides:

"The work is organised by the Directorate inside and outside of institutions with the assistance of third parties, where necessary. During any period of imprisonment after the entry into force of this law, prisoners who have reached the age of retirement, disabled persons of the first and second degree, pregnant women, persons who because of the physical or health conditions are not able to do the work that is offered to them, cannot be obliged to work. Prisoners that have psychiatric problems can be put to work when this serves for therapeutic reasons. All such work does not have the character of punishment and is compensated based on defined criteria by a special decision of the Council of Ministers."

108. This article establishes an overriding guarantee for special categories of prisoners and, in addition, reaffirms that the character of work in prison is not a punishment. This provision is in compliance with the Convention and with the developing recognition of guarantees in favour of prisoners as a special category of vulnerable persons whose labour may be unlawfully exploited.

109. On a final point, it is important to record that, at the present stage of implementation of these new standards in Albanian penal practice and in our judicial system, no case has been reported so far of such violations of the individual right to freedom from servitude and forced labour.

C. Conclusions

To conclude this comparative view, we would like to highlight the following points and suggestions:

a) In relation to freedom from slavery and forced labour, Albanian legislation generally corresponds to the standards of the European Convention in respect of the scope of the prohibition, the category of exceptions, and the entirety of the issues involved in its regulation.

b) However, there are certain gaps in Albanian legislation, the complete and detailed regulation of which is necessary to prevent violations in the future. In this context we can mention the need to more fully regulate states of emergency and to complete article 8 (3) of the Labour Code with an additional point that corresponds to the content of Article 4(3)(d) ECHR.

c) Albanian legislation also contains certain provisions, which could raise in practice the question of being not in compliance with the standards of the European Convention, and these should therefore be considered with a view to ensuring full compliance. These provisions are the following:

- Article 8 (3)(b) of the Labour Code
- Article 3 of the Law on Public Work.

CHAPTER 4

COMPATIBILITY OF THE ALBANIAN LEGISLATION WITH ARTICLES 5, 6 & 7 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

BY HALIM ISLAMI

I. PRELIMINARY CONSIDERATIONS

1. The European Convention of Human Rights states the essential democratic principles of criminal and civil proceedings, which guarantee the lawful rights of individuals under those proceedings. Their acceptance by Albanian legislation has taken place over the past ten years through the gradual abrogation of old legislation and the enactment of new legislation.

2. Democratic Albania inherited criminal legislation of the Eastern type, made worse by the desire to introduce original features of Albania as the only country building true socialism. This negative tendency brought about the departure of criminal justice from international principles and standards and its reliance on political orientations, which served the sustainability of the totalitarian regime.

3. Following the reforms of the '60-ies which lead to abolition of advocacy and of the Ministry of Justice, the Criminal Code was approved in 1977 and the Code of Criminal Procedure in 1979, whereas the Civil Code and the Code of Civil Procedure were approved in 1981. The universally recognised principles of equality of the parties, access to defence, presumption of innocence, right to compensation, adversary were substituted with some political principles, according to which civil and criminal legislation is lead by the party policy and ideology and is based on the antidemocratic principles of class struggle, line of the masses and reliance on own forces (Articles 1 and 2 of the Criminal Code, Articles 1-4 of the Code of Criminal Procedure, Articles 1 and 6 of the Civil Code and Articles 2 and 4 of the Code of Civil Procedure). The court took accusatory functions, the prosecutor was deprived of investigative authority which was passed on to the investigation bodies, the right to be defended by advocate was repealed and the rule was applied according to which evidence was taken in preliminary investigation. Thus Albanian justice became the most regressive one in Europe.

4. This legislation was inappropriate for the new situation created as a result of the political system, therefore it started to be changed since 1990. The Ministry of Justice and advocacy were re-instituted in May of that year, although with limited rights. One year later, on 18.12.1991 Law No. 7541 "On the advocate in the Republic of Albania" was ratified, which accepted in full the international standards in this area. In 1994, a more comprehensive law replaced that one.

5. In 1991 work on improvement of codes started. It brought about the abrogation of old codes and their replacement with new ones based on western models. Initially provisions, which politicised criminal justice, were abrogated and then some principles and standards, which were indispensable for the new situation, were adopted. Thus, Law No. of 17.12.1991, repealed procedural provisions, which politicised criminal proceedings, and the provisions determining the authorities of the court and of the prosecutor were changed by depriving the court from the authority to charge and recognising the right of the prosecutor to exercise criminal investigation. The same was done on the Criminal Code through Law No. 7553 of 30.01.1992, which repealed some political criminal offences such as sabotage (Art. 53), agitation and

propaganda against the state (Art. 55), activity against the revolutionary activity of the working class (Art.60), opposition to social activists (Art. 205). At the same time some criminal offences were added such as abduction of the individual, violent obstruction of activities of political parties, obstruction or prohibition of religious services, and the protection of private property was made equal to that of state property.

6. In April 1992 constitutional provisions on the judiciary were ratified. They opened the road for adopting international standards in the field of criminal justice. They stated the separation of powers and the independence of the judiciary, the immunity and irrevocability of judges. Important changes to the judiciary and the functions of the participants in the criminal proceedings took place. The Court of Cassation as the highest judicial authority, as a legal authority in conformity with international standards to examine the lawfulness of judicial decisions and to unify judicial practice was established. The regional courts as second tier courts with review functions were abolished and they were replaced with appeal courts to ensure the implementation of the right to appeal, according to the European Convention of Human Rights. The function of the prosecutor was determined properly as the authority exercising criminal investigation and his competencies in the criminal proceedings. According to constitutional provisions advocacy is exercised as a free profession on basis of tasks determined by law. The High Council of Justice was set up as the only authority deciding on the appointment, transfer and responsibility of judges of first tier courts and of appeals and of prosecutors.

7. Law No. 7574 of 26.06.1992 "On the organisation of the judiciary and some changes in the codes of civil and criminal procedures" was enacted in implementation of constitutional provisions. The law determined the rules of functioning of courts of appeals and of the Court of Cassation in conformity with international standards. The right of the prosecutor to manage and control investigation was sanctioned and the main competencies of the prosecutor were determined. For the first time in the history of Albanian justice the control of the court on arrest was established and the right of the defendant to complain to court against arrest decided by the prosecutor. This solution was not in full conformity with the European Convention of Human Rights, but marked a step forward in the efforts for the democratisation of criminal procedures, helped in breaking the old concepts and the establishment of a new experience related to security measures. It remained in effect for three years and served as a test period for the gradual recognition and application of international standards by the participants in the criminal procedures. Law No. 7574 repealed previous laws on the organisation of the judiciary, prosecutor's office and investigation office.

8. The constitutional provisions on human rights and freedoms, based on the European Convention on Human Rights were ratified in 1993. They dictated changes to the criminal legislation. Law No. 7717 of 02.06.1993 "On some changes in the Code of Criminal Procedure of the Republic of Albania" was ratified in order to implement and make concrete those changes. The law provided for access to advocate from the moment of arrest, detention or from the moment of appearance of the person called to be taken under criminal liability and it also determined the rights of the defendant and of the lawyer in the stage of preliminary investigations. In conformity with the Convention and constitutional provisions, the rule of assessing the remand in custody by the judge was determined and the time a person may be held in custody before being sent to a judge was set at not more than 48 hours. At the same time, the rule according to which house search and seizing of correspondence can be made only by a decision of a judge was also adopted, thus changing the year-long practice of their approval by a prosecutor.

9. In continuation of the work for the approximation of criminal legislation with the European Convention of Human Rights, important changes were made to the Criminal Code at the end of 1993. Law No. 7769 of 16.11.1993 abolished the death penalty for 6 crimes and provided for life

imprisonment for 22 serious crimes. Provisions on sentences with re-education through work and removal of the right to vote (Art. 20 and 25 of the Criminal Code) were repealed. At the same time some new provisions on criminal offences related to social and economic changes were added such as interference with personal secrets, hiding of income, non-payment of taxes, etc.

10. The gradual changes made during 1990-93 improved considerably criminal justice, thus bringing it nearer to international standards. But the codes of that time, although improved, remained backward and constituted an obstacle for the further democratisation of the situation in this sector. Thus work started since 1993 on drafting new codes based on western legislation and with the effective assistance of the Council of Europe. The French code served as a model for the Criminal Code and the Italian one for the Code of Criminal Procedure.

11. The Criminal Code, approved by Law No. 7895 of 27.01.1995, included new provisions on supplementary sentences, alternatives to prison sentences, liability and criminal measures against juridical persons, measures against convicted persons on bail, extradition, etc. The number of criminal offence s was increased and were considered as such crimes against humanity, against freedom and religion, crimes in commercial companies and in bankruptcy, and crimes against state and private property were unified.

12. The Code of Criminal Procedure was approved by Law No. 7905 of 21.03.1995 and came into effect on 01.11.1995. This Code sanctioned the main principles of criminal procedures, such as independence of the court, presumption of innocence, assurance of defence, prohibition of a second trial for the same crime, remedy, application of international agreements, etc. According to the latter, the relationships with foreign authorities in the criminal justice sector are regulated by international ratified by the Albanian state, by the generally accepted standards of international law as well as the provisions of this Code. On this basis the Code fully accepted the rules determined in the Convention on Extradition, Reciprocal Assistance in Criminal Cases, of the International Validity of Criminal Trials and that on Transfer of Proceedings, by including them in the chapter "Jurisdictional Relations with Foreign Authorities".

13. The Code of Criminal Procedure took up broadly the international standards on participants in proceedings by giving each of them its place and determining justly their relationships. It was for the first time that the competencies of the court on approving the most important acts of the stage of preliminary investigations, such as those on remand in custody, search and sequester were sanctioned. Judicial police was established as a separate body with determined procedural functions, subordinate to the prosecutor and the court. In conformity with international standards, the rights of defence, the guarantees for their implementation and the relationship with the defendant were determined fully and accurately.

14. In contrast with previous legislation, the Code of Criminal Procedure accepted the standards of the European Convention of Human Rights related to custody, search of the individual, house and of correspondence. The right of the prosecutor to decide these measures, which limit the fundamental human rights and freedoms, was repealed and the international standard of the determination of these measures by the judge, in cases and conditions provided by law, was instituted.

II. ARTICLE 5 OF THE CONVENTION

A. Situations and reasons for liberty restriction

15. In conformity with Article 5 of the Convention on the right to liberty and security, the Constitution and the Code of Criminal Procedure clearly accurately determine the cases when a

the liberty of the person may be limited as well as the conditions and criteria on deciding the measures of security in general and of arrest in particular.

On basis of Article 27 of the Constitution a person can be deprived of his liberty only in the following cases:

a) when he is convicted with imprisonment by a competent court;
b) for failure to apply the lawful orders of the court or for failure to fulfil a an obligation set by law;
c) when there is reasonable doubt that he has committed a criminal offence or to prevent him from committing one or his escape after committing one;
d) for the supervision of a minor with the purpose of re-education or for escorting him to the competent body;
e) when the person spreads a contagious disease, is mentally unsound and dangerous for the society;
f) for illegal crossing of the state border as well as in cases of expulsion or extradition.

The circumstances of deprivation of liberty set forth in Article 27 of the Constitution are regulated by specific laws and concretely as are described in the following paragraphs.

16. When a person is sentenced with prison by a competent court, on basis of Article 464 of the Code of Criminal Procedure, the prosecutor issues the order of enforcement, which contains the details of the prisoner, the relevant part of the court decision and the appropriate orders for enforcement. The order is sent to judicial police and to the state body administering prisons.

17. Article 46 of the Criminal Code regulates the taking of medical and educational measures. It determines that the court can decide medical measures for irresponsible persons, who have committed criminal offences, and educational measures for minors, who are exempt from conviction or who, because of their age, are not criminally liable. The enforcement of decisions for compulsory confinement in medical and educational institutions is made by an order of the prosecutor, in conformity with Article 464 of the Code of Criminal Procedure.

18. The provisions of Law No. 8092, dated 21.03.1996 "On mental health" are applied on mentally unsound persons who have not committed any criminal offences, but who represent a risk for society. On basis of Article 27 of that Law a person with mental disorders may be hospitalised in a psychiatric hospital without his consent or of is guardian only in case he represents a direct risk to the life or health of himself or of others due to his mental disorder. The decision for his hospitalisation is taken by the specialist doctor, and is notified to the person, his family members or his legal guardian. The specialist doctor is obliged to inform the head of the clinic within 24 hours and the latter should submit a request to the court of the district, in which the institution is, within 48 hours from giving the permission for compulsory hospitalisation. The request is examined within three days by a single judge, whose decision is immediately enforceable. The family members or the legal representative enjoy the right to request the release from hospital at any time. If the release is refused, they have the right to appeal within 7 days to the district court and the decision of the judge is final.

19. The same rules are applicable for persons who are mentally retarded and for this reason are not in a position to take care of themselves and are not taken care by someone else.

20. With regard to persons who spread contagious diseases, the deprivation of liberty takes place in conformity with the rules provided by Law No. 7761, dated 19.10.1993 "On the prevention and fight against contagious diseases". On basis of Article 16 of that Law the health care staff assigned to this service have the right to enter workplaces and houses in order to make an epidemiological

investigation, the isolation and hospitalisation of sick persons. When they encounter difficulties, they request the support of the public order bodies, which are obligated to assist.

21. Law 8342, dated 06.05.1998 "On Border Police" provides that the border police *"perform all necessary action for the discovery, apprehension, arrest on the act ... of persons who enter or exit the border illegally"*.

22. Based on Article 493 of the Code of Criminal Procedure, on request by the Ministry of Justice, submitted by the prosecutor, the court may order limitation measures, including the arrest of the person, whose extradition has been requested, whereas Article 494 provides also the possibility of ordering a temporary arrest, demanded by a foreign state, prior to the arrival of the extradition request.

23. The Constitution and the Code of Criminal Procedure have determined detailed rules on the case envisaged in Article 5.1.c of the European Convention of Human Rights, according to which a person may be deprived of his liberty when he is arrested or detained *"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"*.

B. Security Measures

24. In full conformity with Article 5.1.c and Article 5.3 of the Convention, Article 228 of the Code of Criminal Procedure has set forth the conditions and criteria on determining the security measure. The important condition has been stressed according to which no one can be subjected to measures of personal security if there is no reasonable doubt based on evidence against him.

25. Judicial theory and practice have accepted that reasonable doubt means the conviction, which is formed by the evidence obtained and examined in conformity with the requirements of the law, which in their unity indicate that the criminal offence has been committed by the accused. This conviction should be such as to be generally accepted as fair and reasonable by anyone who gets to know the circumstances of the fact and the evidence that proves it.

26. The other condition on the determination of the security measure is the existence of a criminal offence and the responsibility of the accused. In this respect the criminal offence should be envisaged in the Criminal Code or any other law, which considers as such a certain fact. The extinction of the criminal offence as a result of time-barring or the repeal of the relevant provision, as well as impossibility of sentencing due to age or other legal reasons (necessary defence, extreme necessity, etc.) exclude the application of security measures.

27. In conformity with Article 228 of the Code of Criminal Procedure, security measures can be applied in the following cases:

    a) when there are important reasons that threaten the taking or truthfulness of evidence;
    b) when the defendant has escaped or there is a risk that he escapes;
    c) when due to the circumstances of the fact and of the personality of the defendant there is a risk that he commits serious crimes of the same kind on which he is being prosecuted.

28. On basis of Article 229 of the Code of Criminal Procedure, certain procedures will have to be respected in determining security measures. The court should consider their appropriateness in view of the need for securing the person on a case-by-case basis. According to this Article, each measure shall be proportionate to the importance of the fact and the sentence envisaged for the concrete criminal offence. The same Article mentions that when the defendant is a minor, the

court should consider the requirement for not interrupting concrete educational processes. Minor cannot be detained on light criminal offences or criminal contraventions.

29. In order to increase care in the application of the security measure, Article 230 of the Code is says that custody in prison can be decided only when any other measure is not appropriate because of the special dangerousness of the act committed by the defendant. According to this Article, custody in prison, as a rule, cannot be decided for a woman who is pregnant or breastfeeding, for a person in a grave health condition or who is older than 70 years old.

30. The determination by law of the conditions and criteria on deciding on security measures has had an influence on increasing the care and responsibility both by journalists and judges. But nevertheless, cases of breaches or lack of appropriate consideration of these requirements of the law, which directly affect the liberty of the citizens, are observed in the work practice of judges.

C. Arrest in flagrantia & reasonable suspicion

31. A specific chapter of the Code of Criminal Procedure makes accurate and detailed determination on arrest in the act and the custody of a person who is suspected to have committed a crime, by making more concrete and detailed Article 5.3 of the Convention. Article 252 of the Code provides a definition on seizing in the act, by determining that a person is in such a situation if he is apprehended while committing a criminal offence or he is being followed, immediately after committing the act, by judicial police, the person damaged or other persons or he is caught with things and material evidence, from which it seems that he has committed the criminal offence.

32. Article 253 of the Code determines the conditions on the arrest of a person suspected for having committed a crime. According to this Article, the prosecutor orders the arrest of the suspect for a criminal offence that is punishable with not less than two years when there are grounded reasons to think that there is a danger of him fleeing. Even though these provisions are clear, it has been found in practice that prosecutors have ordered the arrest of suspects despite the lack of any grounds to think that they could flee.

33. The old concept and practices on security measures, according to which the prosecutor can determine them, was the reason for anti-constitutional changes in criminal legislation in 1996. Law 8175 of 23.12.1996, which made some changes to the Criminal Code, approved a procedural provision, Article 43, according to which the bodies that arrest the authors of criminal offences should, within 48 hours, request from the prosecutor the order for the detention of the arrested persons. It was the prosecutor who decided on their detention or release. On basis of an order by a prosecutor the arrested person could be kept in custody for 5 days without the need to bring the person before a judge to assess the security measure, in contradiction with the deadlines set forth in the constitutional provisions. Thus the prosecutor had the right to determine himself the security measures.

34. In view of this provision, the court can assess the order for detention at the request of the prosecutor or on complaint by the person detained, after five days from the issuance of the detention order by the prosecutor. But in case the court ordered the release and the prosecutor appealed against the decision, its execution was suspended until the decision of the court examining the appeal. Therefore the defendant was not released even thought the court decided on his release, thus violating the known rule that appeals against court decisions on security measures do not suspend their execution.

35. This openly anti-constitutional provision was repealed by the Constitutional Court by its decision 55 of 21.11.1997, with the reasoning that it is against the constitutional provisions related to individual rights and freedoms and the rules set on the instances and manner of their limitation.

D. Right to be notified

36. In conformity with Article 5.2 of the European Convention of Human Rights, the Constitution and the Code of Criminal Procedure include detailed rules on the notification of charges and questioning of arrested or detained persons. Article 28 of the Constitution says that *"everyone deprived of his liberty has the right to be notified immediately in the language he understands on the reasons of this measure as well as on the charges made against him".*

37. According to Article 255 of the Code of Criminal Procedure, officers or agents of judicial police who have arrested or detained someone are obliged to inform immediately the prosecutor of the place where the arrest or detention has taken place. The notify the defendant or the arrested person that he is under no obligation to make any statement, as well as on his right to choose a defence lawyer and notify immediately the chosen defence lawyer or the one appointed by the prosecutor.

38. Judicial police, with the consent of the arrested or detained person, should his family without delay. When the arrested person is a minor or sick, the prosecutor can order him to be kept under watch in his house or in another guarded place.

39. The prosecutor is obliged to verify the arrest in the act or the detention. He questions the arrested or detained person in the presence of his defence lawyer and notifies to him the fact for which he is being prosecuted as well as the reasons for questioning. When the prosecutor finds that the requirements of the law have not been respected or that the deadline for bringing the arrested or detained person before the court, the prosecutor must order the immediate release of the arrested or detained person.

40. The Code of Criminal Procedure and Law 8553, dated 25.11.1999 "On the State Police" provides for the obligatory accompaniment of the person by the police and this is essentially different from the arrest on the act or the detention of a suspect for having committed a crime. Article 259 of the Code provides that when the person under investigation *"refuses to identify himself or indicates details or shows documents suspected to be false, the judicial police accompanies him to its offices and keeps him there for as long as it is necessary to identify him, but not longer than twelve hours".* The law "On the State Police" provides in its Article 45 that *"the persons accompanied who are under suspicion to have committed a criminal offence, are treated in conditions different from those of detention or arrest, and in any case the accompaniment should continue until the issue is clarified but not more than 10 hours".* In other words, in both cases the persons are not imprisoned, but are kept in a compulsory manner in the police station, and as mentioned in Article 45, item 3, they enjoy all the rights recognized by Article 28 of the Constitution, determining the legal safeguards for the person arrested on the act or detained on suspicion to having committed an offence. In this perspective, the person accompanied by force to the police station may complain to court on basis of Article 28, item 4 of the Constitution.

41. Article 5.3 of the Convention sets forth the rule that *"Everyone arrested or detained in accordance with the provisions of paragraph 1.c. of this Article shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release .... Release may be conditioned by guarantees to appear for trial".*

42. On basis of the Constitutional Provisions of 1993 and of the Code of Criminal Procedure, the arrested or detained person shall be brought to a judge within 24 hours from the moment of the arrest or detention in order to assess the arrest or detention *(habeas corpus principle introduced since 1215 in England by Magna Carta).* This assessment had to be completed by the judge within the 24 hours. In view of geographical and infrastructure conditions of Albania, this short deadline

constituted an obstacle for the work of judicial police, prosecutor and the court. It happened that the deadline could not be met and as a result persons arrested in the act were released. This situation was resolved by the new Constitution, approved in November 1998, which changed the deadline to 48 hours for each stage and presently the deadlines set by the Constitution are respected. On basis of Article 259 of the Code of Criminal Procedure, failure to respect these deadlines brings about the immediate release of the arrested or detained person.

43. A specific provision of the Code determines the rules for the assessment of the arrest by the judge. The assessment takes place in a court hearing with the indispensable presence of the prosecutor and of the defence lawyer. The judge hears the prosecutor, the defendant and his defence as well as the evidence presented by them.

44. If it comes out that the arrest and detention have been made in a lawful manner, the judge decides to validate the measure and when there is a request by the prosecutor decides on an appropriate security measure. Otherwise the judge decides on the immediate release of the arrested person.

E. Bail

45. Article 28 of the Constitution accepts the rule of the Convention according to which the arrested person can be prosecuted while free against a bail. The meaning of this measure of security is given in Article 236 of the Code of Criminal Procedure which provides that bail is the acceptance by the court of a written statement, signed by the defendant or another person deserving trust, by which they are obliged to pay a certain amount, deposited in a bank, if the defendant shall not appear to the prosecution body.

46. In full conformity with Article 5.4 of the European Convention of Human Rights, the Code of Criminal Procedure provides specific rules for the right of the parties to appeal against the decision of the judge on security measures. On basis of Article 249 of that Code, the prosecutor, the defendant and his defence lawyer may appeal, within ten days, to the appeal court or directly to the Court of Cassation (High Court) for violation of the law, against the decision which has determined or rejected a security measure.

47. The request should be examined within ten days from its filing. Such a short deadline aims at disciplining the solution within an optimal time of the appeal and the maximum limitation of the time of pre-trial detention when this is not reasoned and based on law.

48. The court examining the appeal decides, as the case may be, to confirm, change or reject the decision determining the security measure. When the decision is not proclaimed within the ten-day deadline, the decision providing for the security measure looses its effects.

49. The Code of Criminal Procedure determines the time deadlines for pre-trial detention at each stage of the proceedings. On basis of Article 263, at the stage of preliminary investigations pre-trial detention looses its effects after three months when proceedings are for criminal contravention, after six months when proceedings are for crimes that are sentenced at maximum for not less than 10 years imprisonment and 12 months when proceedings are for crimes that are sentenced with at least 10 years or life imprisonment.

50. At the stage of trial at first level court, pre-trial detention cannot last for more than two months when proceedings are for criminal contravention, nine months when proceedings are for crimes that are sentenced at maximum for not less than 10 years imprisonment and twelve months when proceedings are for crimes that are sentenced for a minimum of 10 years or life imprisonment.

51. At the stage of trial at appeal courts, the pre-trial detention deadlines are two months when proceedings are for criminal contravention, six months when proceedings are for crimes that are sentenced at maximum for not less than 10 years imprisonment and nine months when proceedings are for crimes that are sentenced for a minimum of 10 years or life imprisonment.

52. Total time of pre-trial detention for all stages of proceedings cannot be longer than ten months when proceedings are for criminal contravention, two years when proceedings are for crimes that are sentenced at maximum for not less than 10 years imprisonment and three years when proceedings are for crimes that are sentenced for a minimum of 10 years or life imprisonment.

53. In order that the length of pre-trial detention be controlled by the court, Article 149 of the Code of Criminal Procedure provides that after six months from the application of the decision for detention, the defendant and his defence lawyer can appeal to the High Court, which decides on the appeal within fifteen days from receiving the documents. Similarly, on basis of Article 260 of the Code of Criminal Procedure, the defendant is entitled to request at any time the revocation or substitution of the security measure with an easier one. The request is considered by the court within five days from its filing.

54. For ensuring the periodical control by the court of the security measure, Article 246, item 6 provides: "Every two months from the application of the arrest decision, the court should be informed by the prosecutor on the arrest. When necessary, the court may revoke or change the security measure".

F. Right for eventual compensation

55. Albanian criminal legislation regulates in details the right to compensation of an individual, who has been unjustly imprisoned, thus complying with Article 5.5 of the European Convention of Human Rights. On basis of Article 268 of the Code of Criminal Procedure, an individual, acquitted by a final decision or, who had his case dismissed by the court or prosecutor, has the right to compensation with regard to his pre-trial detention. The same right is enjoyed by an individual held in pre-trial detention as a security measure, if a final decision finds that the decision ordering the security measure was issued in absence of the conditions and criteria determined by law.

