

Europeanization of the Hungarian Legal Order: From Convergence to Cancellation?

Tamas Dezso Ziegler and Balázs Horváthy

Abstract

Since the political transition of Hungary in the late 1980s, the law of the European Union has been the primary external influence on the modernization of domestic legislation. This chapter aims to illustrate that Hungary, as a passive and receptive actor, implemented all components of EU law which were prerequisites for EU membership. This has resulted in an intense convergence in rules and values of the domestic and EU legal order until its accession to the EU in 2004. After accession, however, Hungary started to move from a constructive to a confrontational Member State, which has led to a substantial divergence between the laws of Hungary and EU law. This chapter analyzes these processes and attempts to identify the possible consequences of this alteration in the Hungarian stance to the adoption of rules, values, and regulatory models originating from EU law. It will be demonstrated with case studies ranging from recent Hungarian economic legislation to the constitutional reform, illustrating how this new role of Hungary negatively affects the adaptability of Hungarian legal order and leads to canceling the convergence to the European law.

Keywords

Europeanization, Hungary, harmonization, implementation, democratization, rule of law

1. Introduction

Hungarian law reforms in the last two centuries have been accomplished through the adoption and reception of foreign legal models,¹ and therefore the general attitude of Hungarian law is characterized as both open and adaptive towards foreign legal models. Over the past two decades since the political transition of Hungary in the late 1980s, the law of the European Union (and its predecessors) has been the primary external influence on the modernization of domestic legislation. As a passive and receptive actor, Hungary had implemented all components of EU law which were prerequisites for EU membership, resulting in an intense convergence in rules and values of the domestic and EU legal order prior to its accession to the EU in 2004. In the post-accession period, however, Hungary as a Member State has been able to directly influence legislative procedures at the EU level and become more of an active rather than receptive actor. In the first years of Membership, this position could be characterized as a constructive stance to EU legislation, but later Hungary shifted slightly towards a role of a confrontational actor and began to divert its legal order and policies from the value, principles, and norms of the European Union.

In the terminology of this chapter the *convergence* is conceptually an orientation of the legal order towards the models, rules, norms, and values of the European Union, while *divergence* is understood as detaching from such path, leading to more conflicts between the substance of EU and Members States' – here specifically the Hungarian – law.² Divergence can manifest itself in several forms, not only in incompatible legislation, but also in the practices of the government, authorities, and domestic courts. In this manner, the process of convergence and divergence is palpable not only in the formal operation of the legal orders, i.e. the “hard text” of the law, but also in informal ways,

¹ Disregarding some exceptional periods, e.g. the 1860s, when Hungarian legislation intensively resisted the reception of law forced on it by the Austrian Empire. For external influences and impacts on the Hungarian legal order, see Attila Harmathy (ed.), *Introduction to Hungarian Law* (Kluwer, The Hague, 1998).

² See Pierre Legrand, “Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?”, in Paul Beaumont, Carole Lyons, and Neil Walker (eds.), *Convergence and Divergence in European Public Law* (Oxford University Press, Oxford, 2002), 225-226.

when the domestic legislators are accepting or refusing e.g. values, principles or even certain legal attitudes.³

The converging tendency of the domestic legal order to EU law is labeled here also as 'Europeanization.' Europeanization plays, however, also the role of an evocative term, since it can recall the permanent expansion of the legislative and rule-making procedures of the EU and refers to consequent fact that more and more areas of law have been becoming progressively subject to EU legislative procedures in the last decades. In other terms, the evolving process of Europeanization requires more convergence at domestic level and attempts to minimize the diverging elements of the legal orders.⁴ Therefore, the Member States face increasing level of legal sources, which originate from EU law and should be adapted and implemented at domestic level. Even though the trends of Europeanization are commonly used and well established in political science⁵ (and partly within economics⁶), this chapter primarily contextualize Hungary within the legal scholarship through the lens of (legislative) convergence/divergence. Accordingly, the method of the analysis is restricted only to these concepts and can be understood as a simple legal-comparative narrative arranged in a chronological manner.

The following chapter analyzes these processes and attempts to identify the possible consequences of this alteration in the Hungarian stance to the adoption of rules, values, and regulatory models arising from EU law. It will be demonstrated with case studies ranging from recent Hungarian economic legislation to the constitutional reform of 2011, illustrating how this new role of Hungary negatively affects the adaptability of Hungarian legal order (divergent trends) and leads to canceling the convergence to the European legal order.

2. Convergence

Unilateral Adaptation of EU Law

The adaptation of the Hungarian legal order to EC/EU law until 1994 could be described as a *unilateral* process, which was mostly guided by economic and commercial interests within Hungary. The starting point of this period was not bordered by the political transition itself. As far back as two years before the first democratic parliamentary election, after having signed the general agreement on trade and cooperation with the EC and its Member States in 1988,⁷ it was obvious that

³ Lyons elaborates the role of aspirations ('*mentalité*') and states that "reading between the lines of the ordered 'hard text' of the process of (legal) integration, there is an evolving sense of a European common good which can be said to represent an emergent European (legal) culture." Carole Lyons, "*Perspectives on Convergence Within European Integration*", in Beaumont, Lyons, and Walker, *ibid.*, 81.

