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# Critical Analysis of Albanian Criminal Legislation on Protection from Sexual Abuse<sup>3</sup>

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## Abstract

The approximation of the domestic legislation with the international legal framework is one of the main guarantees for the implementation of international standards. According to the Albanian Constitution, ratified treaties constitute part of the internal juridical system and are implemented directly, except for cases when they are not self-executing, and the issuance of a law is necessary for their implementation. This article aims to analyse the alignment of Albanian criminal legislation with international standards on prevention and fight against sexual violence. It seeks to achieve this through an approximation and comparative analysis of provisions of the Criminal Code with the international conventions ratified by the Republic of Albania. Thanks to these methods, the paper has reached some important conclusions about the limited compliance of Albanian criminal provisions on sexual crimes with international standards and the need to approach them to international standards.

**Keywords:** criminal legislation, sexual violence, international standards, implementation of international treaties, implementation of national legislation.

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# Krytyczna analiza albańskiego ustawodawstwa karnego dotyczącego ochrony przed wykorzystywaniem seksualnym<sup>4</sup>

## Streszczenie

Zbliżanie ustawodawstwa krajowego do aktów międzynarodowych jest jedną z głównych gwarancji wdrożenia standardów międzynarodowych. Mimo że Konstytucja Republiki Albanii przewiduje bezpośrednie stosowanie ratyfikowanych umów międzynarodowych, ustawodawstwo karne wymaga istotnych poprawek, gdyż jego przepisy nie są stosowane przez analogię. Celem artykułu jest analiza dostosowania albańskiego ustawodawstwa karnego w zakresie zapobiegania i zwalczania przemocy seksualnej do standardów międzynarodowych. Stara się to osiągnąć poprzez analizę skali zbliżenia oraz podejście porównawcze pomiędzy przepisami Kodeksu karnego a konwencjami międzynarodowymi ratyfikowanymi przez Republikę Albanii. Dzięki tym metodom w artykule wyciągnięto ważne wnioski dotyczące stopnia zbliżenia i konieczności jego dostosowania do standardów międzynarodowych.

**Słowa kluczowe:** ustawodawstwo karne, przemoc seksualna, standardy międzynarodowe, stosowanie traktatów międzynarodowych, stosowanie ustawodawstwa krajowego.

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## Introduction

In recent years, there has been an increasing public concern regarding sexual violence in Albania. This is attributed not only to the growing number of reported cases but also to the raised awareness about this very serious form of gender-based violence. According to the General Prosecutor's report on the state of crime in Albania for the year 2022, *The proportionate occurrence of sexual crimes in 2022*, 'compared to the total number of registered criminal proceedings nationwide, stands at 0.63%, as opposed to 0.56% in 2021. Additionally, the Crime Rate per 100,000 inhabitants for this category of offenses was 5.80 in 2022, compared to 5.58 in 2021.'<sup>5</sup> There are two interpretations of this data: an increase of cases of sexual violence or an increase in reporting of these crimes, which would be a positive development. However, in the latter case, the difference is minimal and requires further studies on the level of awareness of the Albanian society and the effectiveness of the criminal legislation to fight sexual violence.

Combating sexual violence has also become part of the agenda of the Albanian Parliament, which has increased its efforts to improve preventive legislative measures. This attention has resulted not only in improvements to the criminal legislation but also in the enactment of other legislation, including the Law No. 62/2022, 'On the National Register of Persons Convicted for Sexual Crimes', which aims to prevent harassment, violence, abuse, and sexual exploitation of individuals through the establishment of the National Register of Persons Convicted for Sexual Crimes.<sup>6</sup> This law came as a joint public and parliamentary initiative and was proposed to the Assembly by more than 20,000 voters, aiming to prevent sexual violence. Nevertheless, the Assembly's vigilant oversight of the law's implementation, backed by discernible benchmarks for monitoring its efficacy, remains pivotal.

At the same time, to effectively address sexual violence, the improvement and enhancement of implementation of the criminal legislation remain essential. Hence, a comprehensive assessment of an approximative nature of the existing provisions of Albania's Criminal Code, coupled with the identification of legal gaps and

<sup>5</sup> See: *Raport i Prokurorit të Përgjithshëm mbi gjendjen e kriminalitetit për vitin 2022*, March 2023, [https://www.pp.gov.al/Dokumente/RAPORTE\\_T\\_PROKURORIT\\_T\\_P\\_RGJITHSH\\_M/](https://www.pp.gov.al/Dokumente/RAPORTE_T_PROKURORIT_T_P_RGJITHSH_M/) (access: 15.09.2023).