56. According to Article 269 of the Code of Criminal Procedure, the request for compensation should be made within three years from the date in which the acquittal or the dismissal of the case became final. The same Article provides for the amount of compensation and the manner of its calculation to be determined by a separate law, but although it is six years since the Code was approved, the law has not been drafted. The courts have accepted compensation requests, and they have relied on Article 34 of the Criminal Code regarding the amount of compensation, providing that if the fine is not paid within the determined deadline, the court decides to substitute the fine with imprisonment calculating five thousand Lek for one day of imprisonment. They have decided to compensate one day in prison with five thousand Lek.

57. Articles 58 to 68 of the Code of Criminal Procedure provide for the right to compensation of damage for the victim of the criminal offence and the rules to implement that right. "The person who has suffered material damage from the criminal offence, or his heirs, may start civil action within the criminal action against the accused in the criminal case or the defendant in a civil case, to request the return of the property and compensation for damage" (Article 61 of the Code). At the request of the civil claimant, the procedural body may decide to sequester the property of the accused or civil case defendant to ensure the return of property and compensation for damage.

58. Law 8510 dated 15.07.1999 "On tort liability of state administration bodies" accepts that state administration bodies are liable for property and non-property damage caused to private, local or foreign, physical or juridical persons. Regarding non-property damage, Article 12 of this law clarifies that "in cases when the damage is related to interference with peaceful enjoyment of physical integrity, health, liberty or personality, the compensation is made in money, by considering the role of the damaged person in the damage caused. Procedures for seeking and obtaining compensation are carried out in conformity with the provisions of the Code of Administrative Procedures. The decision of the state administration body on recognizing liability in causing the damage, payment of the relevant compensation, and its amount, constitute an executive title, therefore are enforced by the bailiffs office.

III. ARTICLE 6 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

59. Article 6 of the European Convention of Human Rights proclaims the right of citizens to a fair and public hearing within a reasonable time by an independent, and impartial court established by law.

60. Albanian legislation is in full conformity with the provisions of Article 6 of the European Convention of Human Rights. Article 42 of the Constitution reads:

> *"Everyone has the right to a fair and public trial within a reasonable period of time by an independent and impartial court established by law".*

A. Independent Court

61. In conformity with the requirements of Article 6 of the Convention on courts established by law, Article 133 of the Constitution sanctions that *"judicial power is exercised by the High Court as well as courts of appeal and courts of first level which are established by law. The Parliament can establish by law courts for specific fields but in no case extraordinary courts".*

62. Judges of the High Court are appointed by the President of the Republic with the consent of Parliament, whereas the other judges are appointed by the President of the Republic on proposal by the High Council of justice. The term of office of judges is not limited, whereas for the judges of the High Court it is 9 years, not renewable.

63. The judges of the High Court can only be criminally prosecuted after the consent of Parliament, whereas other judges after the consent of the High Council of Justice. Although there are remarks against the manner of appointing judges and against the term of office and manner of dismissal of judges of the High Court, it is generally accepted that the constitutional rules on the career of judges provide sufficient safeguards to strengthen the independence of the judiciary in relation to other powers and to each judge on deciding concrete cases.

64. Abiding to the important requirement of the Convention on the independence of the court, the Albanian Constitution in its Article 145 sanctions:

> *"Judges are independent and subordinate only to the Constitution and laws. Interference with the activity of the courts or judges entails responsibility according to the law.".*

65. Independence of the courts relies on the constitutional principle of the separation and independence of powers. Without ensuring a judiciary fully independent and separated from the other powers, one cannot speak of independence of the court, of fair and independent trial of concrete cases. It is a fact that in practice it happens that the independence of the courts is encroached upon exactly by the marring of these relationships, by the interference of other powers

and of political parties with the activity of the courts. The interference of politics has brought about the situation that some judges are considered as belonging to one party or the other and as a result they feel obliged towards those who hold the reins of their career. Although these interferences are no be publicly stated and accepted, public opinion and the media highlights and comments on them time and again.

66. An important safeguard serving the independence of the judges is the constitutional standard (Article 138 of the Constitution) according to which:

> *"the term of office of judges cannot be limited, their salary and other benefits cannot be lowered"*

But as an exception from this general rule, Article 136.3 provides *that "the Chairman and the judges of the High Court remain in office for 9 years without the right to be reappointed"*. Therefore, although they are judges, their term of office is limited. This solution does not comply with the standards and may have a negative influence on the quality of the High court, which is required to say the last word on the resolution of concrete cases and unify judicial practice.

67. The constitutional standard on the independence of the court is detailed and made concrete in specific laws, which recognise the optimal democratic standards guaranteeing that independence. Law No. 8436 of 28.12.1998 "On the organisation and functioning of the judiciary in the Republic of Albania" and Law No. 8235 of 28.08.1997 "On the High Council of Justice" set the rules for the career of judges, the conditions to become a judge, the manner of their appointment, transfer and dismissal, as well as the right to complain to the High Court. As a rule, judges are appointed after having graduated the School of Magistrates, which prepares independent judges, who obtain the right to study at the School through a rigorous competition and good professional education, without any need for political support.

68. The independence of the court does not exempt judges from respecting the law, therefore they are subordinate to the law. Even when the judge is of the opinion that the law is not based on the Constitution, he does not have the right to act against that law, but is obliged to send the case to the constitutional court. Article 145 of the Constitution says:

> *"When judges find that laws run against the Constitution, they do not apply them. In such a case they suspend the trial and send the case to the Constitutional Court. The decisions of the Constitutional Court are compulsory for all courts".*

69. The court does not loose its independence when it implements the tasks determined by a higher court on a concrete case or when it abides by legal interpretations made by the High Court.

B. Impartial Court

70. In conformity with Article 6.1 of the Convention, Albanian civil and criminal legislation has determined concrete rules to ensure the impartiality of the court in resolving concrete cases, by excluding from trial those judges who have a prejudice or have an interest in the resolution of the case. Thus, articles 15 to 17 of the Code of Criminal Procedure and Article 72 of the Code of Civil Procedure determine the reasons for exempting a judge from trial, such as: relation of blood or in-law with those being tried, property interests or any other interest on the manner of the resolution of the case, giving of advise or expression of opinion on the case in trial, participation in any of the stages of proceedings, as well as any other reason indicating a biased attitude.

71. By confirming the constitutional principle on the impartiality of the court, the Albanian Constitutional Court, in its decision 48, dated 30.07.1999, accepted the request to invalidate as

anti-constitutional decision 1391, dated 02.12.1998 of the Joint Colleges of the High Court, because two judges of that court, who were members of the High Council of Justice, had voted on the dismissal of a judge. The Constitutional Court decision says in its reasoning: "it is a sufficient reason and at the same a lesser safeguard for the claimant, who has well-based doubt that the court was not impartial in considering this case . . . Failure to respect the constitutional principle on the impartiality of the court, sanctioned in Article 42 of the Constitution and in Article 6 of the European Convention on Human Rights, constitutes an interference with the due process of law and as a consequence brings about the invalidation of the Joint Colleges decision as anti-constitutional".

72. It is a fact that in Albania there isn't a good opinion on the impartiality of judges and it is generally accepted that there is corruption in the courts, even to a greater degree than in the other sectors. Administrative measures have been adopted against corrupt judges, nut it should be accepted that the fight against this dangerous phenomena has not been consequent and effective. The Criminal Code contains two provisions, which aimed at hitting corruption in courts and prosecution offices, namely delivery of an unjust decision (Article 315) and request or acceptance of compensation by a judge, prosecutor or arbiter assigned to a case (Article 319). But these provisions have not been applied, because the corrupt individuals have been protected in various ways and forms by those whose task is to develop proceedings against them.

C. Public Hearing

73. Albanian legislation has recognised and made concrete the requirement of Article 6 of the Convention on **holding the trial public**. Article 339 of the Code of Criminal Procedure reads that the judicial session is public, otherwise it is invalid. The same principle is sanctioned in Article 26 of the Code of Civil Procedure. Article 340 and Article 173 of the Codes respectively provide for the cases when a trial in camera is allowed, namely:

    a) when the publicity may damage public morals or may bring about the propagation of data that have to be kept secret in the interest of the state, if this is requested by the competent body;

    b) when commercial secrets and inventions are mentioned, the publication of which would affect interests protected by law;

    c) when it is necessary to protect the security of witnesses or defendants;

    d) when it is considered necessary for the questioning of minors;

    e) when the regular development of the session is disturbed by acts from the public.

74. These criteria are recognised and are applied generally right. But the actual condition of the buildings of first level courts does not provide the necessary conditions for a solemn and public trial. There are few halls appropriate for trials and because of this trials often take place in the offices of judges, in which there is space only for judges and the parties. Therefore in fact the trial takes place in camera although it declared open to the public.

D. Reasonable Time

75. Article 6 of the Convention requires the trial to take place within a reasonable time. This definition is an objective standard, but the European Court of Human Rights has determined certain criteria in order to assess if this standard has been respected, which are: complexity of the case, the manner of handling the case, aspects of the behaviour of the plaintiff which may have influenced

some delay, as well as the specific circumstances which may have justified the prolongation of procedures. The Strasbourg Court has rejected the Government arguments according to which insufficient staff or general administrative deficiencies are sufficient grounds for failing to respect the "reasonable time" standard. (*De Cubber vs. Belgium*, 1984).

76. Albanian legislation does not determine deadlines for the completion of a trial, both in civil and penal cases. But both Codes determine deadlines and specific rules for the start and continuation of the trial.

77. From the Code of Civil Procedure we can quote:
    - Article 155, which sets a deadline of 10 days for appearance in court following the notification of claims;
    - Article 170, which obliges the judge to undertake certain preparatory actions in order for the case to be tried fast;
    - Article 181, which obliges the court to organise the work in such a manner that the trial be completed by the same judicial body (group of judges);
    - Articles 435, 443 and 472 which set deadlines for appeals to the court of appeal and High Court against arbitration awards, etc..

78. From the Code of Criminal Procedure we can quote:
    - Article 333, which obliges the court to call the judicial session within 10 days from the filing of the request by the prosecutor;
    - Article 342 on the uninterrupted trial, which determines that if the judicial session cannot be completed in a single day, the court can decide to continue on the following working day. The court can interrupt the judicial examination only for special reasons for up to 15 days;;
    - Articles 402 and 406 on direct and summary trial;
    - Article 415, which determines the deadlines for appeals against the decision of the court;
    - Article 419, which sets the deadline of 10 days for sending the file to the court that will examine the appeal.

79. The respect of these deadlines and those of investigations guarantees the implementation of the requirement of Article 6 of the Convention for a trial take place within a reasonable time.

E. Equality of Arms

80. Article 6 of the Convention contains principles which are not worded, but which are important for its just application. Such is the principle of the equality of parties, which constitute an indispensable condition to provide justice. On basis of this principle, each of the parties should have equal opportunities to present the case and none of them should enjoy an advantage against the adversary. The European Court has highlighted this principle in *Numeister vs. Austria* (1968).

81. In conformity with this principle, both parties have the right to have information on the facts and arguments of the opposite party and each party should have an equal opportunity to respond to the other party. This rule is sanctioned also in Article 19 of the Code of Civil Procedure, according to which *"Parties should make known to each other at the appropriate time, the means and facts on which they base their claims, the evidence they shall submit and the legal provisions to which they shall refer, in order to make it possible for each party to protect their interests in trial"*. Articles 155 and 156 of the Code determine the rules for the notification of the claim and of the documents attached to it, as well as the necessary time allowed to the defendant to get acquainted with the documents and to prepare for the trial of the case. The same is required in Articles 39 and 308 of the Code of Criminal Procedure, obliging the prosecutor to notify the defendant on the charges and to allow the latter time to prepare.

82. The right to be informed is also envisaged in the Code of Administrative Procedures. Its Article 20 reads: *"All participants in an administrative procedure are entitled to receive information and to get acquainted with the documents used in the procedure ..."*

83. There are come decisions of the Strasbourg Court in which it has found that this principle has been violated in cases where courts have based their decision on evidence completely unknown to the defendant (*Brandshetter vs. Austria*, 1991), when the party does not have access to the file (*Kerojarvi vs. Finland*, 1995), when one party was not duly notified on the dates of the hearings against it (*Vahcer vs. France*, 1997), etc.

84. The court is responsible for the full application of the principle of equality of parties in each case, rigorously abiding by the known rule of "equality of arms". This is highlighted in Article 20 of the Code of Civil Procedure which reads "the court shall apply and request to be applied the principle of adversarity. Its decision is based only on means, explanations, documents and other evidence told or brought by the parties when the latter have been in a position to debate according to the principle of adversarity".

85. Albanian legislation is in full compliance with the requirements of Article 6 of the European Convention of Human Rights in relation to the rights of the defendant and the public trial of criminal cases by an independent, impartial court established by law.

86. Similarly to the Constitutional Provisions of 1993, the Constitution of 1998 recognises the democratic standards on the rights of the defendant. Article 8 of the Constitutional Provisions and Article 31 of the Constitution determine the main rights of the individual under criminal proceedings. They provide that during a criminal process, everyone has the right:

    i. to be notified promptly and in detail on the charges against him, on his rights as well as to be given the possibility to inform his family or relatives;
    ii. to have sufficient time and facilities to prepare his defence;
    iii. to have the free assistance of a translator, when he does not speak or understand the Albanian language;
    iv. to defend himself or with the assistance of a legal defendant of his choice, to communicate freely and in private with him as well as to be provided free defence when he has insufficient means;
    v. to question the witnesses present and to request for witnesses, experts and other persons who may clarify the facts to appear.

87. These constitutional standards are detailed and made concrete in the Code of Criminal Procedure.

88. In order for the defendant to have sufficient time to prepare his defence, Article 308 of the Code envisages that the invitation to appear sent to the defendant by the prosecutor should contain a presentation of the fact which results from the investigation conducted until that moment in time and that it should be notified to the defendant at least three days before the date set for appearance.

89. A discussion has emerged in the practice of criminal proceedings in Albania on whether the prosecutor has the right to order the compulsory escort of the defendant who does not wish to appear for questioning. It is generally accepted that he does not enjoy such a right, except for the case when the presence of the defendant, as provided in Article 353 of the Code, is indispensable for taking an evidence, but not for his questioning. Therefore the defendant may be obliged to appear at the prosecuting body when it is necessary to examine his body, in order to be seen by witnesses, etc. but not to be questioned, because it is known that he has the right not to answer.

F. Notification of Charges in Criminal Cases

90. Articles 34 through to 39 of the code determine the rules for the notification of charges and questioning of the defendant. According to these articles, the person attributed with a criminal offence becomes a defendant through the act of notification of the charges, which indicates the sufficient data against him. These data in their entirety, should have been obtained on basis of the requirements of the law and should be such as to indicate in their entirety a reasonable basis for instituting the charges, to indicate that a criminal offence has been committed and that the person charges is its author.

91. Albanian legislation has accepted the known rule according to which data obtained in contravention to the law are not valid. Article 32 of the Constitution sanctions that "No one can be declared guilty on basis of data obtained in an unlawful manner", whereas Article 151 of the Code of Criminal Procedure reads that evidence obtained in violation of prohibitions provided by the law cannot be used.

92. The document containing the charges should be communicated to the person accused and to his defence lawyer. If the person to be charged is in detention, the notification is made in the place of isolation, whereas if he is free action is taken in conformity with the rules determined on the notification of procedural acts. If the person charged hides from investigations or flees, then the decision on not finding him is made and the notification is made by handing it over to his defence lawyer. In case he has no defence, one is appointed by the court to represent the defendant. In this manner the defendant is provided with a real possibility to be informed of the charge and to be defended.

93. The defendant is questioned by the prosecutor or the officer of judicial police authorised by him. The person questioning is obliged to explain to the defendant in a clear and accurate way the fact attributed to the latter, informs him on the evidence available against him and their source. Before the questioning starts it is made clear to the defendant that he has the right not to answer and that his statement cannot be used as evidence. The defendant is questioned as a free man, even when he is in pre-trial detention, and methods or techniques to affect his free will or to change his capability of memorising or of assessing facts cannot be used against him.

94. During preliminary investigations, the prosecutor is obliged to notify the defendant to be present together with his defence when searches or sequesters shall be performed (Article 310) of the Code.

G. Free Assistance for Interpretation

95. On basis of Article 31 of the Constitution, the defendant that does not speak or understand the Albanian language is provided the free assistance of a translator. This right, related to Article 6 of the Convention is recognised by Article 8 of the Code of Criminal Procedure, which reads that persons who do not speak or understand Albanian use their own language and have the right to speak and be acquainted with the evidence and documents as well as with the development of proceedings through a translator.

96. The proceeding body is obliged to assess the mental condition of the defendant and decides to perform a medical examination when it finds that he is not able to consciously participate in the proceedings.

97. Of particular importance is the rule envisaged in Article 278 of the Code of Criminal Procedure according to which the defendant can complain to the court if his rights provided by law are

denied during preliminary investigations. This provision constitutes a significant safeguard for the protection of the defendant from unlawful acts of judicial police or the prosecutor and for setting right any violations from the moment they are made and for the prevention of unjust proceedings.

98. At the beginning of the judicial examination, the presiding judge should notify the defendant on his right to make the statements that he considers appropriate as well as the possibility given to him to request evidence and to participate in their examination.

99. The defendant has the right to request a summary trial, based on documents drafted during investigation and brought for trial by the prosecutor. When the court accepts his request and declares him guilty, the prison sentence is reduced by one third, whereas life imprisonment is substituted with 25 years imprisonment (Articles 403 through to 406 of the Code of Criminal Procedure).

H. Trial in Absentia

100. The Constitution and procedural criminal legislation recognise the possibility of trial in absentia, considering this as a choice made by the defendant himself. On basis of Article 33 of the Constitution, anyone has the right to be heard before trial, but those individuals who flee from justice cannot benefit of this right.

101. This constitutional standard is made concrete in the Code of Criminal Procedure, which indicates the actions, to be taken when the defendant does not appear or goes away from trial. According to Article 351, when the defendant does not appear in hearing without reasonable grounds, the court declares his absence and his defence represents him. But the decision declaring the absence is invalid when it is proven that it was due to not receiving notification or from an absolute impossibility to appear. If the defendant declared absent appears later in the hearing, the court revokes the decision declaring the absence and when the defendant proves that notification was made late, but not due to his responsibility, the court orders the undertaking or repetition of actions which it considers that are of importance on making a decision.

102. When the defendant requests of gives his consent that the judicial investigation be made in his absence, or when he is in detention refuse to participate, the trial proceeds in his absence on condition that he is represented by his defence. The same course of action is followed when the defendant hides or, after appearing, leaves the courtroom at his own will. (Article 352).

103. The defendant that has been tried in absentia has the right to be acquainted with the judicial decision pronounced against him and appeal himself or authorise his defence for this. The Court of Cassation wrongly interpreted this just rule, defined in Article 410 of the Code of Criminal Procedure, by giving the possibility to the defence lawyer to appeal even without a power of attorney issued by the defendant. Thus it happened that the case was examined in the appeal level and the decision became final, although the defendant was not aware of the decision and the grounds of appeal. This wrong interpretation was recently corrected by the High Court and presently the judicial practice is in conformity with the law.

104. The full and accurate regulation by law of the cases when trial in absentia is allowed and of the manners of trial in absentia has ensured the implementation in practice of the rights of the defendant and has had a positive influence on the efficiency of the fight against crime.

105. An important constitutional and procedural principle is that of the presumption of innocence. In compliance with Article 6.2 of the Convention, Article 30 of the Constitution reads "anyone is considered innocent until his guilt is proved by a final decision of the court". Article 4 of the Code

of Criminal Procedure formulates this principle as follows: "The defendant is presumed innocent until his guilt is proved by a final decision of the court. Any doubt on the accusing party is considered in favour of the defendant".

106. The just understanding and application in practice of the principle of presumption of innocence is the main safeguard for the protection of the rights of the defendant, because this principle obliges the accusing party to prove the guilt of the defendant and releases the latter from the burden to prove his innocence, giving him the right to choose the most appropriate defence for him, to make or refrain from making statements, to look for evidence and to take active part in their examination by requesting that suspicious evidence be interpreted in his favour.

I. Assistance by a Lawyer

107. The defendant has the right to be assisted by his defence chosen by him or appointed by the proceeding body. He can choose to have two defence lawyers. The defendant that has not chosen a defence lawyer or has remained without one is assisted by a defence lawyer appointed by the body initiating the proceedings, if this is requested. When the defendant is under the age of 18 or with mental or physical disabilities that prevent him from defending himself, the assistance by a defence lawyer is obligatory. Article 49 of the Code provides that if the defendant does not have sufficient means, the expenses incurred for the defence are paid by the state.

108. On basis of Article 50 of the Code of Criminal Procedure, the defence has the right to communicate freely and in private with the defendant in pre-trial detention, to be preliminary informed on the performance of investigative actions where the defendant is present and to participate in the, to ask questions to the defendant, witnesses and experts, to get to know the entire file at the end of investigations. The person arrested in the act or the detainee has the right to talk to his defence immediately after his arrest or detention.

109. Procedural law prohibits the tapping of conversations or communications of the defence lawyer or his assistants, neither between themselves nor between them and the persons they defend, as well as the control of correspondence between the defendant and his defence (Article 52.4 and 52.5). Inspection, control and sequesters in the office of the defence can be made by a decision of the judge only in cases envisaged by Article 52 of the Code of Criminal Procedure.

110. Juvenile defendants are provided with legal and psychological assistance in the presence of the parent or other persons requested by the juvenile and accepted by the proceeding authority. As an exception form this rule, the performance of procedural action without the presence of these persons can be made only when this is in the interest of the juvenile or when the delay may seriously damage proceedings but always in the presence of the defence lawyer.

J. Right to Appeal

111. Protocol No. 7 of 22.11.1984 complements Article 6 of the Convention. Article 2 of that Protocol proclaims the right of every person declared guilty by the court to appeal to a higher court, according to rules established by law.

112. In conformity with this requirement of the Convention, the Code of Criminal Procedures makes a full and accurate regulation on the right to appeal. Under Title VIII "Appeal" (Articles 407 through to 421) the Code sets forth in details the right to appeal, the instances and manners of appeal, the form and filing of the appeal, the deadlines and the manner of notifying the appeal, etc.

113. On basis of Article 407 the possibilities of appeal are: appeal, recourse to the High Court and request for review. Appeal to the court of appeal may be made against any decision of the first level courts. The deadline for filing an appeal is ten days, starting from the day following the proclamation or notification of the decision. Recourse to the High Court is made only against final decisions, as well as against first level court decisions which affect personal freedoms, jurisdiction and competence. Recourse can be made only on grounds of violation or non-application of the law, provided by Article 432 of the code of Criminal Procedure. It should be filed within 30 days from the day the decision becomes final.

114. In compliance with Articles 3 and 4 of Protocol No. 7, the Code of Criminal Procedure recognises the right of review of final decisions, and regulates it in Articles 449 through to 461. On basis of Article 450 review may be requested in the following cases:

i. when the facts constituting the foundation of the decision do not comply with those of another final decision;
ii. when the decision is based on a decision of a civil court, subsequently reversed;
iii. when after the decision new evidence has emerged or been discovered, which on their own on jointly with those already examined, indicate that the decision is wrong;
iv. when it is certified that the decision is rendered as a result of falsifying documents of trial or of another fact determined by law as a criminal offence.

115. On basis of Article 459 the person acquitted following the review of the decision of the court has the right to compensation proportionate to the duration of the conviction and to the personal and family consequences ensuing from the conviction. The person who wilfully or due to serious negligence has caused the judicial mistake does not benefit of this right. The right to compensation belongs also to heirs of the person convicted, who has died before or during the review.

116. Article 7 of the Code of Criminal Procedure reflects clearly the requirement of Article 4 of protocol No.7 on the prohibition of a second trial for the same offence. Article 4 of the Code reads: "No one can be tried again for the same criminal offence on which he has already been convicted by a final decision, except in cases when the competent court has decided on the re-trial of the case".

IV. ARTICLE 7 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

117. Albanian legislation is in full compliance with the rules determined in Article 7 of the European Convention of Human Rights, according to which no one can be tried for an act or omission which at the time of happening did not constitute a violation of the law according to national or international law. On basis of Article 29 of the Constitution no one can be accused and declared guilty for a criminal offence which was not considered as such by law at the time it was committed, therefore criminal legislation cannot have retroactive effects. Similarly Article 2 of the Criminal Code provides that no one can be criminally convicted for an offence that earlier was not expressly determined by law as a crime or contravention. An exemption from this rule is made for criminal offences, which at the time they were committed constituted war crimes or crimes against humanity according to international law, in the meaning of the second paragraph of Article 7 of the Convention.

118. Albanian criminal codes after World War II did not contain provisions on crimes against humanity. Only in 1995, when the new Criminal Code was ratified, its Article 74 sanctioned provisions on crimes against humanity, which considers as such crimes murders, exterminations, conversion to slavery, internments and banishments, as well as any kind of torture or other inhuman violence committed for political, ideological, racial, ethnic and religious motives.

119. In 1995 Article 74 of the Criminal Code was applied with retroactive effects against senior officials of the communist regime on the grounds that the criminal offence on which they were charged constituted crimes against humanity according to "the general principles of law recognised by civilised nations", as provided in Article 7 of the Convention. Similarly it was accepted that criminal prosecution for these crimes is not time-barred, just as for other crimes against the state.

120. Law No. 8001 of 22.09.1995 "On genocide and crimes against humanity committed in Albania during the communist rule for political, ideological and religious motives" dictated this attitude. Article 1 of that law reads: "The prosecution bodies, in conformity with criminal and procedural provisions are charged to start immediately and with priority the investigation of the activity related to the crimes against humanity committed in Albania during the communist rule for political, ideological and religious motives".

121. Some of the leaders of the communist regime were prosecuted on this basis, who had lead the work on drafting legislation on administrative internment and banishments as well as with the concrete determination of those measures. They were accused of genocide and crimes against humanity. The Court of Tirana, in its decision no. 414 of 24.05.1996 declared guilty for crimes against humanity and awarded heavy sentences, three death penalties and two life imprisonments. The court of appeal as well in its decision no.526 of 24.07.1996 confirmed the charges but soften the sentences given by the first level court for all defendants.