⁴ The concept of divergence is not applicable to the legal exceptions provided by EU law (e.g. public policy exceptions regarding the free movement of goods in Article 36 TFEU, or security exceptions in Articles 344 and 345 TFEU) as these exceptions merely illustrate the boundaries of the EU legal integration – unless the Member States exercise such exceptions without fulfilling all the criteria laid by EU law (i.e. divergence in procedural laws).

⁵ See e.g. Attila Ágh, *The Politics of Central Europe* (SAGE, London, 1998); Wade Jacoby, *Ordering from the Menu in Central Europe: The Enlargement of the EU and NATO* (Cambridge University Press, Cambridge, 2004); and Frank Schimmelfennig and Ulrich Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (Cornell University Press, Ithaca, 2005). For definitions, see e.g. Tanja Börzel, "Europeanization: How the European Union Interacts with its Member States", in Simon Bulmer *et al.* (eds), *The Member States of the European Union* (Oxford University Press, Oxford, 2005), 45-76.

⁶ See e.g. Reiner Martin, *The Regional Dimension in European Public Policy: Convergence or Divergence?* (Palgrave Macmillan, Basingstoke, 1999).

⁷ Agreement Between the European Economic Community and the Hungarian People's Republic on Trade and Commercial and Economic Cooperation of 26 September 1988, [1988] OJ L327/14. The prerequisite of this agreement was the normalization of the relations between the EC and the Central and Eastern European countries, which was accomplished by the Joint Declaration on the Establishment of Official Relations (so-called Luxembourg accord) in June 1988. This declaration led to opening of bilateral trade deals, resulting in removal of long-standing import quotas on a number of products and also the General System of Preferences was extended to the countries of this region. See John O'Brennan, *The Eastern Enlargement of the European Union* (Routledge, London, 2006), 15.

a significant part of Hungarian commercial regulations should be harmonized with the *acquis communautaire*, in order to expand market opportunities for the major export products of Hungary. The adaptation was characterized not only by the liberalization of export and import rules, but also the consideration of the entire set of EC single market regulations that played a central role in this process. In this period, the legislators were, sometimes spontaneously, implementing models of EC law, and therefore the *acquis* became a significant tool of Hungarian law reform. The reception of legal models and institutions of EC law was not always adequate, resulting in partial convergence with EC law in several cases (e.g. the 1988 reform of company law⁸). Nevertheless, EC Law certainly inspired the Hungarian regulators as in the case of the ‘grouping’ of companies, based on the European Economic Interest Grouping,⁹ adapted into a wide range of activities. A striking example of *full* harmonization was the improvement of the Hungarian product liability provisions, carried out by simply translating the relevant *acquis* in 1993.¹⁰

The basis of such approximation of Hungarian law to EC law was the institutional improvement which the government introduced in 1990 with the specific requirements for harmonization into the domestic legislative procedures.¹¹ This Government Decision emphasized the importance of convergence between the Hungarian and EC legal orders, and obliged the Minister for Justice to discover the possible EC law relevance for all proposed legislation, including not only EC legislative acts, but also all international treaties concluded by the Community.¹² If the Hungarian legal instrument was proposed and detailed in accordance with the regulatory model of EC law, the proposal had to also encompass the cost estimation and an overall analysis of the possible horizontal consequences of implementation. Otherwise the proposal would include an explanatory memorandum why it intends to deviate from the provisions of EC law. The importance of the Government Decision lay in the fact that the adaptation of the Hungarian legal order was formally and institutionally incorporated into the domestic legislative procedures, therefore the spontaneous (ad hoc) legal harmonization was replaced by a general and permanent method. Although the economic interests remained central to this institutionalized harmonization process,¹³ the attitude of Hungary towards Europe at that time was also a conscious choice of (mainly procedural) legal culture. Consequently, the unilateral character of legal adaptation meant that Hungary chose – or, to be precise, could now choose – the path of Europeanization of its own volition based on the values and norms of the Union.

Adaptation Governed by the Objective of EU Membership

In the period between 1994 and 2004, legal harmonization was no longer determined only by economic and commercial reasons, but also by the political objective of Hungary joining the EU,

Only specific quantitative trade restrictions remained in force until early 1990. See Allan F. Tatham, *Enlargement of the European Union* (Wolters Kluwer, Austin, 2009), 76-77.

⁸ Act VI of 1988 on Business Companies. The reformed law only partly implemented the compulsory disclosure requirements set forth by Council Directive 68/151/EEC of 9 March 1968, and the capital requirements for public limited liability companies set forth by Council Directive 77/91/EEC of 13 December 1976. See Magdalena Pajor-Bytomski, *Gesellschaftsrecht in Ungarn (Company Law in Hungary)* (Hüthig, München, 1994). The significance of this ‘selective’ harmonization in the early transition legislation should not be underestimated. Tatham, *ibid.*, 340.

