

3 On Hungary's Accession to the European Union

—History, Law, Institutions—

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I The European (Re-) Integration of Hungary - A Historical Perspective

Accession to the European Union has been the first foreign policy priority of the Republic of Hungary for more than a decade. A year ago the country report 2000 of the European Commission declared Hungary to be ready for full membership in the Union at a next round of its enlargement; by November 2001 Hungary has concluded 23 chapters of pre-accession negotiations out of a total of 31; by the end of this year the number of concluded chapters are to reach 24 and by the end of 2002 all

the chapters are to be closed. Recent announcements by EU representatives have forecast the accession of Hungary to the Union for not later than 2004, most of them adding that Hungary has fared faster in the process than any other candidate country.

The new yearly reports for all the candidate countries were issued just last week, on the 13th of November, when I left Hungary for Japan. This report, with its “big bang” orientation, i.e. with its projection of an “all-out expansion” of the Union at its next enlargement phase by ten or even by twelve countries, somewhat has blurred formerly envisaged schedules, but the overall prospects for Hungary’s mid-term accession have not been basically altered.

All these are true, yet I do not want to limit my account to facts you can easily spot on the internet or in the headlines of the media. Having been granted the honor of talking in front of you today on selected aspects of Hungary’s accession to the European Union, in particular on aspects which may be relevant for research on the reception and transplant of law, I would like to refer also to some longer-term processes, at certain junctions even to some subjective experiences that may help the interpretation of readily available information.

For not always was it self-explanatory that by the first years of the 21st century Central and East European countries would be heading for full-membership in the European Union. By way of an illustration, I would recall a typical experience of my generation from the cold war decades. I well remember the first TV newsreel I saw in Britain in the first half of the 1970’s: the “News from Europe” were broadcast with a map of Europe where the European continent eastward from the eastern borders of former West-Germany and those of Austria was left literally in the shadow: while in the “Free World” part of Europe you could observe geographic names and borders, the rest of Europe was indiscriminately

rendered black. By that sight you might begin pondering whether it was a sign of compassion with those nations under soviet rule, or plain neglect. Listening to the news confirmed the latter: in the “News from Europe” there was no mention of anything on/from that forgotten half of the continent. (From most “East Block” countries people could not even travel to West Europe.)

The detour may also illustrate that one of the conditions needed for making sense, let alone a better understanding, of “instant facts” is a broader approach. In order to have a more balanced view of our subject matter, it is advisable to extend our horizon both in time and space and to adopt a historical perspective.

In such a perspective the EU-accession of Hungary has been a recent development, but the relations between Hungary and Europe are no recent ones at all. The story began more than 1100 years ago and much of its course and turns may be relevant to have a look at for a more reliable map of the current landscape.

This is true for the very beginnings of those interactions, no matter how remote they may seem at a first sight. As it is known, the Hungarian entered European history as an Asian people from the East in the late 9th century. “Getting integrated” with contemporary Europe became an order of the day for them within a time-span less than a century. Whether we are aware of it or not, the way how the challenge was managed has had enduring effects both on Hungarian and European history ever since. Some basic features of the blueprint still guiding, consciously or unconsciously, many of our present-day “integration efforts” date back to that critical first stage of the encounter.

To put it in a summary way, the history of Hungary and that of Europe have become one, and not only in an *ex post facto* retrospection, but, more importantly, as a joined forward concern from the 11th century on.

How could this be achieved? The crucial condition for any viable integration is a proper common denominator on the basis of which lasting unity can build. One thousand years ago our first king, Steven I. realized that it was the common denominator of Christianity that could resolve the otherwise intractable dilemmas of Hungarian and European history. And most of his fellow rulers in contemporary Europe shared his vision and conviction. But how did he become a king, in the first place?

Hungary and Hungarian people, not unlike the Japanese or other peoples for that matter and at other times, had their own identity dilemmas implying “unavoidable choices from among irreconcilable alternatives”, antagonized by the epoch-making changes of the 10th and 11th centuries. One of the identity dilemmas King Steven and his nascent nation had to face was that of “preserving Eastern (Asian) identities, but getting overwhelmed by adjacent European powers sooner or later” or “joining the West, but loosing primordial identity”. The challenge was complicated of course by a host of further circumstances we cannot follow up here. The relevant moment for us now is that wisdom had it: the multiple dilemma could be resolved by transcending it.

How did this transcendence work? First and foremost it worked by its radical and universal quality: before and while joining Europe, King Stephen, and gradually his nation-in-the-making, embraced the foundations on which Europe itself was being built. This has proved to be an ingenious and uniquely effective decision, the intrinsic logic of which has been validated in the case of Hungary by one thousand years to date.

