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Albanian and Italian Constitution in a comparison overview regarding the application of international law in domestic legal order

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Abstract

The aim of this paper is to provide an overview of the Albanian Constitutional provisions in comparison with the Italian one, regarding the application of the international law and more specifically to the supremacy of the European Union law. It is analyzed the way of how it is regulated by the Albanian and Italian Constitution the case of the application of international law into the domestic legal order. Another issue analyzed is the application of the international law and to what extent is provided the delegation of legislative powers to the international organization and more specifically to the sui generis organization such as European Union after the integration of Albania as a member of European Union. Despite the fact that Albania is not yet an European member the constitutional provisions are analyzed in terms of allowing or not the integration into an supra national organization, in order to study the relationship between the domestic law and European Union law regarding the supremacy doctrine of European Union law.

Keywords: Constitution, European Union Law, supremacy, international law, national law

I. Introduction

Albania, as one of the Western Balkan Countries, following the approval of the Stabilization and Association Agreement intends and wishes the integration into the European Union as one of the most important target of any government after the steps that has taken and all the efforts tried in order to fulfill all the obligation and recommendations imposed by EU authorities. It should be understood that the integration into a supra national organization brings the transfer of a part of the national sovereignty to the Union. This paper will be focused on the supremacy that will have the EU Law in relation to the national law. The study of the supremacy doctrine is very important, as it will serve to analyze how it is applied the European law in the EU member states and which is the relation between the EU law and national law.

The European legal system was not always effective at influencing state behavior and compelling compliance, but it was the European Court of Justice which transformed the original system through bold and controversial legal decisions declaring the direct effect and supremacy of European law over national law (Alter, 2002, 4). The European Court of Justice (ECJ) has decided that the aim of the common market between the different states will be undermined if the EU law will be subject to national law of the different states. As result, according to the ECJ the

validity of the EU law cannot ever be assessed by referring to the EU Law. It is required to the national courts to give immediate effect to the direct effect provisions of EU Law, of each category and order, in cases when are presented to the national courts, and to ignore or set aside each contradictor national law, which may hinder the application of EU Law. The request to set aside the contradictor national law does not include the obligation to declare invalid the national law, which can continue to be applied in any situation of which it is not implied in the contradictor terms of EU Law. Many national courts do not agree with the unconditional monist overview of ECJ regarding the supremacy of the EU Law. Even though they accept the supremacy application in practice, and most of the states consider this more as a result from their national constitutions as from the authority of the European Community Treaties or of the ECJ, and they keep the power of the final constitutional review over the measures of the EU law. In this sense, the ECJ has become an important agent in the constitutionalisation process of the European Union, and a process of legal integration has taken place, in which European and national laws are becoming integrated and therefore transforming a dominant dualist conception of the legal architecture into a monist one (Magone, 2011).

The Albanian legal system belongs to the monist national system, where the international law has priority over the other normative acts. The article 5 of the Albanian Constitution provides that "*The Republic of Albania applies the international law that is mandatory for it*". This article is strictly related to the other articles of the Albanian Constitution, such as the article 17, 116, 121,122 and 123. In the hierarchy of norms the ratified international agreements takes place after the constitution and they are superior to laws. How is it regulated the case of the application of international law in the national law order according to the Constitution of the Republic of Albania? Does the Albanian Constitution permit the application of the international law, and if yes, to which extend it is extended the delegation of the legislative powers to the international organizations.

The Constitution of the Republic of Albania, in the articles 121-123 provides the ratification of international agreements, their effects in the hierarchy of the legal system and the delegation of powers to international organizations for special issues. The article 123 of Albanian Constitution which provides the delegation of the powers to international organization was applied in the case of Albanian adhesion to NATO. But meanwhile the question that rises is if it will be more efficient if the article 123 to be specified more clearly the clause of integration to the EU, and the provision of the supremacy principle by clarifying the fact that the EU legal norms would have direct effect in the Albanian legal system and its supremacy on Albanian legislation.

While in Italy, the report between the constitution and subsequent treaties has a specific. Generally the constitution prevails, but based on the fact that Italy is a member state of EU as result EU law has a direct effect and it is superior on the national law.