⁹ Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

¹⁰ Act X of 1993 on Product Liability.

¹¹ Decision 2006/1990 (HT 4) of the Government.

¹² See paragraph 2 of the Decision.

¹³ This technocratic sentiment was well-matched to the objectives of the 1988 Agreement that predominantly aimed at the economic reforms and the complete conversion to a market economy. See David Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (Sheffield Academic Press, 1999), 44; and Tamás Sárközy, *A szocializmus, a rendszerváltás és az újkapitalizmus gazdasági civiljoga 1945-2005 (The Economic-Private Law of the Socialism, the Transition and the New Capitalism 1945-2005)* (HVG-Orac, Budapest, 2007).

supported by a broad domestic consensus.¹⁴ Hungary negotiated for a substantive reference to Membership in its Association Agreement (Europe Agreement)¹⁵ with the European Communities (similar to that with Turkey), but only a unilateral and non-binding declaration by Hungary was included in the Agreement's preamble.¹⁶ After the promulgation of the Agreement, on 1 April 1994, the application for EU Membership of Hungary was formally submitted to the European Communities.

The Agreement also encompassed a legislative approximation clause, which made clear that the major prerequisite for integration into the Community was the approximation of Hungarian legislation to EC law "as far as possible."¹⁷ This formulation did not express an absolute obligation, but the provision had significant impact on the future process of adaptation and Europeanization of Hungarian law. Act I of 1994 that promulgated the Europe Agreement laid down the concrete legislative tasks arising from the approximation clause. First, the conformity with EU law had to be assured, and therefore subsequently, Hungary would only be able to conclude international agreements compatible with EU law.¹⁸ Second, Act I of 1994 technically obliged the legislative bodies to assess the compatibility of all legislative proposals with EU law, and the conformity had to be indicated in all legal texts within a specific clause referring to equivalence with EU law. The Europe Agreement did not contain any provisions either on the method or on the extent of the approximation but referred to branches of law that were 'particularly' targeted areas for harmonization.¹⁹ Moreover, the EU offered technical assistance regarding the implementation of EU law, which included provision of information, opportunities for expert exchange and aid with the translation of Community legislation in relevant areas.²⁰ In 1995, following a White Paper of the European Commission,²¹ the Hungarian Government reformed the coordination and institutional structure of legal adaptation and announced the first comprehensive program for harmonization in 1995.²² The Government Decision laid down the framework for the planning and programming of legal harmonization. The entire legislative procedure from the identification of an obligation arising from EC law, through the drafting of legal texts up to its adoption fell under the scope of the Decision, and responsibilities were clearly allocated within the institutional structure of government. This framework for harmonization played a major role in the success of accession negotiations (1990-2002).

¹⁴ For detailed analysis, see Attila Fölsz and Gábor Tóka, "Determinants of Support for EU-Membership in Hungary", in Robert Rohrschneider and Stephen Whitefield (eds.), *Public Opinion, Party Competition, and the European Union in Post-Communist Europe* (Palgrave Macmillan, Basingstoke, 2006), 145-164.

¹⁵ Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part. [1993] OJ L347/2-266.

¹⁶ Paragraph 13 of the Preamble: "Considering Hungary's firm intention to seek full integration in the political, economic and security order of a new Europe", Europe Agreement [1993] OJ L347/3. Despite the Hungarian objective, the Communities were not willing to make any commitment concerning the future accession, see Attila Harmathy, "Constitutional Questions of the Preparation of Hungary to Accession to the European Union", in Alfred Kellermann *et al.* (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level* (T.M.C. Asser Press, The Hague, 2001), 315.

¹⁷ Article 67 of the Europe Agreement. For detailed analyses, see Barna Berke, "Implementation of the Association Agreement, Approximation of Laws, Eventual Accession: Some Constitutional Implications", in Ferenc Mádl (ed.), *On the State of the EU Integration Process: Enlargement and Institutional Reforms* (EU Centre for Research and Documentation, Eötvös Loránd University, Budapest, 1997), 323-341; and Imre Vörös, "The Legal Doctrine and Legal Policy Aspects of the EU-Accession", 44(3-4) *Acta Juridica Hungarica* (2003), 141-163.

¹⁸ Act I of 1994 on Promulgation of Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, Article 3

¹⁹ Art. 68 of the Europe Agreement. This list includes customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, food legislation, consumer protection including product liability, indirect taxation, technical rules and standards, transport, and the environment.

²⁰ Art. 69 of the Europe Agreement.

²¹ White Paper - Preparing the associated countries of Central and Eastern Europe for integration into the internal market of the Union. COM (95) 163 final [1996] OJ C141/135.

²² Government Decision 2004/1995 (I. 20.) on the Hungarian Harmonization Plan Preparing the Accession to the European Union.

