

IV. A. 2. *Constitution, International Treaties and Contracts*

LÁSZLÓ BODNÁR*

Constitution, International Treaties, and Contracts

Abstract. Hungarian statutes and regulations contain a “without prejudice to international treaty obligations” clause as to the scope of their provisions. In such cases the international treaty—or maybe an existing *mutual practice* in its absence—shall be enforced based on the express provision of the domestic act. This process might prove to be quite lengthy, since the Minister of Justice is authorized to pronounce on the existence of such mutual practices. In the second half of the 1990’s the Hungarian legislative branch (the Parliament) passed a statute on taxation which entered into force even though it violated the bilateral treaties concluded by Hungary to avoid double taxation.

Keywords: constitution, status of treaties, promulgation

I. General issues concerning the relationship between international law (including international treaties) and the Hungarian legal system

In order to understand the specific the problems dealt with in the outline of the report, first of all one must define the status of international treaties in the Hungarian legal system. The question has been settled by the comprehensive revision of the Constitution of the Republic of Hungary entering into force on October 23, 1989. Art. 7 (1) of the Constitution¹—corresponding to the previous doctrine and practice followed in the absence of constitutional provisions—provides that *no international treaty shall be applied directly by Hungarian authorities issuing legally relevant decisions*. According to the above mentioned constitutional provision, the ensurance of the agreement between the accepted international legal obligations and domestic statutes is

* Professor, University of Szeged, Law School, H–6701 Szeged, Rákóczi tér 1., Hungary.
Fax: (36 62) 544-490; E-mail: drbodnar@juris.u-szeged.hu

¹ Art. 7 (1) of the Constitution (statute No. 20 of 1949 with several modifications) in its present form provides: “The legal system of Hungary accepts the generally recognized rules of international law, and furthermore, it shall ensure the agreement between the accepted international obligations and domestic statutes.”

in fact the *transformation* of an international treaty into the Hungarian law, i.e. the promulgation of a treaty in the Official Journal (*Magyar Közlöny*) as a Hungarian legislative act in the form of an instrument of domestic law (regulation, statute).²

Thus the Hungarian judiciary and other organs applying the law regard not the international treaty itself but the internal legislative act as the source of law.

However the regulation having the force of statute (tvr.) No 27 of 1982 on the conclusion of international treaties also provides for the mere publication of an international treaty in the official journal without actually transforming it.³ While the internal legal status of an international treaty already transformed is clearly defined by the legislative act of promulgation, that of an international treaty merely published cannot be ascertained. In the present state of Hungarian law the priority of international treaties is not recognized.

The provisions outlined above present several difficulties, especially for the judiciary. A judge, for instance, finds no guidance in the relevant legal materials as to the relationship between an international treaty promulgated by a statute, and another domestic statute on the same subject. It is unclear whether the principle *lex posterior derogat legi priori* is applicable. The situation is even more complicated if such a collision exists between a regulation of the Cabinet, and a previous or subsequent statute, i. e. in cases where reference might be made to the principle *lex superior derogat legi inferiori*.

Some German courts—with regard to the provisions of the *Grundgesetz* also establishing a dualistic/transformational system—have on several occasions deemed an international treaty *lex specialis* in order to secure its priority

² E.g. statute No. 100 of 1999 on the promulgation of the European Social Charter; regulation of the Cabinet No. 148 of 1998 (IX. 18.) on the promulgation of the Agreement between the Government of the Republic of Hungary and the Government of the Russian Federation concerning the cooperation in cultural, scientific and educational matters; however, the Exchange of Letters between the Government of the Republic of Hungary and the Commission of the European Communities on (The Rapporteur's remark: the promulgation of a legal instrument is the final phase of its adoption (in this regard, see: Creifelds, C.: *Rechtswörterbuch*. Munich, 1978 (5th ed.) 224 and 890). Since the adoption of an international treaty is complete by signature, ratification or accession, its promulgation seems superfluous and meaningless.)

³ Art. 13 of the regulation having the force of a statute (tvr.) No. 27 of 1982 provides: "(1) International treaties ratified by Parliament shall be promulgated by statute. (2) International treaties conferring rights and duties on natural and legal persons in a direct and general manner shall be promulgated by statute, regulation having the force of a statute, regulation of the Council of Ministers or regulation of a Minister. (3) International treaties not referred to in paras. (1) and (2) shall be published. The Council of Ministers or the Presidium of the People's Republic of Hungary may decide otherwise."

over the domestic legislation by invoking the principle *lex specialis derogat legi universali*.⁴ However the Hungarian judiciary has not developed a similar approach so far inducing the Hungarian judge to enforce the domestic act.

