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The Importance of the Judiciary for the European Integration of EU Candidate Countries: The Case of Albania

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Abstract. All Western Balkan countries currently holding the EU Candidate Country status, namely, Albania, Montenegro, FYROM, Serbia, and hopefully in the near future Kosovo, are in a critical stage of the EU integration. From their institutions are required serious reforms which are necessary for almost all the of above countries.

The focus of this paper is Albania. After the approval of the EU Candidate Country status, each branch of the Albanian government is now facing new legal challenges. However, at this stage, the central role passes to the judiciary, which should and could turn into a real “engine” of the EU integration. The new role of the Albanian judiciary for the EU integration should primary be understood and recognized by judges themselves, as well as academics and the public. Judges in particular, should know what instruments are available there, in order to best perform their new task. This paper initially aims to clarify the new role of the Albanian judiciary, as the “engine” of the EU integration, in order to raise awareness not just to judges, but also to academics and the public. Then, it will present what practical instruments can and must be used by the Albanian judiciary in order to best achieve the required EU integration. Examples of such instruments are: the preliminary ruling; principle of supremacy; principle of direct effect; principle of indirect effect; and most importantly, EU remedies in national courts. The paper will analyze each of these instruments and will display precisely how Albanian courts can use them in favor of their citizens, and for achieving higher EU integration. In conclusion, the article suggests that although significant constitutional and legal reforms are needed, the existing constitutional and legal framework of Albania allows the judiciary to perform its new role as the “engine” of the EU integration.

Keywords: EU Candidate Country status, integration, judiciary, practical instruments

1 Introduction

In a world that is rapidly becoming ever more global, one of the most important political and legal consequences of this process seems to be the globalization of public institutions, including the judiciaries. International tribunals and national constitutional/supreme courts, including the lower courts, are increasingly being more active in communicating, collaborating and referring to each other’s decisions, by playing a crucial role in shaping states and societies.⁷⁴ Indeed, the most advanced form of judicial cooperation is certainly the partnership between national courts of EU Member States (MS) and the Court of Justice of the European Union (CJEU).⁷⁵

The aim of this paper is to shed light on the active and important role of the judiciaries of EU Candidate Countries for the European integration of their countries, with a primary focus on Albania. After the EU Candidate Country status of Albania, each branch of the government is facing new legal challenges. The legislative and executive have and will always have an important role in the further EU integration of Albania, however, at this stage the essential role passes to the judiciary. The Albanian judiciary ought to turn into the “engine” of the EU integration, but in order to achieve this, a new role should primary be recognized, understood and used by judges themselves, as well as accepted by academics and the

⁷⁴ Slaughter A.M. (2000) Judicial Globalization. *40 Virginia Journal of International*.

⁷⁵ Slaughter A.M. (2003) A Global Community of Courts. *Harvard International Law Journal* Vol. 44: 194.

public. Judges in particular need to know what instruments or mechanisms are available there, in order to best perform their new task.

First, this paper clarifies the new role of the Albanian judiciary as the “engine” of the EU integration, in order to raise awareness not just to judges, but also to academics and the public. Then, it presents practical instruments that can be used by the Albanian judiciary in order to best achieve the required EU integration. The paper analyzes each of these instruments and shows how Albanian courts can use them in favor of their citizens, and for achieving deeper EU integration. Finally, the article analyzes constitutionally all the above mechanism, and suggests that the existing constitutional and legal framework of Albania allows the judiciary to perform its new role as the “engine” of the EU integration. However, for better results, important constitutional and legal reforms are necessary, and a short taste of them is given.

2 The New Role of the Albanian Judiciary After the EU-Candidate Status

After the official approval as EU Candidate Country, Albania enters in a new important stage of EU integration. So far, this process was attributed only to the legislative and executive branches. However, the central question is, whether and to what extent the Albanian judiciary can and ought to play a role in the EU integration of Albania.

In fact, this question would sound strange or even meaningless if addressed in the European context, because it would be: Can the CJEU and the courts of Member States (as holders of judicial power) play a role in further integration of the EU? The answer to that is: Not just simply “Yes”, but the CJEU is widely-known as the most pro-European EU institution, and along with the courts of Member States are rightly regarded as the “engines” or the “heart” of EU integration.⁷⁶

National judges of Member States under the blessing and guidance of the CJEU, besides their domestic duties, are also transformed into European judges to guarantee individual rights under EU law. This irreversible trend of “Europeanisation” of national courts is also expected to occur for the courts of EU Candidate Countries, such as Albania. The Albanian judiciary, in other words, courts and judges of all levels have the greatest burden to help the integration of their country into the EU. From them is required to become the “engine” or the “heart” of Albania’s EU integration. They ought to understand this and to act as soon as possible.