<sup>6</sup> Law No. 62/2022, Për Regjistrin Kombëtar të të Dënuarve për Krime Seksuale, Fletore Zyrtare, No. 114, date 12.08.2022, [https://qbz.gov.al/share/DI7IciUBSbSgi74FOjKh\\_Q](https://qbz.gov.al/share/DI7IciUBSbSgi74FOjKh_Q) (access: 15.09.2023).

implementation shortcomings arising from certain ambiguities, is imperative to improve its provisions, particularly in the context of the Assembly's review.

## Methods

This article aims to perform a thorough analysis of the criminal legislation in Albania pertaining to this matter. The study has been carried out employing two main methodologies: an approximative analysis and a comparative analysis. While these analytical methods share significant similarities, they have some differences and maintain their respective identity. They enable us to utilize international and other countries legal sources rationally, with the purpose of reaching accurate conclusions for the selection of the most suitable legal formulations. These approaches have been the main methodologies for improvement of the legislation in countries like Albania which are going through a long transition towards the European integration. The 'direct applicability' approach of the Albanian Constitution for international ratified treaties, requires the approximation of the Criminal Legislation, the provisions of which cannot be implemented through an analogy.

The article highlights several issues related to the importance of meeting international gender equality standards and preventing gender-based violence in Albania's criminal legislation. The alignment of legislation with the standards set by international conventions is key for of ensuring its effective implementation.

### Amendments to the Criminal Code and the Alignment with International Gender Equality Standards

In recent decades, the Albanian Parliament has ratified several international treaties that impose significant obligations regarding gender equality. Alongside the United Nations Convention 'On the Elimination of All Forms of Discrimination Against Women' (CEDAW)<sup>7</sup> the Council of Europe Convention 'On Preventing and Combating Violence Against Women and Domestic Violence', known as the Istanbul Convention, holds a special position.<sup>8</sup> According to the Albanian Constitution, these conventions form an integral part of domestic legislation with supra-legal

<sup>7</sup> The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was ratified by the Albanian state in 1993. Fletore Zyrtare No. 13, date 14.12.1993, <https://qbz.gov.al/share/HUs01iuLTUKeJwNaVUgFTw> (access: 15.09.2023).

<sup>8</sup> Law No. 104/2012 – On the Ratification of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, available in Albanian Language at: Convention Albanian version (coe.int) (access: 16.09.2023).

authority.<sup>9</sup> Based on this foundation, various amendments have been incorporated into the Criminal Code to ensure the harmonization of its content with international standards and safeguard women from gender-based violence and violence within families. Certain amendments have also been motivated by the increase of rates of these crimes in Albania.<sup>10</sup>

The most noteworthy revisions to the Criminal Code were introduced during the legal reforms of 2012–2013. In 2012, stalking was, for the first time, recognized as a criminal offence (Article 121/a).<sup>11</sup> Aggravating circumstances are outlined for this offence in situations where the perpetrator is a former spouse, former cohabitant, or an individual who maintained an intimate relationship with the victim. Such circumstances also apply when the offence is committed against a minor, a pregnant woman, or an individual incapable of self-defence. Simultaneously, the criminal act domestic violence<sup>12</sup> was introduced for the first time (Article 130/a), encompassing various forms of violence exercised by family members. This provision underwent further changes in 2013, introducing the concept of ‘assisted violence’ to protect children present during violent incidents. Additionally, the 2013 amendments complemented the Code with the criminal offences of premeditated murder due to family relationships (Article 79/c), severe bodily harm (Articles 88 and 2),<sup>13</sup> and forced disappearance, which impose penalties on those accountable for the disappearance of a child, a pregnant woman, or an individual incapable of self-defence (Article 109/c). In 2020, additional amendments took place to clarify all forms of domestic violence and the roles of family members. These include, *inter alia*, criminalization of psychological violence and inclusion of intimate or former intimate partners in the category of victims of domestic violence, regardless of cohabitation.

In addition to the previously mentioned criminal offenses, these amendments, particularly in 2013, introduced aggravating circumstances and more severe penalties for family violence offences. For instance, the criminal offence premeditated murder due to family relations (Article 79/c) is punishable by imprisonment of not less than 20 years or life imprisonment. Meanwhile, for the criminal offence of severe bodily harm, the revisions established a more severe penalty when the offense is

<sup>9</sup> L. Omari, A. Anastasi, *E drejta Kushtetuese*, Tirana 2017, pp. 55–56.

<sup>10</sup> V. Hysi, *Veprat penale kundër grave dhe fëmijëve dhe politika kundër krimit në Shqipëri, Reflektime mbi ndryshimet në Kodin Penal (2012–2013)*, “Studime Juridike” 2014, 2.

