

Justice in countries in transition: International law and constitutional court of Albania

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I. ABSTRACT

International law is part of that field of law, which, for the time being, is experiencing major and rapid developments. Without its existence, relations among countries would be in a real chaos, since each country would act on the basis of its economic and political interests, which would lead to war and destruction among nations. This is because international law occupies an important place both in relations among states, but also in their own legislation. Seen in the light of the extent of this report, in case of a collision between international and national law, a problem encountered in the legislation of many countries is that of the primacy of either to the other norm, by means of which different countries offer different solutions, as it happens even in Albania.

This paper deals with studies and practices of the Albanian Constitutional Court concerning this issue, because it is very important to come to know the exact position of international law in the Albanian legislation and the relationship between them, and especially in terms of justice in transition. So, to what extent does international law impact on the national Albanian law? Are international law norms treated at the same level as those of the national Albanian law?

All these issues are considered, in terms of law doctrine, as the most interesting and the most controversial. Therefore, let us examine the relations between international law and the Albanian law.

II. Introduction

Since Albania got out of isolation, judicial structures faced a number of problems similar to those of their counterparts in other countries but the lack of some relevant articles in our state's law, led to confusion. Albania's access to international treaties and conventions, clearly witnesses its political will to be transformed into a democratic state. But at the same time it requires an all-inclusive review of existing laws, so that they could be drafted in accordance with the Albania's obligations under international instruments, part of which it has voluntarily become, and there is a large number of conventions which Albania has ratified without any legal reservation.

However, to have its legal force the ratification needs to be made through a special law enacted by parliament, as due to the effect that they provide, according to the international law, international documents are considered as an important source of the national law. The Albanian legislation in itself is legally obliged to take into account the clauses of these international instruments, by deploying the international law. Nevertheless, it remains to be noted that if these regulations and modifications are not included yet in our legislation, Albanian courts will certainly implement national law instead of the international one.

1. The Constitution of the Republic of Albania and the place of international law in our legislation.

One feature that occurs mainly in all small countries where a fragile democracy exists, is the comfortable and privileged place given to the international law. Given that our Constitution is a new constitution, it was compiled by delivering solutions based on concrete experiences of other states, in both positive cases and cases of "cramps" that these states may have encountered in their life history. As a result, the Constitution of the Albanian Republic chose international law as a priority. So we can affirm that we rank among the countries that have embraced the national constitutional option of the monistic system. Therefore, in our Constitution, in general, the issue on the relationship between national law and international law has been resolved, defining the hierarchy between norms. This is certified with the Constitution of Republic of Albania's content, in which there are some articles that define the place of the international law, namely Articles 5, 17, 1 resolved 16, 121, 122, 123. So, taken together, they determine the status of international law and its relationship with the national law of the Albanian Republic.

Furthermore, Albanian constitution also means showing attention not to create gaps in terms of the ratio treatment between national law and international law that may derive from the Albanian legislation handicap or from collisions of norms stemming from Albanian national law with those derived from international treaties and traditions, by enriching, systematically structuring the Albanian law and clearing out outdated norms and principles of the Albanian constitution.

This means that our country has respected international law principles, with regard to necessary changes making in its national legislation and has also fulfilled all international obligations it has undertaken, in order to ensure the execution of the agreed commitments. How well these principles are respected, not only do we refer to international law and its doctrine, but they are also reflected in the Constitution of the Republic of Albania. Specifically in Article 5 of this Constitution the key principle is the implementation of the international law: "The Republic of Albania implements international law as mandatory to it", which at first glance seems to be of declarative character, but in opinions on a broader interpretation of this article, followed the trend of more and more influence of international law on the national Albanian law.

