LÁSZLÓ BODNÁR

The Relationship of International Law and Domestic Law in Our Constitution – *de lege ferenda*

Introduction

As a political decision has been made about a new constitution to be accepted in 1995 (96), another issue arises which has to be dealt with constitutionally, namely what place the norms of international law (both the rules of customary law and the rules of treaty) take in the Hungarian legal order.[1]

This question has to be answered inevitably at the constitutional level for two reasons:

The theoretical and dogmatic debate of "monism or dualism", dating from more than a hundred years ago, has become an everyday, practical issue for every state with a well-developed legal order and extensive international relations by the second part of the 20th century – and especially by the last 2–3 decades of the century (millennium). In this period it is hardly possible that a state which refrains from co-operating with other states can operate efficiently. Under normal circumstances states cannot act in such a way both for political and economic reasons. In other words the operating state mechanism is part of an international *interdependence* and the position of a given state in the international order of relations is – among others – a legal issue.

It is a legal issue, in which the state – typically in the constitution (or in an act with constitution's force) – determines how and according to what *values* it accepts its international obligations in its own national legal order.

This latter "obligation" is especially important for the states of *Europe*, as with respect to these states a more developed (and at the same time a more precise) regulation and a stricter protection of *human rights* have evolved compared both with the rules of universal international law and with other regional, international systems of regulation.

Almost simultaneously with this a process of (economic) integration has arisen among the states of Western Europe, the system of which is undergoing the simultaneous intensification and extension of integration at present. The latter one, that

[1] The author's private remark: in order to have time for the thorough professional (and political) preparation and discussion of the draft of the constitution, it is inexpedient to hurry the passing of the new constitution by the Parliament. If preparation has been duly accomplished, the 1100th anniversary of the Hungarian conquest may be an appropriate occasion to promulgate the new constitution (possibly in Ópusztaszer).

is the process of extension affects the political, economic and social perspectives of the Republic of Hungary fundamentally, and it is hardly necessary to emphasize that the only alternative for Hungary is to join – as soon as possible – the European Union (EU).

The analysis of the economic, political and social conditions of joining is not the jurists' task. However, it is their task to emphasize strongly: *the question of "monism or dualism" cannot be asked in the European Union.* The reason is that in the European Union the condition of membership (or in other words existence) is to acknowledge that the legal norms of the European Union, both the *primary* and the *secondary* sources of law are to be applied *directly* in *each and every member-state*, concerning both the *state* and the *natural and legal persons*, and they *are given* unconditional *priority over the norms of* national, that is *domestic law.*

The situation is essentially the same with respect to international treaties concluded under the aegis of the Council of Europe (CE) – above all to protect human rights (fundamental rights) – as none of the EC members can avoid conforming to e.g. the (European) Convention for the Protection of Human Rights and Fundamental Freedoms by virtue of saying that as a state representing the dualistic concept it has not transformed the treaty into domestic law.

However, in addition to the "severity" of European regionality, one can also see that essential changes have occurred at the universal level of international law/international relations for the last one or two decades. Just to mention the most typical examples: the military action taken against Iraq and the embargo on (Small)-Yugoslavia prove that member states (and even non-member states) were compelled to adhere unconditionally to the sanctions, as international acts, ordered by the UNO (Security Council). In these instances none of the states can (could) claim that the resolution of the UNO (SC) had not been incorporated – by means of transformation – into its own national (domestic) legal order. (NB. The fact that e.g. the resolutions of the UNO SC imposing sanctions against (Small)-Yugoslavia were promulgated in a *decree of the government* in Hungary did not entitle the Republic of Hungary to apply its higher-level rules of law (acts) over the UNO SC resolution promulgated in the decree of the government.)

Based on the above circumstances and in view of the limits of content of the present study, I do not wish to engage in a detailed discussion of the issue of "dualism/transformation" or "monism/adoption" either now or subsequently,[2] I will restrict myself only to its summary later on.

I. The Hungarian constitution and international law in the changing (especially European) world

1. *Antecedents*

Until 23rd October, 1989 the Hungarian constitution *never* included *any kind* of directions on the application of the norms of international law within the state (that is on the relationship of international law and domestic law), the relationship of international law (international treaties) and the Hungarian legal order was determined only by the

[2] For the detailed discussion see *Bodnár*, L.: A nemzetközi szerződések és az állam. Budapest 1987, p. 276 (See particularly pp. 15–52 and 88–115).

general and accepted judicial practice – without being questioned seriously – by applying international treaties (over the Hungarian law) only exceptionally and not even consistently.[3]

Our constitutions – both the "thousand-year-old" (unwritten) and the first written ("socialist") constitutions – did not deal with this issue.

The law-making (and applying of law) during the period between the two World Wars as well as between 1945/49 and 1989 considered it natural that international treaties concluded by Hungary had to be incorporated in acts (or domestic legal rules of law of another level), and that these acts (or other rules of law) had to be promulgated in the official paper as all the other (domestic legal) rules of law in order to ensure their domestic legal (judicial) applicability. Let me remark, however, that it was almost inconceivable, especially during the period of 1949–1989, that reference to international treaties providing subject rights for natural persons could be successful in national law-applying (judicial) organs.

When reference was made to such rules of law promulgating international treaties – which happened very rarely in judicial practice – it was always the act promulgating the international treaty which could be referred to, and not the international treaty itself, as the *original source of law.*

Based on this the conclusion can be drawn that the practical application of the very pronounced, classic theory of dualism/transformation was recognized in the Hungarian constitutionality, legislation and jurisdiction.[4]

Our first written constitution – Act XX. of 1949 – is one of the East European, Soviet-type constitutions, and as such it reflects the "socialist" (Soviet) concept of that time, which did not recognize the norms of international law in the domestic sphere without the sovereign approval, that is the special decision of the state (that is without its transformation into domestic law). This political (legislative) approach was duly supported by the jurisprudence of that time.[5]

This *official concept* (and practice), taken by Hungary too, – strangely and unfortunately – prevailed in the 70s and 80s as well, although some East European countries (even the ones which had a much stricter political system than Hungary, such as e.g. the GDR, the Soviet Union, Romania) had already given up, at least formally, this rigid approach to the relation of international law and domestic law. In Hungary it was only jurisprudence, especially that of international law, on whose part an ever-increasing, professionally supported claim arose to take another (that is a monistic/adoptional) approach.[6]

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[3] In the field of criminal law/law of criminal procedure (extradition) or e.g. in the cases related to the international transport of goods bilateral or particular conventions were applied by the Hungarian courts, but neither e.g. the International Covenant of Civil and Political Rights or the ILO convention prohibiting women's night work (before being cancelled), and not even the act or law decree promulating them constituted enforceable subject rights for the individual in court during the past years.

[4] See the discussion of this by *Triepel* and *Anzilotti*. Cf. *Triepel*, H.: Völkerrecht und Landesrecht, Leipzig, 1899; *Anzilotti*, D.: Lehrbuch des Völkerrechts, Berlin and Leipzig, 1929.

[5] Thus e.g. György *Haraszti* propagates the (moderate) dualistic concept of the relation of international law and domestic law even in the university textbook published in 1976, and as János *Bruhács* states: in the 60s the dualistic concept was *prevailing* in the Hungarian jurisprudence of international law. Cf. *Haraszti*, Gy.–*Herczegh*, G–*Nagy*, K.: Nemzetközi jog (Ed. by Haraszti, Gy.), Bp. 1976, pp. 27–29; and János *Bruhács*: A nemzetközi jog és a belső jog viszonya. In: Magyar Jog 1973 (10), p. 700.