The regulations, directives and decisions of EU are self-executing and directly applied in automatic way. Thus in Italy, the EU law has priority even over constitutional norms, although recently Italy has undertaken a certain distance to the Community Court, being limited only to its serious violation of the constitution by community acts.

II. Albanian Constitution in comparison to Italian Constitution

Despite the fact that Albania and Italy belong to the same family law, that of the civil law, they are different concerning the position of the international law in rapport to the national law.

Italy is part of the dualist system where the international law and national law are independent from each other and develop in parallel. Each of them can borrow from the other special norms, and applies them into practice, but neither of them can prevail over the other (Puto, 2004, 28). The article 10 of the Italian Constitution provides that "*The Italian legal system is in compliance with the generally recognized principles of international law*". Furthermore this article provides the solution in cases of conflicts between the international common law and constitutional law regarding the immunity of diplomatic agents of states and international organizations. The Italian clause regulates the status of foreigners by law but in conformity with international provisions and treaties. Hence, in the Italian system the international law cannot be automatically part of the national law. The status of European law, within dualist states, is seen as depending on national acts "transposing" the European Treaties and where this was a parliamentary act, any subsequent parliamentary acts could-expressly or impliedly – repeal the transposition law (Schütz, 2015, 144).

On the other side the Albanian Constitution, in distinction from the Italian Constitution gives a privileged position to the international law and more respectively to the European Convention of Human Rights, but only as regards to the limits of the rights and liberties provided by the ECHR, for which this convention is in the same level with the Constitution. Besides this the Albanian Constitutional Court (Decision No.6/2006), considers that the text of ECHR and the jurisprudence of the Strasbourg Court serve to interpret the constitution and to define case by case the limits of the essential constitutional rights.

The Italian system based on the specifics of administrative divisions in regions, provides that the regions can produce norms with equal value to the state laws. The article 117/1 stipulates that exercising of legislative power by State and Regions is conditioned by the respect of international law. This provision is distinguished for the introduction of constitutional restriction directed to the common legislator, state and regional in compliance with the international obligation (Bianchi, 2008). To be stressed is that the Regions, with respect to the international law the only competences that have is that of specifying and completing the international law in the issues that appertains to them, but the regions are not entitled to avoid the application of the international agreements in force.

In the article 80 of the Italian Constitution are specified the cases when it is necessary the authorization by law from the parliament chambers of the ratification of the international treaties, and the cases are as follows; when the treaty is of political nature, provides arbitration or legal regulation, or that causes changes in territory, financial liabilities or in laws. Therefore it considers the participation of parliament as necessary in establishment of treaties, in manner that the international obligation that may arise from the article 117 of the constitution to be in charge of the legislator. It should be also stressed that the power to ratify the international treaties in Italy, is given to the President. But this power of president is just a formal act as substantially the government has the exclusivity regarding the negotiation and conclusion of the ratification of treaties.

Also in the Albanian Constitution it is provided the cases of the ratification of international treaties and agreements by law from the parliament and which are those related to territory, pace,

alliances, political and military issues, human rights and liberties and obligations of citizens, Albania's adhesion in international organization, assumption of financial liabilities by the state and in the cases of approval, change, amendment and repeal of laws. But, different to the Italian Parliament, to the Albanian Parliament it is vested the right to ratify other agreements that are not specified in constitution, by the majority of all its members. There is another category of international agreements that are signed by the Council of Ministers and which are not ratified by law, but they have to be notified to the Parliament by the Prime Minister.

In the Italian system for the adoption of the international agreement it is required the order of execution while in the Albanian system this instrument it is not required, as the international agreement ratified by law are directly applied in Albania, except in the cases when their implementation requires the promulgation of a law.

In cases of conflicts between a international agreement ratified by law and a law, the Albanian Constitution provides that will prevail the international agreement and the judges in this cases should not be directed to the Constitutional Court but have to apply the directly applicable international agreement. In the Albanian Constitution it is explicitly specified the supremacy of the international agreement ratified by law over the national laws that are in contradiction with it. But with respect to the European adhesion, the supremacy of EU law can be threatened even in the monist states like Albania. For even in the monist states, the supremacy of European Law will find a limit in the State's constitutional structures (Schütz, 2015, 144).

