LÁSZLÓ KECSKÉS

EU-Hungary Perspectives in the Approximation of Laws

I.

Arriving with the last wave of the great migrations in the 9th century, the Hungarians as "latecomers" met with a medieval social structure firmly established in Europe. That situation and the existing geopolitical configuration left them no option other than adaptation to the prevailing pattern of conditions. Creation of appropriate sets of cultural, social and legal conditions formed part of that process.[1] Clearly, then, the Hungarians soon came to feel the need for "harmonization". Along with the coronation regalia and Christianity, our King St. Stephen adopted several other values of the West, with artists and intellectuals arriving in Hungary and with significant spiritual assistance received, particularly from the Church. All these combined to exert a notable effect on the laws of St. Stephen and other measures of his which came down in writing. Roman law and Roman culture, canon law and Christianity had a decisive influence on the Hungarian course of development, one that continued to be felt in the centuries that followed. Romanization not only permeated contemporary Hungarian legislation, but also had a considerable bearing on law enforcement by the courts and the Chancery. The teaching of law and jurisprudence equally played an important role in transmitting the effects of Romanization. Although short-lived in consequence of turbulent historical events, the law schools of medieval Hungary had the services of many professors from famous foreign universities. In like manner, many of the Hungarian professors obtained their diplomas at European universities of great fame. Numerous practising lawyers and other intellectuals educated in law similarly availed themselves of that opportunity.[2] National aspirations have always been accompanied by certain factors of harmonization in Hungarian legal development. In our legal history the agents of harmonization were and are an economic and social structure similar to that of Western Europe and the efforts to measure up to the European standards.[3] Hungarian private and commercial law definitely followed the European course of development from the mid-19th century down to World War Two. Law-making relied on wellfounded studies of comparative law. Codifiers drew heavily on foreign legal institutions, mainly of Germany, Austria, Switzerland and France. In point of fact, Hungarian economic thinking followed the same pattern. The need soon became obvious for the Hungarian economy and economic

[1] See *Mádl*, F.: Ius Commune Europae, Jogtudományi Közlöny, No. 3 of 1990, pp. 117–118.
[2] See *Mádl*, F.: Ius Commune Europae, p. 118.
[3] See *Mádl*, F.: Ius Commune Europae, p. 118.

actors to be open to other countries. It was a necessity for the Hungarians to recognise - the wisdom lying in "multilateral interest compensation", and they acted accordingly: For what else, if not "multilateral interest" compensation , was the fact, for instance, that in 1335, at the „Visegrád Conference" in the Castle of Visegrád, our King Robert Charles saw to it that Kings John of Bohemia and Casimir of Poland, who were his guests, received the following gifts: "Charles presented John with 50 silver jugs and a wonderful chess-board and Casimir with 500 marks (about 125 kg.) of the "finest" gold to enable him to pay his debt to the „Czech ruler".[4] Later, of course, history imposed strong restrictions on the possibilities of our economic development, and our external economic relations were also largely one-sided, but, due perhaps to these circumstances as well, there was hardly any need for the meaning of a wider dimension, of integration, to be explained to this country. Nevertheless, the hope of a truly forward-oriented integration was late in looming on the horizon of the Hungarian economy, because the small states with different configurations in Central and Eastern Europe or the regions comprising them never united in voluntary integration, although more than once they formed part of some larger compact whole, which the outside world also regarded as a unit. However, the force of integration was outside the region itself every time. The Habsburg empire undoubtedly represented a formation of high-level integration, forming a single customs union at the empire level, which also meant a common foreign trade policy as we understand it today, with foreign and military affairs similarly conducted in common. While the German Third Reich's zone of interest in Central-Eastern Europe was made up of states that appeared more or less independent, the centre's overwhelming military superiority secured political harmony and a type of economic cooperation responsive to German needs. In like manner, Central and Eastern Europe occupied by the Soviet Union consisted of separate states for the most part, yet their military and foreign political unity was guaranteed by the strongly centralised Warsaw Treaty Organisation and their economic cooperation was secured by CMEA, which turned central planning into a tool of integration.[5]

As regards Hungary, the shift in its relationship to EC, which had been hopelessly rejectionist and hostile, started in parallel with the preparations for reforming the Hungarian system of economic management in the second part of the 1960s and was marked by a series of relatively small and cautious steps for some 20 years. Obviously, restraints on the Hungarian economic reforms were placed directly by the sanctity of the primacy of state ownership and indirectly by the monolithic political structure, which had for a long time prevented any economic pluralism from taking root. Finally, enforced adjustment to the great-power interests of Soviet foreign policy was another factor creating an unfavourable external environment for the Hungarian reforms.[6]

It was the speedy process of political and economic transformations that made it possible for EC, at the Summit Meeting of Dublin on 28 April 1990; to raise the idea of signing association agreements with Hungary, the Czech and Slovak Republic and Poland. Hungary warmly welcomed that Community initiative. From the outset the

[4] See *Mádl*, F.: Az európai integráció sodrában: a Visegrádi Négyek közép-európai szabadkereskedelmi övezete (In the Drift of European Integration: the Central-European Free Trade Zone of the Four of Visegrád), Európajogi tanulmányok I. (Ed. F. Mádl), Budapest, 1993, p. 154.

