

CONTEXTUALITY AND UNIVERSALITY:
CONSTITUTIONAL BORROWINGS ON THE GLOBAL
STAGE – THE HUNGARIAN VIEW

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I. INTRODUCTION – A NEW EPIDEMY IN CENTRAL AND EASTERN
EUROPE: ESTABLISHING CONSTITUTIONAL COURTS

A. *The Hungarian Constitution and the Constitutional
Court Emerged in 1989*

Even during the last years of communist rule in Hungary a “Constitutional Council” was set up. This organ was formed in order to “play” constitutionalism when Hungary did not have a constitution based in the rule of law, but a communist constitution. The Constitutional Council was no more than a propaganda organ of the regime.

Only in the *spring of 1989*, when the *National Round Table negotiations* between the interim government and the opposition began, did the question of the new constitution reach the agenda. In September 1989, when the draft of the new constitution was almost completed, the participants in the talks – both the interim government and the opposition – agreed that the content of the draft was worthy of protection by a constitutional court.

Therefore, the draft law *setting up a Constitutional Court* of the Republic of Hungary was worked out quickly in the fall of 1989 and enacted as *Act No. XXXII* together with the new Constitution in October 1989. The Constitutional Court began its activity on January 1, 1990.

The Act was developed in the framework of a research project of the Institute for Administrative and Legal Sciences of the Hungarian Academy of Sciences and involved a thorough *comparative analysis of the systems of contemporary constitutional courts*. As a reaction to the just outgoing communist dictatorship, the German model, with a very strong constitutional court, was regarded as a model to be followed. The U.S. model, and the role of the U.S. Supreme Court, was examined as well. But it was acknowledged that the U.S. Supreme Court works under different circumstances and under a different system of separation of powers – most clearly the U.S. presidential system.

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B. *The Hungarian Constitutional Court is a Very Strong State Organ*¹

The Hungarian Constitutional Court has a very *wide competence*: its basic activity relates to the supervision of the constitutionality of legal regulations enacted by the Parliament, the national government, and the local governments. Moreover, the Court has competence for the preliminary supervision of acts that were passed by the Parliament, but not signed by the President of the Republic. The Court is competent to interpret the Constitution and to decide whether the legislature omitted its legislative duties and, therefore, whether an unconstitutional situation emerged. The Court has the right to decide constitutional disputes between different state organs over their powers and even to impeach the President of the Republic.

It seems clear that the Court is in a certain context the most powerful state organ in the Republic of Hungary. It cannot create – decide *in a positive way* – the law in Hungary, but it can prevent – *in a negative way* – a definite, unconstitutional, legal regulation of the Parliament, of the government or of the local government, by *abolishing* the law.² Therefore, during the transition period between 1990 and 1995, all the most important legal regulations, which had for decades decided the “face” of the Hungarian democracy, were investigated by the Court; the most important enactment disputes of the Parliament were decided finally in the course of an investigation within the framework of the Constitution and before the Constitutional Court. Thus, the Court played an eminent role in the formation of the new Hungarian democracy and in the formation of Hungary’s new legal and socio-economic system.

This occurred because the Court’s extraordinarily wide competence is tied to an *actio popularis* provided for the people;³ everybody, even foreigners, has the right to launch a procedure before the Court, even if they do not have a definite legal interest. As a consequence, almost all the important legal regulations were brought in front of the Court by somebody – a natural or legal person, a countryman, or a foreigner.

C. *The Development of Constitutional Courts in Central and Eastern Europe*

Setting up constitutional courts became, in the course of the transition from communist rule to democracy, an “*epidemy*” in Central and Eastern Europe; the characteristic indicator of the extent to which a state is ruled by law became whether a constitutional court had been

¹ See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. IV (delineating the competence and the powers of the Constitutional Court). An English translation of the Hungarian Constitution is easily available at www.wiretap.spries.com:70/00/gov/world/hungary.com.

² See *id.* at ch. IV, art. 32/A(2).

³ See *id.* at ch. IV, art. 32/A(3).

formed. This fact led to an influx of constitutional courts. The value of the work done by the courts, however, has been very different. In Yugoslavia, a constitutional court was established even before the changes of 1989-1990, and it still exists. The court's application to be a member of the Conference of the European Constitutional Courts, however, was rejected in the mid-1990's.

