Recognition and Introduction of the Trust in Hungary and Russia from the view of Comparative Law  
(Interview with Professor Gábor Hamza)  

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[Introduction]  
This is a transcript of an interview with Professor Gábor Hamza on the issues related to recognition and introduction of the Trust in Hungary and Russia, from the view of comparative law. The meeting was held in March 2011 in the studying room of Professor Hamza in Budapest. Professor Hamza serves as the chair at the ELTE Romai Jogi Tanszek and an authority on Roman law. Also, he has actively done marvelous comparative law research on over 80 jurisdictions. /(Watanabe)

WATANABE: Professor Hamza, it's a real honor and pleasure to meet you again in Budapest. Thank you very much indeed for taking your precious time for today’s meeting.  
I met you first at Waseda University in 2007 and we have kept in touch since then. I remember your lecture at our University well. It concerned the unification of European private law and I found it very impressive.  

HAMZA: Thank you. Yes, as you know, I went to Japan to visit Waseda University, Meiji Gakuin University, Meiji University, Chuo University, Keio University, University of Kyoto, Doshisha University and some other universities at that time. I made lectures, presentations at these universities. I had very fruitful exchange of views with Japanese legal scholars. In 2006 I had a visiting professorship at Seinan Gakuin University in Fukuoka.  

WATANABE: Before starting today’s interview, I must tell you the sad thing. Professor Hayakawa who have majored in Russia and East European Law at our University suddenly passed away. I think you remember Professor Hayakawa.  

HAMZA: What? I cannot believe it. I just received an email for season’s greeting from him the other day…… I can show you his email. ………….Here it is.  

WATANABE: It cannot be avoided that you don’t believe such a thing. He passed away very recently.  

HAMZA: Very recently. I remember I conversed with him and his colleague after my presentation at

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Waseda. He spoke also some Hungarian.

**WATANABE:** I understand that he especially has been well versed in Hungarian political history.

Then, let me start the interview.

You published in 2009 the voluminous book entitled „Entstehung und Entwicklung der modernen Privatrechtsordnungen und die römischrechtliche Tradition“. It covers over eighty jurisdictions and also has a huge perspective from Roman law to the existing law. How could you accomplish such a great work?

**HAMZA:** I started to work on this book as early as 1985, because in that particular year, I was invited by the University of Rome, Italy, as a visiting professor, to make a course on the changing legal systems of the then-existing Eastern and Central European countries.

As a result, I started to work to read law-related materials, quotes, and secondary literature on the then-existing Soviet Union, on the so-called socialist states, including Poland, Czechoslovakia, Romania, Hungary, and so and so forth.

At the end of the eighties, I finished working on these states. Then I started to work on the Western European countries, not only those countries, the legal system which is based on Roman Law, on the continental legal traditions, but also on those countries having a Common Law tradition, in particular England. And I was also dealing with the legal system of the Northern European countries like Norway, Sweden, Denmark, Iceland, and Finland.

Then, a couple of years later, I started to work on the legal system, so private law, civil law, and commercial law, of the Central American countries and the countries of South America.

Then I continued to work on the legal system of a number of African countries, in particular South Africa, but also Ethiopia and Egypt, because the private law system of all these countries is based on European legal traditions.

And later, I extended my research to the United States of America and also to Canada.

And the last phase of my work was the countries on the Asian continent, including Japan and the Republic of China (Taiwan), Ceylon (Sri Lanka), Siam, which changed its name to Thailand, and the Philippines.

I still have to continue my work in two ways. The first is to deepen the research I’ve done on the above-mentioned countries, and the second is extending my research to other countries, including even Australia. Because in some areas, the European legal traditions, in particular in the water law, even in Australia, although the legal system of Australia is mainly based on the Common Law system, in some areas European legal traditions survived.

**WATANABE:** Among those countries, which country’s law systems were most impressive for you?

**HAMZA:** It’s hard to say. The most extensive numerically legal system is which no doubt the German one. The German civil code was largely adopted in Japan, and is still heavily present in Central and Eastern Europe, including Russia, because the new Russian civil code is mostly, mainly, predominantly based on the German civil code. It is based not only on the German civil code, but also on the German legal thinking, on the Pandectist legal science. I would even say that the new Russian civil code, the fourth part of the new Russian civil code, which was completely adopted in 2007, so it’s a very recent civil code, is based on the Pandectists, and then the German civil code.

