JUDICIAL INDEPENDENCE AND ITS GUARANTEES BEYOND THE NATION STATE – SOME RECENT HUNGARIAN EXPERIENCE

*Attila Vincze**

Abstract

The governing coalition in Hungary backed by a supermajority has amended the Constitution during the last several years and had even interfered with such cornerstones of constitutional thinking like the judicial independence. As this happened at constitutional level even the Constitutional Court could not provide a remedy, and therefore the role of international fori such as that of the European Court of Justice and that of the European Court of Human Rights has become utmost important. The present paper portrays the constitutional developments in Hungary in a nutshell and discusses how judicial independence can be addressed at the international level.

I Introduction

AS THE right-wing coalition received a two-thirds majority in 2010 general elections in Hungary this majority was large enough to amend the Constitution. As a result of this electoral success a new Constitution – a so-called fundamental law – was adopted in 2011 which has been heavily criticized as it was feared that it undermines classical values of constitutionalism.[1]

Many issues were discussed in this respect: data protection,[2] media legislation, the status of the churches,[3] the powers and composition of the constitutional court[4] and judicial independence which will be examined in the following sections.

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* Reader in public and European law and grant holder of the National Excellence Program, Andrassy University Budapest. E mail:attila.vincze@andrassyuni.hu.This research was realized in the frames of TÁMOP 4.2.4. A/1-11-1-2012-0001 "National Excellence Program – Elaborating and operating an inland student and researcher personal support system" The project was subsidized by the European Union and co-financed by the European Social Fund.

1 See: A Jakab & P Sonnevend, "Kontinuität mit Mängeln: Das neue ungarische Grundgesetz *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 79-102 (2012); A Vincze, "The New Hungarian Constitution: Redrafting, Rebranding or Revolution?" *Vienna Journal on International Constitutional Law* 88-109 (2012); A Vincze, "Die neue Verfassung Ungarns" *Zeitschrift für Staats- un Europawissenschaften* 110-129 (2004); A Vincze & M Varju, "Hungary - The New Basic Law *European Public Law* 436-457(2012).2 ECJ Case C-288/12, *Commission* v. *Hungary*

3 ECtHR *Magyar Keresztény Mennonita Egyház* v. *Hungary* Application nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, Apr. 8, 2014.

4 A Vincze: 'Wrestling With Constitutionalism: The Supermajority and the Hungarian Constitutional Court' *Vienna Journal on International Constitutional Law* 2014, 86-97.

The constitutional amendments of 2011 forced many judges to retire prematurely and terminated the Office of the President and that of the Vice-President of the Supreme Court. As is discussed subsequently, the Hungarian Constitutional Court provided only very limited judicial protection in these cases, and, therefore, the role of the international or supranational judicial fori such as that of the European Court of Justice and that of the European Court of Human Rights (ECHR) became overwhelmingly important. After sketching the factual background, (1) the decisions of the Hungarian (2) and international fori will be portrayed. These cases are also capable of demonstrating the very complex interplay between national and supra-national legal remedies, a system called as multi-level constitutionalism.[5] This concept suggests that a European constitution is the result of a complex interplay of national and European constitutional levels – encompassing not only the law of the European Union (EU) but also that of ECHR.[6] The theory also suggests that European constitutional adjudication should be conceptualised as a co-operation between the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR) and national supreme or constitutional courts. As a conclusion, therefore, the functioning of the European multi-level constitutionalism and the role of international fori in guaranteeing judicial independence will be discussed

II Factual Background

Judicial independence is undisputedly a cornerstone of classical constitutional thinking and as such belongs to the very essential values on which the EU was founded on according to article 2 Treaty on Eropean Union (TEU).[7] The Hungarian Parliament in its constitutional making capacity interfered with this independence in many ways.

The new fundamental law has renamed the Supreme Court to the former historical name of Kúria (Curia). The institution nonetheless has basically the same functions as earlier at apex of the judiciary. The Venice Commission – an advisory body of the

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5 See Ingolf Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?" 36 *Common Market Law Review* 703-750 (1999); G della Canane, "Is European Constitutionalism Really "Multilevel?" 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 283-317 (2010).