By this logic of transcendence Hungary has avoided the fate of a one-sided absorption by “Europe”, or by the “West”. By embracing Christianity as the unconditional common denominator for an integrated Europe, Hungary and other European entities did not need to adapt to each other in an imposed and necessarily superficial way: they undertook

the obligation to adjust to universal and increasingly common standards to which all the parties in the process were equally expected to adhere and adjust to. By the same token, at its birth as a historical state and nation, Hungary could avoid also the pitfalls of gaining international recognition through the mercy of either “Eastern” or “Western” worldly empires. Saint Steven, as he was canonized later, asked for his crown neither from the Byzantine, nor from the Holy Roman empires; he asked for it, and got the Holy Crown of Hungary (the physical substance of it being essentially irrelevant in the given context) from the Holy See in Rome.

Distant as such events may seem from the actual exigencies of “EU-accession” and “EU-enlargement” in our days, its imprint can be unmistakably recognized on the ingrained, often implicit, assumptions of the integration process, its legal harmonization aspects included.

Of course, there have been also other instructive, occasionally controversial chapters in the relationship of Hungary and Europe in the past one thousand years. There were times when synchronization worked better, and times when *European* qualities eclipsed on one or both sides. When a guest from West Europe happens to be guided e.g. through the medieval collections of National Gallery in Budapest, he or she may be taken by surprise. While the media are delivering news on the “future European status” of Hungary, visitors to Hungary from West-Europe are discovering a historical past of one thousand years thoroughly European and Hungarian at the same time.

During most of Hungarian history there were no doubts either in Paris, Rome or London that the Hungarians were a European nation, their institutions basically compatible with those elsewhere in (West) Europe. Relative exceptions were two periods when Hungary receded from the historical consciousness of Europe, due not to the least to action or inaction on the part of “Western powers” themselves. One instance was

the occupation and devastation of the central regions of Hungary by the Osman Turkish Empire for more than 150 years (1526-1699), the other such case was the post-war occupation of the country by the Soviet-Russian empire for about 45 years (1945-1991).

Especially during the latter period, institutions were destroyed and "remodeled" in ways irreconcilable either with Hungarian or European traditions. The latent, often disguised, survival of long-term historical continuities has provided an obvious factor in Hungary's "return to Europe" since 1990, but the post-war decades of an un-European and un-Hungarian party-state and command economy have left also heavy damages in all spheres of Hungarian society. Those surviving qualities and the legacy of the postwar decades – neither of it totally "positive" or "negative" in itself – together constitute the immediate historical antecedents of the country's ongoing EU-integration.

II Hungary's EU-accession – The More Immediate Historical Context

For most of present-day students the cold war is rapidly receding into the remote past without direct personal memories of it. Since the early 1990's "globalization", "regional integration" and "transition" have been the labels for much of the turmoil on the international scene. The collapse of the cold war world gave new momentum to integration also on the European continent and especially the countries in its central and eastern zones have been on a fast track of change ever since.

Focusing on Hungary, one could cite a host of "bench-mark figures" indicating where Hungary is standing now on a number of related dimensions. Let us limit our attention here only to a few recent indicators.

Apart from official assessments by the European Commission, the 1999

report of the EBRD (European Bank for Reconstruction and Development) had Hungary's complex "transformation index" - involving scores on a wide spectrum of economic, political, etc. "transitions" - at 3.72 in a 4.00 unit range (where Poland and the Czech Republic, e.g., were placed at 3.50, Estonia at 3.46 and Slovenia at 3.25). On the international globalization scale of AT Kearney the Hungarian economy by 2000 was more globalized than any other candidate country (actually more than EU-members Spain and Greece). According to the Swiss World Competitiveness Report in 1995 Hungary was lagging behind as 45th among 47 surveyed economies, but by 2000 it ranked 27th, preceding EU-member Portugal, Italy and Greece. In the same year the economy grew by 5.2% and nearly 80% of the country's foreign trade was transacted with economies in the European Union, resulting in what has been often termed as "*de facto* trade integration". (The comparable pre-accession percentage for present-day EU-members was around 65% at respective times.) A recent, 2001 survey by the OECD on the dynamics of progress of its 25 members towards a knowledge-based economy has placed Hungary at 6th, proceeding all EU-members except Sweden, Ireland and the Netherlands. (One might add that a Citation Index survey has just found it that relative to allocated funds Hungary is producing the largest number of scientific papers in the world: 107 papers in internationally registered publications for each USD 1 million.)