Rightly one could ask: Can the Albanian courts take over their shoulders the EU integration? The public trust in them is really low; they have lack of infrastructure; the budget of the judiciary remains the lowest in the entire Europe floating well below 1% of the total government budget; or even worse, Albanian judges may lack comprehensive understanding of EU law!

These are all valid concerns and need to be adequately addressed. Albanian judges have lots of real difficulties. However, there is a way to start the positive transformation. First, Albanian judges should understand and be aware of their new role after the EU Candidate status of Albania. They are now the guarantors of the implementation of EU law in Albania, and at the same time, they can be considered as “the local branch of the EU judicial power”. In particular, after the Lisbon Treaty, the EU judiciary is constructed as a two-tiered structure in which the supranational and national courts are connected to each other by a reference system and not appeal. In other words, the exercise of judicial power at the EU level (supranational) is entrusted to the CJEU, whilst at the state level is entrusted to national courts. Same as other national judges of Members States and Candidate Countries, Albanian judges are not merely judges of their country, but they are also EU judges, guarantors of the EU legal order. They are entrusted with the “sacred” duty to protect individual rights arising from EU Treaties and the Stabilization-Association Agreement (SAA) with Albania.⁷⁷

⁷⁶ De Witte B. et al. (2013) *Judicial Activism at the European Court of Justice*. Edward Elgar Publishing 76-102; Chalmers D. et al. (2010) *European Union Law (Second Edition)*. Cambridge: Cambridge University Press 142-183; Maher I. (1994) National Courts as European Community Courts. *Legal Studies* 14: 226.

⁷⁷ SAA entered into force on 1 April 2009. For further key dates in Albania’s path towards the EU see the official website of the European Commission [Online] Available at http://ec.europa.eu/enlargement/potential-candidatecountries/albania/eu_albania_relations_en.htm [accessed 18.09.2014].

Practically, if Albanian judges would face an incompatibility between the Albanian law (of whatever rank) and EU law, naturally they have a duty to set aside the Albanian law, and to apply with supremacy the EU law. Some possible cases that they may face are: custom laws hindering the free movement of goods, services, or capital originating from the EU; legal acts establishing discriminatory taxes or tariffs on goods, services or capital originating from the EU; property laws that impede EU citizens to own land in Albania if they do not invest the double or triple of its value; etc. This idea may prompt sharp criticisms from pro-sovereignty scholars; however, EU law supremacy is not an innovation deriving from the SAA and EU Treaties. On contrary, it is settled directly by the Albanian Constitution since 1998, acknowledging that "norms issued by an international organization have supremacy in case of conflict with the law of the land".⁷⁸

The central question remains: What practical instruments can and should use Albanian judges for promoting and intensifying the EU integration? This is not an easy question and requires a lot of expertise. In this article based on my own personal previous expertise as judge and academic, I am trying to bring some practical solutions. It is there where the paper now turns.

3 Practical Judicial Instruments for the EU Integration

The most important question for the purpose of this paper is practical. What concrete instruments can Albanian judges/courts use in order to best achieve high EU integration in practice? To respond to this question, we will have to first look at the judicial branch of the EU and the instruments used by the national courts of Member States for the EU integration of their countries.

The Judicial branch of EU is comprised by two components, the Court of Justice of the European Union (CJEU; the ECJ before the Lisbon Treaty),⁷⁹ and the judiciaries of the Member States.⁸⁰ The CJEU has always been considered a very pro-EU institution because of its leading role in promoting further EU integration,⁸¹ and through the "Europeanization" of national judiciaries.⁸² The CJEU, since the very first years of its existence, and through its bold and creative interpretation of the EU Treaties in its judgments, started the process of relying on national courts to nationally implement the EU law, by enhancing their roles and transforming them into EU courts. This process, which led to the actual complex judicial architecture of the EU, was not a simple and immediate process. To the contrary, it was a continuous development that was done through different legal instruments at the same time.

The most important tools used by the CJEU and the national courts of the Member States are: *preliminary rulings*, *the principles of supremacy* and *direct effect*, *the principle of indirect effect*, and *EU remedies in national courts*. With just one exception, namely the use of preliminary ruling procedure, these instruments are exactly the same instruments that can be also used for the EU integration by the judiciaries of Candidate Countries, including the Albanian judiciary.