[5] See *Balázs*, P.: Magyarország európai integrációs felzárkózásának története és perspektívái, különös tekintettel a nyugati-európai integráció fejlődésére (the History and Perspectives of Hungary's Case for Integration into Europe, with Particular Emphasis on the Development of West European Integration), Kézirat (Manuscript), Budapest, 1993, p. VI.

[6] See *Balázs*, P.: op. cit., p.1.

Antall Government's program had accorded priority to the plan for "return" to Europe, and the desire to join the European Community had been formulated as a strategic goal. In July 1990, giving expression to that endeavour, Prime Minister József Antall of Hungary handed Jacques Delors, President of the Commission of the European Community, a Memorandum which summed up Hungary's proposals concerning the substance of association. Following upon the exploratory talks, the negotiations to conclude an Association Agreement commenced in Brussels on 21 December 1990 and, as a result of eight official and one technical rounds and several expert meetings, ended on 22 November 1991, when the draft text was initialled. The Association Agreement and the Provisional Agreement containing the former's provisions on trade and trade related matters were signed by the Prime Minister and the Minister of International Economic Relations, respectively. The negotiations with Poland and the Czech and Slovak Republic were conducted parallel to those with Hungary, and the Agreements were signed at the same time. Our Provisional Agreement went into effect on 1 March 1992 and our Association Agreement – following ratification by the European Parliament, the Hungarian Parliament and the Parliaments of the 12 Member States – entered into force on 1 February 1994.

The Contracting Parties of the Association Agreement are Hungary on the one hand and, on the other, the three Communities (the European Economic Community, the European Atomic Energy Community and the European Coal and Steel Community) and their Member States. Thus the Association Agreement is a "mixed treaty" of which the Communities as well as the member states are contracting parties. The Preamble to the Agreement uses the term "Community" denoting all the three Communities, so it is a matter of interpretation to decide which Community is, or perhaps all Communities are, to be regarded as the subject of a particular right or obligation in a given case. Although, as is known, the three Communities have the same system of institutions, the competence and functioning of the different Communities are governed by different rules, so making a distinction between the Communities is of continuing relevance. Guidance in this respect is provided by the law of the Community rather than by the Association Agreement. The main reason for the conclusion of a mixed agreement was the fact that the matters regulated affect and require the competence of both the Community and the member states. It should be added that the delimitation of powers between the Community and the member states is not crystal-clear at present and that, moreover, the dividing lines are in a state of flux. This problem is resolved by the term "Parties", for, in a particular context; it should be understood to mean the member states or the Community or both.[7] On the part of Hungary, the contracting party is the Hungarian State, not the Government. Although the matters regulated relate to questions within the Government's competence and implementation of the Agreement in this field could be ensured by government regulations, numerous provisions refer to matters subject to statutory coverage.[8]

[7] See *Kecskés*, L.: EK-jog és jogharmonizáció (EC Law and Law Harmonization), Budapest, 1995, p. 301.

[8] See *Kecskés*, L.: op. cit., p. 301.

II.

Since 1990 Hungarian civil-law and economic legislation has adopted numerous solutions from the legal systems of other countries. There is no doubt that the first place is occupied by EC law as regards the frequency of such adoptions, but our law has also incorporated several legal solutions of national legal systems.

Hungarian civil-law. codification has so far followed two main directions during the period since the change in the political regime in 1990. One direction is represented by the partial reregulation of property relations and, in that context, by the legislation on compensation. Our related legislation showed a conservative tendency manifested in "annulling" certain earlier unlawful or quasi unlawful acts of the State. In this domain we generally could not but cast side-glances at solutions or attempts at solutions by those countries of Central-Eastern Europe which were in a similar situation.

The other direction concerned the goal of laying the groundwork for a social market economy. It stood to reason that relevant regulations followed a liberal trend. In this field we could draw more heavily on the law-making experience of Western Europe and even overseas countries, with adjustment to EC law becoming an increasingly determinate factor.

The EC's law harmonization program formulates requirements to which the national legal systems of the member states have to be adjusted on a continuing basis. Hungary's law harmonization obligation will not lapse with its becoming a member of EC. Even after the hoped-for status of member state has been gained, we shall have to keep "adjusting" our standards to the legal material of EC, which will continue to change in the meantime. It should also be borne in mind that EC law is not a static one, but it is developing dynamically. Also, EC rules on law harmonization tend. to change. In drawing up Hungary's law harmonization program it seems practicable to take into account the perspective development of EC law as well. Therefore it appears advisable for us to work with some margin of "forward orientation".

