ISSN: 2038-632X

PECOB'S PAPERS SERIES

International law and european law application in the see constitutions and courts practice: harmonization of legal orders in the pre-accession phase

Dr Saverio Francesco Massari
University of Bologna

September 2014 | #51
ver.2.0 | Timestamp: 201505191055

PECOB

Portal on Central Eastern and Balkan Europe
University of Bologna - Forlì Campus

www.pecob.eu

International law and european law application in the see constitutions and courts practice: harmonization of legal orders in the pre-accession phase

Dr Saverio Francesco Massari

University of Bologna

Table of contents

Abstract

The SAAs the EU signed with the South East Europe Countries (SEE) in the pre-accession framework are the main tool to enhance the harmonization of SEE legal orders with the European standards.

The convergence to the European acquis is a pre-condition to obtain the EU membership.

However the harmonization process is not only a formal transposition of the EU legal standards in the national legal orders but it requires a direct implementation of these regulations before the national Courts. Therefore, the Constitutional provisions interpretation and the practice of Constitutional/national Courts are fundamental to enhance the application of the supranational/international regulations and rights in the internal legal order. The paper aims at understanding the approach of each SEE Constitution and Constitutional Court with regard to the international agreements validity in the national legal orders.

Keywords

South East Europe, Constitutions, Enlargement, acquis communautaire, harmonization, SAA, international customary law, international law.

Introduction

The EU harmonization process of the South East Europe Countries (SEE) legal orders is involving several institutional, economic and political aspects.

The approximation and convergence to the European economic and democratic criteria and the transposition of the European legal ***corpus*** is a pre-condition to obtain the EU full-fledged membership.

The obligation to adopt the European standards and *acquis communautaire* is indeed coming from the Stabilization and Association Agreements signed bilaterally, from specific commercial or trade Agreements and from multilateral cooperation Treaties.

The transposition of the European *acquis communautaire,* the adoption of Euro-friendly provisions into the national legal orders are a partial aspect of the "Europeanization" process.

As a matter of fact, the actual achievement of this complex transitional process is directly linked to the real implementation of those provisions coming from the EU *acquis.*

In the specific case of the Balkan Countries in the pre-accession phase, the main door to access the national legal frameworks and to apply the EU provisions and standards are the international bilateral-multilateral agreements that represent the legal source of that supranational law.

Nevertheless, the transposition of the provisions set out in international agreements and of the EU legal ***corpus*** into national legal orders (whether performed or not) could remain just a formal activity without the possible direct implementation of these standards before the national Courts through the direct application of international agreements or SAAs.

In order to understand the current situation and the real status of implementation of international and the EU legal standards it is necessary to understand the relation of the national Constitutions with the regulations provided for in the international law and international agreements.

Indeed, the Constitutional provisions defining the hierarchy between national and international provisions are basic to understand

the possibility for the EU acquis to be effectively and directly applied in the everyday life and practice of the national Courts.

It is a fact that the implementation phase is the real challenge for the Balkan Countries considering that a real integration with the EU legal ***corpus*** shall be achieved when the *acquis* shall be *directly applied* or it shall prevail in case of conflict with the national law.

On the other hand, the EU legislation could be usefully *indirectly applied* as well: in other words, it could be the base to interpret the national law in the light of the rationale and aim of the supranational legal order. It is evident that this interpretation process can be performed exclusively by national Courts practices.

The direct and indirect application of the EU legislation is a reality for the EU members but it is not automatic for the pre-accession Countries although specific commitments in this sense are set forth in the international Agreements signed (mainly SAAs): this is why it could be interesting to understand the approach of each Constitution and Constitutional Court with regard to the international agreements validity in the national legal orders.

This is true not only to secure the application of the EU economic-market regulations and freedoms but it is related to the implementation of democracy and human rights protection according to the European legal standards especially under the European Convention of Human Rights (ECHR) that is the main international sources in this domain.

Besides, it is really interesting to compare the South East Europe Countries' pre-accession phase with the pre-accession as it is lived in Central Eastern Countries, considering that the Courts of those Countries faced the same dynamics in the application of the supranational European law and principles.[1]

The cases related to the CEE Countries are more and more interesting considering the common transitional process in the constitutional approach to international law.

In fact, the common traditional soviet/socialist roots were mainly based on a "dualist approach": according to this theory developed by the Italian and German doctrine at the beginning of the XIX Century, the international and national legal systems would have been definitely isolated into two different domains.

Therefore, the laws and principles coming from the international legal system cannot be directly applied in domestic orders before a formal transposition into the national legal framework by a national law.

On the contrary, the "monist approach" assumes the unity of international and juridical orders into the same legal order: therefore, it will be necessary to define the interactions between these two systems in order to define their domains, hierarchy and prevalence in case of conflicts.

The constitutional provisions are the tools to determine these intersections and to define hierarchy and the settlement of possible conflicts between national and international norms.

Besides, the practice of Constitutional Courts is another important aspect to understand how in reality this balance is guaranteed: very often the interpretation of the Constitutional provisions by the Courts is a useful reference point to assess the degree of availability to opening the internal legal system to the international law and international agreements.

As a matter of fact, an open "monist" Constitution could be closed by a Constitutional Court jealous of its sovereignty or of the internal legal framework supremacy.[2]

In the cases of the CEE and SEE Countries the new Constitutions adopted after the socialist systems collapsed have been – mainly - drafted on the basis of the monist approach.