These figures can be interpreted in various ways of course. More important for the present purpose is to step back again and to spell out the combined message of such facts in a wider context, this time in that of post-war Hungarian (and European) history. One is likely to arrive at a more realistic interpretation of current data, if he or she addresses also such questions: How and in what shape did the integration challenge find Hungary a decade ago? What were the base-line conditions for Hungary's (re)integration efforts on the thresholds of the post-cold war era in

terms of her 20th century, especially post-WWII experience?

The answers to such questions may be helpful also in finding out some specific features of the Hungarian accession agenda. One of those is the disjunction of state and nation in the Hungarian case. If this is remembered, one may more adequately assess also such disputes as the current one over the Hungarian "Status Law" (on the Hungarian domestic law status of the Hungarian minorities living beyond the state-borders). Post-WW I. peace-treaties deprived historical Hungary of two-thirds of her population and territory, and left the largest national minority on the present-day map of (non-CIS) Europe: one third of the Hungarian population of Central Europe in the states adjacent to Hungary. The impact was reinforced by post-WW II. peace-treaties and aggravated by a host of other factors. For its present territory the country's wartime death casualties amounted to one million of a less than ten million strong population; over 40% of national assets were lost; more than 850,000 persons were taken to the Soviet Union for forced labor (about 650,000 as war prisoners of whom nearly 200,000 could never return). But the worst was yet to come: shortly after the end of the war Hungary was incorporated into the soviet-ruled "East Block" of the cold war system (under the pretext of a "liberation" that cannot be compared to an occupation of the MacArthur type). Much talk is going on in these days on terrorism. By way of an illustration of the police-state terror in the soviet-imposed "People's Republic of Hungary": by 1951 100,000 people were interned (large numbers of them to concentration camps), 60,000 jailed; between 1952-1955 "legal" repressive measures were taken against 1,136,434 persons (about one fifth of the adult population), while tens of thousands of the nation's political, intellectual elites had to emigrate, etc. Hungary stood up in October 1956 against oppressive rule alien by Hungarian and European standards alike.

The immediate outcome of soviet invasion is largely known, less known

are its long-term consequences, those for political and legal culture included. Apart from about 3000 casualties on the Hungarian side during the 1956 revolution and war of independence, about 400 people were executed after military defeat and more than 200,000 people emigrated to the West. But the heaviest toll was taken in less readily perceptible ways. By the second half of the 1980's Hungary had one of the highest alcoholism and family breakdown rates in the world, and from the 1960's to the early 1990's it had the highest suicide rates in international comparison (the suicide rate per 100,000 stood at 45 [per 100,000 of population] in the mid-1980's, almost double of the high Japanese rates of the 1950's; the suicide rate for the Hungarian minority in neighboring Romania is still twice higher than the Romanian average). The nation has had one of the worst health statistics in Europe (along with some other countries of formerly soviet-ruled Central and Eastern Europe) and an overall population decline since 1980 (the aggregate number of abortions in the 1956-1990 period approached 5 millions, half of the number of the total population). While footing much of the bill for stationing a 60,000 soviet army in the country from 1956 to 1991 (more than 100,000 with auxiliary and dependents), the command economy was "financing" an unprecedented erosion in social, cultural, political and health conditions, and all that at the cost of accumulating more than USD 20 billion international debt by the end of the 1980's ...

Damaging as all those afflictions were, the most detrimental for meeting the challenge of European reintegration in the 1990's were the deep-going fissures in the moral fabric of society. This is why and how also other symptoms of social disorganization, economic malfunctions and health deterioration could be as grave as put by an American sociologist visiting Budapest in the second half of the 1980's. When asked in the Institute of Sociology of the Hungarian Academy (where I was working at that time) why had he chosen Hungary for a year's study on social

problems (alcoholism in particular) he said: "Hungary is the best documented worst case in the world I know".

External pressure alone cannot be so devastating, if not coupled with a lack of commensurate moral resources. Under specific conditions the effects of external oppression can even be converted into moral strengths. The constellation that was critical for the observed outcomes of the post-war 40 years – and is still going to shape the integration endeavor for a long time to come – consisted not only of the cumulative external effects of a series of veritable historical catastrophes, but also, and more importantly, of the simultaneous reduction in inner resistance capabilities. The main instrument in "achieving" this was the outright persecution of religions and churches in the pre-1956 period, and the more subtle, seemingly less oppressive, but in a way more "effective" policies of secularization, a type of "socialist" consumerism after 1956, up to the late 1980's. Basic human rights were massively and routinely denied or violated, legal instruments abused or distorted, up to the point when much of it seemed to go virtually unnoticed by large segments of the population. As a result, however, self-destructive tendencies were set free that prompted both domestic and foreign observers to realize the un-sustainability of the system and finally completed the verdict on it.