As a consequence of the stable policy objective of EU membership and the precise methods of legal harmonization, this period resulted in the largest law reform of the history of modern Hungary and led to intense convergence between the Hungarian and EU legal orders. The constitutional prerequisites of accession were also established during this period.²³ The amendment of 2002 inserted the so-called Europe clause into the text of the Constitution of that time,²⁴ and additionally, another new provision on integration was included, which stresses that the Republic of Hungary shall participate in “establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe.”²⁵ This rule formulated integration as a national constitutional objective, which while only symbolic and programmatic in nature, theoretically gave the government no choice but to follow the straight path of integration and cooperation with other European countries.

The process of legal harmonization and adaptation in this period was a success with few exceptions: e.g. the consumer protection provisions of the Hungarian Civil Code and the car registration tax, which had to enter into force on the day of accession, both inconsistencies with EU law were pointed out by legal scholars prior to accession. Not surprisingly, both disputes led to proceedings before the European Court of Justice after the accession. Following *Ynos*,²⁶ the Hungarian legislator modified the Civil Code and made clear how the unfair terms in consumer contracts could be contested before the Hungarian courts, while *Nádasdy* resulted promptly in the necessary corrections regarding the tax law inconsistencies.²⁷ Even though these discrepancies can be regarded as factors indicating less convergence, the outstanding activity of the Hungarian courts in the preliminary ruling procedures has obviously showed that the Hungarian courts were open to interactions and judicial dialogue with the European Court of Justice.²⁸ Institutionally coordinated harmonization, including adaptation and reception, resulted in high-level convergence between the Hungarian and EU regulatory models during this period.

3. Divergence – or Cancellation of Convergence?

A Cooperative Member State

²³ The preparatory process for the constitutional amendment concerning Hungary’s prospective accession was launched by Government Decision 2319/2000. (XII. 21.). For comprehensive analyses (especially on Art. 2/A), see Balázs Horváthy and László Knapp, “The Relationship between the Hungarian and the EU Legal Orders”, in Péter Smuk (ed.), *The Transformation of the Hungarian Legal System 2010-2013* (CompLex Wolters Kluwer, Budapest, 2013), 51-68; Márton Varju and Flóra Fazekas, “The Reception of European Union Law in Hungary: The Constitutional Court and the Hungarian Judiciary”, 48(6) *Common Market Law Review* (2011), 1945-1984.

²⁴ “By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities [...]; these powers may be exercised independently and by way of the institutions of the European Union.” See Act XX of 1949 on the Constitution of Republic of Hungary, paragraph 1 of Article 2/A. The English translation is available at <http://www.parlament.hu/angol/act_xx_of_1949.pdf>. The Constitution was repealed by the Fundamental Law of Hungary in 2011.

²⁵ Act XX of 1949 on the Constitution of Republic of Hungary, paragraph 4 of Article 6.

²⁶ C-302/04 *Ynos Kft. v. János Varga*. The *Ynos* case was the first Hungarian preliminary ruling procedure before the European Court of Justice. The decisive factor before the Court was that the facts of the case had been established before the accession of Hungary to the EU. For detailed analysis, see Balázs Horváthy, “After the First Lessons and Experiences: Cases Concerning Hungary before ECJ (2004-2007)”, 49(1) *Acta Juridica Hungarica* (2008), 89-110.

²⁷ C-290/05. *Ákos Nádasdy v. Vám és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága*. In the *Nádasdy* case, the ECJ regarded the Hungarian system of registration taxes discriminating and not proportionate to value, thus it was contrary to EU Law. *Ibid.*, 95.

²⁸ Among countries of the region, Hungary’s courts referred most actively to the ECJ for interpretation of EU Law within a preliminary ruling procedure. Hungary had 11 references, while the other nine Member States that joined in 2004 together had 14, between 2004 and 2007, i.e. in the first three years of membership. *Ibid.*, 110.

After joining the Union, the adaptation of the Hungarian legal order to EU law became a permanent obligation arising from Membership, but it is not merely a unilateral process. Hungary, as a Member State, is an actor in legislative procedures at the EU level, and this position needs other capabilities than those expected from a candidate country. The major question in this period was whether Hungary, as a formerly passive and receptive candidate country, could be an active yet co-operative Member State, without jeopardizing the convergence between the domestic and EU legal orders.

In the first four to five years after its accession, Hungary was one of the most cooperative Member States. Several examples prove this. The implementation of directives was very efficient and prudent, unlike in some of the older Member States, such as Italy.²⁹ The Hungarian Parliament ratified the Lisbon Treaty in an extremely short time on 17 December 2009, only three days after its signing, despite the then right wing opposition calling the action “unusual” and “inelegant” with the lack of public discourse. Hungary did not ask for an opt-out of the EU Charter of Fundamental Rights and it did not seek to extend the ban on foreign land buyers, which later became a crucial point of conflict within the country. Nor did Hungary formally ask for more rights for Hungarians who live in Transylvania when Romania joined the EU in 2007. Once again, it later became a source of conflict when more than 600,000 Hungarians living abroad in minority received citizenship without any negotiations with the countries concerned.

