THE PROCESS OF INTEGRATION OF ALBANIA INTO THE EUROPEAN UNION FROM AN INTERNATIONAL AND EUROPEAN LAW PERSPECTIVE

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Abstract: The EU integration process of Albania and other Balkan countries requires *inter alia* a significant redefinition of the relationship between the domestic law of these countries and international law in general and European law in particular. At present, when international law represents *inter alia* one of the most meaningful tools of globalization, the relationship between international law and domestic law has been extensively redefined. However, there are still many disputable and challenging issues that need to be resolved by both international and domestic bodies. Indeed, international law by virtue prevails over domestic law, since it defines its content and borders in the same manner as the constitutions define the content and the borders of the domestic law. Otherwise, international law cannot be considered to be binding and superior to states' domestic law system. Thus, the main purpose of this paper will be to analyze the relationship between international law and European law with the domestic law from both a theoretical and practical comparative perspective, among countries such as Albania, Germany and Italy. A special focus will be on European law as a product of a *sui generis* supranational state form, such as the European Union.

Keywords: *Acquis communautaire*, approximation of legislation, domestic law, international law, *pacta sunt servanda*, sovereignty, theories of international law.

1. Introduction

The approximation of domestic legislation with the EU law or *acquis communautaire* is one of the basic criteria of EU membership or the so-called Copenhagen criteria of 1993 for Western Balkan Countries, including the Republic of Albania. This process does not mean solely a mechanical approximation of legal texts or their meaning, but above all it requires an approximation of their way of implementation.[1] On the other hand, this is a continuing process that necessarily requires the establishment and functioning of necessary administrative structures that would practically realize the approximation of legislation. In other words, the approximation process means more than the writing of legislation; it requires that special attention be paid during the phase of policy making, in order to adopt well-thought decisions and produce high quality legal texts.[2] The obligation of the Republic of Albania to approximate its domestic legislation with the EU law is foreseen in the Stabilization and Association Agreement (hereinafter SAA), which expresses also the aspiration of the Republic of Albania to be a full member of

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[1] Jordan Daci, The relationship between international law and domestic law in accordance with the Constitution of the Republic of Albania, (Tirana, May 2010), p. 169.

[2] Manual for drafting laws in Albania. (EURALIUS, 2006), p. 82.

EU.

2. The process of EU integration from an international and European law perspective

Specifically title VI of the SAA, Article 70, provides that:

> The Parties recognize the importance of the approximation of Albania's existing legislation to that of the Community and of its effective implementation. Albania shall endeavour to ensure that its existing laws and future legislation shall be gradually made compatible with the Community Acquis. Albania shall ensure that existing and future legislation shall be properly implemented and enforced. This approximation shall start on the date of signing of this Agreement, and shall gradually extend to all the elements of the Community Acquis referred to in this Agreement by the end of the transitional period as defined in Article 6.

The approximation process itself, as mentioned above, is not a simply mechanical process, but it first requires fundamental changes on the way how we understand and implement legal norms in general and especially norms that will be approximated with EU legal norms. Indeed, with the beginning of the approximation process, the Albanian domestic law will undergo an essential change that includes the largest part of norms as well as court practice that shall be under the impact of the EU Court of Justice and Common Court practice, in the same manner as norms of *acquis* impact on the Albanian domestic law.[3]

Approximation and EU membership lead to a hierarchical relationship between domestic law norms and the EU *acquis*, similar with the relationship between norms of international law and norms of domestic law. The latter is a little bit different from the relationship between the *acquis* and domestic law, because of the different nature of the *acquis* compared with international law. The *acquis* is very similar with a law which derives from a *sui generis* form of state as the EU, which can be classified as less than a federation and more than a confederation. Thus, norms of the *acquis* constitute a supranational legal system which is based on the notion of multilevel constitutionalism.[4] According to this notion, the EU integration process is a process of constitution-making instead of a sequence of international treaties which establish and develop of

[3] With the entry into force of the Lisbon Treaty, "Court of Justice of European Communities" has been named as "EU Court of Justice", while the First Instance Court has been named as "Common Court". Furthermore, this treaty has introduced several changes on the EU Court of Justice jurisdiction, by extending its jurisdiction to examine also case related with asylum, visas etc.

