

# The Transformation of the Hungarian Legal Order 1985–2005

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András JAKAB, Péter TAKÁCS and Allan F. TATHAM (eds.), *The Transformation of the Hungarian Legal Order 1985–2005. Transition to the Rule of Law and Accession to the European Union* (Alphen aan den Rijn: Kluwer Law International 2007), 658 p., ISBN 9789041121806

‘The last two decades changed the post-socialist legal orders both quantitatively and qualitatively in a manner rarely experienced in history’, notes the preface to the volume edited by Jakab, Takács and Tatham. In order to gain a better understanding of the scale and the content of the legal reforms, the book provides a panoramic overview of the developments in the Hungarian legal order between 1985 and 2005. The changes were predominantly determined by two factors. The first was the transition to the rule of law following the peaceful and negotiated transition that in Hungary lay between reform and revolution, and thus came to be known as a ‘refolution’ (a term coined by Timothy Garton Ash, cited in the preface, p. ix). The second factor shaping the evolution of the Hungarian legal order was the accession to the European Union and legislative approximation to the *acquis communautaire*.

The volume is based on a conference held in 2006 at the Eötvös Loránd University (ELTE) in Budapest. The contributions have been written by more than fifty legal scholars, predominantly from Hungary. The contributions are structured into seven broader parts: Part I ‘Constitutional Law’; Part II ‘Administrative Law’; Part III ‘Criminal Law’; Part IV ‘Private Law’; Part V ‘Other legal areas’; Part VI ‘Relationship to International and European Law’; and Part VII ‘Society, Politics, and Law’. Due to the scale of the book, the majority of the chapters provide overviews of specific fields of Hungarian law rather than embarking on in-depth analyses. Several chapters provide shorter responses to preceding chapters or develop further the thoughts put forward in them. In view of the remit of *EuConst*, this book review will confine its focus to the chapters on constitutional and European law.

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The book opens with Halmai's overview on the transformation of Hungarian constitutional law. He begins by explaining the historical and political processes, central to which was the National Roundtable of 1989 that led to the amendment of the 1949 socialist constitution rather than to the adoption of a new one. The missed opportunity to pass a new constitution had drawn criticism from many quarters, including the eminent American law professor Bruce Ackerman. According to him, '[b]ecause the appearance of the constitutionalism is not supported by a modern, new constitutional text, but is based on the interpretation of the current Constitutional Court, the Hungarian constitutional achievements are too fragile and uncertain' (p. 5). The retention and adjustment of the old Constitution led to the central role of the concept of the 'invisible constitution', developed by the activist, Sólyom-led Constitutional Court when interpreting general clauses such as human dignity, rule of law and separation of powers. Halmai explores the relevant case-law in greater detail, followed by an examination of the more subdued case-law of the subsequent compositions of the court.

The idea of adopting a new constitution did not go away, though, and Paczolay's chapter that follows explores relevant discussions that recurred on several occasions. He lists various drafts that were proposed, including the most promising one discussed during the period 1994–1996. According to the advocates of a new constitution, the text of the old Constitution has been modified on too many occasions and represents the result of political compromises, having overall become incoherent and controversial and lacking in legitimacy. Paczolay himself remains against the adoption of a new constitution, though; this option would be beneficial only 'if the basic norms or values of the political community were to change, or the present Constitution was to become inactive' (p. 25). The failure to adopt a new constitution is also explored later in Chapter VII by Körösenyi, who identifies the reasons why the efforts to adopt a new constitution failed, and explores legitimacy issues surrounding the absence of a new constitution as well as judicial formation of constitutional standards.

More recently, the idea of adopting a new constitution was revived in view of the amendments necessitated by accession to the European Union, but to no avail. Instead, the EU amendments were introduced into the existing constitutional text in 2002. These amendments are the focus of chapters by Toth and Sonnevend as well as of the second part of Paczolay's contribution; several others explore the constitutional setting for the application of public international law (e.g., Kovács, Kardos, Molnár and Sulyok). Toth finds that the constitutional provisions on the EU are compatible with the requirements arising from EU law. He notes, however, that 'while looking at some of the Hungarian academic writings in this area, I had the impression that Hungarian constitutional lawyers approach this subject fairly one-sidedly, almost exclusively from the point of view of the Hungarian

Constitution and constitutional law' (p. 492). Toth seeks to redress the balance by recalling the importance of the case-law of the European Court of Justice (ECJ), which has established the supremacy of EU norms over national constitutional norms. Toth reminds the reader that disobedience may eventually lead to disintegration of the legal order of the Union, which now has 27 member states. In the chapter that follows, Sonnevend (representing partly the constitutionalist viewpoint criticized by Toth) dwells on Toth's contribution and explores two limits to the supremacy of EU law which may arise from the amended text of the Hungarian Constitution: human rights and competences.

