Provisions on International Law in the Constitution of the Republic of Albania: Principle of Supremacy and Direct Application in View of the Accession of the Republic of Albania to the Eu

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Abstract

The purpose of this article is to analyze the provisions of international law in the Constitution of the Republic of Albania of 1998, from the point of view of the accession to the European Union. The analysis was carried out firstly in the context of the principle of supremacy and the principle of direct application and secondly given the accession of the Republic of Albania to international organizations. This analysis is intended to understand the constitutional framework in light of the accession of the Republic of Albania in the European Union. The analysis of the constitutional provisions important for the accession of the Republic of Albania in the European Union was done through the descriptive method.

Keywords: *Constitution, international law, EU law, integration, accession*

1. Introduction

The provisions in the Constitution of the Republic of Albania of 1998 (Constitution) that define the status of international law in our legal order and the relationship between them are: Article 5, 17, 116, 121, 122 and 123. For the relationship of domestic law with international law, two important principles have been affirmed in the constitutional provisions: 1. principle of supremacy and 2. principle of direct application.

The principle of supremacy is regulated within the Constitution: first, in the relationship between domestic law and the classical norms of international law, and second, in the relationship between domestic law and the norms issued by an international organization. Also, the principle of direct application of ratified international agreements is provided in the Constitution, except in cases where it is not self-executed and its implementation requires the adoption of a law.

Regarding the accession to international organizations, the Constitution in its Article 123 accepts the delegation to international organizations of state powers for specific issues, through the accession agreement of the Republic of Albania to that organization.

The purpose of the article is to analyze these norms from the point of view of the accession of the Republic of Albania to the European Union (EU). First, do they constitute a sufficient basis for the country's accession in the EU? Second, if these norms as currently provided in the Constitution are compatible with the basic principle of EU law, the supremacy of EU law over the national norms of the Member States?

2. The Principle of Supremacy of International Law and Direct Application

2.1 Article 5 of the Constitution: The Republic of Albania applies international law that is binding upon it

The position of international law in the Constitution of the Republic of Albania of 1998 (the Constitution) is regulated in several provisions. Article 5 in the introductory part of the Constitution "Basic principles", determines that: *"The Republic of Albania applies international law that is binding upon it."* The author of public international law Ksenofon Krisafi considers such a provision a novelty and a great achievement of the modern Albanian legislation. Unlike the previous constitutions, it declares that "the Albania of the beginning of the third millennium, separated from the monist regime, is determined to join the international community, assuming the rights, but also the responsibilities arising from normal co-existence and relations with other international subjects".[1]

At first glance, this provision can be interpreted as a general principle made by a state declaring that it will act in the international arena by the generally accepted rules of the community of states. In the entirety of the rules of international law are included treaties, customary law, general legal principles, doctrine and jurisprudence. The last two, as second sources, are complementary to the first ones which are considered as main sources, in the meaning of Article 38 of the Statute of the Interbational Court of Justice. [2] Thus, a broad interpretation of Article 5 is accepted.

The narrow understanding of this provision would limit it to a formal declaration, without any special value, as the acts of states according to the norms of international law are *a sine qua non* condition for them to be able to participate in international life. But, in this context, Article 5 of the Constitution would not bring any novelty. Therefore, to this article should be given a broader meaning, and to value its application in reference as well to other provisions of the Albanian Constitution.[3]

In our legal literature, there are opinions that this article does not exist separately, but can be applied only in close connection with other relevant articles, specifically Article 122 of the Constitution: "*Article 5 should be interpreted narrowly only in relation to Article 122 of the Constitution, which means that the Republic of Albania recognizes and implements the international agreements ratified by it and published in the Official Gazette, since in this way they become part of the system of internal legal system of our country*". On the contrary, the other opinion that states that Article 5 should be subject to a broader reading seems more reasonable.[4]

This position was held by the Albanian Constitutional Court when it judged the case of compatibility with the Constitution of the provisions of the Rome Statute for the International Criminal Court. It stated that: "... *while based on the Constitution the universally accepted rules of international law are part of domestic law, then even the lack of immunity in international criminal proceedings for certain high-risk crimes becomes part of the Albanian legal order*".[5]

2.2 Principle of supremacy

The principle of supremacy in the Constitution is regulated:

1. first in the relationship of domestic law with the classical norms of international law and,
2. secondly, in the relationship of domestic law with the norms issued by an international organization.