[6] See particularly *Nagy*, K., *Valki*, L., *Bodnár*, L. Cf. *Nagy*, K.: A nemzetközi jog jogrendszerbeli helyének és tagozódásának néhány kérdése a jog általános fogalmának tükrében. In: Jogtudományi Közlöny

It is very characteristic of the "backward" Hungarian conditions existing in this field of law-making/law-applying that until 26th November, 1982 (that is until the passing of Law Decree No. 27 of 1982) there was no rule of law on the conclusion, promulgation and/or publication of international treaties with Hungarian participation, or on the global relation of international law and the Hungarian legal order.[7]

The – extremely minor – amendment of our effective constitution on 23rd October, 1989 meant the first, by no means very great step towards "settling" the issue of the relation of international law and (the Hungarian) domestic law, the application of international legal obligations within the state. According to this:

"The legal order of the Republic of Hungary accepts the generally recognized rules of international law, and ensures the harmony of the undertaken international legal obligations and domestic law [Constitution, Sect. (1) of § 7].

The direction of our constitution quoted above is *prima vista too general* (and accordingly incomplete) *and eclectic*:

a) it is too *general*, because its direction concerning international treaties does not say anything essential (either on a dualistic or monistic basis) about the position of international treaties in (the Hungarian) legal order, about the question of priority, the possibility of direct applicability (or the obligation thereof) or about resolving (possible) collisions with the (Hungarian) national legal order. Thus the generality of this direction – also – implies its incompleteness.

b) it is *eclectic* because the generally recognized norms and principles of international law (that is the rules of customary universal international law) are received into the Hungarian national legal order, while the law of the treaty is not.

However, in addition to this – in my opinion basic – paradox I have to remark that it is conceptual nonsense to view this reception (which is nothing else than the intention of receiving on the state's part) as a general transformation. The reason for this is that one cannot transform a norm which is far from being exact, and which often necessitates a concrete interpretation of case so as to determine the *content* of the norm even in international jurisdiction (or in other international application of law).[8]

On the other hand, however, if the first expression of Section (1) of § 7. of our constitution is interpreted not as a "general transformation" but as the *adoption* of the rules of customary law, then the content of the norms of customary law determined by the national (in this case by the Hungarian) jurisdiction can only be a *unilateral domestic interpretation.*[9] (The content of international treaties – as written sources of law – is usually exact enough for the unilateral domestic interpretation to be adequate to the authentic, that is to the law-making interpretation.)

1972. (1–2), pp. 39–49. See particularly pp. 43 and 45. *Valki*, L.: A nemzetközi jog sajátos társadalmi természete, Bp. 1981. p. 35. *Bodnár*, L.: A nemzetközi jog és az államon belüli jog viszonya – egyes államok alkotmányai alapján. Acta Jur. et Pol. Szeged, Tom XXV. Fasc. 1.

[7] Before Law Decree No. 27 of 1982 was passed, this problem was "regulated" only by the KüM–IM (Ministry of Foreign Affairs–Ministry of Justice) Press Release ("A Külügyminisztérium és az Igazságügyi Minisztérium tájékoztatója a nemzetközi szerződések megkötéséhez"), which can hardly be regarded as a source of law.

[8] In this sense see *Müller*, J.P.–*Wildhaber*, L.: Praxis des Völkerrecht, Bern 1977,- p. 134; *Seidl–Hovenveldern*, I.: Transfromation or Adoption of International Law into Municipal Law. In: International and Comparative Law Quarterly, 1963, pp. 93–94; *Öhlinger*, Th.: Der völkerrechtliche Vertrag im staatlichen Recht, Vienna–New York 1973, p. 151.

[9] Cf. *Haraszti*, Gy.: A nemzetközi szerződések értelmezésének alapvetõ kérdései, Bp. 1965, pp. 111–120.

However, the main theoretical/dogmatic paradox lies undoubtedly in the fact that the two different constructions, which are in total contrast, cannot be accounted for correctly with respect to the rules of customary law or international treaties. Consequently it is not accidental that strong criticism has been voiced against such duality found in the German Constitution [GG Section 25 and GG (1) II. 59.].[10] In the Federal Republic of Germany this contradiction manifested in the constitution is further sharpened by the fact that as the result of the EU membership of the FRG the EU treaties (as well as the secondary sources of law) are applied directly, without transformation – in accordance with the EU obligations – in the FRG, without the naturalness of this being questioned.[11]

2. *Is it necessary to regulate the relation of international law (customary law + treaties) and the national (Hungarian) law in an exact way in our new constitution?*

In my opinion there is only one answer to this question: by all means! The reasons for this categorical answer are the following:

a) The most important and at the same time the most general reason is that – as our effective constitution states it, too – the Republic of Hungary is a *constitutional state*. (It is hardly necessary to give reasons for the importance of constitutionality as a basic constitutional *value*, for it is the fundamental condition of not only our joining the European Union and of our already granted membership in the European Council, but also of belonging to the European civilization.)

On the other hand the inherent attribute of constitutionality is not only to subject the state to the regulations of the constitution and the laws (as regards the domestic legal order), but also to fulfil international legal obligations in good faith – including their application within the state – that is to ensure the subject rights originating therefrom.[12]

b) In all probability it is not pure chance that almost all the traditional (bourgeois) democracies considered it important to settle the issue of the relation of international law and domestic law. It was typically regulated in their constitutions,[13] or – in the absence of this – an accepted judicial practice had evolved, which was considered to be a natural, unquestionable conception complying with constitution(ality).[14]

Following the example of the oldest (bourgeois) democracies (the Netherlands, the USA, France, Switzerland), West European states which became democratized later

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[10] See particularly *Partsch*, K.J.: Die Anwendung des Völkerrechts im innerstaatlichen Recht. Berichte der Deutschen Gesellschaft für Völkerrecht, Karlsruhe, 1964, p. 101; *Bleckmann*, A.: Grundgesetz und Völkerrecht, Berlin, 1975, p. 279.

[11] An absolute exception is the so-called "Solange (I–II) Beschluß" resolution of the constitutional court – subject to much criticism and debate – in which the German constitutional court stubbornly insisted on the application of German law instead of the European Community law because at that time the German law gave more protection to the individuals as regards fundamental rights than community law. For more details on the criticism and the debate see e.g. *Rupp*, H. H.: Grundrechtsschutz in den Europäischen Gemeinschaften. In: Die Grundrechte in der Europäischen Gemeinschaft. Baden-Baden 1978, pp. 9–21. For the different viewpoints see op. cit., pp. 61–62.

[12] Article 27. of the Vienna Convention of 1969 codifying the law of international treaties states: "neither party can refer to the directions of its domestic law to justify the failure of the execution of the treaty..."

[13] Cf. Article 55 of the French Constitution, Article 66 of the Dutch Constitution, Section (2) of Article VI. of the Constitution of the USA.

[14] This is the situation in Switzerland. Cf. *Müller*, J.P.–*Wildhaber*, L.: op. cit., p. 134.

