RATIFICATION, THE INSTRUMENT OF RATIFICATION AND ITS ROLE IN THE ENTRY INTO FORCE OF INTERNATIONAL TREATIES

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ABSTRACT

Binding international treaties is an important issue that aims to create international rights and obligations between the parties in the treaty. The procedure to conclude a treaty is made by three phases including means of expressing consent to be bound. Ratification is a tool that includes in itself a process that combines aspects of international law with internal arrangements. This phase concludes with the submission of the instrument of ratification by the states. This mean that the instrument of ratification is a very important element for the entry into force of the treaties and also it is strongly related with the moment of creating legal effects for the parties. This paper aims to analyze in terms of qualitative methodology based on research in the literature and in the respective legislation the main elements of the ratification process and the provisions of Albanian legislation on this issue. Also the purpose of this article is to clarify the meaning and content of the instrument of ratification and the role that it plays in the entry into force of international treaties. ratification remains one of the main means of expression of consent given that in most cases, even when consent is given by other means, is required the strengthening of the consent by ratification. In Albania the ratification process is required for the international treaties with a substantial importance for the state and this is made by the Parliament. The instrument of ratification remains a key element in the entry into force of the treaties.


1. General considerations about the ratification

The procedure of concluding an international treaty is an important issue for the states as well as for the international law itself. It is known that the conclusion of an international treaty goes through the negotiations, expressing the consent to be bound by a treaty and the entry into force of the treaty. Vienna Convention “On the law of treaties” 1969, as the most important international legal act in this field, handles the means of expressing consent to be bound by a treaty and provides that this can be done by signature, ratification or accession. Of
course that ratification is one of the most important processes in this regard, as it usually is required even when consent is expressed by other means. Vienna Conventions (referred below as CV) provides that consent by ratification is regarded as a final stage for the conclusion of the treaty (but not for its entry into force), since this is a procedure used after the signing and some treaties provide that the consent will be considered officially given after the ratification (Dixon, McQuorquordale, Williams, 2011). In fact ratification often is interpreted as a process of national law which gives legal effect and enforceability of an international treaty, but this is a wrong interpretation for several reasons. Firstly, the fact that ratification is provided by the Vienna Conventions necessarily means its international character. Secondly, if we refer to Article 2 of the CV, it states that "ratification......means in each case the international act so named through which a State presents internationally its consent to be bound by a treaty ". This definition indicates that the Convention does not see ratification as a legislative process, but as an international legal act. Thirdly, the above definition explicitly defines as an act whereby is expressed the consenting to be bound by an international treaty and it does not mention its entry into force. This shows that the international aspect of ratification is divided and indifferent to the domestic legislative and constitutional aspect through which it is formed or realized the will to express consent to be bound by a treaty through ratification.

Normally, the question would be why the expression of consent is needed if it is done before through signing? Of course the answer to this question is not exhaustive, there may be cases where states require sufficient time to decide if it want to be bound by the treaty in question or not as well as whether to make reservations, may have treaties that require adaption of the domestic legislation before the treaty becomes obligatory, or there may be states that their legislation provides that for certain types of agreements may require the consent of a particular state body, etc. Although, referring to VC, there are different approaches to this questions, some scholars think that ratification should be made only if the treaty expressly so provides (and this is also the UK approach), others think that ratification should be made in each case unless the treaty provides differently (Shaw, 2008 pg. 912). In any case, the VC is vague in this aspect and this can bring practical problems, therefore it is good that during the negotiations the parties stipulate expressly the means of expressing consent to be bound by the treaty (Dixon, 2010, pg. 110). It must be said that ratification is a discretionary act of a State (Puto, 2008, pg.371), it means that there is no obligation to necessarily ratify an agreement signed, so it has the full freedom to ratify or not
The same attitude holds the Albanian Constitutional Court in the decision of the Agreement with Greece “For the delimitation of their respective sea areas, continental shelf and other areas belonging under international law” which argues that "In cases where internal legislation conditions the entry into force of the agreement with the ratification by the parliament of each country, this process (ratification) cannot be regarded as a formal simple act. It is an essential process closely associated with the entry into force of the agreement signed. State party in the agreement is free, through its legitimate authorities, to ratify the agreement or not." 

On the other hand it must be said that there are no sanctions if an international treaty is not ratified, as being an entirely discretionary act in character, in this case state cannot be charged with the responsibility and thus Constitutional Court justifies the aforementioned decision, explaining that "as long as the agreement is not ratified and does not come into force, we cannot have deviations from international legal obligations" 

According to the Vienna Conventions, consent may be given through the ratification, when the treaty in one of its provisions provides that should be in this form, if the contracting parties themselves have recognized or expressed this during the negotiations or when the treaty was signed that will be subject to ratification. The same provision provides that consent will be expressed through the ratification even when it is determined in the content of omnipotence, because it could be an agreement that under domestic legislation requires the confirmation of certain state bodies.

