Judicial Application of International and European Law in Southeast Europe

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1 United in Diversity

History does not move in a straight line. And yet, while there are obvious differences in their political, economic and social constructs, the countries of Southeast Europe (SEE)[1] share—by and large—a common trajectory: one of transformation from authoritarian communist rule and centrally planned economies to liberal democracy and capitalism. With the exception of Albania, all countries of the Western Balkans were part of a single jurisdiction until the violent implosion of the Socialist Federal Republic of Yugoslavia. For almost half a century, they shared the same body of law, judicial system and legal culture. The new structures that have taken shape following the collapse of communism in the region in the early 1990s are largely the same. And like the countries of Central and Eastern Europe before them, the transformation of the countries of Southeast Europe has been driven by a desire to join the European Union. Whereas legal transition has so far been fairly swift on paper, the process remains incomplete in most parts of the region when measured against the standards applied by the European Commission.

Indeed, differences do exist, for instance in the speed of transformation. This is partly due to the diverging impact of the wars in the first half and at the end of the 1990s. In part, regional differences are also due to varying levels of political will to look beyond electoral cycles, break vested interests, curb corrupt trends during

[1] The loose geographical concept employed in this volume applies to the successor states of the Socialist Federal Republic of Yugoslavia + Albania. It does not encompass Greece, Bulgaria, Romania and Turkey.

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transition, and implement tough reforms for ulterior gain. Even if some results appear shaky, Slovenia and Croatia have realised the dream shared by all. They acceded to the EU in 2004 and 2013, respectively. All of the other countries of the region are locked into the Stabilisation and Association Process (SAP), the pre-accession process for the countries of the Western Balkans. They are parties to the Central European Free Trade Agreement (CEFTA) which, as a precursor to joining the Union's internal market, liberalises trade between them. And they have all concluded Stabilisation and Association Agreements (SAAs) with the EU,[2] even if the one with Bosnia and Herzegovina has entered into force only partially pending full ratification,[3] and the one with Kosovo has only been initialled.[4]

2 Constitutional Status of International Law

All SEE countries covered by the research in this volume have a monist approach to the relationship between national and international law. The Constitutions of Albania (Art. 122), Croatia (Art. 141), Kosovo (Art. 19), Macedonia (Art. 118), Montenegro (Art. 9), Serbia (Arts. 16 & 194) and Slovenia (Art. 8) state that international agreements which have been properly ratified and published in the official journal are an integral part of the country's legal order and enjoy primacy over national laws.

The latter phrase concerning primacy of ratified treaties over national law is not always as clear cut. This is the case, for instance, in the Constitution of Macedonia. In their contribution to this book, Marija Risteska and Kristina Miševa adhere to the formal distinction between monism and dualism and argue that given the fact that ratification is needed for an international legal act to become an integral part of the domestic legal order, the Macedonian system is to be described as a dualist one. In practice, however, the monist and moderate dualist approaches give rise to the same

[2] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/1-197; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L26/3-220; Council of the European Union, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part (6.6.2008) 8226/08; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/116-502; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3-254; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part [2013] OJ L278/14-471.

[3] Interim Agreement on trade and trade-related matters between the European Community, of the one part, and Bosnia and Herzegovina, of the other part, [2008] OJ L169/13–807.

[4] The EU and Kosovo chief negotiators initialled the SAA in Brussels on 25 July 2014.

results.[5] In keeping with widely accepted views on the relationship between international and national law,[6] one could therefore ascribe a monist status to the Constitution of Macedonia. After all, Article 118 stipulates that 'international agreements that are ratified and in accordance with the Constitution are an integral part of the domestic legal order and *cannot be changed or derogated with laws*'.[7]

Although the Constitution of Bosnia and Herzegovina (BiH) is silent on the legal status of international agreements in general, it is based on a treaty (the 1995 Dayton Peace Agreement) and its Article 2(2) states that the European Convention on Human Rights (ECHR) is directly applicable and hierarchically superior to national law.[8] Furthermore, Annex I to the Constitution of BiH lists other human rights agreements which also appear to be self-executing.