Hungary's Association Agreement with the European Communities and their member states, the so-called European Agreement, makes evident the need for the Hungarian system of law or for a large part of its rules to be brought into line with Community law. Articles 67 and 68 of the Association Agreement contain the main provisions on law harmonization. As it appears from Art. 67, those pro\ ions form -part of the "soft" material of the Association Agreement inasmuch as Hungarian legislation must, for the time being, be harmonized "so far as possible": The Contracting Parties recognise that a fundamental sine qua non for Hungary's integration into the community consists in the approximation of its present and future laws and regulations to Community law. Hungary must ensure that its future legislation will be consistent so far as possible with community law. Art. 68 regulates Hungary's law harmonization. obligations in these terms: The approximation of law must extend in particular to the following fields: customs law, company law, bank law, enterprise accounting and taxation, law of intellectual property, workers' protection at the workplace, financial services, rules of competition, protection of the life and health of persons, animals and plants, food regulations, consumer protection, including liability for product, indirect taxation, technical rules and standards, transportation, and environmental protection.

The fields of law enumerated in the Association Agreement coincide with the main subject areas of EC's law harmonization program. They embrace the economic-commercial domains of law, but EC has for the time being little to do with the classical

parts of civil law. The community seeks to influence that legal material in a more indirect way, through multilateral international agreements and by encouraging member states to accede to them. It is only recently that the legal life of the community has shown keener interest in the classical institutions of civil law. The late 1980s saw the beginning of a spectacular experiment. On the mandate of EC a working group of scientists, (Land Committee) was set up in 1989 to try, in the field of contract law, to elaborate a uniform legal material which might serve as a basis for Community law harmonization even in respect to the classical institutions of civil law. A similar activity is pursued by another scientific committee, the Storm Committee, with a view to unification of the law of civil procedure.

At any rate, the catalogue of items in EC's .law harmonization program shows, as is also reflected in the enumeration of the subject-matters of law harmonization in the Association Agreement with Hungary, that while the system of Community commercial law has been largely developed at the level of Community law, a national commercial law as a separate branch of law in the national legal systems of member states cannot emerge precisely for this reason. In point of fact, Brussels' great law harmonization magnet is attracting elements of a civil-law nature and consequently the legal systems of member states retain no elements unintegrated by the community which could constitute body of commercial law, i.e. a separate branch of law, within national frameworks. This important determinant feature should also be taken into account in the development trends of the Hungarian legal system. Accordingly it is not worth while to deal with the idea of developing Hungary's commercial law. We have to come to terms with the fact that the structure of Hungarian law will also decisively be influenced by Community law in the long run.

In adopting our position rejecting the separation of commercial from civil law, namely the .recognition of commercial law as a separate branch of law, we relied on the experience of comparative law as well. On this basis and within a historical context, it may be stated that the emergence of commercial law was attributable not only to the immanent slowness of civil-law codification, but always to some concrete situation of political history in which the bourgeoisie was unable to affirm its interests within the frameworks of civil-law codification. This is why the legal history of individual states mainly developed in such a way that commercial law or the commercial code appeared where and when the codification of civil law was blocked for one reason or another.

It is a fact that European legal literature witnessed a significant wave of upturn in commercial law a few decades ago, in response partly to a genuine internationalization of commercial law after World War Two, to the world trade euphoria at the time, partly to the popularity and vogue in Europe of the USA Uniform Commercial Code. That wave, however, drifted down the large European river of legal literature at least 15 years ago. Recently the idea of civil law unification has grown prevalent again, and plans for civil-law codification are undoubtedly reviving today. This has repeatedly brought forward the case of a Uniform European Civil Code as an issue of the day. In 1989, for instance, the question of organising the work of codification was taken up even by the European Parliament. For the moment, I myself do not believe in the reality of elaborating a Uniform European Civil Code, but there is a possibility of unification in partial aspects of certain subject-matters. This is best illustrated by the United Nations Vienna Convention of 1980 on International Sale of Goods, which the European communities have also encouraged their member states to ratify.

A factor of importance to law harmonization, too, concerns the degree to which the adoptive legal system is open to reception of solutions and institutions: of foreign legal systems in general. Hungary's legal development has been adoptive in this respect. Our legal life has been marked by no rooted aversion to foreign laws. Our legal history has recorded incidents of aversion to only 3 foreign laws. The first such occasion was the 1861 National Conference of High Justices, where our forefathers decided against keeping Austrian law in effect in Hungary. That was understandable; for the Austrian private law had been kept in force in Hungary under political pressure between 1853 and 1861. In the 20th century it was during the intervening period to World War Two that a certain Hungarian national aversion was felt to German law. At that time, by proclaiming the theory of "self-luminous laws", our professors denied the effect, otherwise unquestionable, of German legal thinking on Hungarian legal development and tried to emphasise the similarity of Hungarian law to Anglo-Saxon law. The advocates of that doctrine went so far as to deny the fact of reception of Roman law into Hungary, solely because the route of adoption had led through Germany. The most spectacular work of that trend in legal literature was Béni Grosschmid's book entitled "Werbőczy and English Law" published in 1928.[9] Finally, it is the socialist era that in our legal history can be seen as an element of aversion to foreign law. That element cannot be traced at all in the socialist legal literature of Hungary. Otherwise the Soviet law exerted but a relatively small influence on Hungary's socialist civil law, with its effects felt on not more than 6 or 7 legal institutions.

