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The Constitutionality of International Treaties in the Hungarian Legal System

Abstract

The purpose of this study is to provide a historical overview of the relationship between International Law and Hungarian Domestic Law and to present the constitutional regulation. In Hungary, the currently effective regulation follows the same dualist practice with respect to international treaties as it once did during the period of the historical constitution. However, Hungarian Domestic Law inevitably continues to present this day the problems that arise from the lack of regulations in the period following the historical constitution, and then from contradictory regulations. The study covers legal background of both the before and after the regime changes, highlighting some constitutional contradictions, which are also illustrated by some decisions of the Constitutional Court. However, the current law and the Constitutional Court no longer attaches importance to the transformed international treaties, i.e. to the promulgating legislation, but to the full enforcement in the Domestic Law of the existing international treaties.

Keywords: relation between International Law and Domestic Law in Hungary, international treaties, dualism, monism, promulgation, transformation, constitutional review.

Introduction

Today, the significant increase in the number of international legal norms poses ever greater challenges to the legislative bodies of individual states. An essential tool for the enforcement of International Law is the question of the applicability of International Law within the state. It is completely irrelevant what kind of constitutional practice is followed by a state regarding the relationship between International Law and Domestic Law, international legal norms can only apply in Domestic Law and to domestic legal entities if there is a con-

stitutional adoption act. From the point of view of the relationship between International Law and Domestic Law, it is essential to take into account the special situation that the state is present as a legal entity in International Law and, as a general rule, international legal norms bind the state as a legal entity of International Law. At the same time the state appears as the bearer of sovereignty and the enforcement of international legal norms and therefore the state must adopt these international norms in some form to the Domestic Law. Practice has proven that the fact that a given state considers International Law and Domestic Law as a monistically unified legal system, or as two separated legal systems following a dualistic practice, is not of theoretical, but of practical significance. The current Hungarian constitutional regulation follows the practice of dualism, as it had done during the period of the historical constitution. However, after the historical constitution, both the legislator and the law enforcer were faced with extremely diverse and complicated problems and presumably it has not changed so far because the constitutional challenges continue to increase with the changes of the relevant legal regulations. The purpose of this study is to provide a historical overview of the significant main points of the relevant legal regulations concerning the relationship between International Law and Hungarian Domestic Law, highlighting several constitutional contradictions, and to highlight issues closely related to the legal regulation from the relevant jurisprudence of the Constitutional Court.

1. The difference between monistic and dualistic practice

International legal norms bind the state as a legal entity in International Law, therefore the enforcement of these norms must somehow be made possible in the internal legal system of the states. In order for the rules of International Law to prevail in Domestic Law, the legislative behavior of the state is necessary. Regarding the relationship between International Law and Domestic Law, two main approaches have emerged: monism and dualism. In the case of a state practicing monism, international treaties can be directly applied, since International Law and the domestic legal system are unified. In the case of dualistic practice, the situation is more complicated, since international treaties are part of a separate legal system, therefore only the legislation promulgating international treaties are effective against domestic legal entities.[1] It is indispensable to resolve the conflict between international and domestic legal norms, because if conflicting international and domestic legal rules exist in parallel then it is necessary to decide which rule applies, which rule takes precedence over the other. According to the modern understanding, International Law norms are given pri-

[1] J. H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, "The American Journal of International Law" 1992, vol. 86, no. 2, pp. 310–340.

ority almost as a matter of fact by the vast majority of states, but from a historical point of view, it was also the subject of a separate debate whether International Law has priority over Domestic Law, or whether Domestic Law takes precedence over the rules of International Law.[2]

After the change of regime, it was formulated that the international legal norms should have priority over the domestic legal norms in Hungary within the framework of the Concept of the New Constitution.[3] Prior to the Hungarian Basic Law effective January 1, 2012, this question had actually been completely unclear, since all subject areas were regulated by a law or a law promulgating an international treaty. But in this case it was not clear that the *lex posterior derogat legi priori* rule was applicable or not.[4] In Hungary, during the period of the historical constitution, judicial practice gave international treaties exceptional priority over Domestic Law.[5] At the same time, there is currently no uniform practice regarding the fact that International Law and Domestic Law together form the subject of a single or two separate legal systems.