Some constitutions literally incorporate provisions of international agreements ratified by the SEE countries. The Slovenian, Croatian and Kosovo constitutions, for instance, borrow directly from the language of the ECHR.[9] The Constitution of Macedonia, which was developed incrementally on the basis of the 2001 Ohrid Framework Agreement, is founded on a long list of treaties and includes many a provision of the ECHR, the International Convention on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[10] As such, international and EU law has to a great extent been domesticated in the basic law of the lands of Southeast Europe. The same applies, albeit to a lesser extent, to the jurisprudence of international courts and tribunals. In Kosovo, the Constitution demands respect for the jurisprudence of the European Court of Human Rights (ECtHR), even if—or rather, exactly because—the country is not a member of the Council of Europe.[11] Slovenia and Croatia adopted constitutional amendments so as to secure the supremacy of EU law, as developed in the *Van Gend en Loos* and *Costa v. ENEL* judgments of the Court of Justice of the EU (CJEU).[12]

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[5] See also Janja Hojnik's interpretation about the views held in Slovenian legal theory in the chapter Judicial Application of International and EU Law in Slovenia.

[6] See Denza (2006), p. 429; Stein et al. (2012), p. 58.

[7] Emphasis added.

[8] The Albanian Constitution also refers directly to the ECHR (Art. 17). See the chapter by Gentian Zyberi and Semir Sali, The Place and Application of International Law in the Albanian Legal System.

[9] See, e.g., Arts. 22, 23 and 33 of the Slovenian Constitution, Art. 3 of the Croatian Constitution and Arts. 25 and 31 of the Kosovo Constitution. See also the chapters by Janja Hojnik, Judicial Application of International and EU Law in Slovenia; Ivana Božac and Melita Carević, Judicial Application of International and EU Law in Croatia; and Kushtrim Istrefi and Visar Morina, Judicial Application of International Law in Kosovo.

[10] See the chapter by Marija Risteska and Kristina Miševa, Application of International Law in Macedonia.

[11] Art. 53 of the Kosovo Constitution. See also the chapter by Kushtrim Istrefi and Visar Morina, Judicial Application of International Law in Kosovo.

[12] See Art. 3a of the Slovenian Constitution and Art. 145 of the Croatian Constitution. See also the chapters by Janja Hojnik, Judicial Application of International and EU Law in Slovenia; and Ivana

All this confirms that the treaties and international agreements to which the SEE countries are parties (e.g. ECHR, WTO treaties,[13] Aarhus Convention,[14] etc.) are part and parcel of their domestic legal orders and that they are hierarchically superior to national laws. This finding gives rise to the central question of this volume: to what extent is international law in fact applied by the judiciaries of the eight SEE countries under review?

3 Judicial Attitudes: The Soul Travels on Foot

As Sanja Bogojević points out in her contribution to this book, the judiciary in each country of the region typically consists of a three- or four-tier court system with the Supreme Court and the Constitutional Court on top. The judicial architecture of Slovenia and Croatia has been supplemented since accession to the EU: the CJEU has the monopoly to decide on the interpretation and validity of EU law, and as such binds Slovenian and Croatian courts and tribunals in their domestic application of EU law. The judicial system in BiH and Kosovo is different still, with foreign judges (and prosecutors) being part of the composition of higher court structures like the War Crimes Chamber of the State Court in Sarajevo and the Constitutional Court in Pristina, precisely in an effort to help the local judiciary attain higher standards and get to know international law better. While, as Bogojević observes, it is important to bear these institutional differences in mind when assessing *how* the judiciary functions in Southeast Europe, there is more than just the judicial architecture that explains national courts' relatively poor track record in the implementation of international law.

Unlike the—sometimes lightning—speed with which the governments and parliaments of SEE countries have been blazing the paper trail, the legal culture in the judiciaries has been far slower to adapt. The shadow of the authoritarian and communist legal mind-set, whereby judges were supposed to follow—not to interpret—the will of the legislature,[15] still looms large over Southeast Europe. Whereas older generations of judges are gradually retiring from the bench, a positivist approach to adjudication still prevails whereby the role of the judge is restricted to the objective application of the law and the act of legal interpretation amounts to nothing more than 'a process of deduction, void of any contextual considerations'.[16] As Zdenek Kühn has argued elsewhere for the countries of Central

Božac and Melita Carević, Judicial Application of International and EU Law in Croatia. More generally, see Albi (2005) and Kellermann et al. (2006).