<sup>11</sup> Law No. 23/2012, Për disa shtesa dhe ndryshime në ligjin No. 7895, date 27.01.1995 Kodi Penal i Republikës së Shqipërisë, as amended, Fletore Zyrtare, No. 26, date 27.03.2012, <https://qzb.gov.al/share/FddlBywMQGG6Sj5DIImKI0w> (access: 15.09.2023).

<sup>12</sup> *Ibidem*.

<sup>13</sup> Law No. 144/2013, Për disa shtesa dhe ndryshime në ligjin No. 7895, date 27.01.1995 Kodi Penal i Republikës së Shqipërisë, as amended, Article 18, Fletore Zyrtare, No. 83, date 20.05.2013, Pamja e dokumentit – Qendra e Botimeve Zyrtare (qzb.gov.al) (access: 15.09.2023).

committed against a person who is a spouse, former spouse, cohabitant, former cohabitant, a close relative of the perpetrator, or if it results in death. Furthermore, the criminal offence of infanticide was categorized as a more serious crime, resulting in a more stringent penalty.<sup>14</sup> Stricter penalties were also introduced for criminal offences related to the trafficking of women and girls, including the exploitation of prostitution or other forms of sexual exploitation, forced labour or services, slavery or similar practices, organ use or transplantation, along with other forms of exploitation, within and beyond the borders of Albania (Article 110/a).

Also, in 2013,<sup>15</sup> aggravating circumstances were introduced to cases where criminal offenses are committed, infringing upon protection orders, capitalizing on family connections, or motivated by factors associated with gender, gender identity, and/or sexual preference. These amendments led to alterations in Article 130 of the Criminal Code, designating as an offence the breach of obligations or the obstruction of cohabitation, engagement, or marital arrangements,<sup>16</sup> as well as the intentional solicitation of an adult or a minor for forcibly transporting them outside the Republic of Albania to coerce them into marriage. Furthermore, aggravating circumstances apply to cases involving minors, individuals with close kinship ties, spouses, guardians, or those in official relationships. The same applies when the offence is committed collaboratively, on multiple occasions, or by individuals vested with state and public functions.

These amendments have brought the Albanian Criminal Code largely in line with international standards on gender equality and elimination of gender-based violence. This process was also accompanied by changes to the Code of Criminal Procedures, for the implementation of European Union standards regarding the protection and support of victims of crime. The new provisions bring fundamental changes to the victim's position during the criminal process and align the Albanian Code of Criminal Procedures with the standards established in Directive 2012/29/EU.<sup>17</sup> The victims of sexual violence and human trafficking obtained a wider set of rights, due to their special status<sup>18</sup> (Article 58/b).<sup>19</sup>

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<sup>14</sup> Ibidem.

<sup>15</sup> Ibidem.

<sup>16</sup> Ibidem.

<sup>17</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, EUR-Lex – 32012L0029 – EN – EUR-Lex (europa.eu) (access: 15.09.2023).

<sup>18</sup> A. Anastasi, *Për një klasifikim të të drejtave të viktimave gjatë procesit penal në qasje me procesin e rregullt ligjor*, Conference: Çështje të teorisë dhe praktikës mbi mbrojtjen e të drejtave të viktimave në procesin penal, Onufri, Tirana, 2019.

<sup>19</sup> Kodi i Procedurës Penale i Republikës së Shqipërisë, as amended, [https://qbz.gov.al/share/hATwC6ANSsup7K\\_Q8NYNBw](https://qbz.gov.al/share/hATwC6ANSsup7K_Q8NYNBw) (access: 15.09.2023).

Nevertheless, an assessment of the Criminal Code vis-à-vis the Istanbul Convention highlights additional requirements, which have not yet been addressed, particularly with regards to sexual violence. In this context, various surveys underscore the need to increase public awareness, especially among professionals, concerning the prosecution of sexual violence cases. Prejudice and stereotypes related to sexual violence continue to be present, not solely among the public but also within the ranks of justice and public administration personnel. For instance, a survey conducted among employees of diverse Albanian institutions regarding their stance on the statement: ‘Women who are raped often provoke men with their clothing and behaviour, thus sharing responsibility for the rape’ unveiled that certain employees harbour gender biases that significantly impede their endeavours to report or prevent sexual violence incidents, and to safeguard victims. Specifically, this survey unveiled that 14.3% of court employees remain undecided, while correspondingly, 9.1% of prosecutor’s office staff are undecided, in agreement, or fully in agreement. The situation is notably alarming among educational office employees, where 12.50% express agreement with this assertion.<sup>20</sup> In the light of such circumstances, the enhancement of legislation to meet international benchmarks remains pivotal for a comprehensive grasp of the institutions dedicated to curbing and penalizing sexual violence.