(Austria, and even later Spain, Portugal, Turkey) also recognize the priority and direct applicability of the norms of international law over domestic law.[15]

But even in those West European states in which the system of dualism/transformation has been maintained, the international treaties transformed into domestic law (now as acts) *are given priority over the "ordinary" acts, either in conformity with the regulation of the constitution* (as e.g. in the FRG and in Greece) *or due to the "compulsion" of belonging to Europe* (see the Scandinavian states).[16]

Now that the *Scandinavian states* have been mentioned, a special – and now very short – remark should be made. Namely that the Scandinavian legal orders are not really continental legal orders, the Anglo-Saxon influence (that is the *British* influence) is almost as dominant in them as the "continental" influence![17] Accordingly, the Scandinavian concept (and practice) of the relation of international law and domestic law is based on the British law. It is true, however, that the membership itself in the Council of Europe has already forced the revision of the British legal concept serving as a "model" (at least with respect to international treaties).[18]

c) In view of the above – it seems that – it is not unnecessary to quote the new European constitutions of the last two decades. At least two basic conclusions can be drawn from them – even without a thorough analysis:

ca) The new constitutions – without exception, although to a different extent – considered it important to determine the relation of international law and national law in the constitution.

cb) The great majority of the new constitutions generally recognize the priority of international law (international treaties) over the state's own acts (excluding the constitution).

The most recent constitutions of Western Europe contain the following major directions about the relation of international law and domestic law:

Greece, the constitution of 1975 (Section 1 of Article 28):

"The generally accepted rules of international law, as well as international treaties, after they have been enacted and have come into force, shall become the integral part of Greek domestic law, each to its own expression, and are to be applied over any conflicting legal measures."

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[15] The "priority" of international treaties – in contrast with the term "primacy" used by Kelsen – does not imply a subordinate – superordinate relation between international law and domestic law. The *priority* of the norms of international law means only that if there is collision between the norms of international law and domestic law – which, after all, have been created by the same law-making body (bodies) of the state –, the norm of international law is given priority.

[16] Cf. FRG GG. Article 59, Greek Constitution, Section (1) of Article 28. The Scandinavian states had traditionally adopted the concept and practice of dualism, which was undermined by the application of the European Convention on Human Rights, and in the 80s the direct judicial application of the directions of this convention became the natural part of judicial practice. Cf. *Jensen*, S. S.: The European Convention on Human Rights in Scandinavian Law. Jurist-og Ökonomforbundets Forlag. 1992. See particularly pp. 4–7 and 40–72.

[17] In this sence e.g. *Strömholm* In: An Introduction to Swedish Law. Vol.I. (Ed. by Stig Strömholm) Deventer, The Netherlands, Boston–Antwerpen–Frankfurt, 1981, pp. 32–33.

[18] In Denmark and Norway it is clearly established that administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with international obligations undertaken – be they incorporated or not – whereas in contemporary *Swedish* law there seems to be only a tendency to recognize such obligations." *Jensen*, S. S.: op. cit., p. 174. (Since Sweden is the member of the European Union as of 1st January, 1995, the rules of law of the EU are to be applied directly, preceding Swedish law in Sweden, too. – L.B.)

Portugal, the constitution of 1975 (Article 8):

"1. The norms and the principles of general or common international law constitute the integral part of Portuguese law.

2. The duly ratified or accepted general norms of international treaties shall become part of the domestic legal order after they have been published officially and if the Portuguese State has joined them internationally."

Spain, the constitution of 1978 [Section (1) of Article 96]:

"The validly concluded international treaties, provided they have been published officially in Spain, constitute part of the national legal order. The provisions thereof can be repealed, amended or suspended only in the manner determined in the treaty itself or according to the generally recognized rules of international law."

Turkey, the constitution of 1982, (Exp. 5 of Article 9):

"International treaties which have been duly entered into force have the force of law. Therefore the Constitutional Court cannot be appealed to on the grounds of violating the Constitution."

Three of the above four new West European constitutions (Portuguese, Spanish, Turkish) provide for the relation of international law and domestic law on the basis of the concept of monism/adoption, and only the Greek constitution represents the practice of dualism/transformation. It is noteworthy, however, that the *Greek* constitution also states that the *acts promulgating the treaties transformed into domestic law have priority* over all the other legal acts.

The majority of *East European* states which have undergone a democratic transformation, or East European democratic states which have become independent recently, have accepted a new constitution almost immediately – although obviously for different reasons. (Thus Russia, Estonia, Lithuania, the Czech Republic, Slovakia, Croatia, Slovenia, Bulgaria, Romania.)

Poland and Hungary opted for another way: Poland passed an act with constitution' force (in fact a constitution's novel – L.B.). On 17th October, 1992 "On the mutual relations of the legislative and executive bodies of the Republic of Poland and on the local authorities" "With the aim of improving the operation of the highest-level bodies of the Republic of Poland until its *new Constitution is accepted...*" (The author's own emphasis.)

In Hungary the amendment of the constitution of 23rd October, 1989 (Act XXXI of 1989) essentially signified the general revision of the constitution, and it was then that the above quoted Section (1) of § 7. was included in our constitution, which – in spite of its defects – can be regarded as a milestone in constitutional history, as it was the first time that the Hungarian constitution mentioned the relation of international law (international treaties) and the Hungarian legal order.

With the amendment of the constitution of 1989 the *fundamentals* of the democratic system had become part of the constitution. Several further partial amendments to the constitution and (in some cases) related legislative acts were made, partly simultaneously with this and partly later, in order to extend democratic constitutionality .

Thus the common feature of the Polish and the Hungarian constitutional processes (following the change of the regime) is that they both intend to accept the *new constitution* in a later system of politics/power which – compared to the period of the change of the regime – is more settled, more tranquil and more stable.

Let us see now how the already accepted East European constitutions regulate the relation of international law and domestic law:

The *Federation of Russia*, constitution of 1993 [Section (4) of Article 15]:

"The generally recognized principles and rules of international law and the international treaties of the Federation of Russia are the constituents of its legal order. If the international treaty of the Federation of Russia states rules other than ordained by the act, the rules of the international treaty shall be applied."

The *Republic of Lithuania*, constitution of 1992 [Section (3) of § 138]:

"The international treaties ratified by the Parliament of the Republic of Lithuania constitute the integral part of the legal order of the Republic of Lithuania."

The *Republic of Estonia*, constitution of 1992, second exp. of Section (1) of Article 3, and Section (2) of Article 123):

"The universally recognized principles and norms of international law constitute the inseparable part of the Estonian legal order."

"If the Estonian acts or other decrees are in contradiction with the international treaties ratified by the Parliament, the relevant articles of the international treaties shall be applied."

The *Republic of Slovenia*, constitution of 1991, (Article 8):

"The acts and the other regulations have to be in harmony with the generally effective principles of international law and with the international treaties binding Slovenia. The ratified and published international treaties are to be applied directly."

The *Republic of Croatia*, constitution of 1990, (Article 134):

"The international legal conventions, which have been concluded, confirmed in conformity with the constitution and published, constitute the part of the domestic legal order of the Republic, and as to their application they are superior to the acts. Their provisions can be repealed or amended only on the condition and in the manner determined by them, or according to the general basic principles of international law.

The *Republic of Bulgaria,* constitution of 1991 [Section (4) of Article 5 and Section (3) of Article 85]:

"Every international deed which has been ratified, promulgated and entered into force in the constitutionally specified manner with respect to the Republic of Bulgaria shall be deemed to be the part of the national legislation of the country. The deed shall replace any national act regulating otherwise."

"The ratification of an international treaty which necessitates the amendment of the Constitution has to be preceded by passing the relevant amendment to the constitution."

Romania, constitution of 1991 [Section (1) and (2) of § 11]:

"(1) The Romanian state obliges itself to fulfil, consistently and in good faith, its obligations imposed on itself by the treaties signed by the state.

(2) The treaties which have been duly ratified by the Parliament constitute part of the national law."

The *Czech Republic*, constitution of 1992 (Article 10):

"The ratified and promulgated international treaties on human rights and fundamental freedoms, which treaties are binding on the Czech Republic, shall be directly compulsory and shall have priority over the acts."