Basically, Hungarian law has never refused to adopt elements of foreign law. Just the contrary. Adoption of foreign legal institutions has been of great importance during periods of modernization in the development of our legal system. The noted bill of 1928 on Hungarian private law, an essential document of the one-time modernization of our private law, incorporated, inter alia, German, Austrian, French and Swiss elements, which were largely retained in the Civil Code (Act N of 1959). That was a great achievement, since the work of codifying the Civil Code was nearing completion in the middle and the second part of the 1950s, an immensely difficult political period.

III.

In 1990 the codification of civil and economic law started under difficult professional circumstances, as in the 1980s our legal system had shown up contradictory trends of development despite the indisputably positive tendencies. For instance, there was general confusion about defining the concept of state ownership. There was no clear answer even to the simple question of who was the subject of state ownership: the State or the state enterprises. What we had for a guide was no more than recipes at the level of a cookery book in applying confused alternative concepts of state ownership. From the time of introduction in 1984-85 of a new enterprise typology, particularly of the state enterprise of a self-governing type, there emerged a completely distorted trend in our law of economic organisation as well. The contemporary "promters" were obviously influenced by Yugoslavian "hallucinations" in making suggestions for the introduction of self-governing state enterprises. The only problem was that state ownership never existed in Yugoslavia, not even at the time when the State existed, but what was put into

[9] See *Grosschmid*, B.: Werbőczy és az angol jog (Werbőczy and English Law), Budapest, 1928.

practice in the "associated labour" organizations substituting state enterprises was virtually direct social ownership of property. That, however, had no tradition in Hungary. An extremely confused situation resulted from the fact that, with the reform of enterprise typology in 1984-85, the Hungarian theory and the work of codification had moved in the direction of recognising the ownership of state enterprises in fixed assets. A solution for that hopelessly contradictory state of affairs was sought in summer of 1990 by amendments to the relevant laws and regulations which made it clear that state property was owned by the State, i.e. the Treasury, not by the state enterprises. The legal entity theory was likewise on the decline by the end of the socialist era. The theory of legal entity in civil and public law was similarly characterised by a tendency to oversimplification. This is how matters stood: in civil law, legal personality coalesced in the condition of subject at law, which in turn was limited to legal capacity until finally the criterion of legal personality was now and then manifested only in the capacity to sue and to be sued, whereas in public law, oversimplification lay in the reduction of legal personality to the condition of subject at law and in the latter's limitation to powers. In public law, virtually any organisation and organ vested with powers was regarded as a legal entity.

Since the introduction of the "new economic mechanism" in 1968, the development of Hungary's socialist law relating to the economy had experienced a longdrawn-out period of modernization at a not too rapid rate, which certainly gained momentum in the second part of the 1980s. However, at that "reform-socialist" stage of development in our legal system, Hungarian legislation had not yet been marked by any orientation to the European Community. This is understandable, for those directing the reforms had a rather uncertain vision of the future at the time. What is more, the terms "European Community" and "Common Market" occasionally had pejorative overtones in Hungary. Therefore the reformers disregarded the development trends in EC law and confined themselves to borrowing from the legal systems of certain western countries solutions that they deemed fit to follow. The tax reform followed Scandinavian examples, our law of association is patterned on the German model, and our Securities Act reflects basic elements of Anglo-Saxon law. Thus the laws and regulations reflecting economic modernization at the end of the 1980s show a rather eclectic picture. It is therefore absolutely necessary to reappraise the legal developments in those years of reform, now in the context of EC law criteria.

IV.

Our adhesion to EC's law harmonization program is an important factor in the modernization of Hungary's legal system as well. It would be hardly disputable that our legal system is also modernised through compliance with EC's law harmonization requirements. The modernising effect of law harmonization cannot naturally be reduced to our legal system becoming "better" and "simpler". The illusion about the goal of making a "better law" and a "simpler law", which was entertained at the very outset, has been abandoned even by Community law. In a legal sense, too, we should conceive of modernization rather as a process conducive to bridging over differences between centre and periphery. According to Kálmán Kulcsár, "the substance of the modernization process is in removing the contradiction between the challenges ensuing from phenomena of the historically organic development of centre societies and the pressure

for answers to challenges breaking and diverting the organic development (stagnation in a given case) of periphery societies and stemming from the centre. However, the situations thus emerging tend to vary, may differ from one another in response to various factors".[10] "We would narrowly and hence wrongly interpret the process of modernization if we merely considered it as one of 'catching up', in which differences between centre and periphery were reduced by adopting the institutions of the centre. Elimination of differences in development in the centre-periphery relationship – and concurrently modernization in substance – means adoption rather than 'simple catching up'. Nevertheless, the process of integration into the world economy and, let me add, into the global community – which may in perspective eliminate 'subordination', usually a concomitant attribute and state up to now – cannot evolve except in the second, 'residual' phase after the upswing of modernization. And this may result in pursuing a path of development based on the internal conditions of a given society, including its historical peculiarities, and growing into an organic process (generating new pushings and removing attendant cyclical pressures for reform). This is the real substance of the modernization process."[11]