In the Albanian judicial literature it is frequently thought that Article 5 of our Constitution should be interpreted, applied closely with other relevant articles, and especially its Article 122, which states that the Republic of Albania recognizes and implements international agreements it has ratified and published in the Official Journal, as the determining ways of their becoming part of our country's judicial system. So, our Constitution provides the international norm with a judicial value in our internal legislation (122/1) and it also clarifies the primacy of the legally ratified international norm over our country's laws which does not agree with it (122/2), in case there is a clash of these norms, the resolution is given on the basis of the norm implementation of international law. The same can be said about the norms of an international organization (122/3), or the norms on the basis of which solutions are given to specific issues, such as: delegation of state powers to an international organization (Article 123 of the Constitution), although for practical absence or concrete decision so far, these two provisions remain somewhat unclear. Their goal in the constitution is to provide a good legal basis for Albania's integration and membership in international institutions and life in general, and its membership in the European Union in particular. The primacy of international law against the national (inner) law does not affect our country's sovereignty, as we are before a voluntary and conscious cession. The lawmaker has paid particular attention to its practical implementation, defining the adoption of international agreements for the delegation of legislated state powers approved by the majority of the parliament members, and in certain cases "...may decide that this agreement should be ratified by referendum" (Article 123-2-3 of the Albanian Republic Constitution, 1998). Therefore, in our Constitution, "Primacy of international law to national law (Article 121 -123), witnesses the establishment of the modern Albanian state, determined to preserve the constitutionality and to affirm the Albanian democratic values" (Krisafi, Tirana 2004).

So, our Constitution charges the Parliament, the lawmaking authority, to undertake international commitments, adoption or abolition of inner laws due to these commitments, especially in case of non self – applicable agreements. Meanwhile, it also charges the Constitutional Court to make a judicial review of the admittance and implementation the international law, particularly in its Article 131: "The Constitutional Court decides on: a) The compliance of law with the Constitution or the international agreements, as provided in Article 122, b) The compliance of international agreements with the Constitution prior to their ratification., C) The compliance of normative acts of central and local organs with the Constitution and the international agreements. "

This means that, in case of an incongruity between national law and a legally ratified international agreement, for a question which is to be solved by a common Court, the ordinary lawyer may surely refer to the ratified international agreement, and that has the priority to the inner laws, due to the fact that the ratified international agreements are part of our internal

legislation, therefore they must be implemented by the national Courts. So, it is a mere interpretation of an ordinary lawyer.

2. The jurisprudence of the Albanian Constitutional Court on the rates of the international law

Even in the case of Albania, as in almost all European countries, it is the constitutional control that guarantees the compliance of international norms with constitutional norms, which come into our inner legal order. Our country has chosen the monistic system, and as defined in the constitutional provisions (Article 131 / b), and a priori model to control international agreements and their compliance with the Constitution prior to ratification. In our judicial literature it is defined that the exertion of this control (upon international agreements) perfectly complies with the nature of international relations and the implementation of established norms in treaties, which are mandatory to the signing parties, and this exertion of control is also known as the principle of "pacta sunt servanda". So, in case of an 'a priori control', the international act is still non ratified and has not been enforced yet. At the same time, the Constitutional Court has been mobilized to control the conformity of this act and its norms with the Constitution. In a case of compliance, through the Court control and interpretation, the issue is easily solvable. The international act (law or agreement) is ratified and becomes part of our legal system, coming into hierarchical power immediately after the Constitution, and therefore on laws and other internal normative acts.

Such an attitude of our Constitutional Court is shown on the Decision number 186, date 23.09.2002, regarding the compliance of the Constitution with the provisions of Rome Statute on the International Criminal Court. Thus, stating the provisions of the Statute concerning the jurisdiction of the International Criminal Court, in relation to our constitutional concepts of sovereignty, by interpreting the Articles 2 and 123 of our Constitution for this issue, our Constitutional Court stated:

*“After examining the ICC Statute, the Constitutional Court came to the conclusion that its activity and functions do not violate our constitutional provisions regarding the sovereignty exertion. The ability to contract international constitutional commitments in such an important field of criminal justice constitutes an attribute of state sovereignty exertion. According to the Statute, the ICC's function is complementary to national criminal jurisdiction, ...
..... the establishment of the Statute provisions in the internal legal order is not controversy with the Constitution, as defined in Article 135, which strictly determines judicial organs in Albania established by law and which categorically excludes the creation of courts of emergency. It is obvious that this is not a national organism or a court of emergency. By its nature, ICC is an international legal and judicial institution created with free will of sovereign states party of the Statute, whose provisions are based on the principle of respect for human rights and freedom. “*

In addition, regarding the compatibility of immunity in criminal proceedings, for which our Constitution provides some immunity from criminal proceedings for certain subjects, such as the head of state, members of the government, deputies etc.. While the Statute determines that ICC does not recognize a legal status for certain subjects, our Constitutional Court when monitoring the compliance of our constitutional norms with these norms, by analyzing the status of these

provisions, it concluded that they did not come into conflict with what the Albania's Constitution defines, and interpreting the Article 5 of our Constitution as well:

"... since the Constitution generally accepts that the rules of international law are part of the inner law, then the lack of immunity in international criminal proceedings for certain crimes of high risk, be part of the Albanian legal system "

Another provision, part of the control on the compliance of Rome Statute for the International Criminal Court with our constitutional provisions, was the principle of impunity twice for the same crime - "ne bis in idem". This principle finds its reflection in Article 20 of the ICC Statute which prohibits the ICC or other courts to retry a person about an offense for which he was tried and acquitted before by the ICC or itself (item 1 and 2). According to this article, ICC becomes competent to judge the person about the offense for which he was investigated or tried by the national courts only a) to protect this person from criminal responsibility, and (b) when the judgment has not proceeded impartially and fairly so that this person could escape criminal responsibility.

Whereas Article 34 of the Constitution of the Republic of Albania - Chapter on Fundamental Rights and Freedom states that: "No one can be punished more than once for the same offense, nor tried again, except when a retrial of the case is set by a higher court in the manner provided by law. " Facing these provisions, which are reflected in other international acts, such as the National Pact on Civil and Political Rights adopted by the UN General Assembly on 16 December 1966, the Constitutional Court concluded again the following provisions:

"..... do not come in conflict with each other. The Issues examination by the ICC, according to Article 20, item 3, letter "e", "a" and "b" in in is a kind of review, which according to the above-mentioned provision of the Constitution, is under the competence of the highest court. Through this term, the Constitution does not mean the institution of the Supreme Court, but the highest court by means of a specific ranking. Thus, the ICC is, indeed, presented as the highest court (regarding the trial of certain crimes)....."

.... In conclusion, considering the Statute provisions as a whole and confronting them with the spirit and content of the Albanian Republic Constitution of Albania, the Constitutional Court finds that the Statute does not come into conflict with the Constitution. Consequently, there is no constitutional obstacle to its ratification. ... "

With the announcement of this Albanian Constitutional Court decision, as a decision of final, general and binding nature (erga omnes), the Albanian Parliament in terms of Law no. 8984, 12.23.2002 ratified the Rome Statute of the ICC.

Meanwhile, with the adhesion of the Republic of Albania to the Statute of the Council of Europe (law no.7959, 11.07.1995 of the National Assembly), which enabled its membership with full representation in the Council, as a result of political, economic, social, and judicial developments that Albania had undergone, and as a result of the gradual transition towards a free and democratic society, but also against some international legal obligations and commitments, which it undertook to be fulfilled within deadlines, under Resolution no.189, 1995, adopted by the Parliamentary Assembly of the Council of Europe, the European Convention on Human Rights was ratified, along with Protocols 1, 2, 4, 7 and 11 within one - year period, and Protocol No. 6 of this Convention, concerning the abolition of death penalty in peacetime, within a three years' period, from the time of its admittance to the Council of Europe. For this process, the Constitutional Court stated:

The Constitution has recognized in Articles 5, 116 and 122 that the Republic of Albania applies international law as mandatory to it, by ranging the ratified international agreements, which constitute a part of the internal legal system, considering the hierarchy of normative acts that are effective prior to laws. The European Convention on Human Rights is one of those international agreements which Albania has signed and ratified.