Even during this introductory period, there were signs that showed a lack of cooperation, or to be more precise, indicated that the country had yet to acquire the ‘thinking’ of the Single Market.³⁰ The first Hungarian legislative effort clearly conflicting with the European rules was made by the left-wing Government, in power until 2010. In 2009, the Government sought to adopt a law which would have forced shops and supermarkets in Hungary to sell at least 80% Hungarian goods, a protective measure towards traditionally strong agriculture and the food industry. As passing such an act would have been contrary to EU law (free movement of goods), the Government pushed some of the representative organizations of domestic food producing and retailing companies into signing the ‘Code of Ethics on the Food Production Chain.’ This ‘recommandatory’ and ‘non-binding’ Code contained similarly discriminatory provisions, contrary to EU competition policy. In fact, it was also in conflict with Hungarian competition law. Consequently, the Hungarian Competition Authority (GVH) started an investigation into the case, although the case was closed based on the facts that the signed Code had never entered into force and that the representative organizations did not have authority from their member companies to bind them to such an arrangement.³¹ However, with or without a strict rule, supermarkets still sell around 80% Hungarian food.³² Another example is the case of the country’s most important oil company, MOL. MOL is a public corporation limited by shares, one of Hungary’s largest companies with a central role in the Eastern European oil industry. In 2007 Austria’s OMV planned a takeover of MOL. The Government took several steps to counter this action, including the

²⁹ The EU Internal Market Scoreboard, available at <http://ec.europa.eu/internal_market/score/index_en.htm>.

³⁰ The following paragraph is further elaborated in Tamas Dezso Czigler (Ziegler), “Protectionism – The Side Effect of Hungarian Nationalism”, *Social Europe* (12 April 2012), available at <<https://www.socialeurope.eu/2012/04/protectionism-the-side-effect-of-hungarian-nationalism/>>.

³¹ GVH, “No Food Production Chain Code, No GVH Proceedings”, Press Release (6 August 2009), available at <http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=133&m5_doc=5993>.

³² According to a survey conducted by Corvinus University (Budapest) in 2010, the portion of the food products produced or processed in Hungary in domestic retail was 76.45%. The research has shown a relatively lower portion at the international supermarket chains (72.8%) in comparison to the domestic owned stores (82%). See “Többsegben a magyar élelmiszer a kereskedelmi láncok polcain (The Major Part of the Products on the Shelves of the Supermarkets are Hungarian Food Products)”, *Trade Magazin* (9 November 2010), available at <<http://www.trademagazin.hu/hirek-es-cikkek/piaci-hirek/tobbsegben-a-magyar-elelmiszer-a-kereskedelmi-lancok-polcain.html>>. Recent estimates suggests the same portion of the Hungarian food products – 70-85% – in domestic retail, see “Egyre jobban fogy a magyar élelmiszer (Selling Hungarian Food is Getting Better and Better)”, *Heti Világgazdaság* (21 March 2014), available at <http://hvg.hu/gazdasag/20140321_Egyre_jobban_fogy_a_magyar_elelmiszer/>.

adoption of an act, which resembled the so-called ‘golden share’ laws that have been ruled illegal in Western Europe. Later, the situation was moderated partly by the EU.³³

On the Road to a Possible Cancellation of Convergence

In 2010, a right-wing Government was elected, led by Prime Minister Viktor Orbán and his party, Fidesz. Very quickly, hundreds of laws were passed that effected fundamental changes in society and governance, including a new constitution, electoral laws, civil code, and penal code.³⁴ Several of them were criticized by the Commission and other EU institutions as they were against the concrete provisions of the *acquis*, or were in violation of international human rights standards (including Strasbourg law).³⁵ Hungary completed the presidency of the Council of the EU with relative success in 2011: the priorities were carefully selected and most of its goals were either achieved or prepared for approval. Even though the motto of the presidency was ‘Strong Europe’, however, the government remained on the same path as it had been started earlier when it comes to domestic legislation, e.g. the aforementioned law offering the citizenship to all ethnic Hungarians abroad³⁶ and the new media law restricting its freedom³⁷. The EU did not adopt effective sanctions against these actions, as the European People’s Party in the European Parliament supported Orbán in many cases.³⁸ As a result, the government has a broad room to maneuver for divergence.

The core of rule of law problems in post-2010 Hungary is the newly introduced constitution (translated as ‘Fundamental law’ or ‘Basic Law’),³⁹ which the public (e.g. NGOs and scholars) was not aware of its planning. The Fundamental Law was then amended six times: whenever the Constitutional Court found an act unconstitutional, the Parliament codified the act into the constitution.⁴⁰ The Commission raised concerns against some of these modifications,⁴¹ as they began to curtail the powers and independence of the Constitutional Court itself through Government’s exclusive power to nominate its judges. Additionally, the maximum retirement age of judges was reduced from 70 to 62 years (the general retirement age is 65 years), and the Head of the Supreme Court, among other nearly 300 judges, was replaced, without waiting the end of his mandate. The Constitutional Court found it unconstitutional and discriminatory, which again led to

³³ Andrew Johnston, “Cross-Border Re-structuring, Company Law between Treaty Freedom and State Protectionism”, in Ulf Bernitz and Wolf-Georg Ringe (eds.), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford University Press, Oxford, 2010), at 171-172.