Nevertheless, it is still important to assess the actual balance in the Constitutions and Courts practice in order to avoid the risk of a *de facto "dualist inertia"* although a conceptual monistic approach would be formally accepted: in others words, the practice of National Courts could adopt a restrictive and fruitless mechanical evaluation of the international law (EU provisions included).

In this case the Constitutional monistic approach would be frustrated by a textual reading and application, without consideration to the real rationale of the international law and its influence on the national order.

For instance, while assessing the Croatian Constitutional Court's practice, S. Rodin identified the application of the European Convention of Human Right as *"...formalistic and not genuinely*

1 Czech Republic Olomouc High Court "Skoda Auto case" November 14 1996, Polish Constitutional Tribunal in "Gender Equality in Civil Service case" Dec. 15/97.

2 E. Ciongaru " *The monistic and the dualistic theory in European law*".

motivated by protection of human rights…..Constitutional Courts…. quotes decontextualizated normative parts as a justification of decision in individual national cases. In other words, practical recourse to fundamental rights is mainly instrumental…".[3]

The risk is still present in SEE Courts *"…as a resilient remnants from the ex socialist past. Equally depicted as limited law application or dogmatic positivism in law application later phenomenon has been attached to the obvious problems of the CEE ordinary Courts of excessive reliance on a literalist (or textualist) reading of law, their ignorance of the underlying purpose of the law and their inability to apply abstract legal principles. But it appears to be a chronic habits of judges' still prevailing in SEE Courts' practice as well..."*.[4]

The assessment of these aspects could be useful to evaluate in the daily Courts' practice the effectiveness of SAAs and other bilateral and multilateral European Agreements beyond the formalistic transposition and emphatic textual declarations.

Therefore, considering the real Courts' practices, the European Union policies could be readdressed in order to handle the hurdles that are frustrating the effective implementation of the EU standards in the National Courts of the Countries in the pre-accession phase.

Moreover, the assessment could emphasize the possible need to make Constitutional reforms aimed at redrafting the constitutional provisions on the grounds of a more International/Euro-consistent approach; furthermore, new programs devoted to a new training to implement the EU legal culture of judges and legal practitioners could be evaluated.

Therefore, this paper is aimed at briefly describing the approaches of the Albanian, Bosnian-Herzegovinian, Macedonian, Montenegrin and Serbian Constitutions[5] toward the direct application of general International law (customary law), SAAs and decisions of Bodies

3 S. Rodin "*Developing Juridical Culture of Human Rights*" Opatjia Inter/University Center of Excellence Working Paper WP E2/2011: S. Rodin "*Stabilization and Association Agreement-Hostage of Dualism Inertia*" in Bruha, Vrcek, von Czege "Croatia on the path to EU:Political, Economic, Legal aspects, Europa' Kolleg, Hamburg 2003.

4 S. Georgievski "*Judicial Harmonization: a Major Challenge for South East European National Courts" in European Union Law application by National Courts of the EU/ Membership Aspirant Countries from South East Europe*" Sept. 2014; T. Capeta "*Courts, legal Culture and EU*" in Croatian Yearbook of European Law and policy, 2005 .

5 Considering its very peculiar situation with regard to the Justice and Courts system, the situation of Kosovo has not been investigated in this paper.

created under SAAs, the European Convention of Human Rights, the European Law-acquis communautaire, national Courts' practice and interpretation of national law in the light of EU law and EU-target Countries Agreements.

The approach of the national Courts to the provisions of the EU law ***corpus*** and subject to the *"direct effect"* principle shall also be analyzed: the mere *"direct applicability"* principle provides for the rule at stake to be immediately part of the internal legal order, although it does not concern the possibility for individuals to invoke it before a national Court.

Nevertheless, it is general knowledge that after the judgment "Van Gend en Loos" dated February 5th 1963, the European Court of Justice settled out that the European law does not only commit the Member States, but also provides rights to individuals.

Individuals might directly invoke European laws and regulations before national and European Courts[6] when the legal principles are clearly formulated, when they clearly impose obligations/rights and when it is requested no additional measure in implementation or adoption through a national law.

2. Albania

2.1. International law and international agreements in the Albanian national legal order

The Albanian Constitutional[7] structure is strongly based on a monistic criterion: a positive approach toward the international legal order is envisaged in the Constitutional provisions.

6 The Van Gend and Loos decision defined the existence of a vertical and horizontal aspect in the direct effect principle implementation: therefore, the vertical direct effect involves relations between individuals and the State. This means that individuals can invoke a European provision in relation to the State. Secondly, the horizontal direct effect is consequential in relations between individuals. This means that an individual can invoke a European provision in relation to another individual. http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14547_en.htm.

7 Available in English at http://www.osce.org/albania/41888?download=true.

Art. 5 of the Albanian Constitution provides for Albania to apply all the international binding laws that are part of the customary international law.

Art. 116 specifies the hierarchy of legal sources in Albania: the Constitution is the supreme legal act whilst the international ratified agreements are previously placed with respect to the national laws.

This drafting shows the intention of the Constitution to define the hierarchy rank of international ratified agreements: as a matter of fact, Art. 122 of the Albanian Constitution explicitly provides for any ratified international agreement to constitute a part of the internal legal system after it is published in the Official Journal of the Republic of Albania and it is directly applicable. Therefore, the second paragraph of art. 122 states that the international agreements ratified by law have priority over the domestic legal order.