The *Republic of Slovakia*, constitution of 1992 [Article 11, Section (e) of Article 125 and Section (2) of Article 144]:

"The international treaties on human rights and fundamental freedoms, which have been ratified by the Republic of Slovakia and have been promulgated in the manner prescribed by the law, are given priority over the acts of the Republic of Slovakia if they guarantee the extension of constitutional rights and freedoms."

The Constitutional Court shall decide whether "the generally binding legal rules are in harmony with the international treaties which have been promulgated in the manner prescribed for the promulgation of acts."

"If the constitution or the act states so, the international treaties shall be binding on the judges, too."

Finally, to satisfy the need of precise documentation:

the act with constitution's force of 1992 of the *Republic of Poland* [Section (2) of § 28, and Section (1) and (2) of § 33; effective until the new constitution is accepted]:

"The President of the Republic (...) shall see to the observation of international treaties."

"(1) The President of the Republic shall confirm and dissolve international treaties, of which he has to notify the Szejm and the Senate.

(2) The confirmation or dissolution of international treaties which concern state borders or defence alliances, or impose financial obligations on the state, or necessitate changes in the act, require legislative authorization."[19]

The regulations contained in the above quoted East European constitutions lead to the following conclusions:

With respect to the regulation of the relation of international law (international treaties) and domestic law, the *constitution of the Federation of Russia* is modelled on the concept of the relevant *act* of the former Soviet Union,[20] but at the same time this relation is further improved and made unequivocal according to the most characteristic concept of monism/adoption. One must emphasize the fact that Russia – in contrast with the former Soviet Union – regulated this issue in its *constitution*, in a separate chapter thereof.

In the case of *Lithuania and Estonia* – by virtue of their characteristic historical situation – it was the first time they had the opportunity to regulate the relation of their national legal order to international law comprehensively, at the constitutional level, as independent states.

One can say that both constitutions accepted the progressive bourgeois democratic traditions and the relevant concept of the majority of the new West European democracies. The constitutions of both Baltic states are based on the concept (the Lithuanian constitution implicitly) that the *international treaties which have been ratified and published* (by the Parliament) *form part of their national legal order,* are to be applied directly and have priority over the ("ordinary") acts.

However, as to the position within the constitution a difference, which is more than a mere structural difference, can be observed in the constitutions of these two newly independent Baltic states. Although both constitutions regulate the relation of *international treaties* and domestic law in a *separate* chapter, the *Estonian constitution* also provides for the "generally recognized principles and rules of international law"

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[19] The quoted texts of the constitutions are *not* authentic translations.

[20] See the text of the act in: Ezsegodnik mezsdunarodnogo prava, 1978, Moscow, 1980, pp. 435–439.

separately, in Chapter I entitled "General regulations", while the Lithuanian constitution makes no reference to this whatsoever.

Slovenia and Croatia, which won their independence by separating from the (former) Yugoslavian Socialist Republic, modelled the constitutional regulation of the relation of their national legal order and international law (international treaties) not only on the concept and experience of the constitutional system of the European (bourgeois) democracies but also on the constitution of their predecessor state, the federal Yugoslavian Socialist Republic (YSR). Section 210 of the 1974 constitution of the YSR stated that "the published international treaties shall be applied directly by the courts."

Compared to this, the two former Yugoslavian member states limited the direct applicability of international treaties and their priority over the acts inasmuch as this status is recognized only in the case of *ratified* (and published) international treaties.

Otherwise the comparison of the Slovenian and Croatian constitutions – which are essentially the same in content – raises only one (although not negligible) question as regards position: namely whether or not the constitutional norms of the same content have a special relevance in view of the fact that – as in this case – the given norm is included in the separate (relevant) chapter of the constitution (Chapter VII. of the Croatian constitution on the "International legal relations") or in the – typically first – chapter determining the general regulations of the constitution (in other words the fundamentals of constitutional order) (Slovenian constitution: Chapter I.: "General regulations", and similarly: Russian constitution, Part I., Chapter I.: "The fundamentals of constitutional order").

The new constitution of *Bulgaria* – compared to the previous constitution, which did not regulate the application of international treaties within the state – radically overstepped the former "socialist Bulgarian" concept, when for the regulation of the relation of international treaties and domestic law it accepted the constitutional regulation which suits democratic constitutionality the best. It is stated in Chapter I. of the constitution, among the "*Basic principles*", that international treaties which have been constitutionally ratified, promulgated and entered into force form part of the legislation and replace any other national act regulating otherwise.[21]

A natural exception to this is the ratification of international treaties requiring the amendment of the constitution, as in such cases the prerequisite of ratification is the previous amendment of the constitution.[22]

The recognition of the (generally accepted) principles and norms of international law – in the field of foreign policy – is also regulated in Chapter I., but quite strangely and separately from regulations concerning international treaties, only in Section 24, the last section of the chapter.

The new constitution of *Romania* regulates the relation of international law (international treaties) and the Romanian national law with certain antecedents, as the former Romanian "socialist" constitution – unlike most of the socialist constitutions of that time – also contained certain provisions about the relation of international treaties and the Romanian domestic law, stating the priority of international treaties.[23]

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[21] Cf. Section (4) of Article 5 of the constitution.

[22] Cf. Section (3) of Article 85 of the constitution.

[23] Cf. the Romanian Constitution of 1965: Section (9) of Article 43, Section (3) of Article 63 an Section (9) of Article 77.

In view of this it is actually surprising that the new Romanian constitution is hardly more elaborate in this respect than its "socialist" predecessor, and it is especially so if compared to the majority of the new constitutions of the East European countries. Although the new Romanian constitution acknowledges, in the "*General Principles*" determined under Title I, that the treaties ratified by the Parliament constitute part of the national law,[24] priority is mentioned explicitly only in § 20 on "International treaties concerning human rights", regulated under *Title II* (Fundamental rights, freedoms and obligations"), and only regarding these treaties.[25]

The constitutions of both the *Czech Republic* and the *Slovakian Republic* also raise theoretical/dogmatic questions with respect to regulating the relation of international law (international treaties) and domestic law – compared with the eclectic nature of the Romanian constitution.

It is well-known that before becoming independent both states were the member states of the former (federal) Czechoslovakian Socialist Republic. Their former – common – constitution, the Czechoslovakian constitution of 1960 was quite terse on the relation of international law and domestic law, in fact it implied the system of dualism/transformation.

At the same time, thanks to the former Czechoslovakian Republic, both states can look back on considerable bourgeois democratic experiences – the extent of which is quite unusual in Eastern Europe. Thus it makes one think why the constitutions of these two new East European democracies are so curt when it comes to regulating the relation of international law and domestic law. The fact is that both constitutions keep quiet about the global relation of international law (international treaties) and the national legal order.[26]

However, both constitutions assert the *priority of* – ratified and promulgated – *international treaties on human rights and fundamental freedoms* over the national acts. But while the Czech constitution does so in Chapter I. containing the "Basic provisions", the Slovakian constitution includes it among the general provisions of the second part on "Fundamental rights and freedoms". In addition to this difference in position a further difference of content must also be pointed out, namely that the *Slovakian* constitution stipulates further conditions of recognizing the priority of international treaties concluded in this field.[27]

In my opinion the quoted provisions of the new Czech and Slovakian constitutions concerning the "definition" of the relation of international law and domestic law cannot be interpreted on a theoretical/dogmatic basis. The reason is the fact that the priority of international treaties concluded in a single field – that is concerning fundamental human rights (and freedoms) – over the national acts is recognized at constitutional level without even mentioning the legal status of treaties concluded in other fields, which suggests a political consideration at best, but legal reasons are hardly conceivable.