³⁴ For background materials see the website of Princeton University on Hungarian constitutional issues, available at <<https://lapa.princeton.edu/newsdetail.php?ID=63#english>>.

³⁵ See e.g. Bojan Bugarič, “Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge”, *LSE “Europe in Question” Discussion Paper Series* (2014) No.79, available at: <<http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper79.pdf>>; Kriszta Kovács and Gábor Attila Tóth, “Hungary’s Constitutional Transformation” 7(2) *European Constitutional Law Review* (2011), 183-203, at 197; and “Editorial Comments: Hungary’s New Constitutional Order and ‘European Unity’”, 49(3) *Common Market Law Review* (2012), 871-883, at 878.

³⁶ Mónika Ganczer, “Hungarians outside Hungary: The Twisted Story of Dual Citizenship in Central and Eastern Europe”, *Verfassungsblog* (8 October 2014), available at <<http://verfassungsblog.de/hungarians-outside-hungary-twisted-story-dual-citizenship-central-eastern-europe/>>.

³⁷ Also see European Parliament Resolution of 10 March 2011 on Media Law in Hungary. P7_TA(2011)0094.

³⁸ See e.g. “MEPs Voice Concerns over Constitutional Changes in Hungary”, (17 April 2013), available at <<http://www.europarl.europa.eu/news/en/news-room/content/20130416STO07356/html/MEPs-voice-concerns-over-constitutional-changes-in-hungary>>; and EPP, “EP Report on Hungary: EPP Group Rejects the Use of Double Standards”, Press Release (3 July 2013), available at <<http://www.eppgroup.eu/press-release/EPP-Group-rejects-the-use-of-double-standards>>.

³⁹ András Jakab and Pál Sonnevend, “Continuity with Deficiencies: The New Basic Law of Hungary”, 9(1) *European Constitutional Law Review* (2013), 102-138; and Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law* (Central European University Press, Budapest, 2012)

⁴⁰ Tamas Boros, “Constitutional Amendments in Hungary: The Government’s Struggle against the Constitutional Court”, *Analyse* (Friedrich Ebert Stiftung Büro Budapest, 2013), available at <http://www.fesbp.hu/common/pdf/Nachrichten_aus_Ungarn_februar_2013.pdf>.

⁴¹ “The European Commission Reiterates its Serious Concerns over the Fourth Amendment to the Constitution of Hungary”, available at <http://europa.eu/rapid/press-release_IP-15-4673_en.htm>.

its inclusion in the Fundamental Law. The CJEU then found that the rule violated human rights, and that the judges had to be reinstated and compensated, which did not take place.⁴² It also became common to put provisions into the so-called ‘cardinal laws’, which require 2/3 majority to be amended in Parliament. By selecting a wide range of topics which are codified in cardinal laws, the Government is able to bind future governments’ hands if the successors wish to modify them.

Even beyond these actions, the Government regularly criticized judges as ‘traitors’ who serve the interests of banks and foreign actors, especially in the highly controversial case of foreign currency loans. In the preliminary procedure of *Kásler*, the Hungarian Supreme Court asked the CJEU whether foreign currency loan contracts was deemed invalid under EU law, especially under the Directive on unfair terms in consumer contracts.⁴³ The CJEU ruled that contractual terms relating to foreign currencies were not necessary exempt from an assessment as to whether they were unfair, and the evaluation of such contracts may be done by local courts.⁴⁴ As a counteractive measure, the Government introduced a new law that the banks had to sue the Government and had to prove (in a 30-day long court procedure) that foreign currency loans were conformant with consumer law rules,⁴⁵ but courts were not allowed to accept the former arguments of banks that these contracts were conformant with the letter of the law at the time of signature. As a result, in most of cases banks lost the trials, which raised a constitutional problem of retroactive rules – roughly 3 billion Euros was lost.⁴⁶ Hostility towards foreign companies became visible in other sectors such as supermarket (e.g. the *Hervis* case⁴⁷) resulted in several infringement procedures commenced by the European Commission.⁴⁸

These actions follow a clear path: to turn away from the rules of the Single Market and to undermine the rule of law both on the domestic and EU level. This divergent trend from the values and norms of the Union leads to canceling the more than two decades of convergence to the European legal order. The response of the EU is divided into three different groups. First, there has been economic pressure applied which culminated in an excessive deficit procedure and halting of funds from the Union (although both of them were lifted eventually). Second, there was a political pressure from the European Parliament, symbolized in the so-called Tavares report and the discussion to commence the Article 7 procedure (i.e. suspension of EU voting rights based on human rights violations).⁴⁹ Thirdly, some infringement procedures were started by the Commission, mostly in connection with commercial issues. However, compared to the seriousness of the human rights violations, there were only a few lukewarm actions. The creation of a clearly written system that can effectively react to human right cases was proposed,⁵⁰ and the discussion seems to continue as Poland began to be mentioned.⁵¹

⁴² Case C-286/12, *European Commission v Hungary*, ECLI:EU:C:2012:602; and Tamás Gyulavári and Nikolett Hős, “Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts”, 42(3) *Industrial Law Journal* (2013), 289-297. The ECtHR also proceeded in a related case. *Baka v. Hungary* (application no. 20261/12).

