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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CHAPTER TWO:

THE PREDOMINANCE OF THE GERMAN MODEL IN CENTRAL EUROPE – MIGRATIONS OF LEGAL AND CONSTITUTIONAL IDEAS

A. RELEVANT LEGAL MODELS FOR CENTRAL EUROPE

1. Introduction

The bilateral processes of rule and experience transfer between sending State and recipient are paradigms of legal transplants, legal migrations or cross-fertilisations as discussed above in Chapter One.[1] The matter that gives this work its interest is the way in which the German model described in the succeeding Chapter has acted as the main potential mediating influence on the Hungarian and Polish constitutional courts in the development of their own responses to the implications of EU accession. This Chapter seeks to set out the reasons why the present author argues that the German legal system in general and its constitutional jurisdiction in particular exert such a strong pull on the constitutional courts in Hungary and Poland. In order to demonstrate his argument, the author needs to explain briefly first the breadth of legal models present in the Union with respect to national superior courts' approaches to EU integration and, secondly, the group of courts which he regarded as especially relevant in attempting to choose the dominant model for emulation for the Hungarian and Polish constitutional tribunals. Based on these justifications, the author chooses the German constitutional model vis-à-vis EU integration (see below Section A).

Nevertheless, the author regards it as apposite to provide a fuller reasoning for selection of the German model as worthy of emulation in Central Europe. These reasons encompass a variety of matters from historical and legal cultural affinities to the migration of constitutional idea from Germany to Central Europe in the period of transition in the early 1990s (see below Section B). All in all, the author is able to conclude that the overwhelming attraction of the German constitutional judicial approach to EU integration, as expressed by the Central European constitutional courts in this study, would in any case have proved to be difficult to deny.

2. The kaleidoscope of national judicial approaches to EU law

The pre-2004 accession EU Member States exhibited not only a diversity of legal and political systems but also a broad kaleidoscopic spectrum of national (constitutional) judicial attitudes to EU law. A detailed discussion of these different judicial responses to the constitutionalisation of

[1] See above at Chapter One, point C.2.

EU law is beyond the scope of the present work.[2] Nevertheless, they represent – in the majority of cases – serious attempts by domestic judiciaries to accommodate the requirements of EU law with the demands of their own constitutional and legal systems. The spectrum may be said to be represented at its Europhile end by the superior courts of the Benelux states[3] and at its Eurosceptic end by the Danish Supreme Court,[4] with the remaining higher-level courts occupying various points in between.

A choice had to be made in order to reduce the ambit of the preliminary Chapters, before proceeding to examine in more detail the situations in Hungary and Poland. The test adopted to find "the right institutional and legal fit" was broadly a two-stage one and focused on the constitutional courts of these two Central European states:

(1) similarity in constitutional court models, being a constitutional and jurisdictional test; and

(2) similarity in approach to EU law, being more of a legal influences and judicial cultural affinity test.

3. Choice of national constitutional courts

The choice of country was initially dictated by the similarity to the type of domestic constitutional review system which exists in Hungary and Poland. Saiz Arnaiz observed that[5] two main constitutional review systems are present in Europe: the European, also known as the Kelsenian or concentrated system, and the American, or diffuse system. In the former, review can only be performed by the constitutional court whose decision to annul a provision as unconstitutional has a general effect as a sort of negative legislation. In the latter, judicial review is at the discretion of each judge and tribunal whose decision only affects the parties to the case.

In the Member States of the EU, some have chosen the diffuse system (Denmark, Greece and Sweden), while some have a mixture of concentrated and diffuse (Ireland and Portugal). Accordingly, before the 2004 EU enlargement, only Austria,[6] Belgium,[7] France, Germany, Italy, and Spain could be said to adhere to the Kelsenian notion of judicial review.[8]

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[2] For useful analyses, the reader is referred to B. de Witte, "Direct effect, supremacy, and the nature of the legal order," in P. Craig & G. de Búrca, *Evolution of EU Law*, OUP, Oxford (1999), chap. 5, 177-213; J. Rideau (ed.), *Les Etats memberes de l'Union européenne. Adaptations – Mutations – Résistances*, L.G.D.J., Paris (1997); A.M. Slaughter, A. Stone Sweet & J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford (1998).

[3] On Belgium, see H. Bribosia, "Report on Belgium," in Slaughter, Stone Sweet & Weiler (1998), chap. 1, 1-39; H. Bribosia, "Applicabilité directe et primauté des traités internationaux et du droit communautaire – Réflexions générales sur le point de vue de l'ordre juridique belge" 1996 RBDI 1. On The Netherlands, see M. Claes & B. de Witte, "Report on the Netherlands," in Slaughter, Stone Sweet & Weiler (1998), chap. 6, 171ff; and A. Kellerman, "Supremacy of Community law in the Netherlands" (1989) 14 EL Rev. 175. On Luxembourg, M. Thewes, "La constitution luxembourgeoise et l'Europe" (1992) 2 *Annales de droit luxembourgeois* 65; and E. Arendt, "Le traité de l'Union européenne et la Constitution du Grand-duché de Luxembourg" (1992) 2 *Annales de droit luxembourgeois* 35.

[4] Højesteret (Danish Supreme Court), 6 April 1998, Case I 361/1997, *Carlsen v. Rasmussen* [1999] 3 CMLR 854; and K. Høegh, "The Danish Maastricht Judgment" (1999) 24 EL Rev. 80.

[5] A. Saiz Arnaiz, "Constitutional Jurisdiction in Europe: Between Law and Politics" (1999) 6 MJ 111, at 111-113.

[6] G. Holzinger, "Die Bedeutung des Vorabentscheidungsverfahrens für das verfassungsgerichtliche Verfahren," in M. Holoubek & M. Lang (eds.), *Das verwaltungsgerichtliche Verfahren in Steuersachen*, Linde, Wien (1999), 65; M. Klamert, *Die richtlinienkonforme Auslegung nationalen Rechts*, Manz, Wien (2001); Th. Öhlinger & M. Potacs, *Gemeinschaftsrecht und staatliches Recht – Die Anwendung des Europarechts im innerstaatlichen Bereich*, Orac,

Since the constitutional courts of Hungary and Poland, whose practice forms the basis of this thesis, belong to the concentrated system of review, the present author decided to focus his preliminary investigations on the models which have proved to be the most influential in directing these courts in their approaches to EU law.

4. Choice of approach to EU Law

Having selected the Kelsenian group of constitutional tribunals, the present author then commenced his initial research into the importance of each of these national constitutional models in guiding their Hungarian and Polish counterparts in their approaches to EU law.

The focus on the various constitutional judicial institutions – Austria,[9] Belgium,[10] France,[11] Germany, Italy[12] and Spain[13] – allowed the author to examine the way each developed

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Wien (1998); P. Pernthaler, "Europäische Integration und nationales Verfassungsrecht in Österreich," in U. Battis, D. Th. Tsatos & D. Stefanon (eds.) *Europäische Integration und nationales Verfassungsrecht*, Nomos Verlag, Baden-Baden (1995), chap. 13, 437; and Ch. Thun-Hohenstein & F. Cede, *Europarecht: das Recht der Europäischen Union unter besonderer Berücksichtigung der EU-Mitgliedschaft Österreichs*, 2nd ed., Manz, Wien (1999).

[7] The Belgian *Cour d'arbitrage* (created in 1983) defined itself as a constitutional court with limited competences: *O.V.A.M. v. de Smet*, CA 29 janvier 1987, Arrêt no. 32: <www.arbitrage.be>. This designation was subsequently confirmed in a constitutional revision on 7 May 2007 when the Belgian Constitution was altered by the alteration to Art. 142(1) which now reads: "There is, for all of Belgium, a Constitutional Court, the composition, competencies, and functioning of which are established by law."

[8] For general overviews of constitutional review in Europe, see C. Grewe & H. Ruiz Fabri, *Droits constitutionnels européens*, Presses universitaires de France, Paris (1995), at 66-100; and D. Rousseau, *La justice constitutionnelle en Europe*, Montchrestien, Paris (1998).