A specific provision envisages the approach to be taken toward the norms issued by international organizations. In case of conflict, the international source will prevail over the domestic law in case the direct application of the norms issued by the organization is expressly provided in the agreement ratified by the Republic of Albania for participation therein.

It is clear that the Albanian Constitution places the international ratified agreements and general international provisions (customary or *ius gentium*) over the national order.

Besides, the Constitutional Court is entitled to declare void a national norm which contrasts with an international provision: upon request[8], the Court is empowered to provide an *ex ante* judgment on the constitutional compliance of an international agreement before its ratification.

8 The Constitutional Court can be invested for the constitutional review of a international agreement to be ratified by the President of the Republic, the Prime Minister, one-fifth of deputies, the Head of State Control; local authorities, religious parties and political parties can refer the matter before the Court but only if their direct interests are involved. The Albanian Constitutional Court has activated this ex ante evaluation procedure by decision 15/2010 about the Albanian-Greece Treaty on "Delimitation of Continental Shelf and other Maritime Areas". Caka F. "*The Application of International and European Union Law by the National Courts in Albania*" in European Union Law application by National Courts of the EU/Membership Aspirant Countries from South East Europe" Sept. 2014.

2.2. SAA and SAA's bodies decisions

The Stabilization and Association agreement between Tirana and Brussels has been signed in 2006 and it entered into force in 2009: this agreement has been ratified by the Albanian Parliament and therefore it is a part of the national legal order and it prevails over the internal law in case of conflict as per art. 122 of the Albanian Constitution.

A case of conflict between the Albanian internal order and SAA has been settled by the Albanian Constitutional Court when the Council of Minister approved Decision 52 in 2009 "On quality of diesel fuel, produced from the refining of domestic crude oil" that provided for protections and better conditions for the national productions.

The Decision was in contrast with Art. 33 of the EU-Albania SAA that prohibits the introduction of restriction on import and export or equivalent measures in trade between UE and Albania.

The Albanian Constitutional Court declared Ministerial Council Decision no. 52 not in line with SAA's provisions since said measure had not been taken on the ground of justified reasons with arbitrary and discriminatory effects.

Besides, in accordance with art. 116 SAA, the Stabilization and Association Council is established in order to take decisions in the scope of the Agreement in the case provided therein.

The Council can make recommendations: therefore it is necessary to evaluate the applicability of decisions and recommendations taken by the Council and their constitutional rank.

Considering the SAA the legal base of the Council it is possible to conclude that this body and its decisions have the same Constitutional status of SAA. Therefore, the Council decisions should prevail over the national laws in case they are not in line.

2.3. The European Convention of Human Rights in the Albanian legal order

The European Convention of Human Right (ECHR) enjoys a prominent position in the Albanian Constitutional framework.

Art. 17 paragraph 2 explicitly recalls the ECHR conceptual framework

as the minimum standard for Human Rights protection under the Albanian legal order.

According to the rule of law principle, the Albanian Constitution clearly states that the law is the only source able to provide limitations and restrictions of personal and human rights but in no case such limitations can exceed the ones provided for in the European Convention of Human Rights.

There is a dispute between Albanian scholars with regards to the constitutional status of the ECHR since some of them are arguing that the Constitution is granting the constitutional prominence only to the limitations provided by the ECHR on the grounds of a literal interpretation of art. 17.

On the contrary, some authors are evaluating the real sense of the Albanian Constitution: in this light the Albanian Constitution should be a perfect mirror of the ECHR and therefore the constitutional status should be granted to the entire Convention as integral part of the Albanian Constitution.[9]

According to this interpretation, the Albanian national Court should directly apply the ECHR provisions as constitutional principles as well as the jurisprudence of the European Court for Human Rights.

However, it seems that when the national Courts are in a position so as to directly apply the ECHR, the specific provisions of the European Convention are just cited whilst the judges prefer the national provisions. In other cases, when there is a more direct involvement of the international provisions, the Albanian Courts seem *"…to opt more for consistent interpretation than direct application…"*.[10]

2.4. European acquis

As per the above mentioned art. 170 of the SAA, Albania commits itself to gradually harmonizing its existing legislation with the UE *acquis* and to make the future laws compatible with European standards. This process seems to be implemented only in part by Albanian higher Courts[11] with regard to the interpretation of national law in the light of the EU legal *corpus.*

Indeed, the harmonization process can find an effective indirect application through the implementation of it in the Courts' interpretation of the national law, therefore the approach of the Albanian Courts seems to be favorable to this process.

The legal source for the indirect application of the EU law seems to lie on solid legal bases provided by the SAA.

As a matter of fact *"…art. 71 SAA provides that in the sphere of competition any practice must be assessed on the basis of criteria arising from the rules applicable in the Community……..and interpretative instrument adopted by the Community Institutions…"* therefore *"…relevant Authorities in Albania (included Courts) should refer not only on the relevant articles in the TFEU but also practice of CJEU since the Court has the exclusive authority to interpret the Treaties…".*[12]

Besides, the interpretive approach of the Albanian Courts could be further justified on the grounds of a general principle of genuine and sincere cooperation between Albania and the EU provided for by art. 126 of the SAA.[13]

3. Bosnia and Herzegovina (BiH)

3.1. International law and international agreements in BiH national legal order

The very peculiar structure of Bosnia and Herzegovina is reflected in its Constitutional framework and its relation with international agreements and international law.