II. THE LEGAL ENVIRONMENT OF THE HUNGARIAN CONSTITUTIONAL COURT – THE DEVELOPMENT OF HUNGARIAN CONSTITUTIONAL LAW

A. *The Impossibility of Discussing Constitutional Law Before 1989*

Before 1989 *with a communist constitution, one could have hardly spoken about constitutional law in Hungary in the sense used in modern democracies*. Considering *the legal system as a whole, and in particular the constitutional law, it was hardly possible for the legislature to "borrow" experiences from the West*. The use of the comparative method, however, was common in *legal science*. Researchers visited western – mostly European – countries and gained experience with the legal framework of rule of law democracies and market economies. In the mid-1970's, Prof. Gyula Eörsi established in Hungary *the convergence theory*.⁴ This theory, widely spread in the West, stated that there are *certain common areas* of Western and Soviet-type legal systems. A famous result of the efforts in Middle and Eastern Europe to accept the convergence theory was the Vienna Convention on the International Sale of Goods.

B. *Economic Legislation*

As far as *legislation* was concerned, it became possible to begin to study free market solutions in the early 1970's within the framework of the Hungarian Academy of Sciences. This research resulted in many market economy-orientated acts – for example, the Competition Act of 1984. The Competition Act of 1984 was the first competition legislation in Eastern Europe. It was then borrowed wholesale by other East-European nations' legal systems, including China's. The Act was strongly influenced by U.S. antitrust legislation, and even the introduction of a treble damages provision was considered.

C. *Constitutional Law*

The field of *constitutional law* was *not touched* by this development since it may have threatened the "heart" of the existing system by

⁴ See GYULA EÖRSI, COMPARATIVE CIVIL (PRIVATE) LAW: LAW TYPES, LAW GROUPS, THE ROADS TO LEGAL DEVELOPMENT 363-413 (Gábor Pulay et al. trans. & Muntine Petetin & Kenneth Munn eds., 1979).

suggesting that the manner with which power was exercised should be revised. The revision of the old legal material became unavoidable during the round table discussions in 1989. Without such changes the new democracy could not have been introduced and the democratic election of 1990 could not have been held.

The efforts to establish a *new Constitution* resulted in the draft law which was enacted by the Parliament in *October 1989*. The text was brand new although the numeration of the old constitution (Act No. XX (1949)) remained since the Constitution was considered to be an interim text. The intention was that Parliament would enact the final Constitution after the free democratic elections of Parliament in 1990. Almost the entire text of the old communist constitution was replaced. Only one sentence remained: "The capital of Hungary is Budapest."⁵

The intended new constitution is not yet enacted and it seems unlikely that it will be enacted in the near future. One cannot exclude the possibility that the present constitution will serve the Republic of Hungary for several decades. Since the text was *borrowed* from *western sources* of constitutional law it is suitable for this purpose – with the additional interpretation of the Constitutional Court.

D. Borrowing from Foreign Experiences

The solutions in the Hungarian constitution were *borrowed from the national constitutions of western democracies*. The American, German, French, Spanish and Italian Constitutions were all considered together with the practice of their respective constitutional courts.

Attention was given also to the *international conventions* in the field of human rights. Among others, the Universal Declaration on Human Rights (1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Convention on Civil and Political Rights (1966), and the International Convention on Economic, Social and Cultural Rights (1966) were considered.

Considering international conventions became a constitutional obligation of the new Hungarian democracy because Article 7(1) of the new constitution lays down the requirement that the Court harmonize internal law with the international law.⁶

⁵ A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA ch. XIV, act. 74.

⁶ *See id.* at ch. I, art. 7(1) ("The legal system of the Republic of Hungary accepts the universally recognized rules and regulations of international law, and harmonizes the internal laws and statutes of the country with the obligations assumed under international law.").

III. CONSTITUTIONAL BORROWINGS – WITH SPECIAL EMPHASIS ON THE PRACTICE OF THE HUNGARIAN CONSTITUTIONAL COURT (HCC)

A. *The Influence of National Constitutions on the Practice of the Hungarian Constitutional Court – Selected Examples*

Early on, the unconstitutionality of the death penalty was investigated. In the *death penalty case*,⁷ decided in 1990, the Hungarian Constitutional Court held the death penalty unconstitutional. One of the concurring opinions referred to the U.S. Supreme Court's now overruled decision in *Furman v. Georgia*⁸ as a liberal example for other nations, but also analyzed the subsequent development – the reversal tendencies since 1976.⁹