3.1 Preliminary Ruling

Preliminary ruling was and still remains the most important procedure that enables the CJEU to provide rulings on the interpretation and validity of EU law,⁸³ at the requests of national courts and tribunals.⁸⁴ Article 267 of the Treaty on the Functioning of the European Union (TFEU) states that, where a question of EU law is raised before a national court or tribunal, that court or tribunal may, if it considers a decision on the question is necessary to enable it to give judgment, request that the CJEU provide a ruling.⁸⁵ Moreover, it further provides that, where a question of EU law is raised before a national court against

⁷⁸ Article 122/3 of the Albanian Constitution.

⁷⁹ CJEU and ECJ are not exactly same institutions. For further explanation see Article 19(1) TEU.

⁸⁰ Chalmers D. et al. (2010) *European Union Law (Second Edition)*. Cambridge: Cambridge University Press 142-183.

⁸¹ Alter K. J. (1996) The European Court's Political Power. *West European Politics* 19.3: 458-487.

⁸² Slaughter A. M. (2003) A Global Community of Courts. *Harvard International Law Journal* Vol. 44: 194.

⁸³ After the Lisbon Treaty the right to give preliminary rulings is placed from the ECJ to the CJEU.

⁸⁴ Previously Article 177 of the Treaty of Rome, then Article 234 EC and finally after Lisbon Article 267 TFEU.

⁸⁵ Article 267(2) TFEU.

whose decision there is no judicial remedy under national law, that court must bring the matter before the CJEU.⁸⁶

However, for the purpose of this article, the question remains whether the courts of Candidate Countries, including Albanian courts, can use this instrument. In my view, at this stage of integration, unfortunately, the courts of candidate countries cannot directly use this instrument. The above article of TFEU and the jurisprudence of the CJEU show that only courts of Members States can use the preliminary ruling procedure.⁸⁷ Nevertheless, what Albanian courts can certainly do, is to use the preliminary ruling procedure to the Albanian Constitutional Court arguing that a particular law is against the Albanian Constitution and the EU law.⁸⁸ Regrettably, the statistics of the Albanian Constitutional Courts show that yet this instrument remains underexplored and underused by the Albanian judiciary, even for pure domestic constitutional issues, and almost never or very rarely is being used for an EU law issue.⁸⁹

3.2 Principle of Supremacy and Direct Effect

It is widely accepted that the most famous and popular principles known as great inventions of the CJEU are the *principles of direct effect* and the *supremacy* of EU law. These two central principles were not directly expressed in the Rome Treaty, but were introduced for the first time in the 1960s by the Court, through two oft-cited judgments, *Van Gend en Loos*⁹⁰ and *COSTA v ENEL*.⁹¹

The principle of direct effect was first introduced in the case of *Van Gend en Loos*. The CJEU argued that EU law formed *a new sovereign legal order*, and that it did not fall within traditional international law. It asserted that EU law—in this case Article 28 TFEU—“must be interpreted as producing direct effect and creating individual rights which national courts must protect.”⁹² The first corollary of this ruling is that, through the doctrine of direct effect, the CJEU established *a new legal order* with a powerful authority that should be applied directly by the national courts.⁹³ In addition, through this case was created *a new system of individual rights* that should be protected before the national courts.⁹⁴

The principle of direct effect was not the only instrument used by the CJEU to transform national judiciaries and the entire national and EU legal order. Only one year after the invention of the direct effect doctrine, the Court revealed another, even more important principle in the *Costa case*:⁹⁵ *the principle of the supremacy of EU law*. According to the Court, “the precedence of Community law is confirmed by Article [288 TFEU], whereby a regulation ‘shall be binding’ and directly applicable in all Member States.”⁹⁶ Thus, it seems that the *Costa* decision suggests a hierarchy of legal acts that is of constitutional importance for all MS, and for the EU itself. This principle, although not very welcomed by MSs, was addressed by the Constitutional Treaty⁹⁷ and, after its failure, became part of Declaration 17 of the Lisbon Treaty.⁹⁸

The duty of national judiciaries to apply EU law not only directly, but—more importantly—with precedence given to national laws, means that they must apply it even when it is not in compliance with national law. It is interesting to note that the primacy principle reached its maximum point, particularly

⁸⁶ Article 267(3) TFEU.

⁸⁷ There is not a single case that the CJEU has ever accepted a preliminary ruling application from national courts of Candidate Countries.

⁸⁸ See Article 145/2 of the Albanian Constitution.

⁸⁹ Statistics of the Decisions of the Constitutional Court of Albania 1998-2014 show that the number of preliminary ruling cases is very low, about 1-2 cases per year. See the official website of the Constitutional Court of Albania [Online] Available at http://www.gjk.gov.al/web/Decisions_92_2.php [accessed 11.09.2014]. See also: Rado K. (2006) Constitutional Court Preliminary Ruling Procedure, Dissertation-School of Magistrates of Albania.

