The European integration of the Albanian legal system

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ABSTRACT

The EU membership criteria as defined by the European Council in 1993 include several legislative criteria which require *inter alia*: 1.Translation of more than 120.000 pages of EU legislation; 2.Approximation of domestic legislation with EU legislation; 3.Continuing harmonization of national institutional framework with EU legislation and institutional framework. On the other hand the Albanian Legal System cannot be integrated into Euro-Atlantic legal system without a significant change of the Albanian jurisprudence in regards to the relationship between international law and domestic law as a must to achieve a full harmonization between EU law and Albanian Law.

KEY WORDS: sovereignty, domestic law, international law, approximation

of legislation, Acquis Communautaire.

INTRODUCTION

In June 2003, the Thessaloniki Summit again reconfirmed the EU membership perspective for Western Balkan Countries - including Kosovo. All these countries before join EU must fulfill all the EU membership criteria as defined in the Declaration of the European Council in 1993 which include: 1.Political criteria, Economic criteria, and 3.Legislative criteria. The last criteria require *inter alia* undertaking the following steps: 1.Translation of approximately about 125.000 pages of EU legislation; 2.Approximation and of the domestic legislation with the EU legislation; 3.Continuing harmonization of the national institutional framework with the EU legislation and institutional framework. For Western Balkan Countries including Albania, the harmonization process or in other words the process of Europeanization of domestic legislation with the EU legislation represents one of the major challenges for the EU membership. The EU legislation is usually identified with the expression Acquis Communautaire that was used for the first time in an Opinion of the EU Commission of October 01, 1969, concerning the application for membership of United Kingdom, Denmark, Ireland and Norway, than the Article 2 of EU Treaty known also as the Maastricht Treaty defines the meaning of Acquis Communautaire:

> "To maintain in full the *Acquis Communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community."

In simple words, Acquis Communautaire or EU Law means the ensemble of rules that form the legal functioning framework of European Community. Today's EU legal system differently from the Universal International Law System or other regional international law systems, has become the most

effective international law system in existence, standing in clear contrast to the typical weakness of international law and international courts.

The harmonization of legislation with Acquis Communautaire *inter alia* means the adoption of legal norms of Acquis Communautaire into the domestic legislation. The adoption is not a mechanical process, in other words is not a literal approximation of legal text, but an approximation of standards. Some domestic acts might require a complete approximation; some others might require partial approximation; while some other acts may not require any approximation. The process of approximation might be understood also as the process of the Europeanization of the domestic law and institutions because of its strong impact on their future configuration and responsibilities.

In parallel with the harmonization, all candidate members should translate the entire Acquis Communautaire into their national languages, composed by approximately 115.000 – 125.000 pages. The translation is a pre-condition for EU membership and the cost of translation must be borne by the countries themselves. In the year 2005 Croatia spent over one million Euro translating part of Acquis, while FYROM spent about 360.000 Euro. The translation methodology involves the establishment of a Translation and Coordination Unit – (TCU) and includes also outsourcing translation. After translation the text is revised by linguistic experts and lawyers with knowledge of foreign languages, than the text is submitted to a database provided by TAIEX and communicated to EU Commission.

In case of Albania, the European Integration process of the Albanian Legal System, beside technical approximation of domestic legislation, requires a significant change of the Albanian Jurisprudence in regards to the relationship between international law and domestic law as a must to achieve a full harmonization between EU law and Albanian Law. The regulation framework and the approach chosen by a state regarding this relationship, in a way or another defines the status of that state in the International Community, which is functional and exists thanks to the rules of international law. While the current phase of European Integration of

Albania offers the most appropriate opportunity to explore the sensitive field of the relationship between the EU and domestic legal systems. In case of Albania, after a detailed analysis of Constitutional provisions especially of articles 4, 5, 116, 121, 122 and 123, referring *inter alia* to few case laws that exist, it results that these provisions are unclear regarding: 1.The issues of hierarchical relationship between international agreements which are not subject of ratification in relationship with other normative acts into force in the Republic of Albania. 2. Direct and indirect effects of treaties accepted by the Republic of Albania into the domestic system produced via the decisions of their supervisory bodies. 3.The relationship between these two systems of law referring to the Vienna Convention on the Law of Treaties and the Law on the Adoption of International Treaties and Agreements of 1999. 4. The relationship between International law and the Constitution itself.

Under the framework of the Euro-Atlantic Integration of Albania, it is understandable that the reform of the Albanian legal system should provide appropriate solutions for the issues identified above in order to achieve a full harmonization of the domestic legislation with Acquis. Indeed, this is a nonnegotiable condition for Albania which in order to be part of EU and international community should act in compliance with the principles of the International Law and EU law upon which is founded the international community and EU itself.