122. The Court of Cassation examined the case in joint colleges and in its decision no. 344 of 29.09.199 decided to dismiss the case on the grounds that internments and banishments did not constitute a crime, because they were performed on basis of the laws of the time and that law 74 of the Criminal Code of 1995, related to internments and banishments "exceeds the content of crimes against humanity determined by the Nuremberg court and reiterated in UN resolutions No. 3 of 13 February 1946 and No. 95 of 11 December 1946".

123. In Albania there are no persons convicted in application of Article 7.2 of the Convention on the trial and punishment of a person guilty for an act which was not determined as a crime at the time it has occurred, but which is considered criminal according to the general principles of law, recognised by civilised nations.

124. In conformity with contemporary legislation, Article 3 of the Criminal Code recognises the known rule according to which a new law, which decriminalises a criminal offence, has retroactive effects, therefore is applied also for criminal offences that occurred prior to the coming into effect of the new law. For this reason, according to this Article, if a person was convicted in conformity with the old law, the execution of the sentence cannot start and if it has started it is dismissed.

125. Article 3 of the Criminal Code determines the manner of action when the new law differs from the previous one. Paragraph three of the Article provides that if the law of the time when the criminal act was committed and the later law are different, the law is applied whose provisions are more favourable for the person who has committed the criminal offence. In this meaning finds application also the rule provided in Article 7 of the Convention according to which "a heavier sentence than that provided by law at the moment the violation is committed cannot be given".

126. Article 8 of the European Convention of Human Rights provides for the right to respect for a person's home and correspondence, as well as the cases of interference of public authorities with the exercise of these rights. In full conformity with this important standard, the Constitution and the Code of Criminal Procedure determine detailed rules for the recognition of these rights and the instances of their limitation.

127. Article 37 of the Constitution provides: "The inviolability of the home is guaranteed. Searches of the home, as well as of premises identified with it may be made only in the instances and manners described by law". In cases of criminal proceedings it is provided that when there are reasonable grounds to think that someone hides material evidence or things belonging to a criminal offence, the court decides on the search of the place or home. In case the person is caught in the act or is being chased while fleeing, which do not allow for the issuance of a search order, the officers of judicial police perform the search of the home, respecting all the rules specifically described in the Code (Articles 202 and 198 of the Code of Criminal Procedure).

128. Article 36 of the Constitution sanctions: "The freedom and confidentiality of correspondence or of any other means of communication are guaranteed". The limitation of this right in cases of criminal proceedings is described in Article 209 of the Code of Criminal Procedure, which provides: "When the court has reasonable grounds to believe that in post or telegraph offices there are letters, envelopes, packages, telegrams or other objects of correspondence sent by the defendant or addressed to him, even under another name or through another person, it decides their sequester". In urgent cases, officers of judicial police may suspend the sending of these objects, by informing immediately the prosecutor.

129. Another important step for the compliance of Albanian criminal legislation with the European Convention of Human Rights and specifically with its Article 2 and Protocol No. 6 of 24.04.1983 was the abolition of death penalty which was made possible by the Constitutional Court in conformity with the content and spirit of the new Constitution (Decision No. 65 of 10.12.1999 of the Constitutional Court).

130. As a conclusion it can be said that the adoption of the standards of the European Convention of Human Rights by the Albanian legislation was made in studied and gradual manner, enabling the public and the bodies of criminal and civil proceedings to know and apply them. During 1991 work concentrated mainly on repealing provisions which were not in compliance with contemporary justice, whereas since 1992 there has been a systematic absorption of international standards by making changes and amendments to the previous legislation, until the drafting and ratification of new codes and other laws was achieved.

131. This process is in continuous development and presently the task of further improvements to the Criminal and Civil Codes is on the table.

CHAPTER 5

THE APPROXIMATION OF ALBANIAN CIVIL LEGISLATION WITH ARTICLE 6 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

BY ILIR PANDA

I. PRELIMINARY AND HISTORICAL REMARKS

1. The approximation of the Albanian legislation with international conventions and the universally recognized standards has been and remains a process that develops gradually. This process has been universal and radical because the democratic state inherited a backward legislation from the past that needed to be redone.

2. The legislation in force in Albania until the early '90-s, was based on the totalitarian regime principles, ignoring international conventions and standards universally recognized by democratic states.

3. According to the 1976 Constitution, the civil legislation denied the right of private property as well as the principles governing the market economy. According to Article 1 of the 1981 Civil Code "The civil juridical relations rely on the socialist property and on the socialist system of economy". The private property, considered as personal property, was limited to the income by work and other necessary restricted items for personal and familiar needs. Only the premises were considered real estate. According to Article 6 of the above-mentioned Code, it was forbidden by law to make concessions, to take loans and to create any foreign economical and financial company.

4. Same principles regulated also the consideration of civil cases. Article 4 of the 1981 Civil Procedure Code sanctioned the principle according to which: "The civil procedural legislation reflects the principle of class struggle in the field of civil relations" (!) whereas Article 2 of this Code stressed that "the civil procedural legislation has the obligation to protect the socialist state, the Party of Labour of Albania as the only political leader of the state and society..." According to Article 43, the decision of the court should reflect "the social and political appraisal of the civil dispute" (!). Since 1967, parties in a civil case were denied the right to be represented by a lawyer.

5. In the early '90-s, the legislation in force became inadmissible. It was necessary to radically transform it into a more reconcilable legislation with the European Convention on Human Rights and the international standards of civil process. This transformation was not an easy thing to do. The existing Codes needed to be repealed, new Codes had to be drafted, in compliance with the international standards, which called for time and assistance. For this purpose, with the precious help of the Council of Europe, the very first measures taken consisted in repealing the antidemocratic standards and principles, as well as improving special provisions, which came into conflict with the new conditions.

6. Law no. 7537, dated 17.12.1991, abrogated the principle of the "implementation of class struggle principle and leadership of the party in power". The court was no longer obliged to make a political assessment of a civil dispute, the trial of some special categories of cases by a

single judge was authorised, provisions on the execution of civil court decisions in order to favour the market economy were improved.

7. Law no. 7574, dated 24.06.1992, sanctioned important changes on the organization of the judiciary and in the Codes of Civil and Criminal Procedure. Several Courts of Appeal were set up following western models, as well as the High Court, with defined competencies and rules for a fair trial. The High Council of Justice became the only organ with the authority to designate and remove from duty judges and prosecutors, who were given immunity from penal prosecution.

8. Although these changes, including those made to other Codes, substantially improved the situation in the judiciary, they were not sufficient to ensure its normal functioning. With the valuable assistance of the Council of Europe, intensive work was carried out to draft new Codes such as the Civil Code, Code of Civil Procedure, Penal Code, Code of Penal Procedure, which marked an important step for the approximation and the harmonization of Albanian Legislation with international conventions and especially with the European Convention on Human Rights.

II. ACTUAL SITUATION

A. Constitution and Code of Civil Procedure

9. Law no. 8116, dated 29.03.1996 approved the Code of Civil Procedure, which confirmed the main principles of the civil process and determined the rules of judgment for civil disputes at all levels.

10. The new Constitution was approved in 1998. It laid the foundations of rule of law and proclaimed the human rights and freedoms. It is understandable that the new Albanian legislation would contain, as it indeed does, the judiciary with all its constituent elements, as one of the powers. The place occupied by the judiciary in the Republic of Albania is determined in Article 7 of the Constitution, according to which "The system of government in the Republic of Albania is based on the separation and balance of the legislative, executive and judicial powers". Whereas part nine of the Constitution, which contains Articles 135 to 147, provides a description of the judiciary. Article 135, paragraph 1, sets forth "The judicial power is exercised by the High Court as well as by the courts of appeal and courts of first instance, which are established by law". This part of the Constitution, among other things, determines the position of the High Court, the manner of appointing its members and its Chairman, their immunity, term of office of nine years, manner of terminating their mandate and their removal, as well as the jurisdiction of the High Court.

11. The position of the High Court, as well as that of other courts is determined also by Law No. 8434 of 28.12.1998 "On the organisation of Judicial Power in the Republic of Albania". This law determines the High Court as the highest judicial authority. Article 1 of this Law says: *"Judicial power is exercised only by courts, in conformity with the Constitution and the competences assigned by law"*, whereas Article 5 says: *"The judicial system consists of first instance courts, courts of appeals and the High Court"*. Article 2 of the same law determines that the courts have authority to examine all criminal, military, civil, administrative cases as well as any other case determined by law.

12. Law No.8588, dated 15.03.2000, "On the organisation and functioning of the High Court", regulates in a more detailed manner the organisation and functioning of that court, the status of the High Court judge and the administration of services in that court.

13. Article 41 of the Constitution sets forth: *"The High Court has original and review jurisdiction. It has original jurisdiction when adjudicating criminal charges against the President of the Republic, the Prime Minister, members of the Council of Ministers, deputies, judges of the High court and judges of the Constitutional Court."* Review jurisdiction of the High Court is set forth in the Codes of Civil and Criminal Procedure. The Code of Civil Procedure, in its Article 472, says:

> *" The enunciated decisions of the Court of Appeal as well as those of first instance courts, in the cases determined in this Code, may be complained against by a recourse to the Court of Cassation (now the High Court) only when:*
>
> *a) a law has not been respected or has been wrongly applied;*
> *b) there are grave breaches of procedural standards (Article 467 of the Code of Civil Procedure);*
> *c) when decisive evidence requested by the parties before the trial has not been taken;*
> *d) the argumentation of the decision is obviously illogical;*
> *e) provisions on jurisdiction and competence have been breached."*

14. The Constitution and the Code of Civil Procedure reflect the requirements of Article 6 of the European Convention of Human Rights for a fair and public trial, within a reasonable time, by an independent and impartial court specified by law, which decides on rights and obligations of a civil nature.

15. Article 42 of the Constitution states: "Everyone, to protect his constitutional and legal rights, freedoms and interests or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law".

16. Article 6 of the ECHR determines the main elements regarding the good administration of justice. Any interference by the legislative body in the administration of justice, aiming at influencing the judicial determination of a dispute, is excluded by the notion of a fair trial, as enshrined in Article 6 of the Convention. In case of lack of legislation regarding the court activities, according to the Commission and the European Court, if a court refuses to consider the lawsuit by not accepting its jurisdiction, that will constitute a violation of the right of access to a court (*Terra Woningen vs. The Netherlands* (1996)).

17. Article 1 of the Albanian Code of Civil Procedure in accordance with the above mentioned concept, has accepted that "The Court cannot refuse to consider and make decisions on issues which are presented to it for consideration, on the ground of lack of law, it being incomplete, contradictory or unclear".

18. As for the notion "civil rights and obligations", The Commission and the European Court have concluded that, these concepts should be autonomous/independent, and that, it is not necessary to specify the difference between private law cases and those of public law, as well as limit their application in disputes between private contenders (*Ringeisen vs. Austria* (1971). Wherever the right is determined in the domestic legislation in the meaning of Article 6 of the Convention, the court will consider it as a civil right. The notion of civil right also includes the right to enjoy good reputation and honour (*Helmers vs. Sweden* (1991))

19. Article 6 of the Convention includes principles, which have not been worded, but are important for its right implementation. This goes for the principle of equality of parties, which constitutes an essential condition for justice. Based on this principle, each of the parties should enjoy equal opportunities to present the case and none of the parties should enjoy any advantage over the adversary (*Numeister vs. Austria* (1968))

20. According to this principle the parties have the right to get information on the evidence and the argumentation of the adversary. Each of the parties should have equal opportunities to respond to the other party. This is stipulated in Article 19 of the Code of Civil Procedure, as follows: "Parties must make known to each other in due time the means and the facts on which they base their claims, the evidence they shall present and the legal provisions they shall refer to, in order to make possible for each party's interests to be defended in trial". Article 155 and 156 of the Code determines the rule on the notification of the lawsuit and of the attached acts. These articles also determine the time frame ensured to the defendant to become acquainted with these acts and prepare for the trial of the case.

B. Administrative Procedures

21. The right to be informed is also stipulated in the Code of Administrative Procedure. Article 20 of the Code states: *"All parties involved in administrative procedures have the right to be notified and get information on the relevant documentation used in this procedure..."*.

22. Referring again to the Code of Administrative Procedure, its chapter II, known as "General Principles", Article 18 stipulates that:

> *"In order to defend the constitutional and juridical rights of legal persons, the administrative activity is subject to:*
> *a) Inner administrative control, in accordance with the provisions of this Code regarding the administrative complaint,*
> b) *Control exercised by courts in accordance with the provisions of the Code of Civil Procedure"*

23. The trial of administrative disputes is reflected in the Code of Civil Procedure, Title III regarding Special Trials, as well as in Articles 324-333 of Chapter II.

24. In conformity with the Code of Civil Procedure, special sections are set up for the trial of administrative disputes, commercial ones as well as related to juveniles and family disputes. The President of the Republic, on proposal by the Minister of Justice, determines the courts in which these sections shall be set up as well as the areas of their jurisdiction, on basis of joining of territorial jurisdiction of one or more district courts. The Minister of Justice determines the number of judges for each section and looks after their training for the relevant section. The judges adjudicating administrative cases are the usual judges of the district courts and the same rules apply to them just as for all other judges.

C. Independence and impartiality of judges

25. There are several decisions that the Court of Strasbourg concluded that: *"it constitutes a violation of the above mentioned principle, when courts base their decisions on evidence that the defendant was not aware of (Brandshetter vs. Austria, (1991)), or one of the parties was not given the evidence of the file (Kerojarvit vs. Finland, (1995)), as well as in cases that one of the parties was not duly notified on the dates of the process (Vahcer vs. France, (1997))"*.

26. The Court is responsible to ensure the implementation of the principle of equality in each and every process, rigorously respecting the well-known rule of equality of arms. This is stressed in Article 20 of the Civil Procedure Code that says: "The court must abide by the adversarial principle and must request that this principle be applied. It supports its decision only on the means, explanation, documents and other evidence shown or brought in a position to debate in conformity with the adversarial principle".

27. Article 6 of ECHR declares the right of citizen to be heard and judged by an independent and impartial court. In accordance with this principle, Article 145 of the Albanian Constitution sanctions that: *" Judges are independent and subject only to the law. Interference in the activity of the courts or the judges entails liability according to the law"*.

28. The constitutional principle of division and independence of powers ensures the independence of judiciary. A judiciary impartial and independent from other powers ensures independence of courts and free and fair trial. In practice, the independence of the judiciary is threatened by the interference in its activities by the other powers and political parties. Political interference in the judiciary has brought about situations in which some judges are considered to belong to one or another political party. This is the reason why these judges feel obliged to those that determine their careers. Although publicly the interference is not accepted or declared, the public opinion as well as media has evidenced and widely commented this phenomenon.

29. Albanian legislation is clear in relation to the party affiliation of judges. The Constitution in its Article 143, determines that "the office of a judge is not compatible with any other state, political or private activity". Whereas, Article 29 of the law "On the organisation of the judiciary in the Republic of Albania" says that "Judges are not allowed to take part in a political party or to participate in activities of political character".

30. In underlying this principle over the independence of the judiciary, the ECHR has stressed the fact that judges are not obliged to accept the interpretation of the law made by the executive power representative. In *Beaumartin vs. France* (1994) the Court considered a violation of Article 6 the case when a court asked the Minister of Foreign Affairs to make an interpretation of a treaty and refused the claim based on that interpretation. This happened as well in the case *Van de Hurk vs. the Netherlands* (1994) when the Strasbourg Court stressed the fact that: *"government authorities cannot refuse or neglect the execution of decisions taken by the courts of the judiciary system"*. Paragraph 2 of Article 142 of the Albanian Constitution states that: *"the organs of the state are obliged to execute judicial decisions"*.

31. The constitutional standard which stating *"The time a judge stays on duty cannot be limited; their pay and other benefits cannot be lowered"* (Article 138 of the Constitution) constitutes an important guarantee on the independence of judges. Paragraph 3 of Article 136 of the Constitution stipulating "The Chairman and the members of the High Court hold office for 9 years without the right of re-appointment", constitutes an exemption from the general rule. So, even if they are judges, the time of staying in their duty is limited. It seems that this could negatively influence the quality of the work of the High Court, which is requested to say the last word in resolving concrete cases and unify judicial practice.

32. The constitutional standard on the independence of the court is determined in detail and is made concrete in specific laws, which recognise the optimum democratic standards guaranteeing such independence. Law No.8436, dated 28.12.1998 "On the organisation of the judiciary in the Republic of Albania" determines the rules on the career of judges, the conditions to be fulfilled in order to be judge of a first level court or of an appeal court, their status and the substantial and procedural standards of liability and disciplinary procedures. On basis of Article 44 of that law, the Minister of Justice can initiate disciplinary proceedings against judges. According to the Constitution, it is the High Council of Justice that decides on disciplinary liability of judges. The new Constitution of the Republic of Albania, in its Article 147 regulates the composition of the High Council of Justice. It is composed of the President of the Republic, the Chairman of the High Court and of nine judges elected by the National Conference of the Judiciary. The President of the Republic is the Chairman of the High Council of Justice. In any case, the judge who has committed the offence and against whom

disciplinary proceedings have started will have to be heard. The judge under disciplinary procedure should be made available the full file ten days before the hearing. During the hearing the High Council of Justice should hear the claims of the parties before taking a decision. The judge under proceedings is entitled to self defence or defence by a lawyer. The law provides for the right of the lawyers to complain to the High Court against decisions of the High Council of Justice on disciplinary measures against them. The trial at the High Court takes place in the Joint Colleges of that Court. According to Article 136 of the Constitution, district and appeal judges are appointed by the President of the Republic on proposal by the High Council of Justice whereas the judges of the High court are appointed by the President with the consent of the Parliament. As a rule judges are appointed after having graduated the School of Magistrates, which prepares independent judges, who obtain the right to attend that School through a rigorous competition and good professional training, without any need for political support. The activity of the School is regulated by Law No. 8316 dated 31.07.1996 "On the School of Magistrates". According to the Constitution, its Article 147, the transfer and dismissal of judges is made by decision of the High Council of Justice. The transfer of judges cannot be made without their consent, except when this is dictated by the needs of the reorganisation of the judicial system.

33. The Ministry of Justice is presently working on drafting an organic law on the High Council of Justice.

34. The independence of the judiciary does not exempt judges from the obligation to respect the laws, their independence by the law even in case when the judge sustains that the law is not compatible with the Constitution, he does not have the right to contradict it. He is obliged to bring the case before the Constitutional Court, which is the only one to decide on the constitutionality of the law. Article 145 of the Constitution states that " If judges find that a law comes into conflict with the Constitution, they do not apply it. In this case, they suspend the proceedings and send the issue to the Constitutional Court. Decisions of the Constitutional Court are obligatory for all courts".

35. The Court does not lose its independence in fulfilling duties from higher courts nor legal interpretations of the High Court on concrete cases.

36. The independence is strictly linked with the impartiality. It is a well-known standard that a decision could be independent only when it is impartial. This is the case when, whatever the reason, the decision is not influenced by pressure, threatens or other ways of interference from anybody. In the case Sramek vs. Austria 1984, the Court of Strasbourg concluded that Article 6 of the Convention was violated in case when a judge was dependent from one of the parties in the process. The Court declared that in such circumstances "parties may doubt on the independence of this person".

37. In order to ensure the independence of judges while judging concrete civil cases, Article 72 of the Civil Procedure Code lists the cases when judges are excluded from trial: "the judge is obligated to resign from a case when:

    i. he has an interest in the case or in another dispute, which is related with it in trial;
    ii. he or his spouse is next of kin to the fourth degree or in-law to the second degree, or is related by obligations of child adoption or lives together in a permanent manner with one of the parties or of the defendant;
    iii. he or his spouse are in judicial conflict or in enmity or in relations of creditor loan with one of the parties or one of the representatives;

iv. he has given advise or has expressed opinion on the case in a different level of the process, has been questioned as a witness, as expert or representative of one of the other party;

v. he is the guardian, employer of one of the parties, administrator, or has an other task in the entity, association, society or other institution which has interests in the case in trial;

vi. in any other event when, according to concrete circumstances, serious reasons for impartiality are ascertained.

38. The impartiality is a principle that is recognized but in general not regarded. In practice, there are also cases when some judges do not respect impartiality and are affected by unjust interference, which lead illegal decisions. This is for different reasons linked with social, political, familiar motivations, and especially with the phenomena of corruption. Analyses and polls show that Albanian judiciary is one of the sectors characterized by the phenomena of corruption. This has strongly damaged the image of judiciary towards the public and has influenced to consolidate the opinion that "with money you can succeed to buy any trial". There are cases when disciplinary measures have been taken on corrupt judges. It should be accepted that the fight against this phenomenon was not continuous and effective.

39. There are two provisions in the Penal Code, which aim at fighting corruption in the judiciary and prosecutor's office. According to these articles giving a conclusive sentence, which is known to be unfair (315), as well as asking for or receiving bribes by the judge, prosecutor, defence lawyer, expert and arbiter of a case is punishable (319). But these provisions are not implemented because the presumed corrupt persons have found different ways to defend themselves from those who have the duty to penally prosecute them.

D. Public Hearings

40. According to Article 6 of the ECHR the trial should be public and open. The presence in the courtroom of media and public during the trial could be prohibited in cases of interest as: morality, public order and national security. This could be the case also when interests of minors or security of life of the parties in the process make these measures absolutely indispensable. This could happen also in some special circumstances when publicity may damage the interests of the judiciary.

41. These requirements of the Convention are reflected in Article 42, paragraph 2, and Article 146 of the Constitution of the Republic of Albania, as well as in Article 26 and 173 of the Code of Civil Procedure. Article 26 states that "the judicial session is open, unless otherwise set forth in this Code". Article 173 determines that "In conformity with Article 26 of this Code, the trial of the cases entirely or partially in a session behind closed doors is allowed by a justified decision of the court only when:

    a. it is necessary to maintain a state secret and public order;

    b. trade, invention secrets are mentioned, the publication of which would affect interests protected by law;

    c. circumstances from the intimate private life of the parties and of other participants in the process are mentioned.

42. Only parties, their representatives, testimonies and experts as well as those who have permission by the court, are permitted to be present in the courtroom when cases are judged in closed doors.

Minors under 16 could not be present in the courtroom, unless the court asks them. The decision to hold a trial behind closed doors should be publicly proclaimed.

43. The participation of parties in a high court trial has raised many discussions. Article 483, paragraph 2 of the Code of Civil Procedure states that "After the report the Chairman invites the defence lawyers of the parties to present their defence". According to the interpretation made to the above-mentioned provision, the participation of parties is not allowed in a high court trial. The question was raised whether the parties have the right to participate in their trial. This impossibility of parties to attend the courtroom in certain cases was due only to the reconstruction of the court, but this is no longer a reason.

E. Legal representation

44. Albanian procedural legislation provides for the representation of a party by defence in civil proceedings. Also Law No. 7827 dated 31.05.1994 "On advocacy in the Republic of Albania", sets forth that legal aid is provided in cases provided by law. The law also sets forth that in specific cases of mandatory defence or when the interested party does not have the economic possibility to pay for defence, the court or the prosecutor may decide for legal aid to be provided free and for its costs to be paid out of the state fund set up for this purpose. In such instances the court or the prosecutor respectively determine the payment for the defence lawyer according to tariffs. In practice this provision is applied only in criminal cases and in cases when defence is mandatory by law, mainly in cases involving minors or defendants in absentia. In fact, in Albania the law regulating accurately legal aid for persons, who do not possess the means to obtain it, both in criminal and civil cases, is missing.

45. Article 6 of the Convention requires that the trial should take place within a reasonable time frame. This definition is a subjective standard. As a matter of fact the European Court has determined criteria's to evaluate and monitor whether this standard has been met. These standards are: complexity of the case, the way the case is considered, attitude of plaintiff which may cause delays, as well as special circumstances which may have justified the prolongation of procedures. This court has withdrawn the arguments used by governments that lack of staff or administrative shortcomings are sufficient to justify the impossibility to ensure "the reasonable time frame" (*De Cubber vs. Belgium* (1984)).

F. Reasonable Time

46. The Albanian legislation does not determine a time frame for the conclusion of the trial. This goes for the civil as well as for penal cases. But both Codes determine special rules on the time frame for initiation and continuation of the trial when the lawsuit is presented. According to Article 155 of the Code of Civil Procedure, in a ten days time after a lawsuit has been notified, the case should be presented to the court. According to Article 170, the judge is obliged to ensure that the preparatory action are taken, in order that the case is sent to court as soon as possible. Article 181 obliges the court to organise the work in order that the same adjudicating body concludes the trial of the case. Article 328 states the time frame for lodging lawsuit against an administrative act. Articles 435, 443 and 472 determine time frames for appeal on decisions of arbitrage and the court of appeal, the High Court. Article 83 determines the time frame for the revision of appeals by the High Court concerning competency and jurisdiction. The Albanian legislation, in the framework of its total reformation, after 1990, provided for the establishment of the Constitutional Court, initially with Constitutional Law Nr.7561, date 29.04.1992. Actually, the Constitution of the Republic of Albania, in Part Eight, determines the Constitutional Court as the highest authority to uphold and guarantee compliance with Constitution and to make its final interpretation.

G. Constitutional Court

47. Article 124 of the Constitution sets forth that the Constitutional Court is independent in exercising its functions and is subordinate only to the Constitution. It consists of nine members appointed by the President of the Republic with the consent of Parliament. The judges are appointed for a term of nine years. One third of the members of the Court are renewed every three years, in conformity with the relevant law. The judges are selected among lawyers graduated in law with high qualification and with a work experience of not less than fifteen years. According to Article 125 of the Constitution, the Chairman of the Constitutional Court is appointed from the ranks of its judges, by the President, after receiving the consent of Parliament, for a period of three years.

48. The Constitution sets forth that the functions of the Constitutional Court judge are incompatible with any other public function or private activity. It also provides for the immunity of the judges of that Court.

