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Central European Constitutional Courts in the face of EU membership : the influence of the German model of integration in Hungary and Poland

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INTRODUCTION

This study seeks to examine the extent to which the approach of the German constitutional judiciary to EU law has influenced its counterparts in Hungary and Poland. The purpose of this Introduction, then, is to furnish a preliminary outline of the main contours of the thesis, its aims, purpose, method of approach and framework. In order to achieve this, it will be necessary to examine the objectives (below point A) and methodology of the research (below point B), followed by the structure (below point C).

A. OBJECTIVES OF RESEARCH

1. Introducing the main objective

The main objective of this thesis is to examine the attitude of the Hungarian Constitutional Court and the Polish Constitutional Tribunal towards EU law, with particular concern to the influence on their decision-making in this field of the German Federal Constitutional Court's own approach to the Union's constitutional principles as created by the European Court of Justice ("ECJ").[1]

This research consequently centres on the perennial problem faced by national constitutional courts when dealing with EU law is the consideration of the extent to which they can give effect to it while retaining the sacrosanct nature of the domestic Constitution, i.e., how to have their EU cake and eat it? This problem dates from the time, in the first half of the 1960s, when the ECJ commenced the process of constitutionalisation of the then three Treaties, turning them (through a series of cases) into the constitutional charter of the then Communities.[2] In this change, national constitutional courts in particular faced almost insurmountable difficulties in accommodating the ECJ's demands of recognition of the primacy and direct effect of EU law with the demands of the uniqueness and supremacy of their own constitutions. These courts are thus left with the unenviable task of balancing, on the one hand, the protection of domestic constitutional principles and values which they are sworn to defend and which they regard as so vital to state sovereignty with, on the other hand, the requirements of EU law.

The experience of such courts in "old" EU Member States in Western Europe has been mirrored in those of the "new" Member States of Central and Eastern Europe (referred to collectively as the Central and Eastern European countries or "CEECs"[3]).

[1] For a recent collection of analyses of the ECJ's work, see K. Alter, *The European Court's Political Power: Selected Essays*, OUP, Oxford (2009).

[2] For an analysis of the constitutionalisation of the Treaties, see A. Stone Sweet, *The Judicial Construction of Europe*, OUP, Oxford (2004), at 50-96.

[3] The CEECs who joined in 2004 were: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, plus the Mediterranean island States of Cyprus and Malta. The 2007 accession comprised Bulgaria and Romania. The area of Central Europe will be used by the author to refer to the countries of the Czech Republic, Hungary, Poland, Slovakia and Slovenia while mindful that Austria might also be included.

These countries variously joined the Union in 2004 and 2007 and their constitutional judiciary remain mindful of protecting the gains made since the collapse of Communist rule, from unnecessary encroachments from EU law and ECJ case-law.[4] It is against this background that the present study examines the case-law of two Central European constitutional courts – viz., those of Hungary and Poland – which have shed various amounts of light and shadow on their particular approaches to EU law, refracting the light already cast by the German Federal Constitutional Court in its own decision-making on European integration. In order to proceed, it is apposite at this time to indicate the reasons for the present author's choice of courts to be examined before looking at the methodology and structure of the work.

2. Why a study of two Central European judiciaries and their responses to EU law?

Until the late 1980s, the relations between the European Union and the countries of Central Europe were blighted by the pressures of the Cold War and the mutually antagonistic economic, political and military goals of the organisations on each side of the Iron Curtain. Only with the advent of a new era of understanding and openness was it possible for the states of Central Europe to take their proper position in the European integration processes.[5]

The countries which form the focus of this study – Hungary and Poland – share several important features that make them apt for comparative research and the examination of the effect of external influences on the development of their constitutional judicial responses to EU law, both ante and post EU accession. The Polish-Hungarian comparison will accordingly constitute a research design of "most similar cases, most likely cases."[6]

On the one hand, these are most similar cases because both States have had long experience with broader European institutional developments, relatively high levels of economic development and long-term integration into the Germanic law sub-group of the civil law tradition.[7] By focusing on just these two post-communist States in Central Europe, this substantially reduces the propensity for variation between their models and thereby allows for concentration on radically fewer key variables between the models and for exclusion of a whole host of complicating factors if examination were to countenance further country examples.[8] In view of the fact that, as these States (along with a host of

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[4] See the various recent contributions in A. Łazowski (ed.) *The Application of EU Law in the New Member States – Brave New World*, TMC Asser Press, The Hague (2010).