2. Ratification in Albania

Certainly we cannot deny that the ratification is accompanied by an internal process of consent by the State authorities of the signatory states. This process is determined by each state separately, depending on the manner of its organization. Ratification of international agreements is provided in the main state acts of the Albanian state. In “Organic Statute” we cannot find provisions for this process, but based on what we discussed above, was the prince that decided international agreements which means that the right to confirm the agreements was of the prince. While in the second paragraph of section 60 of the “Enlarged Statute of Lushnja”, in the powers of the Supreme Council stipulates that "treaties and agreements have no effect without the consent of Parliament" (Luarasi, 2014), which means that any international agreement must pass through ratification of the legislative body.
In the “Fundamental Statute of the Republic of Albania” the right of ratification of treaties and international agreements concluded by the President of the Republic was known by both Houses, so, it had to be accepted by the Chamber of Deputies and the Senate too. “Statute of the Albanian Kingdom” provides that treaties with political nature connected by the king do not undergo the process of ratification by the Parliament, but the latter is only made aware of, and treaties of economic nature must pass through Parliament's ratification in order to be effective.

The Constitution of the Republic of Albania in 1946, for the first time explicitly mentioned the term "ratification" and we can see this power divided between the Presidium of the National Assembly and the National Assembly. Although, in principle it was a right that belonged to the Presidium, but when the latter deemed it appropriate, it could decide ratification to be made by the National Assembly itself. The other acts then do the same adjustment for the process of ratification, Article 2/1 of the Regulation "On the preparation of documents used for the conclusion and entry into force of treaties, agreements and conventions" article 67 and 77 of the Constitution of the Socialist Republic of Albania in 1976, and Article 13 and 14 of Regulation No. 243, dated 27.1.197 "For the conclusion of treaties and international agreements". Law “On basic Constitutional Provisions” provides that the right to ratify international treaties or agreements was of the president of the Republic by decree and the National Assembly by laws, but as regards the latter's powers predicts that which category of agreements must ratify "ratifies and denounces": Treaties of a political nature; Treaties or agreements of a military character; Treaties or agreements relating to the boundaries of the Republic of Albania; Treaties or agreements relating to the basic rights and duties of the citizens; Treaties that derive financial obligations to the state, treaties or agreements leading to changes in legislation; Treaties or other agreements which provide that the ratification or denunciation should be done by the National Assembly. The right of these bodies to ratify treaties is once again restated in Law no. 8371, dated 9.7.1998 "On the conclusion of treaties and international agreements".

The 1998 Constitution makes a new regulation and the right of ratification of the agreements is not mentioned to the President but only to the Assembly. The Article 121 of the Constitution stipulates that the ratification of the agreements is made by law in all cases where a party of these agreements is the Republic of Albania, which means that it is about interstate agreements and not intergovernmental ones if we refer to the division that the above mentioned law makes about this case and usually arrangements of this nature are signed by
the president. International agreements which are subject to ratification process by the Parliament are "... a) territory, peace, alliances, political and military issues; b) human rights and freedoms, obligations of citizens as provided in the Constitution; c) membership of the Republic of Albania in international organizations; d) the undertaking of financial obligations by the Republic of Albania; d) the adoption, amendment or repeal of laws." However this is not an exhaustive list, because paragraph 2 of the same article states that the Assembly can ratify international agreements that are not part of the above-mentioned provisions.

The Constitution also provides that ratifying of international agreements is made by the Assembly, but does not specify the majority required for the above mentioned agreements referred to in Paragraph 1 of Article 121, while the agreements which are not included in these categories, is required the majority of all its members of the assembly. Article 123 of the Constitution stipulates that "I. Republic of Albania, based on international agreements, delegates to international organizations state powers for specific issues "and in this case the required quorum is a majority of all its members of the assembly." As regards the amendment, supplement or repeal of laws whereby are ratified international agreements, we can say that it takes the same majority with which these laws have been adopted.8

Regarding the ratification this Constitution makes a very interesting prediction regarding agreements that delegate state powers to international organizations, for which the Assembly may decide that the ratification can be done by referendum. Still we do not have any other legal prediction specifying the reasons for which the Assembly can take such a decision nor any case when ratification is made by referendum.