49. The Constitution provides also for instances when the judge of the Constitutional Court ceases to exercise his functions and the manner in which his mandate terminates.

50. Article 131 of the Constitution provides that the Constitutional Court decides on:

- Compatibility of the law with the Constitution or international agreements before their ratification, as provided in Article 122;
- Compatibility of international agreements with the Constitution before their ratification;
- Compatibility of normative acts of central and local bodies with the Constitution and international agreements;
- The disputes on authority between powers as well as between central government and local government;
- Constitutionality of political parties and other organisations under Article 9 of the Constitution;
- The release from duty of the President of the Republic and the assessment of the incapacity to exercise his functions;
- Issues related to electionability and incompatibility in exercising the functions of the President of the Republic and of members of parliament, as well as with the assessment of their election;
- The constitutionality of a referendum and the assessment of its results;
- Final trial of complaints of individuals on the violation of their constitutional right for due process of law, after all other juridical means for the protection of these rights have been exhausted.

51. The Constitutional Court is set in motion only on a request by:

i. The President of the Republic;
ii. The Prime Minister;
iii. One fifth of the members of parliament;
iv. The Chairman of the High State Control;
v. Any court, according to Article 145, item 2 of the Constitution;
vi. The People's Advocate;
vii. The local government bodies;
viii. The bodies of religious communities;
ix. Political parties and other organisations;
x. Individuals.

The natural and juridical persons sets forth in subparagraphs 6, 7, 8, 9 and 10 may make a request only on issues related to their interests.

52. In the Republic of Albania, the Constitutional Court acts on basis of the Constitution and of Law No.8577 dated 10.02.2000 "On the organisation and functioning of the Constitutional Court". According to Article 27 of that law, when a complaint is addressed to that court, it is handed to its Chairman, who appoints a reporting judge to make preliminary preparations for its examination. A college consisting of three judges, one of which is the reporting judge, examines the admissibility of the complaint. When the decision on admissibility is not taken unanimously, the case is submitted to the plenary session of the Court, where the decision is taken by a majority of votes. When the subject of the complaint is not under the authority of the Court or the person submitting it is not entitled to set the Court in motion, the complaint is considered inadmissible.

53. The Constitutional Court is called in hearing by its Chairman. The plenary hearing, in which participate not less than two thirds of all the judges, is chaired by the Chairman. The Constitutional provisions as well as those of the relevant law on the organisation and functioning of the Constitutional Court determine the necessary safeguards for the exercise of the independence of the judge and of the High Court. The activity of the Court complies with the fundamental principles of constitutional trial and of due process. The debates are adversarial and, as a rule, public. According to the organic law, the parties may be represented by their defence lawyers. The judicial proceedings are free of charge. At the end of the judicial examination, the Court comes out with a decision on the complaint submitted. The decisions of the Court are taken by majority voting and each decision should be reasoned in writing. The Constitutional court is entitled only to repeal the act submitted to it for consideration. The decisions of the Constitutional Court are final and have a general mandatory power. As a rule they come into effect on the day they are published in the Official Notebook. The Court may decide that the text of the law or act found invalid should come into effect on another date. The decisions of the Court, as a rule, do not have retroactive effects. Nevertheless a decision may have retroactive effects when it states that a criminal judicial decision is invalid, even if that is being executed, decision that has been taken in application of the normative act declared invalid by the Constitutional Court. When a decision states the invalidity of a judicial decision, the latter loses its juridical effects from the date when that decision is taken and the case is sent for reviews to the same court. The decision of the constitutional Court interpreting the Constitution has retroactive effects.

54. The decisions of the Constitutional Court are mandatory for application. The enforcement of the decisions is ensured by the Council of Ministers through the relevant organs of the state administration. The law sets forth sanctions when an individual does not implement or impedes the enforcement of the decision.

55. These are the main aspects of the approximation of the Albanian civil legislation with the Article 6 of ECHR. This approximation is in process.

CHAPTER 6

COMPATIBILITY OF THE ALBANIAN LEGISLATION WITH ARTICLES 8, 12 OF THE CONVENTION, AND ARTICLE 5 PROTOCOL 7 TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS

BY ARTA MANDRO & VALENTINA ZAÇE

I. ARTICLE 8 OF THE CONVENTION - private and family life

1. The respect for private and family life is a fundamental human right recognized and guaranteed in all the instruments related to the human rights. The right to respect private life is part of the fundamental principles of civil and political rights, because it has direct influence on the effective operation of democracy. The right to respect family life is less related to specific democratic principles. These two rights may be included in one provision as they present ample conceptual relations between them.

2. The European Convention on Human Rights regulates these two rights under its Article 8:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

3. In understanding this provision, Article 12 of the Convention (which regulates the right to marry and found family), Article 2 of Protocol Nr.1 (which regulates parental care in relation to education of children) as well as Article 5 of Protocol Nr.7 (which regulates equality between spouses and their responsibilities during marriage and in the event of its dissolution) come to its help.

4. The freedom provided by the above-mentioned provisions, like all the human rights, should be protected against any arbitrary or illegal interferences of the State, i.e. against interferences that are not justifiable particularly according to paragraph 2 of Article 8. To avoid being only theoretical, such a freedom means that the state takes all the positive necessary measures to guarantee its effectiveness, particularly against the violations from private entities. Such an effort in relation to private and family life is provided in the famous decision *Marckx v. Belgium* (1979) (A.31 & 3) or in *X & Y v. The Netherlands* (1985) (A. 91, pg.23).

5. The notion of respect is relatively undefined, but the Court and the Commission of Strasbourg have interpreted it in a constructive way through taking into consideration the evolution of traditions and the scientific and technical progress, as well as through regarding the social needs, public interest, or the right of third parties.

A. Notion of private life

6. According to a writer (Jean Rivero: Les Libertes Publiques, PUF, t. 2, 1989, pg.74): *"Private life*

is that sphere of every existence in which we can not interfere without the respective authorization for it. Freedom of private life is, to the benefit of every man, acknowledgment of an area of activity that belongs to him, which he is in the position to stop the others". This definition covers the protection of personal and confidentiality fields and includes the respect for home and confidentiality of correspondence, which are particular aspects of private life. Everything that concerns personal health, philosophical, moral or religious conviction, family life, affective or sexual or friendly relations and with some reservations the material and professional life, may be considered related to private life.

7. According to the classical liberal interpretation of human rights, human rights should be considered as negative rights, fundamental individual rights that include only the negative obligations by the state. The state should be limited in its interferences to private life, except for the cases provided in paragraph 2 of Article 8 of European Convention of Human rights. Anyhow, the Court of Strasbourg has affirmed the existence of an obligation of the state does not interfere unjustifiably in exercising the rights, but, as well the obligation to positively interfere in the protection of the above-mentioned rights.

B. Positive obligations of the state

a) The principle

8. With the above-mentioned decision, the Court and the Commission have interpreted Article Nr. 8 as a provision that is not limited only in the obligation of the state not to interfere in arbitrary way. This positive obligation, which is related to the effective respect for these rights, is added to the negative obligation. Such a doctrine enjoys general importance, but it assumes particular importance when dealing with private life, because it is individuals that mainly interfere in this field. Thus the state has the obligation to take measures, particularly legislative ones, to avoid or punish such cases.

9. The Court has confirmed this in other decisions such as in *X and Y v. The Netherlands*, (1985).

10. The new Constitution of Albania proclaimed by Decree of the President No. 2260, of 28.11.1999 reaffirms this positive obligation of the (Albanian) state, which derives from the Convention. Article 15, paragraph 2 of the Constitution of the Republic of Albania provides:

> *"The organs of public power, in fulfilment of their duties, shall respect the fundamental human rights and freedoms, as well as contribute to their realization".*

b) The rights of homosexuals and transsexuals

11. Issues related to the homosexuality and trans-sexuality are important for two reasons:

> First, these two issues depend on one common principle, the sexual identity and activity of any person is related to the right of protection of private life guaranteed by Article 8 of the Convention.
> Second they depend on the principle that a state may limit the exercise of this right for reasons not clear for political interest, which are not explicitly provided in paragraph 2 of Article 8.

12. The Commission and the Court adopted quite different stands in the decision on *Dudgeon v. the United Kingdom* (1981) (A.n.45) and the decision on *Norris v. Ireland*, (1988) (A.n.142), from what the Commission proclaimed about 30 years ago when it had rejected an application against criminal sanctions regarding the male homosexual activity. They declared that prohibition by

the state of homosexual activity is interference in private life, which is against what Article 8 provides.

13. The Criminal Code of the Republic of Albania approved through law Nr. 7895, date 27.01.1995, which entered into force on 1 June 1995 does not provide any criminal sanctions against male homosexual activity as provided by the previous Criminal Code. The homosexual activity is punished in virtue of Article 116, when such activity is performed on juvenile persons incapable of protecting themselves or through violence.

> *"Homosexual intercourse, when conducted forcefully, with minor people, or with persons unable to protect themselves, is sentenced with up to five years of imprisonment ."*

c) The right to have access to personal file

14. The right to have access to personal file has been in the focus of decision on *Gaskin v. the United Kingdom* (1989) (A. 160). According to the Court, *there can not be one general right to have access to personal data of a person*, but there should always be kept in mind *the concrete case.* There should be accordance between the interests of the competitors, i.e. the interest of the person, who applies to have access to his or another person's file, and of the one that has provided the information.

15. The new Constitution of the Republic of Albania has reflected this right derived from Article 8. Article 35 of the constitution provides:

> 1. *"No one may be compelled, except when the law requires it, to make public data related to his person.*
> 2. *The collection, use and making public of data about a person is done with his consent, unless otherwise provided by law.*
> 3. *Everyone has the right to become acquainted with data collected about him, unless otherwise provided by the law.*
> 4. *Everyone one enjoys the right to request the correction or deletion of untrue or incomplete data or collected in violation of the law."*

16. In virtue of this constitutional provision and for its implementation, the Assembly (Parliament) of the Republic of Albania approved law No. 8617, of 22.07.1999 "On protection of personal data". The law explains the meaning of such terms like *personal data* or *sensitive ones*. The first Chapter of the law regulates issues of handling personal data (Article 5), procedures on notifying the holder of personal data (Article 6), the guarantees to be fulfilled by the person responsible for handling the data (Article 7), conditions to be fulfilled by other persons who handle personal data (Article 8), as well as technical and organizational measures to protect these data in case of unlawful or accidental damage or loss and against any unauthorized change, access or distribution (Article 9).

17. A specific Chapter regulates the rights of the holder of the personal data: Article 10 provides that handling of personal data by other persons is allowed only if the holder of these data has explicitly given his\her consent for such handling. In case of sensitive data, preliminary consent is valid only if it is issued in writing.

18. Article 11 provides for the cases when the preliminary consent is not necessary, which in fact is:
    a) When the handling is useful in completing a contract in which the holder of the data is a party, or in case of preliminary action in having him\her in a contractual relations.

b) When the handling is necessary to fulfil a legal obligation of the holder of the data himself.
c) When the data received from public registrar, lists, acts or other documents publicly known by all.
d) When the handling is necessary for the protection of life and physical integrity of the holder of the personal data or of a third physical person, but if the consent of the holder of the personal data is impossible due to physical incapability or lack of capacity to act or in case the holder is irresponsible.

19. Articles 12 and 13 respectively provide for the right of the holder to get acquainted with his personal data and the right of the holder to complain against their handling, as well as correction or deletion of the untrue, incomplete data or those gathered in violation of the law.

20. The last Chapter of the above mentioned law regulates the complaint procedure to the People's Advocate (Article 15), in virtue of regulations provided in law No. 8454, of 04.02.1999 "On the People's Advocate". The People's Advocate sets up a registrar for handling personal data. In virtue of Article 17, every one enjoys the right to complain in an administrative way when he considers that his rights, as provided by this law, have been violated.

21. A violation of the provisions of this law, when not constituting a criminal offence, is an administrative offence and is regulated by the respective law "On administrative offences". Article 18 provides also for the judicial way as a means of protecting personal data. The law obligates every legal and physical person involved in handling personal data, to take the respective technical – administrative measures to adopt and regulate their activity in accordance with the legal provisions.

22. The Criminal Code provides that all offences under Article 121 "Unjust interference in private life" (placement of interceptive equipment that serve for listening or recording words and views, listening, recording or transmitting words, focusing, recording or transmitting views as well as protection against publication or the publication of these data that expose one aspect of the private life of a person without his consent constitute a criminal offence and is sentenced accordingly) are criminal offences against the moral and dignity ; article 122 "Disclosure of personal secrets" (disclosure of a secret belonging to the private life of a person by someone who gets it as a result of duty or profession, when obliged not to disclose it without relevant authorization, constitute a criminal offence and is sentenced either by a fine or by up to one year imprisonment. But, this offence, when committed for profit or intentionally against another person, constitutes a criminal offence and the offender is sentenced either by a fine or by up to two years imprisonment).

23. In conclusion, the regulation provided by the Constitution and law No. 8617, of 22.07.1999 "On protection of personal data" seem to comply with the requirements of Article 8 of the ECHR and of the European Court case-law guaranteeing respect for personal data.

C. Prohibition of arbitrary interference

24. According to paragraph 2 of Article 8 of the ECHR, interference by the state may be accepted only if:
- it is in accordance with the law,
- it is necessary in a democratic society in achieving a legitimate objective.

25. The Constitution of the Republic of Albania has provided through Article 17:

"1. Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. The limitation shall be in proportion to the situation that has dictated it.

2. These limitations may not infringe the essence of the rights and freedoms and by in no case may exceed the limitations provided for in the European Convention of Human rights."

a. Respect for correspondence

26. This is closely related to private life. The word 'correspondence' is quite broad, but it refers particularly to the written correspondence and the correspondence through telephone lines. Telephone interception constitutes interference with the exercise of the right for respect to private life and correspondence. Nevertheless, the practice and legislation of many countries show that telephone interception may be legal to fight against modern forms of banditry, espionage and terrorism. The secret interception may take place either for intelligence purposes following an application to a judicial authority, or on grounds of state security following an application to executive authorities. Anyhow, for this interference to be legitimate, it should respect what paragraph 2 of Article 8 provides. The European Court explicitly mentions this in two of its important decisions, respectively in *Malone v. United Kingdom* (1984) (A. 82) and in *Klass v. Federal Republic of Germany* (1978) (A. 28) and in *Kruslin v. France* (1990) and *Huvig v. France* (1990) (A. 176-A and a. 176-b). In the latter decisions the Court held that based on paragraph 2 of Article 8 of the Convention and other similar provisions it had always interpreted the word law in its material content and not in its formal understanding and declared that this word included other provisions of a lower level than the law (even international norms) and also unwritten right. Regarding the requirement "in accordance with the law" contained in paragraph 2 of Article 8, the Court simply confirms the limitation provided by the national law; according to it the quality of the law should be referred to.

27. The quality of the law means that it should fulfil two requests: *First*: the law should be known by the public, which means that the person should have relevant and public information on the juridical norms applicable in a certain case. *Second*: the law should be as clear as possible aiming at allowing the citizens to regulate their behaviour in accordance with very clear requests.

28. Interception should be under a three-phase control: when interception is ordered, during interception and after it. The law should specifically provide for the duration of the interception, modalities and its execution, as well as the handling of the collected information. On the other hand the law should guarantee professional and protection confidentiality. What was said above about judicial interception is valid also for administrative interception, but the procedures to obtain it may take another form.

29. Another issue similar to the above-mentioned one is that on secret files. The Commission dealt with this issue in *Leander v. Sweden* (n. 9248, Rap. 17 May 1985).

30. The existence of a registrar of secret information and secret practices and investigation on a person before his nomination to some function relevant to national security, naturally constitute interference into the private life of a person. But, can they be justified as according to paragraph 2 of article 8 of the Convention? European case-law speaks about a necessary balance to be established between the legitimate interference of the State to defend the democratic society and the role of the rule of law as the protector of the fundamental human rights and freedoms.

31. As correspondence is related to the private life of a person (excluding here the administrative and public correspondence), it enjoys a protection, which in many countries is quite old. The majority of cases claiming violation of the right to respect for correspondence have been raised by prisoners.

32. Regarding the reading of correspondence or its delays by prison organs, the intervention may be acceptable only if they are in accordance with the law and are necessary in a democratic society.

33. In *Silver v. Switzerland* (1991) (a. 20) and in *Campbell v. Britain* (1992) (a. 233) the Court held that the reading of the correspondence of a person, serving a criminal sentence, with his defence lawyer may take place only exceptionally, only when there is the conviction that it is damaging the interests of third parties or of the institution. The same principles are valid also on the correspondence of a detainee with the European Commission of Human Rights.

34. The new Constitution provides in Article 36 that freedom and confidentiality of correspondence or any other means of communication are guaranteed. The Criminal Code considers a criminal contravention against the moral and dignity all those provided in Article 123, i.e. "Halting or violation of the privacy of correspondence" (any intentional act such as destruction, non-delivery, opening and reading letters or any other correspondence, as well as the interruption or placement under control, hearing any conversation through telephone, telegraph, or any other means of communication, constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment); Article 255 punishes "giving orders or committing actions for destroying, reading and disseminating postal correspondence, or which break, make it more difficult, put under control or eavesdrop phone correspondence or any other means of communication, committed by a person holding a state function or public service during the exercise of his duty, except the cases when it is permitted by law ...".

b. Respect for home

35. There is hardly any European case-law on this issue. The right to respect for home includes aspects that are related to the property and non-material aspects (e.g. noise from Heathrow airport (England), as the applicant lived close to it and this constituted interference with his private life and his home) Respect for home, as related to private life, includes its free use and particularly its inviolability by private persons or public authorities. Regarding the inviolability, all legislations include protective provisions and provide the cases of intervention in accordance with paragraph 2 of Article 8.

36. Article 37 of the Albanian Constitution provides:

> *"1. The inviolability of residence is guaranteed.*
> *2. Searches of a residence, as well as premises that are equivalent to it, may be done only in the cases and manners provided by law"*

37. Home is inviolable and in case of violation of this principle there are particular sanctions provided in Article 254 of the Criminal Code: *"Entering into premises without the consent of a person living therein, committed by a person holding a state function or public service during the exercise of his duty, except the cases when it is permitted by law, is punishable by a fine or up to five years of imprisonment".*

D. The notion of family life

a. Definition

38. In its narrow meaning the notion of family, as basically protected by the Convention, means the parents and minor children. But, the European Court has further broadened this notion, particularly in cases related to foreigners. Family life is defined as the existence of a very close relation, *de facto* or *de jure* between two or more persons, who have set up a family union.

39. In view of this concept and practice of the European Court, family life covers all persons who have blood (natural) or juridical (like matrimonial and adoption) relationship. But, the European Court has not defined the level this relationship extends to and as consequence the affectivity element becomes more important.

40. Article of the new Constitution of Albania provides for the right of everyone to marry and have a family.

41. The existence of family life is based on relations due to marriage and relations outside marriage.

42. The extent of the definition of family life in view of relations outside marriage has been provided by the European Court in *Marckx v. Belgium*, (1979) (A. 31). This case played an important role in the family law of many countries that have ratified the European Convention. The Court was obliged to declare this principle in the above-mentioned decision, despite the fact that this solution is provided in Article 8 of the Convention: *"Every one has the right to respect for his family life, his home and his correspondence"*. Article 14 of the Convention prohibits the discrimination based on the provisions of the Convention. This issue was the open gate in the evolution of the practices of many contracting States.

43. This principle was reflected in previous constitutional laws and throughout Albanian family legislation after World War II.

44. Article 54, paragraph 2 of the new Constitution provides that children born out of marriage enjoy the same rights as children of married couples. Family legislation, inheritance and the rights within their jurisdiction have already included this constitutional principle.

b. Effectiveness of the relations

45. The Commission has accepted that there is family life as long as there are effective relations between the interested persons. Thus the Commission has taken into consideration that if people live together or they are financially depended on each other, and the right to visit and have regular or continuous relations between the father and the children born out of marriage.

46. The concept of living together is most appropriate and mostly used by the Court. There can be no family life between mother and father and the child after divorce. Still, there are the relations of the parents through his\her right to visit and contribute in the education of the child. The Court held this in *Berrehab v. The Netherlands* (1988) (a. 138) .

47. Article 8 of the Convention refers to the relations between two members of a heterosexual married or not married couple. Regarding relations between a homosexual couple, the Commission has held that *"despite the modern evolution of the stands towards homosexuality"*, this relation is not within the right for respect to family life, but the right of respect to private life cannot be evoked. The stand of the Commission is that Article 8 does not cover homosexual relations.

48. Anyhow, the need to include a system of partnership registration in the legal systems derives from the principle of equality in treating the homosexual and heterosexual partners and the recent legal regulations provided by European legislations on this institute proved that even the IV Conference convened in the Hague (The Netherlands) in October 1998 raised a question mark on the above stand of the European Court.

49. Moral life of the Albanian society, legislative inheritance, Albanian legislation in general and family law in particular (including the new Family Code, which is in the process of drafting) goes very far in the concept of the need to provide the institute of partnership registration for homosexual couples, which is similar to marriage.
Under the present situation, the Albanian family legislation regulates only the relations between members of a heterosexual married couple.

50. Many legislations have approved laws that regulate cohabitation and mainly the issue dealing with the administration of joint property (real estate and movable property), regardless of who owns the property.

51. Relations established between two persons living together are not regulated in Albanian legislation, either by public or private right, and particularly either by social security or tax laws, unlike in many countries that provide for such regulations for the persons living together (including homosexual couples) with the spouses.

52. Despite the administrative law reform, the new law "On administrative offences" and "The administrative procedures", the Decree Nr. 3161, date 10.10.1961 "On prohibition of cohabitation unmarried couples" is still in effect, although not applied in practice for decades (including the dictatorship period). This Decree considers the cohabitation of a man and a woman, who have no obstacle to get married, an administrative offence and the man as sole responsible for this offence.

c. Children of married and unmarried couples

53. Relations between parents and children compose one of the bases of the family life.Acts issued by a public authority that aim at separating those who live together in a family life are interference with this right protected under Article 8. Anyhow, in virtue of paragraph 2 of this provision, the state may interfere to protect the health and moral (balance of child) and to protect the rights of third persons.

54. The Commission and the Court have underlined that the child may be detached from the family environment, even temporarily, only for very serious reasons. Many applications to the Commission and the Court on the issue of keeping the child after the family is dissolved have stressed that priority should be given to the interests of the child.

55. The family legislation in effect regulates the relations between parents and their children born in marriage and from unmarried couples on the basis of the principle of equality (Article 63 of the Family Code). Infants live with their parents. Parents who are not living together should agree on whom the child will live with. In case there is no agreement, then upon the application of either of them, the Caring Council settles the case by asking the child if he\she is at least 10 years old. In such case, the Caring Council decides on the relations of the child with the parent he\she is not living with. (Article 66 of the Family Code). In case the marriage is dissolved and becomes invalid, the parent, whom the child is left with, exercises the parental right. The Court is the competent organ to decide on the above-mentioned cases. When the other parent considers the measures taken by the caring parent unjust, then he\she may address the Caring Council for relevant measures (Article 68 of the Family Code).

56. When the Caring Council considers that the parents are not taking care in bringing up and educating the child or when the interest of the child thus requires, the Council may apply to the court to decide on taking the infant away from one parents into public care or third party to bring up and educate the child, if agreed. The rights and obligations of natural parents do not cease when the child is taken away from them (Article 75 of the Family Code).

57. The parent may be deprived from the parental rights only through a court decision when the parent exploits the parental right or shows serious lack of care in his parental right, as well as when, through his decisions, has a bad effect on the education of the child and only upon the application presented by the other parent, the Caring Council or the prosecutor (Article 76 of the Family Code).

58. The Code of Civil Procedure coming into effect on June 1996, proclaimed through Decree Nr. 1474, date 18.04.1996, provides for the setting up of family panels (Article 349 onward of the Code of Civil Procedure) at courts of first instance. These panels review disputes related to family and marriage.

59. The new Family Code provides for all the above mentioned functions of the Caring Council as mentioned in the present Code (despite the reorganization of the local authorities during the transition, these organs have not exercised their role) and all the other duties of the parents towards their children, as viewed in accordance with the developments of the family law in various countries and international acts, all the authorities pass over to the court.

d. Relations between sisters and brothers with the other members of the family

60. Article 11 of the Family Code provides for that family members should help each other and participate, according to their abilities, in increasing the material well being and cultural development of the family. In completing this provision, the Family Code provides for nutrition obligation of sisters and brothers towards the younger ones and grandparents towards grandchildren and vice versa.

61. The Family code provides for the first time the regulation of personal relations between grandparents with grandchildren, when their parents are dead or they are under the care of third persons and they are not allowed to have personal relations. The competent organ to resolve these disputes is the Caring Council (Article 67 of the Family Code). The new draft of the Family code passes on this authority to the court.

e. Relations between members of an adopted family

62. Adoption is the only institution that has suffered fundamental changes after the dictatorship period. The present legislation regulates only the complete adoption, that which is provided by the international instruments. Law Nr. 7650, date 17.12.199? "On adoption of infants by foreigners and some changes to the Family Code" was drafted according to the UN Convention "On children's right" and The Hague Convention "On the protection of children and cooperation in the international adoption" (still a draft at the time). Albania has ratified the UN Convention in February 1992 and is in process of ratifying The Hague Convention. The new draft of the Family Code, besides complementing and regulating the provisions of the above-mentioned law and those of the Family Code in view of the recent practice and contemporary regulations of this institute, has provided another simpler form of adoption.

63. Anyhow, it does not mean that the court will automatically acknowledge the existence of family life at all kinds of relations. There is no clear criterion to define the family relations as

family life. This depends much on what was said above on the effectiveness of this relation, despite the quality of relations between the interested persons (blood relation, spouse relation, adoptive relation).