All these have heavily affected, both directly and indirectly, the conditions of Hungary's accession to the European Union. The antecedents referred to, blatantly contradicted the normative premises and the legal frameworks of the European integration project, and were obviously disadvantageous for the country's base-line accession conditions and competitiveness in many other ways, too.

III Stages and Issues in the Enlargement/Accession Process

When Hungary assumed diplomatic relations with the European Communities in August 1988, the political regime was on the verge of collapse, the economy was heading for crisis and society was experiencing breakdown symptoms extant in international comparison. When the Europe Agreement was signed by Hungary (also by Poland and by the Czech Republic) on association with the EC in December 1991 and thereby the integration process officially took off, the country was deep in what economists dubbed its “transition crisis”: due to domestic structural transformations, to the collapse of “eastern markets” abroad, to the repayment burden of international debts, etc., the GDP fell by 25-30% (depending on which expert estimate is taken) in a couple of years. The economy bottomed out around 1993-94 and it took an additional five-six years for Hungary to reach 1989 macroeconomic levels in 1999 again. (Other candidate countries in general have faced even dimmer outlooks.)

On the ruins of the cold war domestic and international system, in the 1990's Hungary had simultaneously to attend the tasks of political and economic transformation, social reconstruction, moral recovery, and those of international realignment: the agenda of Euro-Atlantic reorientation, with the specific priorities of accessing NATO and the European Union at the earliest possible date.

Hungary joined NATO in 1999, but attaining full membership in the European Union has proved to be a more prolonged process. After the Hungarian-EC agreement on Association took effect in February 1994, in April of the same year Hungary officially submitted her application for accession to the Presidency of the European Council. Summit meetings of the Council in Essen and Madrid were landmark events leading up to

filing the Commission's Questionnaire for the Hungarian Government in April 1996. By July of the same year the Hungarian answers to the Questionnaire were drafted, and in mid-1997 (publishing its "Agenda 2000" on the Union's enlargement) the Commission issued a positive avis on Hungary and recommended the commencement of accession negotiations. The negotiations started in March 1998 with Hungary (as well as with Poland, the Czech Republic, Estonia, Slovenia and Malta) through the screening of the *acquis communautaire* and have proceeded in a chapter-by-chapter manner since then, as referred to above.

For about a year the prospects have been set for Hungary's attaining full membership in the Union by 2004, in order to participate in the European Parliament elections scheduled for that year. When and how the formal event actually takes place, remains to be seen. It has been evident from the very beginning that there is a multiplicity of values, interests and actors involved, not necessarily consistent even on any of those sides. "Enlargement" and "accession" are two facets of the same coin, but minting them into a single piece is by no means a routine exercise.

Many of the roles, functions, stakes and effects of the enlargement/accession process have been dealt with at length by respective representatives. For Hungary as well as for Europe it has been obvious that the country's European integration has no alternative, but this has not meant that it could be a painless operation or its constructive outcome may be taken for granted. Progressive integration is in basic ways coterminous with the overall renewal of the country. It implies and helps :

- the regeneration of long-term continuities, natural areas of cooperation and synergies in sub-regional and continental dimensions,
- the qualitative reconstruction of society, its polity, and economy

included,

- the provision of aid and assistance through EU programs and funds in “catching up with Europe” in important concerns, etc.

As it is often voiced, European integration is uniting not states or countries, but people. People-to-people, region-to-region linkages are being resuscitated along centuries or year-thousand old paths across the continent. At the same time it is also clear that frictions and conflicts are inevitable concomitants of progress. Much of it is due to the respective and sometimes very different antecedents, often molding divergent short-term interests.

Against the historical background outlined, it may be more understandable what it means when Hungary (or other candidate countries from the region) ask for “transition periods” or “derogations” in the accession negotiations, or when the man-in-the-street in “Eastern countries” expects more assistance and faster enlargement from “Europe” or from the “West”. It is self-explanatory in turn that not all of those requests and expectations are unconditionally agreed on in all EU quarters. Enlargement/accession is steered and conditioned in many ways not only by elite leaderships, but also by mass perceptions and public opinion, and these have their distributions as well. Although related data are usually favorably tilted for Hungary, according to October 2001 Euro-barometer statistics only 43% of the EU public are supporting enlargement on the whole, 35% are against it, while 22% are indifferent.

One of the stakes and expected fruits of integration is the (re)construction of a workable legal and institutional order, valid and compatible across the economic, political, social, security as well as legal “spaces” of the Union. At the same time it is obvious that also law exerts formative effects on the integration process: shapes it, in some respects offers

indispensable tools for and constitutes preconditions to it.