Regarding the principles and procedures to be followed for ratification, Article 121 provides that should be provided by law, but whereas the Constitution is adopted in October 1998, the law "For the conclusion of treaties and international agreements" was approved in July 1998, so about 3 months before the Constitution and mostly reflects the requirements of the Law on The Constitution, and has deficiencies in some cases and objections to the provisions of the Constitution in 1998, therefore it would be necessary to change it, but as long as it is not possible, are applied its provisions. Specifically in 23 Article stipulates that "The Ministry of Foreign Affairs presents to the Council of Ministers the acts (report, bill or draft) for ratification, acceptance or approval of international treaties and agreements within one month from the date of filing of the latter ones. The Council of Ministers presents the bill to the People's Assembly, together with the respective report, on ratification or adherence to
treaties and agreements containing a clause of ratification or accession and approves agreements containing a clause of approval. Ratification, accession and adoption of treaties and agreements is notified to the other party and, when the latter officially announces its ratification, acceptance and approval, Ministry of Foreign Affairs sends to the ministries and other institutions concerned a copy of the treaty or agreement."

The law in question has determined the way of drafting instruments of ratification by the Foreign Ministry, which is also the depository institution for the instruments of ratification of the contracting states/organizations. Usually they write only the title not the text and we can find written in them the reserves that could make the state to one or more provisions of the treaty and translated into the language of a contracting state.

3. Instrument of ratification and its role

In the Article 16 of the CV is provided that the ratification consists in preparing an act called the ratification instrument and in its submission following the procedure established in the treaty provided. When it comes to bilateral treaties the expression of consent is made with the exchange of the instrument of ratification. Usually in these cases, when the development of the negotiations is made in one of the states, the exchange is made in the other state. There is no special procedure for the exchange of instruments of ratification or not necessarily is required that the person who submits the instrument to be equipped with fullpower. The exchange usually is made by the Foreign Ministry or from the diplomatic representatives of the state. For multilateral treaties it is impossible to implement the exchange of instruments of ratification between each of the parties, therefore they decide for a depositary state where the instruments of ratification are deposited. Conventions provide that if the parties have decided in advance, they just have to notice the other state or the depositary state for the design of the instrument of ratification and it is considered that it provided its consent through it. The instrument of ratification is in a written form and is signed by a competent authority to conclude the treaty. Usually it contains the title of the agreement, the time and place of the signing, a brief summary of the substance of the agreement, data and signature of the representative of the state of the country where it is drawn and corresponding seal.

The instrument of ratification has a particular importance in the expression of consent to be bound by a treaty, since it relates directly to the entry into force of the treaty for the state which submits the instrument. So, exhaustion of ratification as a stage does not mean the
entry into force of this treaty, because the entry into force is considered the moment when they hand in the instrument of ratification. There may be treaties which provide that the entry into force will be linked to the exchange of instruments of ratification in a particular state, usually these are bilateral treaties and if negotiations are held in the capital of one of the parties, the exchange is made in the capital of the other party (Harris, 1998). Multilateral treaties may have projections which link the entry into force with the moment when all signatories states of the treaty would submit the instruments of ratification. We should note that this is not an always followed rule, especially for multilateral treaties that seek to have a broad range in as many countries, as the condition of submission of all instruments of ratification can severely delay or even more can suspend for an indefinite period the entry into force of the treaty. For this reason, a large number of multilateral treaties stipulate that the treaty will enter into force at the moment of depositing of a certain number of instruments of ratification by the signatory states (Wildhaber, 1985, pg. 485), the Vienna Conventions themselves which predict that they will enter into force thirty days after submission of the 35th instrument of ratification by signatory states. This is the case when the treaty not only provides the number of instruments that seeks to enter into force but also the time when you begin to create legal effects and in case 30 days must be numbered correctly and not always happens that the date of handing in the last instrument of ratification coincides with the date of entry into force of the treaty. While in the cases when it is predicted that the treaty will enter into force one month after delivery of the last instrument of ratification, then the delivery date will coincide with the date of entry into force of the next month (Aust, 2012, pg. 169).

Also, we can refer to the case of Poland and Germany on the Lisbon Treaty, where although the process of ratification by the legislative bodies was implemented, the respective heads of state claiming that the treaty violated the constitutions of these states, refused to hand over the instruments of ratification for the treaty, temporarily suspending the entry into force for these countries. After the award of the relevant decisions by the Constitutional Court that the treaty did not contradict the internal constitutional order, they handed the instruments of ratification and the Lisbon Treaty came into force for Germany and Poland.