9 G. Zyberi, S. Sali " *The Place and Application of International Law in Albanian Legal System*" in S. Rodin Judicial Application of International Law in South East Europe, Springer 2015.

10 Caka F. "*The Application of International and European Union Law by the National Courts in Albania*" in European Union Law application by National Courts of the EU/ Membership Aspirant Countries from South East Europe" Sept. 2014 analyzing Albanian High Court Decision no. 4 27.03.2003.

11 Albanian High Court Decision no 2/2012.

12 Caka F. supra no 9.

13 Caka F. cit..

The BiH Constitution[14] is a part of an international agreement itself for it has been drafted as annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), entered into force in 1995 and never ratified by the BiH Parliament.

The very peculiar nature of this Constitution raises original and new questions about its relations with other international agreements and the hierarchy among them.

Furthermore, the complex state structure contributes to make unclear the legal order of BiH with regard to the topics at stake.

The entities of Federation of Bosnia and Herzegovina, Republika Srpska and the District of Brčko have their own Constitutions as well as the 10 Cantons of the decentralized Federation. It means that 13 Constitutions are into force in the territories of BiH with immediately evident problems in internal and international orders coordination.

Besides, the BiH Constitution's provisions seem to be not clear about the fundamental approaches toward the international law between a monistic or dualistic doctrine.

It is true that the General Framework Agreement for Peace in Bosnia and Herzegovina and related attachments (including the Constitution) have not been ratified by BiH Parliament and, therefore, one might imagine an immediate application of international provisions as per the monistic doctrine.

Art II.2 of the Constitution defines the international standards to be directly applied in Bosnia and Herzegovina: as per said article the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina with priority over all other laws.

Furthermore, art. II.4 recalls additional international agreements to be directly implemented in BiH, as listed in the Annex I of the Constitution.[15]

14 Available in English at www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf

15 Namely: the Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto; the 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; the 1957 Convention on the Nationality of Married Women; the 1961 Convention on the Reduction of Statelessness; the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; the 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 1966 Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination against Women; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1987 European Convention on the Prevention of Torture and Inhuman or Degrading; Treatment or Punishment; the 1989 Convention on the Rights of the Child; the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the 1992 European Charter for Regional or Minority Languages; the 1994 Framework Convention for the Protection of National Minorities.

This kind of construction generates doubts about the approach toward the international order since it seems that all the others international laws and agreements but the ones explicitly mentioned in the Constitution as directly applicable should be implemented by a transposition in the internal order by specific legislative processes.

Some authors define the BiH Constitutional system as a "quasi-dualistic" or a "moderate dualistic" system since it seems that the monistic criterion is adopted only with regard to the quoted Agreements.[16]

3.2. The SAA and SAA's bodies decisions

The situation of the Stabilization and Association Agreement with Bosnia and Herzegovina is very peculiar.

Although the SAA has been signed in 2008 and ratified in 2011 it is not yet into force since Bosnia and Herzegovina did not accomplished the condition settled by the European Union implementing the European Court for Human Rights ruling in the Sejdić-Finci case about the exclusion of some candidates to run for election because of their Roma and Jewish ethnic origin.[17]

Nevertheless, from the BiH Constitutional point of view the SAA has been ratified and therefore it is into force in the national order.

The validity of the SAA before the domestic Institutions and for individuals is clearly defined by the "Procedure for Conclusion and Execution of International Treaty" act that states the obligation of the competent Institutions or legal persons involved to execute the

16 Z. Meškić "*The Apllication of the EU Law in Bosnia and Herzegovina*" in European Union Law application by National Courts of the EU/Membership Aspirant Countries from South East Europe" Sept. 2014.

17 European Commission Bosnia and Herzegovina progress report 2014 available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf.

provisions of the ratified agreements: therefore, it is possible to argue that those provisions and obligations are directly applicable.

However, if there is no doubt about the Constitutional rank of provisions coming from the ECHR and other Treaties listed in Annex 1, the rank of the ratified agreement (the SAA included) in case of conflict with an internal law is not clear enough. Probably, since the BiH Constitution gives priority to the ECHR and to other specific Treaties, the same standard should be coherently adopted for the ratified agreements and Treaties since they juridically have the same international status.

Besides art. VI. c) grants the Constitutional Court the jurisdiction to review the issues concerning the existence or the scope of a general rule of public international law pertinent to the Court's decision: therefore the Constitution recalls as applicable standards for decisions any provision from the general public international laws domain in addition to the Treaties and Agreement explicitly mentioned.

3.3. The European Convention of Human Rights in the BiH legal order

The rights and freedoms set forth in the European Convention of Human Rights are immediately applicable in the BiH legal order as per art. II.2 of the BiH Constitution and they have priority over the national law in case of conflict.

The rank of the ECHR is clear but the BiH Constitutional Court has ruled about the interaction between the Constitution and the ECHR stating that the latter cannot have priority on the Constitution considering that *"…it entered into force by means of Constitution itself".*[18]

3.4. European acquis

According to M.Čoloaković's[19] examination of the Constitutional Court decisions, the judges rarely refer to the EU law in their judgments: sometimes

18 Z. Meškić "*The Application of the EU Law in Bosnia and Herzegovina*" in European Union Law application by National Courts of the EU/Membership Aspirant Countries from South East Europe" Sept. 2014.

19 M. Čoloaković "*European Law application by the Constitutional Court of Bosnia and Herzegovina and Supreme Court of the Federation of Bosnia and Herzegovina*" in European Union Law application by National Courts of the EU/Membership Aspirant Countries from South East Europe" Sept. 2014.

the EU standards have been recalled in the public law framework but they have not been applied to the private law practice yet.

