The Place and Role of International Law in the Albanian Legal System and Practice, the case of ECtHR decisions

Dr. Fjorda Shqarri
Faculty of Law, University of Tirana, Albania

Magistrate Anita Jella

Abstract

The relationship between international law and domestic law explains the way of transposition of the international norm in the legal order of a state and of course this relationship is usually determined by its most important legal acts. This ratio, as long as it is determined by internal provisions, may have its own specific characteristics in each state depending on the legislative formulas that the state may have selected.
This paper aims that relying on the qualitative methodology based on research in the literature and the relevant legislation, to analyze the role and the place that the norms of international law dealing with human rights issues have in the Albanian legal system. The purpose of this paper is to explain the system, to which the Albanian legal order belongs, the general provisions for the position of international law and then human rights in Albanian legislation, as well as the Decisions of the ECtHR.
The expected result of this paper is the conclusion that international law has a privileged position in the Albanian legal system and that especially human rights has a constitutional status and that the decisions given by the ECtHR are mandatory to be implemented.

Keywords: international norm, system, ratio, prevalence, decision.

1. Introduction

The relationship that international law has with the national legal system is provided by the Constitution of a country. Of course, the issue of the interaction of the international and domestic legal order or the way international law is applied vertically, i.e. in each state, will always remain an issue both current and of interest.
When we discuss about the relationship that international law and internal law have with each other, of course this discussion is based on the main division between the monist and dualist systems, based respectively on monistic and dualistic theories. The monist theory supports the idea that the norms of international law and those of domestic law are part of the same legal system, and therefore the monist system of treaty implementation, which is also called the incorporation system, claims that all international treaties are automatically part of internal legal order, directly applicable, without the need for internal acts that can make it applicable (Shqarri. F, 2016, Puto. A, 2010).
A self-executed treaty produces effects directly on the parties, which means that courts and other national institutions can be addressed directly, and likewise individuals can address the court for the protection of rights that may derived from the treaty. When we refer to implementation, we cannot leave without mentioning the way of application of treaty norms by national and international courts.
The dualist theory supports the claim that international law and domestic law are

two legal orders completely separate from each other and that do not merge at any point (Puto, A, 2010), therefore international legal norms, treaties, to be applicable in the law of a state must necessarily be made acceptable through an internal legal act that gives it force. This is also called the transformation system, as it requires an internal act to transform international law into internal law.
There is a view in international law, that the self-applicability or not of treaties is not a matter of internal constitutional determinations, but of the interpretation of the treaty itself, since there are cases when the latter have mandatory direct application in the national regimes of states member. A good example of this is the case of EU legislation, which is self-enforceable in member countries (Bleckman. A, 1985).

2. Constitutional provisions in relation to the norm of international law

In our constitution, international law has an important position as in some cases it is equated with the Constitution itself and in other cases the Constitution itself provides specific formulas for the supremacy that the norms of international organizations may have over the law of the country or the fact that they may have delegated state powers (Omari. L, Anastasi. A, 2017).
From the general characteristics presented by the Albanian constitution and legislation, as well as from the position that the international legal norm itself has in relation to domestic law, we can observe that it has the characteristics of a monist system. From this provision we understand that the basic rule is that international agreements are self-executed and immediately after publication they become part of our internal system, while exceptionally, when the agreement is not self-enforceable, a law can be issued for its implementation (Constitution of Republic of Albania, 1998).
The first provision that deals with the position of international law in our internal system is Article 5 of the Constitution according to which "The Republic of Albania applies the international law binding on it". In the context of this forecast, one of the early discussions was what we will understand by binding international law, only ratified international agreements or even widely other norms of a customary nature such as *jus cogens*[1] and the generally accepted position[2] is that this category should definitely include customary law (Zaganjori, 2012).
Article 5 of the Constitution has been applied in several cases presented to the Constitutional Court, where its position has been that mandatory international law also includes the generally accepted norms of customary international law such as *jus cogens*, but also the general principles of law, specifically the Decision on the abolition of the death penalty, the Decision on the compatibility of the Statute of Rome with the Constitution, and later in the Grori case, where in the absence of bilateral treaties the court reasoned that the principles of international law such as reciprocity can be used.
Customary law is a corpus of unwritten norms and its application, especially in countries that have a legal system that is based on written law, is a delicate matter and certainly requires a good knowledge of this right from the implementers. In this regard, several challenges may appear during its implementation: first, the possibility