Similarly, both unification and harmonization of law mean reception of law, namely a process in which a legal system incorporates the rules of another. The relationship between reception, unification and modernization of law was also discussed by Gyula Eörsi in his famous book on "Comparative Civil Law" published in 1975. He proceeded from the fact that the concept of reception was disputed and hard to define, because the dividing line grew blurred between conscious and spontaneous reception and, more recently, between reception and unification of law or between adoption of certain provisions and reception.[12] In his view, the deepest seated cause of reception is the exhausted adoptive energy of the existing law in addition to political, economic and lego-professional factors. Reception is generally directed towards modernization of law once the adoptive energies of law have exhausted or if they are unable to come into play.[13] "The minimum requirement of reception is for one law to permeat another in a larger field of law. As regards unification of law, if law is unified not only on the international plane, but unification comes to govern domestic legal relations of the State promulgating the unified law, we are inclined to consider it as a modern form of reception, because in this case the state receives another law by a legislative act, even though that law is not one of any other particular state."[14]

Thus, the thesis that law harmonization is equal to both reception and unification of law is reliably consistent with the views of Kálmán Kulcsár and Gyula Eörsi on modernization, adaptation, reception and unification of law. It is nevertheless worth keeping in mind what Ernő Várnay wrote in connection with our topic, since thereby we may reduce eventual undue expectations about Hungarian-EC law harmonization: "The periphery always exhibits a strong tendency to hasten. development by legal means, to seek apparent „solutions" for problems by laws and regulations".[15]

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[10] See *Kulcsár*, K.: A modernizáció és a jog (Modernization and Law), Budapest, 1989, p. 14.

[11] See Kulcsár, K.: op. cit., p. 15.

[12] See *Eörsi*, Gy.: Összehasonlító polgári jog (Comparative Civil Law), Budapest, 1975, p. 532.

[13] See *Eörsi*, Gy.: op. cit. pp. 533 and 538.

[14] See *Eörsi*, Gy.: op. cit. p. 532.

[15] See *Várnay*, E.: Az EK–magyar társulási megállapodás és közösségi jog (The EC-Hungarian Association Agreement and Community Law), Európa Fórum, No. II. of 1992, p. 68.

The adjustment of Hungarian legislation to EC's law harmonization program is an important element also of the process going on in the Hungarian legal system toward a change in the type of law. It was the change in the political regime in 1990 that opened the way to transforming the Hungarian system of law, formerly established antidemocratically and conditioned by a one-party socialist type of law, into a type of law of a truly civil conditionality. Hungarian law harmonization with EC will have a fundamental role to play in completing the process of change in the type of law, which got under way in 1990.[16]

As our Association Agreement contains no separate rules on the mechanism, methodology and techniques of law harmonization, we have no choice but to take into account the rules of Community law governing law harmonization, at least as a basis of departure or analogy. To put it very simply we have no other point of reference. Therefore in our efforts at law harmonization, we must be oriented by the rules of the EEC Treaty on law harmonization (e.g. para. (h) of Art. 3, Art.100, paras. (1) to (5) of Art.100/a) and the decisions of the European Court concerning law harmonization.

In EC law governing law harmonization it is the larger "freedom" which the States obligated for law harmonization enjoy in certain fields of law, within the compass of "fundamental protection requirements", notably in questions of security, consumer protection and environmental protection, that may be of importance to devising the Hungarian strategy for law harmonization. As a matter of fact, the States concerned are not required to adopt Community law in these domains if their respective national laws afford a greater measure of protection for citizens than Community law does. However, our attention is also deserved by the rule allowing member states to introduce security measures, where necessary, even against EEC provisions on law harmonization, but only when warranted by causes described in Art. 36 of the EEC Treaty (public morals, public interest or public safety; protection of the health and life of persons, animals and plants; protection of national property embodying artistic, historical or archaeological property). The measures introduced may only be transitory, temporary. [See Art.100/a, paras. (3) and (5), of the EEC Treaty.]

Hungary's law harmonization obligation in connection with the very implementation of the Association Agreement is evidently of a much wider scope than that determined by Art. 68, because EC law harmonization requirements must be extended to our legal system as a whole. We must undertake efforts to ensure that our legal system will be more transparent and that our future legislation will not bring it into conflict with EC law. Eventual conflicts must be resolved. In developing our legal system we should keep in mind the directions determined by EC law, its fundamental liberal philosophy, and its requirements concerning the free movement of persons, goods, services and capital.

The extent to which a legal system adopts the rules of Community law appears to be relatively measurable: The amount and ratio of change in law are comparatively easy to examine by jurimetric methods. It should be taken into account; however, that EC does not place concrete demands upon member states obligated for law harmonization, but it employs a more general method [Art. 3 (h) of the EEC Treaty] in providing that the law harmonization obligation of member states must secure the "proper functioning of the Common Market". As can be seen, EC does not appraise the quality of member states'

[16] For the concepts of type of law and legal system, see *Eörsi*: Összehasonlító polgári jog (Comparative Civil Law), pp. 47–51 and 61–99.

legal systems primarily by formal criteria, including jurimetric, but rather it proceeds from the specific function which its law harmonization program is destined to fulfil.