II. ARTICLE 12 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS – right to marry

64. The right to marry and found family is provided by Article 12 of the Convention and is closely related with the right for respect to private and family life as provided by Article 8. Still these two provisions differ from each other in many aspects. Article 12 is related to detached actions, while Article 8 provides protection to a continuous situation, or otherwise said to relations created after these acts. On the other side, Article 12 limits its effects on persons of the marriageable age, while Article 8 refers to all persons. The word family, as after Article 12 is more limited than what is provided by Article 8; the latter includes the relations based on blood links, real relations and is referred to infants and adults, too.

65. Based on Article 12 of the European Convention on Human Rights, *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right"*. It should be stressed that the editors of the Convention have not referred to the Universal Declaration of Human Rights, a similar provision of which is integrated into Article 23 of the International Covenant for Civil and Political Rights. These provisions request free and complete consent of the spouses to get married, during marriage and to dissolve the marriage. They guarantee the respective protection on the children in case of the dissolution of marriage. This principle is partially guaranteed by Article 14 of the Convention and Article 5 of Protocol 7.

66. These issues are regulated by the national legislations.

67. Regarding the discretion allowed by this provision to the citizens regarding the right to marry and to found a family (still with many limitations) looks as if it contradicts the main goal of the Convention. In general it provides some rights despite the internal statute and legislation. The wording of Article 12 indicates that we have to do with one right, i.e. the right to marry and the right to found a family are indivisible. Here comes the question: Can two persons marry without an aim, wish or their capability to found a family? Can there be a family without marriage?

68. Nevertheless the Commission and the Court have verified if the right to marry is explicitly provided by the national legislations and whether future spouses are hindered to exercise this right.

69. Article 53 of the Constitution of the Republic of Albania provides for everybody's right to marry.

70. The Family Code in effect regulates more thoroughly the issues related to the consent the spouses should give when getting married, conditions regarding the content and form of the marriage, personal and property relations between the spouses.

71. What the Constitution and the Family Code provide for and what the new Family Code will provide are in violation to Article 12 of the European Convention. Many issues have been raised particularly in the circumstances of and in relation to married persons, who are in detention, and the acceptance of the right for transsexual marriages.

72. In *Draper v. the United Kingdom* (Comm. Rapt. of 1979) and *Hamer v. the United Kingdom* (Comm. Rept of 1979), both persons, who were detained, requested from the Commission to consider a violation of the right of marriage as provided by Article 12 of the Convention the fact that they were not allowed by the relevant British authorities to marry while in detention. The Commission concluded that it constituted violation of Article 12 holding that: *"It is not important the fact that the applicant can not live with his spouse and consume the marriage during his detention. The core of the right of marriage is the obligatory juridical relations between spouses. It is up to them to decide whether to establish or not such relations under the concrete case as they cannot live together"*. Thus the Commission estimated that the prohibition by the Government in exercising the right to marry was a violation of the Convention.

73. Law Nr. 8328, date 16.04.1998 "On the rights of prisoners" provides not only for the ways of maintaining family relations (Article 400, meetings and visits, correspondence and information and "...the prisoner may get authorization for staying with family members beyond the allowed limit ..." (Article 40), the prisoner enjoys special leave (Article 60) *"In case of death or serious family events, the head of the institution may issue special leave to the prisoner to attend the event. ..."*, but Article 64 of this law directly provides for leave to get married, while in prison. *"Marriages, births, deaths and other events of such nature, while the prisoner is in prison ... "*. The General Regulation of Prisons thoroughly explain the procedures to implement the set principles provided by the Albanian law and the international rules and regulations.

74. The Commission and the Court also have declared that the right to marry guaranteed by Article 12 does not include the right to divorce and/or remarry. In *Johnston and Others v. Ireland* (1986) (A. Nr. 112), the Court declared that Article 12 does not guarantee the right to divorce. The Commission has kept the same stand on several cases. In an application against the Federal Republic of Germany, the Commission estimated that Article 12 of the Convention did not guarantee, among the rights and freedoms, the right to marry with a dead person, as the applicant claimed that his right to marry under Article 12 was violated by the German authorities, which did not allow him to get married to his fiancée after her death, despite the fact that the German legislation allowed it on special cases.

75. The Commission, in another case, held that Article 12 does not guarantee the right to have children *"If the right to found family is an absolute right, this would not mean that the person should have been given all the possibilities to have children"*. The case involved a prisoner and the British authorities had deprived him from conjugal visits or home leave and thus, he applied to the Commission that he was deprived from his right to found family as provided by Article 12.

76. The Commission had reviewed also many cases related to adoption. In one case against Britain, a British citizen claimed that his right to found a family was violated because his nephew, an Indian citizen, adopted by him according to the Indian legislation, was refused the right to live in Britain. The Commission noted that the adoption of a child by one couple may, in certain circumstances, be the founding of a family, but Article 12 does not guarantee the right to adopt, or in general lines to integrate a child, who is not a natural child of the relevant couple, in a family.

77. In general we can say that the Court acknowledges the marriage as an act in itself aiming at founding a family under Article 12, regardless of the fact whether children are or not part in this relation.

III. ARTICLE 5 PROTOCOL 7 - Equality between spouses and the responsibilities between them during marriage and in the event of its dissolution.

78. The ever increasing variety of cases related to family life in Europe is also reflected in the case-law developed under Article 8 and 12 of the Convention, as well as under Protocol 7, Article 5, which provides:

> *"Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children".*

79. Based on this provision, the equality between spouses should be guaranteed in their personal and property relations and in relations with the children. This right and responsibility has a private juridical character, and is not applicable in other fields of rights, particularly in administrative, fiscal, criminal, social labour law. The provision refers to spouses and it does not cover the unmarried persons. It does not refer to the capacity to found a family as provided by the national law, contrary to Article 12 of the Convention. The provision regulates juridical effects related to marriage. Nevertheless, spouses enjoy equal rights and responsibilities in relation to their children, and this does not hinder the states to take the respective measures in the interest of children. The Commission and the Court have underlined in many cases that equality between spouses is broadly guaranteed by the Convention, and particularly by Article 8 combined with Article 14, which have underlined the need to take into consideration the interests of children.

80. The wording of this provision should not be understood as if it hinders the national authorities to take into consideration the existing factors when they make decisions on division of property regarding marriage. The wording *"in the event of marriage dissolution"*, does not imply the obligation of the state to provide the dissolution of marriage or all the other forms of dissolving the marriage.

81. Chapter IV of the Family Code in effect provides for the rights and obligations of spouses:

> *"Spouses enjoy equal rights and responsibilities. They should love and respect each other, be loyal to each other, help each other in family and social obligations and participate in fulfilling the material and cultural needs of the family"* (Article 24, Family Code).
>
> *"Spouses decide together on any issue related to the matrimonial relations"* (Article 25, Family Code).
>
> *"Spouses, when married, enjoy the right to keep the same family name, either of the family names or each his own"* (Article 26, Family Code).

CHAPTER 7

COMPATIBILITY OF ALBANIAN LEGISLATION WITH ARTICLES 9, 10 & 11 OF THE CONVENTION AND ARTICLES 2, 3 & 4 OF PROTOCOL 7 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BY PERIKLI ZAHARIA

I. ARTICLE 9 OF THE CONVENTION - freedom of religion

1. Article 9 of the European Convention on Human Rights provides:

> *"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
>
> *2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".*

2. This Article of the Convention affirms the right to freedom of thought, conscience and religion. It establishes the content of this right and circumstances where the freedom to manifest one's religion or belief can be restricted.

A. Article 9, Paragraph 1

3. Freedom of conscience and of religion is provided for by Article 24 of the Constitution of the Republic of Albania. This article lays down that:

> *"1. Freedom of conscience and of religion is guaranteed.*
> *2. Everyone is free to choose or to change his religion or beliefs, as well as to express them individually or collectively, in public or private life, through cult, education, practices or the performance of rituals.*
> *3. No one may be compelled or prohibited to take part in a religious community or its practices or to make his beliefs or faith public."*

4. Article 17 of the Constitution provides for limitations of the rights and freedoms as general principles to guarantee indeed the exercise of the above-mentioned rights. So, the limitation of the rights and freedoms provided for in the Constitution of the Republic of Albania may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

5. Article 9 of the Convention guarantees the freedom of any kind of belief, whether it is of a religious, moral, scientific or any other nature. The word "belief" differs from "religion" in that it covers individual convictions, which are not necessarily religious. The Commission used to

consider the distinction of great importance and both words are sometimes used together in describing a situation (*No.5947/72, X v the UK*).

6. On one hand, Article 24 of the Constitution seems to be superior on matters of religious beliefs to that afforded by Article 22 on freedom of expression, where the activity of the individual is both the manifestation of belief and the exercise of freedom of expression. On the other hand, Article 24 of the Constitution doesn't mention the freedom of thought. However, the protection of that freedom seems to be based on Article 22 of the Constitution.

7. The term "religion" in the meaning of Article 9 of the Convention should be understood in a wider context. The protection of the right to freedom of religion is not confined to widespread and globally recognized religions, but also applies to rare and unknown faiths. But, one condition is that the said religion has been duly specified and sufficiently identified before national competent authorities (*No.7291/75, Farrant v the UK*).

8. Religious freedom has two aspects:

   a) It is an "individual" freedom, the individual being free to personally adhere to a religion or withhold from doing so, to choose or reject it;
   b) It also is a "collective" freedom, in the sense that it is not simply a matter of faith or belief, but necessarily gives rise to practices, the free exercise of which must be guaranteed. People must be free to worship.

9. Freedom of religion also comprises the freedom not to take part in religious services.The right to freedom of religion includes the right to decide on the religion of one's children and to raise them in accordance with one's religion and belief. The freedom of children means that they have the right to express and manifest their religious beliefs within educational establishments provided that they respect the freedom of others.

10. The term "conscience" can be based on both religion and a non-religious belief (*No.1718/62, X v Austria*). A more pervasive problem is conscientious objection, an unwillingness to comply with obligations imposed by law for reasons of conscience. The application of a general law to someone, who has reasons of conscience for not complying with it, does not violate Article 9, paragraph 1, of the Convention (*Seven Individuals v. Sweden No.8811/79*).

11. In *N v. Sweden -N.10410/83*, the Commission found also that an exemption from even substitute service for those who object to it on religious grounds does not violate the Article 14 rights of others, who are obliged to complete the civilian activities. Swedish law in fact granted total exemption only to Jehovah's Witnesses, a practice the Commission endorsed because of the all-embracing commitment of members of this religion to its prescriptions - a commitment which the Commission allowed "creates a high degree of probability that exemption is not granted to persons who simply wish to escape service".

12. On this issue, both the Resolution 337 (1967) of the Parliamentary Assembly of the Council of Europe and also the Recommendation No. R (87) of the Committee of Ministers envisage: "Anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service. Such persons may be liable to perform alternative service".

13. The Constitution of the Republic of Albania covers the respect due to the refusal on grounds of conscience to perform public obligation, especially military service, in its Article 18 (2,3). These provisions provide for that: "No one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs,

economic condition, education, social status, or parentage. No one may be discriminated against for above-mentioned reasons without a reasonable, objective and legal justification".

14. Article 9 of the Convention provides for the right of manifesting one's religion or belief either alone or in community with others and indicates the ways of manifesting religion and faith, i.e. "in worship, teaching, practice and observance". To ensure exercising of the right of manifesting one's religion and faith in community with others, it is necessary to permit the religious communities to organise themselves and perform their task. This is envisaged by Article 10 of the Constitution, which provides for that "religious communities are juridical persons. They have independence in the administration of their properties according to their principles, rules and canons, to the extent that interests of third parties are not infringed". Article 24, paragraph 3 of the Constitution provides for that:

> *"no one may be compelled or prohibited to take part in a religious community or in religious practices or to make his beliefs or faith public".*

15. The judgment of the European Court of Human Rights in the case of Kokkinakis v Greece A 260-A (1993) should be taken into consideration in this respect. Mr. and Mrs. Kokkinakis, who were members of the sect of Jehovah's Witnesses, attempted to induce Mrs.Kyriakaki, who was an adherent of the Orthodox Church, to change her religion. Mr. and Mrs. Kokkinakis were later charged with proselytism. Finally, Mr. Kokkinakis was punishable by three months imprisonment. The European Court of Human Rights found that this was a case of the violation of Article 9 of the Convention. The Court argued that freedom of conscience and faith was inseparable from the right to manifest it in public and in communication with other persons. As the freedom to manifest religion in teaching and to propagate it cannot be restricted, Mr.Kokkinakis's teaching and proselytism shouldn't have been punished. Only excessive attempts and attempts by unlawful means to convert someone to another faith could be punishable.

16. If holidays or the time of obligatory services for adherents to a religion or faith do not coincide with the holidays or free time provided for by law, the state is not obliged to ensure that these persons are given special extra holidays or time off. A foreigner may not demand from the state to be issued a permit to enter that country or to prolong his/her residence permit on the grounds of propagating his/her faith or receiving teaching in it, observing its rites, participating in the latter etc. in that state. But the state may be required to act to exempt a person from the operation of a general law where his objection to complying with it is based on considerations of conscience or belief.

17. In *X v UK - No.8160/78*, 22 DR 27 at 37-38 (1981), where the issue was the right of a Moslem school-teacher to attend prayers at the mosque during school hours in breach of his contract of employment, the Commission held that the decision of his state employers not to release him had given "due consideration" to his right under Article 9(1), taking into account the extent of the religious obligation and the measures of accommodation offered by the employer. It was not conclusively established that he had a binding obligation to attend the mosque and the education authority had allowed him to be absent when the consequences for his school were not so significant.

18. But, in the case *Prais v EC Council* (case 130/75 1976 ECR 1589, ECJ.), a European Community case, where the plaintiff/applicant, who was a Jew, successfully complained that the holding of examinations on a Saturday for a week-day job, examinations which she could not sit because of her religious obligations, was a violation of her rights. The obligation under this part of Article 9(1) includes desisting from interference with acts of worship and from rites associated with worship.

19. The European Court of Human Rights has established the opinion that the individual is not obliged to declare himself/herself as a member of a religious community. This right is provided for even to persons who belong to a national minority in Albania. Under Article 20(2) of the Constitution, they have the right to freely express, without prohibition or compulsion, their religious belonging.

20. Article 10 of the Constitution provides for that there is no official religion in Albania. Under this article, the state is neutral in questions of belief and conscience, and also, it guarantees the freedom of their expression in public life. The state recognizes the equality of religious communities. The state and the religious communities mutually respect the independence of one another and work together for the good of each of them and for all. Relations between the state and religious communities are regulated on the basis of agreements entered into between their representatives and the Council of Ministers. The Assembly ratifies these agreements.

21. **The Penal Code of Albania**
Criminal Acts Against Freedom of Religion

Article 131
Obstructing the activities of religious organizations

Ban on the activity of religious organizations, or creating obstacles for the free exercise of their activities, is punishable by a fine or to up to three years of imprisonment.

Article 132
Ruining or damaging places of worship

Ruining or damaging places of worship, when it has inflicted the partial or total loss of their values, is punishable by a fine or up to three years of imprisonment.

Article 133
Obstructing religious ceremonies

Ban or creating obstacles for participating in religious ceremonies, as well as for freely expressing religious beliefs, constitutes criminal contravention and is punishable by a fine or up to one year of imprisonment.

B. Conclusions and Proposals

22. Provisions of the Constitution of the Republic of Albania and of other existing laws do not conflict with the requirements of Article 9 of the Convention. The limitations and restrictions, which are stipulated in Albanian legislation, are within the limits of the Convention and they do not exceed the limitations provided for in the Convention.

23. Law no.7978, 26.07.1995 "On the Armed Forces of the Republic of Albania", amended by law no.8183, 20.01.1997, should be amended in order to include conscientious objection, allowing for exemption from military service and substituting it by civilian service, which can be performed in the armed forces without carrying and using arms.

II. ARTICLE 10 OF THE CONVENTION - freedom of expression

24. Article 10 of the European Convention on Human Rights provides:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

25. As the Court of Human Rights has mentioned in Handyside v UK (1976), Freedom of expression constitutes one of the essential foundations of a (democratic) society, one of the basic conditions for its progress and for the development of every man.

26. Freedom of expression plays a big role in the protection of other rights under the Convention. So, this article should be considered within the scope of the entire Convention, since other rights and freedoms include aspects of freedom of expression, such as freedom of peaceful assembly and association (Article 11). Where an expression interest is assimilated under any other right provided for by the Convention, the Court usually consider the case under that other right. So, the right to vote is seen as an element of the states' obligations to hold fair elections and not as an exercise of freedom of expression.

27. Freedom of expression covers not only the press, radio, television and cinema but also writers, poets, publishers, actors, painters and so on. Freedom of expression under the Convention, on the one hand, means the right of every person to express his opinions, and on the other hand, everyone must consider the interests of others and of the state.
28. Freedom of expression includes the negative freedom not to speak. Also, since this article protects the freedom to receive ideas and information, no one may be compelled to listen to someone else. In the case of Muller v Switzerland, 1988, the Commission found that Switzerland had violated Article 10 of the Convention because a Swiss court had ordered the seizure of several pictures that were displayed at an exhibition and depicted sexual intercourse between a human being and an animal.

29. In the case of Handyside v UK, 1976, concerning the confiscation of a book which described sexual intercourse, the Court of Human Rights explained that freedom of expression covered not only freedom to disseminate harmless information or ideas but also such information and ideas that hurt, shocked or disturbed the state or a section of its population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

30. In Jersild v Denmark a television journalist was convicted of aiding and abetting the dissemination of racial insults after a program which he made was broadcast that included explicit and crude racial remarks by a unfriendly group of young people. The Court of Human Rights found that his conviction was not proportionate to the interest of protecting the rights of others, i.e. those foreigners against whom the hatred and contempt were

expressed. The Court noted that the journalist himself had not voiced any views and therefore had not violated the code of journalistic ethics.

31. The notion of expression in the Convention: It is impossible to define why particular exercises of freedom of expression should be protected and the extent to which a state might limit them. Furthermore, it is necessary to take into consideration the 'kind .of expression' -political, commercial, artistic - the medium through which it is delivered - personal or news media, press or television - and the audience to which it is directed - adults or children, the public at large or a special group - to consider how extensive the protection is that the Court of Human Rights give to a particular item of expression.

32. As the Court has determined, the term "expression" under Article 10, which covers artistic expression, "affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds". These include works of art (Muller v Switzerland, 1988. The Court has decided that advertising cannot be excluded from the scope of Article 10 (Markt intern Verlag v Germany, 1989). The Court has argued that Article 10 did not apply 'solely to certain types of information or ideas or forms of expression'.

33. In Autronic v Switzerland, the Court was confronted with the question whether the reception and demonstration of a satellite television signal for commercial purposes was protected by Article 10. The government argued that because the content of the program was irrelevant to the company's purpose, which was to encourage the sale of satellite dishes, the applicant was seeking the protection of an economic right rather than a right protected by Article 10. In rejecting this submission, the Court said that article extended to the means of transmission or reception as well as to the content of information.

34. "Expression" is not merely words, but extends to pictures (Muller v Switzerland, 1988), images, and actions intended to express an idea or to present information. Means of protected expression go also beyond speech and print, (Handyside v UK, 1976), radio and television broadcasting (Autronic v Switzerland, 1983), artistic creations (Muller v Switzerland, 1988), film and, probably, electronic information systems. Because of this, what are protected are not only the expression itself but also the means for its production and distribution and for its communication. But, though all kinds (political, artistic, commercial), forms (words, pictures, sounds) and media (speech, print, film, television, etc.) of expression may fall within article 10, it does not mean that the government must treat them all equally. The limitations, which Article 10 allows, may be applied differentially (but not discriminatorily).

35. It is accepted that commercial free speech falls under the term "expression", although the level of protection required is less than is required for the expression of political ideas - (Jacubowski v Denmark, 1994). Under the Article 10 of the Convention, freedom of expression protects activities, which carry a risk of damaging or actually damage the interests of others or the public interest. In this way it is tolerated the publication of some information which injures the reputation of an individual. However, it is widely accepted that the toleration of different views is an essential aspect of a democratic political system.

A. The Right to Receive and Impart Information

36. Article 10 provides for that freedom of expression 'includes the freedom to hold opinions and to receive and impart information and ideas'. 'Holding opinions' is obviously a precondition for expressing them.

37. As for the right to 'receive and impart', we can refer to the Sunday Times v UK, 1979. The newspaper started a series of stories about several women who, after using a certain medicine

produced by a British pharmaceutical company, had given birth to babies with serious deformities. The Sunday Times used harsh words to point its finger at the culprit, the pharmaceutical company. The children's parents sued the company for damages and the company sought to suppress the publication of the articles subsequently written. With reference to English contempt to court legislation (the court has the right to order the suspension of the allegedly illegal action which is the subject of litigation), the judge granted an injunction against the publication of the articles. The Court of Human Rights held that the United Kingdom had violated Article 10 of the Convention, and pointed out that the press was a vital institution in a democratic society, whose purpose was to reveal all sides of an issue. The Court said that in this case there was a right to express opinions and there was an independent right of a willing hearer to hear such expression.

38. In Lingens v Austria, 1986 case, Lingens published several articles in a Vienna newspaper alleging in rather 'strong' language that the Austrian Chancellor Bruno Kreisky had been on very close terms with the former SS quislings. The chancellor brought an action for defamation against the author and Lingens was convicted. The Court of Human Rights held that freedom of expression under Article 10 had been violated. "Freedom of the press ... affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom and political debate is at the very core of the concept of democratic society which prevails throughout the Convention" the Court held that criticism of public figures may go further than criticism of private individuals.

39. In the case of the Bartfod v Denmark, 1989, a journalist had expressed his opinion in a magazine about two lay judges, casting doubt on their impartiality in a case against an employer contesting the legality of taxes. The journalist was tried and fined for libel. The Court of Human Rights affirmed the importance of 'the principle of impartiality' of the court but libelling the judges could not be regarded as a balancing criterion because criticism must always be based on arguments, which can be proved, and there had been no violation of Article 10 of the Convention.

40. Article 10 makes a distinction between 'information' and 'ideas' and makes it clear that the freedom of expression is not restricted to verifiable, factual data (Lingens v Austria, 1986).

B. Licensing of the Media

41. Article 10 of the Convention allows for the state to require the licensing of broadcasting, television or cinema enterprises. This does not mean that the state can apply licensing under any conditions it desires. The requirement of licensing must take into consideration that the restrictions must be necessary in a democratic society and must consider the interest of the public to receive information. The case of Autronic v Switzerland, 1990 illustrates this point. The Court of Human Rights noted in this case that the right to receive information also included the right to receive television programs, and since there was no risk of obtaining secret information, the authorization of the Government was not necessary in a democratic society.

42. The "licensing" procedure was revealed in the case of Groppera Radio AG v Switzerland, 1990. The owner of a cable television company made a complaint against a ban on broadcasting programs for Switzerland via the transmitters located in Italy. The Swiss government explained that the state prohibited the use of stations that did not conform to international agreements on radio and TV standards. The Court of Human Rights held that the actions of the government were lawful and said that state licensing was admissible only "in pursuit of organizing and maintaining the order of radio (TV) programs on the most adequate technical basis' (e.g. better frequency monitoring). Otherwise, there was a danger

that the state would abuse its power, which would be a violation of Article 18 of the Convention. The final sentence of Article 10(1) permits the state to decide who shall have a license to operate a radio or television station or a cinema and on what technical and financial conditions. Therefore, a state may take actions against unlicensed operators without infringing any right of theirs under the Convention.

C. Article 10, Paragraph 2
Interference with Freedom of Expression.

43. Paragraph 2 of Article 10 of the Convention provides for the possibility of restrictions on the rights established in paragraph 1. As it is known, pre-publication censorship prevents the transmission of information and ideas to those who wish to receive them. Pre-publication measures such as licensing of outlets or journalists, submission of copy to a public official and court-ordered injunctions are subject to close scrutiny for their necessity. Though there is no a fixed-line prohibition against such measures, the burden of establishing the need for them is heavy. Post-publication sanctions include civil and criminal actions. Another form of sanction, which may be a pre- or post- publication measure is seizure and forfeiture of the means of communication or, in the case of works of art, the work itself.

44. As mentioned above, the exercise of freedom of expression carries with it 'duties and responsibilities'. The position of soldiers (Engel v Netherlands, 1976) and civil servants (B v UK, 1984) are among those carrying 'duties and responsibilities' which may justify interference with their freedom of expression on grounds particular to their status. In the case of Engel v the Netherlands, 1976, the Court justified the state ban on the publication and dissemination by soldiers of materials criticizing senior officers, because 'public order in certain social groups, the army in particular, plays a significant role'. In the case of Vereinigung Demokratischer Soldaten Osterreichs and Gubi v Austria, 1994, the Court rejected a claim by the government to rely on Engel v Netherlands in deciding whether denial of facilities for the distribution of a magazine directed to soldiers could be sustained. The Court distinguished Engel because in that case there had been evidence of a threat to military order. In this case such a threat had not been demonstrated. The Court made no distinction between the position of the publisher and the distributor, who was a soldier.

45. The state must identify the national law, which authorizes the interference with the freedom of expression. In the case of Autronic v Switzerland the Court allowed the state to rely on domestically applicable rules of public international law to satisfy this criterion. The interference with freedom of expression must have the legitimate aim of furthering one or more of the public interest purposes listed in Article 10(2). There are cases where restrictions on freedom of expression are used to safeguard the judicial process. There may be circumstances in which the state, referring to the requirements of Article 6(1), has a duty to interfere with freedom of expression, if the right of an individual to a fair trial would be prejudiced by the publication of information about the proceedings. Article 10(2) permits interferences which have as their aim the protection of 'the rights of others', including an accused person, or 'for maintaining the authority and impartiality of the judiciary' (Barford v Denmark, 1989).