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[24] Cf. Section (2) of § 11 of the constitution.

[25] Compared to the other new East European constitutions, the new Romanian constitution gives a rather disharmonious impression; it seems to the author that current political reasons make the legal/institutional system eclectic.

[26] For lack of constitutional regulation the Czech and Slovakian law-appliers are in fact forced to take the "Scandinavian way".

[27] Cf. Article 11 of the constitution.

The underlying intention is most probably the fact that both states – as members of the Council of Europe – are by all means bound to ensure the priority of the European Convention on Human Rights. They did so, and only so. And with this they scarcely satisfy the criteria of constitutionality – laid down in Section 1. of both constitutions.

The *Polish* act with constitution's force – most probably because of its provisional nature – does not take a stand on the issue of the global relationship of international law (international treaties) and the Polish national legal order. However, certain conclusions can be drawn implicitely, e.g. that adherence to the provisions of international treaties – in the domestic sphere, too – has to be ensured in some way. This is made to be the task of the President of the Republic by the act with constitution's force.

Summarizing conclusions

1. *All* of the already accepted East European constitutions *provide for* the relation of international law and the national legal order *in one way or another.*

2. All the quoted constitutions recognize the priority of international law (international treaties) over the acts.

3. With respect to whether priority is given to all the international treaties two extreme poles can be seen, on the one hand *Russia* (it covers all the international treaties), on the other hand the *Czech Republic* and *Slovakia* (it covers only the international treaties on human rights).

4. The typical construction is the following: the international treaties which have been ratified and promulgated/published (by the Parliament) constitute the part of the national legal order and have priority (with the exception of the constitution) over all the national law-making acts.

II. How should the relation of international law (international treaties) and the Hungarian legal order be regulated in our new constitution?

1. Without engaging in the detailed discussion of the theoretical/dogmatic problems concerning the relation of international law and domestic law, let me give a review of the general theories, the applied or possible legal-technical solutions, the basic questions of which can be defined as follows:

a) The global relation of international law (international treaties) and domestic law.

b) How does an international treaty become part of the legal order of the state (transformation and/or adoption)?

c) On what basis can the provisions of an international treaty be applied *directly* in the sphere (of the application) of domestic law?

Ad a) As to the relation of international law and domestic law, the historical conception to appear is the one which is based on the unified legal order but which accords *primacy to domestic law.* This view, which is usually traced back to Hegel, namely that international law is in fact the extension of state law, thus it is external state

law, was professed by the school of law known as the *School of Bonn* (Zorn, Wenzel, Kaufmann) at the end of the 19th century.[28]

This view, and especially the practical consequences thereof deprived international law (international treaties) of its essential attribute; namely that international law is the joint law-making of at least two states. If, however, domestic law has priority over this, all in all it implies that international obligations can be ignored by means of unilateral (domestic) law-making. This doctrine has obviously been made insupportable by the development of inter-state relations, and by the emphasis laid on the more or less mutual interest inherent in these relations.

It was the German *Triepel* who worked out a new construction. In his monograph published in 1899, entitled: Völkerrecht und Landesrecht, he expounded an entirely new construction of the relation of international law and domestic law, namely the duality of the legal order. Accordingly, international law and domestic law were regarded as completely independent, co-ordinate legal orders. In his concept the two legal orders can be depicted with two circles, which may touch but will never intersect each other, that is they are applied separately, in two different domains.[29]

This rigid dualistic concept was disproved by reality just as the concept based on the primacy of domestic law also proved to be unviable. Reality definitely proved that certain norms of international law do enter and are (may be) applicable in the sphere of domestic law. If the dualistic concept is to be maintained, this is possible only by admitting that there is some overlapping between the systems of international law and domestic law. The explanation of this overlapping is given and expounded by *Anzilotti* in his textbook published in 1929.[30] Anzilotti's concept can be depicted with two circles which intersect each other, and the area of intersection is the field which forms part of both international law and domestic law.

As the basic principle and one that characterizes every concept of dualism it can be asserted that the norms constituting the "system" of international law can be applied in the sphere of domestic law only by way of their *transformation.*

Contrary to the doctrines discussed briefly in the foregoing and to the state practice based on them, outside Europe, more precisely in the USA, a radically different concept has prevailed since the end of the 18th century. The constitution of the United States (as early as in its 1789 form) declares that the international treaties concluded by the Federation are the most important acts of the USA, they are binding on each (member) state and each judge, and they have priority over the acts. This constitutional regulation asserts the implicit priority of international treaties, and once they have been concluded they automatically become part of the legal order of the state.[31]

In Europe this approach to the relation of international law and domestic law became known only in the middle of the 20th century, mostly due to the work and activities of the jurists representing the *School of Vienna* (Kelsen, Verdross, Kunz). However, this doctrine, propagated primarily by Kelsen, goes beyond the doctrine and

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[28] Cf. *Zorn*, Ph.: Die deutschen Staatsverträge. In: Zeitschrift für die gesamte Staatswissenschaft. Band 36. (1880); *Kaufmann*, W.: Die Rechtskraft des internationalen Rechts und das Verhältnis der Staatsgesetzgebungen und der Staatsorgane zum demselben. Stuttgart, 1899.; *Wenzel*, A.: Juristische Grundprobleme. Vienna 1920.

[29] Cf. *Triepel*, H.: Völkerrecht und Landesrecht. Leipzig, 1899. (See particularly pp. 111–118.)

[30] *Anzilotti*, D.: Lehrbuch des Völkerrechts. Berlin und Leipzig, 1929.

[31] Section (2) of Article VI. of the constitution.

practice which had appeared and been applied in the USA. In Kelsen's concept (as the result of the global, normative concept concerning law) international law is given not only priority, but also *supremacy* over domestic law, that is according to his concept states can make domestic law only in the domain and to the extent allowed by international law.[32]

It is evident that on account of the sovereignty of the states this concept could not (and did not) become an acceptable concept in practice. Accordingly, in several European countries it is essentially the approach taken in the constitution of the USA which has become known and accepted, and I am also of the opinion that it is this concept and the practice based on it which expresses the relation of international law and domestic law correctly, that is the priority of international law (international treaties) over the domestic law of the state in the domain of jurisdiction.

Now I do not wish to go into details of why.[33] From the aspect of practicability it can be stated that the actual application of international legal contacts, international legal relations is suited the best by this approach. The reason is that until only the states were recognized as the *subjects* of international law, it had no real practical significance whether the concept of dualism or monism was predominant.

However, since it became undeniable that international law may have subjects other than the states, and since the international rules of human rights expressed the need that the individuals' fundamental rights laid down by international protection should be provided in every state, the recognition of the direct applicability of international treaties within the state has become an elementary issue and need so that in the case of a potential collision the rights provided for individuals (and legal persons) in international treaties can be realized effectively.

Besides, one also has to consider the European trend according to which e.g. the "compulsion" of integration itself, manifested in the European Union, asserts the necessary condition that all the (primary and major secondary) rules of the Union should have priority over the national law of the member states.

Finally, I would like to give a brief answer for the question why, besides the practical reasons, international law (international treaty) is "superior" to the national law of the states, that is why the rules of international law are (may be) given priority over the national law of the state.

Actually the answer was already touched upon when discussing why the approaches professing the priority of domestic law are insupportable. The point is that the international legal norm representing the joint law-making of at least two states – which norm is made by the same state bodies with authority for law-making – is superior because it can be changed only by the same joint law-making as it was created. The values and the constitutional expectations of legal security and constitutionality can be ensured only if the application of the obligations undertaken in international treaties is ensured by the states in the sphere of domestic law, too.