6 P Birkinshaw, "Does European Public Law Exist?" *Queen's Papers on Europeanisation* No 9/ 2001. *Available at*: http://www.qub.ac.uk/schools/SchoolofPolitics International StudiesandPhilosophy/FileStore/EuropeanisationFiles/Filetoupload,38429,en.pdf (last visited on June 18, 2014).

7 C Kombos, *The Esoteric Dimension of Constitutional Pluralism* in *The European Union Legal Order after Lisbon* 307 (Kluwer 2010). Cf. among others the "European Charter on the Statute for Judges of 8-10 July 1998".

Council of Europe[8] – asked therefore the completely justified question in 2011 as to whether this change of the name would result in a replacement of the Supreme Court's president by a new president of the "Curia"?[9] Although promises were made that should not happen the worries seemed to be unfortunately justified.[10] The Transitional Provisions of the Fundamental Law of Hungary –an Act governing the issues necessary for the introduction of the new constitution but some others of substantial nature as well – provided that the mandates of the President of the Supreme Court would be terminated upon the entry into force of the fundamental law. As a result of the constitutional amendments, the mandate of the President of the Supreme Court was indeed terminated on January 1, 2012, three and a half years before its normal date of expiry and a new President of the Kúria was elected.

The constitutional changes did not leave the other judges unaffected either. Until December 31, 2011, the applicable law on the legal status and remuneration of judges essentially allowed judges to remain in office until the age of 70. The new fundamental law of Hungary, however, provides, in article 26(2), that 'with the exception of the President of the Kúria, judges may remain in office until the general retirement age'. The transitional provisions of the fundamental law provided those judges over the general age of retirement – 62 in 2012 – to retire. In accordance with these constitutional rules, a new law on the status of judges was adopted providing that a judge must retire if he 'has reached the age-limit for retirement applicable to him (…) with the exception of the President of the Kúria'. The same rules were applicable for prosecutors, as well. As a result of the new legislation 236 judges, 100 prosecutors and 60 notaries had to retire in 2012 which were 10, 5 and 20 % of the total number in each profession respectively.

These constitutional amendments were about two different legal issues but both of them interfering with judicial independence, and hence are worthy to be analyzed

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8 The Venice Commission – or officially the European Commission for Democracy through Law – was established in 1990 and was charged with providing assistance and advice about constitutional matters to Council of Europe states. Each member state of the Council of Europe appoints an independent expert. They meet four times a year in Venice. A permanent office in Strasbourg supports the activities of the Venice Commission. Typically a representative group of rapporteurs is appointed to study an issue. Before submitting an opinion for the Commission's consideration, the country concerned is visited. See Steven Greer: *The European Convention on Human Rights Achievements, Problems and Prospects* 286-289 (2006).

9 Commission for Democracy Through Law (Venice Commission) Opinion on the New Constitution of Hungary, Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) Nr. CDL-AD(2011)016 (hereinafter Second Report of the Venice Commission), para 107.

10 See the facts in *Baka* v. *Hungary*, no. 20261/12, §§ 17-23.

together. The further common element in the cases is that an ineffective and national legal remedy had to be completed or substituted by an international one.

III Rulings of the Constitutional Court – ineffective remedies at national level

Constitutional Court's judgment on premature retirement of judges

In its judgment no. 33/2012 of July 16, 2012, the Constitutional Court declared unconstitutional and, therefore, annulled the provisions on the compulsory retirement age of judges. However, this was only a pyrrhic victory of the rule of law as the judgement did not change too much.

Those judges who were directly affected by the new rules by being forced to retire lodged a constitutional complaint at the Constitutional Court, and argued that the new fixed age of retirement is discriminatory, contrary to the requirements of the Directive 2000/78/EC, its rapid entry into force violates human dignity and it infringes the independence of judiciary. Interestingly, the Constitutional Court picked up only the last point and declared the law to be unconstitutional as it infringed judicial independence by meddling with vested rights of retirement.

The argumentation is though highly interesting it suffers from some basic shortcomings. The Constitutional Court applied a historic interpretation of the constitution, as the new fundamental law itself requires,[11] and took into account the rules on the status of judges in the 19th century guaranteeing an active judicial career until the age of 70. The interesting historical reasoning on judicial independence made the question of discrimination fade away. A possible violation of the anti discrimination directive was not discussed at all. The court might have thought to have found a much stronger point, namely judicial independence. It must not be forgotten however that it was a constitutional complaint procedure which presupposes the violation of own fundamental rights. Nonetheless, judges have no right to be independent but the parties have the right to an independent judiciary. This is however not the only failure of the judgement. The Constitutional Court decided though to repeal the Hungarian legislation but the decision had no effect on the already retired judges as they were not reactivated by the judgement. If they wished to return to their former jobs they had to turn to the ordinary courts and ask for a review of the legality of their forced retirement.