46. In the Handyside and Muller cases, the Court accepted that there was a pressing social need to punish expression for the protection of 'morals' of relatively small areas of population. In one of these cases the material was aimed at children, and in the other, children were not excluded from the exhibition. In the Open Door case, 1992, the Court acknowledged that it was primarily for the national authorities to asses the content of 'morals', but it subjected to scrutiny the claim that the action taken by the state to protect its own conception of morals was 'necessary in a democratic society'. The Court concluded that the interference could not

be justified. Article 10(2) also permits the state to interfere with expression for the prevention of 'disorder'. This concept is not restricted to 'public order', though it certainly includes that. The need to protect public order in the face of terrorist threats is also regarded as a significant basis for restricting freedom of expression. In Autronic v Switzerland, the Court said the state could move against freedom of expression in the interest of preventing disorder in the international telecommunications order.

47. In the case of Observer and Guardian v UK (1991) the national security was taken into consideration. The Attorney-General obtained interlocutory injunctions in the English High Court against two newspapers to prevent them publishing information about the operation of the British security services from the manuscript of a proposed book, *Spycatcher*, written by a retired secret agent, Peter Wright. The interlocutory injunctions were granted in connection with a High Court application by the Attorney General for a permanent injunction to prevent the applicant newspapers publishing material from *Spycatcher* on grounds of breach of confidence. They were granted under English law pending the outcome of the application of the proceedings for a permanent injunction to prevent the Attorney General's claim in those proceedings being prejudiced by the prior publication of material that would be the very subject of any permanent injunction. The House of Lords maintained the interlocutory injunctions on 30 July 1987, despite the publication of the book in the meantime in the United States and the resulting circulation of copies in the United Kingdom. The book was published in Australia and Ireland in October 1987. It was not published in the UK until after the Attorney General's application for permanent injunctions was rejected in 1988.

48. The government claimed initially that the interlocutory injunctions could be justified under Article 10(2) as having the aim of 'maintaining the authority of the judiciary'. When the case reached the Court, it also argued that they were necessary to safeguard the operation of the security service. The Court accepted these were both legitimate aims for the purposes during the whole period of the injunctions for the purposes of Article 10(2).

49. After publication of the book overseas and some distribution of it in the United Kingdom, the newspapers argued that there was no need to continue the injunction while the substantive action was being decided because the government's right to keep the information secret had already been effectively undermined. None the less, the government persisted with the attempt to maintain the injunctions and the English courts continued them until the end of the litigation when the House of Lords refused to grant permanent injunctions against the newspapers. The government did not isolate a single aim in justification for the ban on publication of extracts from the book. Because national security was only indirectly in point, the specific Convention objective, which the government said that the injunctions were protecting, was based on the fact that Mr.Wright's information has been received in confidence. To publish prematurely would have destroyed any right to confidentiality, which the court might later find. When the information did get into the public domain as a result of its publication abroad, this argument lost its cogency. In consequence, the government relied upon a different aim. National Security was to be protected by assuring third parties of the effective protection of secret information by making it clear that officers who threatened to breach their life-long duty of confidentiality could be effectively prevented from doing so by legal action and that such action would, indeed, be taken. The European Court did not attempt to assess whether this was a plausible national security objective, though it did comment on the transformation of the government's case, because it found that, in any event, the continuance of the injunction was disproportionate to any need to protect the confidence interest. However, the Court held that there was no breach of Article 10 before the book was first published, in the US in July 1987; the injunctions were justified to protect national security and maintain the authority of the judiciary.

50. The Court frequently resorts to the language of 'balance' between the expression and the public interest. The Court gives the highest importance to the protection of political expression and, generally, requires the strongest reasons to justify impediments on the exercise of political speech. The privileged position of political speech derives from the Court's conception of it as a central feature of a democratic society, both in so far as it relates to the electoral process and day-to-day matters of public concern. Political speech involves questions of press freedom. There is an intense relationship between government and the media, which the case law of the Court of Human Rights acknowledges.

51. The role of the press is that of 'public watchdog', though the press is not above the law. In Goodwin v UK, 1994, a journalist was ordered by the national court to reveal the source of information to be included in an Article he proposed to write. The information related to the affairs of a company, which alleged that it had been stolen.
The national court ordered that the information should be revealed for the 'prevention of crime'. The Commission said that the protection of sources was an 'essential means' for the effective exercise of press freedom and a journalist could be compelled to reveal his sources only in 'exceptional circumstances'.

52. Where the reason for the condemnation of a press report is that it is untrue, the defendant must be given the opportunity to prove the truth of his allegations. This was the position in Castells v Spain, 1992, where the applicant had complained about the manner of and lack of accountability for policing of the Basque country. Castells was a senator and a member of an extreme Basque nationalist party. His allegations were particularly serious: that the police were responsible for the murder of Basque activists and that they were protected by the authorities from prosecution. He had been convicted of criminal offences involving serious insults to the government and public servants. The Court of Human Rights found that the Spanish courts had denied Castells the opportunity he had requested to prove the truth of his allegations and held that it was not necessary to punish him for the publication of factual assertions, which might be true.

53. The Court attaches great importance to the role of press and television in assuring the effective enjoyment of the right to receive ideas and information on matters of political and public concern. As it is known, there is no a licensing regime applicable to the press and it is free from many of the constraints such as balance and taste, which are applied to television. The court of Human Rights decides whether an interference with expression is justified. In the Otto-Preminger-Institut v Austria case, 1994, where the content of a film was distressing to some people, part of the purpose of it was to warn people of the nature of the film.

54. As it is known, freedom of expression is related with political process. In Casells v Spain, 1992, the Court of Human Rights indicated the special value of freedom of expression to members of the opposition. It said that 'in a democratic system the actions or omissions of the government must be subject to close scrutiny no only of the legislative and judicial authorities, but also of the press and public opinion'.

D. Margin of Appreciation

55. The Court of Human Rights takes into consideration a margin of appreciation to the states in assessing whether an interference with a protected right is 'necessary in a democratic society'. It is for the state to show that there is a 'pressing social need' for the interference, given that the rights protected by Article 10 carry a particular weight. It is worth to mention that the issue of proportionality of the interference to its objective has come to play a prominent part in the disposition of freedom of expression cases.

E. Proportionality

56. The proportionality of the interference is an important issue.
Issues of proportionality are divided into two groups: those where the finding is that the restriction is disproportionate because there is practically no need at all for it, when a review of the national decision will be readily undertaken; and those where there is room for different assessments of the breadth of a restriction or the feasibility of alternative for the state, where the margin of appreciation conceded to the state is, other things being equal, likely to be greater. It is considered that the state has acted disproportionately where it fails to produce evidence for its claims of the necessity to interfere with expression. In Barthold v FRG, 1985, The Court of Human Rights held that the injunction against the applicant was disproportionate to the need to protect the rights of his fellow veterinarians to fair competition because it reached matters, which were properly ones of public concern.

57. The Court of Human Rights takes always into consideration the conflict between the individual right and the public interest. The requirements of 'law' as the basis for interference have been elaborated and the demand for a 'pressing social need' to justify interference was first set down. Article 10(1) brings in expression of different worth. The Court of Human Rights puts a hierarchy of value, first to political expression, then to artistic expression and finally to commercial expression. Accordingly, the interference that is permitted will depend upon the character of the expression involved. The requirement of a 'pressing social need' to limit political speech puts a high burden upon the state to show that its action was necessary, but for advertising it appears to be sufficient that its restrictions were not unreasonable.

58. It would be a mistake to consider that the characterization of the kind of expression would alone be enough to decide whether interferences were legitimate. Many factors related to the vigour of the expression, the means by which it is communicated and the audience to which it is directed will be relevant in each case. The 'European' standard is to be considered in each case, since it is adopted in national law and practice by Albania.

59. The Convention does not provide standards to arbitrate on matters of taste, on the legitimacy of measures to protect cultural identity, on the conflict between concentration and pluralism of media outlets, among many issues of current concern. The margins of appreciation here will be very wide but the jurisprudence of the Court reminds states that their powers are not unlimited.

F. Albanian Legislation Concerning Freedom of Expression

Let us consider now the legislation of the Republic of Albania concerning freedom of expression.

a. The Constitution:

Article 22: "

1. *Freedom of expression is guaranteed.*
2. *Freedom of press, radio and television is guaranteed.*
3. *Prior censorship of a means of communication is prohibited.*
4. *The law may require authorization to be granted for the operation of radio or television stations."*

Article 23:

"1. The right to information is guaranteed.

2. Everyone has the right, in compliance with the law, to get information about the activity of state organs, as well as of persons who exercise state functions.
3. Everybody is given the possibility to follow the meetings of collectively elected organs".

Article 48:
"Everyone, by himself or together with others, may address requests, complaints or comments to the public organs, which are obliged to answer within the time periods and conditions set by law".

Article 73(1):
"1.A deputy does not bear responsibility for opinions expressed in the Assembly and votes given. This provision is not applicable in the case of defamation."

Article 60 & 63:
The People's Advocate (the Ombudsman) defends the rights, freedoms and lawful interests of individuals from unlawful or improper actions or failures to act of the organs of public administration.
The People's Advocate has the right to make recommendations and to propose measures when he observes violations of human rights and freedoms by the public administration.
Public organs and officials are obligated to present to the People's Advocate all documents and information requested by him.

b. The Penal Code:

Article 119
Insulting

"Intentionally insulting a person constitutes criminal contravention and is punishable by a fine or to up to six months of imprisonment.
When this act is committed publicly, it constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment"

Article 120
Libel

"Intentionally spreading rumours, and any other knowingly false information, which affect the honour and dignity of the person, constitutes criminal contravention and is punishable by a fine or up to one year of imprisonment.
The same act, committed publicly, constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment."

Article 239
Insulting [a public official] on duty

"Insulting intentionally an official in the execution of a state duty or public service, because of his state activity or service, constitutes criminal contravention and is punishable by a fine or up to six months of imprisonment.
When the same act is committed publicly, it constitutes criminal contravention and is punishable by a fine or up to one year of imprisonment."

Article 240
Defamation [toward a public official] on duty

"Intentional defamation committed toward an official acting in the execution of a state duty or public service, because of his state activity or service, constitutes criminal contravention and is punishable by a fine or up to one year of imprisonment.
When the same act is committed publicly, it constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment."

Article 241
Defamation toward the President of the Republic

"Intentional defamation committed toward the President of the Republic is punishable by a fine or up to three years of imprisonment."

Article 121
Intruding into someone's privacy

"Fixing appliances which serve for hearing or recording words or images, the hearing, recording or airing words, fixing, taping or transmitting images, as well as their preserving for publication or the publication of these data which expose an aspect of the private life of the person without his consent, constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment."

Article 122
Spreading personal secrets

"Spreading a secret, which belongs to someone's private life by the person who obtains that [secret] because of his duty or profession, when he is compelled to not spread it without prior authorization, constitutes criminal contravention and is punishable by a fine or up to one year of imprisonment.
The same act committed with the intent of embezzlement or of damaging another person, constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment."

Article 294
Spreading state secrets by the person entrusted with it

"Divulging, spreading, and informing facts, figures, content of documents or materials which, according to a publicly known law, constitute state secrets, by the person entrusted with it or who became informed of it because of his capacity, is punishable by a fine or up to five years of imprisonment.
When the same act is committed publicly, it is punishable by a fine or up to ten years of imprisonment."

Article 295
Spreading state secrets by citizens

"Divulging, spreading, and informing facts, figures, content of documents or materials which, according to a publicly known law, constitute state secrets, by any person who becomes informed on them, is punishable by a fine or up to three years of imprisonment.
When the same act is committed publicly, it is punishable by a fine or up to five years of imprisonment."

Article 213
Handing over classified information

"Handing over classified information of military or other character to a foreign power with the intent of encroaching the independence of the country is sentenced from ten to twenty years of imprisonment."

Article 214
Providing information

"Providing classified information of military or other character, with the intent of handing over to a foreign power in order to encroach the independence of the country, is sentenced from three to ten years of imprisonment."

Article 168
Giving false information

"Giving false information on the situation of a society by the certified accountant of a corporation, or non-reporting to the competent agency on an offence committed, when cases of exclusion from criminal responsibility provided in Article 300 of this Code do not exist, is punishable by a fine or up to five years of imprisonment."

Article 169
Revealing secrets of a company

"Revealing the secrets of a company by its certified accountant, except of the cases when he is compelled to do so by law, constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment."

Article 265
Inciting nationality, racial and religious hatred or conflict

"Inciting nationality, racial and religious hatred or conflict as well as preparing, propagating, or preserving with the intent of propagating, of writings with that content, is punishable by a fine or to up ten years of imprisonment."

Article 222
Calls for taking on the arms or unlawful taking-over of the command

"Calls for taking on the arms against constitutional order, creating or organizing the armed forces in violation to the law, unlawful taking-over of the command of the armed forces in order to conduct military actions with the intent of opposing constitutional order, are sentenced from five to ten years of imprisonment."

Article 223
Public calls for violence

"Public calls to commit violent acts against the constitutional order, are punishable by a fine or up to three years of imprisonment."

Article 225
Distributing anti-constitutional writings

"Distribution of writings or use of symbols belonging to an anti-constitutional party, organization or associations or to one previously banned on the same grounds, is punishable by a fine or up to three years of imprisonment.

Distributing or infiltrating materials, writings or symbols into the Republic of Albania from abroad, which intend to overturn the constitutional order or affect the territorial integrity of the country, is punishable by a fine or up to three years of imprisonment."

Article 227
Insulting representatives of foreign countries

"Insulting prime ministers, cabinet members, parliamentarians of foreign states, diplomatic representatives, or [representatives] of recognized international bodies who are officially in the Republic of Albania, is punishable by a fine or up to three years of imprisonment."

Article 117
Pornography

"Production, delivery, advertisement, import, sale and publication of pornographic materials in minors' premises constitutes criminal contravention and is punishable by a fine or up two years of imprisonment.

c. Restrictions to receiving and imparting information in various laws

60. Law no.8457, 11.02.1999 " On Information Classified 'State Secret'"
This law establishes regulations for classifying, using, keeping and declassifying information on national security, which, according to this law, is considered state secret. Violation of these regulations is punishable either as a disciplinary or criminal offence.

61. Law no.8391, 28.10.1998, "On the National Intelligence Service" amended by the law no.8479, 29.04.1999. This law provides that the National Intelligence Service collects information for the protection of national security. The National Intelligence Service must act proportionately with the safeguarding of human rights and freedoms, whenever it collects the necessary information.

62. Law no.8503, 30.06.1999 "On the Right to Information on Official Documents" provides that everyone is entitled to ask for information on official documents concerning the activity of public authorities and persons vested with state functions, without being obliged to explain the motives of such request. The public authority is obliged to impart information to every person concerning an official document, except when the law provides otherwise.

63. Law no.8517, 22.07.1999 "On Personal Data Protection" provides that the public can have access to the personal data of an individual only in the way prescribed by this law.

64. Law no.8485, 12.05.1999 " Code of Administrative Procedures of the Republic of Albania" provides that in exercising of its functions, public administration protects public interest, the rights and constitutional or legal interests of individuals. In its relations with individuals, the public administration is guided by the principle of equality, in the sense that nobody can not be privileged or be discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, social status, or parentage. Acts of public administration, which limit the rights of individuals for a public interest or for the protection of the rights of others and are provided by the Constitution, international agreements, laws and normative acts, should take into account the proportionality principle and may not infringe the essence of the rights of others. In exercising of its functions, the public administration treats honestly and impartially all subjects, with whom it enters into relations. The public administration exercises its activity in co-operation with individuals, providing them for the necessary information and explanations. The public

administration is responsible for written information imparted to individuals. The public administration persons are obliged not to disseminate personal data or data considered as state secrets. Participants involved in an administrative procedure are entitled to receive information and to be aware of documents used by this procedure, except for the cases where restrictions are provided by the law. Every person is entitled to be informed by the administration on proceedings concerning him.

65. Law no.8549, 11.11.1999 "The Status of Civil Servant" defines that civil servants should know, respect, apply and act in accordance with the Constitution, the Code of Administrative Procedures and the other legal or normative acts. They should provide the information demanded from the public, interested persons and public institutions, except for the cases where this information is considered as state secret, confidential or for internal use, in accordance with laws and the other normative acts.

66. Law no.8454, 04.02.1999 "On the People's Advocate" provides for every individual, group of individuals or non-governmental organizations, which claim that their rights, freedoms and lawful interests are violated from unlawful or improper actions or failures to act of the organs of public administration, are entitled to complain or notify the People's Advocate and to demand his intervention in defending of those rights and freedoms.

67. Law no.8410, 30.09.1998 "On Public and Private Radio and TV in the Republic of Albania" covers the public and private radio and television activity in the territory of Albania. The activity of radio and television is free. This activity respects for impartially the right to information, political and religious beliefs, personality, dignity, private life of individuals, as well as their fundamental freedoms and rights. The rights of children are particularly respected in this activity.

68. This law requires the licensing of private broadcasting and provides for rules on the dissemination of information through broadcasts. The private broadcasting license is issued by the Radio and Television National Council, which organizes a competition for this purpose. Radio and Television programs may not be censured. These programs respect restrictions in Article 10 of the Convention and those provided by the Constitution and the law. The broadcasting, which incite violence, racial, religious and national hatred, acts against Constitution, territorial separation, discrimination against for reasons such as political and religious community, are not allowed. Albania has ratified the European Convention on Inter-frontier TV. (The Law no.8525, 09.09.1999).

69. Law "On Cinematography" defines basis and principles of organization, direction and development of cinematography, as a way of artistic expression.

70. Law no.7756, 11.10.1993 "On the Press", amended by the Law no.8239, 03.09.1997. This Law determines that the press is free. Freedom of press is protected by law." So, the Albanian press is not regulated in details by law. There are no regulations governing who should be liable if an article causing insult or injury is published, whether a journalist has to reveal his sources, and if he must, under what conditions.

71. Recently a new draft-law "On Freedom of Press" is being prepared by the Committee on Public Information Means of the Assembly of Albania in cooperation with the Institute on Public and Legal Studies and supported by the IREX Office, relying on European experiences. It provides restrictions in giving information to the public wherever it is prohibited by the laws "On the Information classified as State Secret", "On the Right to Information on official documents", "On the Personal Data Protection", "On Copyrights", "On Private and Public Radio and Television" and by the Penal Code. Before making information public, the

journalist should verify the correctness, content and credibility of the source. If the information would cause serious damage to a legal person, it should be verified also through a second alternative source. In the case where the information is taken in an official way, which means from authorized official sources in relation with public or from an activity open to the public, the journalist does not need to verify the truthfulness and accuracy of the information. While reporting about criminal persons the journalist should observe the rule on the presumption of innocence. Journalists should not misuse the freedom of expression and should not exceed the limits of such freedom when they are investigating the facts. These limits are exceeded if the journalists do not respect the other's rights, such as the right to privacy, presumption of innocence, reputation, honours and dignity of individuals, and the public order, national security and justice. It is provided that when a journalist commits a misdemeanour, he is punished with a fine and with the compensation of the damage caused by his actions. In the compensation of the damage is included not only the material damage, but also the moral one. The same punishment is for the chief editor in the case of misdemeanours. When it is verified that he has published some incorrect, incomplete or deceitful information and he is responsible for this, the Court, upon the request of the interested person, can order him to publish an article in denial of the previous one. He is obliged to publish this denial article even if it is verified that the publication of those facts was not illegal and intentional and the chief editor didn't know that the information was incorrect or incomplete.

72. Journalists or chief editors are not responsible, unless they act in collaboration, and they are excluded from criminal proceedings for comments, news or opinions of others, if they clearly mention the authors and sources of these facts. The publisher is responsible for his actions if he acts in collaboration with the journalist and the chief editor. He is responsible also in the cases when he knows that he is going to publish an article that is false and harmful on the honour and dignity of other persons or it is against public order, national security, etc. As a rule, he is punishable by a fine and payment of damages.

73. Law no. 8044, 07.12.1995 "On Competition", amended by the law no.8403, 10.09.1998.
This law prohibits unfair competition in Albania, including misleading advertisement, incorrect use of a company name, trademark or other identifying feature. These restrictions are in accordance with the requirements of the Convention.

74. Law no. 7827, 31.05.1994 " On the Albanian Bar Association", amended by the law no.8428, 14.12.1998, no.8551, 18.11.1999, prohibits lawyers from disclosing and disseminating information made known to them in the course of providing legal assistance. Law no.7829, 01.06.1994 "On Notaries", amended by law no.7920, 19.04.1995, provides for that notaries must keep in confidence all information made known to them in the performance of their activity and that is regarded as professional secret.

75. Law no.7638, 19.11.1992 "On Commercial Companies" protects business secrets.

G. Conclusions

76. The respective legislation in effect in Albania is, in principle, in accordance with Article 10 of the Convention. More attention should be given to the press issues, which are not covered by law yet.

III. ARTICLE 11 OF THE CONVENTION - freedom of assembly and association

77. Article 11 of the European convention on Human Rights provides:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security of public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."'*

78. Article 11 protects two rights of the individual: the right to freedom of peaceful assembly and the right to freedom of association. Since these rights are different from each other, they are treated separately.

A. Freedom of peaceful assembly.

79. The European Convention on Human Rights protects the right to organize political demonstrations as a 'fundamental right'. It covers 'private meetings and meetings in public places'. It includes marches as well as meetings. In such cases the only limitation is that the assembly must be 'peaceful'. Disruption incidental to the holding of the assembly will not render it 'unpeaceful', whereas a meeting planned with the object of causing disturbances is not protected by Article 11.

80. As it is known, for the authorities this right raises a number of problems, especially where public meetings and marches are involved. These cause threats to public order through the disruption of communications, the prospect of confrontation with the police and the danger of violence with rivals, who ask for their own freedom to demonstrate.

81. Therefore, the principle of freedom of assembly imposes positive obligations on the state to protect those exercising this right from violent disturbance by their opponents. In such a situation both sides may claim to be exercising freedom of assembly. But, the obligation of the state is to protect those exercising their right of peaceful assembly and no those that aim at disruption of the activities of the other. The threat of disorder from opponents does not of itself justify interference with the demonstration. The requirements of this positive obligation do leave a good deal to the discretion of the state authorities. The fact that action may have to be taken in anticipation of possible disturbances leaves a wide margin of appreciation to the state to decide what Article 11 requires in a particular case.

82. In the case of Arzte fur das Leben v Austria, 1988, the Austrian Association of the Medical Profession against Abortions staged a march and a joint prayer in a church in support of strict measures against abortions. Their opponents expressed their indignation by holding at the same time a counter-demonstration during which they threw eggs at the doctors and with using loudspeakers, shouted the demonstrators down. The police tried to re-establish order but did not drive the counter-demonstrators from the platform. They interfered only when a real danger of a riot arose. The applicants claimed that Austria had violated the Convention, because Article 11 prescribes not only passive tolerance of the right to assembly, but also active interference in implementing the right in practice. The Court of Human Rights held that the provisions of Austrian laws were fully in compliance with the provisions of Article 11 of the Convention. The Austrian criminal law makes it a punishable offence to obstruct a legal demonstration, while the Assemblies Act lays down the duty of the police to protect the

participants of a legal demonstration in the event of a counter-demonstration. The police did everything within their power under such circumstances.

83. Since the threats to public order from the exercise of the right of peaceful assembly are real, the state authorities demand a prior authorization, which imposes some conditions to be respected. Criminal penalties may be provided for taking part in assemblies held in defiance of rules or for offences committed in the exercise of this right. Requirement of notification or permission is not normally considered as interferences but bans.

84. The interference must be 'prescribed by law'.
The aims of government interferences permitted by Article 11(2) are 'the prevention of disorder or crime' and 'the protection of the rights and freedoms of others'.

85. In Ezelin v France case, 1991, Ezelin had taken part in a demonstration directed against the courts and individual judges in Guadeloupe. Ezelin attended in his capacity as lawyer and trade union official, carrying an inoffensive placard. The march disintegrated into violence. Ezelin did not leave the demonstration when this happened and he refused to answer police questions in an inquiry into the events. He was reprimanded by the Court of Appeal exercising its disciplinary function over lawyers for 'breach of discretion' in not disassociating himself from the march and for not cooperating with the police. No allegations of unlawful conduct during the march were made against Ezelin.

86. The Court of Human Rights held that there had been a lack of proportionality between the imposition of the sanction and the need to act in the interests of the prevention of disorder. A 'just balance' must not discourage persons from making their beliefs peacefully known.

Article 47 of the Constitution of the Republic of Albania provides that:

1. Freedom to have peaceful meetings, without arms, and to participate in them is guaranteed.
2.Peaceful meetings in squares and places of public passage are held in conformity with procedures provided by law.

87. New law no.8773, 23.04.2001 "On Assemblies" clarifies criteria, proceedings and circumstances for permitting and refusing assemblies by the State Police. It also provides for the procedure and the ground of restrictions for organizing an assembly. Organizing of meetings in public places (passages) requires a permit from the chief of police station, within that territory this meeting will be held, at least three days before the meeting. Under urgent circumstances the organizers of the assembly are obliged to notify the chief of the police station immediately, but no later than three hours before the meeting. The meaning of "assembly" and "public places" are defined. This law envisages the positive obligations of the public authorities in order to guarantee the safety of those assembled.

88. Sanctions provided by this law against participants in an unlawful assembly are less severe. So, participating in an unlawful assembly constitutes a criminal contravention and is sentenced only by a fine. Refusing to obey the order of the chief of police station for leaving an unlawful assembly, which constitutes a criminal contravention is sentenced also only by a fine. The relevant person can complain to the court against the administrative decision taken by the chief of the police station.