⁹⁰ Case 26/62 *Van Gend en Loos* [1963] ECR 1.

⁹¹ Case 6/64 *Costa v. ENEL* [1964] ECR 585.

⁹² Case 26/62 *Van Gend en Loos* [1963] ECR 1.

⁹³ *Ibid.*

⁹⁴ Chalmers D. et al. (2010) *European Union Law (Second Edition)*. Cambridge: Cambridge University Press 269.

⁹⁵ Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁹⁶ *Ibid.*

⁹⁷ Article I-13.

⁹⁸ According to this Declaration attached to the Treaties; “[T]he Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States”.

with the case of *Internationale Handelsgesellschaft*, where the CJ famously ruled that EU law takes precedence over all national laws, including their national constitutional laws.⁹⁹ Although the most extreme form of the primacy principle, as ruled in the above case, was not accepted by most of the MS' constitutional courts,¹⁰⁰ this principle is still essential because, generally, the primacy of EU law is almost always accepted.¹⁰¹

Both principles, especially when used together, transformed and enhanced the roles of national judiciaries. Bound by a duty to use the principles of direct effect and the supremacy of EU law, national judges are vested with a new power to protect the Union's legal order. Constitutionally, this means that they are obliged not only by their national constitutions to protect their national legal order, but also by the EU constitutional principles of supremacy and direct effect to protect the EU legal order. Ultimately, as each Member State now has two interlocking constitutions—national and EU constitutional acts¹⁰²—national courts are the first institutions obliged to safeguard both of these legal orders.

The new constitutional roles of the national judiciaries in both legal orders not only enhance their power, but also transform them in a very fundamental manner. National judges no longer have only their internal constitutional and legal duties to consider. As with CJEU judges, it is their duty to know and directly apply with precedence EU law, and probably interpret and apply EU law even more often than the three Union-level courts do.¹⁰³ As Advocate General Tesauro rightly states, “the national court is the natural forum for Community law.”¹⁰⁴ However, the strongest sign of the transformation of national judiciaries was given by the General Court (GC),¹⁰⁵ which made a bold declaration of constitutional importance, saying that, “when applying [EU law], the national courts are acting as Community courts of general jurisdiction.”¹⁰⁶

Exactly same arguments can also be made for the EU candidate countries, including Albania. Albanian courts have now two interconnected constitutions—Albanian and EU constitutional acts—to safeguard and they are the first institutions obliged to protect and guarantee both these constitutional orders at national level. In order to do this, they need to use the instruments of supremacy and direct effect of EU law. These combined principles empowered Albanian courts—and courts of other candidate countries—with a constitutional competence that they did not have, *the right to review the compatibility of national law with EU law*. In concrete cases that come before them, Albanian judges relying on direct effect and the supremacy of EU law can set aside national laws that are contrary to EU laws. This process vested them with the power of *judicial review of national laws from the EU law perspective*. The ability to review the compatibility of national law with EU law in a decentralized manner by all national courts of Member States and Candidate Countries, including Albania, although never directly provided by their constitutions, is a significant power granted by the EU through the CJEU.

Finally, by effectively using the instruments of supremacy and direct effect, the CJEU has made national courts of both Member States and Candidate Countries its allies in the enforcement of EU law at the national level. As some scholars rightly argue, it is national courts—not the CJEU—that decide what the concrete consequences are when a Member State or a Candidate Country fails to fulfill its obligations under EU law.¹⁰⁷ In addition, it is the national courts' duty to decide whether a rule of national law should be applicable in individual cases or, as explained above, by setting it aside if it is not compatible with EU law. As widely admitted, the jurisdiction of the CJEU is quite limited at the national level.

⁹⁹ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹⁰⁰ Chalmers D. et al. (2010) *European Union Law (Second Edition)*. Cambridge: Cambridge University Press 269.

¹⁰¹ For an interesting analysis regarding the relationship between EU law and national constitutional law see the case BvE 2/08 *Gauweiler v Treaty of Lisbon*, Judgment of 30 June 2009.

¹⁰² TEU, TFEU and Charter of Fundamental Rights of the European Union.

¹⁰³ CJ, GC and CST.

¹⁰⁴ Tesauro G. (1993) *The Effectiveness of Judicial Protection and Co-operation Between the Court of Justice and National Courts*. *YBEL 13: 1-17*.

¹⁰⁵ Then the Court of First Instance.

¹⁰⁶ Case T-51/89, *Tetrapak* [1990] ECR II-309.