Ad *b)* Basically there are two possibilities for the application of international treaties in the sphere of domestic law:

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[32] Cf. *Kelsen*, H.: Principles of International Law. New York 1956. (See particularly p. 94); *Verdross*, A.: Völkerrecht, 4th Edition. Vienna 1959. (See particularly pp. 61–63); *Kunz*, J.: Völkerrechtswissenschaft und reine Rechtslehre, Vienna 1923. (See particularly pp. 80–82.)

[33] For the most detailed discussion in the Hungarian literature of law see *Bodnár*, L.: A nemzetközi szerződések és az állam. Bp. 1987.

ba) Some kind of *domestic law-making act* is necessary to transform international treaties into domestic legal norms. This is the practice of *transformation*, which is followed by a considerable number of the states.

bb) The rules of treaty of international law can be *applied directly*, automatically in the sphere of domestic law, without any concrete domestic legal act. This is called the legal technique of *adoption*, which is practiced in several European states (e.g. France, the Netherlands, Austria, Switzerland etc.).

The concept of transformation appeared simultaneously with the dualistic concept of international law and domestic law, or in other words with the appearance of *Triepel*'s doctrines. According to this concept the treaty published by the state is binding only on the state itself, and it is incorrect to say that obligations are also imposed on the subjects of the state through the publication; it is not the treaty but the state norm which will bind them.[34]

The nature of transformation was expounded by *Anzilotti*, who stated that the manifestation of will on the state's part for reception was necessary before a given norm of international law could be applied in the sphere of domestic law. This, in turn, means that the *addressees* of the international legal norm and the *source of law* itself will change (as in the sphere of domestic law the international legal norm will be replaced by the domestic legal norm). Morover, the *structure of law* will also change, the former international legal order of co-ordination will be replaced with a subordinate relation.[35]

Thus the principle and technique of transformation embody the practical application of the plainest dualistic theory.

As to the technique of transformation itself, *special* and *general transformation* can be distinguished. The distinction is based on whether it is some concrete international treaty that is transformed into domestic law (special transformation), or the general rules of international law (international treaties). According to *Menzel-Ipsen* this distinction is justified by the existence of customary law, as the rules of customary law – due to their inherent nature – can be the subjects of general transformation only.[36] In my opinion this distinction is artificial and formal, as typically the rules of customary law *cannot* be transformed. According to Anzilotti the essential elements of transformation (the change of the addressees, the source of law and the structure), supplemented with the frequent uncertainty of the content of customary law, make the transformation of customary law – typically – inconceivable.

Besides, another factor of uncertainty has to be considered, namely the one concerning the date of "birth" of a given rule of customary law. The reason is that two phases can be distinguished in the process of origin of the rules of customary law: a) the practical one, which is repeated regularly between the subjects-at-law; and b) the legal conviction associated with this practice (opinio iuris). As the exact date of the latter phase can hardly be determined, it is impossible to decide whether the transformed international "rule of customary law" can really be regarded as a legal norm or only as a custom.

Naturally, in a given stage it will be certain whether a given rule has indisputably become customary law. However, the elements of content cannot be determined exactly in this case either. As regards the case of delimiting the continental shelf of the North

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[34] *Triepel*, H.: op. cit., p. 118.
[35] *Anzilotti*, D.: op. cit., p. 46.
[36] *Menzel*, E. – *Ipsen*, K.: Völkerrecht, 2nd Edition, Munich, 1979, pp. 54–55.

Sea between the Federal Republic of Germany, the Netherlands and Denmark, it was not disputed that the institution of the continental shelf had also become the general rule of (customary) international law. Certain questions of detail, however, – namely the rules of delimitation – had to be judged by the International Court of Justice.[37]

Under such circumstances, however, one cannot say that a certain rule of customary international law can be the subject – by means of transformation – of domestic law-making. Otherwise domestic legal rules should regulate such questions of detail concerning which even the (tacit) *consensus between the states* does not give exact guide-lines. In connection with this the jurisprudence of international law points out another important aspect; namely that "the generally recognized rules of international law" are not in the least a static concept.[38]

As the classic dualistic concept of law – in the Triepelian sense – can hardly be defended any longer, the natural conclusion arises that the reason for the existence of the corresponding legal technique of transformation cannot be defended either. Yet advocates of transformation or dualism adduce the not negligible counter-argument that after all it is always the domestic state bodies and the constitutions which will decide whether a given rule of international law (either customary law or the law of treaty) can be applied in the sphere of domestic law.

Undoubtedly, there is always some state act involved in determining under what conditions, if at all, the rule of international law can be applied in domestic law.

This kind of state act is certainly present in the case of the legal technique of *adoption*, too. The technique of adoption essentially means the appearance of a general clause, when it is declared by a single domestic – typically constitutional – regulation of the state that the *international law of the state is also part of the legal order of the state. The unified legal order* declared in this way – including the norms of both international law and domestic law – makes transformation conceptually unnecessary. The reason being that the norms of international law constituting part of the state's own legal order will be applied by the state in the sphere of (the application of) domestic law. An existing, perfect, valid (international) legal norm. Consequently the essence of the matter will be disregarded if the relation of international law and domestic law is approached from the possibilities and methods of how the norms of international law *can become the norms of domestic law.* The norms of international law do not become the part of domestic law, they constitute the part of the state's (unified) own legal order right from the beginning. Accordingly, the case is not the application of the norms of international origin as domestic legal rules, but the application thereof *as international legal rules in the domestic sphere.*

In addition to the theoretical considerations, the theory of transformation has a vulnerable point from practical aspects, too. Namely: why is only the transformation of treaties considered necessary? The evident reason is that the norms of customary law cannot be transformed. *Müller* and *Wildhaber* both pointed out that the application of the rules of customary international law in the domestic sphere – due to the nature of the matter – is possible only *by means of adoption.*[39] They cannot be transformed, but on

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[37] For the case description in the Hungarian language see *Lamm*, V.: A hágai Nemzetközi Bíróság döntései 1957–1982. Bp. 1984, pp. 162–173.

[38] In this sense see *Seidl-Hohenveldern*: Transformation or Adoption of International into Municipal Law? In: International Law Quarterly, 1963, pp. 93–94.

[39] Cf. *Müller*, J.P. – *Wildhaber*, L.: Praxis des Völkerrechts. Bern, 1977, p. 134.

the other hand none of the states can refuse the application of the norms of customary law on these grounds.

The situation is different with *treaties*, of course. Transformation has no legal-technical obstacles, thus this technique is used by many states. Even such states do so which, otherwise, recognize the direct applicability of the general rules of (customary) international law within the state (e.g. the FRG, Greece). At the same time these states also recognize it implicitly – through their mixed practice – that *the necessity of transformation is not an inherent feature of international law*, as the norms of international law *can be applied directly in the sphere of domestic law.*

One thing for sure is that international law has no such rule which prescribes the obligation of transformation. This statement seems to be formally contradicted by the fact that certain international treaties (e.g. the genocide convention, or treaties concerning the safety of civilian air transport) compel the states to make (domestic) laws. However, this is by mo means a real transformation. It only means that the *fulfilment* of a certain international legal obligation undertaken in the given international treaty is realized by a certain law made by the state.

The conclusion to be drawn from the problems – which I have also criticized – of the dualistic doctrine and from the legal technique of transformation based on this is the following: *the requirements of our age can be best met by the system of adoption, which is based on the unified system of international law and domestic law, and which makes it possible to apply the norms of international law within the state directly.* This approach and legal technique is especially prominent as regards international treaties creating direct rights for the individuals (legal persons), too; such as e.g. human rights, the protection of ethnic-national minorities, conventions on double taxation, etc.