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11 Art. R of the Basic Law prescribes that all provisions of the Basic Law shall be interpreted in accordance with their purpose, with the national creed and with the achievements of Hungarian Historical Constitution.

Constitutional Court's decision no. IV/2309/2012 of March 19, 2013

The Vice-President of the Supreme Court, who was also prematurely removed from his position as of 1, January 2012 by virtue of the fundamental law entering into force, also submitted a constitutional complaint to the Constitutional Court claiming that the termination of his position violated the rule of law, the prohibition of retroactive legislation and his right to a remedy. The Constitutional Court rejected this complaint stating that the premature termination of the office of the Vice-President of the Supreme Court had not violated the fundamental law, since it was sufficiently justified by the full-scale reorganisation of the judicial system and the important changes in the tasks and competences of the President of the Kúria. It noted that the Kúria's tasks and competences had been broadened, in particular with regard to the supervision of the legality of municipal council regulations. The dissenting seven judges did not regard the changes so fundamental which should have affected the status of the Vice-President. Hence, the premature termination of the claimant's term of office weakened the guarantees for the separation of powers, and was contrary to the prohibition of retroactive law-making and breached the principle of the rule of law and the right to a remedy.

Some interim conclusions

As this might be already apparent the Constitutional Court was not able or ready to step in for ordinary judges. The remedy offered in the first case – the annulment of the applicable provisions – aimed though to the protection of judicial independence it was a very limited one as it had no retroactive effect whatsoever and did not reactivate the dismissed judges.

The second case was a more tragic one as the remedy was completely denied. The development might be seen as a result of the circumstance that the new right-wing coalition, in the meantime, was able to pack the Constitutional Court and fill the bench with enough loyal justices.

IV Rulings of international fori

Two procedures were initiated at international level: the first one by the European Commission at the European Court of Justice because of the *en masse* dismissal of judges, the second one by the fired former President of the Supreme Court at the European Court of Justice.

Forced retirement of the judges – the judgment of the ECJ

The European Commission – the watchdog of the EU Treaties – alleged that the forced retirement of the judges to be a violation of a binding EU legislation namely

the antidiscrimination directive,[12] as it gave rise to age-based discrimination between, on the one hand, judges, prosecutors and notaries who have reached the age-limit for retirement fixed by that legislation and, on the other hand, those who may continue to work.

The commission hence filed the case before the (ECJ) and successfully applied for an expedited procedure[13] which helped to close the case with a judgement within a year. The commission put forward in its application that an expedited procedure could contribute to a uniform application of the EU law as the case – at that time at least – was still pending before Hungarian Constitutional Court.[14] Although the expedited procedure was granted the Hungarian Constitutional Court neither waited for the judgement of the ECJ nor submitted the case for the ECJ as a preliminary question according to article 267 Treaty on Functioning of the European Union (TFEU)[15] but decided it single-handedly with the result sketched above.

Hungary argued before the ECJ that the introduction of a general compulsory age-limit of 62 applicable for all employees cannot be discriminatory as it applies for everybody. The ECJ, however, doubted this by analogous application of its earlier case-law – especially that of *Fuchs and Köhler*[16] – and established that arguments of Hungary are not 'capable of calling into question the existence of a difference in treatment between persons compulsorily obliged to retire because they have reached the age of 62 and those who, having not yet reached that age, may remain in their post. The difference in treatment on grounds of age is based on the very existence of an age-limit above which the persons concerned must retire, regardless of the age fixed for that limit and, *a fortiori*, for the previously applicable limit.'[17]

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12 Directive 78/2000 of Nov. 27, 2000, establishing a general framework for equal treatment in employment and occupation.

13 The expedited procedure was granted on July 13, 2012. The commission argued for the application of the expedited procedure with the severe and irreparable consequences of the case. The commission stressed that it was doubtful as to whether at the end of a normal procedure the consequences would be reparable at all as the posts would be surely filled.