### An Approximative Analysis of the Provisions of the Criminal Code Regarding Sexual Violence

In the Albanian Criminal Code, a dedicated section – ‘Sexual Crimes’ (Articles 100–108/a) – covers offences related to sexual violence. These provisions underwent several improvements through 2012 and 2013 amendments. For the first time in 2013, sexual harassment was introduced as a criminal offence, and sexual relations involving violence were also provided as criminal offences, even in cases when they occurred between spouses. However, upon analysing the content of certain articles within the section on sexual crimes in relation to the Istanbul Convention, significant inconsistencies are still observed, as summarized below.<sup>21</sup>

The Istanbul Convention has established *the absence of consent from the victim* as a standard for criminalizing sexual violence (rape). Article 36 of the Convention distinctly underscores that the key element in cases of rape is the lack of consent

<sup>20</sup> V. Hysi, A. Anastasi, A. Bozo, E. Vora, *Vrasjet e grave (femicidi) dhe tentativa për femicid në Shqipëri (2017–2020)*, Tirana 2023, p. 115, <https://www.qag-al.org/publikime/femicidi.pdf> (access: 15.09.2023).

<sup>21</sup> See: A. Nini-Pavli, A. Anastasi, *Analiza e Kodit Penal në lidhje me krimet seksuale*, *Studim, Përmirësimi i Legjislacionit Shqiptar në Fushën e Barazisë Gjinore*, Tirana 2023, pp. 10–20, [legal\\_review\\_report.pdf](https://www.qag-al.org/legal_review_report.pdf) (qag-al.org) (access: 16.09.2023).

from the victim, in contrast to our criminal legislation, which focuses on the use of force or the violence experienced by the victim and/or her/his resistance. These two concepts hold an essential distinction, necessitating legal amendments to address such distinction.

The Istanbul Convention provisions on sexual violence affirms the jurisprudence established by the European Court of Human Rights (ECHR), specifically in the case of *M.C. v. Bulgaria*.<sup>22</sup> In its ruling on this matter, the ECHR articulated: ‘An inflexible approach to prosecuting sexual offenses, such as one demanding proof of physical resistance in all situations, risks leaving certain forms of rape without legal consequences, thus imperilling the effective safeguarding of individuals’ sexual autonomy’. The Court argues that based on the European Convention on Human Rights (Articles 3 and 8), the state has a positive obligation to ensure the effective criminalization and prosecution of any non-consensual sexual act, including cases where there is no physical resistance from the victim.<sup>23</sup> In Albanian courts, there is a tendency to apply these standards when it comes to sexual violence against minors, but the legislation is a real obstacle to their implementation, leading to inconsistent judicial practices.

The Committee on the Elimination of Discrimination against Women (CEDAW) has also expressed its stance on this matter in its decision on the appeal of *Vertido v. the Philippines*.<sup>24</sup> The Committee emphasizes that ‘there should be no presumption in law or in practice that a woman has given her consent, due to her failure to physically resist unwanted sexual conduct...’<sup>25</sup> At the conclusion of its consideration of this case, the Committee called for a re-examination of the definition of rape in the Philippine legislation to centre the absence of consent.<sup>26</sup>

Furthermore, in General Recommendation No. 35, the CEDAW Committee, empowered to interpret the provisions of the CEDAW Convention, urges parties to ensure that the definition of sexual crimes in their legislation is based on the absence of freely given consent and not on coercive circumstances.<sup>27</sup>

In the legislation of the European Union, gender equality issues in justice are affirmed through various directives and regulations, particularly in the fields of procedural guarantees in criminal proceedings and the protection of victims of criminal

<sup>22</sup> *MC v. Bulgaria*, ECHR, 2004, [https://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/M.C.v.BULGARIA\\_en.asp](https://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/M.C.v.BULGARIA_en.asp) §166 (access: 16.09.2023).

<sup>23</sup> *Ibidem*.

<sup>24</sup> See: A. Nini-Pavli, A. Anastasi, *op. cit.*, pp. 10–20.

<sup>25</sup> CEDAW Committee Communication No. 34/2011, *R.P.B. v. the Philippines*, Communication no. 34/2011 (access: 16.09.2023).

<sup>26</sup> *Ibidem*.