¹⁰⁷ Lang J.T. (1996) *The Duties of National Courts under Community Constitutional Law*. *Institute of European Law Cambridge 4*.

Thus, it is the national courts' duty, in other words the duty of the Albanian courts, as *EU courts of general jurisdiction* to apply EU law whenever appropriate.¹⁰⁸

3.3 Principle of Indirect Effect

Another instrument used by the CJEU to enhance the power of national courts and to transform them into EU courts is the *principle of indirect effect*. Through this doctrine, the CJEU compelled national courts to interpret, as far as possible, national legislation in accordance with the spirit and aims of EU law. The *indirect effect doctrine* began with the *Von Colson case*, in which the CJEU suggested that national courts are required to interpret domestic law in accordance with relevant Directives.¹⁰⁹

After *Von Colson*, and in subsequent cases, the Court expanded the doctrine of indirect effect.¹¹⁰ This principle was required to be used by national courts, not only regarding their national laws implementing Directives, but to all national legislation, which should be interpreted in light of EU law.¹¹¹ Although some have supported the strengthening of the indirect effect doctrine, others are opposed to doing so.¹¹² They argue that this doctrine is not only uncertain regarding its limits but, knowing that EU law is so wide-ranging, it is very difficult to be used fully and effectively by all national lawyers or judges.¹¹³ In regard to these critics, the CJEU has recognized that the indirect effect has its limits and does not suggest *contra legem* interpretations of national law or require that national laws be given meanings contradictory to their ordinary meanings.¹¹⁴ Despite this, however, the CJEU has in recent years not only recognized indirect effect as a paramount principle but has begun expanding it further.¹¹⁵

From the perspective of Albanian courts, the consequence of all of the above is that, wherever the executive or legislative have failed to apply EU law or to correctly implement a Directive, again, according to the CJEU, national courts have to fill the gap.¹¹⁶ Through the instrument of indirect effect, national courts of Members and Candidate states, including Albania, are entrusted with another power—the power to interpret national law in accordance with EU law. This new instrument, also granted to Albanian judges, is not only what some scholars call a strengthening of the “national courts’ interpretative duty.”¹¹⁷ To the contrary, in addition to their power to interpret national laws in light of Albanian constitution, Albanian courts are vested with the power to interpret national law in the light of the EU legal order and its principles. It is very likely that this new power will remind them that their duties are not only national, but are also EU duties, under the *principle of sincere cooperation*.¹¹⁸

Finally, the indirect effect instrument has not only enhanced the power of national courts of Members and Candidate States, including Albania, but has also aided in their transformation from merely national institutions into EU courts of general jurisdiction. The CJEU, by granting them the power to not only directly and with supremacy apply EU law, but also to interpret existing national law in the light of EU law, made national courts more than just national institutions. At the very least, by using the indirect effect doctrine, the CJEU required national judges, including Albanian judges, to be aware of their dual role as national judges and guardians of EU legal order within their jurisdiction. Although some might consider this dual role of national courts to be a corollary of the principle of sincere cooperation between

¹⁰⁸ Case T-51/89, *Tetrapak* [1990] ECR II-309, 364. See also the official website of the CJEU [Online] Available at http://curia.europa.eu/jcms/jcms/Jo2_6999/ [accessed 10.09.2014].

¹⁰⁹ Case 14/83 *Von Colson* [1984] ECR 1891.

¹¹⁰ Chalmers D. et al. (2010) *European Union Law (Second Edition)*. Cambridge: Cambridge University Press 294.

¹¹¹ Case C-106/89 *Marleasing* [1990] ECR I-4135.

¹¹² Chalmers D. et al. (2010) *European Union Law (Second Edition)*. Cambridge: Cambridge University Press 296.

¹¹³ De Burca G. (1992) Giving Effect to European Community Directives. *Common Market Law Review* 55: 215.

¹¹⁴ Case C-334/92 *Wagner-Miret v Fondo de Garantia Salarial* [1993] ECR I-6911.

¹¹⁵ Joined Cases C-397/01–C-403/01 *Pfeiffer and Others v Deutsches Rotes Kreuz* [2004] ECR I-8835; Case C-212/04 *Adeneler and Others v ELOG* [2006] ECR I-6057; Joined Cases C-378/07–C-380/07 *Angelidaki v ONAR*, Judgment of 23 April 2009.

¹¹⁶ De Burca G. (1992) Giving Effect to European Community Directives. *Common Market Law Review* 55: 217.

¹¹⁷ Chalmers D. et al. (2010) *European Union Law (Second Edition)*. Cambridge: Cambridge University Press 295.