14 The decision was made only three days after the ECJ granted the expedited procedure.

15 In the framework of the preliminary reference procedure a national court or tribunal may refer a question of EU law to the ECJ. The preliminary ruling should enable the national court to decide the case before it. The function of the preliminary reference procedure is hence to ensure uniform interpretation of EU law across all the 28 EU Member States. Moreover, courts of last instance are bound to question to the ECJ. The preliminary reference procedure is based on cooperation between national courts and the ECJ. The procedure is laid down in art. 267 TFEU.

16 Joined Cases C 159/10 and C160/10 *Fuchs and Köhler* nyr.

17 Case C286/12 *Commission* v. *Hungary*, para 53.

The commission also contended that the alleged difference in treatment is not justified as the national legislation did not pursue any legitimate aim and, in any event, was not proportionate. Hungary invoked, essentially, two objectives ostensibly pursued by the legislation at issue: the standardization of the rules relating to retirement for all public sector employees and facilitation a 'balanced age structure' of judges.

The ECJ accepted though that a standardisation of retirement age might constitute a legitimate employment policy objective, however, the introduced measures were held not to be strictly necessary to achieve those ends because they caused severe hardship to the persons concerned. The court argued that the very expedient introduction of the new scheme did not observe the well-founded expectation that the affected judges would be able to remain in office until the age of 70, and did not introduce any transitional measures whatsoever to protect the legitimate expectations of the persons affected.[18] Therefore, the measures were qualified as not strictly necessary and consequently as disproportional.

Both the commission and the court accepted that a 'balanced age structure' between young and older officials could constitute a 'legitimate aim' of employment and labour market policy.[19] The court, however, found the measures to be inappropriate and therefore illegal.

Dismissal of the President of the Supreme Court – the ruling of the ECtHR

The former President of the Supreme Court, who was a sitting judge of the ECtHR between 1991 and 2007, lodged a complaint against the Republic of Hungary on March 14, 2012, and alleged, in particular, that he had been denied access to a tribunal to contest the premature termination of his mandate as President of the Supreme Court which should constitute a violation of article 6 § 1 ECHR (right of access to court). He also complained that he had been removed from office as a result of the views and positions that he had expressed publicly in his capacity as President of the Supreme Court and hence his rights under article 10 ECHR (freedom of expression) were violated. He further alleged that his premature dismissal breached article 1 of Protocol No. 1 (protection of property), article 13 (right to an effective remedy) and article 14 (prohibition of discrimination). The court established the violation of the right to access to court and the freedom of expression. Regarding the other points, the application was founded to be inadmissible. Only the two main points of the case will be discussed below.

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18 *Id*., para 67-68.

19 *Id*., para 29 and 62.

Violation of access to court

The former President of the Supreme Court contended that his dismissal was the result of legislation at constitutional level which deprived him of any judicial review even by the Constitutional Court. The ECtHR accepted that in some exceptional circumstances a member state may exclude civil servants from the right of access to court. However, there are some strict conditions if a member state chooses to do so. The national law has to expressly exclude access to court for a post or category of staff and the exclusion has to be justified on objective grounds in the state's interest.[20] The fulfilment of these criteria must be proved by the state in question. As a result of this test, most of the public service disputes fall under the protection of article 6 ECtHR such as salaries and other benefits[21], appointment,[22] promotion,[23] transfer,[24] disciplinary measures[25] and dismissal[26] of judges including the President of a Supreme Court herself.[27]

The conditions laid down by the ECtHR were not met in the *Baka* case[28] since judges of the Supreme Court, including their President, were not expressly excluded from the right of access to a court but by the fact that the alleged measure was enacted at constitutional level and therefore not subject to any form of judicial review even by the Constitutional Court. The office of the former Vice-President of the Supreme Court was terminated at statutory level and hence he could – though unsuccessful – lodge a constitutional complaint. The President of the Supreme Court did not have even this futile chance as his office was terminated by the fundamental law itself. This difference seems to be decisive for the ECtHR.[29]

Violation of freedom of expression

In 2011, the former President of the Supreme Court expressed at several occasions his opinion and sometimes critique regarding the governmental measures concerning the judiciary like the newly introduced retirement age of judges, the amendments to

20 *Vilho Eskelinen* v. *Finland* [GC], no. 63235/00, § 61-62, ECHR 2007-II.