We can mention the same thing for our country related to the Rome Statute. It is known that this statute created the International Penal Court, which would develop criminal court proceedings for the state officials who commit international offenses like crimes against humanity, war crimes, genocide, etc. In the text of this statute it was predicted that it would
enter into force at the moment that they would hand in the sixty instrument of ratification. Albania was one of the countries that participated in the negotiation and signed the statute and due to the sensitivity that had at that time on the issue of Kosovo, it was supposed to be one of the states that will not only deliver in a short time the instrument of ratification, but will also give its contribution to more rapid fulfillment of the necessary number, lobbying that other states to which had good relations to deposit the instruments of ratification. But against all expectations, after passing the ratification process in the Assembly, the president of that time refused to hand over the instrument of ratification with the claim that this Statute was into contradiction with the constitution in the part of immunity of some officials, in the delegation of portions of sovereignty in the respect of the principle ne bis in idem, etc (Zaganjori, Vorpsi, Biba, 2012) and the entry into force of the Statute was hampered by the start of the process for controlling the constitutionality of the statute before the Constitutional Court. After the expression of the Constitutional Court that this decision was not contrary to the Constitution, was handed the instrument of ratification to the UN Secretariat, at 10 February 2003 (Zaganjori, 2012, pg.83), and the Statute entered into force in our country, though not with the same value and contribution because at this time it was passed the necessary number of instruments of ratification, required by the Statute to enter into force until 26 April 2002.

Multilateral treaties that establish rights and obligations of a general nature, generally have the specificity of provisions that enable accession of new states in a later time from the entry into force of the treaty. In such cases, for the acceding states the treaty will enter into force at the time of the handing in the instrument of accession. Vienna Convention provides that all states that adhere to a later time, the treaty will enter into force 30 days after the instrument of ratification.12 So, we must remember that it is used the same rule (i.e the passage of a period of time, the fulfillment of certain conditions, etc.) that is used for the entry into force of the signatories, but already calculating the time since moment of handing in the instrument of ratification of the acceding State (Villager, 2009, pg 320). In cases where the treaty provides that it will enter into force at a certain time after delivery of a certain number of instruments of ratification, it remains problematic the case when any of the states that have submitted instruments attracts them. In "UN depositary practice" which summarized the practice of UN in depositing of treaties, it is explained that we distinguish two important moments in these types of situations: when the instrument of ratification is withdrawn before the treaty has entered into force and when the instrument is withdrawn after
the entry into force of the treaty. In the first case the situation is more clear because it is understood that before the treaty enters into force parties have not obligations to each other and can be drawn upon without causing problems for other parties or to implement the treaty. Reasons for withdrawal may be the most varied, depending on the nature of the treaty and the interests of each country but states usually attract instruments because they want to make reservations to treaty provisions. In the second case where the parties withdraw after the entry into force of the treaty, thus reducing the number of instruments of ratification under the minimum required by the treaty for entry into force, the practice followed is that this will not affect the legal force that had received the treaty, and this practice is followed even if the treaty is scheduled to take effect after a period of time from meeting the required number of instruments of ratification and the instrument is withdrawn before the meeting of this time.

As a tool for the expression of consent to be bound by an international treaty VC predicts the adoption and acceptance, which are made in similar conditions to ratification. Adoption is the act whereby the prime minister or the chief executive give the consent to be bound by a treaty signed earlier, which is not subject to the ratification process. Section 2 /(d) of the Act states that "approval" means an act by which the Council of Ministers of the Republic of Albania finally approves a bilateral or multilateral agreement signed by the Government of the Republic of Albania". So, according to this forecast it comes to agreements signed on behalf of the government and not on behalf of the state. Perhaps here may constitute discrimination cases of Stabilization and Association Agreements, which due to the nature of the operation should be concluded by the heads of governments, but of importance are agreements that must pass the ratification process. This law provides that the Council of Ministers has the right to approve or denounce agreements that are not subject to ratification and on the other side has the right to grant approval for denouncing the agreements by ministries and other central institutions on its behalf. In fact there is an uncertainty why the Council of Ministers is required to adopt only reporting at a time when his approval is not required for the conclusion of agreements by the ministries and central institutions on its behalf. As a procedure, the Foreign Ministry sends acts (relation) to approve the treaty or agreement and within one month from the date of their deposit.
Conclusion

Ratification is a very important element of expressing consent to be bound by a treaty, because it means that the competent authorities or bodies of each state have approve the treaty and accept to be bound by its provisions. Vienna convention “On the law of treaties” 1969 doesn’t explain if the ratification is needed always, unless the treaty otherwise provides, or is needed only when the treaty expressly mention the ratification as mean of expressing consent to be bound, creating so practical problems.

Ratification process, as a part of domestic law, has been part of almost every fundamental act of the Albanian State, which means that the consent to be bound by treaties was an important matter which requires the consent of representative bodies. Although, there are different problems in the actual legislative frame, because the Constitution and the specific law have many deficiencies, which need to be completed or amended.

Ratification doesn’t mean the entry into force of the treaty because this is strongly related to the deposit or exchange of the instrument of ratification and this is the moment in which the treaty begin to create juridical effects for each state parties.

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