39 About the Monograph on the Incorporation of Norms of International Origin into the Hungarian Legal System

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(Tamás Molnár, A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe, Dialóg Campus Kiadó – Dóm Kiadó, Budapest-Pécs, 2013, p 303; ISBN 978 963 9950 894)

The profound assessment of the relationship between international law and domestic law is not considered to be a recent phenomenon; neither in the international, nor in the Hungarian legal literature,[1] even despite the fact that in the jurisprudence, for a lengthy period of time, the doctrine of unity with respect to international law and domestic law has prevailed over the concept of differences. Nowadays, such unity has undoubtedly become the feature of the past and basically merely those jurists do not distinguish between international law and domestic law who simply deny the existence, or at least the legally binding nature of international law. This trend has become known as international legal nihilism. If we acknowledge the existence and the legal nature of international law, we can still choose between two basic schools of thoughts. Namely, there exists the concept of monism which propagates the unity of law and the primacy of international law; while the concept of dualism, and its subcategories, holds that domestic law and international law are recognised as two different and separate legal orders. These theories have relevance not particularly from the perspective of international law, but rather from the side of domestic law as pursuant to the notion of monism, which stands on the basis of the unity of legal systems, international legal norms become part of domestic law without the application of any further legal acts. Whereas, in dualist systems the rules of international law could only predominate in domestic law if the state transforms them into its own legal

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1 The last time when a monograph was published on the topic prior to Tamás Molnár's recent book was in 1987 when László Bodnár, international law professor form Szeged, published his work. L. Bodnár, *A nemzetközi szerződések és az állam*, Közgazdasági és Jogi Könyvkiadó, Budapest 1987.

system by an additional legislative act. We can discover examples all over the world for the practical application of monism and dualism as well; moreover the domestic legal systems are entitled to choose between the two types of legal theories and legal methods accompanying them.

The present-day Hungarian legal system, pursuant to Paragraph 3 of Article Q) of the Fundamental Law of Hungary, definitely follows the dualist approach, as 'Hungary shall accept the generally recognized rules of international law. Other sources of international law shall be incorporated into Hungarian law upon their promulgation by laws.' Tamás Molnár emphasises that Paragraph 1 of Article 7 of the previous Hungarian Constitution did not take a univocal commitment on the side of monism or dualism[2] as it stated that 'the legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law.' It is undeniable that regarding the terrain of theory Tamás Molnár is absolutely right, however if we assess the latter provision in the light of the fundamental decisions of the Constitutional Court, particularly Decision No. 4/1997 (I.22),[3] as Tamás Molnár also evaluates it himself,[4] the Hungarian legal system could be described as a purely dualist system, thus the relevant provisions of the Fundamental Law cannot be considered as bringing substantial change in this respect and the recent regulation merely expresses clarifications regarding the relationship between international law and Hungarian law.

Nevertheless, Article Q) of the Fundamental Law of Hungary resolves and establishes problems at the same time. While the mentioned provision obviously declares the application of the dualist transformation model at the theoretical level, it also raises new questions by the determination according to which 'other sources of international law', including basically all forms of written international law such as the resolutions of international organisations, autonomous unilateral legal acts and the judgments of international courts, 'shall be incorporated into Hungarian law upon their promulgation by laws' due to rare practical realisation with respect to the domestic legal practice.

The book of Tamás Molnár does not stop at this point, however the title of the book might suggest it at first read. In the light of Act L of 2005 on the proceedings in relation to international treaties, which was amended in 2011 (the 'International Treaty Act'), the book also assesses in-depth how international law could possibly be transformed into the Hungarian legal system. The material scope of the Act is extended to all procedural aspects

2 T. Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe*, Dialóg-Campus – Dóm, Budapest-Pécs 2013, p. 65.

3 The referential basis of the decision is Paras. 40 and 41 of the Constitutional Court Decision No. 22/2012 (V. 11), (21 June 2012), ABH 2012, p. 97; in addition to Paras. 27-34 of Constitutional Court Decision No. 13/2013 (VI. 17), ABH 2013 issue 13 (24 June 2013) p. 623 confirming the previous decision.