B. Restrictions of this right

The Penal Code

Article 261
Preventing the exercise of freedom of speech and assembly

> *"Committing acts, which prevent citizens from exercising the right of free speech or assembly, constitutes criminal contravention and is punishable by a fine or up to six months of imprisonment. When those acts are accompanied with use of physical violence, they are punishable by a fine or up to three years of imprisonment."*

Article 262
Organizing in illegal assembly

> *"Organizing assembly of people in squares and places of public passage, without prior permission by the competent authority according to the specific provisions or when organizers breach the conditions provided in the request for permission, constitutes criminal contravention and is punishable by a fine or up to one year of imprisonment."*

Article 263
Organizing illegal assembly with participation by armed people

> *"Organizing illegal assembly with participation by armed people is punishable by a fine or up to three years of imprisonment.*
> *Participation in illegal assembly of armed people constitutes criminal contravention and is punishable by a fine or up to one year of imprisonment."*

Article 233
Creating armed gangs

> *"Creating armed gangs to oppose on the public order through violent acts against life, health, personal freedom of the individual, property, with the intent of instilling fear and uncertainty to the public, is sentenced up to ten years of imprisonment."*

C. Freedom of association.

89. The right of freedom of association includes the freedom of individuals to come together for the protection of their interests by forming a collective entity that represents them. This 'association' enjoys fundamental rights against the state and has rights and owes duties to its members. An individual has no right to become a member of a particular association so that an association has no obligation to admit or continue the membership of an individual. In the same way, an individual cannot be compelled to become a member of an association. Therefore, professional associations, established by law and requiring membership of all practicing professionals, are not 'associations' within the meaning of Article 11(1), because of compulsory membership in such associations. Associations may have different purposes. They include political parties, although Article 17 allows a state to impose a restraint upon the programs they may pursue.

90. The negative obligation of the state is to interfere neither with individuals who seek to exercise their freedom of association nor with the essential activities of any established association. A legal basis is required for the formation and recognition of an association, so that it has legal personality.

91. The Court of Human Rights has clarified that the term "association" refers to something more formal and better organized than an assembly. In the Young, James and Webster v UK case, 1981, the Court was required to rule on "the closed shop" system in the United Kingdom. It

observed that in principal Article 11 could not accept a system of coercion in connection with membership of an association.

Article 46 of the Constitution of the Republic of Albania provides that:

"1. Everyone has the right to organize collectively for any lawful purpose.
2. The registration of organizations or societies in court is done according to the procedure provided by law.
3. Organizations or societies that pursue unconstitutional purposes are prohibited pursuant to law."

Article 9 of the Constitution:

"1. Political parties are created freely. Their organization shall conform to democratic principles.
2. Political parties and other organizations, the programs and activity of which are based on totalitarian methods, which incite and support racial, religious, regional or ethnic hatred, which use violence to take power or influence state policies, as well as those with a secret character, are prohibited pursuant to the law."

92. Some provisions of the Civil Code which cover the establishment of Associations are recently amended by law no.8781, 03.05.2001. Those amendments clarify proceedings and criteria for establishing an association and its right to posses its own property.

Article 39 (recently amended)

"An association is a legal entity, which is established by the free will of five or more physical persons or no less than two juridical persons, who pursue a certain, lawful goal for the benefit and interest of the public or its members."

Article 40 (recently amended).

"The association establishment act is registered with the court by its founders' request.
The rules on organization and functioning of the association are defined under its statute, which should be put in writing and must contain in particular:

a) the name and purpose of the association, its centre, and territory where it will conduct its activity;
b) the conditions of admission and removal of members, as well as their obligations and rights;
c) the management organs of the association, the manner of their establishment, and their competencies;
d) the terms, the manner of notification, and competencies of general meetings and the delegates;
e) the sources of funding, as well as the contributions and dues, which are required from each member.
f) *the manner in which the statute is amended and the association is terminated."*

Article 41 (recently amended)

"The association is established by the meeting of founders, where the statute is approved and its managing organs are elected. The association must file a request for registration at the district court by the way prescribed by law."

Article 42 (recently amended)

"The association is recognized as legal entity as of the date the competent court has approved and registered it. Founders of association can complete needed acts for establishing and its registration till the day of registration."

Article 43 (recently amended)

"The association can found its branches wherever it considers reasonable in order to fulfil its goal and activity."

Article 43/1 (new)

"The circumstances and ways of supervising the activity of associations by competent state organs are provided by law."

a. Organization of the Association

Article 44

"The general meeting of the members, or their representatives, is the highest organ of association.
It is called by the managing organ in accordance with the respective provisions of the statute, and when it is demanded by 1/5 of its members."

Article 45

"The general meeting decides upon the admission or expulsion of members and all other matters not specifically within the jurisdiction of any other organ of association.
In particular, it supervises the collection of income, the actions of the association, and the property of the association."

Article 47

"The management organ has the right to care for the interests of the association, to protect them, and to represent the association in conformity with the competencies provided in the statute."

b. Membership in the Association

Article 48

"Candidates for membership, who fulfil the necessary conditions, may be admitted at any time. The right to resign is guaranteed, however, notice of resignation must be presented at least six months before the end of the calendar year, or within the term specified by statute."

Article 51

"Every member has the right to reject any decision of association that is contrary to law or the statute. Members have one month from the day they received notice of the decision to reject it.

c. Dissolution

Article 52 (recently amended)

"An association may be dissolved by the following:
a) a decision of the general meeting of its members;
b) the number of members falls below the number specified in this Code or in the statute;
c) when its purpose is fulfilled, or it has become impossible to fulfil it;
ç) when it is proven that the association has committed an illegal activity;
d) in other circumstances provided by law.
The Court can decide to dissolve the association on occasions provided by law, by the request of every member of the association, its organs and the competent state organs."

d. Restrictions of this right:
The Penal Code

Article 224
Founding anti-constitutional parties or associations

> *"Founding of or participating in parties, organizations or associations which intent to violently overturn the constitutional order is punishable by a fine or up to three years of imprisonment. Re-founding a party, organization or association which was previously banned as anti-constitutional or the continuation of their activity in an open or covert way, is sentenced from one to five years of imprisonment."*

93. Law no.8580, 17.02.2000 "On Political Parties" prohibits political parties which are based on totalitarian methods, as well as those with a secret character. It also prohibits those where their internal organization is against democratic principles, where its aim touse violence in order to take power or influence state policies is expressed through the Foundation Act or through the latter incitement and support of racial, religious, regional or ethnic hatred is expressed, and when the party is established outside the territory of Albania. The unconstitutional activity of political parties is prohibited. This fact is considered and finally decided by the Constitutional Court.

D. Freedom to form and join trade unions

94. This right is a sub-division of freedom of association, not some special and independent right. It is not permitted to establish or to favour a single trade union, in which membership of the appropriate individuals is compulsory.

95. In the case of the National Union of the Belgian Police v Belgium, 1975, the major claim against the government was that in drawing up the statutes of the police. The Court held that there was no violation of Article 11. The aim of this Article is to guarantee the right of trade unions to protect the interests of their members rather than to oblige public or employers' organizations when they are making decisions to consult with all the trade unions and other organizations representing employees' interests. Trade union members have considerable opportunities to protect their interests, including the calling of strikes.

96. In the Schmidt and Dahlstrom v Sweden case, 1975, the Court of Human rights observed:

> *"Article 11 of the Convention does not secure (for) trade union members ... the right to retroactivity of benefits, for instance salary increases, resulting from a new collective agreement. Such a right, which is enunciated neither in Article 11(1), nor even in the Social Charter of 18 October 1961, is not indispensable for the effective enjoyment of trade union freedom and in no way constitutes an element necessarily inherent in a right guaranteed by the Convention. (...) (The right to strike), which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances."*

97. Article 264 of the Penal Code of Albania on 'forcing to strike or not to strike' provides that:

> *"Forcing an employee to strike or not to strike against his will or creating obstacles and problems for continuing his job when the employee wishes to work, constitutes criminal contravention and is punishable by a fine or up to three months of imprisonment."*

Constitution of Albania

Article 49 provides that:

"2. Employees have the right to social protection of work."

Article 50

"Employees have the right to unite freely in labour organizations for the defence of their work interests."

Article 51

"1. The right of an employee to strike in connection with work relations is guaranteed.
2. Limitations on particular categories of employees may be established by law to assure essential social services."

98. The Law no.7516, 07.10.1991 "On Trade Unions in the Republic of Albania", amended by the laws no.7640, 11.12.1992, no. 7795, 16.02.1994, provides that trade unions are independent social organizations, which are established as voluntary unions of workers, whose intention is the representation and protection of the rights and of economic, professional and social interests of their members. Trade unions are social organizations, independent from the employer, public administration and political parties. In their activity they are guided only by the independent will of members, based on the Constitution, laws, their statute and program. Trade unions are obliged to respect the rule of law. They don't deal with political activity.

a. Restrictions on public service employees

99. Article 11(2), provides that: *'This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.'*

100. In the *Council of Civil Service Unions v the United Kingdom*, 1987, the British government had decreed that civil servants working at a telecommunications interception station should cease to have the right to belong to a trade union. Instead, they were allowed membership only of an approved staff association. Previously, staff had been members of trade unions, which operated at the station to represent their interests. The Commission decides that the staff fell within the second sentence of Article 11(2) as 'members of the administration of the state'. In particular, it noted that Government Communications Headquarters (GCHQ) was a 'special institution' with functions associated with those of the military and the police. It held that the term "lawful"("legitimate") in the second sentence meant firstly that the restrictions must be imposed in accordance with national law. Accordingly, it includes the principle of proportionality and, secondly, that, the restriction should not be arbitrary. As to the second, the Commission mentioned that the term "restrictions" cannot imply complete suppression of the exercise of the right in Article 11. However, the Commission recalls that the same term is also employed in the first sentence of Article 11, paragraph 2. This provision has been interpreted by the Commission as also covering a complete prohibition of the exercise of the rights in Article 11.

101. The Court of Human Rights has retained a narrow view of the positive obligations of the state, which may be found under Article 11(1) to prevent private interference with individual freedoms. Under Article 11(2), it has allowed a wide margin to the states.

102. In the case of Gustafson v Sweden, 1994, the Commission accepted that effective trade union action against his business violated his negative freedom of association (not to be a member

of the employers' association with which the trade union dealt) under Article 11 and his right to enjoyment of his possessions under Article 1 of the First Protocol.

Constitution of Albania

Article 12 provides that:

"2. The armed forces maintain neutrality in political questions ..."

103. Law no.8549, 11.11.1999 "The Status of Civil Servant" defines that civil servants are not allowed to strike. They are entitled to establish and to be members of trade unions or professional associations. Rules on exercising of trade union activity of civil servants are prescribed by a particular law.

104. The civil servants are entitled to participate in decision-making process, concerning labour conditions, through trade unions or their representatives. The civil servants are entitled to be members of political parties, but they cannot be members of the respective executive central organs.

105. Law no.7504, 30.07.1991 "On the Police of Order", amended by laws no.7567, 25.051992, no.7601, 09.09.1992, no.7620, 12.10.1992, no.7880, 01.12.1994, no.8341, 06.05.1998 imposes restrictions on the exercise of the right to form and join trade unions. Members of the police cannot be members of political parties and are prohibited to join the activities of political parties. They are not allowed to strike.

106. Law no.7496, 03.07.1991 "On the Status of members of the armed forces of the Republic of Albania" prohibits these members to participate in a political party or organization, as well as in trade unions. They are not allowed to strike.

b. Conclusions and Proposals:

107. The legislation of Albania complies with the provisions of Article 11 of the Convention.

IV. ARTICLE 2, PROTOCOL 7 OF THE CONVENTION - the right to review in criminal cases

1.Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2.This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.'

108. The term "tribunal" is used to indicate that Article 2 does not concern offences that have been tried by bodies, which are not tribunals within the meaning of Article 6 of the Convention. The fair trial requirements in Article 6 of the Convention, as they apply to appeal proceedings, must be respected by the 'higher tribunal' when it conducts its review of the tribunal decision.

109. In the *Nass v Sweden* (1994) case, the applicant complained that he was deprived of his right to have his conviction reviewed by a higher tribunal in so far as he was convicted by the

Court of Appeal and his request for leave to appeal to the Supreme Court was refused. Referring to the second paragraph of Article 2 of the Seventh Protocol, the meaning of 'minor offences' is to be explained. The Explanatory Memorandum suggests that an important criterion is whether the offence is punishable by imprisonment or not. The Memorandum also suggests that where a person pleads guilty at his trial, his right of review is limited to his sentence.

110. In the Putz v Austria (1993) case, the Commission said that an "offence against the order in court" within the meaning of the Austrian Court Organization Act, in conjunction with the Code of Civil Procedure, and the Code of Criminal Procedure respectively, constitutes a less serious offence both as to its nature and to the severity of the punishment involved. The Commission therefore considered that an "offence against the order in court" as being of a minor character. The exception to the right to a review by a higher tribunal, pursuant to Article 2 (2) of the Seventh Protocol, thus was applied.

Constitution of Albania

Article 43

"Everyone has the right to appeal a judicial decision to a higher court, except when the Constitution provides otherwise."

111. The procedure for an appeal against a court decision or sentence is laid down in the Code of Penal Procedure.

Article 135

"The judicial power is exercised by the High Court, as well as the courts of appeal and courts of first instance, which are established by law."

Article 140

"1.The High Court has original and review jurisdiction. It has original jurisdiction when adjudicating criminal charges against the President of the Republic, the Prime Minister, members of the Council of Ministers, deputies, judges of the High Court, and judges of the Constitutional Court."

112. Even in those cases where the above-mentioned persons may be convicted of a criminal offence by the High Court (Penal College) shall have the right to appeal to the Joint Colleges of the High Court.

V. ARTICLE 3, PROTOCOL 7 OF THE CONVENTION - right to compensation for miscarriages of justice

"When a person has been convicted of a criminal offence by a final decision and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the state concerned, unless it proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

113. This article provides for a right to compensation for miscarriages of justice. The person must have been convicted of a criminal offence by a final decision and suffered consequential punishment.

114. Article 3 does not apply where a charge has been dismissed or an accused person is acquitted by the trial court or by a higher court on appeal. The conviction must have been overturned or a pardon granted because new or newly discovered facts show conclusively that there has been a miscarriage of justice, by which is meant "some serious failure in the judicial process involving grave prejudice to the convicted person." There is no right to compensation if the non-disclosure of the unknown fact in time is wholly or partly attributable to the person convicted.

115. Article 44 of the **Constitution** corresponds in general to Article 3 of the Seventh Protocol. It provides for that: "Everyone has the right to be rehabilitated and/or indemnified in compliance with law if he is damaged because of an unlawful act, action or failure to act of the state organs".

116. Article 268 of the **Code of Penal Procedure** provides for compensation for unfair imprisonment. It states that:

> *1.The one who is found innocent by final decision is entitled to compensation for the served detention, except for the case where it is proven that the wrong sentence or non-disclosure of the unknown fact at the time was caused entirely or partly by himself.*
> *2.The same right belongs to a person punished, who has been detained, when by a final decision it is proven that the act which has imposed the measure is issued in absence of the requirements provided by Article 228 and 229.*
> *3.The provisions of paragraph 1 and 2 shall also apply to the favour of the person, on whom the court or prosecutor has decided the dismissal of the case, except for the cases provided by Article 234.*
> *4.When it is proven by court decision that the fact is not considered a criminal offence by the law, because the relevant provision is abrogated, the right to compensation is not recognized for the part of the detention served before the abrogation.*

Article 269 provides for:

> *1.The request for compensation must be presented within three years from the date the decision of acquittal or cessation of the case has become final, otherwise it is not accepted.*
> *2.The amount of the compensation and the way of its assessment, as well as the cases of compensation for the house arrest, are determined by a particular law.*

Article 459:
Compensation for unfair sentence

> *"1.The person acquitted during the review, when he has not given intentional reasons or gross negligence for the judicial error, is entitled to compensation in proportion with the duration of the sentence and personal and familiar consequences deriving from the sentence.*
> *2.The compensation is made by payment of an amount of money or by providing a living income.*
> *3.The request for compensation is made, by effect of non-acceptance within two years from the day that the decision of review has become final and is submitted to the secretary of the court, which has rendered the decision.*
> *4.The request is communicated to the prosecutor and to all interested persons.*
> *5.The decision of compensation is subject to appeal to the High Court."*

Article 460:
Compensation in case of death

"When the punished person dies before the proceedings of review, the right to compensation passes on to his heirs..."

VI. ARTICLE 4, PROTOCOL 7 OF THE CONVENTION - the right to be protected against multiple conviction and punishment *(ne bis in idem)*

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this article shall be made under Article 15 of the Convention."

117. This Article protects freedom from a double threat. Article 4 of the Seventh Protocol is restricted to acts within the same jurisdiction. It does not prevent a person being convicted of the same offence in different jurisdictions. Nor does it prevent a person being made the subject of proceedings of a different character, for instance disciplinary proceedings, as well as criminal proceedings within the same jurisdiction.

118. In the Baragiola v Switzerland (1993) case, the Commission stated: "It is clear from the express terms of this provision, that it upholds the *"ne bis in idem"* principle only in respect of cases where a person has been tried or punished twice for the same offence by the courts of a single state. But the applicant was first convicted in Italy, whereas the second conviction, in respect of the same acts, was pronounced by a Swiss court."

119. This right is provided for by Article 34 of the **Constitution**, which states:

"No one may be punished more than one time for the same criminal act nor be tried again, except for cases when the re-adjudication of the cases is decided on by a higher court, in the manner specified by law".

120. The Code of Penal Procedure in its Article 7 also provides for this constitutional provision. It states that:

"1.No one may be tried again for the same criminal offence, for which he has been tried by a final decision, except for the cases the competent court has decided the re-trial of the case."

CHAPTER 8

COMPATIBILITY OF ALBANIAN LEGISLATION WITH ARTICLE 1 OF THE FIRST PROTOCOL OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BY ILIR PANDA & RIZA PODA

I. BRIEF OUTLINE ON THE MEANING OF PROPERTY

1. Many researchers have tried continuously to give a more or less complete definition or meaning to the institute of property. The significance of their thoughts is that they have all tried to include the fundamental elements that constitute this institute. However, the definitions have been different depending on these elements. This is the cause of the different formulations provided in the relevant legal provisions in the historic aspect but even wider.

2. Anyway, disregarding the difference, and whether these definitions have been complete or not, those have had an impact on the further development of the analysis of the basic meaning of the Institute of property. As a consequence, an objective concept has now been concluded, namely that the property institute has the main role in any juridical system. In one way or another, it is this institute that determines in a direct or indirect manner the definition of other institutes.

3. Contemporary Constitutions, as fundamental laws of various countries, have given concrete formulations regarding the property institute. But, regardless of the differences that are naturally encountered from one country to the other, what they eventually have in common is the fact that they do not the right of ownership protect totally and without limits.

4. Constitutions, as well as other laws and by-laws, put the stress, more or less, on the legal definition of its content and the limits. Apparently, we have to do with, let us say, a fundamental conclusion that the right of ownership of an individual or of a group of individuals, as a right to posses, to enjoy his/her property, is a universal and uninfringeable right, in the meaning that the individual or the group of individuals have an absolute power over his/her property. But, on the other hand, there are limitations defined by law. These limitations consist in the definition by law of the cases when the owner's rights can be interfered with by a third party, and especially by the state as a special juridical person. However, in all these cases, the interference should take place only for a public interest and always against a full and fair compensation.

5. In order to ensure stability and balance in property relations, so that the property will perform its function as an objective and subjective right, regardless of the juridical person we refer to, the regulatory, balancing and controlling role of the state is irreplaceable. If the state will implement this function, in conformity with the fundamental mission of a democratic state by keeping the equilibrium and the harmony between the interests of different social classes, the eventual obvious problems and concerns can be avoided. The role of the state in this direction is comprehensive and permanent. But, this role should always take priority, precisely with regard to the fundamental relations, because the consolidation and further development of the property relations in a harmonised way depends on a large degree from their proper protection. It is required that laws in their entirety should be an expression of the predominance of the general will. But, the state will that creates the general legal standard, should not be unconditioned, because otherwise even this will expressed through its bodies (the Assembly, the Government),

can deviate from the general will for many reasons. In order to prevent this, international law provisions, and also the international institutions and mechanisms in the field of law in general and for the protection of human rights in particular should be kept in mind. It can be said that the property relations can be sanctioned, arranged and protected in the interest of the individual and the society, through concrete legal provisions, but always in conformity and harmony with the international standards on human rights.

II. Analysis of Article 1 of the First Protocol of the ECHR

A. On some problems regarding the content and the meaning of Article 1, Protocol 1 of the ECHR

6. The special characteristic of the right to ownership is that it can be defined neither in a total civil meaning nor in a political or social one. In order to realise completely and effectively the social rights, a first requirement would be the re-distribution of property and sources, whereas from another point of view, the right to ownership protects the gained rights. From one perspective it runs against the re-distribution, and as a consequence against the social right as well. In the historic perspective the right to ownership has been seen as linked with the civil freedoms, but on the other hand, this right has had considerable economic contradictions. The right to ownership is divided from the economic and social right as long as it protects the economic interests of the individual. Effectively, such a protection of the economic rights of the individual has had a passive character up to now, because the stress is put on non-interference by the authorities, instead of underlining the effective measures of the state, in order to realise and ensure to each individual a real enjoyment of the right to ownership.

7. Such a dual character of the right to ownership comes into light even in the process of the creation of the mechanisms and of the definition of the international instruments on human rights. A research has pointed out that precisely this moment is one of the reasons why the right to ownership has been the object of opposite attitudes in International Acts on human rights. In Western countries, the stress is mainly put on the ownership right. Whereas socialist camp countries emphasized the social functions of property, which, in other words, means interference with the ownership rights on behalf of public interest. Notwithstanding the changes that happened during these last ten years, after the fall of the Berlin wall, under a lower ideological and political pressure, the right to ownership brings again into light contradictions with the international acts on the protection of human rights. Effectively, the right to ownership has been tied to the economic and social policies of various countries, and this has brought about a sometimes open, sometimes camouflaged opposition to international observation on this field.

8. From what was mentioned above, the content of the ownership right remains eventually a matter of interpretation by international supervising and observing bodies.

9. The definition of the ownership right in Article 1 of the Protocol 1 of the European Convention on Human Rights, signed on 15 March 1952 and in effect since 18 May 1954, reads:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

10. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

11. According to the definition of this provision, it guarantees the right of respect towards the property of the individual, instead of the ownership right. Whereas the supervising body of the

European Convention on Human Rights gives a somewhat different interpretation. According to it, "the right to peaceful enjoyment of the possessions is in essence the guarantee of the right of the property". Referring to the above-mentioned study, it results that "the absence of the definition of the ownership right in international conventions is not a surprise, because the accurate content of the concept of property, varies according to the different legal systems". Thus, no international convention would risk to reduce the protection of the property with the protection of the different forms of it."

12. The obligations that normally derive from the concept of Article 1 of Protocol 1, in different countries regarding the ownership right take several directions and concretely that of respect, of protection and of its realization.

    i. With **respect** of the ownership right, we understand the obligation of the state to refrain from interfering with the property rights of an individual or of a group of individuals, even if they are organized in different juridical companies, associations or foundations. Regarding a harmonization, in other words a regulation of the public and private interests, and as well the social functions of the property, such an obligation prohibits the state from interfering here and there, or arbitrarily with the property rights, thus creating a burden without causes or reasons to the individual or the group of individuals.

    ii. With obligation for **protection** of the ownership right, we understand the obligation of the state to protect the individual, or the individuals, the natural or juridical persons from the interference of any third party. As such can be considered the thieves, those who infringe the property in the civil point of view, etc. Such an obligation of the state is foreseen in the Constitution and its legislation, in a way that the right of ownership cannot be changed into an illusion.

    iii. With the obligation to **realize** the right of ownership, we understand the passing from the right of the property of an individual to that of his real rights over the property. Its real and objective fulfilment by any individual requires that he/she possesses and realizes at least a minimum of property, which should be necessary for a decent living, without forgetting insurance or the social assistance. If with the realization of the right of the ownership is going to be understood the realization of only the right of those who are in a condition to buy that, it would have been very difficult to talk about true and real realization of the right of ownership. In the concrete case, we would have to do with only a special group of individuals who are "privileged".

B. On some comparative problems between the Albanian legislation and the European Convention for Human Rights

13. The approval of the Law No. 7491, date 29.04.1991 "On the Main Constitutional Provisions", at the same time realized the abrogation of the Constitution of the year 1976. By its abrogation, the state did not have any more the right to be the overall owner in the Republic of Albania. Alongside this the right of the individual or of the juridical persons in order to enjoy the right of private property was recognized. After the approval of this constitutional law, the premises and the legal basis to issue and approve other laws, which would create the relevant conditions and would open the way to the private property and the privatisation in the country, was created.

14. Indeed, in the meanwhile the Albanian Parliament approved **Law No. 7512, date 10.08.1991 "On the sanctioning and protection of the private property, the free initiative, the private independent activity and privatisation"**. The approval of this law intended to set a new economic order and implement the transition from a system of a centralized economy controlled

by the state to an economic system based on free market principles. Article 1 of the law provides for the sanctioning and the protection of the private property, the free initiative, the independent private activities, the affairs, the foreign investments, the right to get and give credit, the right to employ and to get employment, the privatisation of the state property and all the process of the transferral of the economy of the Republic of Albania, from a state planed and controlled economy to one of free market. The approval of this law also created objective possibility for the natural and juridical persons to undertake the privatisation of some sectors of the economy including the field of industry, artisan, agriculture, construction, transport, etc. Were foreseen also the ways of organization of the private activity including from individuals to shareholder companies. The law regulated the way of the transition from state property to a private one: **by auction, by selling or giving state shares, and in any other appropriate way**. The only limitation on the property that would have been privatised was the prohibition on changing the destination for two years without the permission of the competent state body. There were also some guarantees for foreign investments.

15. The above-mentioned law was only the first step for the start of the privatisation process in Albania, a process that has gone through a not so easy and smooth road but which has encountered various obstacles. It is important that this law provided in its Article 23 that the transformation of state property to private property is done through auction, whereas its Article 24 it provided for the auction to be open, free and fair for all. Therefore anyone may purchase through privatisation. Citizens are equal before the law for these purchases. Article 27 of the above-mentioned law determines that revenues from transformation of state property to private property are paid to the state budget and in conformity with Law No. 8379 of 29.07.1998, Article 4/3 "On the drafting and implementation of the state budget in the Republic of Albania" revenues from the sale of state property are part of the state budget.