2. The previous Hungarian constitutional practice

In Hungary, during the period of the historical constitution, a consistent practice as a customary law developed regarding the fact that the National Assembly enacted international treaties in force against Hungary in the form of Parliament Acts.[6] The socialist constitution did not contain any provisions regarding the relationship between International Law and Domestic Law.[7] The Presidential Council of the People's Republic introduced in 1982 a complex, non-transparent regulations that seriously violate legal certainty requirements with its Decree-Law on procedures related to international treaties.[8] By the way, this legislation applied the monist and dualist solutions in parallel, i.e. in some cases it enabled the publication of international treaties in a monistic manner, while in other cases it also enabled the promulgation of international treaties in a dualistic manner. However, publication and promulgation were possible in relation

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[2] Confer H. Lauterpacht, Is International Law a Part of the Law of England?, "Transactions of the Grotius Society" 1939, vol. 25, pp. 51–88.

[3] A. Bragyova, Az új alkotmány egy koncepciója, Budapest 1995, p. 95.

[4] L. Bodnár, Constitution, International Treaties and Contracts, "Acta Juridica Hungarica" 2002, vol. 43, no. 3–4, pp. 279–289.

[5] L. Bodnár, A nemzetközi jog és az államon belüli jog viszonya az új alkotmányban, [in:] A. Bragyova (ed.), Nemzetközi jog az új alkotmányban, Budapest 1997, pp. 35–73.

[6] L. Bodnár, A nemzetközi szerződések kihirdetéséről: Aggályok, dilemmák, [in:] E. Balogh, M. Homoki-Nagy (ed.), Emlékkönyv Dr. Ruszoly József egyetemi tanár 70. születésnapjára, Szeged 2010, pp. 207–216.

[7] Parliament Act XX of 1949.

[8] Decree-Law 27 of 1982.

to the same international treaty as well. At the time of the change of regime, as a result of the constitutional amendment that entered into force on October 23, 1989,[9] the provision containing the relationship between International Law and Domestic Law was built into the Constitution.[10]

In addition to the Decree-Law, we should mention the provision of the Parliament Act on Legislation[11] adopted by the National Assembly as an auxiliary constitutional rule in relation to international treaties, which entered into force on January 1, 1988 before the change of regime. The law stipulated that "an international treaty containing a generally binding rule of conduct must be promulgated with its content enshrined in legislation of the appropriate level"[12] and "an international treaty not enshrined in legislation – unless the Presidential Council or the Council of Ministers provides otherwise – has to be published in the Hungarian Gazette."[13] It can be seen that the Parliament Act on Legislation also provided an opportunity to continue the dualistic and monistic practice as well, since this legislation also provided the opportunity to promulgate and publish international treaties.

However, it is essential to note that the provision that came into force as a result of the constitutional amendment only concerned the acceptance of the generally recognized rules of International Law by the Hungarian legal system, as well as ensuring the consistency of the undertaken international obligations (namely international treaties) and Domestic Law.[14] The fact, that the Constitution states that a state accepts the generally recognized rules of international law, has no significance from an international legal point of view, since these rules are mandatory anyway, and every state is obliged to comply with them.[15] From point of view of the Domestic Law, this provision serves to ensure that the state obligates state bodies to comply with international legal obligations binding on Hungary.[16] This regulation itself does not yet result in any substantial rules regarding whether the Hungarian law pursues a monistic or dualistic practice in relation to the international treaties. After the change of regime, the Decree-Law 27 of 1982 and Parliament Act XI of 1987, which contained opaque rules were still in force however, the legislator largely followed a dualist practice and promulgated the effective international treaties with domestic legislation.

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9 Parliament Act XXXI of 1989.

10 Parliament Act XX of 1949 Section 7 Paragraph (1).

11 Parliament Act XI of 1987 on Legislation.

12 Ibidem Section 16 Paragraph 1.

13 Ibidem Section 16 Paragraph 2.

14 L. Bodnár, Igazságtétel – most már kizárólag a nemzetközi jog alapján?, [in:] K. Tóth (ed.), Szabó András 70. születésnapjára, Szeged 1998, pp. 77–84.

15 L. Blutman, A nemzetközi jog érvényesülése a magyar jogban: fogalmi keretek, MTA doktori értekezés, Szeged 2015, p. 15.

16 A. Bragyova, A magyar jogrendszer és a nemzetközi jog kapcsolatának alkotmányos rendezése, [in:] A. Bragyova (ed.), Nemzetközi jog az új alkotmányban, Budapest 1997, pp. 9–34.