[13] See the chapter by Tamara Perišin, Judicial Application of WTO Law in Southeast Europe.

[14] See the chapter by Lana Ofak, Application of the Aarhus Convention in Southeast Europe.

[15] Rodin (2009). http://www.pravo.unizg.hr/_download/repository/13_Rotterdam.pdf. See also Kühn (2006), p. 19; and Bobek (2011), p. 4: Legislative sovereignty was put on a pedestal, and law 'operated with the notion of unity of state power, not the separation of powers'.

[16] Rodin (2009), p. 2.

Europe, most post-communist judges still adopt a formalist understanding of the law, although their discourses are 'often clothed in a new legal vocabulary'.[17] The national reports compiled in this volume show that the situation in the countries of Southeast Europe is not much different. It will probably take another generation before legal education and culture catch up with the Europeanisation of the other branches of the *trias politica*.

The same applies to the reduction of corruption levels in the judiciaries of Southeast Europe, a matter which has remained outside the scope of the current research. The situation is rather bleak, as evidenced in a report prepared for the European Commission in 2013:

> The independence of the court system is a particular concern throughout the Western Balkans. The threat to this independence comes from several sides. From the state it is primarily through the control of the budget for the court system, and/or the appointment or termination of judges and prosecutors and finally in exerting political pressure in specific court rulings. From the private sector it is through the buying or influencing of legislation and/or outcomes in court cases, though this issue seems to be of much less concern in the region than the threat of state interference and influence.[18]

Subsequent progress reports issued by DG Enlargement have confirmed this sorry state of affairs.

4 Judicial Application of International Law

4.1 Introduction

One of the main features of a monist relationship between national and international law is the obligation of the authorities of a contracting party to a treaty to interpret and apply domestic legislation in conformity with the international obligations entered into by the state. In Albania, Croatia, Kosovo, Macedonia, Montenegro, Serbia and Slovenia, ratified rules of international law are applicable by the domestic courts and other public authorities without the need for any additional regulatory activity of the parliament or the government.[19] Recognition of the direct application of international agreements in Bosnia and Herzegovina arises from the interpretation of Articles 28 and 29 of the Law on the Procedure for the Conclusion and Execution of International Treaties.

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[17] Kühn (2004), p. 550.

[18] Berenschot and Imagos, 'Final main report: thematic evaluation of rule of law, judicial reform and fight against corruption and organised crime in the Western Balkans – Lot 3', IPA Service Contract Ref. No 2010/256 638, February 2013, p. 26.

[19] See Article 122(1) of the Albanian Constitution; Article 118(3) of the Croatian Constitution; Article 22 of the Kosovo Constitution; Article 98(2) of the Macedonian Constitution; Article 9 of the Montenegrin Constitution; Article 16(2) of the Serbian Constitution; Article 8(2) of the Slovenian Constitution.

4.2 Track Record (I): International Law

Reflecting judicial attitudes prevalent throughout the region, the national reports compiled in this volume show that courts in Southeast Europe are generally reluctant to apply international law, in spite of the institutional structures that have been established to facilitate the judicial consideration of ratified international law.[20] Insofar as higher courts are concerned, the focus is primarily on the direct application of rights codified in the ECHR, as exemplified by the reports on BiH, Kosovo and Macedonia. Contrary to lower courts elsewhere in Europe, which tend to be less conservative than superior—let alone last—instances, junior courts in the Western Balkans do not have a tendency of referring to international law, restrained as they are by the authority of their judicial hierarchy.

It transpires from all national contributions to this volume that the most frequently applied source of international law is the ECHR. Paraphrasing Sanja Bogojević: in Kosovo, 90 % of the case law referring to international law is related to rights and freedoms derived from the ECHR. Similarly, in Slovenia, BiH and Macedonia, the ECHR and the jurisprudence of the ECtHR are the main international sources of law referred to. In Serbia, Strasbourg case law (mainly relating to damages for defamation, family and property disputes) has been extensively used to interpret national law and, although it may not have any legally binding force, it is deemed to carry great moral and political value.[21] Along similar lines, the Albanian judiciary has in almost all human rights-related cases pointed to the ECHR. The same applies to Croatia.[22]

At the other end of the spectrum, Tamara Perišin and Lana Ofak in their contributions to the volume find that WTO law, environmental law and the Aarhus Convention have only rarely been applied in SEE countries.