[1] Norms of this nature are mentioned in Article 53 of the Vienna Convention "On the Law of Treaties" as norms recognized and universally accepted by the international community of states as norms from which no derogation can be allowed and which can only be changed by the norms of same nature

[2] In jurisprudence of the Constitutional Court, in decision No. 13, dated 12.07.2004, (V - 13/2004) of the GJK, in the opinion of the minority, the narrow and opposite interpretation also finds place

of identifying the adequate customary norm and arguing its existence; secondly, the exact determination of the nature of the norm and how it can be applied in practice in solving a concrete issue or the necessity of its use.
Article 122 of the Constitution stipulates that international agreements are self-executable and immediately after publication in the Official Journal they become part of our internal system and are directly implemented, except in cases where they are not self- executable and a law is required for their implementation. Also in point 2 of this provision it is provided that a ratified international agreement takes precedence over the law of the country. This provision is seen to be related to the provisions of Article 116 of the Constitution, which lists acts with legal force in the territory of the Republic of Albania and where ratified international agreements are listed after the Constitution and before laws, which also creates the possibility of the prevalence of them in cases where the laws conflict with them.
Other provisions of interest that express the position of our legislation in relation to international law are also those of article 1223/3 and 123 according to which "*The norms issued by an international organization have precedence, in case of conflict, over the law of the country, when in the agreement ratified by the Republic of Albania for participation in that organization, the direct application of the norms derived from it is expressly provided"* and that "*the Republic of Albania, on the basis of international agreements, delegates state competences for certain issues to international organizations."*
Both of these provisions, which discuss the supremacy of international law over the law of the country using general terms, or the possibility of delegating state powers and therefore parts of sovereignty to bodies that operate on the basis of international law and issue norms of this nature, are specific formulas that also indicate a positive approach to international law itself and its application.

3. The position of the ECHR and ECtHR decisions in the Albanian system

A very important provision that deals with the relationship between international law and domestic law in our Constitution is article 17/2, which deals with the limitations of fundamental rights and freedoms and states that they cannot go beyond the minimum level determined by the ECHR, giving the latter a constitutional status, i.e. equal to the Constitution.[3]
Of course, article 17/2, which for the limitations of fundamental rights and freedoms establishes the ECHR as the minimum standard, thus giving a favorable position to the decisions taken by the ECtHR, is an important indicator for the status of international law, especially related to human rights in Albania. However, in general, the approach that Albanian legislation and practice has to other norms or decisions of other international courts is oriented towards the implementation of international decisions or obligations.
However, the issue of the status that the norms of this Convention and especially the status that the decisions of the ECtHR have in our system has not always been so clear and defined, especially in cases where the decisions of the ECtHR were of such a nature that they required the review of judgments in a time that the decision by

[3] Art. 17 of Constitution: "*1. Limitations of the rights and freedoms provided for in this Constitution can only be imposed by law for a public interest or for the protection of the rights of others. The restriction must be proportionate to the situation that dictated it.*
2. These restrictions may not violate the essence of freedoms and rights and in no case may exceed the limitations provided for in the European Convention on Human Rights."

this court was not foreseen in the legislation as a condition for the reopening of the processes.

For this matter, we are once again returning to the discussion above. According to Article 116, ratified international agreements, in this case the Convention, have precedence over the laws of the country.

The issue that remains to be discussed is what will be the way of applying this law in our internal system and even more how will it be applied when giving decisions by judges especially in cases where there are no legal regulations specific to an issue addressed by an international agreement or when a legal provision conflicts with the agreement/convention itself? In this regard, in the doctrine we found both positions, such as the one that claims that the agreement, being an act with higher legal force, can be applied directly, as well as the position that a legislative intervention is needed for this matter.