The President of the Republic submitted a motion to the Constitutional Court for preliminary examination of the unconstitutionality of a Parliament Act on the promulgation of an international treaty adopted by the National Assembly, but not yet promulgated by the President of the Republic. On the basis of the motion of the President of the Republic, and acting *ex officio* in the matter of establishing unconstitutionality manifesting in an omission, the Constitutional Court found in its decision made on March 31, 2005, that there is an unconstitutionality manifesting in an omission due to the fact that the National Assembly enacted Decree-Law 27 of 1982 on the procedure related to international treaties that were not brought into line with the Constitution. In order to put an end to the unconstitutional situation, the Constitutional Court considered it necessary to fully revise the Decree-Law 27 of 1982 on the procedure related to international treaties, so the Constitutional Court called on the National Assembly to fulfill its legislative task in accordance with the provisions of the Constitutional Court's decision by 31 December, 2005.[17] It is essential to point out that the constitutional provision-in-force during the time of the Constitutional Court's decision contained an uncertain provision in itself. The Constitutional Court obliged the Parliament in vain to review the Decree-Law 27 of 1982, which contained contradictory provisions, and to create legal regulations consistent with the Constitution since the constitutional regulation itself was not clear either. Otherwise, the National Assembly fulfilled its legislative obligation according to the decision of the Constitutional Court and created the Parliament Act on the procedure related to international treaties.[18] By creating the new legislation, the Parliament returned to the Hungarian historical traditions to a certain extent and only allowed the dualist solution, that is, international treaties must be promulgated in the form of legislation in all cases. If the international treaty falls within the tasks and competences of the National Assembly, the relevant international treaty must be promulgated by Parliament Act, in all other cases by Government Decree.[19]

3. The currently effective Hungarian constitutional practice

The Basic Law of Hungary entered into force on January 1, 2012, and the previous Constitution was repealed. The Basic Law already contains specific regulations regarding the relationship between International Law and Domestic Law, and now it is clear that the Hungarian practice dualist.[20] It is also essential to note that, according to the relevant regulation of the Basic Law, Hungary ac-

[17] Resolution 7/2005. (III.31.) of the Constitutional Court.

[18] Parliament Act L of 2005.

[19] Ibidem Section 9 Paragraph (1).

[20] Basic Law of Hungary Article Q) Paragraph 3).

cepts the generally recognized rules of International Law. According to the strict interpretation of the provision, this would mean only the universal customary law norms of International Law, and within that the *ius cogens* norms. Although the Constitutional Court broadly interpreted the same relevant regulation of the previous Constitution and declared that the international costumery law and the general principles of law are also transformed into the Domestic Law.[21] The Basic Law stipulates that the other sources of International Law become part of the Hungarian Legal System when they are promulgated in the legislations. Logically, this means that not only the international treaties in force *vis-à-vis* Hungary, but all legal sources of International Law should be promulgated in the form of domestic legislation in addition to the generally recognized rules.

As a result of the moderate, realist dualistic homogenization of the Hungarian legal system, no international treaty exists as an international legal norm in the constitutional structure of the domestic legal system. This situation results that on one hand Hungary is bound by the international treaties in force from outside, from the field of International Law, but at the same time, from the Domestic Law point of view, these norms are partly irrelevant. It is important to note that the legislation promulgating international treaties has nothing to do with the aforementioned, as these legislations are domestic legal norms and are entirely separable from international treaties in force. As a general rule, if an effective international treaty is not promulgated into the Domestic Law of Hungary (there are several such international treaties), Hungary is obliged to comply with them. International legal responsibility exists regardless of whether there was a promulgation or not, if the conditions for breach of international legal obligations and it's attributability to the State exist in a conjunctive manner in the event of violating the International Law,[22] since the International Law does not concern over the Domestic Law of the state.[23] And the responsibility of the state does not come from the promulgating legislation in the Domestic Law, but from the international treaty in force. Therefore, it is not possible to evade responsibility by referring to the failure to promulgate an international treaty, for example, the International Court of Justice examines the rules of International Law, namely whether the state's behavior complies with International Law or not.[24]

In the absence of promulgation, the domestic legal entities are not bound by the international treaty in force vis-à-vis Hungary as a general rule, due to the attributability, Hungary is liable in the event of violating the International Law, but the domestic legal entity is not liable as a general rule. However, there are

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21 Resolution 7/2005 (III.31.) of the Constitutional Court.