[9] I. Seidl-Hohenveldern, "Constitutional Problems involved in Austria's Accession to the EU" (1995) 32 CML Rev. 727; Ch. Grabenwarten, "Änderungen der österreichischen Bundesverfassung aus Anlaβ des Beitritts zur Europäischen Union" (1995) 13 *ZaöRV* 166; Th. Öhlinger, "Die Transformation der Verfassung: Die Staatliche Verfassung und die Europäische Integration" (2002) 124 JBl. 2; T. Schilling, "Anwendungsvorrang des Gemeinschaftsrechts" 1999 EuZW 407; F. Rüffler, "Richtlinienkonforme Auslegung nationalen Rechts" [1997] ÖJZ 126; and P. Fischer, "Die objektive Direktwirkung von EU-Richtlinien: Die Lektion aus dem Fall Wärmekraftwerk Groβkrotzenburg 1996" in H. Mayer et al. (eds.) *Recht in Österreich und Europa: Festschrift für K. Hempel*, Manz, Wien (1997), at 91ff. S. Griller, "Verfassungsfragen der österreichischen EU-Mitgliedschaft" (1995) ZfRV 89: Griller speaks of a constitutional core immune to further integration (*integrationsfester Verfassungskern*). The Austrian Constitutional Court has also initiated a direct dialogue with the ECJ: G. Holzinger, "Die Bedeutung des Vorabentscheidungsverfahrens für das verfassungsgerichtliche Verfahren," in M. Holoubek & M. Lang (eds.), *Das verwaltungsgerichtliche Verfahren in Steuersachen*, Linde, Wien (1999), 65.

[10] The former *Cour d'arbitrage* (established in 1980 with constitutional jurisdiction) indicated its intention to enforce the primacy of the Constitution over treaties, at least to the extent of its reference standards: *Scola europae v. Hermans*, CA 3 février 1994, Arrêt no. 12/94: *Moniteur belge* 6137; *Van Damme v. Procureur général près la Cour d'appel d'Anvers*, CA 26 avril 1994, Arrêt no. 33/94: *Moniteur belge* 17034. In addition, it became the first national court enjoying constitutional jurisdiction to make a reference to the ECJ (*Re a.s.b.l. Fédération belge des chambres syndicales de médecins*, CA 19 février 1997, Arrêt no. 6/97: *Moniteur belge* 4456). The *Cour d'arbitrage* was redesignated the Belgian Constitutional Court in 2007 and has become an active proponent of judicial dialogue with the ECJ: E. Cloots, "Germs of pluralist judicial adjudication: *Advocaten voor de Wereld* and other references from the Belgian Constitutional Court" (2010) 47 CML Rev. 645.

[11] O. Beaud, "La souveraineté de l'État, le pouvoir constituant et le Traité de Maastricht" RFDA.1993.1045; G. Bermann, "French treaties and French courts: Two problems in Supremacy" (1979) 28 ICLQ 458; L. Favoreu, "Le contrôle de constitutionnalité du Traité de Maastricht et le développement du 'droit constitutionnel international'" RGDIP.1993.39; B. Genevois, "Le Traité sur l'Union européenne et la Constitution" RFDA.1992.374; B. Genevois "Traité sur l'Union européenne II: Note" RFDA.1992.937; C. Grewe & H. Ruiz Fabri, "Le Conseil constitutionnel et l'intégration européenne" RUDH.1992.277; M. Lagrange, "Du conflit entre loi et traité en droit communautaire et en

their ideas on an essential core of sovereignty *vis-à-vis* EU law.[14] Through this preliminary study of West European constitutional case-law in the field of European integration, both academic writings and pre-accession judgements of constitutional tribunals in Hungary and Poland led the present author to hypothesise that the German model would probably be most influential.

Since accession in 2004, this hypothesis has proved to be correct and, accordingly, the next Chapter will set out the basic contents of the German model before proceeding to a deeper analysis of and focus on Hungary and Poland.

However, it is necessary to explain first in more detail why the German model plays such an important role for the more recent constitutional tribunals in Hungary and Poland, to which issue the present author now addresses himself.

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droit interne" (1975) 11 RTDE 44; F. Luchaire, "Le Traité d'Amsterdam et la Constitution" RDP.1998.332; S. Millns, "The Treaty of Amsterdam and Constitutional Revision in France" (1999) 5 EPL 61; J. Rideau, "La recherche de l'adéquation de la Constitution française aux exigences de l'Union européenne" (1992) *Revue des Affaires européennes* 7 and 19; S. Wright, "The French *Conseil Constitutionnel*: International Concerns" (1999) 5 EPL 199.

[12] A. Adinolfi, "The Judicial Application of Community Law in Italy (1981-1997)" (1998) 35 CML Rev. 1313; S. Carmeli, "La réception du droit communautaire dans l'ordre juridique italien" RIDC.2001.339; M. Cartabia, "The Italian Constitutional Court and the Relationship Between the Italian legal system and the European Union," in Slaughter, Stone Sweet & Weiler (1998), chap. 4; M. Cartabia & J.H.H. Weiler, *L'Italia in Europa. Profili istituzionali e costituzionali*, il Mulino, Bologna (2000); R. Guastini, "La primauté du droit communautaire: une révision tacite de la Constitution italienne" (2000) 9 *Les Cahiers du Conseil constitutionnel* 119; F.P. Ruggeri Laderchi, "Report on Italy," in Slaughter, Stone Sweet & Weiler (1998), chap. 5.

[13] M. Aragón Reyes, "La Constitución española y el Tratado de la Unión Europea: la reforma de la Constitución" (1994) REDC 9; E. García de Enterría & R. Alonso García, "Spanish report" in J. Schwarze, *The Birth of a European Constitutional Order: The Interaction of National and European Constitutional Law*, Vol. 249 *Schriftenreihe Europäisches Recht, Politik und Wirtschaft*, Nomos Verlagsgesellschaft, Baden-Baden (2001), 287; G. Garzón Clariana, "The Spanish Constitutional Order," in A. Kellerman *et al.* (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level*, T.M.C. Asser Instituut, Deventer and The Hague (2001), 117; M. Herrero Rodríguez de Miñón, "Constitución española y Unión Europea. Comentarios al artículo 93 de la Constitución española" (1992) 26 RCG 7; D.J. Liñán Nogueras & J. Roldán Barbero, "The Judicial Application of Community Law in Spain" (1993) 30 CML Rev. 1135; A. Mangas, *Derecho comunitario europeo y derecho español*, 2nd ed., Madrid (1987); P. Pérez Tremps, "Derecho Constitucional y Derecho Comunitario," in G. Trujillo, L. López Guerra & P.J. González-Trevijano (co-ords.), *La experiencia constitucional (1978-2000)*, Centro de Estudios Políticos y Constitucionales, Madrid (2000), 607.

[14] See generally, F.G. Jacobs, "The Constitutional Impact of the Forthcoming Enlargement of the EU: What can be learnt from the experience of the existing Member States?" in Kellerman *et al.* (eds.) (2001), 183ff.

B. RELEVANCY OF THE GERMAN MODEL IN CENTRAL EUROPE

1. Introduction

In their respective works, Kokott[15] and Dupré[16] have each presented their ideas on why the Central European courts have been influenced by their German counterpart in developing their case-law in the post-communist era. It is my intention here to outline the points that sustain this approach but increasing the remit somewhat. The areas of influence or contrast may be determined in the following manner:

1. Historic and legal cultural affinities;
2. Linguistic ability and intellectual stimulus;
3. Constitution and constitutional jurisdiction formation in the post-communist era; and
4. Resultant influences on constitutional judicial practice.

These different areas will now be addressed in turn, by focusing on the particular points of reference which illustrate the strength of the connections between the Austro-German systems and those in Central Europe.

2. Historic and legal cultural affinities

Despite the fact that Germany did not exist as a political entity until 1871 and Poland did not reappear on the map of Europe till 1918, the influence of laws from the areas now covered by Germany on those of Hungary and Poland law has a long progeny.

a. Middle Ages

As long ago as the medieval period, Germanic legal influences on civil and particularly commercial rules in the old kingdoms of Poland and Hungary was still palpable. In contrast, the field of public law eschewed the practice of German legal influences in the actual guise of Roman law. Both the Polish estates and the Hungarian royal councils of the Middle Ages considered that Roman law as the imperial law of the Holy Roman Empire (*ius Caesareum*) and believed that its reception would promote their kingdoms becoming German vassals.[17] As a result, Roman law spread into these two countries only by means of a slow infiltration.[18] For such reasons, the present part of the Chapter will largely concentrate on civil and commercial rules until the end of communism.

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[15] J. Kokott, "From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization – with Special Reference to the German Basic Law," in Ch. Starck (ed.), *Constitutionalism, Universalism and Democracy – a comparative analysis*, Nomos Verlag, Baden-Baden (1999), section 4, 71.

[16] C. Dupré, *Importing the law in post-Communist transitions: the Hungarian Constitutional Court and the right to human dignity*, Hart Publishing, Oxford (2003).