On the other hand it must be emphasized that a number of important Hungarian statutes and regulations contain a “*without prejudice to international treaty obligations*”⁵ clause as to the scope of their provisions. In such cases the international treaty—or maybe an existing *mutual practice* in its absence—shall be enforced based on the express provision of the domestic act. This process might prove to be quite lengthy, since the Minister of Justice is authorized to pronounce on the existence of such mutual practices.

At this point the national rapporteur would like to propose a general but very important concluding remark. In the post-1989 era the parties to a law-suit invoke the provisions of an international treaty with increasing frequency and success. In the second half of the 1990's the Hungarian legislative branch (the Parliament) passed a statute on taxation which entered into force even though it violated the bilateral treaties concluded by Hungary to avoid double taxation.⁶ The growing number of references to these international treaties compelled the internal revenue service (APEH—Bureau of Taxation and Financial Control) to issue an instrument of interpretation to construe the domestic statute in a way conforming to the international obligations emanating from these treaties. (The question remains whether such interpretation of a statute by an administrative or executive organ is authentic or even constitutional.⁷) It must be noted however that without this kind of interpretation or modification the success of an action

⁴ FG Bremen 18. 2. 1970. (II. 114/68) EFG 1970, FG Baden-Württemberg 3. 9. 1970 (VI. 58/69) EFG 1970, FG Baden-Württemberg 29. 11. 1968 (III./II.74/67) EFG 1969, FG Münster 28. 2. 1965 (II.a.417/65) EFG 1965. In: *Fontes Iuris Gentium*. Series A. Sectio II. Tomus 6. 1966–1970. 6–7. Nr. 107, 120, 73, 11.

⁵ For such provisions, see *inter alia* Art. 37 (1) of statute No. 100 of 1995 on customs duties, Art. 1 of statute No. 95 of 1995 on foreign exchange, Art. 1 of statute No. 112 of 1996 on credit banks and financial services.

⁶ The Agreement of July 18, 1977 between the Republic of Hungary and the Federal Republic of Germany on the avoidance of double taxation of income, profit and assets, promulgated by the regulation having the force of a statute No. 27 of 1979, provides that a State shall not exercise its right of taxation based on the seat of the enterprise if the income has already been taxed by the other State.

⁷ Cf. APEH (Bureau of Taxation and Financial Control) guidelines 1995/62 on the interpretation of the agreement between Hungary and Germany on the avoidance of double taxation.

brought before a court by disadvantaged individuals or companies would have been rather unsure.

As far as the enforcement of foreign law in the area covered by *private international law* is concerned the relevant provisions are much better and safer. The Code on Private International Law⁸—internationally acknowledged for its quality drafting—is applied by the judiciary without reservations.

Admittedly the judicial practice on the enforcement and enforceability of the treaties concluded under public international law is somewhat ambiguous and equivocal. But the effect of the decisions taken by international organizations⁹ and of the rulings of international judicial organs is even more obscure since in this area legislative act or judicial practice is totally lacking.¹⁰

II. Practical Examples

1. From 1990 onwards the Constitutional Court many times had to face the interpretation of Art. 7 (1) of the Constitution in attempting to define the relationship between international law (including international treaties) and the domestic legal system.¹¹

The most controversial decision so far concerned the constitutionality of statute No 90 of 1993 (the so-called “act of delivering justice”). The statute adopted by Parliament provided for criminal proceedings against persons who took part in the crimes committed against participants of the revolution of 1956 despite the fact that according to the Criminal Code in force at the commission of the act, the limitation period prescribed for these crimes has already expired.

In consequence the Constitutional Court held that no criminal proceedings might be initiated under Hungarian domestic law, but if the acts in question constitute a crime under international law and the relevant rules of international law so provide, an action might be based on these provisions.¹² Both

⁸ See regulation having the force of a statute No 13 of 1979. The regulation having the force of a statute existed as a source of internal law until 1990. The Presidium of the People’s Republic was authorized to issue such instruments being in effect equal to the statutes of the Parliament.

⁹ Cf. UN Security Council Resolutions 757 (1992), 760 (1992) and 820 (1993).

¹⁰ Cf. Case concerning the Gabčíkovo-Nagymaros project.

¹¹ Cf. Constitutional Court decisions 30/1990 (XII. 15.), 16/1993 (III. 12.), 53/1993 (X. 13.), 36/1996 (IX. 4.), 4/1997 (I. 22.), 30/1998 (VI. 25.).