21 *Petrova and Chornobrywets* v. *Ukraine*, nos. 6360/04 and 16820/04, § 15, May 15, 2008.

22 *Juricic* v. *Croatia,* no. 58222/09, §§ 53-57, July 26, 2011.

23 *Dzhidzheva-Trendafilova* v. *Bulgaria* (dec.), no. 12628/09, §§ 42-50, Oct.9, 2012.

24 *Tosti* v. *Italy* (dec.), no. 27791/06, May 12, 2009.

25 *Harabin* v. *Slovakia* (dec.), no. 62584/00, July 9, 2002, §§ 122-23.

26 *Olujic* v. *Croatia,* no. 22330/05, 5 Feb. 2009, §§ 31-44, and *G.* v. *Finland*, no. 33173/05, § 34, Jan. 27, 2009.

27 *Harabin* v. *Slovakia* (dec.), no. 62584/00, July 9, 2002, §§ 122-23, see also, for the dismissal of a judge of the Supreme Court, *Oleksandr Volkov* v. *Ukraine*, no. 21722/11, §§ 87-91, Jan.9, 2013.

28 *Supra* note 10.

29 *Id.,* § 78.

the Code of Criminal Procedure, the new legislation on the Organisation and Administration of the Courts and a legislative act nullifying some past judgements. The applicant alleged that he had been prematurely dismissed from his office exactly because of expressing these views and the organizational changes did not justify his removal as they were not of outreaching nature. The applicant also noted that the termination of his office also meant that all of his benefits and allowances due to an outgoing President of the Supreme Court had also been removed retroactively. Therefore the governmental measures were disproportionate and punitive.

The earlier case-law of the ECtHR also suggests that sanctioning a (senior) judge for an opinion expressed might be qualified as a violation of the convention since the freedom of expression of a (senior) judge is seemed to be a safeguard of the independence of the judiciary. In the *Wille* case,[30] the ECtHR found that a letter sent to the President of the Liechtenstein Administrative Court by the Prince of Liechtenstein announcing his intention not to reappoint him to a public post because of the content of a public lecture constituted an interference with the free expression of opinion on questions of constitutional law. In *Kudeshkina* v. *Russia*,[31] the court found that barring the applicant from holding judicial office as a result of her statements to the media violated the freedom of expression and could not be justified by the mere circumstance that the applicant was holding a public post in the administration of justice.

The Hungarian Government doubted the causal link between the dismissal of the applicant and the expression of his views and stressed that his mandate had been terminated simply because of the fundamental changes in the functions of the supreme judicial authority in Hungary, renamed as Kúria. It was put forward that the new President has more a judicial and less a managerial task than his predecessor. The government relied on the *Harabin* case,[32] in which the ECtHR did not find a violation of the freedom of expression because the revocation of the applicant's appointment as President of the Supreme Court essentially related to disciplinary measures and the appraisal of his professional qualifications and personal qualities in the context of his activities and attitudes relating to state administration of the Supreme Court and not to any statements or views expressed by him in the context of a public debate or in the media.

The central issue of the *Baka* case was therefore as to whether the applicant's mandate as President of the Supreme Court was terminated solely as a result of the

30 *Wille* v. *Liechtenstein* [GC], no. 28396/95, §§ 42-43, ECHR 1999 VII.

31 *Kudeshkina* v. *Russia*, no. 29492/05, § 79, Feb. 26, 2009.

32 *Harabin* v. *Slovakia,* no. 58688/11, § 149, Nov. 20, 2012.

reorganisation of the judiciary in Hungary or as a consequence of the views he expressed publicly on legislative reforms affecting the judiciary.

The ECtHR noted that the applicant expressed his views on different legislative reforms in 2011, and – contrary to earlier statements[33] – several legislative and constitutional amendments were proposed and enacted at the end of November 2011 resulting in the election of a new president of the *Kúria* and termination the applicant's term of office as President of the Supreme Court. It was also highlighted that the applicant – due to legislative measures – had been made ineligible for the post as the President of the *Kúria* because experiences gathered as a judge in an international court – in his case 12 years at the ECtHR – did not count for the needed eligibility criteria due to the new rules.