<sup>27</sup> Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 35 on Gender-Based Violence against Women, 2017.



acts. These aspects have also been integrated into the Albanian Code of Criminal Procedure through legal amendments in 2017. In addition, ‘criminalisation of rape based on lack of consent’ has been proposed in the new draft proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence.<sup>28</sup> However, concerning the prevention and combatting of violence against women and domestic violence, the European Union specifically refers to the Istanbul Convention. The EU’s accession to this Convention was determined as a key priority for the European Commission.<sup>29</sup> The EU signed the Istanbul Convention in 2017 and voted for its ratification in May 2023.<sup>30</sup>

The standard of defining sexual crimes in law based on the absence of freely given consent rather than coercive or forceful circumstances, has been embraced by all international organizations in which Albania is a member or seeks membership. The Albanian National Gender Equality Strategy (2021–2030) is also founded precisely on these standards and is expressed as quite ambitious in its pursuit of fulfilling them.<sup>31</sup> However, in the relevant sections of the Criminal Code, we encounter several incompatibilities with these standards. For instance, according to Article 102 of the Criminal Code, sexual intercourse with adults requires the criterion of the use of force or violence by one party. Moreover, the use of force is a pivotal element for the criminal offence of sexual violence against minors aged 14 to 18 (Article 101) as well as in cases of homosexual relations (Article 102). In all these scenarios, the burden of proof lies with the victim, who is required to demonstrate the application of violence against them and their resistance. Currently, only in instances of rape between spouses or cohabitants is the absence of consent mandated as a prerequisite (Article 102, paragraph 1).

The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) in charge of monitoring the Istanbul Convention has also highlighted these disparities in their initial assessment report on Albania, compiled in 2017. The report emphasizes that the definition of rape in the Criminal Code, which hinges on the application of force, deviates from the principles of the Istanbul Convention. According to this definition, the victim has the burden of proof on the use of force, which can potentially lead to unreported or unpunished cases of

<sup>28</sup> European Commission, *Ending Violence against Women: What is the European Union Doing*, 2023, [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/ending-gender-based-violence\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/ending-gender-based-violence_en). (access: 16.9.2023).

<sup>29</sup> Ibidem.

<sup>30</sup> *The European Union ratifies the Istanbul Convention for the prevention and combating of gender-based violence*, EU ratifies Istanbul Convention to prevent and combat gender-based violence – JURIST – News (access: 16.09.2023).

<sup>31</sup> Decision of the Council of Ministers of Albania, No. 400, dated 30 June 2021, *On the Approval of the National Gender Equality Strategy 2021–2030 and Its Action Plan*.

rape. Additionally, GREVIO highlights the absence of a comprehensive understanding of the elements of force in Albania, creating significant barriers for victims to access justice.<sup>32</sup>

Consequently, GREVIO presented several key recommendations to Albanian authorities. These suggestions advocate for a revision of the definition of rape involving adult women so that it centres around the absence of freely given consent, removing the necessity to demonstrate the application of force or resistance. The description of sexual violence against minors aged 14–18 should also undergo corresponding changes. Furthermore, for an all-encompassing and voluntary assessment of a minor's consent, GREVIO suggests that the age gap between the perpetrator and the victim should also be considered. Moreover, the amendments should disconnect the definition of rape involving minors from the attainment of the victim's legal age of majority. Building upon this, also the Committee of the Parties to the Istanbul Convention, in its conclusions of 2021, advised Albania to: 'Amend the definitions of rape and sexual violence to align them with the requirements of Article 36 of the Convention'.<sup>33</sup>

Considering the above, essential legislative adjustments need to be undertaken. Within Albanian legislation, a comprehensive revision of Section VI of the Criminal Code, titled 'Sexual Crimes', is imperative to ensure full conformity with the Istanbul Convention and other similar international norms. Thus far, we can acknowledge a partial alignment. Article 36 of the Istanbul Convention is of particular significance, stipulating that consent must be granted voluntarily and evaluated within the context of relevant circumstances.<sup>34</sup> Achieving this alignment requires a fresh perspective even from the Albanian justice system to effectively implement the novel standards. Conversely, specific formulations within the domestic legislation and determination of factors considered as hindrances to 'freely given consent' fall discretion of the domestic legislation.

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<sup>32</sup> Council of Europe, Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), Baseline Evaluation Report of Albania, 2017, Final Report Albania V5 (coe.int) (access: 16.09.2023).

<sup>33</sup> Ibidem.

<sup>34</sup> Council of Europe, Explanatory Report on the Convention of the Council of Europe 'On Preventing and Combating Violence against Women and Domestic Violence' (Istanbul Convention), 2011, <https://rm.coe.int/grevio-first-baseline-report-on-albania/16807688a7> (access: 16.09.2023).