[5] A.F. Tatham, "European Community Law Harmonization in Hungary" (1997) 4 MJ 249.

[6] R. Snyder, "Scaling Down: The Subnational Comparative Method" (2001) 36 *Studies in Comparative International Development* 93-110. This approach is however still somewhat controversial in comparative constitutional law: cf. in favour, L. Weinrib, "The postwar paradigm and American exceptionalism," chap. 4, 84-111; and against, J. Goldsworthy, "Questioning the migration of constitutional ideas: rights, constitutionalism and the limits of convergence," chap. 5, 115-141, both in S. Choudhry (ed.), *The Migration of Constitutional Ideas*, CUP, Cambridge (2006).

[7] W. Jacoby, *The Enlargement of the European Union and NATO: Ordering from the Menu in Central Europe*, CUP, Cambridge (2004), at 13.

[8] Jacoby (2004), at 13. In fact the low variation across country cases is consistent with research on compliance rates in Western Europe as well: T. Börzel, T. Hofmann & C. Sprungk, "Why Do States Not Obey the Law? Lessons from the European Union," paper presented at the EUSA Eighth Biennial International Conference,

others) were in transition – although very much at the vanguard of political, economic and social change as well as two of the main frontrunners for EU accession[9] – underlines the importance of selecting examples that share as many features as possible.[10]

On the other hand, the Hungarian and Polish cases are most likely examples in that they are "close" to Western Europe, whether this is measured in terms of history, geography, or even the race for EU membership.[11]

For the present author, based in Central Europe since 1993, the attractions of researching the Hungarian and Polish constitutional judicial institutions in the era preceding and following EU membership of their States were most pronounced. Combined with the writer's marked comparatist tendencies, and his prior research into the effect of EU law on national administrative laws through a case-based methodology,[12] the author was led to address the judicial reaction to the effect of EU law in the two Central European constitutional systems under consideration. In addition to his lectureships at universities in Hungary and links to ones in Poland, the author also worked for a number of years at the Hungarian Constitutional Court during its formative period and has continued contacts with judges both at this court and at the Polish Constitutional Tribunal.

At the very start of this research, the author sought to conceive an argument in favour of the existence of some "Central European" attitude among the constitutional judiciary *vis-à-vis* EU law as distinct from earlier approaches. Such constitutional judicial attitude, while not rejecting the whole concept of sovereignty and its essential or core principles, would nevertheless display a more nuanced and subtle consideration towards the judicial acceptance of EU law in the domestic system in the light of the principles developed by the ECJ. Since Hungary and Poland joined the EU in 2004 after the main constitutional decisions of the ECJ and the entry into force of the Maastricht Treaty, their constitutional justices might have absorbed more readily the notion of European integration into their

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27-30 March 2003, Nashville (TN); and T. Lowi, "Four Systems of Policy, Politics, and Choice" (1972) 32 *Public Administration Review* 298-310.

[9] Together with Czechoslovakia as part of the Visegrád Three: The Group originated at a summit meeting of the heads of state or government of Czechoslovakia, Hungary and Poland held in the Hungarian castle town of Visegrád on 15 February 1991. Founded to further co-operation between the States of Central Europe and their road to European integration. The Czech Republic and Slovakia became members after the dissolution of Czechoslovakia in 1993, with the States being referred to as the Visegrád Group or Visegrád Four ("V4").

[10] V. Bunce, "Presidents and the Transition in Eastern Europe," in K. von Mettenheim (ed.), Presidential Institutions and Democratic Politics, Johns Hopkins University Press, Baltimore (MD) (1997), 161, at 175.

[11] Jacoby (2004), at 14.