In the *agricultural land case*,¹⁰ the constitutionality of a prohibition against the acquisition of agricultural land by agricultural cooperatives was questioned. The Hungarian Constitutional Court held this legislation constitutional. One parallel opinion referred to the U.S. Supreme Court's judgment in *Board of Regents v. Roth*,¹¹ in which the Supreme Court held the constitutional right to property only protects vested benefits.¹² In the same case, the question of the freedom of contract was investigated as well, and one parallel opinion – referring to the U.S. Supreme Court's judgment in *Holden v. Hardy*¹³ – stressed that only the restraint of the general power to acquire property would be unconstitutional.¹⁴

In 1993, the Hungarian Constitutional Court examined the constitutionality of the *state owned undertakings*.¹⁵ In this case, the Court analyzed the nature of the market economy and stressed that according to the principle of market economy laid down in Article 9 of the

⁷ See judgment 23/1990 [*death penalty case*] (X.31.) AB [Constitutional Court of Hungary] ABH 1990, 89. This article will cite to Hungarian cases in the continental tradition. The citation lists the official number of the case in the year it was decided, 23/1990, and where it appears in the Official Journal followed by the date the decision was handed down in brackets, here October 31, the abbreviation for the court that decided the case, followed by the reporter and page number in brackets, ABH 1990. For ease of reference, this article will also incorporate the case's common name, and use the common name for subsequent short citations.

⁸ 408 U.S. 238 (1972) (per curiam).

⁹ See *death penalty case*, ABH 1990 at 99. The U.S. Supreme Court upheld a modified death penalty statute in *Georgia v. Gregg*, 428 U.S. 153 (1976).

¹⁰ See judgment [*agricultural land case*] 35/1994 (VI.24.) AB, ABH 1994, 197.

¹¹ 408 U.S. 564 (1972).

¹² See *agricultural land case*, ABH 1990 at 213. In *Roth*, the U.S. Supreme Court explained that an employee, who had been hired to a one-year contract, had no property right in continued employment after the one year since neither the contract, nor the statute, created an interest in further employment. See *Roth*, 408 U.S. at 576-78.

¹³ 169 U.S. 366, 398 (1898) (upholding state legislation limiting the working hours of miners challenged as for violating freedom of contract as a valid exercise of the public welfare powers).

¹⁴ See *agricultural land case*, ABH 1994 at 217.

¹⁵ See judgment 33/1993 [*state owned undertakings*] (V.28.) AB, ABH 1993, 247.

Hungarian Constitution¹⁶ is simply an aim of the state and does not provide a fundamental right. Therefore, the economic policy cannot be evaluated according to the Constitution because the Constitution is – at least from the point of view of the Constitution – neutral.¹⁷ The reference to the German *Investitionshilfe Urteil*¹⁸ cannot be mistaken, but the German view was based on the U.S. practice first outlined in a dissenting opinion in *Lochner v. New York*¹⁹ according to which the constitution does not “embody a particular economic theory.”²⁰

The influence of U.S. constitutional practice can be discovered even in arguments to the Hungarian Constitutional Court. In 1994, a Hungarian citizen criticized the *Hungarian Penal Code* and took reference to the flag burning – symbolic speech – holding in *Texas v. Johnson*.²¹ Launching the procedure, the proponent argued that the American constitutional discussion / protections concerning freedom of speech could orient the Hungarian Constitutional Court.

The Hungarian Constitutional Court takes into consideration the practices of many other constitutional courts in a similar manner.

B. *The Influence of International Conventions and Their Practice*

The above-mentioned international conventions repeatedly influence the practice of the Hungarian Constitutional Court. Since Hungary is a member of the Council of Europe and signed the European Convention for the Protection of Human Rights and Fundamental Freedoms, the judgments of the European Court for Human Rights are binding on Hungary. Therefore, the Hungarian Constitutional Court takes into account the practice of the European Court for Human Rights since that Court has the ultimate authority to decide a human rights dispute.

For example, the decisions of the European Court of Human Rights and the regulation of international conventions were referred to in the *death penalty case*,²² the *agricultural land case*,²³ and in the *punishability of communist crimes* and the *statute of limitation cases*,²⁴ decided in 1993, as well as in the single decision concerning the *freedom of press* and the *freedom of speech* as far as *insulting public authorities / persons* was concerned.²⁵ These conventions also were referred to in the *public*

¹⁶ See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA ch. I, art. 9.

¹⁷ See *state owned undertakings*, ABH 1993 at 249.

¹⁸ See *state owned undertakings*, ABH 1993 at 249.

¹⁹ See judgment July 20, 1954 BVerfGE [Federal Republic of Germany] 4, 7, 17.

