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HUNGARY'S TWO CASES BEFORE THE WORLD COURT

*with remarks on the historical continuity of Pázmány Péter Catholic University and the key role of Cardinal Péter Erdő in its second renaissance**

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Mr. Rector, Mr. Dean, Members of the Academic Council, Distinguished Guests, and in particular Students of this University and of the Cambridge Diploma program:

There is a saying about the English common law that it has existed time out of mind, even though every single element has been changed and altered over the centuries. I am reminded of this when reading of the history of this venerable institution, the Pázmány Péter Catholic University of Budapest. It has gone through so many changes and transformations (reflecting Hungary's turbulent history since the 17th century). But still it can claim continuity back to the first Hungarian university, founded by the Prince-Primate of Hungary, Cardinal Péter Pázmány as the University of Nagyszombat in 1635. He did this by building on to an existing Jesuit College, but the new University was not limited to the study of theology – it was intended as a *studium generale*, and as such needed the approval of the Emperor, Ferdinand II which it received in October 1635. Its first chairs were in philosophy and catholic theology; shortly after, a Chair of Law was added. The University moved to Buda in 1777 (at the instance of Queen Maria Theresa); later still it moved across the Danube to Pest.

After the disturbances of World War I, the Royal Hungarian University of Science of Budapest decided to bear its founder's name and kept its original structure until 1950, when it was nationalized and partitioned. The Faculty of Theology kept the name of the Pázmány Péter Theological Academy. The rest of the institution became the Eötvös Loránd Tudományegyetem, with almost all its educational staff being changed.

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It was only after the European opening of 1990, which manifested itself first in Hungary, that this situation could change again and the University could reassert its vocation as a *studium generale*. The Academy of Theology was yet again expanded into a University with the license this time not of the Emperor but of the Holy See. *His Eminence Cardinal Peter Erdő, Primate of Hungary, played the key role in this second renaissance – he was as it were the Pázmány Péter of our time.* And he did not neglect the study of law – in 1995 the Faculty of Law and Political Sciences was re-established.

In its original Charter of 1635, the Prince-Cardinal expressed the desire for "a University of Sciences… where the attitude of the warrior nation can be tamed, and men apt for the government of Church and state can be educated". These days the government of the state requires women as well as men – and law, alongside political science and moral philosophy, must be a major focus, as it has been here both with the original foundation and the refoundation of the 1990s. Law now is not only domestic (Hungarian) law or civil (Roman) law, it is European law and international law, because the government of Hungary as of every modern European state now has a distinct European and international aspect. In this context I hope I may take this opportunity to welcome the new collaboration in European and English legal studies between your University and mine – the University of Cambridge. It is thus very pleasing that today marks the inauguration of the Hungarian program of the Cambridge Diploma in English and EU Law. The Cambridge Diploma was established through the British Law Centre in Warsaw in 1992, and is now taught to students in seven Polish Universities, as well as in the Czech Republic, Bulgaria and Slovakia. An initial two-year agreement has been signed between the Institute of Continuing Education at the University of Cambridge and the Pázmány Catholic University. Professor Bill Cornish, who is here today, was the founder of Cambridge's law program in Central Europe and has seen it grow and flourish, with the help of many of my colleagues in the Faculty of Law. I am very pleased that a former research student of mine at Cambridge, Dr Marcel Szabo, is the supervisor of the program from your end. I wish the students undertaking the Diploma this year and in future years all success, and I hope that, like Dr Szabo, some of you will come on to further your law studies in Cambridge.

As a lawyer, my focus has been international rather than European, the International Court of Justice at The Hague rather than the European Court of Justice in Luxembourg. In the short time available to me I thought I would say something about the two cases before the International Court in which Hungary has been a participating party. The first, from 1933, bears the name of this University, the *Péter Pázmány University* case. The second bears the name of two border towns and one major project – the *Gabčíkovo-Nagymaros* case, decided in 1997. It is perhaps no accident that both cases concerned relations between Czechoslovakia (now Slovakia) and Hungary in the aftermath of the post-war treaties. Formally and legally, the cases are about very different issues. But they conceal certain tensions and certain national questions which even in the new Europe have not disappeared.

Rather than focusing on such questions, however, I want briefly to summarise the legal significance of these decisions, to give briefly an account of what the world of international law derives from the labels Pázmány Péter and Gabcíkovo-Nagymaros in relation to these cases, still often cited. In doing so, I hope to reflect a little further on the themes of continuity and change which the history of this distinguished University so clearly presents.

First then the *Péter Pázmány University* case. This concerned an appeal brought by Czechoslovakia against a decision of the Hungarian-Czechoslovak Mixed Arbitral Tribunal under the Treaty of Trianon. In its original decision the Mixed Arbitral Tribunal had ordered the restitution to the Péter Pázmány University of certain estates which it owned in territories transferred to Czechoslovakia by the Treaty of Trianon. These estates had been seized at the end of the war by measures which the Hague Court did not hesitate to characterize as discriminatory. Substantively the case is notable for holding that a State cannot defend itself against a claim concerning treatment of foreigners by arguing that it treats its own nationals in the same way. But that was not the main focus of the decision. Czechoslovakia's main defence focused on the status of the University, which it said involved both a jurisdictional bar and a complete defence to the merits. The Péter Pázmány University, it was said, did not exist as a separate legal person. Following the educational reforms of the 19th and 20th century it had been subsumed in the State and its property was that of the State of Hungary Its estates located in Slovakia had passed to Czechoslovakia under the Treaty and were not protected as private property. Thus, it was argued, the University had no standing to bring the claim in the first place, and Czechoslovakia had no obligation to return the property, whatever the Mixed Tribunal might have said.

