

Treaties in context III.

An interdisciplinary contribution to the course on the law of treaties

# TREATIES IN THE HUNGARIAN LEGAL SYSTEM.



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# A historic look back

## Who had the power (to decide on the merits and to ratify)?

### The governing rules

- After 1945 – no formal rule on treaty making (except in Constitution)
- 1973 – Non-public resolution of the government + 1977 a public infosheet issued by the Ministry for Justice and the Ministry of Foreign Affairs (MoFA)
- First public rule: Decree having the force of law, No 27 of 1982 in force till 2005
- Act No L of 2005 – the present rule

### The power structure behind, before the system change

Parallel structures, but one power center: the Hungarian Socialist Workers Party's Central Committee and the bureaucracy subordinated to it **decides**

**MoFA** or the appropriate specialised ministry executes the decision

Ratification: not by Parliament, but by „Presidential Council” exercising the powers of the Parliament between the 4 sessions of 2 days each, in a year.

# The rules in the constitution („Fundamental Law” of 2010) of Hungary

(After its fifth amendment)

## Article Q

(1) ... [Peaceful cooperation with peoples and countries of the worlds]

„(2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.

(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations.”

## Dualist or monist?

- Essentially dualist: all treaties ought to be transformed and promulgated as Hungarian law (Act of Parliament or Decree of Government)

Primacy?

- Hungary shall ensure that Hungarian law be in conformity with international law.

Crucial role of Constitutional Court in

- Finding the place of customary law
- Allocating hierarchical place of international law

(see later)

# The rules on conclusion of treaties Act L. of 2005.

## Preparation of a treaty

- purely domestic – competent minister in agreement with MoFA
  - To guarantee that the future treaty would not conflict with domestic law
  - To implement Hungary's foreign policy objectives
  - Impact assessment of the expected treaty is required
  - End: first textual draft / start of substantive negotiations with the other party (parties)

The competent minister **may** involve the civil sector, the business sector or other stakeholders

# The rules on conclusion of treaties Act L. of 2005.

## The creation of the treaty (negotiations, drafting)

- Domestic empowerment to negotiate: prime minister designates person and entitles him to negotiate and initial the treaty
- Persons accredited to international organisations or conferences do not need a specific empowering document.

# The rules on conclusion of treaties Act L. of 2005.

## Establishing the final text

(without expressing consent to be bound)

signature, final act, exchange of notes.

- Government or (exceptionally) prime minister entitles to „establish the final text” (sign, sign final act, etc.)
  - Practically this means that full Parliament may only see the signed, final text, but the Foreign affairs committee of the Parliament is entitled to receive information on the planned signature and the text as it stands if Parliament has competence to decide on ratification.