22 International Law Comission, Draft articles on Responsibility of States for Internationally Wrongful Acts, Article 2.

23 Already on 14 September, 1872, the first major international arbitration judgement stated this rule in the so-called Alabama claims [United States of America v. Great Britain].

24 L. Bodnár, A nemzetközi szerződések és az állam, Budapest 1987, p. 81.

exceptional cases. An example is the lack of promulgation of the Statute of the International Criminal Court in the Hungarian Domestic Law. The non-promulgation of the Statute of the International Criminal Court does not prevent the initiation and conduct of criminal proceedings against Hungarian citizens who have committed certain crimes defined in the Statute (including the head of the state enjoying inviolability based on Domestic Law and persons enjoying any immunity under public law). The legislation has tried several times to promulgate the Statute by Parliament Act in the Domestic Law, but this has been unsuccessful in all cases so far.[25] However, it is important to note that the domestic legislative failure has no effect on Hungary's international legal obligations, i.e. the proceedings of the International Criminal Court cannot be prevented by the failure domestic legal system's legislation.

We must also acknowledge that something must be done about the constitutional distortions and logical contradictions that always occur in the Hungarian legal system when structural changes take place as a result of the transformation of international treaties due to the dualistic practice.[26] Legislations promulgating international treaties appear in Domestic Law at different levels of the legal system, partly identical to each other and partly in a subordinate relationship, even though in the international legal space the international treaties in force are present at a parallel level together with all other sources of International Law. It is essential to create harmony, which serves nothing more than the harmonization of International Law and promulgating legislation embedded at different levels of the domestic legal system and other domestic legislation of the same level. The second round of Section 7 (1) of the previously effective Constitution would have served as a constitutional obligation regarding the harmonization of international and Domestic Law.

> The legal system of the Republic of Hungary accepts the generally recognized rules of International Law, and ensures the consistency of the undertaken international legal obligations and Domestic Law.

The problem is cumulative. First of all, let's examine what are the subject and predicate are in the above sentence. Regarding customary law, we can also mention that the generally recognized rules are not accepted by the Hungarian legal system, but by the state as a legal entity of the International Law. Our legal system forms the subject in the second part of the above sentence as well. In short, the provision reads as follows: "The legal system of the Republic of Hungary… also ensures the consistency of the undertaken international legal obligations and Domestic Law." The legal system is not suitable for ensuring consistency between

[25] P. Kovács, Miért nincs még kihirdetve a Római Statútum? Gondolatok a Római Statútum és az Alaptörvény összeegyeztethetőségének egyszerűségéről, "Állam- és Jogtudomány" 2019, vol. 60, no. 1, pp. 69–90.

[26] L. Bodnár, A nemzetközi jog és az államon belüli jog viszonyáról, "Állam és Jogtudomány" 1993, vol. 35, no. 3–4, pp. 277–283.

different legal systems and legal norms, because the harmonization of legal norms ensures consistency, which is a legislative issue. Another flaw in the provision is that it orders the Domestic Law not to be brought into line with International Law as a whole, but only with the international obligations undertaken by Hungary.

It is also essential to mention that this provision of the constitution was misinterpreted by the Constitutional Court in its early practice. Firstly, the Plenum correctly stated that "the rules regarding war crimes and crimes against humanity are undoubtedly part of customary International Law…, according to the Hungarian Constitution they are considered to be among the 'generally recognized rules of International Law'. These rules are 'accepted' by Hungarian law according to the first round of Paragraph 1 of Article 7 of the Constitution." However, the Constitutional Court erroneously concluded, with regard to war crimes and crimes against humanity, which are part of customary International Law, that these international crimes "without special transformation or adaptation are among the 'undertaken obligations under International Law', which consistency with Domestic Law is also prescribed by the cited paragraph of the Constitution in its second round." The universal rules of customary International Law, including the international crimes, are not voluntarily assumed obligations, so only those international legal norms, which are based on the voluntary commitment of the state, can fall under the scope of this provision.[27]

Paragraph (2) of Article Q of the Basic Law flawlessly settles the above contradictions when it states that "Hungary ensures the harmony of International Law and Hungarian Law in order to fulfill its international legal obligations." It can be seen that only the state as a legal entity can actually ensure the harmony between the two legal systems. On the other hand, the Basic Law correctly regulates that the Domestic Law must be brought into harmony with International Law as a whole, not just with a particular part of it.[28] It should be noted that the consistency of International Law and Hungarian Domestic Law has to be examined already during the entire international treaty-making process, and the necessary legislative amendments in Domestic Law have to be included in the promulgating legislation.[29]

4. The powers of the Constitutional Court concerning international treaties

The Constitutional Court is entrusted with significant tasks, since the addressee of international treaties is the state, and in countless cases the interna-

[27] Resolution 53/1993. (X. 13.) of the Constitutional Court.