²⁰ *Id.*

²¹ 491 U.S. 397 (1989).

²² See judgment 23/1990 [*death penalty case*] (X.31.) AB [Constitutional Court of Hungary] ABH 1990, 89.

²³ See judgment 35/1994 [*agricultural land case*] (VI.24.) AB, ABH 1994, 197.

²⁴ See judgment 53/1993 [*statute of limitations case*] (X.13.) AB, ABH 1993, 323, 330, 334.

²⁵ See judgment 36/1994 [*freedom of press and speech*] (VI.24.) AB, ABH 1994, 224.

data and information case,²⁶ the *Compensation Act case*,²⁷ by which property damage of the citizens under communist rule were partly compensated, the case concerning the *children's rights*,²⁸ and the *Flats Act case*.²⁹

Even the *Paris Peace Treaty* (1947) which ended the Second World War was the basis of a decision of the Hungarian Constitutional Court.³⁰ The Court found that the compensation duties of the Hungarian State to Jewish citizens had not been fulfilled in accordance with the Treaty. The Hungarian Constitutional Court obliged the Parliament to put an end to the unconstitutional omission.

C. The Dangers of Borrowing

Borrowing from other constitutional experiences is *not always without danger*. Consider first examples of borrowing taken from international conventions rather than from constitutional practices of other nation's courts.

In the *Flats Act case*,³¹ the Hungarian Constitutional Court mainly based its decision on the judgment of the European Court of Human Rights (Strasbourg) in *James and Others*.³² This judgment of the European Court of Human Rights dealt with an old British common law institution: the *long lease tenure*, and thus, the *Leasehold Reform Act of 1967*. However, the Hungarian Constitutional Court investigated the constitutionality of the Hungarian Flats Act's rules on the *rent* of flats which is actually regulated under British law by the Rent Acts. The comparison by the Court was thus false, since the subject – the legal institution in question – in the Hungarian case and the European Court of Human Rights judgment was *completely different*. The sole fact that both affected flats was misleading. The failure to apply the comparative method led to a false result.

The adoption of a German example concerning the constitutional guarantee to property was misleading in another case – the 1995 case on *social rights*.³³ The austerity package of the Hungarian government in 1995 was a result of the catastrophic economic situation inherited from the communist rule. The whole social system had to be reconsidered and many previous benefits were cut or abolished. Many cases attacked the new regulations before the Hungarian Constitutional Court. The Hungarian Constitutional Court reversed a number of provisions cutting social services and claimed to adopt the

²⁶ See judgment 34/1994 [*public data and information case*] (VI.24.) AB, ABH 1994, 185-86.

²⁷ See judgment 15/1993 [*Compensation Act Case*] (III.12.) AB, ABH 1993, 119.

²⁸ See judgment 879/B/1992 [*children's rights*] (???) AB, ABH 1992, 402.

²⁹ See judgment 64/1993 [*Flats Act case*] (XII.22.) AB, ABH 1993, 380.

³⁰ See judgment 16/1993 (III.12.) AB, ABH 1993, 143.

³¹ See judgment 64/1993 [*Flats Act case*] (XII.22.) AB, ABH 1993, 380.

³² 98 EUR. CT. H.R. (ser. A.) at 9 (1986).

³³ See judgment 56/1995 (IX.15.) AB, ABH 1995, 260.

German view relating the interpretation of the constitutional right to property. Applying the German view, not only civil law property, but also social benefits and other claims were found to be protected under the right to property provision of the Hungarian Constitution.³⁴ Such claims were for example claims based on social law regulation that are protected – according to the Hungarian Constitutional Court’s view – as vested rights acquired during previous decades.

Consequently, the Hungarian Constitutional Court – by adopting the German view without critical analysis and without investigating the whole legal and socio-economic environment in which the German decisions were made – protected many parts of the *status quo* inherited from the communist period without taking into consideration the completely distinct legal nature of the right to property and to social rights. The right to property in article 13(1) in the Hungarian Constitution is a right of – so called – *first generation* where the state is obliged in a *negative way* to refrain from intervening into a citizen’s or individual’s life.³⁵ The right to social benefits, contained in article 70/E are *second generation* fundamental right where the state has a duty to *positively provide a definite social service and social assignment*.³⁶ Therefore, social claims are protected – in my view – according to the Constitution not simply by the right to property but in particular by the separate social rights provision – as *lex specialis*. This provision does not prohibit the government from revising positive social services and assignments according to the realities of the economic situation.