From this point of view should be emphasized that is not enough just to reform the legal system in Albania, but this reform should be followed by a substantial reform of the law enforcement structure, especially of the judiciary. The latter should properly reflect to adapt itself with EU standards and abandon the current conservative and often very old practice. Unfortunately, the approach of the actual judiciary system is unprofessional and often wrong in regards to the application of the rules of the international law. The first reason is the lack of knowledge on international law. The second reason is the lack of knowledge of foreign languages by judges, what does not permit them to be autodidact, especially taking into account the fact that most of the literature on International Law is available only in foreign

languages such as English and other languages. The third reason is the absence of necessary instruments that will ensure a long life learning process for law enforcement persons.

Moreover, the experiences of other candidate countries have shown that the Europeanization process of the domestic law and institutions is very difficult and requires a highly qualified public administration and a good national strategy including an adequate financial support. In case of Albania, the process of harmonization represents a real challenge for Albanian administration, because of the lack of experience, lack of qualified human resources etc.

THE CONSTITUTIONAL FRAMEWORK

The Constitution of the Republic of Albania in compliance with articles 5, 116, 122 accepts the norms of International Law binding for Albania and indirectly accepts the superiority of International Law over domestic law. *De facto*, the Constitution of the Republic of Albania has accepted the Monist theory of International Law. Although, the Albanian doctrine and institutional practice hasn't taken a clear position over this issues which is fully resolved by the Article 27 of the Vienna Convention on the Law of Treaties. Indeed, the jurisprudence of the Constitutional Court of Albania in regards to the relationship between international law and domestic law including the Constitution itself is very poor. Nevertheless, in these few cases, the Constitutional Court of Albania tends to stand between the Dualist theory and Monist theory of international law.

THE RELATIONSHIP BETWEEN NORMS OF INTERNATIONAL TREATIES AND NORMS OF DOMESTIC LAW

The relationship between international law and domestic law does not mean only the hierarchical relationship of legal norms that are into force in entire territory of the Republic of Albania, but means also the harmonization

of the standards that they define. In addition, this relationship does not mean only approximation and harmonization of legal norms, but also approximation and harmonization of their meaning and the way how they are enforced by domestic and international institutions.

In this perspective, the Albanian domestic law like the legislation of other countries of international community lacks harmonization and very often need a significant approximation with EU Law. In many cases, many shortcomings are a result of different application standards. For example, very often for Albanian institutions, unfortunately even for courts human rights are considered as something luxury. This wrong consideration is one of the main reasons why human rights are not fully respected and protected in Albania. Indeed, a deep and comparative analysis between norms of domestic law and norms of international law would underlined many shortcomings, a major part of which has been also the focus of practice.
Articles 121-123 of the Constitution and the Article 17 of the Law No.8371, date 09.07.1998 on "The adoption of treaties and international agreements" define that:

1. The ratification and denunciation of international agreements by the Republic of Albania is done by law if they have to do with:
   a. territory, peace, alliances, political and military issues;
   b. freedoms, human rights and obligations of citizens as are provided in the Constitution;
   c. membership of the Republic of Albania in international organizations;
   d. the undertaking of financial obligations by the Republic of Albania;
   e. the approval, amendment, supplementing or repeal of laws
2. The Assembly may, with a majority of all its members, ratify other international agreements that are not contemplated in paragraph 1 of this article.

The Prime Minister notifies the Assembly whenever the Council of Ministers signs an international agreement that is not ratified by law. The principles and procedures for ratification and denunciation of international agreements are provided by law.

Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Gazette of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. The

amendment, supplementing and repeal of laws approved by the majority of all members of the Assembly, for the effect of ratifying an international agreement, is done with the same majority An international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it. 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.

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. The Assembly may decide that the ratification of such an agreement be done through referendum

An agreement becomes legally binding through: ratification, accession, approval by law from the People's Assembly, by decree of the President of the Republic or by decision of the Council of Ministers in accordance with the Constitutional Law. The President of the Republic ratifies, decides on accession and denounces the treaties that are not subject of examination by the People's Assembly as defined by the constitutional law.

The Council of Ministers approves, and denounces agreements which are not subject of ratification, but contain the approval clause. The Council of Ministers gives the approval for the denunciation by the Ministries or other institutions for international agreements signed on its behalf. While the President of the Republic, signs the instruments of ratification, accession or denunciation and the Minister of Foreign Affairs countersigns them.