The ECHR on the contrary is regularly and consistently quoted and the European Court of Human Rights practice is often taken as precedent especially in the trademark- and copyright protection-related matters. This is understandable considering that the ECHR is a part of the BiH Constitution and is immediately applicable in the jurisdiction of the BiH Courts.

The situation seems to be partially different in the light of the Supreme Court of Federation of Bosnia and Herzegovina judgments: as a matter of fact, the Supreme Court stated that *"…the national Courts are obliged to interpreter national law in the light of EU law and solve the case under the national law applied in accordance with the legal standard of the European Union…".*[20]

Therefore, although the applicable law is the national one, the UE law represents an important conceptual standard to achieve in the real application of the law, at least implementing the indirect effect of it.

4. Macedonia

4.1. International law and international agreements in the Macedonian national legal order

The Macedonian Constitution[21] is not clear about the direct applicability of the general international law provisions in the national legal order.

Art. 118 defines the status of the ratified Treaties that are provided with a direct applicability and priority over the national laws as hierarchically higher than the domestic laws.

Special regulation about the customary international law or *ius gentium* is not provided. It seems that the non-ratified Treaties or

20 Resjenje Vrhovnog suda Federajije Bosne I Hercegovine broj 2012 in M.Čoloaković supra 18.

21 Available in English at http://www.wipo.int/edocs/lexdocs/laws/en/mk/mk014en.pdf.

general customary law would only be applicable through a transposition in the internal legal order by a typical dualist treatment.

Nevertheless, some authors[22] suggest that an indirect applicability of the general international law could be found in art. 8 of the Macedonian Constitution which provides the fundamental values of the constitutional order.

Said article defines the basic freedoms and rights of the individual and citizens recognized in international law and the respect for the generally accepted norms of international law as a fundamental part of the Macedonian legal system.

The Macedonian Constitutional Court has sometimes recalled art. 8 as a tool to interact with general international law provisions especially in the matters related to human rights. Nevertheless, the Court has never declared the direct applicability of those provisions even if the doctrine argues that the general international law as fundamental value of the Constitutional order should be considered more that a "persuasive" authority and it should prevail over the national order.

4.2. The SAA-ECHR and SAA's bodies decisions

The Stabilization and Association Agreement between Macedonia and the European Union entered into force in April 2004.

As per art. 118 of the Macedonian Constitution, the ratified SAA enjoys direct applicability and it prevails in case of conflict over the national legal order.

The SAA provisions entail the Macedonian obligations to take specific and general measures to achieve the objectives of the agreement by a sincere cooperation towards an effective implementation of the SAA provisions: it means that the domestic jurisdiction should carefully take into account the specific regulations and the general spirit of the agreement implementing the harmonization process between the internal and EU legal order (SAA Title VI).

Nevertheless, the domestic jurisdiction seems not to be ready to accomplish this process and it is true considering the approaches of higher Courts that should lead these dynamics.

22 S. Georgievski, I. Cenevska. D. Prešova "*Application of the European Law in the Republic of Macedonia*" in European Union Law application by National Courts of the EU/Membership Aspirant Countries from South East Europe" Sept. 2014.

As a matter of fact, the Constitutional Court is following a "rigid textualism" in reading art. 118 of the Macedonian Constitution. This frustrates the monistic approach of the Constitution and *de facto* restrains the direct applicability of international ratified agreements and the SAA as well.

Furthermore, the provisions regulating the functioning and jurisdiction of the Constitutional Court do not specifically envisage the powers of the Court to investigate and decide about the compliance of a national law with an international agreement in order to settle the conflicts between domestic and international orders[23].

Because of its rigid approach, the Constitutional Court avoids to judge these matters and consequentially the priority of the international agreements (the SAA and ECHR included) is not well implemented in the Macedonian judiciary system.

Secondly, the Constitutional Court ruled in several decisions that the international agreements can be a secondary tool to interpret the national law and Constitution but they cannot be an independent source of rights.

As a matter of fact in decision U.br. 39/2004 the Constitutional Court declared that *"…the Court established that although the ECHR is integral part of domestic legal order its legal status is below the Constitution and it cannot represent a direct legal grounds upon the Court can base its decision....Namely, provisions of the Convention… can represent only an additional argument…"*.

Therefore, the real practice of the Constitutional Court *de facto* generates a dualist criterion that frustrates the Constitutional approach to the international legal order: it obviously hinders the immediate applicability of international agreements although they have been ratified.

This is obviously true for the decision taken by Bodies and Authorities established under the international agreements that have been ratified; nevertheless, in a decision about the Multilateral Agreement for the European Common Aviation Area, some annexes recalling the European regulation EC 3922/91 have been considered part of domestic legal order as a part of the ratified aviation Treaty.[24]

23 Decision U.br. 5/2005.

24 Decision U.br. 103/2007 24.10.2007.

4.3. European acquis

The application of the EU ***acquis*** and standards is affected by the rigid approach of the Constitutional Court toward provisions coming from the international legal order.

Nevertheless, in some Court decisions it is possible to find an analysis and positive evaluation of the application of the EU standards.