Regardless of which legal technique is adopted by the state, an indispensable condition of the application of international treaties within the state is that the text of the treaties has to be revealed to the public in one way or another. There are two possible ways for this:

a) the *promulgation* of treaties, and

b) the *publication* of treaties.

Formally the promulgation of the rules of law is the last phase of law-making.[40] This is necessary mainly in such cases when the resolution of the legislative body is not, or is not always sufficient for passing the act (e.g. the head of state has a right of veto). In these cases it is essential to define the date of the "passing" of the act. This date is defined by promulgation.[41] However, if a single legislative body has the authority to pass a final resolution to make a certain law, the date of when the law is (can be) applied can be and is typically defined by the legislative body itself. In this case promulgation is but an authentic document of law-making. This authenticity, however, can also be guaranteed by *publication.*

It follows from the above that as regards international treaties promulgation is not only an unnecessary but also an unacceptable technique for the domestic application of the rights and obligations arising from international treaties.[42] The reason for this is that the ratification or the entry into force of the treaties in some other way (e.g. by signature) would suffice.

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[40] Cf. *Creifelds*, C.: Rechtsvörterbuch, Munich, 1978. (5th Edition) pp. 890 and 1244.

[41] In this sense see *Kovács*, I.: Magyar államjog, Volume II. Szeged, 1978.

[42] Cf. *Scelle*, G.: Précis des droit des Gens. Principes et systematique. Paris, 1932, pp. 352 and 353.

As to the legal nature of *ratification*, it signifies not only the conclusion of the inter-state law-making process, but also the creation of rights and obligations concerning the state bodies or other subjects-at-law. Therefore in the case of international treaties the use of promulgation actually means a "double ratification" in such a way that the "second ratification" appears as *unilateral "enactment"*, as there is no international public authority for promulgation.[43]

On the other hand the *publication* of effective international treaties is by all means necessary so that – as in the case of all the other rules of law – their content can be learned about authentically and be applied. Therefore as to its legal nature, publication is but making the valid, effective rule of law known publicly. Therefore the publication of the rule of law or the international treaty has no effect whatsoever on their validity or execution. Thus formally, from the aspect of legal technique, it is the authentic publication of the rules of law – in this case of international treaties – in conformity with the local practice.[44]

There are two logical ways for the publication of international treaties:

a) the text of the treaty is supplemented with a publication clause or preamble, and it is published formally as a domestic law in the official paper. This solution essentially means the use of transformation – be it named as such or not.

b) Without any additional domestic source of law the authentic text of the international treaties concluded by the state *is published in the official paper* (or in its supplement), if possible not only in the official language of the state but also in the original, authentic language of the treaty.

Ad *c)* If the legal technique of adoption is used, in theory the applicability of a given international legal norm in the domestic sphere does not necessitate any further state act. However, it is quite frequently encountered that the execution (application) of a given, concrete international legal norm within the state can be realized only after special executory directions have been passed. At the same time it must be emphasized that not all the international treaties require executory directions for their domestic application. International law may and does have certain rules which can be applied, executed in the domestic sphere without special executory directions. This possibility especially applies to international treaties containing direct rights for individuals (legal persons) or certain groups of people. Therefore if the state allows for the automatic incorporation of its international treaties into its legal order, for their application by the domestic jurisdictional bodies as *direct* sources of law, it is extremely important to decide whether or not the given international treaty or some concrete direction thereof necessitates a *special executory direction.* If this is not necessary, international treaties are qualified from the moment of coming into force as sources of law to be applied directly by domestic jurisdictional bodies, too.

If, however, the execution of the rights and obligations contained in an international treaty requires the existence of further – domestic – executory directions, the domestic application of the directions of the treaty must be preceded by passing the executory directions. This problem – manifested in execution and in jurisdiction – is of significance in those states which have opted for the use of the legal technique of

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[43] In this sense see *Guggenheim*, P.: Lehrbuch des Völkerrechts. Volume I., Basel, 1949, pp. 37–38.

[44] In this sense see *Bliscsenko*, I. P.: International Treaties and Their Application on the Territory of the USSR, In: Americal Journal of International Law. 1975, p. 820.

adoption. Yet this difference, which is inherent in international treaties, must not be disregarded by the states with the practice of transformation either, as the passing of special *executory* directions may similarly be required or made unnecessary by the execution or application of the otherwise transformed international treaty.

The above difference found in international treaties is expressed by the distinction of *"self-executing"* and *"non-self-executing"* treaties. These technical terms, used both in the literature of law and in the practice of states, for the distinction of treaties have originated from the United States, which is explained by the fact that the possibility of the direct applicability of international treaties was accepted first in the United States, therefore it was the US courts which came up against the self-executing nature of a treaty for the first time (in 1829) in the *Foster v. Neilson* case.[45]

In Europe it was after the Second World War that (by accepting the practice of adoption) the definition of the self-executing and/or non-self-executing nature of the treaties became a topical and important issue.

The self-executing nature of an international treaty means that the treaty, on account of its content, the concrete character of the rights and obligations contained therein and its addressees, can be executed without any further domestic act in the sphere of domestic law. In the case of non-self-executing treaties the treaty can be executed only after the necessary executory directions have been passed.

Although the content (and possibly the subject) and the addressees of a given international treaty are basic factors in deciding whether the treaty is self-executing or non-self-executing in nature, in reality the distiction is far from being so clear. It would be obvious, for example, to state prima vista that the European Convention on Human Rights is a self-executing treaty, as its addressees are basically individual persons (natural persons), who are also vested by the treaty with the right of complaint to the European Committee of Human Rights. Yet the Federal Council of Switzerland (Bundesrat) qualified Article 13 of the Convention as of double nature – and not without grounds – when it said: "The complainant is entitled to resort to the possibility or turning to forums of appeal within the state. This is provided as an irrevocable individual right by Article 13.[46] There are no legal remedies, however, which would oblige the states to execute it..."[47]

In addition to the quoted Swiss example, the complexity of determining the self-executing or non-self-executing nature is also illustrated by the the fact that more than a hundred years after the frequently quoted *Foster v. Neilson* case, the theoretical and practical debate on distinction has been revived in the United States, too. The legal cases inspiring these debates drew the attention to the question of the self-executing nature of treaties in Europe.[48]

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[45] For the details of the case see *Deák*, F.: American International Law Cases, New York, 1971, Volume II. pp. 412–430.

[46] The authentic English text of Article 13 of the convention is the following:"Everyone whose rights and freedoms as set forth in this Convertion are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by person acting in an official capacity." (Act XXXI. of 1993, Magyar Közlöny, 1993 (41).

[47] Bericht des Bundeserates and die Bundesversammlung über die (Europäische) Konvention zum Schutze der Menschenrechte und Grundfreiheiten. Bundesblatt (Schweiz) 1968. II. p. 1074.

[48] For the discussion of the *Sei Fuji v. State case* particularly in the USA see among others the articles published in the American Journal of International Law: *Fairman,* Cf.C: Volume 46. (1952) pp. 687–690; *Hudson*, M. O.: Volume 44. (1950) pp. 543–548; *Wright*, Q.: Volume 45 (1951) pp. 67–77. From

In the *Foster v. Neilson* case the basis of Judge Marshall's decision was that the treaty under debate created rights and obligations directly for the political power and not for the judicial power.