[17] G. Hamza, *The Subsequent Fate of Roman Law in a Comparative Legal Approach: Reading Materials*, Eotvos University Press, Budapest (2007), at 49.

[18] R. Taubenschlag, "Einflüsse des römischen Rechts in Polen" (1962) IRMAE V 8.

Bartlett[19] highlighted the intrinsic link between language, law and legal language, proposing that linguistic nationalism linked to legal particularity and superiority in Europe's conquered borderlands – in the present case, the Saxons and Swabians in Poland and Hungary[20] – were instruments in ensuring successful colonisation in these areas. Such "conquests" were not necessarily military: more often, invitations would be issued by the Polish and Hungarian kings inviting Germanic peoples to settle certain parts of their territory, either as farmers or as merchants in the towns. The high impact of Germanic law was particularly noticeable in the towns as German merchants – as part of the royal dispensation and as a means of encouraging their settlement – were allowed to retain their personal/local (Germanic) law.

In 1244, for example, King Béla IV of Hungary[21] ruled that the Germans who settled in Karpfen (modern Krupina in Slovakia) "are not bound to stand judgement before any judge … except their own particular judge."[22] In the charter for the new town of Krakow, established in 1257 for German burgesses, the application of the Romano-canonical maxim – to wit, all cases in which the German was defendant should be tried before a German judge – was set out:[23]

> Since it is right that the plaintiff should plead in the court of the accused (*actor forum rei sequi debeat*), we ordain and will that when it happens that a citizen of the said city brings a case against a Pole of the diocese of Cracow, he should pursue his right before a Polish judge; conversely if a Pole brings a case against a citizen, the advocates [of the town] should give judgment and determine the issue.

Nevertheless, there was no German common law at that time: rather separate laws were administered by town or territorial or feudal courts. The major German cities during the Middle Ages were somewhat more open to legal influences from elsewhere. Their law-finders or "*Schöffen*" – the (elected) members of the court – were sometimes great merchants who at least knew other regimes. Further these cities might themselves exercise a wide influence for when new towns were founded in Poland or Hungary, they might take their law *en bloc* from older cities. Such daughter towns would, through their *Schöffen* appeal to the mother town for advice.[24]

Following on from this practice, the great urban constitutions of the German movement to Central and Eastern Europe – for example, the laws of the towns of Lübeck and Magdeburg[25] –

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[19] R. Bartlett, *The Making of Europe: Conquest, Colonization and Cultural Change 950-1350*, Penguin Books, London (1993), s.v. "Race Relations on the Frontiers of Latin Europe (1): Language and Law," chap. 8, 197ff.

[20] Others include the English in Wales and Ireland: see generally, R. Davies, *Domination and Conquest: The Experience of Ireland, Scotland and Wales 1100-1300*, CUP, Cambridge (1990); and the Castilians and Aragonese in Moorish Spain: C.J. Bishko, "The Spanish and Portuguese Reconquest, 1095–1492," in H.W. Hazard (ed.), *The Fourteenth and Fifteenth Centuries* (1975), 396-456, vol. 3 of K. Setton (ed.), *A History of the Crusades*, University of Wisconsin Press, Madison (6 vols.,1955-1989).

[21] B. Mezey (ed.), *Magyar Jogtörténet*, 3rd ed., Osiris Kiadó, Budapest (2004), at 44.

[22] H. Helbig & L. Weinrich (eds.), *Urkunden und erzählende Quellen zur deutschen Ostsiedlung im Mittelalter*, 26 *Ausgewählte Quellen zur deutschen Geschichte des Mittelalters*, Vol. 2, Wissenschaftliche Buchgesellschaft, Darmstadt (1968-1970), No. 138, at 520.

[23] Helbig & Weinrich (1968-1970), No. 77, at 294.

[24] O. Robinson, T. Fergus & W. Gordon, *European Legal History*, 2nd ed., Butterworths, London (1994), at 112 and at 184-188.

[25] H. Lück, "Die Verbreitung des Sachsenspiegels und des Magdeburger Rechts in Osteuropa," in M. Fansa (ed.), *Der Sassenspeyguel. Der Sachsenspiegel – Recht – Alltag*, Vol. 2, 10 *Beihefte der Archäologischen Mitteilungen aus*

provided the fundamental legal and institutional structure for hundreds of settlements from Narva (Estonia) to Kyiv (Ukraine).[26] As a result, for example, the *Sachsenspiegel*[27] (as used in Saxony) came to be used in their respective Saxon daughter towns – either re-founded or newly founded – in the Central European kingdoms.[28]

Another example is the Göttingen codex of Lübeck law which contains the text of the law as sent to Danzig (present-day Gdańsk in Poland) in response to the request of the local (Polish) prince and the city's German burgesses:[29] in order to maintain the consistency of the law and its application, the German burgesses were allowed to retain a right of appeal from the city courts of Danzig to Lübeck, which jurisdiction the German mother city exercised over its daughter towns throughout the Baltic.[30] This practice only finally started to decline in the 15th century,[31] but such restrictions only became widespread and effective following the end of the Thirty Years' War in 1648 and the emergence of absolutist government. In this manner, Germanic law and practice of the civil and commercial law (i.e., the law merchant[32]) gradually came to be observed in the Central European region.

Even this brief explanation shows a clear link between the German language, Germanic law and local (Polish/Hungarian) reception of such law and were well-established notions by the mid-fourteenth century in Central Europe although such influence did not lead to the overthrow of the independence of the domestic legal systems in Poland and Hungary. Rather German law – as the "modern law" of the time – acted as the conveyor and conduit of new ideas and legal developments in the Central European kingdoms.

Nordwestdeutschland, Isensee Verlag, Oldenburg (1995), 37ff. Magdeburg law survived in Poland until Napoleonic times and in Kyiv until 1834. It also had an influence on the 1937 Latvian Civil Code.

[26] See generally, W. Schlesinger (ed.), *Die deutsche Ostsiedlung des Mittelalters als Problem der europäischen Geschichte*, 18 *Vorträge und Forschungen*, Reichenau-Vorträge 1970-1972, Sigmaringen (1975).

[27] The *Sachsenspiegel* was a privately-composed treatise on law (meaning "the Mirror of the Saxons"), composed by Eike von Repgow in the first half of the 13th century. Von Repgow was a *Schöffe* (or law-finder), a member of the panel of men who made decisions in the *Schöffen* courts, presided over by a judge (usually the local lord). Originally produced in Latin, von Repgow brought out a Saxon German version which was subsequently translated in to several German dialects: see generally M. Dobozy, *The Saxon Mirror. A Sachsenspiegel of the Fourteenth Century*, University of Pennsylvania Press, Philadelphia (1999); and F. Ebel (ed.), *Sachsenspiegel – Landrecht und Lehnrecht*, Reclam, Stuttgart (1993).

[28] E. Wagner, *Geschichte der Siebenbürger Sachsen. Ein Überblick*, 7th ed., 1 *Schriften zur Landeskunde Siebenbürgens*, Edition Wort und Welt Verlag, München (1998), at 10; and Mezey (2004), at 41.

[29] J. Hach (ed.), *Das alte Lübische Recht*, Lübeck (1839), reprinted, Scientia Verlag, Aalen (1969), at 185.

[30] See generally, W. Ebel (ed.), *Lübecker Ratsurteile*, Vols. 1-4, Musterschmidt, Göttingen (1955-1967).

[31] As early as 1432, the Elector of Saxony forbade any subject to seek legal advice from outside the Duchy.