The Constitutional Court spells out *"...Although the directives of the European Union as a supranational law are not part of the legal order, that is are not source of law in the Republic of Macedonia and as such are not the subject-matter of appraisal before the Constitutional Court, nevertheless, in support of its legal standing took into consideration Directive 2002/21/EC .....regarding common regulatory framework for electronic communications...."*.[25]

It seems that the European legal source is a valid argument for the Constitutional Court to reach its decisions: of course it is a source to orientate the decision and not a law directly applicable.

5. Montenegro

5.1. International law and international agreements in the Montenegrin national legal order

The Montenegrin Constitution[26] as been drafted on the ground of a solid monistic approach since art. 9 declares the ratified and published international agreements and generally accepted rules of international law to be an integral part of the internal legal order.

The ratified agreements and customary international laws shall have the supremacy over the national legislation and it shall be directly applicable over the internal legislation in case of conflict.

The definition of Constitutional hierarchy is very clear but its direct applicability is rare in the national Courts practice.[27]

25 U.br. 26/2006 15.04.2006.

26 Available in English at http://www.wipo.int/edocs/lexdocs/laws/en/me/me004en.pdf.

27 M. Kostić-Mandić "*Implementation of International and European Union Law in Montenegro*" in European Union Law application by National Courts of the EU/ Membership Aspirant Countries from South East Europe" Sept. 2014.

5.2. The SAA-ECHR and SAA's bodies decisions

The Stabilization and Association Agreement with Montenegro is into force since May 2010: the Montenegro commitments toward European Union in the application of UE acquis and harmonization process should be stronger considering Montenegro is a Candidate Country.

As per art. 9 of the Montenegrin Constitution, the SAA enjoys direct applicability before the national Courts in case the provisions are clear enough to define obligations and rights.

Nevertheless, it seems that the national judges do not apply directly the SAA and other ratified agreements with EU for they consider the implementation of the SAA provisions in the national legal order to be necessary.

Furthermore, it seems that there are no claims requesting the SAA application before Courts.[28]

On the other hand, the ECHR and European Court of Human Rights' practice recurs in the Courts decisions directly or indirectly through an interpretative method that drives the application of the national law near to the spirit and rationale of the ECHR.

The Montenegro Constitutional Court ruled that the ECHR is ***per se*** a direct basis for decision of all national jurisdictions.

5.3. European acquis

The application of part of the EU law in the domestic legal order is granted by the Private International Law Act into force since 2014: in application of this law, the EU law and the practice of the European Court of Justice can be directly incorporate in the national legal framework in specific fields as contracts or succession law and by means of international agreements that are binding for the EU and Montenegro. In spite of this huge openness, the real application of it is still difficult considering the Judges approach toward international and EU provisions considered as "soft" law and very often recalled as mere interpretative patterns.

28 M. Kostić-Mandić "*Implementation of International and European Union Law in Montenegro*" in European Union Law application by National Courts of the EU/Membership Aspirant Countries from South East Europe" Sept. 2014.

6. Serbia

6.1. International law and international agreements in the Serbian national legal order

The Serbian Constitutional legal order[29] establishes (art. 16.2) that the generally accepted rules of international law and ratified international Treaties shall be an integral part of the legal system in the Republic of Serbia and directly applied.

Therefore the Serbian Constitution seems to accept a monistic approach toward customary international law (generally accepted rules) and ratified agreements.

Nevertheless art. 194.4 states that the international ratified agreements cannot be in contrast with the Constitution and therefore the Constitution should be considered as the supreme legal source.

On the other side, after ratification and integration of international agreements they shall prevail over the national laws because of their direct applicability.

6.2. The SAA-ECHR and SAA's bodies decisions

The Stabilization and Association Agreement with Belgrade supports the harmonization process of the Serbian legislation with the European *acquis* by means of a sincere cooperation: of course the main instrument to effectively operate this convergence is the judiciary system and the international law application over the conflicting national law.

In spite of the clear reference of the Serbian Constitution to the direct applicability of international ratified agreements, the national Courts clearly distinguish between direct applicability and direct effect and therefore only a provision with a clear formulation that expressly recalls an obligation or a right could be applied. Therefore Serbian domestic Courts *"…did not consider the direct application of the SAA or other agreements signed with the EU…"*.[30]

29 Serbia Constitution available in English at http://www.wipo.int/edocs/lexdocs/laws/en/rs/rs011en.pdf.

30 R. Vukadinović, D. Milovanović, D. Janicijević, V. Cucić "*Application of EU Law by Serbian Courts Pre-Accession Issues*" in European Union Law application by National Courts of the EU/Membership Aspirant Countries from South East Europe" Sept. 2014.

In spite of this position, the SAA provisions and the SAA body's decisions should be directly implemented as per art. 72.2 that defines the obligation of Serbia to adopt interpretative instruments in the legal national order approximation process respecting the *acquis communautaire* and European standards.

The obligation of a direct and indirect application of the EU law is actually common in the SAAs signed with the SEE Countries and therefore it implies the commitment of the signatories to adopting EU-consistent application and interpretation of national legislation.

Besides, the decision of the SAA Council shall be binding for parties as per art 121 of the SAA.

6.3. European acquis

In some cases the Serbian national Courts applied the directives and laws coming from the European legal *corpus* as immediate source of rights and regulations.[31]

However, the Constitutional and Higher Courts did not create a precedent on this sense establishing a common ground for lower Courts in interpreting the national law by a euro-friendly approach or applying the EU law directly. Nevertheless, the ordinary Courts (Novi Sad) are recalling definitions and practice from the EU *corpus* and EU Courts practice (especially in the Human Rights related matters).