# The rules on conclusion of treaties Act L. of 2005.

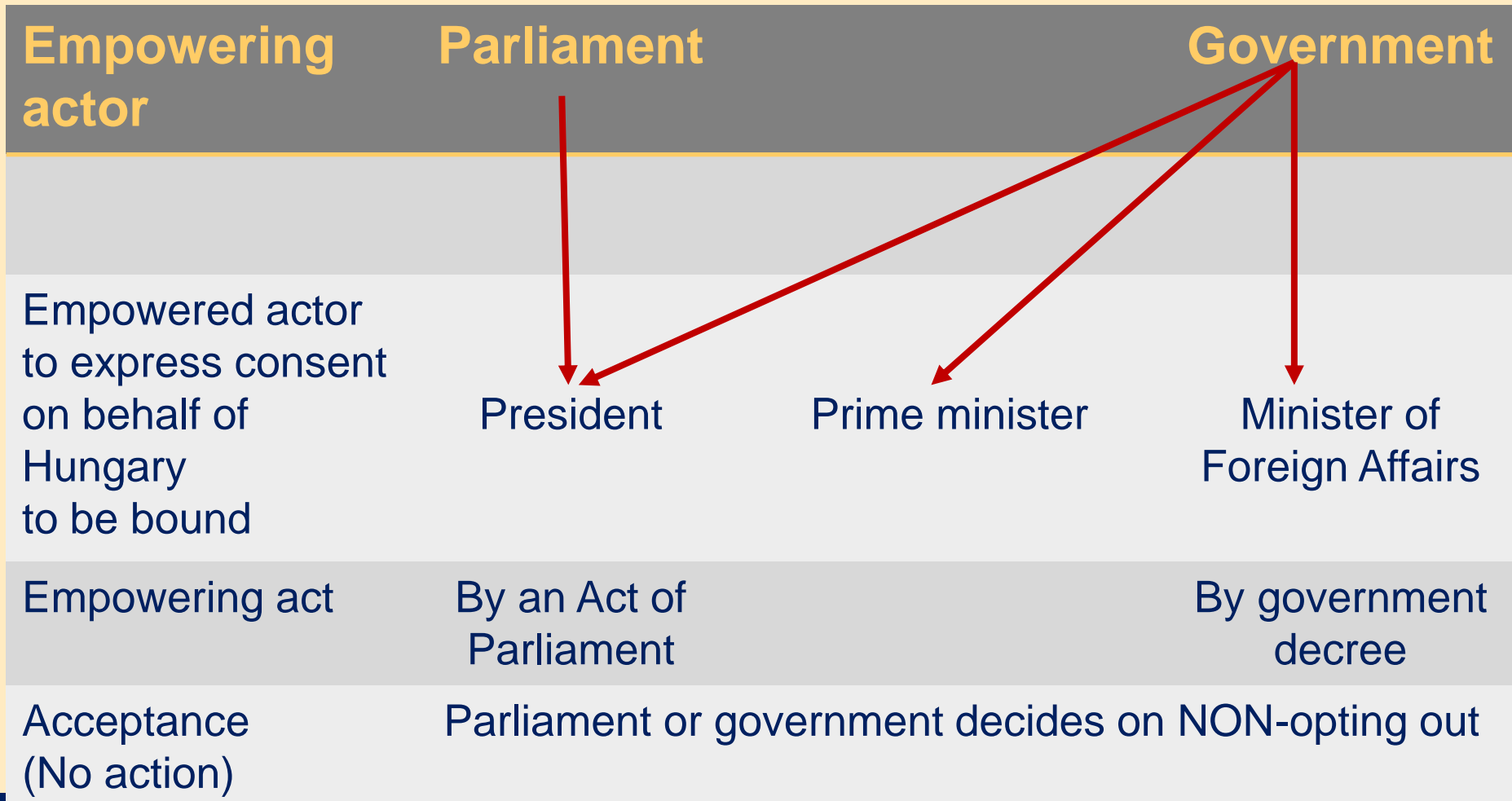
Establishing harmony with domestic law by the  
legislator

Promulgating law (containing the treaty not yet in force for Hungary) should contain rules on amending contradicting national legal provisions.



# Treaty conclusion powers

## Empowerment to express consent to be bound



**Treaty conclusion powers**  
**Empowerment to express consent to be bound**  
**Parliament or Government expresses consent?**

<b>Period</b>	<b>Parliament</b>	<b>Government</b>	<b>Principle of division of competence</b>
2005 - 2011	„Treaties of <b>salient importance</b> for the <b>foreign relations</b> of the Hungarian Republic”	All other	Purely <b>political</b> . If Parliament so wishes retains the right
2011-	Treaties falling into the <b>competence and tasks</b> of the Parliament	All other	Basis: <b>competence allocation in the Fundamental Law</b> (Constitution)

# Treaties in the domestic legal system

- The drawback of promulgating a treaty not yet in force:
- The MoFA (now in Hungary: „Ministry of Foreign Affairs and Trade”) must later publish a communication in the annex of official journal („Hivatalos Értesítő”) announcing the entry into force of the treaty itself.
- That comes late. Example: the Hungarian-Lithuanian Treaty on the avoidance of double taxation and tax evasion:
  - Empowerment by Hungarian Parliament 22 December 2004. Same day: communication to Lithuania
  - **Entry into force: 22 December 2004**
  - Promulgation of the treaty in the Official Journal: 23 December 2004
  - Communication on its entry into force: **23 November 2005** announcing that it entered into force 11 months before!