¹¹⁸ Article 4(3) TEU.

EU and Member State/Candidate Country institutions,¹¹⁹ it is difficult to deny at least their local national role as *de facto* courts of the European Union.

3.4 EU Remedies in National Courts

Although the *supremacy*, *direct effect*, and *indirect effect* instruments were used by the CJEU to empower and transform national courts, this would have little substance if no remedies followed.¹²⁰ In this vein, one of the most powerful tools used by the CJEU to Europeanize national courts is the *EU remedies*. In cases such as *Rewe*¹²¹ and *Francovich*,¹²² the CJEU increased the power of national courts by allowing for damages to be awarded against national governments when an individual had suffered loss because of a breach of EU law, or due to non-implementation of a Directive.

Although there are at least four known circumstances where a right to EU remedies exists,¹²³ our focus will be mostly on the state's liability for damages where a serious breach of EU law has led to a loss for the individual concerned. This category of EU remedy in particular embodies the strongest example of the role of national courts as EU courts, by guaranteeing EU rights for individuals.

It may come as a surprise to Albanian and other Candidate States, however, that state liability includes not simply the executive and/or legislative institutions of the Member/Candidate States, but also the acts of judiciaries.¹²⁴ Although all kinds of state liability for breaches of EU law are important—be it from the executive, legislative, or judiciary power—for the purpose of this paper it is the last form that will be focused. State liability caused by national judiciaries—in our case from Albanian courts—on one hand, and the right of individuals to ask for EU remedies in the same national courts on the other, is the highest form of showing the dual role of the national judiciaries and their judges. In these circumstances, they must take up the EU mantle, setting aside their national roles and interests, and even making decisions against higher national courts that make decisions in violation of EU law.

To better comprehend the complexity of the dual role of the national courts from an EU remedies prospective, it is important to view both the doctrine and jurisprudence of the CJEU. The Court, based on previous case law stemming from *Francovich*¹²⁵ and *Brasserie du Pecheur* in particular,¹²⁶ indicating that states are liable for the acts of all of their institutions, made another step forward by introducing the liability for rulings by national courts.

In an extremely important judgment, *Köbler v Austria*, the CJEU interestingly and challengingly ruled that the Member States were liable for EU law infringements even when are made by the national courts, including the courts of last instance.¹²⁷ The same argument is certainly valid even for Candidate Countries, including Albania. Although this idea may come as a surprise, and raises important constitutional questions about the principles of legal certainty and traditional judicial hierarchies within the national level, yet the CJEU was determined to continue its process of transforming national courts into EU courts. In the long run, reparation for the effects of an erroneous judicial decision could be considered to enhance the quality of a legal system and the authority of the judiciary within Member States or Candidate Countries, including Albania.

Although a very challenging judgment, *Köbler* was reaffirmed and developed further by the CJEU a few years later in the *Traghetti* case.¹²⁸ The Court not only re-stated that the *Köbler* ruling applied to all national courts, including the courts of last instance, for a manifest infringement of, or refusals to apply, EU law, but that it also applied to poor interpretations. As some scholars rightly argue, this indicates that the liability test will turn from *fault-based tests* to *competence-based tests*.¹²⁹ Such a development affects not only Member and Candidate States, but national courts and judges as well. They should not

¹¹⁹ Article 4(3) TEU.

¹²⁰ Chalmers D. et al. (2010) *European Union Law (Second Edition)*. Cambridge: Cambridge University Press 276.

¹²¹ For direct effect liability see Case 33/76 *Rewe* [1976] ECR 1989.

¹²² For indirect effect see Case C-6/90 *Francovich* [1991] ECR I-5357.

¹²³ Chalmers D. et al. (2010) *European Union Law (Second Edition)*. Cambridge: Cambridge University Press 268.

¹²⁴ Case C-224/01 *Köbler v Austria* [2003] ECR I-239.

¹²⁵ Case C-6/90 *Francovich* [1991] ECR I-5357.

¹²⁶ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur/Factortame III* [1996] ECR I- 1029.

¹²⁷ Case C-224/01 *Köbler v Austria* [2003] ECR I-239, paragraph 52-56.

¹²⁸ Case C-173/03 *Traghetti del Mediterraneo v Italy* [2006] ECR I-5177.

¹²⁹ Chalmers D. et al. (2010) *European Union Law (Second Edition)*. Cambridge: Cambridge University Press 312.

only deliberately and manifestly adhere to EU law, but should also increase their knowledge of EU law, in order interpret it in a reasonably competent way. This is another fundamental reason why Albanian judges can no longer explicitly or implicitly deny/resist learning and correctly interpreting the EU law. The consequences of such Eurosceptic actions would fall firstly upon them.