However, the problem of distinction is much more complex and is the function of several factors, therefore Judge Marshall's reasons can serve as a guide-line only in that given case. The complexity of distinction and the necessity of considering several factors are also reflected in the jurisprudence of international law. In *O'Connel*'s opinion the major difference between self-executing and non-self-executing treaties is that the subject of the latter ones is *a priori of political nature*; such are certain customs items, the acquisition of property, the acquisition or surrender of land, and the issues related to the armed forces.[49]

Müller from Switzerland takes another approach to the problem and examines *whether the directions of the treaty concerning individual persons are concrete enough* to be applied directly in a given case.[50] *Öhlinger* takes essentially the same stand, and he makes an attempt to give the exact definition of "directions concrete enough concerning individuals". According to his view self-executing treaties are the ones "which address one or more particular private persons, that is if on the basis of the international treaty a judicial judgement or administrative decision, with the general term an act is made, by means of which the legal relationships of private persons are formally implied, and which may reinforce already existing legal relationships or may create new legal relationships."[51]

Finally let me mention the approach taken by *Evans*, who claims that an international treaty can be regarded as self-executing if a rule of law is created by its own directions for the government (administrative) bodies, the courts, the states (that is for the member states of the United States – the author's remark) or for the individuals. On the other hand, non-self-executing treaties require, either in an explicit or in an implicit way, measures on the part of the executive or legislative bodies before they can become rules of law for the courts or for the individuals, too.[52]

In view of the – theoretical and practical – differences seen in the determination of the self-executing nature I cannot evade the task of trying to determine the self-executing nature of a given international treaty so as to create sound bases for the direct applicability of international treaties in Hungary.

First of all I would like to assert that I view the self-executing nature as an *objective* category, that is the self-executing nature of a treaty cannot depend on the intention of the parties to the treaty. In my opinion the parties' intention is relevant only inasmuch as in the case of such intention the parties to the treaty must pay special attention to ensure that the objective conditions of the self-executive nature are reflected in the content and in the text of the treaty.

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among the abundant European literature on the case see particularly: *Bleckmann, A.*: Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtliche Verträge. Berlin, 1970; and *Öhlinger*, Th.: Der völkerrechtliche Vertrag im staatlichen Recht. Wien–New York, 1973.

[49] *O'Connell*, D. P.: International Law (2nd Edition) Volume I, London, 1970, p. 65.

[50] *Müller*, J. P.: Völkerrecht und schweizerische Rechtsordnung. In: Handbuch des schweizerischen Aussenpolitic, Bern, 1975. p. 65.

[51] *Öhlinger*, Th.: Op. cit., p. 139.

[52] *Evans*, A. E.: Self-Executing Treaties in the USA. In: British Year Book of International Law. Volume 30 (1953), p. 193.

As to the objective features: in my opinion the basic conditions of the direct (self-executing) applicability of a certain international treaty can be defined according to the minimal criteria, the absence of any of which precludes the possibility of the self-executive nature of a treaty. In my view these are the following:

a) The domestic law of the contracting parties should not rule out the possibility of direct execution.

b) The *addressees* of the treaties should be subjects-at-law which are or can be defined concretely (natural persons, legal persons, state bodies).

c) The content of the treaty should be constituted by exactly determined rights and obligations.

2. So the two main directions are represented by the constructions of dualism/transformation and monism/adoption. It must be emphasized that both constructions occur not only in theory, in jurisprudence, but also in the practice of the states, and both constructions may be used suitably for ensuring the full domestic application of the rights and the obligations originating from international law (international treaties). It must be similarly asserted that both constructions may and do work efficiently or on the contrary, very poorly. The reason is that the observation of legality as such is always the function of the will of the given state or power.[53]

In spite of the above my standpoint is unchanged and unequivocal: it is only the constitutional regulation based on the construction of monism/adoption which can be considered in the acceptance of our new constitution both on theoretical/dogmatic grounds and as a much simpler legal technique.

The main reasons for my standpoint are the following:

a) The generally accepted/recognized principles and norms of international law (that is the rules of universal customary international law), similarly to the other *rules of customary law, cannot be transformed* into the national legal order. Conceptually they can become part of a certain legal order only *by means of adoption.*

The above is supported by the fact that the basic conceptual feature of transformation is that concrete rules of behaviour (or other rules) defined by international law (international treaties), that is concrete rights and obligations are changed (transformed) into a domestic source of law. Thus not only the formal source of law is changed but also the subjects-at-law, the addressees of the norm and the relation of the norm within the system (as co-ordination is replaced by subordination).[54]

b) Transformation is not only an unnecessary but also a definitely unjustified legislative act. It seems as if the process of law-making became complete through this. This is far from being true! The conclusion of the international treaty (e.g. ratification) makes the (international) law-making process complete and perfect. The subsequent transformation is qualified as a "second" or "double" law-making act, what is more in such a way that the validity of an international legal norm, which conceptually postulates the joint law-making of at least two states (or other subjects-at-law), is made to be the function of another, this time unilateral law-making act.

c) The practice of transformation – as the international treaty has to be promulgated in a national source of law – creates an opportunity for the domestic law-

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[53] See the example of the Federal Republic of Germany and Greece, where the transformed and promulgated international treaty has *priority* over both the former and the newer acts.

[54] Cf. *Anzilotti*: op. cit., p. 46.

makers to make unilateral decisions – using or omitting transformation – on the domestic applicability of the international treaty which has been concluded perfectly with the participation of its own law-makers.

The possibility of this decision in itself may question the good faith and seriousness of the international law-making intention – by all means so in the political sense.

d) In the *European Union* (and to a certain extent in the *European Council*, too) there can be no question of whether the member states have transformed the treaties creating the Union, and the same applies to the decisions of the Union bodies invested with law-making authority (so-called secondary sources of law).

The member states (including the countries opting for the practice of transformation, such as the founder FRG and Italy as well as the Scandinavian states and Ireland, which joined the Union later) are obliged to conform to the rules of the EU-law *directly* (that is without transformation) and to ensure their *absolute priority* over the national legal order.[55]

e) In theory the practice of dualism/ transformation gives the national law-makers a free hand to decide what domestic rank, as regards the source of law, the international treaty will be given. An international treaty promulgated by the government (and this is typical in the case of the so-called intergovernmental treaties) can hardly become a source of law higher in rank than a decree of the government in the domestic (Hungarian) hierarchy of the sources of law.

At the same time, however, constitutionality requires that the directions of the higher-rank sources of law precede those of the lower-rank sources of law. Thus e.g. an international treaty promulgated in a decree of the government could be disregarded any time by passing a(n new) act. (Let me remark that this problem is actually encountered in our effective legal order.)[56]

f) Finally let me mention that in addition to the foregoing theoretical/dogmatic problems there is also a pragmatic reason why the practice of transformation/dualism would not be expedient. It would take unnecessary time and energy in the course of the law-making process and would further slow down and delay the passing of important acts (and decrees).

3. Conclusion:

– in view of the theoretical-dogmatic considerations outlined in the present study,

– following the European trend of the new constitutions of the recent decades,

– considering the compulsory regulations and the decision-making mechanism of the European Union and the European Council,

– acknowledging that the application of international law (international treaties) within the state as part of the legal order is the integral attribute of constitutionality,

– recognizing the additional practical advantages yielded by the legal technique, one can say that *the direction of our new constitution on the relation of international law and domestic law has to be based on the construction of monism/adoption.*

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[55] See Article 189 of the Treaty of Rome of 1957, which founded the EEC.

[56] Thus e.g. the Hungarian–West German bilateral convention on the elimination of double taxation was promulgated in a decree of the government. The contents thereof were totally contrasted sharply by the modification of the act on personal income tax for the year of 1994. Yet in the case of compliance with international treaties in good faith it is inconceivable to apply an act over the international treaty by referring to *lex superior derogat legi inferiori.*