Moreover, the ECtHR also observed that these amendments had been enacted after the applicant publicly expressed his views on the legislative reforms at issue, and were adopted within an extremely short time. The court also considered the sequence of events in their entirety corroborate the applicant's version of events, namely that the early termination of his mandate as President of the Supreme Court was not the result of a justified restructuring of the supreme judicial authority in Hungary, but in fact was set up on account of the views and criticisms that he had publicly expressed in his professional capacity on the legislative reforms concerned. The court also stressed that there was no evidence to conclude that the views expressed by the applicant went beyond mere criticism from a strictly professional perspective, or that they contained gratuitous personal attacks or insults.

V Some lessons

Safeguards of judicial independence

Though judicial independence is one of the cornerstones of modern constitutional paradigm[34] and an undoubted prerequisite of joining the Council of Europe[35] or the

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33 The court noted that on July 6, 2011, the Government of Hungary assured the Venice Commission that the drafting of the transitional provisions of the Fundamental Law would not be used to unduly put an end to the terms of office of persons elected under the previous legal regime.

34 R. Masterman, The Separation of Powers in the Contemporary Constitution: Judicial Independence in the United Kingdom (2011).

35 Steven Greer, The European Convention on Human Rights Achievements, Problems and Prospects 108-109 (2006). The ECtHR does not require to comply with any theoretical concepts as such and for the ECtHR the question is always rather whether, in a given case, the requirements of the Convention are met cf. *McGonnell* v. *United Kingdom* (2000) 30 EHRR 289.

European Union[36] alleged violations of this requirement are hard to address. Neither the ECJ nor the ECtHR dealt with the question directly even when in both cases the issue at stake was judicial independence.

The judgment of the ECJ did not even mention the word judicial independence. The Advocate General brought up the point among the arguments put forward by Hungary to justify the retirement of the judges by the efficacy of the judiciary. The Advocate General contended in this respect that a sudden retirement of the judges may raise concerns regarding the independence of the judiciary, and argued that the independence of the judiciary is partly a question of appearance: the judiciary must be free of external influences which might endanger the independence of the decision making. She pointed out that the introduced pension scheme was though not directed against individual judges, and as such was not intended to influence the decision making process, it was a measure of greater significance able to raise concerns as to whether the judiciary may function without fearing external influences.

These remarks however were seemingly not reflected in the ECJ judgment. The only factor showing in a different direction is the fact that the President of the ECJ granted an expedited procedure[37] which happens only exceptionally.[38] Therefore, the case must have decided a very fundamental question even if – at the surface – it was nothing else than an alleged violation of the antidiscrimination directive. Therefore is the question more than justified: how could they have addressed the judicial independence otherwise? There are unfortunately very limited ways to do so. Judicial independence – as it was stressed above – belongs though to the essential values of the EU (article 2 TEU). The commitment of a member state in respect of these values can only be challenged in a very sophisticated nonetheless political procedure laid down in article 7 TEU. If, at the end of this procedure, it is established that a member state seriously and persistently breaches these values certain rights the member state may be suspended. The procedure is quite complicated and requires unanimity of all other member states. Moreover, the whole procedure is of very political nature and very limitedly justiciable as the ECJ may only review procedural aspects but not substantial ones as it follows from article 269 TFEU. Suspension of membership rights is though an option but not a really viable one for many reasons: the political consensus among the institutions and especially the requirement of unanimity in the

36 Cf. art. 49 and 2 TEU and the so called Copenhagen criteria of accession to the EU.

37 Based on art. 62a of the Rules of Procedure of the Court of Justice.

38 Or as Eric Barbier de la Serre put it: 'As a whole, however, they are rarely applied' E. Barbier de la Serre, "Accelerated and Expedited Procedures before the EC Courts: A Review of the Practice" 43 *CMLRev* (2006) 783 at 811, see also B W Wegener, *Art. 281 AEUV*, in EUV/AEUVPara 11 (2011).

European Council, in the most important political decision making body of the EU, is hard to meet. In a Union of 28 member states there are always political needs and alliances which might counter value questions. The suspension of membership rights is therefore like the mutually assured destruction strategy of the cold war. Both sides built up huge nuclear arsenal and hoped that it will never be used. The suspension of the membership rights is though legally allowed everybody hopes it will never be necessary to apply the procedure. As the application of this procedure is political unlikely value questions such as the independence of the justice cannot be addressed openly. They, hence, need to be dealt with in a politically neutral way, e.g. as violations of the antidiscrimination directive such as in the case *Commission* v. *Hungary*.