¹² In its decision 53/1993 (X. 13.) the Constitutional Court held that notwithstanding the expiry of the limitation period for a crime set by domestic law, if “the act committed

the Constitutional Court and the proceeding courts of justice declared such charges admissible basically by invoking common Art. 3 of the four Geneva Conventions¹³ of 1949. In the opinion of the national rapporteur, from the viewpoint of international and constitutional law the main difficulty was created by Hungary's failure to transform the Geneva Conventions into internal law, publishing only the titles thereof in the official journal and completely omitting their texts.¹⁴ Accordingly the Geneva Conventions could not become

is considered a war crime or a crime against humanity under international law and the rules of international law prohibit the existence of such a limitation period, Hungary is bound by international law to exclude limitation in these cases."

¹³ Common Art. 3 of the Geneva Conventions of 1949 provides that:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded, sick and shipwrecked shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

¹⁴ The exact words of the regulation having the force of a statute No. 32 of 1954 are as follows:

"Regulation having the force of a statute of the Presidium of the People's Republic No. 32 of 1954 on the legal effect of the International Conventions for the Protection of Victims of War done at Geneva on August 12, 1949. (The instrument ratification of the People's Republic of Hungary have been deposited at Bern, on August 3, 1954.)

part of the Hungarian law. The relevant decision of the Constitutional Court is based on the assumption that the Geneva Conventions belong to the generally recognized rules of international law, and thus became part of the Hungarian legal system by virtue of Art. 7 (1) of the Constitution providing for the “*general transformation*”¹⁵ of such norms.

The provisions of the Constitution referred to above were interpreted in 1998 by the Constitutional Court in a more detailed and precise manner. The Court reinforced that an international treaty may become part of the Hungarian law only by an act of transformation. In addition the Court held that it had no jurisdiction to rule on the constitutionality of an international treaty itself but reserved the right to do so as regards the transformed version of the international treaty, i.e. the domestic act performing the transformation.¹⁶ Following the same line of reasoning the Constitutional Court declared unconstitutional an instrument publishing the executive provisions of a protocol of the Association Council relating to Art. 62 of the Association Agreement concluded between the Republic of Hungary and the European Communities and their Member States (the so-called European Agreement), without having to pronounce on the treaty itself.¹⁷

Art. 1 The Presidium of the People’s Republic hereby incorporates the following Conventions for the Protection of the Victims of War done at Geneva, on August 12, 1949 into its regulations having the force of a statute:

1. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
2. Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
3. Convention relative to the Treatment of Prisoners of War;
4. Convention relative to the Protection of Civilian Persons in Time of War.

Art. 2 (1) The Conventions enumerated in Art. 1 shall be effective as regards the People’s Republic of Hungary from February 3, 1955.

(2) The competent ministers shall be responsible for the execution of the Conventions.

Art. 3 The Minister of Foreign Affairs shall be responsible for the communication of the official translation of the Conventions to the public before the Conventions shall take effect.”

¹⁵ The transformation of customary rules is inconceivable. The concept of “general transformation” have been invented by the dualistic doctrine and practice in order to provide for the internal application of universal customary rules, and their recognition as a part of the national legal system. In this regard, see Müller, J. P.—Wildhaber, L.: *Praxis des Völkerrechts*. Bern, 1977. 134.

¹⁶ Cf. Constitutional Court decisions 4/1997 (I. 22.) and 30/1998 (VI. 25.).

¹⁷ The Constitutional Court in its decision 30/1998 (VI. 25.) has reinforced its stance taken in decision 4/1997 (I. 22.): “According to decision 4/1997 (I. 22.) the Constitutional Court after finding unconstitutional a provision of an international treaty, shall declare

2. For the analysis of Art. 7 (1) of the Constitution, it also might be of interest to take a look at the domestic legal effect of judgement No 92 of the International Court of Justice (ICJ) dated September 25, 1997 in the case concerning the Gabčíkovo-Nagymaros project involving Hungary and Slovakia. In 1992 the Republic of Hungary terminated a bilateral treaty¹⁸ stipulating for carrying out a joint project originally concluded in 1977 between Hungary and Czechoslovakia. In doing so, Hungary—by an act of domestic legislation—abrogated the regulation having the force of a statute No of 1978 that transformed the bilateral treaty into domestic law.¹⁹ The ICJ held however that Hungary could not lawfully terminate the treaty and it is still in force. Nevertheless the statute No 40 of 1992 abrogating the regulations having the force of a statute No 16 of 1978 and No 6 of 1984 (the second act promulgated the 1983 protocol of Prague modifying the original treaty) continues to be operational as far as the domestic law of Hungary is concerned.²⁰