# The rules on conclusion of treaties Act L. of 2005. Termination of treaties

- Act L of 2005: termination = mutatis mutandis: conclusion
- **Constitutional Court, 2007: termination: prerogative of the Parliament**
  - Background: according to the (then valid) Constitution **no referendum** could be held concerning an obligation derived from an **international treaty**.
  - Proposal: to have a referendum on **leaving NATO**
  - National electoral committee **denied leave to collect signatures in favour of referendum**
  - Constitutional **Court approved denial**, and claimed that termination of treaties is a monopoly of the Parliament

# Unregulated moves concerning treaties

- Revocation of reservations, objections, declarations
- Treaty making within the EU (Pre-Lisbon period)
- Mixed agreements between the EU and its Member States and Third states

# Constitutionality and hierarchical questions – the activity of the Constitutional Court

- Control of the constitutionality of a treaty: 1997, Constitutional Court: it **can annul the Hungarian law promulgating the treaty**, but – of course – not the treaty itself if the rule contradicts the Constitution (Hungary's international responsibility would arise)
- 1998: **Non-transformation** of a treaty does not mean that its provisions **can not be taken into account** when applying Hungarian law
- **Jus Cogens**: above Constitution
- **Treaties: as Acts of Parliament**: below the Constitution but enjoying primacy above all else.
- **If treaty promulgated in Government decree** contradicts to act of Parliament: The CC **calls upon the Government or the Parliament to eliminate** conflict.
- If treaty is in Act and **lower rule contradicts** to it: CC **annuls** domestic rule.

# Security Council decisions and domestic law

Until 2011: no clear rule („incoherent, confusing and contradictory” - Tamás Molnár)

After the amendment of the 2005 Act: new § 12 B:

If the **decision** of an organisation or an organ created by a treaty binding Hungary adopts a decision **creating, amending or terminating international rights and obligations for Hungary** or modifying a treaty without Hungary expressing its consent, then the decision must **be promulgated in the same way as treaties.**

In principle: **no retroactive promulgation** – so if sanctions promulgated after their adoption in the IO – „interregnum” in time.

SC sanctions – **EU regulation incorporates into EU law if EU competence** – no need for national transformation If CFSP joint position then need to adopt domestic rule.

Cp complaints: obscure info sheet hidden at Government home page

Restrictive measures, sanctions:

EU:  
[http://www.eas.europa.eu/cfsp/sanctions/docs/asures\\_en.pdf](http://www.eas.europa.eu/cfsp/sanctions/docs/asures_en.pdf).

UN:  
<http://www.un.org/sc/committees/>

# Court judgments and domestic law

- Judgments of courts, arbitral tribunals or conciliation commissions, if binding in a dispute between subjects of international law, must be **promulgated mutatis mutandis to treaties** (Act L of 2005, § 13 (4))  
Assumption: judgments are treaty interpretations
- Fundamental Law, Article Q:  
„**Other sources** of international law shall become part of the Hungarian legal system by promulgation in legal regulations.”
- Commentators: it includes (interstate) judgments but not judgments in litigation between the individual and the state




# Court judgments and domestic law

## Strasbourg, UN case law

- ECtHR /UN HR Committee - individual complaints: **no promulgation**
- Constitutional Court: accepts **ECtHR's guiding role as part of rule of law**
- Penal Procedural Code: **right to start new procedure** with a view of annulling criminal judgment if that flows from the judgment of a human rights court
- Courts: **total confusion concerning** the place of **Strasbourg** jurisprudence
- Parliament – **absurd resolution** – expressing disagreement with the judgment finding the prohibition of the red star illegal

Fratanolu judgment i  
Appl. 29459/10 of 3  
November 2011  
Parliament resolution  
58/2012 (VII.10) Ogy  
hat.

# The place of customary international law

- **Jus Cogens: above Constitution** (Constitutional Court, several times, after 1993, e.g. 2011 on amendment of Constitution)
  - Constitutional Court, 1993  
„generally recognised rules of international law are part of the Hungarian law without specific transformation”  
(Debated if only jus cogens and universal customary law or also general principles of law recognised by civilised nations)
  - Since harmony of international law and domestic law is to be assured „**in order to comply with its obligations under international law**” general customary law has **primacy over Acts of Parliament**
  - The place of **regional (not general) customary law** not clarified, but under Constitution
  - 2011: even the drafting of a Constitution is subject to limits: there are **immutable** parts of the Constitution **resting on international jus cogens** and on treaties to which Hungary is party. (Adopted with small margin!)
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# Thanks!

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