The International Court unanimously (except for the Czech *ad hoc* judge) rejected this argument. There was no doubt that the University, having been duly established at the time of the Empire and in accordance with its law as a *studium generale*, had legal personality and the capacity to hold property and to bring claims. It had never lost that personality. Subsequent educational reforms led to heightened State control but did not amount to the extinction of the University as a distinct entity or the nationalization of its property. Thus the University could still maintain its claim and Czechoslovakia's appeal failed.

From a legal point of view what is most significant about the decision, perhaps, is what the Court did not say. First, it did not say that the University had some form of external personality for the purposes of bringing international claims. Whether the University could maintain the claim depended on whether it was a legal entity in Hungarian law, which was, however, a matter for the Court to decide because it was necessary for it do so. (It was not enough for the Government of Hungary to assert the legal personality of the University: it was a matter of law and had to be demonstrated.) Second, the Court did not say that there was any general principle of legal personality of corporations or entities, abstracted from the applicable law. But it did not equate the University with the State of Hungary as a matter of international law either. The case before the Mixed Tribunal involved both Hungarian law and international law, it involved both Hungarian legal rights and international obligations under a treaty.

These were applied coordinately as required. There was no doctrinaire separation of legal domains and no assumption that the rights of the University were subsumed in the rights of Hungary. There could be at the same time a dispute between the University and the State of Czechoslovakia in an international forum pursuant to the Treaty of Trianon – a dispute involving the rights of the University and the obligations of Czechoslovakia – and a dispute between Hungary and Czechoslovakia before the International Court, a dispute as to the jurisdiction of the Tribunal and the substantive correctness of its decision as a matter of international law. Thirdly, the Court did not attempt to analyse its powers in an appeal brought by Hungary involving a claim of the University. But it had no difficulty in entertaining the appeal, and there can be no doubt that had Czechoslovakia succeeded, it would have been entitled to some remedy – perhaps the quashing of the decision, perhaps its reconsideration. For if Czechoslovakia was right the decision of the Mixed Tribunal could not stand.

You may be interested to hear that the issues raised by the *Péter Pázmány* case are still live ones. We have now the widespread phenomenon of international claims by individuals and corporations against States brought before international tribunals under treaties. This is true of the European Court of Human Rights (with thousands of cases pending); it is equally true of claims under the large number of bilateral investment treaties (with over a hundred cases pending). Only the other day the Czech public bank, CSOB, was awarded billions of crowns against Slovakia in a dispute arising from the financial restructuring which followed the dissolution of Czechoslovakia. Are these rights public or private? It may be they are both, or that they have to be analysed differently for different purposes. Do they involve rights of the claimants or rights of their State? Since the claimant may actually have the nationality of the respondent State the answer is clear: they involve individual rights. If they did not, the international law of human rights would be based on a deceit. But does this mean that the underlying obligations are not interstate ones? Not at all, and there can be a public interest appeal by the State in a case which simultaneously involves individual rights. In these ways the rules and institutions which States make are not, and these days I believe cannot be, confined to the interstate domain. They affect us all and make us, to varying degrees, real participants in the process.

I turn to the second case, the *Gabčíkovo-Nagymaros Barrage System* case. I confess that I was senior counsel for Hungary in that case, my first case as leader on the legal side before the International Court. I shall always be grateful to the Government of Hungary for entrusting me with that role, but equally of course it limits to some extent what I can say. Unfortunately, and despite rather clear guidance as to the terms of a settlement given by the Court in its judgment, the issues associated with the Barrage System are not yet finally settled. Let us hope they soon will be, as the compromise suggested by the Court – needing of course to be implemented especially through the provision of more water and of a satisfactory management regime for the Szigetköz – is, if not ideal (we would much have preferred the outcome supported by Judge Herzegh, whose presence here today is a special pleasure), perhaps the best that Hungary can achieve in the circumstances.

But I should turn from the politics of settlement to the legal significance of what the Court decided in broader terms. No doubt a Hungarian audience needs no

reminding of the dispute. It involved a major hydroelectric project with peak power operation along a substantial stretch of the Danube, starting upstream in that short section where Czechoslovakia and now Slovakia has sovereignty over both banks of the Danube, extending to the whole stretch where the Danube forms the common border, and extending still further downstream to the region opposite the Royal castle of Visegrad where the small and previously obscure village of Nagymaros lies. Having regard to its size, cost and potential impact on the environment, the Barrage System was rather controversial even before 1989, and in retrospect we should not be surprised that the rationale of the project was increasingly questioned in the 1980s. Indeed it became something of a symbol of the *ancien régime*. But there were real concerns and not only symbolic ones. Nothing that met the standards of a modern environment impact study had been carried out; the impacts of the diversion of the Danube around the Szigetköz region and of peak power operation had hardly been calculated, and the changing economics of energy in Central Europe raised serious questions about the viability of the project, which was a relic of centrally planned economies.