[12] A.F. Tatham, "Judicial Control of the Administration in France and Italy" 1990/3 *Oxford University Law Society Journal* 11; A.F. Tatham, "The Effect of European Community Directives in France: the Development of the Cohn-Bendit Jurisprudence" (1991) 40 ICLQ 907; A.F. Tatham, "Diritto comunitario e provvedimenti cautelari nei confronti della pubblica amministrazione nel Regno Unito" (1993) 32 *Diritto comunitario e degli scambi internazionali* 107; A.F. Tatham, "Les recours contre les attentes portées aux normes communautaires par les pouvoirs publics en Angleterre," (1993) 29 CDE 597; A.F. Tatham, "Incidenza e prevalenza del diritto communitario sul diritto inglese in materia di ripetizione dell'indebito" (1994) 33 *Diritto comunitario e degli scambi internazionali* 81; A.F. Tatham, "Restitution of charges and duties levied by the public administration in breach of European Community Law: a comparative analysis" (1994) 19 EL Rev. 146; and A.F. Tatham, "Judicial review as effective protection of Community rights" (1995) 36 ZfRV 15.

deliberations and decision-making in a less fraught way than their colleagues in the "old" EU Member States.[13]

Nevertheless, these courts (within the overall context of Europeanisation[14] of the institutional framework and legal systems of the CEECs prior to their respective accessions in 2004 and 2007) had been looking towards already well-established models of constitutional courts in the EU and their responses to the position of EU law in the domestic systems. During the present research, it became ever clearer that – despite a number of references to other courts in their case-law – the German Court's influence has proved to be predominant.

3. Why look at the model created by the German constitutional judiciary vis-à-vis European integration?

In this respect – due to its the institutional, legal and jurisdictional "fit" – the German Federal Constitutional Court has so far enjoyed the most extensive influence in determining or guiding its Hungarian and Polish counterparts along the road of European integration. There are several reasons for this influence and, in addition to geographical proximity, it may be argued as including: (a) historic and legal cultural affinities; (b) linguistic ability and intellectual stimulus; (c) constitution and constitutional jurisdiction formation in the post-communist era; and (d) resultant influences on constitutional judicial practice.[15] However, the important point to consider in this part of the research will be whether or not the German approach has been slavishly followed, adapted to local conditions or flatly rejected.

4. The main research questions

As a result of the foregoing, the present author has been particularly keen to analyse the reasons for, the means by which and the extent to which the well-established case-law of the German Federal Constitutional Court has influenced or impacted upon the evolving practice of its Hungarian and Polish counterparts. Answers to such questions, it will be argued, undoubtedly have a major impact on the development of judicial dialogue between the ECJ and national constitutional courts. The three relevant questions to be posed and researched are set out and briefly discussed below.

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[13] As if to go some way to support this argument of the late arrivals being more open to the notion of European integration, the Austrian Constitutional Court became the first national constitutional court, *strictu sensu*, to make a reference to the ECJ in 1999: Case C-143/99 *Adria-Wien Pipeline GmbH v. Finanzlandesdirektion für Kärnten* [2001] ECR I-8365. See generally on the relationship between the Austrian courts and the ECJ: G. Reichelt (ed.), *Vorabentscheidungensverfahren vor dem Gerichtshof der Europäischen Gemeinschaft – Europäische Erfahrungen und österreichische Perspektiven*, Manz, Wien (1998); and C. Stix-Hackl, "Österreichische Gerichte und das Vorabentscheidungsverfahren" 1998 AnwBl. 375.

[14] See, e.g., A.F. Tatham, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn (2009), chaps. 1, 13, 14, and 16; and F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration*, Hart Publishing, Oxford and Portland (OR) (2000).

[15] See Chapter 2, points B.1.-B.5. below for further discussion of this topic.

a. Why would Hungarian and Polish constitutional justices be predisposed towards following the example of the German Federal Constitutional Court in developing their own approaches to European integration?

In view of the previous discussion on the impact of German legal influences in Central Europe – combined with the education of the constitutional court justices and their emulation of the rigorous (and academic) standards of constitutional review displayed by the German Court in their own case-law, the natural assumption would be that the Hungarian and Polish justices would follow such example unless it proved to be incur serious disadvantages to their system.

b. Have these courts in fact followed the German Court and to what extent is this reflected in case-law?