16. With the passing of years, the Albanian state started to draft a strategy on privatisations, providing for the privatisation of non-strategic sectors, strategic sectors, special sectors, small and medium size enterprises and a series of laws have been ratified by Parliament and decisions taken by the Council of Ministers, each of them with its specific peculiarities.

17. A very important step was the approval of the **Law 7514, date 30.09.1991 "On innocence, amnesty and rehabilitation of the formerly political persecuted**". This category of persons, during the time of single party system, apart from punishments, imprisonments, internment banishments, persecutions and violations of their political rights also suffered violations of their civil, social, moral, and economic rights. This law, alongside granting them the innocence and amnesty, provided for the recognition of some other rights to them. Thus, according to Art. 5 of the law:

    i. They are recognised the time they spent in prison or internal banishment for pension effects. This included also for those persons who were unemployed before their imprisonment, persecution etc. For pension calculating effects, the sentenced persons have the right to select the average salary of the three years before or after their conviction, or of the salary of a person that has worked in similar conditions with those of the prisoner during his conviction. When this is not possible for different reasons, they are given the average pension.
    ii. They are assisted to return to the place of residence, where they lived before the conviction and prosecution; have priority in being provided a workplace in their profession, in Albania or abroad, and are given precedence in accommodation.
    iii. They are compensated for damages and are given a set amount to meet living conditions, according to rules to be decided by specific provisions in conformity with international criteria. They are recognized the right of restitution of or compensation of confiscated properties.

iv. Compensation for damages is given to the families or the legal heirs of the former politically persecuted, who are no longer living, were executed without trial or died without being tried.

v. The families of executed persons, persons sentenced without trial, or who have died in prison without being tried are allocated a pension, according to the provisions for family pensions,.

18. Therefore, as an element related to the right to property, we can say that Article 5, letter "c" of this law recognises the right for restitution of or compensation of confiscated property to those persons.

19. The essential and more important law for fully reinstating property relations is **Law No. 7698 of 15.04.1993 "On Restitution and Compensation of Property to Former Owners**". The approval of this law was without doubt an important progressive step. The state undertook the responsibility to re-recognize the right of private property, a right that had been denied to the individuals for a period of almost 50 years. This right was recognized and sanctioned some time ago by **Law No. 7692, date 31.03.1993 "On the fundamental human rights and freedoms**". Our country, where private property had been totally abolished by the Constitution of 1976, would implement for the first time a new practice, not based in a previous experience, and in special conditions, that distinguished it from the other Eastern European countries.

20. Its provisions provided for the recognition and restitution of all the immovable properties that have been private property. A maximum area limit and manners of compensation were determined for building and agricultural land to be returned to former owners.

21. The law sanctioned the right to ownership for former owners and their heirs on immovable property confiscated or unjustly taken by the state in any other way. The approval of this law constituted another important step forward in re-establishing even in a partial way the right to ownership of the former owners and their heirs, for the largest part of existing immovable properties. This law provided that even when the restitution was objectively impossible or was prohibited by law because of the use of property for public interests, the compensation would be done concretely in one of the ways provided by law.

22. In view of the requirements of Articles 1 and 2 of the Law, the category of the persons, who will be recognised and return properties, and what would be included in properties to be returned were determined. According to Article 1 *"this law recognises to the former owners their heirs the right to ownership for confiscated properties according to laws, by-laws, or court orders issued after 29 November 1994..."*. According to Article 2 of the law, property means *"the immovable property in the form of building land, buildings and any other thing that is attached in a permanent way with them, like residencies, factories, shops, stores, and any other structure etc."*...

23. Alongside the above-mentioned definitions, the law also categorised the limitations it set. We are quoting below the requirements of Articles 23 and 24 of this law, determining those persons who are excluded from the effects of the law:
    a. Former King Zog and foreign or joint companies.
    b. The former collaborators of nazi- fascist invaders for their properties gained during the invasion, after reviewing the procedures or their definition as such by the Court of Cassation.
    c. The former leaders of the communist party and state, for the properties gained during that time as a consequence of the abuse of the official position, confirmed by court order.
    d. Those convicted for appropriation of state property in large proportions, to the amount of the value of the unpaid damage, as defined in the court decision.

24. It is well known that problems related to the properties of the ex-king, and of the foreigners, especially Italians, have been very much in discussion.

25. Another issue discussed a lot, which was also reviewed by the Constitutional Court, was the definition in the law of "compulsory co-ownership" - Articles 10,11,12/1,2 and 17. Thus, according to the provisions of Article 12/1it was (initially) foreseen that "the building land occupied by other natural or juridical persons, who have bought it from the state after 1 January 1991 in order to build individual dwellings and commercial and service units, will be returned to former owners, and the state will return to the natural or juridical person who bought it the amount of money paid for the building land". And according to the second paragraph *"the private natural or juridical persons, who own the building, are obligated to pay rent to the owner of the building land or to repurchase it on under a contract entered into between the parties..."*.

26. Further on Article 17 reads: *"the former-owner is recognized the ownership over the building land, on which buildings are built. The former owner of the building land becomes co-owner with the owner of the building built on the site.."*.

27. In other words, referring once again to the requirements of Article 12/1, it is confirmed that we have to do with a sale contract between the state and the natural or juridical persons after 1 January 1991.

28. This article was reviewed by the Constitutional Court and was abrogated. This abrogation created a contradiction that later on brought many problems. According to the second paragraph of this provision, the persons, that own the building, are obligated to pay rent to the owner of the site or to re-purchase it. But, by abrogating the first paragraph of article 12, the property is not returned to the former owner. Then the owner of the building is not obligated to pay rent to an individual that is not the owner. Logically this paragraph became again an object of consideration by the Constitutional Court, and was abrogated later on.

29. The Constitutional Court did not consider for some time Articles 10 and 11 on restitution of property to former owners although it had abrogated Articles 12 and 17 of the same law. Later on in considering Articles 10 and 11 of the law, the Constitutional Court has found that the provisions ordering the restitution to former owners of the buildings and unoccupied building land sold to third persons do not have an unconstitutional character, because those do not infringe their fundamental rights. It is well known that the buildings are sold to the citizens by the state always on the basis of the sale contract or by any other similar juridical ac. The same course of action has been adopted regarding building land of former owners for a certain period of time.

30. Thus, according to Article 10 of the Law "On the restitution and compensation of property to former owners" in the case when buildings of former owners had passed on to third persons, those buildings are returned to former owners, whereas the state returns to the third persons the amount of compensation in conformity with the price of sale of the building at the time when they changed owner adjusted according to the index of price increases. Those former owners who have voluntarily donated their property to the state, and there are documents on those actions in relevant publications, are exempt from this law. Whereas according to Article 11 of the same law, in the case when the building land of the owner has been transferred to third persons and there are no permanent buildings on it, the land is returned to the former owner and the state returns to the third persons the amount of compensation, adjusted with the index of price increases.

31. With regard to the compensation of owners of building land on which there is a building owned by someone else, Article 16 of the Law "On the restitution and compensation of property to former owners" provides that when the building land is occupied with permanent buildings, owners are compensated with the limits of expropriation in the following manners:

a) with treasury bonds, which shall be used in conformity with the equivalent value and with priority in relations with the state both in the process of privatisation of state property and in other activities, which are performed through credits.
b) with equivalent areas of building land near inhabited centres in conformity with general urban development plans, but with no more than 5000 m²;
c) with equivalent areas in tourist areas, in conformity with general urban development plans, but with no more than 5000 m². The remaining part falling under letters b and c shall be compensated in the other forms provided by this Law. The Council of Ministers determines more detailed rules on manners and time limits of implementing these compensations.

32. The two above-mentioned provisions of the law "actually abrogate the contracts for purchasing the buildings and the unoccupied building land of former owners by third persons, without any distinction from the abrogation decided by the first paragraph of Article 12. Such a dual attitude towards the sale contracts is contradictory from the legal point of view: when the first paragraph of Article 12 was reviewed the sale contract was considered invulnerable, whereas when the constitutionality of Articles 10 and 11 was reviewed the opposite was decided on the same contracts.

33. Regarding the contracts of purchasing the buildings by their employees, on which the decision of the Constitutional Court for the abrogation of Article 17 is based, it is necessary to emphasize, that even those as juridical actions are against the law, because they are carried out under by-laws contrary to the law "On sanctioning and protection of private property, free initiative, independent private activities and privatisation" and the further amendments. In none of its provisions is foreseen the right of first purchase or any precedence in purchasing for the employees that were employed in it or for any other category of individuals. The decision of the Council of Ministers No. 347 of 10.08.1992 that recognized to the employees of commercial or service buildings, the right of precedence in purchasing, was contrary to the law because it surpassed the content of the law on the basis of which it was issued. It excluded other categories of individuals like the former owners.

34. The approval of the law in question "On restitution and compensation of property to former-owners", brought about changes in the Government attitude, reflected in by-laws, on the way of privatisation of the objects under state ownership. After the approval of the law, the privatisation of the small and medium enterprises was to be made "mainly by auction". As an exception, the privatisation without auction took place only for former-owners for the implementation of the law "On restitution and compensation of property to former-owners". But, alongside this legal exclusion for former-owners, the Council of Ministers gave the right to privatise without auction for special natural and juridical persons to the steering board of the National Agency of Privatisation and its branches in the districts. The decision also provided for the privatisation without auction for those enterprises that are expressly determined in special decisions of the Council of Ministers. This practice of privatisation, based mainly on by-laws, that continued up to 1995, despite improvements, contained time and again elements that contradicted the law.

35. The compulsory co-ownership continued to be regulated by other provisions similar to the abrogated Article 17. In view of the requirements of Article 20, there is a sanctioning of co-ownership of former owners on the land on which one and two storey buildings were constructed by the state. Article 20 reads "the former-owner of the building land, on which are constructed one and two storey state buildings, have the right to co-ownership of the building land in the first case (one storey building) at a 1:2 ratio and in the second case at a 1:3 ratio ... Thus, a compulsory co-ownership between the state and the owner is determined again.

36. Continuing the analysis of the law "On restitution and compensation of property to former-owners", we should mention its amendment by Law No. 7916, date 12.04.1995. Thus, after Article 27 article 27/a is added with the following content: "The participants in the process, have the right to appeal against the decision of the Commission for Restitution and Compensation of Property to Former-Owners to the district court. The court decision issued in such a case by the district court, can be appealed according to the provisions of the Civil Procedural Code".

37. But, the process of restitution of property to former-owners could not be hindered and the decisions of the Commission for Restitution and Compensation of Property to Former-Owners could not be suspended, even by court order when the judicial process had started or was continuing. Actually only final court decisions can be implemented. In such conditions, the last paragraph of addition of Article 27/a was taken into consideration by the Constitutional Court, which by decision No. 9, date 31.07.1995 decided its abrogation as non-constitutional. The decision of the Court says:

"a. ...the provision contradicts the law "On the Main Constitutional Provisions", which sanctions the fundamental principles that have to do with the state organization based on the separation of powers. According to these provisions, the judicial power is independent from the other powers and is exercised only by the bodies recognized by law which are the courts and which in their independent activity are guided only by the law.

b. ...the third paragraph of article 9 of the Law No. 7916, denying to the court the right to take a temporary measure on those cases which judicial process have started or are continuing, takes away its natural prerogative and as a consequence impedes the development of a regular and impartial legal process.

c. Article 9 makes difficult or impossible the realization by the citizens of one of the fundamental rights like the right to ownership, because it carries the risk that the immovable property disappears, is damaged or alienated and also may create conditions for possible conflicts between the citizens."

38. The right of ownership is conclusively sanctioned in the Constitution of the Republic of Albania that entered into force on 28 November 1998. Its Article 11 sets forth:.. "the economic system in the Republic of Albania is based on private and public property, and on a market economy and on freedom of economic activity. Private and public property are equally protected by law".

39. Regarding private property, Article 41, item 1 of the Constitution reads "the right of private property is guaranteed". This provision, in its entirety, sanctions the recognition, safeguarding and guaranteeing of private property to anyone. This provision sets forth that any individual in the Republic of Albania, has the right of personal property and the state takes all the necessary measures in order to guarantee its protection. Item 2 of this article provides that: "the property is gained by donation, inheritance, purchase and with any other classical way as provided by the Civil Code". This constitutional provision, defines also the ways of gaining the property, which are strictly regulated by the material civil law. According to that, the property cannot be gained in any way, but only in those ways that are regulated by specific laws.

40. Article 41, item 3, of the Constitution provides for limitations that eventually can be foreseen by the state on the right of property. Thus, according to this point "the law can provide for expropriations and limitations in the exercise of the right to property, only for public interest". Thus, in this case the state has the right to expropriate or impose limitations on the right of property, only when this is necessary by such obvious and major interests that are related to public benefit. In such a case, these expropriations or limitations can be made only by specific law.

41. Article 41, item 4, of the Constitution defines also the rights of the owner of the property that is expropriated or has its rights limited. In other words it defines the manner of compensation for expropriation or limitation on property rights. The provision sets forth: "Expropriations or limitations of the right of property that are based on the expropriation, are allowed only against a fair reward". Item 5 of article 41 provides for the way of resolving eventual disagreements that can come up between the expropriated individual and the state, regarding the amount of compensation for the expropriation. This provision sets forth that "a complaint can be filed with the court on disagreements relating to the amount of compensation". Thus, the court is defined as the competent institution for resolving such disagreements.

42. The Constitution also has paid a special attention, alongside the protection of other interests and rights, to the protection of property by interference that eventually could be perpetrated by anybody. Article 42 sets forth for such cases that property cannot be infringed without a regular legal process.

43. The meaning of property, in the juridical point of view, takes a complete and accurate meaning in the **Civil Code** of the Republic of Albania. Article 149 of the Civil Code gives the definition of the content of property. According to this provision, the property is the right to enjoy and possess things freely, within the limits defined by law. Further on Articles 149 to 195 of the Civil Code define the ways of gaining and loosing the property, and Articles 296 to 303 of the Civil Code provide for the protection of property. Without making a long analysis of these provisions that develop the theme of the right to property and the way how it can be gained, from their content and from the comparison with the provisions of international instruments, it results that the property right is a right over a certain thing or assets and that an individual has all the rights to gain it. But, on the other hand property should be gained and enjoyed, within the limits set by law". Setting such limits, that at first instance seems like a barrier, is effectively the right of the state to set rules so that the security, freedom and dignity of human beings would not be infringed even through the property. Such limits or rules are for example: taking permission by the competent body in order to build on the building land that is private property, the construction norms, the environment protection, etc... These are included in legislation in order to ensure a balance between the interests of the community and the fundamental rights of the citizens.

C. The Issue of Expropriations

44. In the relations between the citizens the Albanian legislation, mainly the constitutional one, the civil one, and that on investments, provide not only for the norms of safeguard, but also for the legal means that guarantee the protection of the property. The right of respect towards property is of special interest, mainly in the aspect of the relations with the state and here the special thing is the problem of expropriations. Above, when we talked about the constitutional provisions that protect the right to ownership, we also mentioned the definitions regarding the expropriation in Article 42 of the Constitution. Viewing these definitions in a broader aspect, we see two important issues that concern expropriation. First, as a condition to expropriate a person, the real and objective motive of "public interest" should necessarily exist. Second, the compensation, against which the expropriation and limitation are allowed, should be "fair". Meanwhile that the first issue - public interest is more or less clear, the second one, has brought up the discussion if the compensation for expropriation should be only "fair", or also "full". However, the problem of expropriation has found a complete regulation, initially by Law No. 7848, date 25.07.1994 and afterwards by Law No. 8561, date 22.12.1999 "On the expropriations and temporary use of the private property for public interest", which abrogated the first one.

45. Article 1 - the object of the law, provides that "this law regulates the right of the state to expropriate and to use temporarily for public interests the property of private natural and juridical persons, and the protection of the rights and interests of the relevant owners".

Expropriation for public interest in the meaning of the law takes place only for the following reasons:

a. For the realization of state obligations that derive by multilateral international conventions and treaties.
b. For the realization of the programs, projects and investments, foreseen in international agreements, involving the territory of several states, where our state is a party.
c. For the realization of projects and investments on national territory that are of interest in the field of transports of any kind, energy, telecommunication, water works of any kind, in benefit of public interest.
d. For the realization of projects and investments on national territory, in function of protecting the environment, health, culture and public education, and of infrastructure, in service and interest of the public.
e. For the realization of programs and investments on national territory in the field of defence.
f. For the protection of monuments, and immovable objects of the archaeological, historical, cultural and scientific character, when these aims, regarding the nature of these objects, can not be realized by the private owner because of the objective impossibility or of his/her subjective attitude, with consequence the real risk of non-realization, damaging or hindering of their functioning.
g. For the protection of movable objects with historic, archaeological, cultural or scientific value in cases when, even after the realization of the obligations of the competent bodies according to the law, these objects are at risk to be damaged or to disappear.
h. For cases when movable and immovable objects, because of objective causes create a permanent risk for the security and public health, to a degree that even with the state assistance, this risks can not be prevented by the owner.

46. The definition by the lawmaker of the above-mentioned causes on basis of which expropriation can take place, constitutes an obvious preventive measure towards the risk of expropriations carried out by executive bodies, interpreting widely the expression "public interest", and against any possible abuse.

47. Article 17 of the law provides for "the evaluation of the objects that are expropriated". This provision defines the competent body that realizes the evaluation and the gives a definition of the calculation of the amount of compensation for the objects that would be expropriated. In the evaluation of the private property that would be expropriated, of other property that would be devaluated, or of the rights of third persons that should be compensated for the expropriation, according to their nature, is taken into account their initial value, the depreciation, the destination, and the place of the object, the indexes of the change of market prices and of the currency.

48. Further in the law, Article 19 defines the calculation of compensation. On the basis of the value that results from the final evaluation of the objects that are expropriated, the measure of the relevant compensation is calculated, to reflect the full value of the object.

49. According to the requirements of the law, the owners that are affected by the expropriation are notified on the basis of a set procedure that is relatively long. The law provides also for the obligation of the competent body to publicize the request for expropriation for public interest.

50. Perhaps here it is the place to express some modest thoughts. Thus, without entering into details, according to our legislation, the expropriation is not conditioned by a preliminary compensation of the owner, as provided in many other constitutions in different western countries, which actually constitutes an infringement of the guaranteed right of "respect for property". With the entering into force of the law on expropriation of property, the expropriated owner is left without

property and may be without any means of livelihood, until "the fair compensation" is paid. It would have been fairer if compensation were paid before the state would interfere with the expropriated property. In this way the balance of interests between the society and the fundamental rights of the individual would be preserved.

51. An important element is the provision of Article 24 of the law on the right to appeal to court against expropriation. The recognition of this right constitutes an important and indispensable accompanying element of expropriation. This opinion has been clearly expressed also in the practice of the international organisations especially of the European Commission and the European Court on Human Rights.

52. The law provides that the Decision of the Council of Ministers on expropriation is notified by the competent Ministry to the expropriated owners, to the owners of the goods depreciated by expropriation and to the third persons whose rights are compensated because of the expropriation. These persons have the right to complain before the Court within 30 days from the notification only with regard to the amount of the reward fixed by that Decision. As it has been already said, the right to complain is foreseen also by Article 5 of the Constitution.

53. With regard to the control of lawfulness and proportionality of legal provisions and administrative acts limiting the right of property, it may be said that such a control exists and it is exercised by the court (the courts of the judicial system), the Constitutional Court and other institutions.

54. First of all it may be said that the Code of Administrative Procedures, approved by Law No. 8485 of 12.05.1999, provides that public administration, in the exercise of its functions, protects in any case the public interest as well as the constitutional and legal rights and interests of private persons (Article 10). Whereas its Article 11, entitled "The principle of equality and proportionality" sets forth:

    1. Public administration, in its relations with private persons is lead by the principle of equality in the meaning that no one may be privileged or discriminated for reasons of gender, race, religion, ethnicity, language, political, religious or philosophical convictions, economic, educational, social status or parenthood.
    2. Public administration actions which for reason of protection of public interest or rights of others, limit the fundamental rights of the individual recognised by the Constitution, international agreements, laws and regulations, should in anyway respect the principle of proportionality and should not interfere with the essence of the rights and freedoms. This means that actions by public administration should be such as:
        - to request the realisation of lawful public interests;
        - to use always appropriate means and proportionate to the goals intended to be achieved.

55. In each case the organs of public administration are obligated to assess if it is possible to achieve the intended goal with the least repressive measures without compromising their efficiency. The same Code of Administrative Procedures, Article 18, provides that "In order to protect the constitutional and legal rights of private persons, administrative activity is subject to:

    a) internal administrative control in conformity with the provisions of this Code and the administrative complaint; and
    b) *control by courts in conformity with the provisions of the Code of Civil Procedures*

56. Articles 324-333 of the Code of Civil Procedure, dealing with special trials regulate the trial of administrative disputes. On basis of this Code, within the district courts are set up special sections

for the trial of administrative and commercial disputes as well as those related to minors and family. The President of the Republic, on proposal by the Minister of Justice, determines the courts in which sections shall be set up and the territory of their jurisdiction on basis of joining territorial jurisdictions of one or more district courts. Judges considering administrative disputes are the normal judges of the first instance courts and the same rules apply to them as for all other the judges.

57. Article 131 of the Constitution determines that the Constitutional Court ultimately decides on complaints by individuals on the violation of their constitutional rights on a due process of law, after all legal remedies for the protection of those rights have been exhausted.

58. Albanian legislation provides for the protection of property also through law No. 8454, of 10.04.2000 "On the People's Advocate". Article 2 of this Law sets forth that the people's Advocate protects the rights, freedoms and lawful interests of the individual from unlawful and irregular actions or omissions of the organs of public administration, as well as of third parties acting on its behalf.

59. On the Albanian legislation should be as well the special protection granted to the foreign investments by Law No.7764 of 2.11.1993 "On foreign investments". Thus, on its Article 4 is expressly foreseen that:

> *"Foreign investments will not be expropriated or nationalised directly or indirectly, will not be subject of other measures equivalent to these ones, except on cases of interest of public benefit, provided by law, without discrimination, against immediate, adequate and effective compensation and in conformity with legal proceedings"*

60. The compensation for expropriation shall be paid without delay and includes also the interest from the time of expropriation, calculated on basis of a reasonable market rate. The foreign investor, in case of a dispute in relation to expropriation, besides the right to complain before national judicial authorities, can make a complaint before the International Centre for the Resolution of Disputes on Investments set by the Convention for the Resolution of Disputes on Investments between States and nationals of other states, adopted in Washington on March 18, 1965.

D. The Banking System

61. If we were to deal with the problem of monetary and even material deposits by various individuals to the juridical persons that exercised loaning activities from the broad public or as otherwise called the "pyramid companies", from the viewpoint of peaceful enjoyment of property and of the direct and indirect responsibility of the state in the banking system, in the control of the banks or even any kind of guarantee on the deposited assets, it is worthwhile mentioning that in this case we were not dealing with the banking system and the relevant companies were not banks and did not operate in conformity with the rules of the banks starting from licensing up to the manner of their operations. They justified their loaning activity by entering into loan contracts on basis of articles 1050 and 1051 of the Civil Code, but did not apply accurately even those provisions, abusing at the same time with the classical loan contract and the quantity of contracts entered into.

62. In fact the above-mentioned entities were registered in court and operated as juridical persons in the form of commercial companies or non-governmental organisations, forms of establishments recognised by the Albanian Civil Code. Those juridical persons which were registered as commercial companies had also economic activity such as trade, building, foodstuff products, etc, whereas those registered as non-governmental organisations acted as charity or community

foundations, thus financially acting as pure financial pyramids, with the simple logic that those who had put in money in the beginning would after e period of time come to the top and get their money, whereas those who had put them in later, would remain at the base of the pyramid and would not get anything, as in fact they did not. The above-mentioned juridical persons were not licensed to perform such operations and the interests they applied were not only beyond any technical financial standards but sometimes even beyond normal logic.

63. Regarding the action undertaken by the Albanian state against such activities may be mentioned the approval of Law No. 8614 of 21.11.1996 "On ensuring transparency in the activity of borrowing with the massive participation of individuals in the Republic of Albania". It is worth mentioning that although during that period of time people continued to put in their money in the so-called "pyramidal companies", despite a verbal announcement by the then Minister of Finance that the money lent to those juridical persons was not guaranteed.

64. Later, the Albanian Parliament approved Law No. 8215 of 09.05.1997 "On the financial control of non-banking juridical persons who have taken loans from the broad public", through which the commercial companies and other non-banking juridical or physical persons who had taken loans from the public in various forms and manners, would be subjected to control within the meaning of this Law by a group of national and foreign financial experts determined by the Council of Ministers. This control would include all issues related to the financial position of the company and the person controlled, but especially the number of creditors, the financial obligations to be paid, the movement of money as well as with the cash in hand and the deposits in banks in the country and abroad.

65. At the end of July 1997, several amendments were made to the above-mentioned Law through Law No. 8227 of 30.07.1997, which determined that subject to the control shall be all those individuals, physical or juridical persons, who have taken loans from the public or who collect money from the public in other forms, with the exception of banks licensed by the Bank of Albania in conformity with legislation in effect; of physical persons who get loans in conformity with the provisions of the Civil Code, but under the condition that the following are met simultaneously:
    a) taking of loans should not be a continuing feature of its activity;
    b) the loan should not be for personal reasons;
    c) the interest given for the loan should not be higher than 10% above the annual interest rates determined by the Bank of Albania for the respective deposits at the time of entering into the loan contract.

66. This Law determined also the qualities of persons who would be considered related to the organisation or person controlled, which would mean all physical or juridical persons who would be considered by law "related persons". The organisations or persons controlled as well as the related persons would be determined by the Council of Ministers. According to this Law, the organisations or persons as well as the related persons were entitled to appeal to the Court of Appeal against the decision proclaiming them as such persons.

67. The Law provides that the quantities of money identified and collected in conformity with this Law are paid according to a special distribution scheme, but it should be mentioned that such a distribution has only started for a very small amount of those money.