Some years later, the Republic of Albania by means of Law No.9639, 09.11.2006, also ratified Protocol No. 13 to the ECHR on the abolition of death penalty in all circumstances. Albania also accepts the jurisdiction of the European Court on the Human Rights, to which in certain cases, Albania transfers the supreme judicial system power, considering it as part of our inner legal system, as well as having priority over the laws (in terms of hierarchy defined in our Constitution), the European Convention of Human Rights can be applied and interpreted directly by the Albanian courts.

But it may happen that a priori control over a non-ratified international act, the Constitutional Court finds this act inconsistent with the Constitution. In such a situation the Court can make a decision through which the State ceases the ratification of the act (see the decision of the French Constitutional Council, no. 99-142 DC, 15. 06. 1999). Or the state is forced to be reserved at the points of disagreements at the time of ratification, as Vienna's Convention on "the Law of Treaties" states (see Article 19 of Vienna's Convention on May 23, 1969), unless this option is prohibited by the concrete treaty. A third solution, in a case of incompatibility of constitutional norms with international norms, as expressed in our judicial literature, is to review the Constitution by the State, to avoid elements of incompatibility. However, such a solution which seems easily achievable by countries with flexible constitution is a difficult process to accomplish the review of the constitutional rate by adapting it to the rate of the international act, for countries that have a rigid constitution. Such is the case of Albania, a country whose constitution carries the physiognomy of a rigid constitution, and in a case of collision rates, the Constitutional Court may decide on the prohibition of the international act ratification.

In our Constitutional Court's practice where unconformities of international agreements with our constitutional norms have been noticed, is the decision of December the 8th, 2009, whose goal was to review the compliance of Albania' Constitution on the agreement signed between the Republic of Albania and the Republic of Greece "For delimitation of their respective zones, of the continental shelf and other maritime zones belonging to them under the international law". Among the unconformities found out in this issue concerning the international law, we can mention the fact that the Albanian delegation was not provided with the appropriate authorization of our Republic President about the negotiations developments with regard to the agreement.

By analyzing the specific claim, the Court concluded that not only does the agreement violate the Constitution, specifically the Articles 4, 7, 92 / ë, but also it is contrary to the international norms such as the case of Vienna's Convention on the Law of Treaties, which in its Article 7 assigns the respective state authorities on treaties, but does not prevent the internal normative systems of states from determining their own rules regarding the consent or consultation of the authorities of each country. But that does not mean eliminating or disrespecting the legal requirements of the state representative, as it happened with the President of our Republic. Thus, the court stated that:

From the point of view of the international law, the omnipotence serves the principle of mutual trust and free will of each State to come to agreements so that it could remain sealed by

the authorized representatives, without questioning the fulfillment of obligations arising from the signed agreement.

So this reasoning makes us understand that this agreement violates not only the Constitution but also our inner law, because the conventions (of Vienna on the law of treaties and that of Montego Bay) in the hierarchy of norms come immediately after the constitution. Thus the Constitutional Court declared as unconstitutional the agreement " For delimitation of their respective zones, of the continental shelf and other maritime zones belonging to them under international law ", by not paving the way to the agreement ratification by the lawmaker.

CONCLUSIONS

To sum up, we can affirm that international law is the complex of created norms by international norms, agreements, traditions and other sources, which regulates relations among its subjects and occupied an important place in the inner law, such as: the complex of norms deriving from Constitution codes, laws, sub-judicial acts, etc., which regulates relations among subjects of inner law.

With regard to the case of Albania (as a developing country) the issue of the relationship between international law and the inner law, referred to the Albanian Constitution, seems to be a pretty positioned issue, giving priority to the international law, that prevails against the norms of national law (Article 122 / 2.3).