## A Comparative Analysis of the Provisions of the Albanian Criminal Code Concerning Sexual Violence

### Experiences of Legislative Changes in Council of Europe Member States

States have the discretion to establish specific wording and factors that influence the aspects of criminal offences within their domestic legislation. In this context, alongside the insights gained from the practices of judicial bodies, valuable perspectives are provided through comparisons with other countries. This reform has been undertaken in various nations. Notably, several European countries, including those within our Western Balkans region, have embarked on legal initiatives to define the components of criminal offenses related to sexual violence in line with the Istanbul Convention. Examining these experiences helps in the identification of the most effective strategies for aligning Albanian criminal legislation with international norms. The practices of European Union member states like Malta, Sweden, Belgium, Denmark, among others, hold particular significance. Furthermore, insightful lessons have been drawn from the United Kingdom and Montenegro in the Western Balkans region.<sup>35</sup>

A comprehensive analysis of these developments has been undertaken by the GREVIO Group itself. They have highlighted that certain countries, such as Sweden and Malta, have modified their criminal laws concerning sexual violence in order to align them with the standards outlined in Article 36 of the Istanbul Convention. These countries, along with Belgium, have introduced criminal offenses related to non-consensual sexual relations in their respective legislations.

Sweden has set its own precedent by incorporating criminal charges for non-consensual sexual relations or any other form of sexual activity involving a non-willing participant. According to these regulations, passivity is not considered an indication of voluntary engagement; rather, voluntariness must be explicitly established. Additionally, Sweden has introduced two novel criminal offences: negligent rape and negligent sexual abuse. In such instances, the onus lies on the perpetrator of the crime to demonstrate that the sexual act occurred with voluntary consent. Since the implementation of the updated legislation addressing sexual violence, Sweden has witnessed a substantial increase in the number of reported cases. Furthermore, the number of cases that proceed to trial and result in a judicial verdict has experienced

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<sup>35</sup> Amnesty International, *Let's Talk About "Yes": Consent-Based Laws in Europe*, 2020, <https://www.amnesty.org/en/latest/campaigns/2020/12/consent-based-rape-laws-in-europe/>; (access: 16.09.2023); Council of Europe, Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *Mid-term Horizontal Review of GREVIO baseline evaluation reports, 2022*, available at: <https://rm.coe.int/prems-010522-gbr-grevio-mid-term-horizontal-review-rev-february-2022/1680a58499> (access: 16.09.2023).

a notable rise. Prior to the adoption of this legislation, numerous cases were dismissed due to insufficient evidence. The new legal framework has effectively rectified these shortcomings in the legal process.

Belgium is also listed among the countries that have legislation in line with the standards of the Istanbul Convention concerning sexual violence. The Belgian Criminal Code explicitly highlights the absence of consent and defines rape as: 'any act of sexual penetration, regardless of its nature or means, carried out in connection with a person who has not given consent.'<sup>36</sup>

Malta has also undertaken legal reforms to amend the Criminal Code in order to align with the Istanbul Convention. Moreover, the group of experts from GREVIO has evaluated that Malta's new legislation exceeds the requirements outlined in Article 36 of the Istanbul Convention.<sup>37</sup> The Maltese law specifies that consent must be evaluated within the context in which it is given, taking into consideration the person's emotional and psychological state.

Denmark introduced *sexual relations without clear consent* as a criminal offence.<sup>38</sup> Previously, in order to substantiate an accusation, Danish law required evidence of violence or threat, or proof that the victim was unable to prevent the sexual assault. However, the current penal provision penalizes sexual relations without clear consent from both parties.

There have been similar changes to criminal legislation in Montenegro as well. However, it is imperative for the reform to progress even further, encompassing all forms of sexual violence based on the absence of consent. And certain countries, like Portugal despite undergoing legal criminal reforms, have not fully eliminated the requirement of proving the use of force in cases of sexual violence. Poland is also one of the countries which, according to GREVIO, despite progress to fight gender-based violence, need to take greater steps to stop sexual violence, rape, and sexual harassment, starting with changing the definition of rape itself.<sup>39</sup>

As Albania is one of the countries that has yet to undergo such a reform and align its legislation with international standards, drawing from the experiences of other countries is essential to draft appropriate legal formulations. In this context, it is also necessary to evaluate the implementation of legal amendments through monitoring of court decisions and data collection. Obviously, these amendments

<sup>36</sup> A. Nini-Pavli, A. Anastasi, op. cit., pp. 10–20.

<sup>37</sup> Ibidem.