IV From Legal Harmonization to Institutional Integration

One of the first steps of post-communist transition was to demolish the “legal” scaffolds of the cold war system, to restore the rule of law and to establish, partly to re-establish, the basic legal frameworks of a democratic polity as well as those of market economy. Similarly, substantive accession negotiations with the EU in 1998 had to be preceded by a screening of the *acquis communautaire*, with a purpose of identifying the divergences between Community law and Hungarian legal regulations.

Hungary has taken, in fact, successful measures to harmonize her law with the EU since the Europe Agreement was signed in 1991. Already Articles 67–69 in Chapter III of Title V of the Agreement had explicit provisions concerning the approximation of legislation. In Article 67 the contracting parties acknowledged that one of the basic conditions for Hungary's integration was to approximate the country's current and future legislation to that of the Community. As early as 1991, Hungary assumed the obligation that her future legislation would be compatible with that of the Community.

It has been evident from the outset that “the adoption and implementation of the *acquis* upon accession is a difficult challenge for the applicants to meet and considerable additional efforts need to be made”, as Agenda 2000 of the European Commission put it in 1997. Remembering the historical antecedents referred to, it may be more straightforward to interpret what was meant by the following statement of the document on the “Adoption of the *acquis*”: “This is a far greater challenge than in earlier enlargements. In the last enlargement [of 1995], the new members, as participants in the EEA [European Economic Area] with highly

developed economies, had already taken on large parts of the *acquis*. This is not the case with the present applicants. Moreover, Community legislation has expanded considerably. Certain policies, which were limited at that time, today consist of an impressive set of principles and obligations. New obligations have arisen regarding the Single Market, CFSP [Common Foreign and Security Policy], EMU [European Monetary Union], and justice and home affairs.” The statement did not explicitly mention the legacy of the post-war decades, the legal and other effects of which (absent for earlier, West-European applicant countries) also have had to be rectified.

Thus legal adjustment has had to move stage by stage. The cited Article 67 in Chapter III of Title V of the Europe Agreement in 1991 expressed provisions on the “approximation” of legislation in rather “soft” terms : a/ the principles and rules established in Community law on law harmonization were not to be enforced at that stage in Hungarian-EU law-harmonization, not with mandatory power at any rate (the Europe Agreement did not prescribe specific rules and methods for harmonization measures); b/ the article contained a rather flexible, even vague term for the expected extent of harmonization : it envisaged the approximation of Community law “as far as possible”.

Act I. of 1994 promulgating the Europe Agreement by the Hungarian parliament had it in its Article 3 that harmony with the Agreement was to be ascertained in the course of concluding international agreements and in preparing and enacting new legislation. Hungarian Government Resolution No. 2004 in 1995 ruled on a national law harmonization action plan, taking into account more immediate needs of the accession process. It prescribed the drafting of a “comprehensive law harmonization program” for a first and a second five years periods. The program was to take itemized stock of the harmonization tasks and to schedule its imple-

mentation. Since the legal basis for the program was the Europe Agreement, it enumerated all community legislation which Hungarian regulations were to be harmonized with: it listed some 470 Community laws in the cases of which adjustment was deemed necessary.

In 1996, by Government Resolution 2282, the "comprehensive law harmonization program" and that of the "single market law harmonization" were combined into a "unified law harmonization program". Apart from a few exceptions, this government resolution envisaged concrete harmonization measures up to the end of 1998.

It was evident, however, that the next stage of the accession negotiations as started in 1998, demanded a more stringent coordination of legal regulative systems than pre-1998 policies had it. Accession negotiations took off by screening the *acquis* under 31 chapters and by defining also the procedures to be applied. In the first phase, the delegation of the Commission, on the one hand, and that of Hungary, on the other hand, went through each piece of EC and Hungarian legislations, to see where the two were already fully harmonized, where harmonization was needed and feasible before accession, and where harmonization could not be done prior accession. In the subsequent second, substantive phase of negotiations the so-called problem areas have been dealt with in detail.

In view of these developments Government Resolution 2282/1996 was revised and a next program was accepted (Government Resolution 2218/1998). This program and its new version (as issued by Government Resolution 2158/2001 for the period up to 31 December 2002) have gone well beyond the immediate obligations of the Europe Agreement: they have had to function as basic guidelines for the legal preparations for full membership. The European Commission declared in several of its documents, e. g. in its Principles of the Accession Negotiations: "Accession presumes the adoption of the entirety of the rights and obligations, whether in force

or potential, related to the operation and institutional structure of the European Union (*acquis*)” (Principle 2); in the last, 8th one of the same Principles it added: “The full and final assessment of the law harmonization activities of the candidates and their related ability to apply the law is possible only after the completion of their preparatory tasks in progress.”