The qualification of social claims by the Hungarian Constitutional Court, mechanically following the German view, might have resulted in an unreformable social system. The Hungarian Constitutional Court’s practice was revised after some months and the constitutionality of social claim’s legislation was later qualified as belonging under the framework of the Constitution’s social rights provisions.

D. Adoption of Foreign Achievements Should Be Realized Through the Application of the Comparative Method

The *comparative method* could prevent the mechanical adoption of

³⁴ See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA ch. I, art. 13(1). A critical analysis of the judgment, see IMRE VÖRÖS, A TULAJDONHOZ VALÓ JOG ÉS TAS ÖNKORMÁNYZATOK [THE RIGHT TO POSSESSION AND THE SELF-GOVERNMENTS] (Budapest 1994).

³⁵ See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA ch. I, art. 13(1).

³⁶ See *id.* at ch. XII, art. 70/E. This provision, which is one part of a larger grant of rights, states:

(1) Citizens of the Republic of Hungary have the right to social security. In case of old age, illness, disability, being widowed or orphaned, and in case of unemployment for no fault of their own, they are entitled to the provisions necessary for subsistence.

The Republic of Hungary upholds the right of [the] people to be[] provided for through the social security system and its institutions

Id.

foreign ideas and practices by obliging the Court to take certain definite and non-exchangeable *steps*.

First: one must analyze not only one but many different foreign legal solutions, judgments and their legal and socio-economic policy background.

Second: one must analyze the Hungarian statute, regulation or law and its legal and socio-economic policy background.

Third: one must compare (a) and (b) to determine the common “core” and the differences between them to ensure that the legal institutions can be compared. “Comparison” of incomparable institutions misleads as occurred in the *Flats Act case*.

Fourth: the foreign regulation or law behind the common core should be investigated considering the possibility of the integration of the experience into the Hungarian legal system.

Fifth: the special legal item should be developed based on the foreign judgment or legal regulation, which will be built into the Hungarian Constitutional Court’s decision as an integral part of the Hungarian way of constitutional thinking.

Through the strict application of these steps and criteria, the application of each nation’s achievements will not be a simple “translation” that remains a “foreign body” in the legal system, but rather an inventive development of the national constitutional system. The dangers of non-organic application of foreign ideas can be prevented: it is possible for citizens to receive their “own” constitution’s application from their own constitutional court. The people need not receive constitutional “tomatoes” instead of the promised “potatoes.”

IV. SUMMARY: WHAT DOES UNIVERSALITY AND CONTEXTUALITY MEAN IN THE FIELD OF CONSTITUTIONAL LAW?

A. *The Universality*

The universality of constitutional law is expressed mostly by *international law*. Peace treaties in general can have consequences in the development and application of constitutional law. International conventions have the same effects. Today, these legal institutions are the most effective means of *harmonizing constitutional laws*.

B. *The Contextuality*

While international treaties and conventions are clearly influencing the legislation and the application of constitutional law, the constitutional *context* refers to *national and international experiences* in the application of constitutional law. Before constitutional courts decide cases, it is advisable for them to investigate foreign experiences and determine which ideas might be useful in the internal / national court's decision. The context refers to definite a national constitutional court's practice or to international convention's practice, if a special court exists for its application.³⁷

C. *The Globalization*

Globalization at the beginning of the 21st century may mean that the universality and the contextuality of constitutional law might develop in the direction of harmonization. But *the chances* of harmonization *are different* among the different fields of constitutional law.

The chances are *favorable* among the *first generation* fundamental rights. In particular, the prospects are promising in the field of *human rights*. These rights affect the "*eternal values*" of mankind, they formulate general principles and ideas which are theoretically acceptable all over the world independent from race, nation and religion.

The chances are *not* as favorable, but rather *limited*, in the field of *second and third generation* fundamental rights, for example, the rights to social security, to health care, to a healthy environment, to study and culture, to a flat, etc. These rights affect the definite, concrete social system and the market economy, including its efficiency, and, therefore, are dependent to a great extent on the individual, concrete circumstances of each nation. Even historical traditions can influence constitutional law and its practice. These rights do not really express "eternal" values of mankind and, therefore, can differ from society to society and from community to community.

This does not mean that the universality and the contextuality of constitutional law cannot influence the harmonization of this field of constitutional law. It only means that the possibilities are not so wide and favorable.

But international efforts, including conferences and collaborative research efforts, may contribute to the harmonization of constitutional law in both fields.

³⁷ For example, the European Court of Human Rights applies the European Convention for the Protection of Human Rights and Fundamental Freedoms.