Other contributions with a constitutional law dimension include the chapters addressing minority rights (Majtényi; Kaltenbach), the concept of nation (Hornburg; Halász), electoral system (Dezső; Somody) and referendums, including the 2003 EU accession referendum (Dezső and Bragyova; Szabó). Other parts of the book explore legal reforms in diverse areas such as consumer law, agricultural law, banking and financial law, administrative law, social law, criminal law, as well as more generally the development of theoretical legal thought and legal philosophy in Hungary. What makes the chapters on specific legal fields particularly interesting to a Western reader, as well as to younger generations of Central and Eastern European lawyers, who acquired their legal education after the communist period, is that they explain the historical context of how the specific legal field was conceptualised during the communist regime and the underlying ideological notions. This allows a better understanding of subsequent legal reforms, which typically represent a radical departure from that period.

Some elements of socialist thinking may well have survived, though, and Jakab's chapter explores these in the present-day Hungarian law. He identifies several such elements, which according to Jakab may influence the legal thinking and sometimes the outcome of cases. The first of these is the strict literal approach to interpretation and a reluctance to accept teleological (or purposive) interpretation by judges at ordinary courts. This observation finds support in Tatham's contribution, who explores in detail the ECJ case-law where the importance of teleological interpretation has been underlined. The need for the Hungarian judiciary to accept the teleological approach to legal interpretation is a precondition for correctly applying EU law to cases before them. Tatham predicts that 'EC law and ECJ teleological methods will act as a catalyst for the adoption of this method into other non EU-based provisions of Hungarian law' (p. 631). Jakab's other observations on the persistence of socialist thinking include the concept of the supreme body of state power; and the state administration as synonymous with public administration. On the last point, Küpper's chapter on the evolution of Hungarian administrative law is informative. While the socialist administrative system was based on democratic centralism, where all administrative organs were part of a uniform pyramidal system of guidance given ultimately by the Party organs,

Küpper highlights that the new Hungarian administration consists of decentralised, autonomous authorities subject to bureaucratic supervision of the Western European *Rechtsstaat* type. Indeed, the amended Constitution banned political parties from exercising immediate public powers.

Fascinating broader perspectives can also be found in the chapter by Dupré, who explores the process of, and driving forces behind, the phenomena that various authors have termed 'legal transplants', 'migration of norms', 'legal borrowing', 'transposition', 'reception of law', 'Europeanisation' and 'globalisation'. Dupré offers the notion 'importation of law' that would better capture the flavour and complexity of the relevant processes in Central and Eastern Europe; this notion originates from her influential monograph *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity* (Hart 2003). As opposed to compliance with legally binding norms (of, e.g., international or EU law), law importation takes place outside a framework of legal obligations, between politically independent and sovereign states. Importers choose to incorporate elements of foreign law into their own legal system for a number of reasons. Among these, she highlights the importance of the suitability of the model as viewed internally, as well as the role of the 'importers' in making the choices, including that of the constitutional court judges, politicians, advisors and legislators, and their familiarity with specific legal systems and languages. Dupré's analysis is welcomed by Badó in his contribution 'Legal Transplant, Law Importation, Normative Optimism and Pessimism.' Badó notes that '... I was able to live through the trite experience that I could learn from someone who – from the outside, thanks to her discernment caused by such distance – managed to point out essential connections, which I – looking from the inside, living through the processes – was unable to notice' (p. 103). The writer of the present review, coming from another Central and Eastern European country which underwent very similar processes, would echo this view: the adoption of Western models and rules was often accepted by default as superior and beneficial, without questioning the political, ideological, cultural or other motives of the individual Western experts, donor countries or of the broader process.

Overall the book offers a wealth of information on legislative developments and case-law for international readership, especially given that legal material in less widely-spoken languages can often be difficult to access. The volume is a welcome addition to the literature and will be of great interest not only to scholars and practitioners working on Hungary but also those interested in legal transformation and EU accession process in the broader region of Central and Eastern Europe, as well as to researchers in public and private comparative law.