Technically, harmonization could be conducted by recourse to a number of typical measures, namely by:

- new (Hungarian) legislation,
- modifying or annulling existing (Hungarian) legislation (deregulation),
- requesting transition periods, preferences and derogations, regarding compliance with Community law,
- requesting adjustments in Community legal regulations.

Technical aspects could be cited and analyzed on end. The government resolution currently guiding the harmonization effort on the Hungarian side is listing corresponding pieces of respective legislation to be harmonized in an item-by-item manner over 250 pages. The particulars are important in their own right, partly because interest-laden issues tend to reside in such details. One might dwell also on the issues of drafting a new constitution. This time it may be more relevant, however, to pay closer attention to the generic nature of the whole process and to raise some questions more pertinent in the perspective of the “reception and transplant of law”. E.g.: How could be those developments interpreted as “reception”, or “transplant” “of EU law” “by Hungary”? or, perhaps in a more relevant reading: What type/s of “reception and/or transplant of law” is/are identifiable in emerging developments? Can these develop-

ments be interpreted either as “reception” or “transplant” of law at all (in conventional senses of the terms) ?

In some abstract analytic formulation the case might be labeled as one of the “reception” or “transplant” of law. It cannot be by chance, however, that related documents do not apply these terms in their texts. In my view, it is more adequate and productive, both theoretically and practically, to interpret the ongoing process not as an act of “reception” or “transplant” of law, but to take it for what it is: harmonization with an *acquis communautaire*.

Of course, there are undeniable elements of “reception” and “transplant” in the procedure, i.e. a large number of rules have to be accepted and adopted by Hungarian legislation, as well as by those of the other candidate countries, before full membership in the Union can be assumed. That is not the whole story, however, and certainly not its definitive theme. In fact, narrowing attention to criteria of unilateral “acceptance” or “adoption” would run the risk of missing the point of a more inclusive project. The point is not in any *mechanical* “borrowing” from any “foreign legal system”; rather in an *organic* harmonization for all the parties with the exigencies of an “*acquis communautaire*”, i.e. of “common achievements”. The question is not about “who is (unilaterally) adjusting to whom”; in principle it concerns the mutual acceptance of and an open-ended approximation to a historically unfolding set of common normative and legal standards as defined by shared premises about the nature and conditions of a workable institutional order.

In basic ways and on good accounts those standards are reminiscent of the essential pattern of the integration of Europe one thousand years ago (or for any viable integrative attempts in European history ever since then). If we were to apply the term “adjustments in legal systems”, at the present junction I would distinguish two types of it: “mechanical adoption” and

“organic harmonization”. Conceptualizing the distinction in this way is indebted to Émile Durkheim’s well-known typology of “mechanical” and “organic” solidarity, but the types implied here do not coincide with those constructed by Durkheim in his “De la division du travail social” one hundred years ago. By a “mechanical” type is meant here a way of adopting law from an other legal system when the focus of attention and effort is on an instrumental transfer of certain “nominal values” or “surface structures”, typically disregarding the ultimate value premises of the legal system from which the adoption is made. The “organic” type, in contrast, focuses primarily on appropriating (“acquiring”) first and foremost the very foundations on which the regulative elements to be harmonized are, can and should be based on. Insofar as those foundations are universal, they do not constitute the “monopoly” of and do not belong unilaterally to any of the legal regimes being harmonized: it is a common ground. Contrary to occasional semblance, harmonization in substantive terms takes place not in relations among particular legal facades, but – to keep the analogy – in relation to legal edifices, on the one hand, and to a shared foundation of those edifices, on the other. The question is not “Which party is adapting to which one?”, but: “How can all the parties better harmonize their respective legal regimes in relation to a common normative base on which an integrated and sustainable institutional order can evolve?”.