With respect to the WTO, the membership picture is rather different from that of the ECHR: Montenegro joined the WTO only in 2012 and can thus not be expected to have produced a lot of practice; Bosnia and Herzegovina and Serbia are still in the pre-accession phase (but have observer status); and Kosovo has yet to apply. In

[20] As explained by Sanja Bogojević in her contribution to this book, 'Europeanisation' of the Judiciary in Southeast Europe, several SEE countries have also established special institutions and judicial pathways to facilitate the application of international law. In Serbia, for instance, a Commission for Information of Public Importance and Personal Data Protection has been set up to help litigators in making the necessary international law references. In BiH, litigants have the right to appeal to the provincial Human Rights Commission after they have exhausted all access to the domestic judiciary. This system is understood to help ensure that judicial decisions are in line with European and international principles of human rights. Similarly, the lower courts may refer to constitutional court issues concerning the ECHR or matters of public international law. See Gould (2002), pp. 178–179.

[21] See the chapter by Mirjana Drenovak Ivanović and Maja Lukić, Judicial Application of International Law in Serbia.

[22] Extensive citation of ECtHR case law by the Constitutional Court has become commonplace, but it remains very rare for other courts, even the Supreme Court, to do so. See Ćapeta (2005), p. 23, at 37.

the other four SEE jurisdictions there are hardly any cases where a national court has relied on WTO law or where parties have cited WTO law to support their claims. For Slovenia and Croatia, one could perhaps raise the argument that, with their accession to the EU, a large share of the competence in the field of WTO law has been conferred on the EU and that the status of WTO law is now largely governed by EU law. Yet, these countries had been WTO members for a decade prior to EU accession and so their courts could have been expected to cite or even apply WTO law.[23] Croatian courts stand out as the most active in the region, even if the total number of publicly available decisions referring to WTO law can be counted on two hands. The most prominent case concerns a foreign law firm wanting to set up a branch in Croatia on the basis of the General Agreement on Trade in Services (GATS). Slovenia comes second in the ranking, with regular courts and the Constitutional Court being exercised only by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The picture in the other two WTO countries is depressing. In Albania (a member since 2000), WTO law has been invoked once before the Constitutional Court. But the Court established that there had been a breach of the SAA and did not go on to analyse the compatibility of the measures with WTO rules.[24] In Macedonia (a member since 2003), there has been no court practice with WTO law whatsoever.

As Perišin surmises, the dearth of application of WTO law by national courts can be explained mainly by the small size of the SEE markets, making it too costly for other WTO members wanting to export to a country in the region to go through a WTO dispute in order to improve market access. What is worse, perceptions of endemic corruption, outdated laws, red tape and an ineffective and corrupt judiciary render many a Western Balkan country an unfriendly place for foreign investment. Whereas Western European companies expanded their businesses in Central and Eastern Europe prior to the EU enlargement waves to those countries, they now tend to look past Southeast Europe to more lucrative markets in Southeast Asia and the Far East. Insofar as foreign companies do try to get a foothold in the Western Balkans, they tend to resolve their issues and disputes out of court. Another explanation for the unpopularity of WTO law before national courts in SEE countries lies in the lack of education in the field,[25] making it unlikely for practising lawyers to invoke WTO law and for judges to rely on it. This is not helped by the fact that the WTO Agreement, its annexes and WTO case law are mostly unavailable in the official languages of SEE countries. On a brighter side, SEE countries have achieved trade liberalisation with each other and with their major trading partners through CEFTA and the SAAs, thus making adherence to and enforcement of WTO law less pertinent.

[23] Croatia (since 2000) and Slovenia (since 1995).

[24] See the chapter by Gentian Zyberi and Semir Sali, The Place and Application of International Law in the Albanian Legal System.

[25] Croatia stands out as the single exception.