3. The national rapporteur finally would like to note the difficulties that were presented by the application of the Security Council resolutions of 1992-1993 imposing embargo on the Federal Republic of Yugoslavia.²¹ In compliance with the resolutions, the Hungarian legislature amended the Criminal Code and provided for a new criminal offence. However the definition of this crime inserted in the Code was too general and vague for the courts to apply it in an exact manner, since it did not contain the enumeration of the acts falling under the scope of the resolution.²² Though the resolution itself usually was not available for the judges, they wouldn't have been allowed to apply it in a way contrary to the Criminal Code (a statute) anyway because it was *in part promulgated by an inferior source of domestic law (regulation)*.²³ The situation was further complicated by

unconstitutional the internal legal instrument promulgating the treaty. The declaration does not affect the international obligations of the Republic of Hungary.” (Reasoning of decision 30/1998 (VI. 25.) Part VI. Section 2.)

¹⁸ Promulgated by regulation having the force of a statute No. 17 of 1978.

¹⁹ See statute No. 40 of 1992.

²⁰ The statute No. 40 of 1992 was still effective on November 1, 2001.

²¹ See Security Council Resolutions referred to *infra* 11.

²² Art. 261/A of the Criminal Code provides: “Whoever violates the economic, commercial or financial restrictions imposed under international obligations of the Republic of Hungary, shall commit a crime, if such act is sanctioned by separate statute.”

²³ On this problem, see Kovács, P.: Nemzetközi szervezetek szankciós típusú határozatai magyarországi érvényesíthetőségének alkotmányjogi gyakorlata és problémái. (Constitutional Practices and Problems of Applying in Hungary the Resolutions

the legislature's failure to provide guidance in distinguishing the resemblant cases of "*smuggling*" and "*violation of embargo*".

In spite of the aforementioned constitutional problems as a matter of fact there are encouraging attempts to define the status of international treaties in the legal system of Hungary, to facilitate their application by the judiciary, and in general to honor their provisions. These attempts—even in short term—might contribute to the disappearance of a tradition of neglecting the international treaties in the domestic administration of justice that characterized the judicial practice between 1950 and 1990. For these ends the modification of the Constitution is indispensable in order to secure the application of international treaties and clarify their priority over domestic law. The remarks and proposals of the Hungarian scholars of international law are intended to support this process.²⁴

III. Treatment of individuals and entrepreneurs

First of all one must point out that the law of Hungary recognizes the right of entrepreneurship and contains provisions on the protection of the rights of individuals.

1. The fundamental rights of individuals are dealt with in a separate chapter of the Constitution²⁵ and in other statutes laying down detailed rules for each fundamental right.²⁶

The protection of fundamental rights is also fostered by Hungary's becoming a party to the European Convention for the Protection of Human

of International Organizations Imposing Sanctions) In: *EU-csatlakozás és alkotmányozás*. (Publication No. 2. of the Department of International Law, University of Szeged), Szeged, 2001.

²⁴ See particularly the critiques by Bodnár, L.: The Relationship of International Law and Domestic Law in our Constitution—de lege ferenda. *Acta Jur. et Pol.* Szeged, Tom. XLIX., Fasc. 8., Szeged, 1996.; Bragyova, A.: A magyar jogrendszer és a nemzetközi jog kapcsolatának alkotmányos rendezése. (Constitutional Regulation of the Relationship between International Law and the Hungarian Legal Order.) In: *Nemzetközi jog az új alkotmányban* (ed. András Bragyova), Budapest 1997.; Vörös, I.: Az Európai Megállapodás magyar bírósági alkalmazása. (Implementation of the European Agreement by Hungarian Courts.) In: *Collega* (Journal of the Loránd Eötvös University), 1997/3–4.

²⁵ For the enumeration of fundamental rights, see Chapter XII of the Constitution (Art. 54–70/K) entitled "Fundamental Rights and Duties".

²⁶ See *inter alia* statute No. 2 of 1989 on the right of association, statute No. 3 of 1989 on the right of assembly, statute No. 7 of 1989 on strike.

Rights and Fundamental Freedoms (the 1950 Convention of Rome and its Protocols), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted in 1966 under the auspices of the UN. In addition Hungary took the necessary measures to enable other States as well as individuals claiming to be victims of violations of any of the rights set forth in the Convention or in the Covenants to access the European Court of Human Rights or to submit a communication to the Human Rights Committee by becoming a party to the relevant optional protocols, as well.

2. The law of Hungary (e.g. statute No 144 of 1997 on incorporated companies, statute No 145 of 1997 on the company register, the publicity of company related informations and judicial proceedings concerning companies or statute No 24 of 1988 on foreign investments in Hungary) recognizes the right of entrepreneurship and promotes both individual and corporate enterprise.