The following constitutional provisions on international law, relevant to this article, can be found in Article 116 and in Part 7, Chapter II on "International Agreements" (Articles 121-123) of the Constitution. Article 116 of the Constitution, paragraph 1, defines the hierarchy of normative acts that have force throughout the territory of the Republic of Albania.[6] This provision places international agreements in the normative hierarchy and even gives them a determined place. They

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[1] Ksenofon Krisafi, "Kushtetuta shqiptare dhe e drejta ndërkombëtare", in the special Bulletin, "5 vjet Kushtetutë", , Shtëpia Botuese BOTIMEPEX, Tirana 2004, pg. 100.

[2] Erjon Muharremaj, "Ndikimi i të Drejtës Ndërkombëtare të mjedisit në legjislacionin shqiptar", Dissertation for the defense of the scientific degree "Doktor", Tirana 2014, pg. 26-27.

[3] Ibid. pg. 27.

[4] Xhezair Zaganjori, "Vendi i së drejtës ndërkombëtare në Kushtetutën e Republikës së Shqipërisë", Journal "Jeta Juridike" no.2, Febbruary 2004; cited in Luan Omari, Aurela Anastasi "E drejta Kushtetuese", pg. 56.

[5] Decision of the Constituional Court no. 186, date 23.09.2002, cited in Luan Omari, Aurela Anastasi "E drejta Kushtetuese", pg. 56.

[6] Article 116, paragraph 1 Of the Constitution: Normative acts that are effective in the entire territory of the Republic of Albania are: a) the Constitution; b) ratified international agreements; c) the laws; ç) normative acts of the Council of Ministers.

are placed immediately after the Constitution and before the laws and normative acts of the Council of Ministers.[7] They must be ratified by law and based on Article 116 and 122/2[8] they have precedence over the laws of the country. Thus, in Article 122/2, the Constitution clearly resolves any conflict between a ratified international agreement and domestic laws that are in conflict with it, in favor of the implementation of the former.

Another constitutional basis for this supremacy can be found in the interpretation of Article 131 of the Constitution: "The Constitutional Court decides on the compatibility of the law with the Constitution or with international agreements as provided for in Article 122". The Constitution recognizes the supremacy of the norms of classical international law over the laws of the country that are not compatible with it.

If, based on the Constitution, the Constitutional Court decides on the compatibility of the law with international agreements, it does not have jurisdiction over the issue of the implementation of the international agreements instead of a law that it is not compatible with it. Such an issue is in the jurisdiction of judicial interpretation of ordinary courts. In such a case, the judge will apply Article 122/1, 2 and not Article 145/2. It is different in cases of the application of a law that contains restrictions on human rights. When these restrictions conflict with the European Convention on Human Rights or the Constitution, the judge of the ordinary courts will refer the case to the Constitutional Court based on Article 145/2. Such an obligation originates from Article 17/2, in which the Constitution itself gives the European Convention of Human Rights a constitutional status and, consequently, from the hierarchy of norms in Article 116.[9]

In the aforementioned constitutional provisions, the Constitution regulates the relationship between domestic law and the classical norms of public international law. Whereas, the constitutional provision in paragraph 3 of article 122 defines the relationship of domestic law with the norms issued by an international organization, to which Albania accedes with a special agreement.[10] They have precedence only when the ratified agreement for participation in that organization expressly provides for the direct application of the norms issued by it. This can be interpreted that for those not related to participation in international organizations, it is not required to provide explicitly the direct application of their norms.[11]

As in the case of classic norms of public international law, the relationship of norms issued by an international organization with domestic law will be governed by the principle of supremacy and that of direct application. In Article 122, paragraph 3, the Constitution defines that: "The norms issued by other international organizations have superiority, in case of conflict, on the laws of the country, when the agreement ratified by the Republic of Albania for its participation in this organization, expressly provide for the direct applicability of the norms issued by this organization.".[12]

The principle of direct application refers to the norms issued by an international organization after the ratification of the accession agreement of the Republic of Albania to it. Meanwhile, as far as the principle of superiority is concerned, there is a difference with Article 122/2. This difference lies in the use of the term "right" instead of the term "law". The legal consequence of such a formulation in the Constitution will be related to broadening the application of the principle of supremacy. The term "right" means the set of norms that make up the internal legal order in a given state, including the Constitution. For this reason, the supremacy of the norms issued by an international organization, when the ratified agreement with it foresees the direct application of these norms, will also extend over the Constitution itself, not only upon the laws of the Parliament.