[28] Confer G. Sulyok, A nemzetközi jog és a belső jog viszonyának alaptörvényi szabályozása, "Jog – Állam – Politika" 2012, vol. 4, no. 1, pp. 17–60.

[29] T. Molnár, A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe, Budapest – Pécs 2013, p. 223.

tional treaties require additional domestic legislative activites. We emphasize that the Constitutional Court cannot depart from the domestic legal system of the state, cannot investigate the constitutionality of existing international treaties. It would be quite simply absurd if the international legal order were subject to a domestic legal system, although in reality the opposite statement is true. The conclusion of international treaties is not mandatory, it is actually based on a voluntary commitment, so the constitutionality of the given international treaty can actually be examined in the framework of preliminary norm control until the last phase of the international treaty-making procedure is completed. But this is unconstitutional, since the treaty is not yet binding Hungary. So the Constitutional Court will only *ad futuram* examine what kind of concerns it would raise with regard to the Basic Law if the given international treaty were to enter into force.

Before recognizing the binding effect of an international treaty by the President of the Republic, then the President of the Republic, or if the international treaty is promulgated by Government Decree before recognizing the binding effect of the international treaty, then the Government may ask the Constitutional Court for a preliminary examination of the compatibility of the international treaty or any of its provisions with the Basic Law.[30] In these cases, in the event of constitutionality concerns, the entry into force of the contract can essentially be stopped. If the Constitutional Court establishes the unconstitutionality of the provisions of the international treaty during the preliminary norm control procedure discussed above, the recognition of the binding effect of the international treaty cannot take place until the states those created that international treaty or other entities of International Law with the capacity to enter into contracts resolve the unconstitutionality is abolished, or as long as Hungary does not rule out a conflict between the international treaty and the Basic Law by making a reservation – if this is permitted by the given international treaty – or by using other legal instruments recognized by International Law.

The above duties and powers of the Constitutional Court would be fine with regard to the constitutionality examination of international treaties not yet in force. However, on the basis of Article 24 Paragraph (2) point a) of the Basic Law, the Constitutional Court considers the consistency of the provisions of the accepted but not yet promulgated law with the Basic Law submitted by the person entitled to make a motion as defined in Article 6 Paragraphs (2) and (4) of the Basic Law, examines it on the basis of a motion containing a definite request. In the subject of this preliminary norm control procedure, point a) of Article 24 Paragraph (2) of the Basic Law stipulates that the Constitutional Court examines laws that have been adopted but not promulgated from the point of view of consistency with the Basic Law.[31] From these provisions, we must come to the

[30] Parliament Act CLI of 2011 on the Constitutional Court Section 23 Paragraph (4).

[31] Ibidem Section 23 Paragraph (1).

conclusion that in the case of all international treaties which the National Assembly promulgates by law, after the adoption of the promulgating Parliament Act, but before the promulgation act of the head of state, they can be the subject of preliminary normative control, because these are also ordinary laws. The above jurisdiction provision does not establish a rule of exception Domestic Laws promulgating international treaties. The problem with this is that the promulgation law already contains an international treaty in force prior to the promulgation act of the head of state, so in this case the constitutional review is completely absurd. Furthermore, we will examine the followings to understand the contradictions. The international treaty will bind the state, even if we stop the promulgation act of a Parliament Act promulgating international treaty. But in the meantime, the international treaty itself is a parallel constitutional standard in case of the procedure of subsequent norm control, even though the promulgating legislation discussed above is the subject of a constitutionality investigation in the Domestic Law. The Constitutional Court examines the conflict of legislation with international treaties in the case of subsequent norm control.[32] Pursuant to Point c) of Paragraph (3) of the same article, the Constitutional Court may annul a law or a legal provision that conflicts with an international treaty. The Constitutional Court examines legislation at the initiative of the petitioners or *ex officio* during any of its proceedings. The procedure can be initiated by a quarter of the members of the National Assembly, the Government, the President of the Supreme Court, the Prosecutor General and the Commissioner for Fundamental Rights. The judge – in addition to suspending the court proceedings – initiates the proceedings of the Constitutional Court if, during the adjudication of the individual case pending before him/her, a law has to be applied which he/she finds to be in conflict with an international treaty.[33]