When reflecting about, the measurability of perspective changes in the Hungarian legal system, of Hungary's compliance with its law harmonization obligations, we should also .bear in mind that in certain cases harmonization can be accomplished by methods of deregulation as well. So; in future "measurements", attention should be paid not only to the actually new positive substance of legislation, but also to its deregulatory aspects.

V.

At major role in coordinating and directing the activities concerning compliance with our law harmonization obligations is reserved for the Ministry of Justice: Decision. No. 2006/1990. (HT. 4.) of the Council of Ministers on "Procedure for Harmonization with the Law of the :European Community" charged the Minister of Justice with primary responsibility for ensuring that the law-making organs take into account the relevant rules of Community law in judging the necessity of new laws and regulations and adopting them. The Ministry of Justice started work on law harmonization partly by acting within its own sphere of competence, vested in it by. the Act on Legislation, under the ordinary procedure for preparation of laws and regulations, partly in the Legal Subcommittee of the Interdepartmental Committee set up to coordinate government tasks connected with European integration. Essentially in conformity with the substance of the aforementioned Government Decision, the hungarian rules on the techniques and procedures meeting the law harmonization requirements have also been formulated at the statutory level. The question of law harmonization is similarly addressed by Act I of 1994 promulgating the European Agreement on the Establishment of Association between the Republic of Hungary and the European Communities and Their Member States, signed at Brussels on 16 December 1991. The Act provides that in preparing and concluding international treaties of the Republic of Hungary as well as in proposing and adopting its laws and regulations the harmony thereof with the European Agreement must be ensured. The requirements as determined by Art. 67 of the European Agreement must be fulfilled in the preparation and adoption of laws and regulations: This Act added the following paragraph to Art. 40 of Act XI of 1987 on Legislation: "If a bill affects the subject-matter of the European Agreement Establishing Association between the Republic of Hungary. and the, European Communities and Their Member States, signed at Brussels on 16. December 1991, the motivation thereto shall also provide information about the extent to which the proposed regulation meets the requirement of approximation to the laws and, regulations of the European Communities and about whether the regulation is consistent with the laws and regulations of the European Communities". Section 11 of Government Decree No. 41/1990. (M:15) on the responsibilities and Competence of the Minister of Justice was likewise supplemented with the following provision: "The Minister of Justice shall comment on draft laws from the additional viewpoint of whether it conforms to the requirement of consistence with the law of the European Community. He shall present his view to the Government meeting and, where necessary in the case of a bill, to: the parliamentary committee concerned with the subject-matter of the bill."

These new rules are indicative of the steps taken by Hungary toward recognising the primacy of Community law. The relevant new regulations have given effect to the primacy of community law with respect to the current and future processes of Hungarian legislation, but naturally that primacy does not yet prevail over the full material .of the Hungarian legal system. In a few important areas the Association Agreement has established a certain link between the' Hungarian legal system and the EC system of law. It is on this basis that Hungary must comply with its obligations to harmonize its law with the European Community. It should be seen; however, that our link to the Community is theoretically rather contradictory by reason of -the transitory character of the associate status. Notably the Association Agreement linked the Hungarian legal system only with the "secondary law" of the Community, i.e.: with the enormous fabric of community regulations, directives, recommendations and opinions. Thus the Hungarian legal system has come into contact with the vast body of positive community law, which determines the law harmonization obligations of member states; too, in substantive terms. On the other hand, the Association Agreement established no such link with the "primary. law" of the Community i.e. with the Treaties that once established the Communities and with the agreements that have modified the since. This, too, is an enormous legal material, with the Maastricht Treaty on European Union being the l4th in the array of its components. In effect, the Hungarian legal system will not be linked with E .C's "primary law", the virtual "public law" of the community, before Hungary becomes a member state of EC. This statement does not hold for Art. -62- of the Association Agreement on the regulation of "competition and. other economic provisions". Para. (2) of Art. 62 refers directly to a passage in the text of the EEC Treaty and spells out that any practice contrary to regulations on competition and other economic provisions, namely to Art. 62, must be judged according to the criteria arising from application of the rules laid down in Arts. 85; 86 and 92 of the Treaty establishing the European Economic Community.

The fact that by virtue of the Association Agreement the Hungarian legal system is not also linked with the practice of the European Court, the EC court based in . Luxembourg, appears to be more problematic from the angle of the practice of law harmonization. True, this leaves Hungary in a much more favourable situation than it would enjoy if it were required to apply the dogmas contained in some of the European Court's judgements in the nature of precedent and to use them as a "yardstick" for judging its compliance with its law harmonization obligations. In this situation, however, we should. be aware that, and we emphasise that this is not of disadvantage to Hungary, our law harmonization obligations appear to be somewhat diffuse, without a contour, for the EC rules on law harmonization come to operate effectively precisely through the dogmas set forth in the caselaw of the European Court.

VI.

The commencement of Hungarian law harmonization raises a question concerning the timing and phasing of this work. as well as the form which the legislative source of law harmonization should take. Moreover, we have to face up to perceptual problems. In Hungarian public opinion there prevail two extremist views regarding law harmonization. Perhaps they are rather politically motivated and make their effects felt in the professional world. Some claim there is no need for harmonization of our law with

EC law, while others urge speedy action, preferring harmonization virtually overnight, which they reduce to tasks of mere translation and mechanical putting into force.