In conclusion, the Europeanization of national courts, in other words the use of national courts for EU integration, by enhancing their powers and transforming them from merely domestic institutions into EU institutions as well, was not done solely on the merits of just one instrument, including the EU remedies. The CJEU, in a very courageous and effective way, mostly through the preliminary ruling procedure, used the above principles of supremacy, direct/indirect effect, and EU remedies, in an overarching manner. Through these legal tools the CJEU made national courts its allies in the enforcement of EU law at the national level, transforming them into *EU courts of general jurisdiction*.¹³⁰ This is the de facto legal status that Albanian courts are having at the moment, a status that will progress more with the further EU integration of Albania.

4 The Constitutional Framework of Albania and the New Role of the Judiciary

Rightly one can ask: It is all fine acknowledging the new role of the Albanian courts/judges, and the practical instruments that they can use for the EU integration, however, are these actions compatible with the Albanian Constitution? The short answer is “Yes”. Nevertheless, the aim of this article is to respond to the above question in more details. In order to do this, the paper will shortly analyze one by one all the above instruments.

The preliminary ruling procedure – the right to request that the CJEU provide a ruling where a question of EU law is raised before a national court - is the only instrument that Albanian judges, including judges of other Candidate Countries, cannot use in the same manner as the judges of Member States. This instrument according to the so far jurisprudence of the CJEU and Article 267 of the TFEU seems to be reserved only to Member States.¹³¹

However, Albanian courts can certainly use the preliminary ruling procedure to the Albanian Constitutional Court if a particular national law is incompatible with the Albanian Constitution and EU law.¹³² They have to bring explicit constitutional arguments and supplement them with EU law arguments. If the matter is clearly against EU law but no argument can be made regarding the Constitution, then the Albanian judges can use the other instruments, such as the *supremacy principle* and/or the *principle of direct/indirect effect*. In this way, they set aside the Albanian national law, and directly apply with supremacy the EU law.

The principle of supremacy and direct effect of EU law – are two legal instruments that are compatible with the Albanian Constitution, and can even derive from it. Although the Albanian Constitution does not explicitly mention EU and EU law no-where in its text, yet, it gives a unique place and hierarchy to international law and law of international organizations that Albania is part. If EU would at least be considered as an international organization with which Albania has ratified international agreements, or is partially or fully part of it, then the *principle of supremacy of EU law* derives directly from the Albanian Constitution. Article 122/2 states that “an international agreement ratified by law has priority over the laws of the country that are incompatible with it”. More interestingly, it goes further by admitting that: “The norms issued by an international organization have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organization is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein”.¹³³ The same can be claimed for the principle of direct effect of EU law. The above article of the Albanian constitution admits the “direct application of the norms issued by the organization” when,

¹³⁰ Case T-51/89, *Tetrapak* [1990] ECR II-309.

¹³¹ Article 267(2) TFEU.

¹³² Article 145/2 of the Albanian Constitution.

¹³³ Article 122/3 of the Albanian Constitution.

as in the case of EU law, it is expressly contemplated in the ratified agreement.¹³⁴ A broad interpretation of these articles can lead to the conclusion-which I also hold- that EU law can be considered above the Albanian Constitution.

The principle of indirect effect of EU law – is an instrument that does not derive explicitly from the Albanian Constitution. However, judge’s duty is to interpret the law, and according to Albanian Constitution “Judges are independent and subject only to the Constitution and the laws”.¹³⁵ Thus, nothing stops them to interpret national legislation in accordance with the spirit and aims of EU law.

Through the *indirect effect* instrument whenever the executive or legislative have failed to apply EU law or to implement it correctly, Albanian courts have to fill the gap.¹³⁶ National courts of Members and Candidate States, including Albania, are entrusted with the power to interpret national law in accordance with EU law. Besides their power to interpret national laws in light of Albanian Constitution, Albanian courts are vested with the power to interpret national law in the light of the EU legal order and its principles. The power to not only directly and with supremacy apply EU law, but also to interpret existing national law in the light of EU law, make Albanian courts stronger and remind us that they are more than merely national institutions. Albanian judges have a dual role, as both national judges, and also guardians of EU legal order within Albania, and the Albanian Constitution certainly does not prohibit them to be so.