It is absolutely clear that the above powers of the Constitutional Court are aimed at and serve to ensure that the international treaties in force against Hungary serve as a constitutional standard, i.e. if the Domestic Law contradicts the international legal norm, it can annul it. We cannot ignore the fact what was the intention of the legislator, the Constitutional Court is not allowed to take into account the domestic legislation promulgating the international treaty. Therefore the subject of investigation is not the promulgating legislation, but the effective international treaty as a constitutional standard. At most, the Constitutional Court may additionally establish a constitutional violation manifesting as an omission, if the effective international treaty has not been promulgated in the form of domestic legislation. But the investigation of the international treaty in force as a constitutional standard is not hindered even if the promulgation of the given international treaty in the form of a Domestic Law missing. Returning to the problems of preliminary control of norms referred to earlier, it should be

[32] Basic Law of Hungary Article 24 Point f).

[33] Parliament Act CLI of 2011 on the Constitutional Court Section 32 Paragraphs (1) and (2).

emphasized that if the Constitutional Court finds a conflict of law with an international treaty, which cannot be contrary to the law promulgating the international treaty based on the Basic Law, the law that is contrary to the international treaty shall be annulled in whole or in part. And if the Constitutional Court finds a conflict of legislation with an international treaty, with which the legislation promulgating the international treaty cannot be in conflict based on the Basic Law in order to resolve the conflict – based on consideration of the circumstances and specifying a deadline – it calls on the Government or the legislator within the specified deadline to take the necessary measures to resolve the conflict.[34] It follows from this that in order to create harmony between legal systems, the domestic legal system must be adapted to international standards, moreover, a law, for example, cannot conflict with either the international treaty or the Government Decree promulgating it. These are the most significant constitutional contradictions of the Hungarian legal system (exclusively from a domestic legal point of view), since a Government Decree promulgating an international treaty is basically equal to all other Government Decrees, and the laws enjoy supremacy over it. The previously effective regulations also stipulated that the Constitutional Court has the competence to conduct a preliminary examination of the unconstitutionality of the draft law, the law that has already been adopted but not yet promulgated by the President of Republic, the rules of the procedure of the National Assembly and certain provisions of the international treaty.[35] In the former Act on the Constitutional Court, an international treaty also existed as a constitutional standard in the procedure for subsequent norm control. Pursuant to the previously effective regulations, the *ex post* review of the unconstitutionality of legislation and other legal instruments of state management falls under the jurisdiction of the Constitutional Court,[36] so the promulgating legislation may be the subject of a constitutionality review, because the international treaty and the domestic legislation promulgating international treaties mean completely different legal norms.

5. Excerpts from the practice of the Constitutional Court concerning international treaties

In the early jurisprudence of the Constitutional Court, it correctly stated in the context of subsequent norm control that

> The Constitutional Court really does not have the authority to review the international treaty. …exclusively the domestic legislation in force, the … Decree-Law on the promul-

[34] Ibidem Section 42 Paragraphs (1) and (2).

[35] Parliament Act XXXII of 1989 on the Constitutional Court Section 1 Point a).

[36] Ibidem Section 1 Point b).

> gation of the convention, which as a piece of legislation is not excluded from the scope of the constitutionality review, was examined.[37]

So, the promulgating legislation can be subject to constitutionality control like any other legislation, despite the fact that the international treaty is not. However, an error slipped into the practice of the Constitutional Court when the petitioner requested the constitutionality of Decree-Law 6 of 1982 promulgating the Statute of the International Monetary Fund. The operative part of the decision of the Three-member Council of the Constitutional Court reads completely absurdly as follows: "The Constitutional Court rejects the motion without a substantive examination." In the second and third paragraphs of the reasoning of the decision, the acting Council of the Constitutional Court supported its decision raising concerns about the rule of law and legal security with the following, no less worrisome factual findings:

> According to the provisions of Section 1 of the Parliament Act on the Constitutional Court, the Constitutional Court does not have the jurisdiction to examine the unconstitutionality of an international treaty that has already been ratified and promulgated in Domestic Law, and the motion is already aimed at this. Due to its lack of jurisdiction, the Constitutional Court rejected the motion without a substantive examination.[38]