7. Conclusion

The situation of direct or indirect application of international law, international agreements, the SAAs and EU legal ***corpus*** in the above mentioned Countries is not at the same level but for sure all these legal systems are involved in a huge harmonization dynamics toward the EU standards.

31 See Decision Court Appeal in Belgrade on the shift-work and applicability of Directive 23/104/EC in R. Vukadinović, D. Milovanović, D. Janicijević, V. Cucić *supra.*

All the SAAs envisage the specific commitment with regard to the application of the *acquis communautaire* and European legal standards in Human Rights.

Although the majority of Constitutional orders grant to the SAAs direct applicability, the direct effect of their provisions is not common and actually very rare.

The higher Courts of Albania, BiH, Macedonia, Montenegro and Serbia are currently setting the balance between the international and national legal systems according to different perceptions of the pre-accession phase those Countries are living.

It is not easy to look for the right balance point between an autonomous and sovereign legal order and a supranational order that is requiring to be applied at the same moment and in the same legal domain.

Very often the Constitutions of the above-mentioned Countries do not envisage clear provisions to orientate the decisions of the Constitutional Courts and this is why the ruling of the national Court becomes fundamental in this phase. Only the proper interpretation of Constitutional law could open the door to the effective harmonization process the parties committed to accomplishing in compliance with SAAs.

The excruciating current *dilemma* the SEE National Courts are facing is not peculiar of those Countries but it has been actually lived by the national Courts of all CEE Countries during their pre-accession process and the EU member national Courts as well.

In the first phase, the CEE Countries National Courts recognized the EU law with no binding power in the national legal order but (especially the Polish, Czech, Latvian national Courts)[32] they emphasized, probably more than the SEE Courts, the obligations arising from the Association Agreements with Brussels aimed at approximating the national orders with the EU *acquis*.

The peculiar situation of the SEE Countries is evident considering the progress of Croatia about the same matters during its pre-accession phase: actually, the approach of the Croatian Courts in that phase generated a "dualistic inertia" in applying the international/supranational law due to a formal reading of the SAA and Constitution provisions.

32 A. Albi "*EU Enlargement and the Constitutions of the Central and Eastern Europe*", Cambridge, Cambridge University Press, 2005; Z. Kuhn, "*The Application of European Union Law in the New Member States: Several Early Predictions*", German Law Journal, 2005.

In the light of the EU membership the Croatian Constitution as been updated with specific provisions under Chapter VIII (European clause) specifically stating that the exercise of the rights ensuing from the European Union *acquis communautaire* shall be made equal to the exercise of rights under the Croatian law.

Besides, all the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union *acquis communautaire.* Furthermore, the Croatian Courts shall protect subjective rights based on the European Union acquis communautaire. Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply the European Union law directly.

Probably, the upgrade of the SEE Countries' Constitutions by means of a "European clause" will be necessary in order to clearly state the relation between the national Constitution, the national law and the international order.

In the pre-accession phase, in order to enhance the process of harmonization, the European Union could shape specific policies in order to facilitate the EU *acquis* implementation through education and training for judges and legal practitioners and supporting the EU *acquis enforcement* through international agreements already into force: for instance, the Energy Community Treaty signed between the SEE Countries and the EU establishes the implementation of the EU ***acquis*** in the energy sector but is not provided with the effective enforcement instruments, sanctions and disputes settlement mechanism.

These dynamics should be under focus: the effective implementation of the harmonization process will make the accession of the SEE Countries simpler and faster and obviously it shall immediately improve the protection of Human Rights and the EU legal standards in those Countries.

Bibliography

- H. Schwartz "The Struggle for Constitutional Justice in Post-Communist Europe", Chicago, University of Chicago Press, 2000;
- W.Sadaruski, "Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective", The Hague, Kluwer, 2003;
- R. Prochazka "Mission Accomplished on Founding Constitutional Adjudication in Central Europe", Budapest, Central European University Press, 2002;
- Z. Kuhn "The Application of European Union Law in the New Member States: Several Early Predictions", German Law Journal, 2005;
- S.F. Massari "La Comunità Energetica del Sud Est Europa" ISBN Press Accademiche Italiane, Saarbrücken, Germany 2013;
- A. Albi "EU Enlargement and the Constitutions of the Central and Eastern Europe", Cambridge, Cambridge University Press, 2005;
- European Union Law application by National Courts of the EU/ Membership Aspirant Countries from South East Europe" GIZ, Sept. 2014;
- S. Rodin "Developing Juridical Culture of Human Rights" Opatjia Inter/ University Center of Excellence Working Paper WP E2/2011;
- S. Rodin "Stabilization and Association Agreement-Hostage of Dualism Inertia" in Bruha, Vrcek, von Czege "Croatia on the path to EU:Political, Economic, Legal aspects, Europa, Kolleg, Hamburg 2003.