The EU remedies in national courts – is certainly the most important instrument that Albanian courts/judges need to understand and apply correctly. It may be a new concept from an EU perspective, but it surely is not new for the Albanian Constitution. According to Article 44: “Everyone has the right to be rehabilitated and/or indemnified in compliance with law if he has been damaged because of an unlawful act, action or failure to act of the state organs”.¹³⁷

Unfortunately, until today it is not widely applied, and almost not even thought to include remedies and compensations against an unlawful act, action or failure to act of courts.¹³⁸ If Albanian courts/judges, individuals, academics, however, will start to think and use this instrument for EU remedies, then it is very likely that it will revolutionize the entire judicial system. Besides remedies for breach of EU law, it may also be expanded to remedies for breach of national Constitution/laws, and it will indeed raise more awareness and responsibility to Albanian judges.

It is entirely constitutional that Albanian judges to start using the instrument of EU remedies in national courts. Understandably, to do this, they should increase their knowledge of EU law, in order interpret it in a reasonably competent way. This is another reason why Albanian judges ought to learn and correctly interpret the EU law. Otherwise, the consequences of misapplication of EU law, would have direct consequences upon the Albanian taxpayers and judges themselves.

4.1 Constitutional Reform Recommendations for EU Integration of Albania

Although the Albanian Constitution clearly allows the use of all the above EU integration instruments by Albanian courts, yet, significant changes and constitutional reforms are still needed. It is the time that the Albanian Constitution recognizes the special place of EU, EU institutions and EU law in its content. In addition, Albanian Constitution can explicitly state the supremacy and direct effect of EU law, in order to make it more visible and understandable to both, public and courts. Another significant positive Constitutional change would be the explicit right and duty of courts to use the indirect effect instrument, in other words, to compel national courts to interpret, as far as possible, national legislation in accordance with the spirit and aims of EU law. Last but not least, the Albanian constitution should explicitly recognize the EU remedies in national courts, for a manifest infringement, refusals to apply, or poor interpretations, of EU law. Ultimately, another step forward would be introducing the liability

¹³⁴ Article 122/3 of the Albanian Constitution.

¹³⁵ Article 145/1 of the Albanian Constitution.

¹³⁶ De Burca G. (1992) Giving Effect to European Community Directives. *Common Market Law Review* 55: 217.

¹³⁷ Article 44 of the Albanian Constitution.

¹³⁸ As far as I am aware of, based on my experience as judge and academic, there is not a single case for remedies and compensation against an unlawful court decision, action or failure to act of courts. Moreover, even in the scholarly Albanian literature, this idea was never discussed, and is almost entirely new.

for both EU and national constitutional/law infringements, even when are made by the national courts, including the court of last instance.

5 Conclusion

Indeed, the "Europeanization" of the Albanian judiciary and judges is not an easy process. Difficulties have encountered states much more consolidated than Albania; therefore, active participation of many actors is a necessity. At first, this operation starts with Albanian judges of all levels. In the consciousness of each of them should be imbibed once and for all the principle: "Before being an Albanian judge, I am now a judge of the European Union". This is not only a privilege. It is a Constitutional and European duty for every single Albanian judge of any level. However, to help establish this European mentality to the Albanian judges, deep and urgent actions are needed in the Albanian School of Magistrates curriculum and law faculties. EU law and the practice of the CJEU should become the core of the educational programs of existent and candidate judges. In addition, the study of European law must become the core of all law schools.

Other actors who can and should contribute to the process of "Europeanisation" of the Albanian judiciary are the legislative and executive branches. They should not only improve the physical/material infrastructure of courts, and urgently increase the budget for the judicial branch (at least at the levels of neighbour Balkan countries); but also they should adopt legislative acts in favour of the process of "Europeanisation" of the Albanian judiciary.

However, a much stronger voice in this process is expected and should come from the EU institutions, including the bilateral Council of Stabilisation and Association. The focus of these actors should be directed to the Albanian judiciary as the only EU local body, which is *de facto* and *de jure* responsible for the application of the SAA and EU legislation in Albania. Considering Albanian judges as "agents" of the EU in Albanian soil, European institutions should do more to guarantee their training with EU law, as well as the consolidation of their independence and accountability.

Last but not least, the "Europeanization" of the Albanian judiciary and its transformation into the "engine" of EU integration, is not limited just at the above actors. Rather, are Albanian citizens, media and civil society, who have to support and reinforce this process. Everyone should realize that since the entry into force of the SAA, and particularly after the EU Candidate status, the rights of every individual in Albania are regulated not only by national legislation, but also by EU law. Everyone should agree that the EU institutions in Albania, are not those of Brussels, but are precisely the Albanian courts of all levels. If lawsuits based on EU rights would be more frequent, Albanian judges would have no choice, but to find and apply EU law more frequently, by transforming themselves into the expected EU integration "engines".

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