Obviously, law harmonization is time-consuming and calls for a good deal of professional foresight. It defies mechanical methods. However pressing our concrete law harmonization obligations may occasionally become, we shall have to fulfil them in the awareness that even the law of the State obligated for law harmonization has inner values, institutions, dogmatic aspects and important elements of substance which deserve protection. It does not appear impossible to have this consideration prevail, for, as is also shown by the experience of European integration, the depth of harmonization with community law does not really affect the dogmatic structures. The emphasis is rather on pragmatic elements, and these are also covered by rules of the EEC Treaty which afford some protection for solutions of national legal systems vis-a-vis Community law.

We can make-good use of the earlier and current experience which countries with :more developed economic and legal systems have gained in law harmonization. On the other hand, it would be a great mistake to mechanically copy another country's law harmonization program already implemented wholly or in part, for such method, would not allow but an inorganic reception of community law. Indeed, historical experience shows that nothing but organic reception can produce useful results, a working law for the adoptive country.

The West European countries which might serve as, an example had a level of economic development and a quality of legal system different from those which Hungary has now when they were first confronted with the law harmonization requirements of EEC. Nor should we forget that the rules of EC law regulating law harmonization have also undergone many changes since the advanced countries of Western Europe, embarked on the approximation of their legal systems within the framework of EEC: Consequently we have no choice but to go our own way in law harmonization. The rules adopted from Community law must be combined with the operative legal material of the Hungarian system of law. The fibres of two systems stemming from different roots must be linked in such a way as to ensure the working of our law modernised by this method as well. Harmonization of law, too, amounts to reception, and as is generally the case with reception of law, law harmonization is only successful in organic form, only if account is taken of the determinant elements of active adaptation in legal development. Inorganic reception disregarding active adaptation or legal regulations adopted through inorganic law harmonization do not result in a working law.[17]

The entry into force of our Association Agreement on 1 February 1994 gave a strong impulse to law harmonization in Hungary, because this country is required by the Association Agreement in a legal sense, too; to harmonize its law. Thus the question of harmonization or no harmonization cannot be disputed. We can devote all our energies to making law harmonization meaningful. We cannot content ourselves with formal harmonization, with the phenomenon, still encountered now and then, that while the preparers of draft laws make in the preamble superficial references to the need to take EC law into account and perhaps even invoke some Community directives with indication of their numbers, the relevant substantive elements of EC law do not appear in the draft texts. It is an important requirement that in preparing acts of national

[17] See *Eörsi*: Összehasonlító polgári jog (Comparative Civil Law), pp. 391–412. and 532–539.

legislation we should take stock. and make the acquintance of the entire body of EC law relating to the subject-matter of regulation.

Law harmonization must be thorough and profound, from article to article. A procedure under which a handbook on EC law is on the table of a "consultative" meeting preparatory to legislation, but it is closed; while topical domestic issues are being discussed, is no harmonization of law. The handbook must be opened, and we must be familiar with EC law! Lawyers of EC member states have developed an interesting dual awareness of Community law. They can be observed to "feel" EC law to be foreign, but in applying its rules they matter-of-factly regard it as domestic law.

It is practicable to eliminate this duality between EC law-related "feelings" and actual legal practice. It would be important to ensure that once Hungary has become a full-fledged member of the Community there will be no mental and emotive effects of bias against Community law.

A fundamental change in respect to the legal profession and legal culture in Hungary will result from the fact that from 1994 the. development trend of hungarian law is clearly determined by the law of the European community and our adhesion to its law harmonization program. Higher education in law in Hungary and Hungarian jurisprudence will also have to adapt themselves to the altered circumstances. It is a welcome phenomenon that the law of the European Community is already taught in one form or another at all law schools of Hungary. Instruction in this subject should be gradually extended and made more intensive, whereas the most urgent task of Hungarian jurisprudence concerning EC law appears to be one for our writers on legal theory to reach consensus about the Hungarian legal terminology to be used for naturalising , the basic concepts of Community law. Efforts at solving this problem are handicapped by the fact that the documents of EC law have been translated into Hungarian at a rather low professional standard.

VII.

Government Decision No. 2004/1995. (I. 20.) devised an administrative mechanism working under the direction of the Minister of Justice to see to compliance. with Hungary's law harmonization obligations. In it, after having discussed the submission on the "plan of action for law harmonization preparatory to Hungary's accession to the European Union", the Government invited the ministers to observe, in drawing up their respective half-year plans for legislation, the time-limits set by the plan of action for law harmonization covering the first quinquennium as from the entry into force of the Association Agreement. Also, it invited the ministers to prepare, subject to the content of the detailed plan of action for law harmonization annexed to the Government Decision, their respective submissions for the first part of 1995. It invited the ministers to inform, before 30 April 1995, the Minister of Justice and the Permanent Secretary of State of the Prime Minister's Office about the law harmonization aspects of their respective legislative programs. It invited the Minister of Justice to submit, before 31 October each year during the first quinquennium, a detailed plan for law harmonization for the next year. If invited the Minister of Industry and Commerce to submit, in concurrence with the ministers concerned before 31 March 1995, a program and a comprehensive plan of action for the adoption of Community laws and regulations that are in force from 1 January 1993 and govern a single internal market; taking into