[32] A. Cordes, "Gewinnteilungsprinzipien im hansischen und oberitalienischen Gesellschaftshandel des Spätmittelalters," in G. Köbler and H. Nehlsen (eds.), *Wirkungen europäischer Rechtskultur. Festschrift für Karl Kroeschell zum 70. Geburtstag*, Beck, München (1997), 141ff; G. Dilcher "Marktrecht und Kaufmannsrecht im frühen Mittelalter," in K. Düwel, D. Claude & H. Jankuhn (eds.), *Untersuchungen zu Handel und Verkehr der vor- und frühgeschichtlichen Zeit in Mittel- und Nordeuropa: Berichte über die Kolloquien der Kommission für die Altertumskunde Mittel- und Nordeuropas in den Jahren 1980 bis 1983*, Part 3, Vandenhoeck & Ruprecht, Göttingen (1985), 392ff; K. Kroeschell, *Studien zum frühen und mittelalterlichen deutschen Recht*, Duncker & Humblot, Berlin (1995), *s.v.* "Bemerkungen zum 'Kaufmannsrecht' in den ottonisch-salischen Markturkunden," 381ff; M. Weber, *Zur Geschichte der Handelsgesellschaften im Mittelalter. Nach südeuropäischen Quellen*, F. Enke, Stuttgart (1889); reprinted, Schippers, Amsterdam (1964).

b. Renaissance

With the reception of Roman law in the Holy Roman Empire in the fifteenth/sixteenth centuries,[33] the result of a combination of factors – the political ambitions of emperor and princes, the desire of litigants, the urge towards system whether in general or local legislation, the growth of professional courts, the work of law faculties – gave Germany some type of common law.[34]

While Hungary and Poland still maintained their independence,[35] the systemisation and professionalisation of the legal system in Germany encouraged a growth in legal learning at university law faculties. The existence of these faculties led to a more scientific attitude to law and, beyond accepting individual doctrines of Roman law, German scholars took a structured and analytical approach to the whole discipline. Hungarian and Polish kings sought to emulate their Germanic (and European counterparts) and themselves founded universities and law faculties.[36] The influence of academics at universities in the Empire greatly helped to propagate the German approach to Roman law through discourse and exchange with their colleagues in Poland and Hungary:[37] where scholars had once travelled to Bologna and Paris, they now travelled in much greater numbers to Krakow and Vienna for their education, due to financial reasons as much as convenience.[38] This reinforced a certain stronger Central European identity among faculties.

The arrival of Roman law, the *ius civile*, was later in Poland than in Hungary: the Poles rejected it in the 13th and 14th centuries for political reasons springing from the constant conflicts with the Teutonic Knights (although canon law was fully accepted). Only under the influence of natural law in the 16th century could the Poles take a more favourable attitude to a system they associated with a hostile Holy Roman Empire.[39]

c. Nineteenth and early twentieth centuries

With their loss of independence, both Hungary and Poland came to be largely dominated by the two emergent Germanic powers, Austria and Prussia (post-1870, the core of the German Empire). Legal development in the areas now covered by both Central European states was therefore heavily influenced by those in Austria and Prussia/Germany, most especially in the later nineteenth century when Hungary regained some semblance of autonomy and after 1918 with Poland's reconstructed independence.

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[33] W. Kunkel, "The reception of Roman law in Germany: an interpretation," in G. Strauss (ed.), *Pre-Reformation Germany*, Macmillan, London (1972), 263-281; Robinson, Fergus & Gordon (1994), chap. 11, at 188-197.

[34] P. Vinogradoff, *Roman Law in Medieval Europe*, Clarendon Press, Oxford (1929), chap. 5.

[35] Hungary effectively lost hers in 1526 after defeat by the Ottoman Turks at the battle of Mohács and Poland's first partition occurred in 1772, followed by the two further divisions of the country by Austria, Prussia and Russia in 1793 and 1795.

[36] Kraków in 1364 and Pécs in 1367. For the beginnings of Hungarian higher education, see A. Csizmadia, *A pécsi egyetem a középkorban* [*The University of Pécs in the Middle Ages*], 40 Studia Iuridica Auctoritate Universitatis Pécs Publicata, Tankönyvkiadó, Budapest (1965).

[37] Mezey (2004), at 46-54.

[38] Hamza (2007), at 59.

[39] Robinson, Fergus & Gordon (1994), chap. 7, at 106.

The Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch* or "ABGB") of 1811[40] had an effect in many parts of the non German-speaking parts of the Austrian Empire as the nineteenth century progressed. Although it was in force in Hungary[41] for only a few years – from 1853 to 1861 –, even after the collapse of the Austro-Hungarian Monarchy in 1918, the ABGB held on tenaciously in that part of Poland which had been part of the Austrian side of the Dual Monarchy.[42] Indeed, it was only after the Second World War that the ABGB was replaced in 1964 by a new socialist civil code in Poland.[43]

The German Civil Code (*Bürgerliches Gesetzbuch* or "BGB") of 1900[44] and German law generally enjoyed greater prestige in Hungary. In 1861, Hungary repealed the Austrian ABGB after having achieved a certain degree of independence within the Empire (confirmed in the 1867 Compromise). Hungarian courts thereafter relied increasingly on German law, in addition to old Hungarian customary law and principles of Austrian law.[45] German law also provided the basis for a series of statutes on commercial law and civil procedure: Hungarian commercial and company law being originally regulated in the 1875 Commercial Code[46] which corresponded for the most part with the main principles of German law.[47]

Several drafts for a Hungarian Civil Code were based on German law and, although they never actually became law, the domestic courts treated them as if they had been enacted.[48]

d. The interwar period 1920-1940

During this period, the 1875 Hungarian Commercial Code was itself supplemented in 1930 by an Act on Limited Liability Companies[49] which again, implemented into domestic law the main German rules on such companies: the provisions of these two legal instruments were only finally repealed – almost without exception[50] – by the new Civil Code of 1959.[51]

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[40] K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 2nd ed., Clarendon Press, Oxford (1987), Vol. 1, chap. 13, 163ff.

[41] Mezey (2004), at 132.

[42] Zweigert & Kötz (1987), at 172.

[43] Dz.U. 1964, No. 16, Item 93.

[44] H. Coing, "Erfahrungen mit einer bürgerlich-rechtlichen Kodifikation in Deutschland" (1982) 81 Zvgl. RW 1; M. John, *Politics and the Law in Late Nineteenth Century Germany. The Origins of the Civil Code*, OUP, Oxford (1989); Zweigert & Kötz (1987), chap. 12, 149ff.

[45] Mezey (2004), at 136-141.

[46] 1875: XXXVII.t.cz.: *Corpus Juris Hungarici. Magyar törvénytár 1875-1876*, 120-207.

[47] E. Heymann, *Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn*, Mohr, Tübingen (1917).

[48] Gy. Eörsi, "Richterrecht und Gesetzesrecht in Ungarn" (1966) 30 RabelsZ 117; and Mezey (2004), at 169-172.

[49] 1930: V.t.-c.: *Corpus Juris Hungarici. Magyar törvénytár 1930*, 118-172.

[50] L. Vékás, "Privatrecht und Wirtschaftsverfassung in Ungarn," in P. Schlechtriem (ed.), *Privatrecht und Wirtschaftsverfassung*, Nomos Verlag, Baden-Baden (1994), 43ff.

[51] Act IV of 1959: MK 1959/82.

In addition, the Hungarians enacted their first law in the field of competition[52] through the 1923 Act on Unfair Competition[53] which closely adhered to the principles and provisions of the German Competition Act of 1923[54] (although the impetus for such development originated in the latter part of the nineteenth century in Austria[55]).

Poland returned to existence in 1918 and although the principal influence was originally Austrian law,[56] subsequent legislation and drafts of private law statutes paid attention to German law.[57] The 1933 Polish Code of Obligations was considerably influenced by the BGB and the ABGB but also by Swiss and to a lesser extent French civil law.[58] Further the structure of the 1934 Polish Commercial Code[59] as well as numerous provisions were strongly oriented towards the 1897 German Commercial Code and – regarding the provisions on limited liability companies that were also included – on the 1892 German Act on Limited Liability Companies.[60] The supplementary regulation of the companies register, likewise closely related to German law, entered into force at the same time as the new Polish Code on Obligations.[61]

With few exceptions, these rules were repealed by the 1964 Polish Civil Code[62] although this Code (which maintained the unity of civil law during the Communist period) deviated less from the German civil law tradition than was the case with, e.g., in Czechoslovakia.[63]

In the interwar period, Poland also adopted its first Act against Unfair Competition in 1926[64] which, at that time, was modelled on the corresponding German and French laws. The

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[52] I. Vörös, "Das neue Wettbewerbsgesetz in Ungarn," in F.-K. Beier, E.-M. Bastian & A. Kur (eds.), *Wettbewerbsrecht und Verbraucherschutz in Mittel- und Osteuropa*, Carl Heymanns Verlag, Köln, Berlin, Bonn and München (1992), 160ff.

[53] 1923: V.t.-c.: *Corpus Juris Hungarici. Magyar törvénytár 1923*, 20-37.

[54] D.J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, OUP, Oxford (1998), at 69-114.

[55] In Austria, a group of scholars and administrators articulated the idea of using law to encourage economic growth and competitiveness, reduce antagonisms between workers and owners and among regional ethnic groups. It would also have given the administrative elite a voice in economic development without giving them excessive opportunities to interfere with business decision-making. The proposed legislation was discussed and almost enacted, but political turmoil within the Monarchy in 1897 prevented its enactment: D.J. Gerber, "The Origins of the European Competition Law Tradition in Fin-de-Siècle Austria, (1992) 36 Am. Jo. Leg. Hist. 405.