4 Molnár, 2013, pp. 74, 76-77.

that lead to the conclusion of international treaties, taking into account the preparatory works, which is a mere piece of legislation in domestic law, and the acceptance of binding force. We may think that the daily application of the International Treaty Act does not raise particular questions; nevertheless Tamás Molnár can dispute this standpoint, *inter alia*, by analysing the word of 'promulgation'. The act or governmental decree authorising and acknowledging the binding force of the international treaty is not deemed as promulgation in every cases at the same time as it could be possible that the given international treaty does not become binding on Hungary, for instance because the entering into force of the treaty on the international plane has fallen behind.[5] In his recently published work, Professor László Blutman finds the usage of the term of promulgation as a terminus technicus worrisome as according to his point of view, the 'promulgation act' is rather deemed to be an 'incorporation act', in other words, the legislator basically incorporates the international treaty into the domestic legal system and provides its completeness by incorporating the international treaty into an act and the promulgation is purely a requisite regarding the validity of the act concerned.[6] In the concrete situation we can effectively contemplate with merging the meaning of promulgation under international law and under domestic law, thus with respect to international law we are faced with an evidently inaccurate term.

As Tamás Molnár also mentions, pursuant to the Fundamental Law, other sources of international law, including basically all forms of written international law such as the resolutions of international organisations, autonomous unilateral legal acts and judgments of international courts are incorporated into Hungarian law upon their promulgation by laws.[7] According to the standpoint of Tamás Molnár, the promulgation obligation is only applied to those decisions of the courts which resolve inter-state disputes, since pursuant to Article 13 of the International Treaty Act, 'in case of disputes emerged between Hungary and other legal entities of international law' promulgation is required. However, certainly the most important human rights forums, such as the European Court of Human Rights, do not fall under the category of disputes concerning inter-state relations.[8] I believe, regardless of the fact that the reality seems to confirm the previous approach, that the concept is slightly problematic for several reasons. On the one hand, Article 2 lit. (a) of the International Treaty Act is about 'other legal entities having the competence to conclude international treaties', while Article 13 regulates issues relating to legal disputes raised between 'Hungary and other entities of international law'. In course of the evaluation, it is not hard to discover that the latter provision does not require the ability to conclude a treaty, which wording would evidently exclude natural persons from the conclusion of

5 Molnár, 2013, p. 127.
6 L. Blutman, 'A nemzetközi szerződések törvénybe iktatása: homokszemek a gépezetben', 1(8) *Közjogi Szemle* (2010), pp. 7-14.
7 Molnár, 2013, pp. 78-79.
8 Molnár, 2013, p. 184.

international treaties. On the other hand, according to Article 416(1) lit. (g) of Act XIX of 1998 on criminal law procedures, it is considered to be a cause for judicial review if an international judicial forum on human rights, which was established by an international treaty, determines that either the conducted procedure, or the final judgement of the domestic court have infringed any provision of the promulgated international treaty. In the light of the above, it is more than troublesome if the possibility could be raised in front of a domestic court that the case-law of the European Court of Human Rights is not binding on domestic courts. Nevertheless, if we commence from the concept set out in paragraph 3 of Article Q) of the Fundamental Law, particularly from its explanatory memorandum, and we accept that judgments of the Strasbourg Court with respect to Hungary appear on the governmental web portal on a case-by-case basis, but they are not officially published in any ways, we can easily come to the conclusion that domestic courts do not consider the case-law of the European Court of Human Rights binding on themselves.

Besides the fact that the excellent monograph of Tamás Molnár fulfils a space in the Hungarian international law literature, his work could be bravely regarded as such a successful experiment that intends to prove from different perspectives that assessing international legal queries could be important, useful and instructive also for experts dealing with domestic law and not just for international lawyers.