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Comparative legal aspects of the English Common Law system and the Hungarian Roman-German legal regime, with an emphasis in regards to the constitutional differences in criminal justice.^[1]

Well, ladies and gentleman, in the foregoing let me wish you all a happy May Day, I do hope that all of you took your work easy today, and didn't overburden yourselves with labour. I know I tried not to.

As already introduced, my name is Oliver Bohanek, I'm a Doctor of Hungarian Law, a trainee judge assigned to the criminal division of the Municipal District Court of Pest, currently on unpaid leave pursuing the LLM, a Masters Degree in Law, here in Cambridge.

In medias res, I'll get to the point of my talk: that is concisely comparing the legal systems of England and Hungary, with an emphasis on the constitutional differences in criminal law/criminal justice, based on my observations.

As most of you may already know – and those of you who don't do be informed – the world is crudely divided into two major legal systems. One is mostly the English speaking world, which defines itself as having a common law system (this is about 35% of the world, not including the USA) initially based on the Laws of England (historically originating from Norman law), while the rest of the planet is mainly identified as having a Continental regime, either being fundamentally Napoleonic (French) or Germanic such as the Hungarian, founded on the principles of Roman

Law and forged into a national legal system through political development. While common law jurisdictions tend to be as one big family (e.g. having an Australian court citing a House of Lords decision, also known as cross referencing), the continental systems are strictly coherent, domestic and closed systems.

The main differences – Case Law vs. Codes

The common law is embodied in case law, which are individual judgements passed by the Law Lords of the country (judges of the House of Lords, Court of Appeal^[2]) pointing out principles which are binding in nature on the lower courts. These are an array of cases dating back as far as the 13th century^[3], also known as judge made law, and is the core of the common law legal system. I dare to say that statutory law - that is law passed by Parliament^[4] - is secondary. Historically, the verdicts that were laid down in the judgements of peoples individual cases passed by the King`s Justices, or the Eyres on Circuit^[5] were to be followed in the future as the law of the land.

On the other hand, although Hungarian Supreme Court judges do pass judgements too, however they are not binding on lower courts, and apart from deciding on a dispute it mostly tends to be somewhat of a guideline for practice^[6]. Cases are published by the editorial committee of the Supreme Court, simply to inform practice of contemporary issues arising. Instead of pointing out basic principles, they more or less interpret^[7] parliamentary law, also known as stationary law, which is the constituent element of the effective legal regime. Since 1997 – the reform of the judiciary^[8] – a new legal source has been introduced to keep uniformity in sentencing, called “uniformity decisions”^[9]. This may be somewhat similar to the common law judge made law.

For example, just in the last few decades (1991) was the law of restitution established and accepted by the House of Lords in the case of *Lipkin vs. Karpnale*^[10]. This includes the legal situation of unjust enrichment, when a party has gained riches without a legal basis by causing negative in the other party's wealth.^[11] Or, the famous case of *Donoghue vs. Stevenson*^[12] establishing the tort of negligence claims^[13]. All these have been present in Hungarian Law through the Civil Code^[14], a piece of legislation passed by Parliament and formed by legal engineering.

Keeping it in a nutshell, while common law lives in the individual decided cases, the laws of a continental system such as Hungary are forged together in Codes before the actual cases arise.

Another way of defining differences – Pragmatism vs. Formalism

The legislation of England is rather casuistic, meaning that the written law is not organised, rather it is passed on an ad hoc basis, as it happens, resulting in an extremely scattered system of different acts and cases regulating different parts of everyday life (e.g. One Act per offence versus a Criminal Code). This subsequently gives English lawyers a pretty hard job in finding the right piece of material for the given situation...which could be the reason why English lawyers are better paid than Hungarians. It is simply more difficult to comprehend. This ultimately raises the problem of having no legal security, well, it seems for a continental lawyer anyway. The law is not really foreseeable from a lawyer's perspective, needless to say that by this feature lay people are even more confused.

Hungarian law – just like the rest of Europe – is organized into fields or areas, each having its mother Code, laying down the basic principles and then unfolding into detailed regulations. Just like a neatly edited book with chapters and table of contents, with an attempt to regulate everything, an impossible task due to the nature of human existence and the ever changing world.

Issue on Constitution

England is famous in the legal world as not having a written constitution, hence the principle “nuts and bolts” are laid down in conventions, which are accepted widely, almost as customs. However, I must say that this is changing dramatically: several constitutional elements of the state, such as the main organs of the criminal justice system, the Courts (criminal courts, House of Lords – which is to be reformed by the Constitutional Reform Act of 2005 into the Supreme Court), the Crown Prosecution Service (Prosecution of Offences Act of 1985), the basic guarantees the citizen’s have (The Human Rights Act of 1998) are all in written form, passed as statues by Parliament, so together they very well embody a written constitution. This is just another way of showing how English Law is everywhere, and not “neatly placed in order” like its Hungarian counterpart, where the Constitution of 1949^[15] basically includes every fundamental element a society needs to run on (definitions of the democratic system, institutional law: parliament, government, courts, prosecution, citizens rights, even the national anthem and the music which it should be accompanied by when played, down to the colour of the flag and description of the crest and coat of arms).