The Constitution itself provides that on the basis of Article 131a), 134dh) as well as Articles 49.3.dh) of the Law "On the organization and functioning of the Constitutional Court of the Republic of Albania"[4], ordinary judges in the case when they find that the law contradicts the agreement international, they do not apply the law but suspend the case and send it to the Constitutional Court to express themselves. Under these conditions, if a law adopted after the entry into force of an international agreement conflicts with it, we do not risk that it will be applied according to the *lex poseriori derogat priori* principle when giving decisions by the courts. The problem would be that if there is no legislative initiative or will to fill the vacuum or fix the created situation, can the ordinary judge fairly apply the regulations of the international agreement?

For this reason, the jurisprudence of the Constitutional Court and further that of the ECtHR has stated that the National Courts must directly implement the agreement when special laws (such as the Code of Criminal Procedure) contradict them. This discussion initially started with the Mecaj case, a person extradited on the basis of the EC Extradition Convention, with the condition that as long as his trial was held in absentia, the process could be reopened. In the Supreme Court, this request was rejected with the argument that the conditions provided by the Code of Procedural Procedure for reopening the process were not met. In this case, the Constitutional Court in its interpretation states that Supreme Court should take into consideration that international agreements such as the convention in discussion have precedence over laws.

This problem came up again some times later, already with the decisions of the ECHR. As is well known, according to Article 46 of the ECHR, states are obliged to implement the decision of the ECtHR in cases to which they are parties. Meanwhile, in the Xheraj case, the Supreme Court refused to review the decision since a decision of the ECtHR was not among the legal grounds for reviewing the decision.

In its decision, the Constitutional Court reasons that "*the Court, following its arguments, sees fit to emphasize that, for the treatment of basic human rights, the ECtHR has an exclusive competence in our legal system. This competence is accepted by our internal legal system, as a result of the implementation of Article 122 of the Constitution, as well as Article 17/2 thereof, which oblige the decisions of the ECtHR to be implemented directly.... ...Especially with regard to the decisions of the ECHR on criminal proceedings, there is a need for the legislative power to take measures to harmonize the domestic legislation with the provisions*

[4] Law No. 8577, dated 10.2.2000, amended by Law No. 99/2016 "On the organization and functioning of the Constitutional Court of the Republic of Albania".

of the ECHR. If there is no harmonization, if we are in cases of a legislative vacuum, or when the legal provisions contradict the provisions of the Convention, then the judges of each level directly apply the decisions of the ECHR in accordance with Article 122 of the Constitution and Articles 19 and 46 of the ECHR. Article 122 of the Constitution expressly states that the provisions of international agreements have precedence over the laws of the country that do not agree with it.'. Explaining in definitive way that the ECtHR Decisions are of superior nature and can go over the usual legislative and constitutional formulas regarding the execution of international law and its ration with domestic law.
Constitutional Court in decision No. 4/ 15.2.2021 reiterates once again that the ECHR has exclusive competence in our legal system which has been accepted by our internal legal system as a result of the implementation of Article 122 of the Constitution.
Of course, without going into discussions about the position and role that the ECHR has in our system, it should be noted that this convention is almost the only one that is cited or referred to in the decisions of ordinary courts in our country. Meanwhile, the Republic of Albania is a party to a number of other universal and regional international instruments which could find a place and be best implemented and the giving of solutions by judges, moreover, this is also an obligation within the framework of Article 5 of Constitution. Also, another identified problem is that we find arguments about the nature of the way international law is applied mostly in the decisions of the Supreme Court and the Constitutional Court and much less in the decisions of other courts.

4. Conclusions

The position that the Constitution of the Republic of Albania reserves for international law is quite privileged, since with the specific formulas provided by it, it guarantees superiority over the laws and in some cases even over the law of the country. Especially when we talk about human rights, we see that the ECHR has a constitutional status.
Regarding the status that ECtHR decisions have in our legal system, due to the provisions of Article 46/1 of the ECHR, but also as a result of some interpretations made by this court itself and then by the Constitutional Court, they are binding to be implemented regardless of the legal provisions as the ECHR has an exclusive competence in the Albanian legal system.

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