[4] Ingolf Pernice, Multilevel Constitutionalism and Treaty of Amsterdam: European Constitution-making revised?, 1999 *Common Market Law Review* 36, pp. 703-750, at 707.

international cooperation.[5] For this reason we can say that the EU has a multilevel constitution made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties.[6] From this point of view, as a result of approximation and EU membership processes, the content of the domestic law of a country is defined by the *acquis* in the same way as the content of future laws is defined by a constitution, which does not contain any constitution clauses for their review. This means that the content is defined under the circumstances of alternatives.[7] In other words, this means that the process of EU integration of the Balkans is defined by the approximation of legislation and direct and indirect acceptance of *acquis*'s prevalence over domestic law. This because, the definition of domestic law content by the *acquis* means necessarily the recognition of the latter as the main source of law, which prevails also over the constitutions of these countries as long as this natural recognition of its prevalence shall not question the constitutional identity of these countries and shall not be to such extend as to undermine the fundamental exercise of the national sovereignty by these countries.[8]

The same reasoning is applied also by the German Constitutional Court in the case on the Maastricht Treaty and the French Constitutional Council in the case on the constitutionality review of the Statute of the International Criminal Court. In these cases, these courts have stated respectively that "the transfer of sovereignty powers shall be limited up to that extent where the constitutional identity of the state will be in question",[9] and "the transfer of sovereignty powers shall be limited up to that extent where such transfer will undermine the fundamental exercise of national sovereignty".[10] Influenced by these practices, the Constitutional Court of the Republic of Albania has followed the same reasoning.[11] Nevertheless, the acceptance of the *acquis* prevalence and its direct application means also a change of dualist approach of law practitioners especially of courts which with the approximation of legislation as part of country pre-accession obligations and latter on with the country EU membership, shall be obliged to directly apply the *acquis* even in cases when the latter conflicts with domestic law up to a considerable extent including cases when the *acquis* conflicts with the constitution itself, as long as the above-mentioned principles are respected.

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[5] For more see Ingolf Pernice, Constitutional implication for a state participating in a process of regional integration: the German Constitution and "Multilevel Constitution", Presented at the XV Congress of International Comparative Law, 1998.

[6] Gimm, Does Europe need a constitution? 1 EJL 1995, p. 282.

[7] Hanno Kaiser, Notes on Hans Kelsen's Pure Theory of Law (1st ed.), 2004, available at: <www.hfkdocs.com/files/Kelsen_Pure_Theory.pdf>.

[8] Supra note 4, p. 151.

[9] Judgment of 18 October 1993 of the German Federal Constitutional Court on Maastricht Treaty. *As cited by* the Albanian Constitutional Court in its Judgment No. 186, dated 23. 09.2002.

[10] Decision of the French Constitutional Council of 1985 on the constitutionality of the Statute of International Court of Justice. *As cited by* the Albanian Constitutional Court in its Judgment No. 186, dated 23. 09.2002.

[11] See Decision No.186, dated 23.09.2002.

The obligation to respect the norms of the *acquis*, even in cases when they conflict with the norms of domestic law is based in Article 122(3) of the Constitution of the Republic of Albania which provides that the norms issued by an international organization have superiority, in case of conflict, over the laws of the country, if the agreement ratified by the Republic of Albania for its participation in the organization, expressly contemplates their direct applicability. Thus, this clause for the recognition of prevalence of these norms over the domestic law requires the fulfillment of two conditions:[12] first, the country membership into an international organization should be through ratification by law of the membership agreement; secondly, the membership agreement itself should foresee that norms issued from this organization shall be directly applicable. Indeed, this constitutional definition guarantees the prevalence of norms issued by the international organizations where the Republic of Albania is a member even over the constitution itself, because in the latter on purpose is used the expression "domestic law" which means the whole ensemble of legal norms in the Republic of Albania, so the Constitution itself.[13]

In fact, it is fully justified to consider this clause as the "Integration Clause" of the Republic of Albania into Euro-Atlantic structures, because it ensures without problems the EU membership of Albania, just as in case of NATO membership.[14] However, because of the EU membership specifics, some foreign and domestic authors such as Prof. Anastasi are maybe right when they put forward the need for a constitutional amendment that would forego EU membership.[15] Such opinion may be considered if we take into account the very conservative nature of Albanian lawyers in regard to international law in general. However, the Constitution foresees the possibility for the EU membership treaty to be approved via referendum. This practice has been followed by the majority of current EU Member States. Consequently, an approval via referendum of the EU Membership Treaty would avoid any issue related with the prevalence *per se* and *per virtue* of the EU Law.