**WATANABE:** In the summary that you kindly sent me, you said you were participating in introducing the trust into Russia. What is the background of your participation?
HAMZA: I am organizing international symposia and I do not want to limit my knowledge and my expertise on the Hungarian legal experience, but I always view the Hungarian codification in a European context, and not necessarily in a European, or even I would say, in a world, context. I would like to emphasize also the influence of the extra-European countries, because most European lawyers commit an enormous mistake, concentrating exclusively on the legal experience, codification experience, of the European countries. But we have to take into serious consideration the experience in the field of codification of extra-European countries as well, including the Japanese experience.

WATANABE: I'd like to ask you more about the concept of trusts in Russia. You wrote here, the idea of establishing equity courts in Russia. . .

HAMZA: This idea came up in the second half of the eighteenth century, in the wave of a large-scale reform of the Russian Empire, because Catherine the Great, before Peter the Great, wanted to make a large-scale reform of the Russian legal system. And they also wanted to reform the court system. And they wanted themselves the equity courts, as it was the case, and still is the case, in England. But this was only an attempt, and was never really put into reality. But there were some attempts.

WATANABE: You also wrote that the Russian legal scholars have basically adopted the Louisiana Civil Law Trust, like the French fiducie. It's very interesting.

HAMZA: But as to the trust ownership, very generally speaking, there was an idea that the codifiers of the new Russian civil law would also recognize the trust ownership as a certain form of ownership in the text of the new Russian civil code. But then they rejected this idea, so among the different forms of ownership of property, in the text of the new Russian civil code, there is nothing on trust ownership. But in banking operations, financial operations, on the basis of two presidential decrees, the trust ownership has been recognized. So partially, trust ownership has been adopted in the reform of the Russian legal system.

WATANABE: Very interesting. As you know, there have been some attempts to make an uniform European trust law. Also, there is a draft directive on protective funds and so on. How do you assess these attempts?

HAMZA: The idea of recognizing trust ownership in Europe in the various continental legal systems is gaining more and more ground, not only in the Common Law countries, because lawyers recognize the usefulness of the trust ownership. I think this is a good idea, and it found its way in the various Continental European legal systems.

WATANABE: How about in Hungary?

HAMZA: Hungary has been rather reluctant. We are still a little bit traditional. For this reason, it would be better if lawyers knew more about comparative law, about Common Law systems, about the Japanese law. Then this reluctance would certainly disappear. But Hungarian lawyers are still reluctant to adopt trust ownership.

WATANABE: I suppose it is inevitable. But on the other hand, I suppose as far as the effect of the act is concerned, even in continental European countries, we can enjoy almost fully the effects of the trust, practically. Do you agree or disagree?

HAMZA: I agree with that. It would be good also in the wave of unification, of harmonization, of law. But Hungarian legal scholars should be pushed in this way in order to adopt it.

WATANABE: But France also introduced a kind of trust ownership, as you know well, fiducie. I would be very surprised to learn that the French government adopted the bill to introduce fiducie, because the
government rejected the former bill just some years ago of that. So many countries are trying to introduce the concept of trust or trust-like institutions.

HAMZA: Yes. There are two ways to introduce trust ownership: either in the text of the civil code or outside the text of the civil code. Both ways are possible.

WATANABE: You refer to the Scottish law in your paper. Scottish Law of trust gives ownership to the trustee and confers a personal right upon the beneficiary with certain privileges. I'd like to ask you further opinions about this.

HAMZA: When we look at the Scotts, we have to take into consideration the fact that the legal system of Scotland is based on the Roman Law tradition. It is a Civil Law country, although it's very heavily influenced by Common Law traditions. And this explains why the trust could find its way into the civil law-based Scottish legal system. But I think they are making some compromises: we are in a Civil Law country, most continental legal systems are based on Civil Law traditions. But we have to also consider the historical experience. The trust is not a foreign legal institution. It could well be adopted with some caution also in a Civil Law system.