Whilst in the Italian system, the constitution by the amendments of 2001, distinguishes the EU obligations from the international obligations as the EU law has direct effect and the supremacy of EU law is ensured by the mechanism of non application performed by the single judge. Form the other side the prevalence of international law materializes from the declaration of unconstitutionality of the internal norm from the national Constitutional Court. Italy, by adhering to Community Treaties and being so part of a supranational organization has ceded part of its sovereignty not only regarding the preservation of peace and security, but as well as in terms of legislative power for the issues specified by the Treaties, with the only limitation of inviolability the essential principle and rights guaranteed by the constitution. However, despite the cession of legislative power, the Italian Constitution has stipulated in article 117/2 point a) to s) that the state has exclusive legal power on this well defined areas, to which it is not ceded the legal power to EU. The Italian Constitutional Court (Decision No.348/2007) interpreted that "*the difference between international and community standards makes the choice of constitutionality to be not limited to violation essential principle and rights or of superior principles, but should be extended to any contrary aspect with "established norms" and constitutional norms*".

In perspective of the case Costa v. ENEL (case 6/64), to be taken into consideration is the fact that Italy claimed that the EU Treaties, like ordinary international law, had been transposed into the Italian legal order by national legislation, which could therefore be derogated by subsequent national legislation; but the ECJ rejected this presumption of the supremacy of national law by insisting on the supremacy of EU law (Barnard & Peers, 2014, 74).

Albeit Albania is not part of EU and has not adhered to the Community Treaties, the constitution provides the integration clause at article 123 which defines the supremacy of acts approved by international organizations over the national law, in cases when in the agreement itself for the participation in this organization it is provided the direct application of norms. Also the Albanian Constitution permits the transferring of normative power to an international organization by agreement, which is approved by referendum. What should be emphasized is that the in cases of adhering to EU, and based on the fact that the treaties provides the direct

application of the EU law, as result the integration will bring as well the supremacy of EU law to national law and over the constitution.

III. The need for amendments in the Albanian Constitution

One of the main aspirations of Albania is EU adhesion. The Constitution provides the integration clause at article 123, but the question that may rise is if there are needed constitutional amendments for adhesion in the Community Treaties. Will it be more appropriate to be amended the Albanian Constitution by ratification of the EU Treaty? If yes, which are the main problems and which procedures should be followed in order to pass these problems. Taking into consideration the fact that generally the Albanian Constitution does not have any provision in contradiction with the adhesion of Albania to EU, the answer would be that there is no need for amendments. However, some provisions are drafted on the general meaning and do not exclude the interpretation which may create obstacles for adhesion to EU. Consequently it would be necessary to be amended the constitution in order to not let space for interpretation contrary to the EU adhesion.

Some suggestions were given on 2007 based on the project "to strengthen the capacities of the Ministry of Integration" by the team leader of the project Mr. *Alfred Kellermann* (Kellermann, Albanian Parliamentary Journal, 2007, No.37) as follows:

a) The first provisions that may need amendment are *the article 2 which defines the sovereignty and article 3 which defines the independence, by including provision that provide the adhesion to EU and by defining the methods of exercising the state sovereignty*. As consequence it will be specified in the constitution the delegation of the state sovereignty to the EU institutions. Also in this clause it would be provided the procedure on the ratification of the EU treaties, to be implemented at the time of full succession in EU.
b) Provisions that define *in particulars the legal status of the international law and of the primary and secondary legislation of the Albanian legal system*. Thus it is recommended to be explicitly mentioned in the constitution the supremacy and direct effect of the EU law.
c) Provisions that *regulate in details the relations between the legislator and judiciary with respect to international law*. This regulation it is necessary in order to make it possible for the constitutional authority to give to the Government the constitutional base for the drafting of such decisions and their application in the national law, when it is required by the EU law. In the cases when the Decision of the Council of Ministers decide on the delegation of competences, it is required the approval of the Parliament. The liberty of action of the government regarding the EU issues compulsory depends on the terms of the parliamentary mandates and on the willingness to approve the government acts.
d) Provisions that would regulate *the procedure and the jurisdiction of the Constitutional Court, as the adhesion to EU require some changes of the procedures in compliance with the Simmenthal case.*

Based on the article 145/2 of the Albanian Constitution, when the courts consider that the laws are in contradiction with the constitution, they do not apply that law, suspend the trial and send the case to the Constitutional Court. While on the other side, if the law in contradiction with

EU law, the national court based on the Simmenthal practice, has the obligation to not apply the national law. As result the EU law requires from the courts to apply the EU law in cases of noncompliance between the EU law and national law, without sending the case to the Constitutional Court.