From a study of the case-law of both the Hungarian and Polish courts, it is clear that the Polish Constitutional Tribunal has asserted its own viewpoint within the broad parameters set by the German Court and has used German case-law to support its argumentation in certain specific cases. Nevertheless, it has not slavishly followed the perceived German status quo and, e.g., in the *European Arrest Warrant case*,[16] has adopted a less "confrontational" style vis-à-vis EU law and the ECJ while protecting the essential core of sovereignty. The Hungarian Constitutional Court's decisions on EU law have tended, so far, to hover around the periphery, providing little actual content of a contentious nature while generally falling into line with the main tenets of German case-law. Its tentative approach thus perhaps belies division within the Court as to how to address the issue of EU law or a marked reluctance to be drawn into any controversy on the Union, thus avoiding politicising its work. In either case, the time is fast approaching when the Hungarian Constitutional Court will be forced to take a fully-articulated and reasoned stance on EU law.

c. How can this development be used constructively in order to deepen the dialogue between national constitutional courts and the ECJ?

Transnational judicial dialogue within the constitutional context of the European Union has been described by Rosas[17] as concerning "the special relationship which exists between the ECJ and national courts of the EU Member States faced with problems of interpretation or validity of EU law." However, dialogue between the ECJ and the highest domestic courts (particularly, though not exclusively, constitutional courts) has been fraught with complications: this has been due, as will be argued,[18] to the demands of supremacy and direct effect of EU law juxtaposed with the demands of the supremacy of national constitutions which judges have given their oath to uphold.

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[16] *European Arrest Warrant*, 18 Juli 2005, 2 BvR 2236/04: BVerfGE 113, 273; [2006] 1 CMLR 378.

[17] A. Rosas, "The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue" (2007) 1/2 EJLS 1, at 6.

[18] See below at Chapter One, points B. and C.

As a byproduct of this dialogue, there is the interesting prospect of the development of a constitutional bloc of national (Central and Eastern European) courts, formed around and championed by the German Court under the process of horizontal transjudicial communication and migration of constitutional ideas. There is also the likelihood of a cross-European link with other Kelsenian model constitutional courts in Austria, Italy and Spain, as well as the conceivable participation of the French *Conseil constitutionnel* following the changes to its constitutional jurisdiction which brought it further into line with these constitutional courts.[19]

In bringing the ECJ into a more formal and effective dialogue with these courts, mediated through the wording of the new TEU and TFEU (post-Lisbon Treaty changes), such courts would be able to engage actively in determining the meaning of the actual content of Union principles of democracy, the rule of law and the separation of powers, not to mention human rights (within an ever broader context of EU membership of the ECHR). Such a proposition has already been heralded by the recent decision of the German Federal Constitutional Court in the *Lisbon Treaty case*.[20]

The Conclusion of this work seeks to emphasise the continuing need for dialogue between the courts but to think beyond the justices themselves and other institutions (whether national or EU) in order to engage other stakeholders in the process of dialogue. In this sense, the author will posit the idea of encouraging the development of "constitutional references" to the ECJ within an overall concept of dialogue between this court and the national constitutional courts.

B. METHODOLOGY OF THE RESEARCH

1. An analysis based on case-law

This research uses both theoretical as well as empirical methods. The thrust of this whole research project comes within a complex field of continued national sovereignty in the face of deepening European integration;[21] comparative law and national judicial use of foreign concepts;[22] as well as transjudicial communication.[23] The methodological focus will remain,

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[19] The *Loi constitutionelle de modernisation des institutions de la Vème République* (23 juillet 2008) amended the Constitution to introduce Art. 61-1 to allow courts to submit questions of unconstitutionality of laws to the *Conseil constitutionnel*. The law now permits challenging the constitutionality of a measure through *a posteriori* constitutional review where, previously, the constitutionality of a law could only be reviewed *a priori*. Nevertheless, the *Cour de Cassation* (supreme civil and criminal court) and the *Conseil d'Etat* (supreme administrative courts) filter the requests coming from the courts under them. Moreover, ordinary persons will still not have any *locus standi* directly before the *Conseil constitutionnel* thus leaving only the established political actors according to Constitution Art. 61 with the necessary standing to submit petitions *a priori*: the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, 60 members of the National Assembly or 60 senators.