V Codes, Written and Unwritten

Though harmonization is not instrumental and extrinsic in ways mechanical adoptions tend to be, in important aspects even organic by meant adjustment in the “letters of law” is no end in itself: it is to serve the essential compatibility of well-defined institutional functions. One of

the critical proofs of substantive integration at the institutional level is practical enforceability and this is one of the acid tests also for the success of legal harmonization. Many of the respective policy documents of the European Union display an obvious preoccupation with this criterion of harmonization performance. Already Principle 8th of accession negotiations cited above referred not only to “the law harmonization activities of the candidates”, but also to their “related ability to apply the law”. Part Two of Agenda 2000 on The Challenge of Enlargement states in relation to the criteria of accession on democracy and the rule of law: “Countries wishing to become members of the Union are expected not just to subscribe to the principles of democracy and the rule of law, but actually to put them into practice in daily life.” The document, for instance, points out “flaws in the rule of law” in applicant countries, like the lack of suitably qualified judges and guarantees of their independence, or the insufficient autonomy of local governments, etc. Later on, it stresses in the same chapter: “The applicant countries’ administrative and judicial capacity is of crucial importance for the adoption, implementation and enforcement of the *acquis* ... It is not sufficient to ensure its correct application [i.e. of Union legislation]. It is equally important for the applicants’ administrations to be modernized so that they can implement and enforce the *acquis* ... The applicants’ judicial systems must be capable of ensuring that the law is enforced.” This issue of enforceability is a recurrent and critical one in particular fields like in those of economic competition, environmental policies, or minority protection.

While effective enforceability may be a fruit of truly organic legal harmonization (enforceability is one of the results in which the organic quality of harmonization pays off), it presupposes such fundamental conditions and controls of social functions that are typically not subject to, or can be only partially influenced by legal engineering. In the prevailing situation it is

the latter that is imbued and wrapped up by the more encompassing conditions of legal cultures and culture(s) in general.

There is an observable tendency in the Union for putting increasing emphasis on the formally not specified criteria of validity and enforceability, with likely implications for harmonization. The Convent recently established for drafting a Constitution of the Union is going to make such criteria more explicit and systematic in the foreseeable future, but much of the broader social, cultural and moral preconditions to the legal system and to its effective enforcement are going to remain necessarily beyond the scope of law-making and that of any legal machinery. It seems to be increasingly realized that for viable institutional integration primarily those common implicit foundations are to be reinforced on which a harmonized legal order (too) can steadily develop.

To take an illustration from the Hungarian government's National Program for adopting the *acquis*, we find in the chapter on employment and social policy: "We have to adopt not only the respective [formal] legal regulations of the Community, we have to adjust also to all those expectations which are not regulated by legal means, but are instrumental in shaping the social policy of member states." Ernst & Young's recent "Introduction to European Law" by Walter Cairus confirms: "... the Court of Justice [of the European Community] has applied what are known as 'the general principles of law'. To a certain extent, the E [uropean] C [ommunity] Treaty made provision for the application of these general principles ... 'The law' means a good deal more than simply the formal rules described above. In addition, Article 215 requires the tort liability of the Community to be decided in accordance with 'the general principles common to the laws of the Member States'. They can be brought under five headings: (a) the general principles derived from the nature of Community law; (b) those which are common to the legal

orders of one or more Member States; (c) fundamental human rights, and (d) general principles of international law.”⁽¹⁾ In its Conclusion the handbook asserts: “... the influence of the Common law jurisdictions has been increasingly felt over the past few years. This is particularly the case with the increasing emphasis on the observance of general legal principles, which form part of the ‘unwritten law’ of the Community.”⁽²⁾

At this point the justification for the approach chosen for my presentation may be perhaps more readily recognizable than at some other ones: the actual force of a particular piece of legislation is preconditioned by a host of factors that in the given context can be conceptualized as a multiply embedded hierarchy of regulative controls, ranging from legal rules to ingrained habits, from the “letter” to the “spirit” of laws, from the articles and paragraphs of legal codes through the tacit understandings of civil society to the verse and chapter of moral codes and religious traditions. While in practice all these combine in inextricable ways, its particular components have typical rhythms in historical time. As, among others, Ralf Dahrendorf observed: political and legal change can be relatively fast, economic transformations tend to take more time, the codes of mentality and morality may be even more time-demanding to change. Most treatments of the legal harmonization *problématique* follow a reverse scale in allotting time and attention to the respective layers of the regulative hierarchy controlling actual compliance.

Though in the lines of legal texts explicit reference to *legal* harmonization may be self-explanatory, it is a much broader *institutional* compatibility and integration that is meant to be at stake between the lines. Adjustment in this context may be far more intricate and time-consuming than “mere legal harmonization” tends to be. While it is relatively straightforward to draft and to pass bills of formal regulation, it is much more demanding to put it “into practice in daily life”. Without effective

harmonization among the various regulative layers of social order, textual concordances of “law harmonization” are no more than “Patomkin walls” covering arbitrary, in fact lawless practice. One of the endemic “problems” with “socialist legality” was precisely its poor compliance rate in daily life, in spite (or rather because) of all the terror deployed. Lenin often made observations like this: “Soviet laws are the best, the most progressive on earth ..., but I raise the question: who is abiding by them?” Non-compliance used to be literally a way of life: often a way of survival, ironically and tragically both for the ruled, and for the rulers. Without anchorage in absolute moral values, i.e. without unconditional guarantee and validity from the beginning, those “most progressive laws” withered away when stage and scene changed.