At the same time – and here was a major problem – the project was underwritten by an interstate treaty of 1977 between Hungary and Czechoslovakia, and suggestions that the whole project be reconfigured or abandoned were sternly resisted on the Czechoslovak side. In addition, not merely was there a treaty but the treaty had been implemented over time, as work proceeded, to the tune of several billions of dollars of investment. Indeed the case is as much about the problem of treaty implementation as it is about validity or termination of treaties. And there was a third underlying problem. The upstream portion of the project, at Gabčíkovo on the Slovak side and Dunakiliti on the Hungarian side, occurred just after that short stretch of the Danube which – following the post-war peace treaties – was Czechoslovak on both sides. Czechoslovakia was physically able to implement unilaterally a version of the project – the famous Variant C, using those parts of the project constructed on its side together with the additional elements, the Čunovo barrage and the diversion channel, constructed upstream. In effect the Danube ceased to be a boundary river for more than 30 kilometres, following the implementation of Variant C in late 1992, just before the dissolution of Czechoslovakia. Water supply to the Szigetköz was severely affected, the wetland became dry land, and Hungary lost control over its greatest river in a crucial sector.

From a legal point of view, the case was a wonder. It had just about every legal issue the law professor could want: validity of treaties, amendment of treaties, treaty termination following the impact of changes in international environmental law, the effect of breach of treaties, the doctrine of fundamental change of circumstances, the doctrine of necessity, self-help, state succession to treaties and to state responsibility, countermeasures, remedies. You can teach a whole international law course based on the *Gabčíkovo-Nagymaros* case!

But underlying all these separate legal issues, so delightful to the professors, was a serious and persistent legal dilemma – the problem of the stability of treaty relations faced with changing circumstances. Earlier international courts faced with this dilemma had leaned very strongly in the direction of treaty stability, and states trying to challenge a treaty, as Hungary was, have always tended to lose. France did so, for

example, in the *Free Zones* case against Switzerland. There was, I am afraid, a real prospect that Hungary would have lost the case outright.

I am pleased to say that this did not happen. With the leadership of distinguished Hungarian Agents, Dr Martonyi and then Dr Szenasi, the International Court produced an intricate and generally balanced solution. On the one hand Hungary's attempt to get rid of the 1977 Treaty failed. Indeed the Treaty proved more durable than the State which signed it. The music of Czechoslovakia ceased but the malady of the Treaty lingered on. The real underlying factor here was the strong reliance interest of states in ensuring stability of treaty relations, especially where the treaty has been substantially implemented.

But there were factors on the other side. Hungary had and has a major interest in continued joint control over a boundary river. It has permanent sovereignty over that major natural resource, which a row over an industrial project cannot nullify. It has a strong and continuing interest in the protection of the environment, hence the need to adjust the project to provide more water to the wetland. Indeed that is a shared interest of both States. And unilateral measures of self-help involving a shared boundary river cannot be countenanced – whether Hungary's unilateral attempt to get rid of the treaty or Slovakia's to forcibly implement it upstream. Variant C is unlawful because, even faced with the repudiation of the Treaty, Slovakia was not entitled to assume unilateral control over the River. So the Court while upholding the sanctity of treaties rewrote the Treaty and adjusted the requirements of the Treaty to the changed circumstances. The downstream barrage at Nagymaros-Visegrad was no longer required. Peak power had been objectively abandoned by the construction of a smaller barrage upstream. (Indeed winning the argument against peak power on this scale was one of the major Hungarian scientific victories in the case.) Damages had been suffered on both sides but – the Court suggested – these cancelled each other out, a zero-sum solution. What Hungary did need to do, if it wished to resume its rightful joint control over the diverted Danube, was to pay its share of expenses – a matter still under negotiation and still contentious.

Dr. Martonyi, your own role in this controversy was, if I may say so, both distinguished, moderate and firm – first as Agent, then as Foreign Minister. Little did I think, when I first met you in the earliest stages of the preparation of Hungary's defence in the case, that we would be here 12 years later and in the present circumstances! Hungary's role in Europe has varied over time, from the defence of Christendom to the defence of freedom to the defence of the environment. At the same time there have been neighborhood issues to be sorted out, and it is good that in resorting to law rather than extralegal means in controversies such as those I have mentioned, Hungary has set such a good regional example. And that is, we may hope, emblematic of the period into which Hungary is now entering, as a full party in Europe – a period of regional integration and of increasing adherence to the rule of law, even as, elsewhere, the clash of arms reminds us of a darker history and of the harsh and even tragic consequences of overweening military power.

Mr. Rector, Dean of the Faculty, thank you so much for the great honour you have done me. May the Pázmány University grow and develop in its secular as well as its religious studies as one of the finest as well as most venerable institutions of Hungary.