Constitutionalist Aurela Anastasi regarding the issue states that: "Until today it has not been possible to have any international agreement of this type, but from the linguistic interpretation of the provision (Article 122/3) and from its comparison with other provisions, we arrive at the conclusion that here it is not only about the extra-legal superiority of the acts issued by this international organization. This provision foresees a supremacy of the norms of the international organization over the entire corpus of the country's internal law, i.e. over the Constitution itself. However, that provision remains somewhat unclear as long as it has not been implemented in practice and as long as there is no interpretation of it by the Constitutional Court. Its interpretation in relation to Article 123 of the Constitution also remains unclear.".[13]

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[7] Ksenofon Krisafi, "Kushtetuta shqiptare dhe e drejta ndërkombëtare", a special Bulletin, "5 vjet Kushtetutë", Shtëpia Botuese BOTIMEPEX, Tirana 2004, pg 101.

[8] Article 122, paragraph 2 of the Constitution: "An international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it

[9] See Luan Omari, Aurela Anastasi "E drejta Kushtetuese", Tirana 2008, pg. 60.

[10] Xhezair Zaganjori, Aurela Anastasi, Eralda (Methasani) Çani, "Shteti i së drejtës në Kushtetutën e Republikës së Shqipërisë", Shtëpia Botuese Adelprint, Tirana 2011, pg.60.

[11] Ksenofon Krisafi, "Kushtetuta shqiptare dhe e drejta ndërkombëtare", the special Bulletin, "5 vjet Kushtetutë", Shtëpia Botuese BOTIMEPEX, Tirana 2004, pg 103.

[12] Article122, paragraph 3 of the Constitution.

[13] Aurela Anastasi, "Internacionalizimi i së drejtës kushtetuese: Klauzolat kushtetuese të integrimit të Shqipërisë", POLIS 4 / NDËRKOMBËTARËT DHE DEMOKRATIZIMI, pg.21.

2.3 The principle of direct application

For the inclusion of ratified international agreements in the internal legal order, the publication of ratified international agreements in the Official Gazette of the Republic of Albania is a constitutional requirement. The Constitution recognizes the principle of direct application of ratified international agreements, except in cases where it is not self-executing and its implementation requires the adoption of a law.[14]

The Constitution has clearly stated regarding their implementation. Despite this, in practice there is still a reluctance to refer domestic actions and operations to international acts. However, the judges have already broken the myth of interpreting their decisions only on the basis of the law, also referring to the text of international conventions. In this process they have the most important part.[15]

3. The Constitution of 1998 and the Accession of the Republic of Albania to an International Organization

Article 123 stipulates that the Republic of Albania delegates state powers to international organizations for specific issues. Such delegation is a consequence of the accession agreement of the Republic of Albania in that organization. The Constitution accepts the delegation to international organizations of state powers for specific issues, through the accession agreement of the Republic of Albania to that organization. As a result, with the will of the people expressed through their representatives or in a referendum,[16] the transfer of state sovereignty is carried out, partially, for certain issues, through the delegation of state powers.

There is no doubt that in this case we are dealing not only with the limitation of the sovereignty of the state (external aspect), but also with the limitation of the sovereignty of the people [17] (internal aspect).[18] These provisions help that the sovereignty of the people as a basic principle of this state, is not understood as a *summa potestas* sovereignty, immutable, but as a flexible matter.[19] But, we must affirm that in this case we are dealing with a voluntary and conscious cession of a part of sovereignty. [20]

The modern developments of international law and the occasional composition of the political map of the regional, continental and global communities, identify this as an action that runs parallel to these developments, as an important principled position in the interest of the prosperity of the country, the preservation of its stability and security. The inclusion of this principle facilitates the inclusion of Albania in international organizations, unions and various regional initiatives. It is a positive premise for the opening of legal possibilities for the integration of Albania ... and in the EU.[21]

4. Conclusions

In our legal literature, article 122, paragraph 3 and 123 of the Constitution is considered a good legal basis for the membership of the Republic of Albania in the EU.

However, it would be better if the Constitution specifically provided for a specific clause authorizing EU

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[14] Article 122, paragraph 1 of the Constitution: "Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal 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, supplementation 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.".

[15] Aurela Anastasi, "Internacionalizimi i së drejtës kushtetuese: Klauzolat kushtetuese të integrimit të Shqipërisë", POLIS 4 / NDËRKOMBËTARËT DHE DEMOKRATIZIMI, pg.19.

[16] Article 123 of the Constitution, paragraph 2 and 3: "2. The law that ratifies an international agreement as provided for in paragraph 1 of this article is approved by a majority of all members of the Assembly. 3. The Assembly may decide that the ratification of such an agreement can be done through a referendum.".