⁴³ Case C-26/13: Request for a Preliminary Ruling from the Kúria (Hungary) Lodged on 21 January 2013 - *Kásler Árpád, Káslerné Rábai Hajnalka v OTP Jelzálogbank Zrt.* (2013) OJ C 156/18; Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993) OJ L 95/29.

⁴⁴ Judgment of the Court (Fourth Chamber) of 30 April 2014. Case C-26/13. ECLI:EU:C:2014:282.

⁴⁵ Neil Buckley, “Hungary Struggles with Foreign Currency Loan Burden”, *Financial Times* (25 July 2013), available at <<http://www.ft.com/intl/cms/s/0/6c27cfbc-f50b-11e2-94e9-00144feabdc0.html#axzz45X3O3LZI>>.

⁴⁶ “Banks Facing EUR 3 Billion Forex Bill, *Budapest Times* (14 September 2014), available at <<http://budapesttimes.hu/2014/09/14/banks-facing-eur-3-billion-forex-bill/>>.

⁴⁷ Case C-385/12: Judgment of the Court (Grand Chamber) of 5 February 2014 (request for a preliminary ruling from the Székesfehérvári Törvényszék – Hungary) – *Hervis Sport – és Divatkereskedelmi Kft v Nemzeti Adó – és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága*. OJ C 93, 29.3.2014, 10.

⁴⁸ For further examples, see Tamás Dezső Ziegler, “The Links between Human Rights and the Single European Market: Discrimination and Systemic Infringement”, 7(1) *Comparative Law Review* (2016), 1-23.

⁴⁹ Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)). A7-0229/2013, PE508.211v04-00.

⁵⁰ Kim Lane Scheppele, “What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions”, available at

5. Conclusion – A Way back or Total Cancellation

The process towards convergence between the Hungarian domestic legal order and the law of the European Union has its roots in the political transition period of the late 1980s, resulted in the implementation of the regulatory models, norms, rules, and values of the EU. Even though the method of adaptation – namely, the technique of harmonization – has not formally changed, Hungary's attitude to integration has in recent years transformed from a cooperative into a confrontational one. Examples of this shift have been demonstrated by reference to Hungary's consistent pattern of refusing to fulfill certain obligations under EU law, or deliberately adopting domestic laws that are patently incompatible with EU law. The turning point was 2010 and this change in attitude has also been manifested in the increasing number of infringement procedures against Hungary.

Consequently, we must ask whether a path back exists. According to recent opinion polls, the governing parties sustain a strong support among voters.⁵² Based on the amended electoral rules, the governing parties may retain their majority in the Parliament for the near future. For the EU, this will raise the question whether it seeks to be an economic community or a community based on democratic values, and whether it is ready to promptly intervene domestic legal procedures. Even if the current opposition gains a majority in Budapest, the provisions would be hard to be modified or 'undone.' For example, they cannot remove the pro-Orbán Constitutional judges, or remove the head of the National Bank, since that would be against the rule of law, while the Fundamental Law (or the items under the 'cardinal laws') requires a 2/3 parliamentary majority to amend/revise. Thus, there is a fear that the oppositions must use anti-democratic tactics in order to prohibit further human rights violations.

At present time, there seems to be a chance that the country moves into a repressive autocracy. On the other hand, it is in the Government's interest to try to remain in the EU as long as possible. One reason for this is that it receives support in the forms of funds from the EU. The EU's irrelevant and weak response further encourages 'slow' divergence rather than rapid and dramatic takeover of the regime and the total cancellation of convergence to the European legal order. The refugee crisis has been used as a stimulus to induce fear and 'nationalism' – absence of such 'enemies' once again may lead people to revisit the Hungarian tradition of convergence and its democratic values.

<http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf>.

⁵¹ R. Daniel Kelemen and Mitchell A. Orenstein, "Europe's Autocracy Problem: Polish Democracy's Final Days?", *Foreign Affairs* (7 January 2016), available at <<https://www.foreignaffairs.com/articles/poland/2016-01-07/europes-autocracy-problem>>.

⁵² Median, available at <<http://www.electograph.com/2016/02/hungary-february-2016-median-poll.html>>.