I would like to point out that in the present case the Constitutional Court was denied a subsequent norm control by the promulgating domestic legislation, namely the Decree-Law 6 of 1982. The above decision thus *ex lege* violates the regulation of the Parliament Act XXXII of 1989 on the Constitutional Court. The provision of the law, because the Decree-Law 6 of 1982, as an "ordinary" domestic legislation, is precisely the subject of a constitutional review based on Section 1 Point b) of the referred Parliament Act. Even though the council refers to this section in the decision. I repeat, it was not the Constitutional Court's refusal to subject the Statute of the International Monetary Fund as an effective international treaty to examination (which is actually not possible), but rather the Constitutional Court did so illegally promulgating Domestic Law by rejecting the motion without substantive examination. It should be noted separately that in the first sentence of Point 5 of Part II of the reasoning of the Resolution 4/1997 (I. 22.) discussed below of the Constitutional Court, the Plenum refers to the previous order as an error 761/B/1992, actually numbered 61/B/1992. Incidentally, in the second sentence of this explanatory point, the Plenum of the Constitutional Court, like me, finds the council's order to be worrisome. However, let's examine what conclusions the Constitutional Court reached in the case that follows regarding the unconstitutionality of certain provisions of Parliament Act XXXII of 1989 on the Constitutional Court and the motion to supplement its powers. The Plenum made a good start in the operative part of the resolution, in contrast to the erroneous decision discussed above:

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[37] Resolution 30/1990 (XII.15.) of the Constitutional Court

[38] Order 61/B/1992. (XI. 20.) of the Constitutional Court

1. The Constitutional Court finds that the legislation promulgating an international treaty can be the subject of a subsequent constitutional review based on Section 1 Point b) of the Parliament Act on the Constitutional Court.
2. The constitutionality examination may also cover the examination of the unconstitutionality of an international treaty that has become part of the law promulgating the treaty.

In this provision, the Plenum wishes to indicate that it examines the text of the international treaty that is part of the promulgating legislation. However, as a result of the transformation of the international treaty, the international norm in this form ceases to exist for the domestic legal system, so the text of the international treaty is an integral part of the promulgating legislation, it is considered a domestic legal regulation, and the promulgating legislation does not have parts that would qualify as international norms as a legal norm. In the next point of the statutory part, the Constitutional Court, after the above, got into a complete contradiction when it states the following:

3. If the Constitutional Court finds the international treaty or any of its regulations unconstitutional,…

It is clear from this clause that the Constitutional Court would now have the authority to examine the international treaty directly. This finding is worrisome, since, as discussed earlier, the unconstitutionality of an international treaty in force cannot be investigated. Point 1, discussed earlier, correctly established that the Constitutional Court can only investigate domestic legislation promulgating international treaties. However, in point 3, the Plenum directly examines that which competence has not been established (because there is none), but it must be assumed that the Constitutional Court examines an international treaty that is in force illegal, or finds it unconstitutionally unconstitutional, because it feels an implicit authority over it, that was not established, but actually does not exist *ex lege* either. If we could dispense with these problems, or if they did not exist as fiction, the complete contradiction of Point 3 would now follow, reviving the previous clause as well:

3. If the Constitutional Court finds the international treaty or one of its regulations to be unconstitutional, it shall declare the law promulgating the international treaty to be unconstitutional.

So, after the Constitutional Court has unconstitutionally examined the unconstitutionality of an international treaty that is considered an International Law norm, it claims that as a result a Domestic Law will be annuled, even though it first examined the unconstitutionality of the norm of the International Law. If according to the determination of powers in Point 1, the statutory part according to Points 2 and 3 were to continue, then the last point, Point 4 of the statutory part sounds very correct, because the Constitutional Court removes the promulgating legislation from the Domestic Law in vain, the international treaty remains in force.

4. The decision of the Constitutional Court establishing unconstitutionality has no effect on the international commitments of the Republic of Hungary.