Constitutional elements of Justice

Probably one of the most differentiating elements of the two systems may be found in its ways of serving criminal justice. Still, on a more general perspective, I would like to start with emphasising and comparing the selection process of judges, which involves not only criminal matters, but mostly the whole judiciary. Hungary for some two hundred years^[16] has had a so called professional judiciary opposed to the English appointed justices. The professional judiciary means that judges are specifically trained for office from the time they join the judiciary after completing law school at an early age, mostly in their mid 20`s. Similar to civil servants, will be justices start on the bottom of the ladder as draftsmen, learning the practical particularities of the administration of court work, through observing the customs and manners of the courts in session, to enhancing their legal knowledge gained in law school by mastering the law in action. After several years the candidate may take the general bar exam and continue its career by moving up the burocratic ladder acting as a trainee judge^[17], whom has its own jurisdiction now and takes effective part in the judicial work. Trainee judges once trained are then appointed by the President of the Republic to the office of Justice and begin their true, in court judicial work, moving by their individual pace even further up the ladder and in a simple scenario retiring at the age of 70, a statutory age cap for office. As we can see, a professional judiciary is professional because of its time span that embraces ones whole career, hence why they also call it the career judiciary. Now, England has another way of dealing with selection. Not in a derogatory way, I may call this process the “tap on the shoulder”^[18] method, which expression I have taken from the honourable English judges I have talked to on this subject. This is a not so transparent, more customary way of selection, when the one being appointed to serve justice is informally approached by the profession and offered office. The initial

training here is the actual performance of the individual in his/her legal career, mainly in court as a barrister, demonstrating its capabilities and giving evidence to the colleagues of their fitness to hold office as justice. Conventions have evolved in a way that once appointed the person is a judge for life, with no compulsory retirement age, the only cap being nature itself.

A more particular difference may be found in the segment of criminal justice with the element of lay judges, also known as magistrates. They are non lawyers, whom through their life experience, sound human nature and general reasonableness sit as the decision makers. This is unheard of in a continental regime, where one has no other way to have a seat on a panel and preside, but to take the due course of being properly trained and appointed into office.

A more subjective parting is in the vulnerability of the judiciary. The offence of contempt of court in England hands specialized legal protection to uphold the reputation and seriousness of the Court, whereas the Hungarian courts are viewed as just another bureaucratic body of the state, thus not giving official reason for a more delicate protection. This has caused that attacks on judges are quite common in Hungary^[19], there is no special remedy to furnish the prestige that say England has with its courts. The Hungarian judge is just another official on the budget of the taxpayer, not a peer whom through the mystical ways was “tapped on the shoulder and appreciated for its achievement offered office”.

Further social analysis shows that differences take many forms. The gender and age issue for instance underpins the anomalies of the two systems. The English middle to senior aged, male dominated community is compared to the mainly female dominated, junior with almost absent senior aged society of Hungarian judges.

Going even more into scrutiny, the ways of official dressing and addressing judges, down to the elements of how the display of authority is exercised in the court room have significance in understanding how society relate to going to court. The game of criminal justice requires a certain appearance that embodies the power to punish. A Crown Court room with its higher platform for the judge to have its seat, an usher at its disposal, with the judge wearing a distinctive court dress and wig is incomparable to the small to modestly sized court rooms of a Hungarian criminal court, having the judge sitting closely, sometimes face to face with the crowd of the proceedings. Interestingly a judge in England is addressed in person by “your Honour” or “your Lordship”^[20], whereas in Hungary they refer to the court as a body. The English custom of bowing and not turning ones back on the court honouring the Crown Sovereign is fulfilled by a simple politeness and common respect in Hungary.

The Prosecution Service vs. Procuracy

In England the CPS or Crown Prosecution Service is basically a consultative body, with the power to indict, however the cases are mostly prepared by the investigation authorities, namely the police, revenue and customs or other. Contrary to Hungary, a different constitutional position can be observed, where the Prosecution is a mere limb of the government, with the Attorney General^[21] acting as superintendent, appointed by the Prime Minister (leader of the party which most likely has control in the House of Commons), whom is subsequently appointed by the Queen. The Attorney General as a political shield, more of a minister then technocrat, appoints the DPP or Deputy Public Prosecutor^[22] whom as a practising lawyer, runs the CPS through the Chief Executive whom is responsible for the day to day business of the prosecution service.