While based on the Article 11 of the Vienna Convention on the Law of Treaties that is ratified by the Republic of Albania with the law No. 8696, date 23.11.2000, for the Accession of the Republic of Albania to the Vienna Convention on the Law of Treaties, the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means

if so agreed. In accordance with this clauses, should be emphasized a very important fact that international agreements are equally binding regardless of mean chosen by the state to express the consent to be bound by a treaty. This expression leaves no space for misunderstanding caused by the terminology used by the Constitution of the Republic of Albania which uses the expression "ratified by law".

The superiority of international law especially of EU law over the domestic legislation is confirmed also by the European Court of Justice in the Case *International Handelsgesellschaft* 1970 and in many other cases. For Hans Kelsen, *"the content of a domestic legal system of a state is defined by the International Law in the same way how the content of future laws is defined by a constitution which does not contain any provision for their constitutional review... based on this supremacy of the International Law over domestic law, nothing may deny the presumption of the unity between International Law and Domestic Law. Therefore, the International Law stands over a higher position than the Domestic Law, otherwise treaties reached between states wouldn't be legally binding.* This is especially true for today's International Law is not just a ***jus inter potestas*** or a law that regulates only relationships between sovereign states, but applies also on individuals. To conclude the Article 27 of the Vienna Convention on the Law of Treaties leave no space for further discussion about this issue by provided that: *"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46".* Any kind of interpretation of the domestic law, including the Constitution which would avoid the application of international law at the domestic level as long as the state has accepted international law as integral part of domestic law would be unacceptable and would constitute a violation of the article 31 of the Vienna Convention on the Law of Treaties. The same statement was made by the International Tribunal of ICC in case *"Pyramids".*

Consequently, Albania in order to be a full member of EU, regardless of its constitutional provisions and doctrine shall accept to apply all the norms of international law and especially of EU law. Like William Blackstone used to

say: *"A state that would not accept to be bound by the norms of international law would cease being part of the civilized world"*.

THE RELATIONSHIP BETWEEN NORMS OF GENERAL INTERNATIONAL LAW AND THE NORMS OF DOMESTIC LAW

Another unresolved problem is related with the status of the norms of the General International Law, because the Article 117 and 122 of the Constitution of the Republic of Albania speaks only for that part of international law materialized in the form of treaties. If we refer to the text of Constitutional clauses, we will not be able to find any reference in regard to the status of the norms of General International Law in the Republic of Albania, like the major parts of the constitutions of other countries such as Germany, Italy, Greece etc, do.

However, in my opinion the way how the Article 5 of the Albanian Constitution is formulated *"The Republic of Albania applies the International Law that is binding upon it."*, creates the conditions to guarantee the application of the General International Law taking into account the fact that almost the entire norms falling under this category of International Law are automatically binding to all states including Albania, regardless the fact whether states have expressed the consent to be bound by the obligations that they impose. This interpretation is fully compatible also with the general spirit of the Constitution of the Republic of Albania that transmits strong determination and desire of the Albanian People to approximate its constitutional standards with international standards and to be part of international community. Although from a practical and also theoretical context, this issue remains disputable and hopefully the practice of the Constitutional Court of Albania will clarify it.

CONCLUSIONS

The experiences of other candidate countries have shown that the Europeanization process of the domestic law and institutions is very difficult

and requires a highly qualified public administration and a good national strategy including an adequate financial support. In case of Albania, the process of harmonization represents a real challenge for Albanian administration, because of the lack of experience, lack of qualified human resources etc. For that reason, in order to successfully prepare itself for the initiation and completion of the harmonization process, Albania needs immediately to revise the existing civil service legal framework in order to create a sustainable base for capacity building and make the public administration attractive and at the same time accessible to highly qualified young graduates that have studied abroad in western universities. On the other hand the process of integration of the Albanian Legal system requires a significant change of the Albanian Jurisprudence and courts' practice in regards to the relationship between international law and domestic law.

As part of the Europeanization process the Albanian courts and other national institutions as should accept the supremacy of international treaties for which Albania has expressed its consent to be bound by, regardless of definitions done by constitutional provisions and constitutional laws. Furthermore, the Republic of Albania should accept the direct and indirect effects of treaties accepted by the Republic of Albania into the domestic system produced via the decisions of their supervisory bodies; like in case of Germany, Italy and other EU countries, Albanian courts and institutions need to be Europeanized as part of the European integration process.
The Albanian public should understand that the European Integration provides a framework for development and the Europeanization of the Albanian institutions as well as the Albanian Legal system. Nevertheless, the European Integration of the Albanian Legal System cannot be achieved without the acceptance of the EU law supremacy and a considerable change about the perception of the international law by Albanian law enforcement institutions and its application at the domestic level.

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