Conclusion

It cannot be abstracted from the problem that the problematic regulation of dualistic practice in Hungary has resulted in an extraordinary number of practical problems. As a result, there are international treaties in force that have not been promulgated in the form of legislation at all, and there are international treaties that were previously published in a monistic manner in the Domestic Law. The source nature of these international treaties in Hungarian Domestic Law is unclear. In addition to all of this, the constitutional situation of international treaties, which have actually been transformed into Domestic Law, but promulgated in different levels of the legislation, and their relation with other domestic legislation further complicates the problem. Long before the entry into force of the new Basic Law, the Constitutional Court highlighted the fact that international legal norms must necessarily prevail in Domestic Law, despite Hungarian dualistic practice. So, not the law that promulgates the international treaty, or possibly the lack of transformation in the Domestic Law is important, but the full enforcement of the effective International Law in the Domestic Law.

The previously effective Criminal Code[39] and the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances done in Vienna on 20 December 1988, promulgated by Parliament Act L of 1998, and the Single Convention of Narcotic Drugs, done in New York on 30 March 1961, promulgated by Decree-Law 4 of 1965, are considered to be the most important decisions of the Constitutional Court's ex-post normative control of during which the Plenum made the following exceptionally valid constitutional findings regarding the consistency of international treaties, promulgative norms and the Domestic Law:

> […] the state is not only formally obliged to fulfill its obligations under international treaties… on the one hand, the mere publication of the rules of International Law is not enough […] even when transforming them into Domestic Law, it cannot take measures that impair the effectiveness of the principles and requirements contained in international treaties […] and it must not nominally comply with the obligations arising from the agreements […][40].

As a result of the above, the domestic legislation must primarily comply with the international treaties in force, the legislative bodies are fully obliged to comply with the resulting legislative obligations. Therefore, the promulgating legis-

[39] Parliament Act IV of 1978.

[40] Resolution 54/2004 (XII.13.) of the Constitutional Court.

lation is not primarily important, it does not in any case replace the enforcement of international legal obligations in Domestic Law either. Thus, we can conclude that Hungarian jurisprudence in relation to international treaties follows the dualist practice in vain and thus the promulgating legislation is the subject of a constitutional review. The international contractual commitments that bind Hungary from the outside enjoy priority, and the domestic legal norms must always be brought into line with the international obligations. It is no coincidence that the Hungarian legal system, due to the specificities of International Law, tries to resolve the conflicts of norms arising between international legal norms and domestic legislation at the level of the Basic Law. Although the primacy of International Law is not declared verbatim in the Basic Law, in addition to what was previously discussed. It is essential to refer to the power of the Constitutional Court, according to which, pursuant to point f) of Article 24 of the Basic Law, it can investigate the conflict of any legislation with an international treaty. It follows that from a constitutional point of view, it is mandatory to promulgate the international treaty with a domestic legislation, but it is necessary to examine whether all other domestic legal norms conflict with the provisions of the international treaty in force *vis-à-vis* Hungary. From this, the primacy of International Law clearly follows. The situation is completely different from with those international treaties in which the President of the Republic or the Government have not yet recognized their binding effect, since in these cases it is still possible to examine the compatibility with the Basic Law within the framework of a preliminary norm control procedure, since the binding effect of these international treaties has not yet taken place.

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Konstytucyjność umów międzynarodowych w węgierskim systemie prawnym

Streszczenie

Celem niniejszego opracowania jest przedstawienie historycznego zarysu relacji między prawem międzynarodowym a węgierskim prawem krajowym oraz przedstawienie regulacji konstytucyjnej. Na Węgrzech obecnie obowiązująca regulacja stosuje tę samą dualistyczną praktykę w odniesieniu do traktatów międzynarodowych, co kiedyś w okresie historycznej konstytucji. Jednak węgierskie prawo krajowe nieuchronnie nadal boryka się z problemami wynikającymi z braku regulacji w okresie następującym po historycznej konstytucji, a następnie ze sprzecznych regulacji. Opracowanie obejmuje tło prawne zarówno przed, jak i po zmianie ustroju, podkreślając pewne sprzeczności konstytucyjne, które ilustrują również niektóre orzeczenia Trybunału Konstytucyjnego. Jednak obecne prawo i Trybunał Konstytucyjny nie przywiązują już wagi do przekształconych traktatów międzynarodowych, tj. do ogłaszania ustawodawstwa, ale do pełnego wykonania w prawie krajowym istniejących traktatów międzynarodowych.

Słowa kluczowe: relacja między prawem międzynarodowym a prawem krajowym na Węgrzech, traktaty międzynarodowe, dualizm, monizm, promulgacja, transformacja, kontrola konstytucyjna.