With respect to international environmental law, all of the SEE countries (except Kosovo) are party to the 1998 Aarhus Convention.[26] Yet, there exists only one case of a SEE court (i.e. the Constitutional Court of Slovenia) repealing domestic legislation due to its incompatibility with the Aarhus Convention, *in casu* the omission by the national legislature to prescribe procedural rules for effective public participation in the preparation of implementing regulations for the Convention. As Lana Ofak points out, the ruling of 2008 exposes the duty which rests on all parties' shoulders to adopt detailed provisions in their national legislation to render full effect to the Aarhus Convention. Seizing the opportunity, the Constitutional Court in Ljubljana even went as far as to gold-plate Article 8 of the Aarhus Convention by turning the obligation of intent into one of result in the Slovenian national legal order.

Apart from this flagship judgment in which a national court set aside national law so as to give full effect to the Aarhus Convention, only the national reports of Slovenia and Croatia mention cases in which the Convention was referred to.[27] Since the Aarhus Convention came into force in respect of Croatia, there has only been one judgment of the Administrative Court of the Republic of Croatia in which the provisions of the Aarhus Convention were directly applied.[28] Ofak offers a host of explanations for the rare application of the Convention. The most important of those is no doubt that many rules of the Convention and other acts of international environmental law have been absorbed by the *acquis* of the EU,[29] domesticating them in the national legal orders of SEE countries which approximate their legislation so as to meet pre-accession requirements:

> In situations where the Aarhus Convention could be applied, courts would rather apply the rules of domestic legislation that are relevant to the merits of the case, or the provisions of the EU directives that regulate access to information, public participation in decision-making and access to justice in environmental matters. In addition, in many environmental

[26] All have also signed up to the 2003 Protocol on Pollutant Release and Transfer Registers (BiH and Montenegro still need to ratify the latter). Slovenia is the only country that has ratified the GMO amendment. These acts remain beyond the remit of the current research though.

[27] In Slovenia: Judgment of the Administrative Court, I U 2/2010; in Croatia: Judgment of the Administrative Court, Us-7555/2004-5, Judgment of the Misdemeanour Court in Zagreb, VI-G-2047-09). Ofak also mentions that out of 83 communications by individuals to a designated Committee which deals with cases of non-compliance under the Aarhus Convention, only four cases have been triggered by citizens of Western Balkan countries (two from Albania and two from Croatia). This harks back to the point made by Perišin, namely that the lack of education in the field partly explains the absence of attempts to invoke or refer to international environmental law.

[28] Judgment of 23 October 2009, Us-5235/2009-5, in a case in which the Croatian Society for Bird and Nature Protection appealed against a decision by the Ministry of Environmental Protection refusing to allow the Society to make copies of an environmental impact assessment study for the project 'Control works on the River Drava' over alleged breach of the intellectual property rights of the author of the study.

[29] There exist several EU Directives, binding on the Member States, that include rules on access to information, public participation in decision-making and access to justice in environmental matters: e.g., Directives 2003/4/EC, 85/337/EEC, 2001/42/EC, 2003/35/EC, 2004/35/EC.

> cases the Aarhus Convention [would] not be applicable, since it does not contain any substantive rules regarding the right to a healthy environment.[30]

4.3 Track Record (II): SAA and EU Law

When it comes to EU law, Slovenia and Croatia, in their capacities as Member States, are under a legal obligation to apply EU law. Slovenia, however, has reported little EU-law activity before the national courts since its accession in 2004; the few cases that deal with this body of law concern mainly asylum and taxation.[31] It is too early to detect any post-accession pattern in the Croatian courts.

A pertinent pre-accession period case in which EU law was taken into account and discussed as if it were binding on Croatian courts is that of the Zagreb County Court dealing with a collective claim raised by a group of NGOs against the discriminatory statements of a football official about homosexuals.[32] The Albanian Constitutional Court has made direct references to EU law,[33] as has the Supreme Court of Cassation in Serbia,[34] raising issues relating to the EU Charter of Fundamental Rights.

Prior to EU accession, the CJEU-developed doctrines of primacy, direct effect and state liability obviously do not apply in the legal orders of aspirant states. However, it seems reasonable to argue, as Mislav Mataija does in his contribution to this book, that there is nothing stopping national judges from interpreting the

[30] Ofak claims that the procedural rules of the Convention which were not incorporated into EU law remain irrelevant for the adjudication of disputes. Examples from Slovenia and Macedonia include Judgment of the Administrative Court, I U 2/2010, and *Citizens of Veles v. Republic of Macedonia*, respectively.