WATANABE: As you know, there have been some researchers who have insisted a new theory, so-called patrimony theory. For example, Professor George Gretton of the University of Edinburgh. What do you think about the patrimony theory? If such a new patrimony theory works, the old explanation of two ownerships—equity law and Common Law ownership—are not necessary. So for example, Professor George Gretton says that basically, a person has one patrimony, but a trustee has another patrimony, trust patrimony. So it's protected without the dual ownership. It's a good explanation, but it carries some problems, I suppose.

HAMZA: I think there are so many theories, sometimes even diametrically different theories in relation to the trust, to trust ownership. There are some uncertainties. The Louisiana Trust Ownership is a very particular one. There is no distinction between two forms of patrimony. But this is also a legal title, and equitable title. So we have to put it in a nutshell. We can adopt trust ownership, but the form of trust ownership does not necessarily exist in a Common Law country like Louisiana, the Louisiana Civil Law Trust. The main characteristic feature of the Louisiana Civil Law Trust is the well-known fact that the Louisiana Civil Law Trust does not make a distinction between legal title and equitable title. This is because the idea of equity cannot be fully accepted in a non-Common Law country.

WATANABE: Do you mean “trusts without equity” by that?

HAMZA: Yes.

WATANABE: Have you done research also on the Quebec trust?

HAMZA: Yes.

WATANABE: What do you think about it?

HAMZA: Quebec has a relatively new (second)civil code. It went into effect in 1994. But you have to take into consideration the special situation of Quebec. Quebec is part, like New Brunswick, of Canada. And other parts of Canada, of the same country, use Common Law. So we are not in Quebec, we are not in Louisiana, we are not in Scotland, because all three territories are semi-states or states or provinces, and are in a Common Law sea. They are surrounded by Common Law traditions. So their entire neighborhood is different in a non-Common Law country like Germany or the Netherlands or Hungary.

Nonetheless, it can be adopted, with some modifications. That is my personal opinion.
WATANABE: Concerning German Law, Professor Kenneth Reid in Scotland, whom you mentioned, said that Germany might not accept the concept of trust ever. As you know, in Germany they have a “Treuhand”. The “Treuhand” is like a trust, but there are some big differences between them. So he said that Germany would never accept the concept of a trust itself. What do you think about that?

HAMZA: You are completely right. The Treuhand is a trust-like legal institution. But German lawyers historically developed the Treuhand construction. So basically, they accepted the trust. But the difference is mainly in the name. There is not that much difference in the substance. And recognizing the Treuhand paves the way toward the recognition of the trust.

WATANABE: How do you think about Hungary?

HAMZA: In Hungary, the situation is different, because the Treuhand has not been accepted, has no tradition in Hungary.

WATANABE: I heard that there have been some trust-like institutions in Hungary, and some attempts to introduce the concept of trust in civil law. Are they now ongoing or did they fail, these attempts to introduce the concept of trust into Hungarian civil law?

HAMZA: We are more or less in the same situation as Russia. The trust will certainly not be recognized in the new draft Hungarian civil law, but may be recognized in financial operations, in particular outside the civil law. So the trust will, at least in the near future, not be recognized by the new civil law, but it is very likely that it will be recognized in particular in business law, not in the traditional civil law, outside the civil code. It’s a compromise solution.

WATANABE: From the point of the conflict of law, how do judges in Hungary deal with cases in relation to trust set up outside Hungary? In Hungary, how do you recognize the trust which was set up legally in a common Law jurisdiction?

HAMZA: We have an Act on Hungarian private international law adopted in 1979. It is still in effect. According to this Act on private international law as to the the problem of renvoi, a foreign law has to govern the legal dispute in that particular case. A trust has to be recognized.

WATANABE: I could understand well. And I’d like to read the details of your article by all means.

HAMZA: I have to work still on these. This is only a draft article. I would like to continue.

WATANABE: I found an old version of your article on Russian law on the Internet.