account the situation and development possibilities of the Hungarian economy as well as Hungary's intention to have the negotiations on its accession to the European Union commence in 1997. It is obviously with attention to and by reliance on this submission that the Minister of Justice must fulfil his obligation, also determined by the above-mentioned Government Decision, to present to the Government, before 5 May .1995, the comprehensive plan of action for law harmonization covering the first quinquennium as specified by the Association Agreement. Finally, the Government invited the Minister of justice to submit to the Government, before 31 December 1998, the comprehensive plan of action for law harmonization covering the second quinquennium as envisaged in the Association Agreement. Responsibility for coordination of compliance with these paragraphs of the Decision lies with the Minister of justice, who is under obligation to inform the government, before 30 June each year, about the status of implementation of the plan for law harmonization according to the time-table.

The significance of this Government Decision, which I have amply described, lies in having linked Hungary's future legislative programs with the law harmonization program in relation to EC. In addition, this Government Decision exhibited considerable flexibility in making allowance for the fact that EC's law harmonization expectations with regard to Hungary had changed somewhat in comparison with the negotiations of 1990-91 concerning the Association Agreement. At the time of those negotiations the EC norms for a single internal market were not yet in effect, so it was not possible to include them in the Association Agreement. However, after the entry into force of the norms for a single internal market in 1993, the statements by EC leaders and officials have outlined a desire that the part of Community law governing a single internal market should, regardless, of the law harmonization priorities set forth in the Association Agreement, be "received" as soon as possible into the legal systems of the countries which have concluded an Association Agreement.[18]

Considering that for the time being it is only through the Association Agreement that Hungary is legally linked to the EC system of law, the principle of "closing effect" is inapplicable to the fulfilment of Hungary's law harmonization obligations. This principle means that once the national legislations of member states have accepted a directive of Community law, legal development with respect to the given subject-matter of regulation will become the concern of. Community legislation. It stands to reason that this principle will not apply to Hungarian law harmonization until we achieve the status of member state. It follows from the specific situation arising out of the Association Agreement that, for the time being, the closing effect is not connected to acts of Hungarian legislation involving law harmonization and adoption of Community law. Accordingly, within the time-limits set by the Association Agreement, any particular subject-matter of regulation may be repeatedly covered by Hungarian legislation. In view of this possibility it seems practicable to envisage two phases of compliance with Hungary's law harmonization obligations. Therefore, in the space of the quinquennia determined by the Association Agreement, our plan for law, harmonization may schedule a three year and a five-year time-limit. Even in the case of longer deadlines set by the Association Agreement it appears advisable to balance fulfilment between two phases on such a time-scale. By contrast, it is practicable for the subject-matter of regulation affected by the "asymmetry method" benifiting Hungary under the

[18] See *Kecskés*, L.: op. cit., pp. 313–314.

Association Agreement to be covered in a period close to the end of the given time-limits.

VIII.

A useful purpose in codification can only be served by the, experience of law comparison if codification has appropriate scientific support. The measure of such support in Hungary varies in the different areas of legislative activity. For instance, the measure of scientific support is especially great for classical civil-law codification, but it is inadequate for economy-related legislation.

In the course of codifying economy-related law, when we sought to amalgamate economic and legal ideas or to write into the law economic aspects, making them a "concern of law", we met at every turn with differences and contradictions between economic and legal thinking. These hindered and still hinder our work, mainly because economists have a rather undifferentiated perception of law, while lawyers are inclined to conceive of economics as an undifferentiated system. This approach is of disadvantage to the work of codification as economists keep demanding clear answers from lawyers and vice versa, notwithstanding the fact that in our age both the economy and law form much too differentiated and complicated systems to be able to impart reality to such clear answers. The doctrine of "one solution for one problem/matter" is untenable under the extremely complex sets of conditions obtaining in our age.

Pressing and narrow time-limits and the scarcity of available financial resources have more than once hindered us in comparison of law when coping with tasks of legislation, indeed often drafting "officialsmade law" under the pressure of necessity, even though comparison of law must be a hand tool of the codifier. It would be good to employ as perfect methods as possible and to use this tool as efficiently as possible: But I will conclude at this point, thinking of Byron, who wrote that a good worker never argues with his tool.

KECSKÉS LÁSZLÓ

EU–MAGYARORSZÁG: PERSPEKTÍVÁK A JOGSZABÁLYOK KÖZELÍTÉSÉBEN

(Összefoglalás)

A magyar jogrendszer fejlődési iránya soha nem volt annyira egyértelmű, mint manapság, amikor Magyarország az Európai Közösségekkel és annak tagállamaival kötött – 1991. december 16-án aláírt és 1994. február 1-én hatályba lépett – Társulási Megállapodás értelmében már „jogilag is kötelezett" arra, hogy jogszabályait közelítse az Európai Közösség jogához.

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