But the opinion of some of the Albanian constitutionalists was that the integration clause provided by article 122 and of the competences delegation provided by article 123 are adequate. In the article 122 point 3 it is stipulated that in cases of conflicts the acts approved by the international agreements has priority over the national law, implying thus also the constitution and confirming the supremacy of the EU law when Albania will be part of the EU. Referring to the experience of the other member state which only few of them have amended the constitution and based on the article 122 and 123 of the constitution was concluded that these articles constitute a sufficient base for EU adhesion.

Recently in Albania it was initiated the plan for a judicial reform, as a requirement for fulfilling the EU obligations as a state with the "candidate" status, and preparing for adhesion to EU. Accordingly it was constituted a draft on constitutional amendments necessary to be implemented the reform, which was also sent for opinion at the Venice Commission. This draft among the other changes provided also an amendment regarding the clause of European integration. The first amendment was judged firstly at the preamble to adjoin the European values. Also it was concluded by the constitutionalist experts to be specified in the Albanian Constitution that the Republic of Albania participates in the European Union to exercise jointly with the other member states the state powers, based on a ratified agreement by the majority of all members of the Parliament. Besides to be stipulated the principle of supremacy by specifying that "The European Union Law has supremacy over the national law of the Republic of Albania". The opinion of the Venice Commission (Opinion No.824/2015), regarding the European integration was that since the draft reads as Albania was already a member of the EU, in order not change the Constitution again, it is recommended that the relevant provision should make clear that will enter into force only when Albania joins the Union (CDL-AD, (2015),045, 4). The Venice Commission , taking into consideration the opinion given on the draft law on the Review of the Constitution of Romania (CDL-AD (2014) 010), concluded that at the present reality of Albania a simple statement to the effect that it may join the EU and transfer some of its sovereign powers to the EU would probably be more sufficient.

IV. Conclusions

The Albanian Constitutional Court like the Italian one has adopted the judicial review of the national laws and their conformity in relation to the international treaties. Taking into consideration the principle of rule of law, the laws that are in contradiction with international commitments are also in contradiction with the constitution.

Based on the legal framework the Albanian judges do not have competences to apply the Albanian laws that are in contradiction with the EU law for two reasons. The first reason is because the conformity of the national laws in relation to the international law it is provided by the constitution, as it is given priority to the international law. The second reason is that the EU law would be implied as an international treaty. But to be stressed is that the legal status of the EU law to the Albanian law is different from the status of the international law in general. An

effective application of EU law in practice intends that the national courts would be authorized to not apply the domestic laws based on the EU law and more precisely to the Simmenthal practice.

What it should be understood is that the EU adhesion per se will not bring any change in the organization of the judiciary in Albania. Still though on the ground of ECJ practice it is evident that the EU law does not interfere in the organization of the justice system of the member states.

It is always the competent national court the one which should be referred to the EU law and to ensure that the civil protection is empowered to offer its effect in compliance with the European standards. Based on the recommendations it is also necessary to be amended the constitutional review procedure, in compliance with the EU obligations. The main result from the application of the change would be the reinforcement of the judges of the first courts. The Italian practice shows that the decisions of the judges of the first court have made history in the development of the European law. Analyzing the effect of the Stabilization and Association Agreement of Albania entered into force on April 1, 2009, and which is a precondition for adhesion in EU representing primary legislation, it is concluded that this agreement has direct and binding effect. The article 122 makes clear the necessity to make the EU legislation as integral part of the national legislation and as well as to differentiate the EU law from the International Treaties or form other rules of the international law (Zajmi, 2009).

Another issue to be stressed is that the Albanian Constitution makes no distinction between EU legislation and international legislation difference and relating to the fact that Albania is not yet a member state of the European Union, it is not yet defined the legal status of the EU law, being the primary or the secondary legislation.

Conversely, the Stabilization and Association Agreement itself, interpreted in the perspective of its objective and aim, the integration and membership to EU, authorizes the Albanian courts to directly apply the secondary legislation of EU, which is able to create direct effect with the ECJ precedents.

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