HAMZA: Yes, it is available. You will often find these even more detailed articles in this book. Russia is described in a fairly detailed way, but there were originally so many contexts in the legal field as well between Russia and Hungary. For instance, the second labor law code in Russia was prepared by a Hungarian lawyer, an émigré, a social democrat. And also, the codification of Russian law during the first half of the 19th century was prepared by a Hungarian lawyer, by Mikhail Balugansky. It’s quite interesting. I think this is the only book in the world where you can find his photo. He’s the founder of St. Petersburg University. He was of Hungarian origin. He was a law professor, and studied in Pest (today Budapest) and Vienna. Then he went to Russia, invited by the then emperor, Alexander I, and he was in reality the particular person who coordinated the codification of the Russian legal system. This is the only work in the world, I think, where you can find his photo. And this picture is in the senate hall of St. Petersburg University, because he was also the first rector of St. Petersburg University, in 1809.

WATANABE: What do you think about the future of Russian private law? Many people in the world have great interest in Russia.
HAMZA: They have a new civil code, completed civil code. In the Netherlands, the new Dutch civil code has not yet been completed. Those two books have not been completed. They are in the form of a draft, on the Netherlands. And private international law is only in draft, and also intellectual property. The Russians succeeded in completing also the codification of private international law and intellectual property law, but the main problem is still in Russia that the land is still in national property. And the same is true in China, for the PRC. They have a new act on real rights in property, but there is a gap between reality and law codification. So legal codification would be OK, and this law would also be OK. But in this regard, there is a lot of similarity between China, the PRC, and Russia, because of the ideology, the ideology on the end of history.

It’s not only ideology because to tell the truth, the communists after the seizure of power by the Bolsheviks, took the historically collective-property on land from Czarist Russia. And that was the situation in China. There was no private property on land. Then the communists, during the Communist rule, and China is still a Communist country, whereas Russia is not a Communist country anymore, nonetheless, these centuries-old traditions survive. And besides, this is not only because the Communist Party wants it, but because the people want it. Because these traditions existed even before China in 1949 and Russia in 1917, it was the obshchina, the collective property on land. And 80% of land in Russia in the Czarist Empire was collective property. And that was the situation in China, in the empire.

WATANABE: That is very suggestive.

HAMZA: So those traditions survived. And this was the situation in Europe in the Balkans. In particular, in Montenegro and also to some extent in Serbia, in these two countries, land was owned by a family community. So the difference was that in Russia the land was owned by a large community, by the village community, while in Montenegro the characteristic of this collective property was that it was collective property owned by a large family, not by the village, which is a more sizable community. It was owned by a smaller community.

To some extent this explains why in Serbia and in Montenegro there were still no new civil courts in the Communist period either, in these two countries. The whole history, the old tradition, survives.

WATANABE: Thank you. To my understanding, you have been involved in the unification of European private law.

HAMZA: Yes.

WATANABE: What do you think is the main problem with the unification of European private law?

HAMZA: It would be very easy to unify the law for obligation. The law is much or less unified. But although there have been different attempts to unify family law or the law of successions, even real rights, it's not that easy. It's very likely that all European countries, all the members of the European Union and those are not member countries of the EU, will maintain their civil codes, because the different family law and the law of successions, the law of property and so on, the differences in real rights are still considerable.

WATANABE: If so, it might be a good idea to make a directive on trust-like funds for only commercial uses.

HAMZA: Yes, exactly. Brussels i.e. the European Union cannot force its ideas on the member countries. But it can encourage harmonization or unification.

Now, we are witnessing the problems of the European Union. There are as many as 27 member
countries. But the differences are still considerable. So I think the unification is very thorny.

The French legal scholar, Andre Tunc, said that the unification of law is a very thorny road, and it cannot be forced. Because then the reluctance would grow.

WATANABE: It may be inevitable, especially in family law.

HAMZA: We talk about family, but the concept of family, the strength of the family is not the same in Japan and in Hungary or in Russia or in the United States. There are various groups fomenting the unification of family law, but there has been no progress, at least until now.

I recently had a look at the Thai civil code, which is more or less a copy of the German civil code. It’s a little bit smaller, but has the same structure. It starts with the general part, followed by the law for obligations, followed by real rights, property and real rights, followed by family law, and the last book is the law of succession. And the only difference is that the Thai civil code consists of six books, whereas the German civil code consists of only five books, because the Thai legislature divided the law of obligations into two parts: the general part in relation to the law of obligations, and the special context. But basically, it has the same structure.