[56] F. Korkisch, "Die Entstehung des österreichischen Allgemeinen Bürgerlichen Gesetzbuches" (1953) 18 RabelsZ 263.

[57] F. Korkisch, "Das Privatrecht Ost-Mitteleuropas in rechtsvergleichende Sicht" (1958) 23 RabelsZ 201.

[58] E. Gralla, "Kauf und Eigentumsübertragung im polnischen ZGB (Text mit Einführung)" 1995/2 WiRO 59.

[59] Dz. U. 1934, No. 57, Item 502, as variously amended.

[60] RGBl. 1892, I, 477, last amended by Gesetz vom 31 Juli 2009: BGBl. 2009, I, 2509.

[61] Dz. U. 1934, No. 57, Item 503. E. Gralla, *Gesellschaftsrecht in Polen: Eine Einführung mit vergleichenden Tabellen*, Verlag Jehle Rehm, München (1994), 1ff.

[62] Dz. U. 1964, No. 16, Item 93.

[63] P. Hajn, "Die Entwicklung des Zivilsrechts in der Tschechischen Republik," in P. Schlechtriem (ed.), *Privatrecht und Wirtschaftsverfassung*, Nomos Verlag, Baden-Baden (1994), 27ff.

[64] Dz. U. 1930, No. 56, Item 467.

Polish law mainly served to protect competitors and provided only indirect protection for the consumer in its criminal provisions, e.g., through provisions relating to misleading trade names.[65]

This brief presentation of the impact of German law models (and, to a lesser extent, Austrian ones) on the civil and commercial legal fields in Poland and Hungary during the Middle Ages as well as the nineteenth to mid-twentieth centuries is merely exemplary of the historical and legal cultural affinities between these areas which continue to influence legal developments down to the present day. Such influence would not have been sustained without an openness to language and academic intercourse.

3. Linguistic ability and intellectual stimulus

In the previous section, mention has already been made of the direct link between, on the one hand, language knowledge and intellectual stimulus and, on the other hand, the impact of Austro-German legal models in Central Europe.

Even though Latin remained the language of learned intercourse across Europe long after the Reformation of the sixteenth century and Roman law the basis of much continental law,[66] it was the influence of academics at universities in the Holy Roman Empire who propagated the Austro-German approach to Roman law and its study throughout Central Europe. The learning and approach to legal studies generally, even beyond Roman law, was affirmed by the founding of university law faculties in Central Europe, staffed by both natives and scholars from the Empire whose exchange, studies and discourse were moulded by the Austro-German model.

When German replaced Latin as the legal language of the Habsburg Empire in 1784, it was merely confirming *ex post facto* a change in usage that had already occurred among lawyers and academics.[67] German effectively became the lingua franca for practitioners and professors alike throughout the Austro-Hungarian Monarchy, the German Empire as well as the Baltic territories (due to the presence of large numbers of Germans) and the Balkans. In fact, for example, even though Hungarian became the official language of the Kingdom after the 1867 Compromise with Habsburg Austria, the language of the law, its exposition, argumentation and composition remained grounded in German.[68]

The impact of Soviet influence after 1944/45 and the ubiquitous compulsory Russian-language learning requirement had comparatively little impact in Hungary and Poland in the legal-language sphere when compared with the situations in Bulgaria, the Baltic States, even Czechoslovakia. Nevertheless, Pandectist influences in various civil law codifications could still be observed in Central Europe.[69]

The continued teaching of Roman law, as part of legal history, may also have played a pivotal role in this.[70] With the post-war reconstruction and the revival of academic studies, an avid interest in "bourgeois laws" in Western Europe or America would have been a sure way to

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[65] R. Skubisz, "Wettbewerbsrecht in Polen" in Beier, Bastian & Kur (eds.), *Wettbewerbsrecht und Verbraucherschutz in Mittel- und Osteuropa*, Carl Heymanns Verlag, Köln, Berlin, Bonn and München (1992), 122, at 124ff.

[66] H. Coing, "Roman law as the *ius commune* of the continent" (1973) 89 LQR 505.

[67] K. Göczi, "Die deutsch-ungarische Rechtsverbindungen von der frühen Neuzeit bis in die Gegenwart : Wissenstransfer, Kodifikationen und Liaisonen" [2000] OER 216.

[68] Dupré (2003), at 9.

[69] Hamza (2007), at 76-79 and at 85-88.

[70] Hamza (2007), at 53-54 and at 64.

loss of position and possible persecution. Instead, accepting the "socialist reality" while exploring the legal past was permitted, if only to reveal "bourgeois" shortcomings and "socialist" progress. In order to visit the best law faculties in Europe in the fields of Roman law and legal history – located in Austria and West Germany – it was necessary to understand German.

Moreover, since foreign trade outside COMECON assumed an increasing importance to the Central European states in the 1960s and the main trading partners for the European communist states were Austria and West Germany (although the latter was not formally recognised until 1973), German reassumed its position as the lingua franca of business and law (if it had ever really lost that position). Only détente and further relaxation allowed the teaching of English, French, etc., to be considered as being useful beyond the requirements of the State.

At the time of the change of system in the late 1980s, then, the majority of Hungarian and Polish legal academics and practitioners who spoke a "Western" language fluently or well spoke German. As a result, when those countries and others in Central and Eastern Europe started to re-orient themselves to Western laws and economics, the mediating legal language for most was German. The German legal model, in particular, therefore enjoyed an in-built advantage over other systems and were profoundly influential in the writing of laws for the new democracies and market economies in Hungary and Poland. Such linguistic skills may be regarded as pivotal in the domestic reception of other countries' laws.[71]

The reinforcement of the position of German law in Central European constitutional courts is reflected in the distinctive nature of the composition of the new benches in these institutions:[72] in post-authoritarian systems where constitutional review is concentrated and abstract, ordinary judges had no special claim to authority. Moreover, because of their authoritarian past, judges in these systems were at least initially distrusted as arbiters of constitutional and democratic values. Thus, in all post-communist systems, law professors tended to occupy many of the seats on the newly-created constitutional courts – untainted by an authoritarian past – together with some judges. In fact this has remained generally the practice until the present day in Hungary and Poland where a majority of academics occupy the bench in constitutional courts. Moreover, as deliberative institutions, professors are perhaps better suited to the atmosphere of argumentative, academic discourse that characterises the formulation of judgements as well as dissenting and concurring opinions.

4. Constitution drafting and constitutional jurisdiction formation in the post-Communist era

With the change of system in Central and Eastern Europe, led by Poland and Hungary, the nations seeking to break with their Communist past looked to the Western world for models to emulate. Such reorientation included the search for viable constitutional models that could be successfully adapted to domestic conditions and requirements. Pre-war constitutional systems in Central and Eastern Europe provided a relative paucity of models and experience upon which to construct a new democratic future.

As a result, constitutional (re-) construction started from scratch, engendering the "complete redefinition of terms of political life and of the conditions under which societies are

[71] A. Watson, *Legal Transplants: An Approach to Comparative Law*, Scottish University Press, Edinburgh (1974), at 92-93.

[72] J. Ferejohn & P. Pasquino, "Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice," in W. Sadurski (ed.), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, Kluwer Law International, The Hague (2002), chap. 1, 21, at 31-32.

governed."[73] Indeed, the pull of the old democracies – especially those in Western Europe – was particularly strong and represented for the then emerging democracies workable practices, clear signposts on the road back to Europe. Jens Hesse stated:[74]

> It follows that what is of most immediate interest in the democratizing countries is the political and constitutional reality in Western democracies – the success of systems of law and political institutions in ensuring democratic stability and effective government, and thereby maintaining the framework for economic prosperity.

a. Influences on the new constitutions

Ludwikowski[75] has discussed the very special ambivalent approach to constitutional drafting in Central Europe. The drafters of these new constitutions had no doubts of their needing to borrow from the West but they wanted to borrow in their own way: on the one hand, drafters faced American and West European universalistic constitutionalism[76] with its appeal for the reception of well-tested liberal values; but, on the other hand, such drafters listened to Western scholars suggesting remedies for their drafting problems could be found in domestic traditions rather than in Enlightenment America.[77]

The new constitutions came to enjoy mixed characters, "blending together features produced by different tastes, cultures, and styles."[78] Such blending and mixing, as Ludwikowski noted,[79] became a significant feature of the constitutional culture in Central Europe and stemmed both from public attitudes and emotions and from aggressive Western lecturing about the universal values of liberal constitutionalism. Such processes gave the new Central European constitutions rather eclectic characters. As regards the use of contemporary models, McWhinney noted:[80] "The 1958 constitution of the Fifth French Republic and the Bonn Constitution of 1949 represent, together with the British constitutional system and the American constitution, the

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[73] J. Jens Hesse, "Constitutional Policy and Change in Europe: The Nature and Extent of the Challenges," in J. Jens Hesse & N. Johnson (eds.), *Constitutional Policy and Change in Europe*, OUP, Oxford (1995), chap. 1, 3, at 4-5.