[17] Based on Article 2 of the Constitution: "Sovereignty in the Republic of Albania belongs to the people. The people exercise sovereignty through their representatives or directly."

[18] Xhezair Zaganjori, Aurela Anastasi, Eralda (Methasani) Çani, "Shteti i së drejtës në Kushtetutën e Republikës së Shqipërisë", Shtëpia Botuese Adelprint, Tirana 2011, pg. 61.

[19] See Luan Omari, Aurela Anastasi "E drejta Kushtetuese", Tirana 2008, pg. 61.

[20] Ksenofon Krisafi, "Kushtetuta shqiptare dhe e drejta ndërkombëtare", a special Bulletin, "5 vjet Kushtetutë", Shtëpia Botuese BOTIMEPEX, Tirana 2004, pg 109.

[21] Ibid.

accession.[22] This approach is in accordance with the constitutional practices of the EU Member States, both the founding ones and the countries that joined European Union afterwards. France and Germany based their initial membership in the founding Treaties of the European Economic Community on the classical norms of international law in their respective constitutions. But, with the dynamic development of the European Union, since 1992 for the ratification of the Maastricht Treaty and following other EU treaties, these states have intervened in their Constitutions. These interventions aimed to include in the constitution special provisions for the transfer of competences to the European Union.

The most recent constitutional adjustments are related to the provisions for the participation of national parliaments in EU decision-making as well as the relationship between the government and the national parliament in the function of this decision-making. From the experience of the countries that later joined the EU, with all the favorable constitutional framework in some of them for integration issues,[23] again they had to intervene in the constitution in order to delegate state powers to the European Union.

Regarding the relationship between EU law and the internal laws of the Parliament, in both cases, as those of classic international agreements and norms issued by an international organization, the constitutional provisions clearly give priority to both in relative to the laws of the country. This approach is fully consistent with the jurisprudence of the Court of Justice of the European Union regarding its formulation on the principle of supremacy of EU law over national law. The issue that may remain to be decided concerns the relationship between primary law (EU treaties) and secondary law (norms adopted by EU institutions) of the European Union with the Constitution. In this regard, author Alfred Kellerman is of the opinion that references to the effect and position of EU law in the national legal system should be added to the Constitution.[24] Constitutionalist Aurela Anastasi states the same opinion.

In my estimation, a very important role belongs to the Constitutional Court of Albania, as the body charged by the Constitution to resolve constitutional disputes and make its final interpretation.[25] Moreover, the Constitutional Court has the power to decide on the compatibility of international agreements with the Constitution before their ratification. So, even in case of a conflict between an EU Treaty and the Constitution, the latter can be amended to pave the way to the ratification of the Treaty.

This opinion is based on the jurisprudence of the constitutional courts of the Member States in the EU, which in accordance with their jurisdiction have relied on the national constitutions to decide on the compatibility of the EU Treaties with the national constitutions. In every case that they have assessed that the provisions of the EU Treaty have not had support in their constitutions, the latter has been subject to change or additions before the ratification of the Treaty. This requirement regarding amendments or additions to constitutional provisions has been established as a condition for the ratification of EU Treaties regarding the transfer of state powers since 1992.

In relation to the principle of supremacy of EU law established by the Court of Justice, constitutional jurisprudence has established important limitations. The French Constitutional Council limits the supremacy of EU law if it infringes on French constitutional identity. The German Federal Constitutional Court establishes as a criterion the respect by EU law of the national constitutional guarantees of fundamental rights and freedoms.

As above in this article, the Constitution contains important provisions that allow the delegation of state powers for certain issues based on international agreements. However, based on the nature of the European Union as a *sui gereris* organization and the constitutional practice of the Member States already in the European Union, special constitutional provisions should be included in the Constitution.

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[22] Luan Omari, Aurela Anastasi "E drejta Kushtetuese", Tirana 2008, pg. 63.

[23] We can mention here the Constitution of Poland.

[24] See Alfred Kellerman, "Impakti i anëtarësimit në BE në rendin e brendshëm ligjor të Republikës së Shqipërisë", Journal "E drejta parlamentare dhe politikat ligjore", No 1, pg. 23.

[25] Article 124 of the Constitution, paragraph 1 and 2: "1. The Constitutional Court settles constitutional disputes and makes the final interpretation of the Constitution. 2. The Constitutional Court is subject only to the Constitution.".

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