[20] *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 234, 240 and 339.

[21] See below Chapter One, points B.1.-B.3.

[22] See below Chapter One, point C.2.a.

[23] See below Chapter One, points C.1. and C.2.b.-c.

however, empirical research: a comparative constitutional case-law approach, which examines the actual decisions of the relevant courts in order to determine their respective positions on EU law and the domestic constitutional system.

The impacts of comparative constitutional law have been considered extensively on a system-to-system,[24] institution-to-institution,[25] or law-to-law basis.[26] The focus of research into judicial reception of comparative constitutional reasoning through constitutional decisions has also been made[27] but this work will examine the movement between relatively similar constitutional systems of a judicial attitude to EU law which has been developed solely through judicial fiat. This may be contrasted to the reception of judicial interpretation of constitutional principles like the *Rechtsstaat*, the separation of powers, human rights and so forth. Although the prime method of comparative research and analysis underlines the entire work, in researching the reasons behind the actual case-law, use is made of methods based on sociology of law, political science as well as legal history.

Consequently, into this mix must also be added consideration of the rather unique circumstances surrounding the issue of the law in post-communist transition legal systems, the role of the judiciary in such transition, its ability to sustain the new constitutional system and the building up of the necessary judicial capacity for it (like all other national judges of prospective EU Member States) to apply the *acquis européen*.[28]

Throughout the theoretical development of this research, use of relevant legal literature was essential in elaborating the answers to the questions posed. The decisions of the German and Polish constitutional courts have especially been very widely commented

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[24] See, e.g., H.P. Glenn, *Legal traditions of the world: sustainable diversity in law*, Oxford University Press, Oxford (2007); M.A. Glendon, M.W. Gordon & C. Osakwe, *Comparative legal traditions: text, materials and cases on the civil law, common law and socialist law traditions*, West Publishing Company, St. Paul (MN), (1985); D. Nelken (ed.), *Comparing legal cultures*, Dartmouth, Aldershot and Brookfield (VT), (1997); and E. Örücü, *The enigma of comparative law: variations on a theme for the twenty-first century*, Martinus Nijhoff Publishers, Leiden (2004).

[25] See, e.g., J. Gordley (ed.), *The enforceability of promises in European contract law*, Cambridge University Press, New York (2001); L. Pegoraro & A. Rinella (eds.), *Le fonti nel diritto comparato*, G. Giappichelli Editore, Torino (2000); and J.H. Merryman, D.S. Clark & J.O. Haley, *The civil law tradition: Europe, Latin America, and East Asia*, Michie Co., Charlottesville (VA), (1994).

[26] See, e.g., M. Andenas (ed.), *Judicial review in international perspective*, Kluwer Law International, The Hague and Boston (MA), (2000); M. Andenas & N. Jareborg, *Anglo-Swedish studies in law*, Iustus Förlag, Uppsala (1999); D. Fairgrieve, M. Andenas & J. Bell (eds.), *Tort liability of public authorities in comparative perspective*, BIICL, London (2002); and E. Örücü & J. Mair (eds.), *Juxtaposing legal systems and the principles of European family law on divorce and maintenance*, Intersentia, Antwerpen and Oxford (2007).

[27] E. Örücü (ed.), *Judicial comparativism in human rights cases*, UK National Committee of Comparative Law (in assoc. with BIICL), London (2003); J. Přibáň & J. Young (eds.), *The rule of law in Central Europe: the reconstruction of legality, constitutionalism and civil society in the post-Communist countries*, Ashgate/Dartmouth, Aldershot and Brookfield, (VT), (1999); T. Ginsburg, *Judicial review in new democracies: constitutional courts in Asian cases*, Cambridge University Press, Cambridge (2003).

[28] This concept may be said to include the Treaties, all secondary legislation and judicial and quasi-judicial decisions made by Union institutions, as well as the non-binding acts such as opinions and resolutions of institutions: see A.F. Tatham, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn (2009), chap. 12, 327, at 328. It was formerly referred to as the "*acquis communautaire*" before the entry into force of the Lisbon Treaty which saw an end to the European Community by its complete subsumption into the European Union.

upon not only in Germany and Poland respectively but also in the other official languages of the EU. A completely exhaustive overview of all the relevant works is therefore clearly beyond the capacity of the present author. Nevertheless, as indicated below, relevant German, Polish and Hungarian literature has been used as well as that in English.