[74] Jens Hesse (1995), at 5.

[75] R. Ludwikowski, "Constitutional Culture of the New East-Central European Democracies," in M. Wyrzykowski (ed.), *Constitutional Cultures*, Institute of Public Affairs, Warsaw (2000), 55, at 61.

[76] S. Katz, "Constitutionalization in East-Central Europe: Some Negative Lessons from the American Experience," in V. Jackson & M. Tushnet (eds.), *Comparative Constitutional Law*, Foundation Press, New York (1999), at 286.

[77] Brzezinski also notes that in Central European countries like Poland and Hungary, there was a tendency to look to the pre-Communist constitutions as sources for inspiration. Such earlier documents and practices could serve, *inter alia*, as (i) focal points, allowing the constitution-makers to single out the most salient among the innumerable models that could be adopted; (ii) a source of experience that was particularly relevant because of the sociological continuity with the past; and (iii) a source of symbolism, to affirm the continuity of the nation over time: M. Brzezinski, *The Struggle for Constitutionalism in Poland*, Macmillan Press Ltd., Basingstoke and London (1998), at 29.

[78] Ludwikowski (2000), at 62.

[79] Ludwikowski (2000), at 62.

[80] E. McWhinney, *Constitution-making: Principles, Process, Practice*, University of Toronto Press, Toronto, Buffalo and London (1981), at 6.

principal alternative models or stereotypes for democratic constitution-making at the present time."

Very early on in the process of drafting new constitutions, the Anglo-Saxon models of "ingrained constitutional democracies"[81] – while regarded as inspirational (e.g., in respect of British parliamentary democracy and the sovereignty of Parliament) and influential (e.g., the US approach to the rule of law, separation of powers and protection of constitutional rights) – were nevertheless regarded as largely unsuitable because of their unique characters.[82] Instead, various continental models were utilised. As Paczolay stated in respect of the amendments to the Hungarian Constitution:[83]

> The constitutions of several different Western democracies have had an indelible impact on the current text of the Hungarian Constitution. The objective of the Constitution was to create a document in conformity with European constitutional standards, in order to establish a framework for "Europeanism," or thinking analogous to the ideals of the post-Franco Spanish Constitution…. For example, the influence of the German *Grundgesetz* (basic law) and of the Italian Constitution was very strong, and from among of more recent democracies those of Spain and Portugal had a clear impact.

b. Strengths of the German and French models

In respect of Poland and Hungary, constitution-makers felt the pull of the constitutions of France (because of historic cross-pollenisation) and Germany (because of what was perceived as the most successful example of a formerly authoritarian European polity).[84] Both these models had been promulgated in part to prevent the re-emergence of Fascist dictatorship and authoritarian governance of the Second World War era.[85]

Before the adoption of a completely new constitution in 1997,[86] Poland was governed by the 1952 Constitution as amended substantially in 1989[87] and in 1992 by the Little (or Small) Constitution on the separation of powers.[88] At the general political level there was a conflict

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[81] U. Preuss, "Patterns of Constitutional Evolution and Change in Eastern Europe," in Hesse & Johnson (eds.) (1995), chap. 5, 95, at 102.

[82] For the United Kingdom, British constitutional law was predominantly concerned with the problems of sovereignty, legitimacy, and accountability, and lacked – until comparatively recently – a bill of rights: V. Bogdanor, "Britain: The Political Constitution," in V. Bogdanor (ed.), *Constitutions in Democratic Politics*, Gower, Aldershot (1988), 53ff. On the limited impact of American constitutional institutions in general, see K. von Beyme, *America as a Model*, St. Martin's Press, New York (1987).

[83] P. Paczolay, "The New Hungarian Constitutional State: Challenges and Perspectives," in A. Dick Howard (ed.), *Constitution Making in Eastern Europe*, Woodrow Wilson Center Press, Washington, D.C. (1993), chap. 2, 21, at 36. Footnote omitted.

[84] Brzezinski (1998), at 29.

[85] Brzezinski (1998), at 211.

[86] W. Osiatynski, "A Brief History of the Constitution," (1997) 6 EECR, Nos. 2-3, 66.

[87] M. Brzezinski & L. Garlicki, "Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?" (1995) 31 Stanford Jo. Intl. Law 13, at 31; M. Exner, "Recent Constitutional Developments in Poland" (1991) 42 ÖZöRV 341; W. Sokolewicz "The April 1989 Change of the Constitution" DPC/PCL 1988 no. 3/4 (79/80), at 8-17.

[88] Constitutional Act of 17 October 1992 on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Government: *Dziennik Ustaw Rzeczpospolitej Polskiej* [Joumal of Laws of

between which model to adopt:[89] the German parliamentary system, with a relatively weak president acting as an arbiter of executive power rather than a chief executive (which model was propounded by the *Sejm*, the lower chamber of the Polish parliament); or the French semi-presidential form of government, vesting the president with full government appointment powers (which model was proposed by the Senate).[90]

The framework of government in the 1992 Small Constitution found its basic model in the German Constitution although it gave more powers to the President than the 1949 Basic Law. Still ambiguities continued to surround such conflict was only truly resolved with the coming into force of the 1997 with its (French Fifth Republic-inspired) semi-presidential system of governance.[91] The Polish system of governance, consequently a mixed system, finds its basis through a predominant French influence with German elements.

The predominance of the German Constitution is ensured, however, in other areas, e.g., the fundamental principles such as that of the *Rechtsstaat*. Naturally, no *Rechtsstaat* clause existed in the 1952 Constitution but was inserted into it by a 1989 amendment[92] under Art. 1 to read that Poland was "a democratic state under the rule of law which implements the principles of social justice." The 1997 Constitution repeated this phrasing in Art. 2. These provisions were modelled on the *Rechtsstaat* clause of the German Constitution.[93] As will be examined in the Chapter on Poland,[94] the *Rechtsstaat* implies similar elements according to German and Polish doctrine: human dignity, the supremacy of the Constitution and of the law, the separation of powers, judicial protection, acquired rights and legal certainty.[95]

The situation in Hungary is overwhelmingly tilted in favour of the German model, adapted to domestic conditions.[96] The 1949 Hungarian Constitution[97] was completely amended

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the Republic of Poland], 23 November 1992, no.84, item 426. R. Ludwikowski, "Constitution Making in the Countries of Former Soviet Dominance: Current Development" (1993) 23 Ga. Jo. Intl. & Comp. Law 155, at 219-221.

[89] A. Rapaczynski, "Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament" (1992) 58 U. Chi. L. Rev. 595.

[90] The Polish Constitutional drafts prepared in the early years of the transition were published in *Projekty Kostytucyne 1989-1991* [*Constitutional Drafts 1989-1991*], Wydawnictwo Sejmowe, Warsaw (1992).

[91] L. Garlicki, "The Presidency in the New Polish Constitution," (1997) 6 EECR, Nos. 2-3, 81.

[92] Ustawa z dnia 29 grudnia 1989 o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej [Act of 29 December 1989, Amending the Constitution of the Polish People's Republic] Dz. U. 1989, Issue 75, Item 444. See M. Brzezinski, "Constitutional Heritage and Renewal: The Case of Poland" (1991) 77 Va. L. Rev. 49, at 103-110.

[93] Brzezinski (1998), at 166.

[94] See below at Chapter Five, point B.1.

[95] J. Działocha, "Der Rechtsstaat unter den Bedingungen einer grundlegenden Umformung des Rechtssystems, dargestellt am Beispiel Polen" (1993) 39 OER 1, at 5ff.

[96] F. Majoros, "Ungarns neue Verfassungsordnung: Die Genese einer neuen demokratischen Republik nach westlichen Massstäben," Part I, 1990/2 OER 85; and Part II, 1990/3 OER 161.