The Hungarian constitutional position of the so called Procuracy is extremely controversial. Stereotyped as the ultimate guardian of legality, it is a remnant of the soviet-stalinist era, when Stalins Chief Prosecutor Andrej Visinskij was in charge to secure legal grounds for the communist party to deal with the opposition and set the precedent to be followed in the communist block. Totally independent from the government, the candidate as Chief Prosecutor is selected and nominated by the President of the State, elected by Parliament with a simple majority for a term of six years. In consequence, the Procuracy becomes very independent, it is not responsible to Parliament, questions may be addressed to the Chief Prosecutor (similar to an interpellation of a secretary of state), with the difference that if the answer is not accepted there is no consequence, whereas a minister may have to resign. In the past 10 years 90% of the answers were unaccepted. This has caused a very ill reputation of the Procuracy and has undermined the credibility of the criminal justice system. Further to this it eventuated in moral crisis and peoples lack of trust, with the games of the politicians shadowed in an arena where professionalism should prevail. From this turmoil arises the need for reform, and so the first ever Chief Prosecutor from within^[23] the Procuracy was elected, who by person is less political, but still within the old constitutional framework. Sadly, reform is neglected by the lack of political consensus in Parliament. Returning to the pre war setup would be ideal, similar to the English model, when the Procuracy was superintended by the Minister of Justice, so the criminal justice policy of the government was enforced directly, with the police being operated through the political responsibility of the Ministry of the Interior, technically with the objective in keeping the peace and upholding the order. In the current system an independent judiciary coexists with an independent Prosecution service, which causes ineffective constitutional mechanisms and I dare to say that the Hungarian Procuracy enjoys more independence than the Courts.

Implemented by the judicial reform of 1997, the Hungarian judiciary supreme level down is controlled by the 15 member National Judicial Council, chaired by the Chief Justice of the Supreme Court (whom is nominated by the President of the Republic and elected with a two third majority by Parliament for six years), nine practicing judges, two Members of Parliament (one in charge of budgetary affairs, the other of justice), the Chief Prosecutor, the Minister of Justice and the President of the Bar of Attorneys, giving representation from most segments of the legal profession. The balance is much debated, since the 9 members from the judiciary are usually the presiding judges of the county courts, whom by this basically supervise themselves, even though they are elected democratically. This discrepancy should be eliminated one way or another.

Criminal Procedure

As already mentioned the core differences of the systems compared can mostly be identified through the process of criminal justice. Since criminal law, as one prominent senior Hungarian legal scholar^[24] has put it, is the “sanctional boarderstone of the legal system”^[25], symbolising the ultima ratio nature of criminal law, and so the moral spirit of the land in my view can best be understood through the mechanisms dealing with these “cases of the last resort”. On the lower level in the judicial system, the magistrates courts with its lay element^[26] are a distinctive feature of the common law criminal justice system, only relating with the Hungarian through the percentages of its conviction rate of circa 96%. And to continue, by far the most distinctive element in the common law is the jury^[27], where lay people actually without passing their official reasoning decide over the question of guilt with a binary answer of “guilty” or “not guilty”. There has been much controversy with the jury system on an international level, accused of being in breach of the

European Convention of Human Rights, for the simple reason that a person may be convicted by lay people of the jury without any reasoning or transparency in their decision making. As European Court of Human Rights Justice Nicolas Bratza for the United Kingdom said^[28], they were put in difficulty by the scrutiny of other members of the Court, but the jury system was eventually accepted as it is.

Differences in symbols

One last note regarding the symbols of justice is worth mentioning. Iustitia – the Roman goddess for justice – with a sword in the right hand representing authority and a scale in the left demonstrating reasonableness and fairness in deliberation are present in both jurisdictions. The only difference here is that England has the Royal Coat of Arms as the symbol for the Courts, while the Scale is used as a pictogram for the CPS. In Hungary both the Courts and the Procuracy uses the symbols of Iustitia and the Coat of Arms of the Republic.

Service of Truth vs. Service of Law

Finally, the term used to express justice also carries distinction. In the Hungarian language the noun for justice is translated as truth-service^[29]. In English however the word justice originates from Latin and expresses the service of giving “ius”, which is Latin for law. This difference has more of a philosophical root than linguistic, since a common law system being pragmatic in sense rebalances society through serving justice in an adverse nature, when the battles between the prosecution and defence resolves the wrong^[30], much like the Hegelian model of thesis and anti-thesis resulting in synthesis.

Summa summarum in my opinion both judicial models, with their imperfections are simply alternatives to one another and if the proper conditions are met both can be effective for the purpose.

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^[1] The lecture was held as part of the Graduate Talks on the 1st May 2008 in the Gordon Cameron Lecture Theatre at Fitzwilliam College Cambridge, hosted by Richard Moules.