Indicators of the of international law implementation in national law of our country include: abolition of death penalty (Protocol 6 of the ECHR), the acceptance of the jurisdiction of the European Court of Human Rights which in certain cases is seen as the supreme authority of the judicial system, membership of Albania into NATO and other international organizations, Albania's current developments in everyday social, economic, political life, with the aim of meeting the criteria which will finalize the process of EU integration. But it remains to be noted that, even though necessary changes have not been included in our laws or regulations, Albanian courts will certainly apply their inner law instead of the international law.

The Constitutional Court of Albanian Republic's jurisprudence, referring to the international norms, clearly positions international law in our inner law. I hopefully think that even our inner ordinary courts will apply this practice as well.

BIBLIOGRAFIA

1. Anastasi, A.(2007), *Internacionalizimi i së drejtës kushtetuese*, (Internationalism of the constitutional law)Tirane: Revista Polis, Nr.4,
2. Gruda, Z. (2003), *E drejta Nderkombetare Publike*(The Public international law), Universiteti Prishtines
3. Denza, E (2010), *the relationship between International and national law*, New York: Oxford University Press
4. Krisafi, K. (2010), *Kursleksionesh MND*(Course of lectures Master of second level) – *E drejte Publike* (The public law), UET
5. Krisafi, K. (2004), *Kushtetutadhe e drejtandërkombëtare*,(Constitution and international law) Tiranë: Buletin i Posaçëm i Gjykatës Kushtetuese, 5 vjet Kushtetutë, (Special Bulletin of the Constitutional Court, 5 years of Constitution),

6. Konventa Europiane per te Drejtat e Njeriut, Keshilli i Europes, (The European Convention on the human rights, Council of Europe) , 1999
7. Konventa e Vjenes per te drejten e traktateve (Vienna's Convention)
8. Konventa e Montego Bay per te drejten e detit (Montego Bay's Convention)
9. Kushtetuta e RSH, 1998 (Constitution of the Albanian Republic)
10. Ligji 9639 dt. 9.11.2006 "Per ratifikimin e Protokollit nr.13 te Konventes Europiane per Mbrojtjen e te Drejtave te Njeriut dhe Lirive Themelore per heqjen e denimit me vdekje ne te gjitha rrethanat."("For the ratification of Protocol the No 13 of European Convention on the Protection of Human Rights and Fundamental Freedom about the abolition of death penalty in all circumstances "
11. Omari, L., Anastasi, A (2008), *E drejtakushtetuese*,(The constitutional law),Tiranë: Shtepiabotuese ABC
12. Puto,A. (2004) *E drejta Ndërkombëtare*, (International law), Tiranë: ShtepiabotueseAlbin
13. Shaw, N.M (2009), International law, Cambridge University Press, 6 edition
14. Vendim i Gjykates Kushtetuese te RSH dt. 08.12.2009 per shqyrtimin e pajtueshmerine me Kushtetuten e Shqiperisetem arveshjes se nenshkruarndermjetRepublikes se ShqiperisedheRepublikes se Greqise "Per delimitimin e zonave tetyre perkateseshelfitkontinentaldhezona vetetj eradeta reqe u perkasin ne bazete se drejtesnderkombetare." Decision of the Constitutional Court of the Albanian Republic, 8.12.2009 ." about the review of the compliance of Albania' Constitution on the agreement signed between the Republic of Albania and the Republic of Greece on the examination of incompatibility " For delimitation of their respective zones, of the continental shelf and other maritime zones belonging to them under international law "
15. Vendim i Keshillit Kushtetues Francez, nr.99 – 142 DC, 1999 (Decission of French Constitutional Council)
16. Zaganjori, XH (2004), *Vendi i sëdrejtës ndërkombëtare në Kushtetutën e Shqipërisë*, Tirane: Revista Jetajuridike Nr.2 (The place of international law in Albania's Constitution)