We should emphasize also that countries such as Germany, Italy and so on, have changed their courts' practice in complying with *acquis*'s prevalence over their domestic laws. Decisions of the German Constitutional Court in cases of the Maastricht Treaty, Banana I, II, II and so on, have been the turning point of German courts' practice to comply with the *acquis* prevalence.[16] For example in case *Banana I and II*, in 1995-1996, the German Constitutional Court considered itself as the sole and final authority entitled to limit the EU authority in Germany.[17] In the case of Italy, the

[12] Supra note 4, p. 151.
[13] See Luan Omari, Aurela Anastasi (eds.), Constitutional Law, (ABC Publishing House. Tirana 2008).
[14] Supra note 4, p. 151.
[15] Ibid.
[16] Ibid. p. 67.
[17] Ibid.

Constitutional Court and the Supreme Court (Corte Suprema di Cassazione) for many years opposed to recognize any absolute prevalence of the *acquis* over the Italian domestic law. However, after many judgments these both courts, especially the Constitutional Court unconditionally recognized the prevalence of EU law over domestic law, by considering the EU law as a parameter for the evaluation of domestic law validity.[18]

From a formal point of view, however, the Constitutional Court of Italy excluded the possibility of accepting the monist approach *inter alia* by underlining that:

> It is also possible to point out that the recognition of Union's power on some matters does not necessarily mean any implementation or recognition of monist approach, but means more a recognition of the separation of sovereign powers in different levels of governance or the so-called Multilevel Constitutionalism.[19]

Moreover, in its Judgment No.399/1987, the Constitutional Court of Italy emphasized that EU law prevails even over constitutional norms of domestic law.[20] This Court underlined the fact that none of the domestic law norms which conflicts with the EU law cannot be applied, regardless of their time of approval. In this manner, this court abandoned the application of the *lex posterior principle*.[21]

To conclude based on Articles 5, 17, 116, 122 and 123 of the Albanian Constitution and Articles 26, 27 and 31 of the Vienna Convention on the Law of Treaties, norms of the international law shall prevail also over the Constitution itself as long as they do not threat the constitutional identity of the country and do not undermine the fundamental exercise of national sovereignty. However, this opinion accepted by doctrine, as well as partially accepted by court practice, is not enough to ensure any *de facto* and *de jure* prevalence of the *acquis* over domestic law in the Republic of Albania. Other measures such as the training of law practitioners on international law and EU law issues, more advanced studies on these areas, as well as the introduction of other necessary legal amendments are some of the measures that should be taken in parallel with the process of approximation or harmonization of Albanian legislation with the European *aqcuis*. So far, this process has been limited solely to a mechanical approximation, but has not been extended to include any approximation on the way how legal norms are understood and enforced.

A typical example is the violation of the SAA by the Albanian domestic law by applying a tax over vehicles' exports originated from EU, regardless of the fact *ad*

[18] Ibid.
[19] Raporti tra Diritto Nationale e Diritto Comunitario, available at the official website of the Italian Constitutional Court, as cited in Jordan Daci, supra note 4, pp. 80.
[20] Supra note 4, p. 80.
[21] Ibid.

interim agreement part of SAA forbids such tax application. The need to collect more budgetary incomes from customs might have been the reason why the Republic of Albania has applied a custom policy which violates the SAA. Even more, we can further argue that the last amendment to fiscal legislation in Albania that foresees tax application also for vehicles sold within the territory of the Republic of Albania, but which have been previously imported from EU, not only is a wrong step, but again violates the SAA, because the primary aim of the SAA is not the application of any equal taxation level, but the liberalization of trade. Certainly the application of taxes of the same level an in the same manner does not contribute, but in contrary reduces free trade between EU and Albania. Finally, as previously mentioned Albania cannot be fully nor partially integrated into EU without pre-accepting to unconditionally implement the EU *acquis*, which on the other hand means above all to accept its prevalence over domestic law.