^[2] The House of Lords as the highest court of England and Wales based in London, while the Court of Appeal being the judicial forum between the House of Lords and the High Courts. Members of these law courts are referred to as Law Lords, and addressed as Lordships.

^[3] The earliest cases of recorded legal memory are from the sources of the so called Year Books, the reports of cases in Westminster Hall, from about 1250 onwards. (Sir J.H. Baker: An Introduction to English Legal History – Butterworths 2002 - page 179.)

^[4] Legislation.

^[5] Prominent officials representing the King, whom set out on journeys in to the country to serve justice and uphold the powers of central government.

^[6] Could very well be identified as the law in action.

^[7] As mentioned, Hungarian case law is more of an interpretation, and so causes some controversy due to its nature. For example, according to Supreme Court ruling regarding the criminal offence of trespass, where “force”, being the legal element of the offence, is interpreted by the judges as including the act of “simply changing the locks on the door”. Maybe the judges simply never actually changed a lock on a door? And so the trades of locksmiths are of a “forceful” nature? (BH 1999.8.349, BH 2008.1.5)

^[8] Act No. LXVI. of 1997 on the organization and management of the courts.

^[9] “Jogegységi határozatok” (in Hungarian), according to Paragraph 29 of the Act on the reform of the judiciary, are decisions on a point of law or principle when legal practice or the advancement of the law requires so.

^[10] [1991] 2 AC 548; [1992] 4 All ER 331; [1991] 3 WLR 10; [1988] UKHL 12

^[11] For instance a not uncommon case of being paid twice, say the insurance company wire transfers the claim for damages again due to a glitch in its IT system.

^[12] [1932] AC 562, 1932 SC 31, [1932] All ER Rep 1

^[13] Being able to be compensated for the wrongdoings by the manufacturer of a product.

^[14] Act No. IV. of 1959 on the Civil Code.

^[15] Act No. XX. of 1949 on the constitution of the Republic of Hungary, which was originally the Stalinist constitution of the Rákosi communist dictatorship, however apart from its reference name was revised in content by several acts of legislation from the late 1980’s during the fall of the soviet block. Just another distinctive feature of this legal system.

[16] First regulated by the National Assembly via Act. IV. of 1869.

[17] The title of "judicial secretary" is used for this career stage.

[18] Superseded, the Constitutional Reform Act has reformed this too by setting up the Judicial Appointment Committee, to correspond with the relevant European Conventions.

[19] One recent case involved the accused spiting on the presiding judge, or the case of a more serious kind that the name, address and personal data of judges taking part in the sentencing of public rioters were published on the internet under the headline "Blood Justices", needless to say in a lynching context.

[20] With legislation prescribing the proper ways of addressing the presiding judge.

[21] Baroness Janet Scotland

[22] Formerly Sir Ken MacDonald QC, currently the younger Keir Starmer QC, both whom interestingly were graduates of St. Edmunds (Teddy) Hall Oxford, the sister college of Fitzwilliam College Cambridge. Also, it is worth mentioning that former DPP Sir MacDonald as a youth was convicted for possession of cannabis, only ending up holding office as the "criminal conscience" of England and Wales. (www.wikipedia.co.uk) I do not dare to point out the irony that if the same situation would occur in Hungary, where the Chief Prosecutor, appointed by Parliament and thus a highly political figure, would in my view never have the opportunity to get away with this caliber of mischief despite its achievements.

[23] dr. Tamás Kovács formerly the Military Chief Prosecutor, perhaps to bring an army style order to this institution.

[24] Justice András Szabó of the Constitutional Court from the Sólyom era, László Sólyom being the first Presiding Judge of this Court in the early 1990's, now President of the Republic.

[25] Justice Szabó's parallel opinion in Constitutional Decree No. 23 of 1990 (X. 31.) on the abolition of the death penalty.

[26] The lay element is present in the lower Hungarian Courts through the so called "seaters", whom are equal in rights with the professional judge, however in practice they are usually old age pensioners with enough time to take part in such proceedings, not to mention the low remuneration. From a legal point of view of course the reason is to have the people represented and to counter balance the official judges.

[27] Although unimaginable today, in the history of the Hungarian criminal process there was a fragment of a period where in a very narrow segment of cases the jury was introduced. In criminal matters of libel and slander in the press, where public opinion seems to be a core element of the offence a jury was sworn in, however due to actual events, where political interests of the government were put to jeopardy through public scandals, the legislator found it better to quickly eliminate and comment the Hungarian jury system as a bad concept. This typically shows how England maintained the people's power over government.

[28] At a meeting with Cambridge students at the European Courts of Human Rights in Strasbourg on the 12th March 2008.

[29] Igazságszolgáltatás.

[30] One may define this as procedural truth (accusatorial), opposed to the objective truth which is the ultimate goal of a continental criminal justice system (inquisitorial).