[31] See the chapter by Janja Hojnik, Judicial Application of International and EU Law in Slovenia.

[32] Zagreb County Court, judgment 15 Pnz-6/10-27 of 6 April 2011. The plaintiffs invoked the CJEU judgment in case C-54/07 (*Firma Feryn*) in which an executive's general statements against hiring immigrants were considered discriminatory.

[33] See, e.g., the Constitutional Court's judgment in *Instituti i Ekspertëve Kontabël të Autorizuar*, in which the Court invoked Directive 2006/43 on statutory audits of annual accounts and consolidated accounts as support in order to reject a claim that the national law on auditing was unconstitutional. It found, for example, that State supervision of auditors did not violate the independence of the profession, *inter alia* because such supervision is required by the Directive. Thus, hypothetical conformity with EU law was used as an argument for the actual conformity of the law with the Albanian constitution, though without clarifying the precise basis on which EU law was taken into account. See the chapter by Gentian Zyberi and Semir Sali, The Place and Application of International Law in the Albanian Legal System.

[34] Judgment of the Appellate Court in Belgrade, Rev. 2401/2010 of 28 April 2010. The Supreme Court supported its findings in a family law dispute by referring, in general terms, to the provisions on the right to family life and children's rights of the EU Charter of Fundamental Rights—again, without explaining why the Charter was a relevant legal source. See the chapter by Mirjana Drenovak Ivanović and Maja Lukić, Judicial Application of International Law in Serbia. See further Blockmans and Mihajlovic (2011), pp. 65–94.

already approximated domestic law and provisions of the SAA in the light of the *acquis*, in effect creating a 'back door' for the application of EU law prior to accession. In the countries which joined the European Union in the past decade this was not an everyday practice but there were notable examples whereby the Europe Agreements served as a back door to the application of EU law *avant la lettre*.[35]

In view of their content, the fact that some provisions are capable of having direct effect, and the inclusion of approximation clauses that could be read as imposing a duty on SEE courts to interpret national law in the light of EU law, one would assume that the SAAs concluded with the countries of the Western Balkans should provide at least as much material for judicial application as the Europe agreements did for the countries that joined in 2004 and 2007. However, as Mataija points out, despite these similarities, the evidence compiled in this volume shows that:

(i) the SAAs have not been relied upon to impose broad interpretative duties in the SEE states, such as the duty to interpret national law in the light of EU law (including CJEU jurisprudence);
(ii) [even if the first cases are now surfacing in Albania[36] and Macedonia,[37]] the SAAs have rarely been relied upon directly before national courts in order to disapply or annul conflicting measures of national law; but that
(iii) they have had a more practical effect in areas where the SAA makes a specific reference to the EU *acquis* – notably in competition law.[38]

[35] See, e.g., Łazowski and Wentkowska (2009), pp. 277–323 at 293–298. See also the chapter by Janja Hojnik, Judicial Application of International and EU Law in Slovenia. See further the national reports in Kellermann et al. (2006).

[36] The Albanian Constitutional Court found a violation of the SAA standstill clause, prohibiting the introduction of new or more restrictive quantitative restrictions on imports and measures having equivalent effect, against a decision of the Albanian Council of Ministers which treated domestically produced diesel oils more favourably than imports. The Constitutional Court not only found fault with the SAA standstill clause but also the SAA provision on measures that 'constitute a means of arbitrary discrimination or a disguised restriction on trade'. See the chapter by Gentian Zyberi and Semir Sali, The Place and Application of International Law in the Albanian Legal System. See further Caka and Blockmans (2010), pp. 511–530.

[37] In *Makpetrol v. Ministry of Finance Customs Office*, the First Skopje Basic Court similarly disapplied two by-laws imposing customs duties in violation of the Macedonian SAA and interim agreement. This judgment is the only example found for the purposes of this book of an ordinary court disapplying a provision of national law on the basis of the SAA. The court even made a declaratory finding that the provisions were 'no longer in force' because they conflicted with the SAA and the interim agreement. See the chapter by Marija Risteska and Kristina Miševa, Application of International Law in Macedonia.