Author

Saverio Francesco Massari is a qualified lawyer specialized in energy Law. Massari has successfully defended his PhD in "International Cooperation and Sustainable Development Policies" at the University of Bologna in September 2012 focused on the energy markets in South East Europe. The Ph.D. thesis has been published in July 2013 by the German publisher PAI. Massari obtained his second degree in Political Science in 2013 by an essay on the contractual models in the Natural Gas market. Massari developed this field of research and he published a book with a special focus energy free market/Authority relations and regulation mechanism in 2014. He published several papers on the energy topics and he currently works at the Comminity of South East Europe Secretariat-Legal Unit Vienna.

e-mail: saverio.massari2@unibo.it

PECOB's Scientific Board

Is an interdisciplinary board of directors responsible for reviewing proposals as well as evaluating and accepting high quality scientific research for publication in PECOB's Scientific Library. The Europe and the Balkans International Network (EBIN) and the Association of Italian Slavists (AIS) provide the Scientific Board with assistance in the task of selecting papers for publication. The Board and its collaborators use a blind review process; only after a contribution is accepted through this process will it be published on PECOB.
The PECOB Scientific Board of Directors:

- Stefano Bianchini (IECOB)
- Francesco Privitera (IECOB)
- Marcello Garzanti (AIS)
- Stefano Garzonio (AIS)

PECOB's Editorial Staff

brings together the thinking of distinguished scholars, experts, researchers, and other individuals interested in Central-Eastern Europe, the Balkan region, and the Post-Soviet space by collecting and publishing a wide variety of papers, research studies, and other scientific and sociological document.

Luciana Moretti

Luciana Moretti is responsible for the management of PECOB, the Portal on Central-Eastern and Balkan Europe, and the head of the Scientific Library section. You can contact her for proposals and submission of scientific contributions for the Scientific Library, Newsletter, Published and web resources and all general request for IECOB. All inquiries regarding the submission of papers, articles, and research to PECOB for publication in the Scientific Library, Newsletter, or the Published and Web Resources section should be directed to Ms Moretti at luciana.moretti@unibo.it. Ms Moretti also addresses general inquiries regarding IECOB, the Institute for Central-Eastern and Balkan Europe.

Tania Marocchi

Tania Marocchi works for PECOB's research team and is the head of PECOB's Up-to-Date Alerts section. Inquiries regarding conferences and events, calls for academic papers or applications, and internships with IECOB should be directed to Ms Marocchi at tania.marocchi@pecob.eu.

Andrea Gullotta

Andrea Gullotta is a contributor for PECOB's scientific library. Mr Gullotta's work can be found primarily in the "Language, Literature and Culture" section of the Scientific Library. Mr Andrea Gullotta can be reached at andrea.gullotta@unive.it.

Andrew Troska

Andrew Troska is an editor and translator for PECOB. Mr Troska updates English-language content and translates past articles, primarily from Italian into English. Requests for translation (between English and Italian) or editing (for English grammar, syntax, and diction) of works to be published on PECOB can be directed to him at andy.troska@pecob.eu.

PECOB

AIS Associazione Italiana degli Slavisti

istituto per l'Europa centro-orientale e balcanica

Portal on Central Eastern and Balkan Europe
University of Bologna - Forlì Campus

EUROPE and the BALKANS INTERNATIONAL NETWORK

www.pecob.eu

PECOB *distributes up-to-date materials and information on Central-Eastern and Balkan Europe, provides high quality academic content, and promotes the wider visibility of academic research on the region with the aim of fostering institutional collaboration on the national and international level and promoting further research concerning Central- and South-Easterb European countries, the Balkans, and the Post-Soviet space across a wide variety of academic fields and disciplines.*

PECOB's Scientific Library *contains original, peer-reviewed academic contributions which, once approved by PECOB's Scientific Board, are published online, either in one of Pecob's Volumes (with a unique ISBN code) or as a part of PECOB's Papers Series (with a unique ISSN code). Being published in PECOB's Scientific Library enables scholars, researchers and specialists to contribute a comprehensive collection of scientific materials on various topics (politics, economics, history, society, language, literature, culture, and the media). Texts may be submitted in English or in any language spoken in Central-Eastern and Balkan Europe or the Caucasus.*

PECOB's Informative Areas *offers up-to-date news regarding academic and cultural events. Information about and limited access to numerous academic publications and online news resources is also available, as is current information about academic centres and institutions related to Central-Eastern and Balkan Europe and the Caucasus.*

Supported by the University of Bologna, the portal is developed by the Institute for East-Central Europe and the Balkans (IECOB) with the collaboration of the Italian Association of Slavists (AIS) and the 'Europe and the Balkans' International Network.

ALMA MATER STUDIORUM UNIVERSITÀ DI BOLOGNA A.D. 1088

CALL FOR PAPERS!

THE SCIENTIFIC BOARD OF PECOB ANNOUNCES AN OPEN *CALL FOR PAPERS* TO BE PUBLISHED WITH ISSN 2038-632X

PECOB

Portal on Central Eastern and Balkan Europe
University of Bologna - Forlì Campus

Interested contributors may deal deal with any topic focusing on the political, economic, historical, social or cultural aspects of a specific country or region covered by PECOB.

Manuscripts can be submitted in English or the original language (preferably local languages of the countries considered in PECOB); in the case of non-English text, the author must provide title and abstract also in English.

Contributions must be grammatically correct and in good literary style, using inclusive language. Authors must take care of language editing of the submitted manuscript by themselves. This is a step authors can take care of once the manuscript is accepted for publication. Submissions must include an abstract or summary of the paper/thesis of 350 words at least. The abstract should appear after the author's name and affiliation on the first page.

Upcoming deadlines for submitting proposals are:

January 31
June 30
November 30

Al texts must comply with PECOB Submission Guidelines (www.pecob.eu).

All proposals, texts and questions should be submitted to Ms Luciana Moretti (luciana.moretti@unibo.it or info@pecob.eu)

www.pecob.eu