[97] For the original see Act XX of 1949 on the Constitution of the Hungarian People's Republic, MK 1949/174, at 1355. This amounted to the first formal written constitution for Hungary in over one thousand years of history, before which enactment its constitution (like that of the United Kingdom) was an amalgam of law, custom and convention dating back centuries.

from 1989 onwards[98] but technically remains in force. In parliamentary matters, the role and powers of the President and in most respects of governance, Hungary closely followed the provisions and experience under the German Constitution.[99]

Hungary,[100] like Poland, enshrined the *Rechtsstaat* principle, in Art. 2 of the Constitution in a 1990 amendment[101] that states that Hungary is "a democratic state under the rule of law where all power belongs to the people exercising its sovereignty through its elected representatives as well as directly." The development of this provision by the Hungarian Constitutional Court – as will be subsequently referred to[102] – shows significant influence from German constitutional court practice, whether or not it was expressly acknowledged in decisions.[103]

c. German fundamental rights supreme

For the list of constitutionally guaranteed fundamental rights under the Polish and Hungarian Constitutions, both States used the Bill of Rights in the German Constitution – commencing with the inviolability of human dignity[104] in Art. 30 of the 1997 Constitution of Poland[105] and Art. 54(1) of the Constitution of Hungary.[106]

Moreover, the constitutional drafters in Central Europe went beyond the stated rights in the German Constitution and looked for further inspiration in the decisions of the German Federal Constitutional Court ("FCC"). For example,[107] German Constitution Art. 2(1)[108] which protects a citizen's right to free development of their personality – when read in conjunction with the protection of human dignity secured under Art. 1(1) – protects a general personality right[109]

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[98] Starting with Act XXXI of 1989 on the Amendment of the Constitution: MK 1989/74. On the process of constitutional transformation, see I. Pogany, "Constitutional Reform in Central and Eastern Europe: Hungary's Transition to Democracy" (1993) 42 ICLQ 332.

[99] Paczolay (1993), at 36-39.

[100] Kokott (1999), at 99.

[101] Act XXIX of 1990 and Act XL of 1990, both on the Amendment of the Constitution: MK 1990/46 and MK 1990/59, respectively.

[102] See below at Chapter Four, point B.2.

[103] G. Halmai, "Democracy versus Constitutionalism? The Re-establishment of the Rule of Law in Hungary" in I. Grudzińska Gross, *Constitutionalism & Politics*, IV Bratislava Symposium 1993, Slovak Committee of the European Cultural Foundation, Bratislava (1994), 301.

[104] Kokott (1999), at 82.

[105] See generally, T. Diemer-Benedict, "Die Grundrechte in der neuen polnischen Verfassung" (1998) 58 ZaöRV 205.

[106] On this right, see generally, Dupré (2003).

[107] Kokott (1999), at 86-87.

[108] 1949 German Constitution, Art. 2(1): "Everyone has the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or against morality."

[109] H. Jarass, "Artikel 2," in H. Jarass & B. Pieroth (eds.), *Grundgesetz für die Bundesrepublik Deutschland*, 6th ed., C.H. Beck, München (2002), Rn. 1 and 25ff.

which must be balanced with the public's right to information.[110] According to the FCC,[111] the general personality right implies a basic right to "informational self-determination," i.e., a right to determine about the divulgence and transmission of one's personal data. Such right was expressly provided for by Hungarian Constitution Art. 59 and 1997 Polish Constitution Art. 51, and has since been interpreted by constitutional tribunals in Central Europe, generally following the lines set by the FCC.

Nevertheless, German constitutional law and practice were not the only inspirations for the human rights provisions in the Polish and Hungarian Constitutions.[112] With these two States, eager to join the Council of Europe,[113] the rights set out in the ECHR were also extremely influential – so much so that the new Bill of Rights in the Hungarian Constitution, to a great extent, is a translation of the freedoms guaranteed in the Convention.[114]

d. German model of constitutional adjudication also supreme

Among the most important provisions of the new constitutions were those concerned with the constitutional jurisdiction. In this respect, the model for nearly all former Communist States in Central and Eastern Europe[115] was the German one.

In its establishment, the Polish Constitutional Tribunal pre-dates the system change of the late 1980s/early 1990s: thus constitutional review of laws required reconciliation of various political and social inspirations with the leading role of the United Workers (Communist) Party, a basic feature of the then system but totally alien to systems where such review had originated.[116]

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[110] *Lebach*, 5 Juni 1973, 1 BvR 536/72: BVerfGE 35, 202.

[111] *Volkszählung*, 15 Dezember 1983, 1 BvR 209, 269, 362, 420, 440 and 484/83: BVerfGE 65, 1.

[112] See, generally, M. Wyrzykowski, "Recepcja w prawie publicznym: Tendencje rozwojowe konstytucjonalizmu w Europie Środkowej i Wschodniej [Reception in Public Law: The Tendencies of Development of Constitutionalsim in Central and Eastern Europe]" 1992/11 Państwo i Prawo 23.

[113] Poland became a member of the Council of Europe on 26 November 1991, signing the ECHR. On 2 October 1992, the *Sejm* (according to the then rules in force) expressed its approval through the adoption of a statute ratifying the Convention which statute was signed by the President of the Republic on 15 December 1992: although passed in October, the statute was not officially published until the next month: Dz. U. 1992, No. 85, Item 427, 1485. The instruments of ratification of the Convention were deposited on 19 January 1993: L. Garlicki, "Ratyfikacja Konwencij o ochronie praw czeowieka i podstawowych wolnośi" [Ratification of the Convention on the Protection of Human Rights and Fundamental Freedoms], *Biuletyn – Ekspertyzy i opinie prawne*, Kancelaria Sejmu, 1992, No. 1(4), at 32-35. Hungary signed the ECHR on 6 November 1990 and ratified it on 15 October 1992: it entered into domestic force through Act XXXI of 1993 (MK 1993/41).

[114] A. Drzemczewski, "Ensuring Compatibility of Domestic Law with the European Convention on Human Rights Prior to Ratification: The Hungarian Model" (1995) 16 HRLJ 241; L. Sólyóm, "The Interaction between the Case-Law of the European Court of Human Rights and the Protection of Freedom of Speech in Hungary," speech delivered at Conference, Autumn 1996, Strasbourg [copy on file with the author of the present work]; and A. Ádám, *Alkotmányi értékek és Alkotmánybíráskodás* [*Constitutional values and Constitutional jurisdiction*], Osiris Kiadó, Budapest (1998), chap. 3, at 89-99.

[115] With the exception of Estonia (and possibly Romania which – with its law and legal system based on the Napoleonic Code – is thus subject to strong French legal influences).

[116] J. Stembrowicz, "Trybunal Konstytucyjny," *Tygodnik Powszechny* 7 kwietnia 1985 ["Constitutional Tribunal," *Universal Weekly*, 7 April 1985], at 3, translated in *Polish News Bulletin*, 20 April 1985.

In the 1982 amendment to the 1952 Constitution,[117] Art. 33a introduced the institution of a constitutional tribunal[118] but this was not implemented until the passing of the 1985 Constitutional Tribunal Act.[119] The German constitutional court subsystem was the model for the Constitutional Tribunal's organisation, jurisdiction, and procedure: nevertheless, "these models had to be adapted to the specific realities of the Polish State."[120] Consequently the operation of the Constitutional Tribunal was initially circumscribed to ensure that its practice was congruent with, and not a challenge to, the concept of parliamentary (and Party) supremacy.[121] The Tribunal's powers were altered after the system changes in 1989 and 1990 but it was only with the 1997 Constitution and the 1997 Constitutional Tribunal Act[122] that the Polish Tribunal was invested with powers comparable to those exercised by its German counterpart.[123]

The drafters of the 1989 amendments to the Hungarian Constitution were minded to provide an independent institution, able to operate effectively in what was expected to be a system of political governance still dominated by the (ex-) Communist party after the first free elections in 1990.[124] A Constitutional Court, modelled on that of Germany and imbued with similar powers and jurisdiction,[125] was established under new Constitution Art. 32A and the 1989 Constitutional Court Act.[126]

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[117] L. Garlicki, "Reforma wymiaru sprawiedliwósci a kontrola konstytucyjnósci ustaw" [The Reform of the Justice System and the Constitutional Review of Laws]" (1982) 37 PiP 34.

[118] M. Brzezinski, "The Emergence of Judicial Review in Eastern Europe: The Case of Poland" (1993) 41 AJCL 153; R. Ludwikowski, "Judicial Review in the Socialist Legal System: Current Developments" (1988) 37 ICLQ 89, at 90; and J. Wroblewski "Trybunal Stanu i Trybunal Konstytucynjny-zwiazki instytucjonalne i problemy wspolne [Tribunal of State and Constitutional Tribunal, Institutional Connections and Common Problems]" (1986) 8 *Państwo i Prawo* 9.