[38] See, e.g., the 2006 case law of the Croatian Administrative Court, as well as the 2010 judgment of that court that again refuses the application of EU law, in contrast to the Constitutional Court. See also the chapter by Ivana Božac and Melita Carević, Judicial Application of International and EU Law in Croatia. Apart from Croatia, there is only one such case in the national reports: Court of BiH, decision No. S1 3 U 005412 10 Uvl of 15.3.2012, M.R.M. Ljubuški/ASA Auto d.o.o. Sarajevo (*ASA Auto*). See the chapter by Zlatan Meškić and Darko Samardžić, Application of International and EU Law in Bosnia and Herzegovina.

> The conclusion is that an SEE court disinclined to apply an SAA provision would be more likely to find it wholly inapplicable or not to have direct effect rather than to contrast it with CJEU case law and show why the SAA contextually warrants a lower level of protection, because the latter strategy would require a shift in the usual mode of argumentation applied by those courts.[39]

In sum, there is little evidence of the pre-accession use of EU law, whether directly or on the basis of an interpretative duty imposed by the SAAs. The key question, of course, is to what extent the judges in Southeast Europe can be expected to be *au courant* with EU law and use it in their daily practice. Issues of translation and education again play up in this context. As Adam Łazowski and I have argued elsewhere, one of the main weaknesses of the current candidates and potential candidates for EU membership is the poor shape of their national public administrations and judiciaries.[40] In the pre-accession context, human capacities are limited and due to budgetary restraints it remains a major challenge to create and to staff all national authorities which are necessary for the successful transposition and enforcement of SAA and EU law.

5 Final Remarks

The Southeast European countries examined in this book share a similar recent legal history and a future strategic goal. With the aim of acceding to the EU, itself a community of law, a general political will exists to abide by international and European law. This will has even been translated in more or less clear terms in the constitutions of the SEE countries, enabling the direct applicability of ratified international agreements to run supreme over national legislation.

However, as argued by Michal Bobek, what is important is not the creation of constitutional and institutional frameworks *per se*, but the degree to which the judiciary is able to critically assess and apply various, sometimes conflicting, laws.[41] Unfortunately, practice has shown that, unless provisions have been explicitly incorporated into national law, the domestic courts of EU aspirant countries are

[39] See the chapter by Mislav Mataija, The Unfulfilled Potential of Stabilisation and Association Agreements Before Southeast Europe Courts: "There are a number of examples of SEE courts refusing to interpret domestic law in the light of EU sources. One of them is the Serbian Constitutional Court judgment in *ERC Commerce Computers*, a customs classification case". The Croatian Constitutional Court, too, rejected a complaint related to a customs procedure during which imported goods were reclassified under a higher tariff heading. Another example concerns the High Commercial Court in Croatia, which in a 2007 ruling rejected a party's attempt to use the SAA as a basis for relying on the Treaty rules on free movement of goods and the corresponding ECJ case law in a case on parallel imports and the trade mark exhaustion of rights principle.

[40] Łazowski and Blockmans (2014), pp. 108–132.

[41] Bobek (2008), p. 99.

generally reluctant to apply international law. The national reports compiled in this volume show that most SEE courts follow an all-or-nothing logic: international and EU law is either followed to the letter, or not at all. The prevailing legal culture is one characterised by high levels of formality, whereby '[a]dapting the interpretation of a similarly worded legal instrument, depending on the context, is an unnatural exercise for SEE courts, which are accustomed to viewing legal texts either as binding "sources of law" or as largely irrelevant'.[42] Paradoxically, this judicial conservatism tightens when plaintiffs invest in explaining why 'foreign' sources should be used.

Arguably, this legal culture can be transformed through education which embraces critical thinking, problem-based learning and twinning, and endorses a more dynamic interpretation of the law such as that espoused in the community of law that the SEE countries wish to join.[43] Renewed investment in the modernisation of legal education is key to the creation and maintenance of a progressive judicial system and to the application of international and European law in Southeast Europe.

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[42] See the chapter by Mislav Mataija, The Unfulfilled Potential of Stabilisation and Association Agreements Before Southeast Europe Courts.

[43] The reform of curricula should not be limited to the judicial academies but should also be implemented at graduate and undergraduate levels at university. See Malleson (1997), pp. 655, 667. See the chapter by Sanja Bogojević, 'Europeanisation' of the Judiciary in Southeast Europe.

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