If we are to give justice to the order of effective preponderance of various compliance/enforcement factors theoretically, and we are to have efficiently harmonized legal regimes practically, we hardly can spare proportionate attention to the longer waves of history. And this is not just for their durational significance, or constraining functions⁽³⁾, but also for their recurrent manifestations of inbuilt order. This order may be suppressed from time to time, but in due course you are to witness, either in Europe or in Asia, in Japan or in Hungary, in the 11th or in the 21st century, its patient and patent workings. Hungary is fortunate enough that the generational continuity of faith in its prevalence has been preserved all through the tests up to the end of the 1980's and beyond.

From all the foregoing it is not difficult to extrapolate that the course of Hungary's new European integration is going to be neither smooth nor fast – instead of a much-publicized “soft landing”, a “long haul” is a far more likely prospect.

The relatively high growth rates of Hungarian economy in recent years notwithstanding, by exchange rate figures Hungarian GDP in 2000 was

estimated by Eurostat at 0,58 % of the EU15 aggregate GDP, equal to a 1 : 170 ratio. True, four years before the coefficient was still over 190, but the combined GDP of the Visegrad4 candidate countries (Poland, Czech Republic, Slovakia and Hungary with 17% of the territory and population of total EU15 figures) even in 2000 amounted to no more than 3,5% of the EU15 data. The 10 Central and Eastern European Candidate Countries together have a territory of 33% and a population of 28% of EU15, but CEECC combined GDP was no more than 4,7 % of the comparable EU figure. According to a recent analysis made for the European Commission, it is likely to take 11 years for Hungary to reach 75% of the average GDP per capita for the current 15 member states of the Union (respective figures for some other CEECC are : 15 years for the Czech Republic, 19-20 years for Estonia and Slovakia, 31 years for Bulgaria and Lithuania, 34 years for Romania, e.g.).⁽⁴⁾ A recent paper by the head of the Hungarian Central Statistical Office has estimated the time-span needed for catching up with the moving EU15 GDP average in the range of 15-45 years, depending on contingencies.⁽⁵⁾

Though in most public opinion polls 65-75% of the respondents in Hungary are basically positive about the anticipated effects of EU-accession, along with positive expectations there are also worries of a new divide or of the reproduction of old divisions within Europe ; there are ambiguities about the readiness and the ability of the Union to help candidate countries to the desired extent ; there are mixed feelings about "pooling and sharing" recently regained sovereignty with the "strong and rich nations" of the contemporary EU ; there are anxieties about leaving one third of Central Europe's Hungarian population outside the borders of the Union, in case Hungary's accession precedes that of her neighbors ; there are reservations about the desirability of "catching up" with some of the social problems and excessive consumerism of present-day West

Europe ...

But there is also hope that, true to the ground-works of her history, Hungary will not be a faceless member of the European Union : she may strike a balance between past and future and can offer a creative interchange for the authentic values of both East and West.

* *The text published here is an edited version of the lecture.*

- (1) Cairus, Walter : *Introduction to European Law*, Ernst & Young's series, Cavendish Publishing Limited, 1997 (p 83)
- (2) *Ib. id* (p 89)
- (3) Cf., e.g., with the - in several angles relevant - observations of Aoki Masahiko on history as constraint in his *Information, Corporate Governance, and Institutional Diversity, Competitiveness in Japan, the USA, and the Transitional Economies* : "So why did the tendency toward insider control become embedded in firms against the will of the reform authorities in Central [I'd rather say 'Eastern' - A.G.] Europe and Russia? Most likely because the attempt to simply transplant the Anglo-American system, which had developed under its unique historical circumstances, was, like mixing oil and water, ill-fated from the outset. As a result, the privatization process was heavily influenced by the legacy of communism. In other words, some merits of the Anglo-American system can be easily taken advantage of only if certain historical preconditions exist." Oxford University Press, 2000 (pp 3-4)
- (4) *Real Convergence in the Candidate Countries : Past Performance and Scenarios in the Pre-accession Economic Programs*, European Commission, November 2001, cited by the weekly *Uniting Europe*, No. 168, 2001 (pp 1-2)
- (5) Mellár, Tamás : Mikor éri el a magyar gazdaság fejlettsége az Európai Unió átlagát? *Közgazdasági Szemle*, 2001 december (*When Does the Hungarian Economy Catch up with the Average of the European Union?* Economic Review, December 2001, in Hungarian)