[119] Ustawa z dnia 29 kwietnia 1985 o Trybunale Konstytucyjnym [Constitutional Tribunal Act of 29 April 1985], *Dziennik Ustaw,* Issue 22, Item 98, at 245 (1985). The procedure and operation of the Tribunal was governed by a separate Act: Uchwała Sejmu Rzeczypospolitej Ludowej z dnia 31 lipca 1985 w sprawie szczegółowego trybu postępowania przed Trybunałem Konstytucyjnym [Parliament Resolution of 31 July 1985 on the Special Mode of Proceedings Before the Constitutional Tribunal], *Dziennik Ustaw,* Issue 39, Item 184, at 493 (1985). For further discussion of the Constitutional Tribunal generally see, *e.g.,* W. Sokolewicz, "Kontrola konstytucynjości prawa w państwie socjalistycznym. Zagadnienie form organizacyjnyc [Review of Constitutionality of Law in a Socialist State. The problem of Organizational Forms]," in K. Działocha *et al.* (eds.), *Konstytucja w społeczeństwie obywatelskim: księga pamiątkowa ku czci Prof. Witolda Zakrzewskiego* [*The Constitution in a Civic Society Commemorative Homage to Prof. Witold Zakrzewski*], Krajowa Agencja Wydawnicza, Kraków, (1989), at 187ff.

[120] Interview with M. Wyrzykowski, Professor of Constitutional Law, University of Warsaw, on 23 May, in Warsaw, Poland referred to in Brzezinski (1998), at 142.

[121] Brzezinski (1998), at 155.

[122] Ustawa z dnia 1 sierpnia 1997 r. o Trybunale Konstytucyjnym [Act of 1 August 1997 on the Constitutional Tribunal]: Dz. U. 1997, No.102, Item 643.

[123] In contradistinction with the 1985 Act, the 1997 Act provided that (a) decisions of the Constitutional Tribunal were final (from September 1999, in order words, two years after the entry into force of the 1997 Constitution: Art. 239); (b) the Tribunal was empowered to review treaties *vis-à-vis* the Constitution; and (c) the institution of constitutional complaint was introduced. Nevertheless, the Constitutional Tribunal was deprived of the right under the 1985 Act to deliver generally binding interpretations of statutes.

[124] In the process of constitutional reform, the independence of the Constitutional Court came to assume great significance based mainly on opposition (*i.e.*, non-communist/democratic groups') fears that the "key positions in the political system would remain in the hands of the Communists": P. Paczolay, "Judicial Review of the Compensation Law in Hungary" (1992) 13 Mich. Jo. Intl. Law 806, at 807.

5. Resultant influences on constitutional judicial practice

Having considered the way in which the German model exercised great influence over those creating the new constitutional orders in Poland and Hungary – exceptionally so in respect of the constitutional jurisdiction –, it is necessary to look a little beyond the provisions themselves and rather examine briefly the judicial practice.

In this respect, the influence of German constitutional law did not stop with the enactment of the new Constitutions and the (re-) foundation of the constitutional tribunals. Since the fundamental bills of rights were so similar to the German, as were the powers and jurisdictions of the constitutional courts, it would have been somewhat disingenuous of the Polish and Hungarian constitutional judiciary to have simply ignored the practice of their German colleagues in these areas.[127]

Dupré has already fully examined the influence of the FCC's case-law in the field of human dignity on the decisions of the Hungarian Constitutional Court.[128] Similar effects have already been noted in this Chapter in both Hungary and Poland on the right to informational self-determination as well as the contents of the principle of the *Rechtsstaat*.[129]

These instances of application, influence or adaptation of particularly German constitutional cases[130] on decisions by the Polish Constitutional Tribunal and the Hungarian Constitutional Court are not isolated or limited examples. Rather they represent a broad tendency, on the part of the Central European constitutional judiciary, to look to the well-established practice of the FCC – either expressly, or by reference to a phrase such as "general European principles" (which effectively mean the German case-law),[131] or by implication[132] – as the most utilisable precedents on which to formulate their own rulings in the newly-emerged democratic orders. The premium placed on German constitutional rulings by the Hungarian[133] and Polish[134]

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[125] In fact even broader jurisdiction with the *actio popularis*, *viz.* that every citizen has the right to challenge the constitutionality of legal norms before the Court.

[126] Act XXXII of 1989 on the Constitutional Court: MK 1989/77, at 1283. L. Sólyom, "Aufbau und dogmatische Fundierung der ungarischen Verfassungsgerichtsbarkeit" (2000) 46 OER 230.

[127] L. Sólyom, "The Hungarian Constitutional Court and Social Change" (1994) 19 Yale Jo. Intl. L 223, in which the author describes how the court's efforts to establish itself as a "countermajoritarian" institution committed to the rule of law, self-consciously drew on extra-national legal sources in its work.

[128] Dupré (2003).

[129] See above at Chapter Two, points B.4.-B.5.

[130] But see also the impact of the jurisprudence of the ECtHR on the constitutional tribunals in Hungary (Sólyom (1996) and Ádám (1998), at 89-99) and Poland (L. Leszczyński, "Application of the European Convention in the Polish Courts: An Impact on the Judicial Argumentation," (1996) 2 EEHRR 19).

[131] C. Dupré, "Importing German Law: the Interpretation of the Right to Human Dignity by the Hungarian Constitutional Court" (2000) 46 OER 144.

[132] In the area of environmental protection, the Hungarian Constitutional Court used the provisions of the 1972 Stockholm and 1992 Rio Declarations without express reference to them: A. Tatham, "International Environmental Treaties before Hungarian Courts," in M. Anderson & P. Galizzi (eds.), *International Environmental Law in National Courts*, British Institute of International and Comparative Law, London (2002), chap. 7, 127, at 139-140.

[133] J. Seitzer, "Experimental Constitutionalism: A Comparative Analysis of The Institutional Bases of Rights Enforcement in Post-Communist Hungary," in S.J. Kenney, W.M. Reisinger & J.C. Reitz, *Constitutional Dialogues in Comparative Perspective*, Palgrave Macmillan, Basingstoke (1999), chap. 3, 42-61.

constitutional judiciary is high, due to the historical, legal and socio-cultural influences already described more fully earlier on in this Chapter.

C. CONCLUSION

In summary, then, it was an almost inescapable phenomenon that the Hungarian and Polish constitutional tribunals would be susceptible to the influence of their German counterpart in formulating their own approaches to EU law after (and, as will be examined, even before) accession to the Union. It would be heretical of the present author to determine that the Hungarian and Polish courts were predestined to acquiesce to German doctrinal orthodoxy in respect of their domestic constitutional court system.[135] And yet the weight of historic and legal cultural affinities, as well as geographic proximity, linguistic knowledge, intellectual interchange, formation of post-communist constitutions and constitutional jurisdictions, patterns of judicial thinking – all have combined to produce an ineluctable impact on the approach of constitutional judges in Central Europe. In this process, the constitutional judges have not shied away from admittance of these influences: indeed – as will be seen – they have used the reasoning of the FCC in their own reasoning as well as making explicit reference to relevant case-law in seeking to bolster their own decision-making.

This active engagement in constitutional migration and horizontal transjudicial communication (already apparent in the period after the change of regime in 1989/90) has necessarily provided a fertile ground for bringing forth the thesis that, given such judicial interchange between national jurisdictions, a similar impact would be felt in the Hungarian and Polish constitutional tribunals in developing their particular understanding of the position and role of EU law in their own systems.

In short, based on the propositions in this Chapter, it is therefore the contention of the present author that there is a strong probability that the Hungarian and Polish constitutional judicial organs – in addressing their respective national positions vis-à-vis EU law – would be heavily influenced by the established model of Germany.

In approaching this issue – the focus of the present research work – it will be necessary in Chapter Three to present the German model in dealing with the constitutional implications of EU membership, before embarking upon a more thorough examination (in succeeding Chapters) of the possible application of this model in the constitutional judicial practice of the recently-acceded States of Hungary and Poland.

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[134] For example, the Polish Constitutional Tribunal in *Dec. Kp 3/08* (18 February 2009: OTK ZU 2009/2/A, Item 9, at para. III.6.1) in dealing with the requirement of precision in drafting legislation, noted that the term "specificity of law" derived its origins from the German doctrine and was an element of the concept of a state under the rule of law.

[135] With unreserved apologies to the sometime lawyer, John Calvin, who took the doctrine of predestination (previously and variously propounded by St. Augustine, Luther and Zwingli) to its strictly logical conclusion: G. Harkness, *John Calvin. The Man and His Ethics*, Abingdon Press, New York (NY) (1957), at 72-77.