2. A note on materials and language

In any work on comparative law, the importance of the reliability of sourced materials and translations is paramount: this study is no exception and the present author has ensured as far as humanly possible the authenticity of materials and the accuracy of translations.

For language, the main sources were to be found in German, Hungarian and Polish. In respect of German, the translations of decisions of the Federal Constitutional Court are taken from the *Common Market Law Reports*, the website of the Court[29] itself, the books by Oppenheimer[30] and by Kommers.[31] For any other direct quotation, the author has relied on his initially slightly rusty, now much better honed, German language knowledge. Nevertheless, in some cases, e.g., the translation of the *Maastricht* decision in the *Common Market Law Reports*,[32] there has proved to be some necessity of revising or correcting the translation.

For Hungarian, the author's elementary knowledge could in no way equip him sufficiently to render accessible legal writing or decisions in that language. The translations of rulings of the Constitutional Court come from Sólyom & Brunner's book[33] or from the Court's website.[34] Where no translation has been available of these rulings or any sourced materials, lawyers or juris-linguists have provided the translations. Much the same can be said of Polish: absent a translation of the relevant ruling of the Constitutional Tribunal in the *Common Market Law Reports*, the Tribunal's own collection of cases between 1986 and 1999[35] or its own website,[36] lawyers or juris-linguists have provided the translations as they have also done in respect of other primary or secondary sourced materials.

The materials themselves have been consulted in a variety of places: the Institute of Advanced Legal Studies, London provided much material from German sources

[29] <www.bundesverfassungsgericht.de>.

[30] A. Oppenheimer (ed.), *The Relationship between European Community law and national law: the cases*, Vol. 1 (1994), Grotius Publications, Cambridge; and Vol. 2 (2003), Cambridge University Press, Cambridge.

[31] D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed., Duke University Press, Durham and London (1997).

[32] [1994] 1 CMLR 57. In that case, e.g., the term "*Staatenverbund*" was erroneously translated as "federation of [sovereign] States" rather than as the widely accepted "association of [sovereign] States."

[33] L. Sólyom & G. Brunner (eds.), *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*, University of Michigan Press, Ann Arbor (MI) (2000).

[34] <www.mkab.hu/en/enmain.htm>.

[35] Constitutional Tribunal (Department of Jurisdiction and Studies), *Selection of the Constitutional Tribunal's jurisprudence from 1986 to 1999*, Trybunale Konstytucyjny, Warszawa (1999).

[36] <www.trybunal.gov.pl>.

although the Library of the Hungarian Constitutional Court provided further German materials as well as all the Hungarian-language ones. Lastly, the Parliament Library in Budapest as well as the Library of the Faculty of Law, Jagiellonian University, Kraków furnished most of the Polish materials.

C. STRUCTURE OF THE RESEARCH

1. Elementary structure of the study

The Introduction presages chapters providing the European and German legal and constitutional context for the thesis, followed by the main chapters dealing with the States that are the focus of this present work. The Conclusion contains indications of possible mechanisms to assist in finding solutions to the European constitutional conundrum.

2. Set-up of the study

The study is set up to start with chapters on the European constitutional context and on the potency of German legal influence in Central Europe. These provide the overall constitutional, historical and legal cultural context for the work, and furnish an understanding of how German constitutional practice has such resonance in Hungary and Poland. The author then provides analyses the main themes of the German Federal Constitutional Court's approach to European integration, highlighting areas of particular common concern to the German Court and ostensibly to its EU counterparts.

The next two chapters then examine the development of the responses of constitutional justices in Hungary and Poland. By using the same framework as with the German model, a necessarily more straightforward comparison can be made between all three constitutional judicial organs. Moreover the task of highlighting the impact of the German model is thereby greatly facilitated. The final chapter, which concludes the thesis, reviews and reinterprets the main body of the work before turning to provide suggested solutions to the current stand-off between the ECJ and national constitutional courts.[37]

[37] In this respect, see the FCC in *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.