<sup>38</sup> Presentation by Marceline Naudi, President of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) at the Meeting of the Group of Experts of the Special Rapporteur on Violence against Women of the United Nations, 2020; available at: Report on rape as a serious and systematic violation of human rights (access: 16.09.2023).

<sup>39</sup> GREVIO Baseline Evaluation Report, Poland, September 2021, <https://rm.coe.int/grevio-baseline-report-on-poland/1680a3d20b> (access: 15.09.2023).

must also be put to the test within the realm of criminal justice proceedings to determine their application within regular judicial processes and how effectively they encourage the reporting of sexual violence cases. It is of utmost importance that the proposed amendments to the Criminal Code reflect this new understanding of sexual violence.

### Overview

From a comparative study, researcher Marceline Naudi has categorized the recent legislative changes of different countries into three main approaches: the 'dual level' approach, the 'no means no' approach, and the 'yes means yes' approach.<sup>40</sup>

In the *dual-level approach* adopted by certain countries, the existing provisions related to sexual violence that necessitate the use of force remain unchanged, while a new criminal offence based entirely on consent is introduced, without requiring the use of force under any circumstance. This could result in the categorization of various forms of sexual offences, distinguishing between them and assigning varying degrees of punishment. For instance, a provision mandating the use of force is linked to a more severe prison sentence compared to a criminal offence where the sole requirement is the absence of consent. In terms of legal proceedings, this implies that violations will be assessed and proven based on distinct categories of sexual violence crimes. An illustrative instance of this approach can be found in Austrian legislation, which encompasses a criminal offence for sexual intercourse involving force as well as another offence for violating sexual integrity. The risk envisioned by author Naudi within this model pertains to the criminal offence concerning sexual integrity, wherein there is a potential for legal procedures to overly emphasize consent expression, disproportionately focusing on the victim's conduct. Furthermore, this approach might result in the punishment for violating sexual integrity instead of addressing sexual intercourse involving force, as demonstrating the absence of consent might not be straightforward.<sup>41</sup>

Based on *the second approach*, the provisions encompassing these criminal acts do not necessitate the use of force; rather, they specify that sexual intercourse must have taken place 'against the will of a person'. In terms of criminal proceedings, this signifies that irrespective of how the provisions of criminal acts are articulated, it is imperative to definitively establish in each case that the action transpired 'against the will of the person'. As a result, this approach is commonly known as the 'no means no' approach.

<sup>40</sup> Council of Europe, Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). *Mid-term Horizontal Review...*

<sup>41</sup> *Ibidem*.

The third approach is known as the 'yes means yes' approach. The criminal offence is predicated on consent, but it unmistakably places the responsibility on the perpetrator. As a result, the perpetrator assumes the burden of proof and must establish that the action was carried out with the victim's voluntary consent, rather than requiring the victim to prove the presence or absence of consent. While these experiences share some common elements, they also exhibit differences. Thus, the third approach diverges from the 'no means no' approach by criminalizing sexual interactions or any other sexual activity involving a person 'who does not participate willingly', distinguishing it from situations where the person's will is 'against' their participation. Sweden adopts this approach and notably has introduced new legal categories that also penalize instances of sexual violence occurring due to negligence or a lack of attentiveness toward recognizing the victim's consent. Accordingly, Sweden's existing legislation encompasses sexual intercourse involving force due to negligence, under which perpetrators are held accountable even when they should have been aware (but were not) that the victim had not granted consent. This effectively eliminates any scope for justifications.

Another possible approach involves distinguishing within the legislation based on aggravating and mitigating circumstances. Under this framework, a single criminal offence that penalizes sexual violence can be outlined in the legal code. However, when force or violence is employed, aggravating circumstances can be invoked. Countries such as Malta, Belgium, and Denmark follow a comparable practice.<sup>42</sup> This approach has the potential to lead to a categorization of various types of sexual offences, enabling a classification where certain offences merit more severe penalties than others.

### **Criminalization of Other Forms of Sexual Violence**

Through a comparative study of Albanian legislation with international laws and practices, in addition to the definition of rape, several other gaps have been identified in relation to sexual crimes. These omissions could potentially result in the violation of rights for both victims and the offenders. For instance, certain forms of sexual violence recognized as such by international standards are not explicitly addressed in the Albanian legislation. These include female genital mutilation, forced sterilization, as well as sexual harassment in the workplace.

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<sup>42</sup> Ibidem.