Accordingly there are tens of thousands of companies incorporated at the Hungarian registry courts. A significant percentage of these companies incorporated in Hungary is exclusively or in part owned by foreigners.

The protection and promotion of foreign investments is facilitated by nearly 50 bilateral treaties.

After abandoning the completely planned economy of the socialist era and abolishing State monopoly in international commerce, from 1990 on—subject to some limitations on quantity and compulsory licenses—both internal and external trade can be pursued by anyone. From July 2001 as a result of our membership in the OECD and the progress made in the negotiations concerning our accession to the EU, all restrictions on capital movements and current transactions and transfers have been lifted as regards individuals and companies allowing curbs only for the purposes of the oppression of money laundering.²⁷

3. Litigation concerning companies incorporated in Hungary may usually be initiated before the regular courts of Hungary. Even if the contractual relationship involves international elements (e.g. damage suffered either at home or abroad during an international conveyance), in most cases the jurisdiction of a Hungarian regular court or court of arbitration can be

²⁷ On the liberalization of capital movements and current transactions and transfers, see Cabinet regulation 88/2001. (VI. 25.).

established according to the provisions of the Code of Private International Law or the Code of Civil Procedure.

If the case involving Hungarian citizens or legal persons is judged by a foreign tribunal, the protection of their interests and the assertion of their rights is facilitated by international agreements. The Republic of Hungary concluded some 60 bilateral treaties on judicial assistance in civil and commercial matters. The content of such agreements is of course not uniform, e.g. the treaty of 1965 between Hungary and Austria only provides for judicial assistance in civil matters and the recognition of official documents, however the treaties of 1980 between Hungary and France and of 1981 between Hungary and Finland deal with judicial assistance in civil, family and criminal matters as well.

The Republic of Hungary is also a party to many multilateral treaties on judicial assistance and on other topics with economic implications protecting and binding the Hungarian entrepreneurs and the Hungarian State, as well. Some provisions of international treaties have been incorporated into Hungarian statutes without modifications, e.g. Art. 8 of the Agreement on the Implementation of Art. VII of the General Agreement on Tariffs and Trade is reproduced in our 1995 statute on customs duties.²⁸

The ban on all kinds of discrimination is strictly enforced as regards individual rights and the freedom of entrepreneurship. Discriminative practices have been used frequently by employers but firm State action has been taken in return. It is illegal for an employer to determine conditions for the filling of a vacancy based on gender or age. Exceptionally such discrimination is allowed only if the characteristics of the job itself so require. It is also illegal to publish job advertisements of discriminative nature.

The real problems are of course presented not by the open and obvious discrimination but by the so-called latent discrimination especially directed against gypsies. In such cases the employer will not hire e.g. a gypsy or a pregnant woman but gives other reasons for refusing the application.

Further work has to be done—not only in Hungary—concerning the discrimination based on sexual orientation and the rights of homosexuals and other persons with a not exclusively heterosexual attitude. These days in Hungary a huge debate is going on about a decision of the public guardianship authority allowing a well-known transvestite to adopt a baby. (Should a homosexual or a transvestite be allowed to adopt and raise a child?)

²⁸ Cf. statute No. 100 of 1995, Art. 21–33.

IV. Foreign investments in Hungary, investments of Hungarian nationals abroad

In the past ten years, since the beginning of the transformation of Hungary into a market economy a multi-speed process could be observed in this field. A separate statute was adopted on the foreign investments in Hungary in order to facilitate the influx of capital.²⁹

The single most important barrier is the prohibition of the acquisition of agricultural lands by foreigners. This situation is not expected to change until several years after Hungary's accession to the EU. Otherwise the capital moving into Hungary (first of all green field investments) was given preferential treatment, especially between 1990 and 1995. In the same time a number of treaties on the protection of foreign investments were concluded between Hungary and other States.³⁰

The liberalisation of the investments of Hungarian nationals in third countries was not completed until the aforementioned liberalisation of capital movements and current transactions and transfers. Accordingly investments of Hungarian natural or legal persons in third countries might be limited only in areas requiring special protection and only by invoking the internationally accepted causes of restriction (public order, national security, protection of cultural heritage etc.) besides being subject to the provisions of the host State.

²⁹ Cf. statute No. 24 of 1988 on foreign investments in Hungary

³⁰ E.g. with the Federal Republic of Germany, Canada, Kuwait, Spain, Israel, Australia, Italy, Austria, Sweden, France, United Kingdom etc.