3. Conclusions

Based on the arguments presented above, we can conclude that the process of EU integration of Albania and other Balkan countries first means a redefinition of the relationship between these countries domestic laws with EU law and international law. It should be underlined also that regardless of non-essential differences among the EU and international law consisting on the way how these norms are adopted and how states are bound to these norms, again the EU Law as a pure supranational law has a clear international nature. Indeed, EU law is subject of international law prevalence just like any domestic law is subject of international law prevalence.[22] Such situation is first a result of the EU law itself, the primary sources of which are exclusively made up of pure international treaties. In addition relationships between state obligations under EU, overlaps and even more are defined by other international treaties obligations, especially membership treaties in international organizations such as the United Nations, the Council of Europe, the Organization for Security and Cooperation in Europe and so on.

An important conclusion of this paper emphasizes the fact that the constitutional framework in the Republic of Albania guarantees the prevalence of the EU law over domestic law. Nevertheless, taking into account the fact that EU membership shall have a comprehensive and substantial impact on Albanian law, making a constitutional amendment which would better define the status of the *acquis* in the Republic of Albania might be also considered. In this way, courts and especially the Albanian Constitutional Court will be relieved from the duty to clearly define the relationship between the *acquis* and domestic law. Such an initiative would even be advisable, if one

[22] A typical example is the recognition of prevalence of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Acquis's constitutional framework. Furthermore, UN Charter foresees that obligations under the present Charter shall prevail over obligations under any other international agreement. Article 103 of UN Charter defines that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

considers that the establishment of an overall accepted practice would require many years.

Finally, the Republic of Albania, just like other Balkan countries should redefine the relationship between the *acquis* and domestic law, not only from the point of view of doctrine, but also from the perspective of courts and other administrative practices by also ensuring an unchallenging prevalence of the *acquis* as a directly applicable law. Such thing requires *inter alia* legal amendments, especially of procedural norms, continuing legal education of law practitioners including other decision-making persons of public administration, and above all a significant change of mentality on the unlimited nature of sovereignty and other dualist approaches concerning the status of international law. These kinds of approaches are too old for a globalized world as ours, where international law itself represents one of the most significant forms of globalization itself.

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PROCESI I INTEGRIMIT TË SHQIPËRISË NË BASHKIMIN EVROPIAN SIPAS PERSPEKTIVËS SË TË DREJTËS NDËRKOMBËTARE DHE EUROPIANE

Abstrakti: Procesi i integrimit në BE për vendet e Ballkanit, kërkon *inter alia* një ridimensionim domethënës të marrëdhënies midis të drejtës së brendshme të këtyre vendeve me të drejtën ndërkombëtare në përgjithësi dhe posaçërisht me të drejtën europiane. Sot kur e drejta ndërkombëtare përfaqëson një nga format më domethënëse të globalizimit, marrëdhënia midis të drejtës ndërkombëtare dhe të drejtës së brendshme është ripërcaktuar gjerësisht. Sidoqoftë, ka ende shumë çështje të debatueshme e sfiduese, që kërkojnë zgjidhje, si nga ana e organeve ndërkombëtare ashtu edhe nga ato shtetërore. Në fakt, e drejta ndërkombëtare për nga natyra, mbizotëron mbi të drejtën e brendshme, përderisa ajo deri diku përcakton përmbajtjen dhe kufijtë e të drejtës së brendshme në të njëjtën mënyrë sikurse kushtetutat përcaktojnë përmbajtjen dhe kufijtë e të drejtës së brendshme. Përndryshe, e drejta ndërkombëtare nuk do të ishte e detyrueshme në sistemin e të drejtës së brendshme të Shteteve. Prandaj, qëllimi kryesor i këtij punimi do të jetë analizimi i marrëdhënies midis të drejtës ndërkombëtare dhe të drejtës europiane me të drejtën e brendshme, nga një këndvështrim krahasues teorik dhe praktik midis vendeve si Shqipëria, Gjermania dhe Italia. Vëmendja kryesore do të përqendrohet në të drejtën europiane si një produkt i një forme mbikombëtare organizimi shtetëror *sui generis*, të tillë si vetë Bashkimi Evropian.

Fjalët kyç: *Acquis communautaire*, e drejta e brendshme, e drejta ndërkombëtare, *pacta sunt servanda*, përafrimi i legjislacionit, sovraniteti, teoritë e së drejtës ndërkombëtare.