### Female Genital Mutilation

Article 38 of the Istanbul Convention recognizes the mutilation of female genital organs as a form of violence against women.<sup>43</sup> However, the Albanian Criminal Code does not currently have a provision to prohibit and criminalize this act. This gap may exist due to the fact that the specific categories of mutilation identified in other countries have not been reported in Albania. This void could potentially be addressed through other articles in the Criminal Code, such as Article 88, which sanctions intentional harm resulting in mutilation or other lasting health damage. Nevertheless, we have not identified any instances of judicial practices related to female genital mutilation. In Albania, there are no registered convictions for behaviour categorized as female genital mutilation, a practice that is largely foreign to Albanian customs and traditions. However, as the number of foreign citizens entering Albania continues to rise, particularly among asylum seekers and immigrants from countries where this harmful tradition persists, the necessity of criminalizing this act in the Criminal Code becomes apparent. The GREVIO report on Albania has also highlighted this concern and underscored the importance of identifying and assisting victims of female genital mutilation.<sup>44</sup> Several European countries, including Italy, Monaco, Montenegro, Portugal, Serbia, and Spain, have introduced dedicated provisions against mutilation into their legislation after ratifying the Istanbul Convention.<sup>45</sup>

### Forced Sterilization Obligation

Article 39 of the Istanbul Convention addresses forced interruption of pregnancy and forced sterilization as forms of violence against women. While Article 93 of Albanian Criminal Code criminalises abortion without the pregnant woman's consent with a fine or imprisonment of up to five years, there is currently no provision on forced sterilization.

Importantly, the Istanbul Convention does not seek to criminalize every medical intervention or surgical procedure undertaken to assist women, preserve their lives, or aid those who are unable to provide consent. Instead, the purpose of this provision is to underscore the significance of upholding women's reproductive rights, granting them the freedom to make informed decisions about the number and

<sup>43</sup> The Istanbul Convention defines female genital mutilation as: the cutting, infibulation, or any other form of mutilation performed overall or a part of the labia majora, labia minora, or clitoris of a woman. Compelling or requesting a woman or girl, as well as inciting a girl to undergo these acts, should be prohibited by legislation.

<sup>44</sup> Council of Europe, Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *Albania Baseline Assessment Report*, 2017, op. cit.

<sup>45</sup> Council of Europe, Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *Mid-term Horizontal Review...*

spacing of their children, and ensuring their access to information pertaining to natural reproduction and family planning.<sup>46</sup> This matter could pose particular challenges for individuals with disabilities, especially in situations where they are compelled to undergo forced sterilization against their will.

### Sexual Harassment in the Workplace

Through the amendments of 2013, the Albanian Criminal Code introduced for the first time the criminal offence of sexual harassment (Article 108/a). This provision has been shown to encourage the reporting of instances of sexual harassment. Incidents of sexual harassment in the workplace have also been reported. However, Albanian courts are still unprepared to ensure timely judicial proceedings for such cases. For example, it took 66 court sessions to reach a verdict in a case where a teacher had sexually harassed an 8-year-old student. The trial in the Gjirokastra Court took 4 years to conclude. Additionally, the Court lacked protocols on how to handle and interview child victims of sexual abuse.

Simultaneously, the incorporation of the criminal offense of sexual harassment in the workplace aligns with international standards. Alongside the Istanbul Convention, which calls for addressing sanctions for all forms of violence and unwanted behaviours (Article 40), the Albanian State has ratified ILO Convention No. 190. From various perspectives, Albanian experiences emphasize the necessity of treating sexual harassment as a distinct criminal offence in the workplace. This need is apparent in both the analysis related to legislative alignment with international standards and the ongoing investigations and judicial practices. Introducing such criminalization, or the inclusion of aggravated circumstances for sexual harassment offences, would enhance the effectiveness of criminal legislation.

## Conclusion

The critical examination of sexual crimes within the framework of Albanian criminal legislation has unveiled several gaps, with certain provisions conflicting with international standards on gender equality and elimination of gender-based violence. Valuable insights have been garnered from international practices and the experiences of other member states of the Council of Europe and the European Union. In contrast to the existing provisions of Criminal Code, it is imperative to revise the definition of sexual violence, currently based on the use of force and coercion,

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<sup>46</sup> Council of Europe, Explanatory Report on the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), 2011, op. cit.



to the absence of freely given consent. This revised definition should align with the standards set forth in Article 36 of the Istanbul Convention. Furthermore, this analysis underscores the necessity for the introduction of other forms of sexual violence offences into the Criminal Code, which have utmost importance for the protection of women and girls from grave forms of sexual violence, including genital mutilation and forced sterilization. Beyond these aspects, it is imperative to revisit provisions safeguarding minors against sexual violence and dismantling any prejudiced language directed towards individuals based on their gender identity or sexual orientation.

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