Bibliography

- Ágh, Attila. (1998) *The Politics of Central Europe* (SAGE, London).
- Barna, Berke. (1997) "Implementation of the Association Agreement, Approximation of Laws, Eventual Accession: Some Constitutional Implications", in Mádl, Ferenc. (ed.), *On the State of the EU Integration Process: Enlargement and Institutional Reforms* (EU Centre for Research and Documentation, Eötvös Loránd University, Budapest), 323-341.
- Boros, Tamas. (2013) "Constitutional Amendments in Hungary: The Government's Struggle against the Constitutional Court", *Analyse* (Friedrich Ebert Stiftung Büro Budapest), available at <http://www.fesbp.hu/common/pdf/Nachrichten_aus_Ungarn_februar_2013.pdf>.
- Börzel, Tanja. (2005) "Europeanization: How the European Union Interacts with its Member States", in Bulmer, Simon *et al.* (eds.), *The Member States of the European Union* (Oxford University Press, Oxford), 45-76.
- Bugarič, Bojan. (2014) "Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge", *LSE "Europe in Question" Discussion Paper Series No.79*, available at: <<http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper79.pdf>>.
- "Editorial Comments: Hungary's New Constitutional Order and 'European Unity'", (2012) 49(3) *Common Market Law Review*, 871-883.
- Fölsz, Attila and Tóka, Gábor. (2006) "Determinants of Support for EU-Membership in Hungary", in Rohrschneider, Robert and Whitefield, Stephen. (eds.), *Public Opinion, Party Competition, and the European Union in Post-Communist Europe* (Palgrave Macmillan, Basingstoke), 145-164.
- Gyulavári, Tamás and Hős, Nikolett. (2013) "Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts", 42(3) *Industrial Law Journal*, 289-297.
- Harmathy, Attila. (2001) "Constitutional Questions of the Preparation of Hungary to Accession to the European Union", in Kellermann, Alfred *et al.* (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level* (T.M.C. Asser Press, The Hague).
- Harmathy, Attila. (ed.) (1998) *Introduction to Hungarian Law*, (Kluwer, The Hague).
- Horváthy, Balázs. (2008), "After the First Lessons and Experiences: Cases Concerning Hungary before ECJ (2004-2007)", 49 (1) *Acta Juridica Hungarica*, 89-110.
- Horváthy, Balázs and Knapp, László. (2013) "The Relationship between the Hungarian and the EU Legal Orders", in Smuk, Péter. (ed.), *The Transformation of the Hungarian Legal System 2010-2013* (CompLex Wolters Kluwer, Budapest), 51-68.
- Jacoby, Wade. (2004) *Ordering from the Menu in Central Europe: The Enlargement of the EU and NATO* (Cambridge University Press, Cambridge)
- Jakab, András and Sonnevend, Pál. (2013) "Continuity with Deficiencies: The New Basic Law of Hungary", 9(1) *European Constitutional Law Review*, 102-138.

- Johnston, Andrew. (2010) “Cross-Border Re-structuring, Company Law between Treaty Freedom and State Protectionism”, in Bernitz, Ulf and Ringe, Wolf-Georg. (eds.), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford University Press, Oxford).
- Kovács, Kriszta and Tóth, Gábor Attila. (2011) “Hungary’s Constitutional Transformation” 7(2) *European Constitutional Law Review*, 183-203.
- Legrand, Pierre. (2002) “Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?”, in Beaumont, Paul, Lyons, Carole, and Walker, Neil. (eds.), *Convergence and Divergence in European Public Law* (Oxford University Press, Oxford).
- Lyons, Carole. (2002) “Perspectives on Convergence within European Integration”, Beaumont, Paul, Lyons, Carole, and Walker, Neil. (eds.), *Convergence and Divergence in European Public Law* (Oxford University Press, Oxford).
- Martin, Reiner. (1999) *The Regional Dimension in European Public Policy: Convergence or Divergence?* (Palgrave Macmillan, Basingstoke).
- O’ Brennan, John. (2006) *The Eastern Enlargement of the European Union* (Routledge, London).
- Pajor-Bytomski, Magdalena. (1994) *Gesellschaftsrecht in Ungarn (Company Law in Hungary)*, (Hüthig, München).
- Phinnemore David. (1999) *Association: Stepping-Stone Or Alternative to EU Membership?* (Sheffield Academic Press, Sheffield).
- Sárközy, Tamás. (2007) *A szocializmus, a rendszerváltás és az újkapitalizmus gazdasági civiljoga 1945-2005 (The Economic-Private Law of the Socialism, the Transition and the New Capitalism 1945-2005)* (HVG-Orac, Budapest).
- Schimmelfennig, Frank and Sedelmeier, Ulrich. (eds.) (2005) *The Europeanization of Central and Eastern Europe* (Cornell University Press, Ithaca).
- Tatham, Allan, F. (2009) *Enlargement of the European Union* (Wolters Kluwer, Austin).
- Tóth, Gábor Attila. (ed.) (2012) *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law* (Central European University Press, Budapest).
- Varju, Márton and Fazekas, Flóra. (2011) “The Reception of European Union Law in Hungary: The Constitutional Court and the Hungarian Judiciary”, 48(6) *Common Market Law Review*, 1945-1984.
- Vörös, Imre. (2003) “The Legal Doctrine and Legal Policy Aspects of the EU-Accession”, 44(3-4) *Acta Juridica Hungarica*, 141-163.
- Ziegler, Tamás Dezső. (2016) “The Links between Human Rights and the Single European Market: Discrimination and Systemic Infringement”, 7(1) *Comparative Law Review*, 1-23.