What is very interesting is that in Japan, the Japanese civil code is older than the German civil code. It was adopted two years prior to the adoption of the German civil code in 1898. It was based on the second draft of the German civil code. It also included some elements of the French civil code, from Boissonade, who spent several years in Japan. Is there a street holding the name of Boissonade in Tokyo? A street?

WATANABE: Boissonade street?

HAMZA: It would be interesting to know. Or is there a Roesler Street in Tokyo, in the capital of Japan.

WATANABE: I suppose there is no such street. But among lawyers, Boissonade is very famous.

HAMZA: Because for example, the chief architect in the Ministry of Justice of the Spanish civil code, Martinez, although he was only the coordinator of the Minister of Justice, nonetheless, during his position as a minister of Justice, the Japanese civil code was adopted. And in Madrid, in the capital of the country, there is a very important subway station holding his name, Martinez. Although the Spanish people have a high esteem toward Martinez. And in Berlin, there is a square holding the name of Savigny, Savigny Square.

WATANABE: I think it might be necessary also for Japanese to have something like that.

HAMZA: I think the mayor of Tokyo could come up with this idea. Also, Japanese lawyers Prof. Ishii(Shiro) and so on and so forth.

WATANABE: But as you know, up until recently, in Japanese culture, statutory law had not so much influence on Japanese culture itself. Statutory law have worked through traditional social norm. We may say we have just introduced the modern European legal system.

HAMZA: Yes, but it was a great success, and you made it.

WATANABE: We have no such street, for example Ume street, like Savigny or Boissonade street. Most people in Japan have very little interest in the law.

HAMZA: Hungary was always called the nation of lawyers, because we had a huge percentage of lawyers: 0.3 percent of the entire Hungarian population had, and still has, legal education. And this is now a higher percentage than the United States of America. Hungary has a population of a bit more than 10 million people, and we have at least 40,000 lawyers, so 0.4% of the entire population. It is a huge percentage. The
Bar Association of Budapest has more members than the Bar Association of all of Austria, although we have only eight law schools, law faculties. How many law schools are there in Japan, both private and state? About eighty?

**WATANABE:** There are more than seventy law schools. But there are so many law faculty graduate schools.

**HAMZA:** My understanding is that each law school in Japan also has a graduate school.

**WATANABE:** I think that is correct.

**HAMZA:** Each of them, even the small law schools have a graduate school, or post-graduate school?

**WATANABE:** Basically they have also a school of law, on the other hand, not a post-graduate school. In Japan, law schools were set up very recently, about ten years ago. So they have little experience.

Returning to my first question, how could you accomplish such great work? Are you always traveling?

**HAMZA:** Not always. I travel a lot.

**WATANABE:** So, how could you accomplish such a thing?

**HAMZA:** I am always working in the libraries. I have talks with my colleagues in order to verify things. It was, still is a necessity.

**WATANABE:** But I was very surprised by the huge coverage of your book. And you look very busy in Hungary. How could you do it?

**HAMZA:** I do not watch television.

**WATANABE:** But you read the newspaper?

**HAMZA:** Yes.

**WATANABE:** And use the Internet?

**HAMZA:** When I was working on that book, the Internet was not in use. I could not get information from the Internet. The Internet is a very good thing for controlling things, data and so on and so forth. But the Internet does not replace reading. It replaces reading by the students, unfortunately. Most of them don’t read so much.

**WATANABE:** Thank you for your lecture and comments. To tell the truth, during my undergraduate school days, I’ve rather concentrated on the study of legal sociology or legal philosophy. So I have been absorbed in reading the books on sociology or philosophy written by Karl Polanyi and Michael Polanyi who was the prominent brother scholars from Budapest. I have wanted to visit Budapest since my school days.

**HAMZA:** I very welcome you have an interest in Hungarian culture and history.

**WATANABE:** I wish Professor Hayakawa was here! I wanted to have him hear today’s your lecture and comments.

**HAMZA:** Yeah. Very sorry.

**WATANABE:** Thank you very much indeed for your excellent lecture and comments, Professor Hamza.

**HAMZA:** It’s my pleasure. Thank you very much for coming here today, Professor Watanabe.