The same is true for the *Baka* case. There was no ground to remove Baka from his office so prematurely and therefore that legislative excess was doubtless a violation of the judicial independence. Nonetheless, this aspect was again hard to address. The facts of the *Baka* case were namely not so clear as those in the *Wille* case. In *Wille*, the Prince of Lichtenstein wrote a letter on heraldic paper in which he clearly stated that he was astonished to read the report in the *Liechtensteiner Volksblatt* on the lecture of Wille on the theme of the 'Nature and Functions of the Liechtenstein Constitutional Court'. Such a clear causal link between the views expressed by Baka and the termination of his office does not exist even if the circumstances of the case do suggest that he had been removed because he did not support the governmental plan of reorganizing the judiciary. In this sense, the story is like the one of the data protection ombudsman who had also been fired by constitutional amendment as – under article VI(3) of the Fundamental Law of Hungary – a newly established authority was designed to exercise his functions. His case was nonetheless easier as the data protection directive of the EU clearly prescribes that the authorities responsible for monitoring the application of the data protection directive shall act with complete independence.[39] Although, he favoured neither the new constitution nor the reorganization of his office and he actually did express these views at several occasions it was not necessary to create a case of violation of freedom of expression because EU law clearly stated the legal requirement of an independent data protection supervisor. The statements of the data protection ombudsman may or may not have been the cause of his dismissal. However, it was not necessary to construe a case based upon these statements as the EU law sanctioned his independence. Such clear provisions do not exist for the judiciary.

39 Para 1 of art.28 of Directive 95/46.

VI Conclusion

The above shortly described cases also illustrate the functioning of a multi-level constitutionalism in Europe. This concept suggests that Europe already has a constitution "made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties"[40] and supplemented by international treaties, such as the ECHR, fulfilling constitutional functions and closing gaps in national law.[41] The courts and legal systems are interconnected: national courts may refer questions of law to the ECJ for preliminary ruling according to article 267 TFEU, and after exhausting the remedies at home individuals may refer their cases to the ECtHR according to article 34 ECHR. These institutional bonds create a system of judicial dialogues.[42] This is exactly what happened in the present cases.

As the Hungarian Constitutional Court was not able or not willing to protect judicial independence international fori must have stepped in. The Hungarian Government futilely claimed before the ECJ that a judgment of the Constitutional Court should have closed the case by annulling the alleged legislative act but the ECJ was not satisfied because the judgement did not unmake the early retirement of the judges concerned.[43] In this respect, the ECJ judgement complemented the national ruling as to the remedies.

The ECJ and the Advocate General argued for an expedited procedure exactly because it would help to apply the Union law in a uniform way. This may be read as a courteous invitation to await the judgement of the ECJ or as an invitation to request a preliminary decision of the ECJ.[44]

The Hungarian Constitutional Court did not provide any remedy for the Vice-President of the former Supreme Court and was not able to offer this remedy at all for the former President. The supermajority might have been large enough to stop the procedures at national level either by constitutional amendment or by packing the constitutional court it was still not enough to avoid the consequences at European

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40 Ingolf Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?" 36 *Common Market Law Review* 707 (1999).

41 Robert Uerpmann-Wittzack, "*The Constitutional Role of Multilateral Treaty System*" in Armin von Bogdandy (ed.), *Principles of European Constitutional Law* 145-181 (Hart, Oxford 2006).

42 On judicial dialogue recently see M Amos, "The Dialogue Between United Kingdom Courts and the European Court Of Human Rights" *ICLQ* 2012, 557-584.

43 *Supra* note 17, para 40-46; opinion of *AG Kokott* para 20-24.

44 As the Lithuanian or the Italian Constitutional Court did in cases C-239/07, *Julius Sabatauskas*, C-169/08 *Presidente del Consiglio dei Ministri* v. *Regione Sardegna* respectively.

level. In this respect the different levels or layers of the European multi-level constitutional system are actually able to counterbalance each other. National excesses and abuses of power might be counterbalanced by European courts on the one side, and the European legislation[45] or judiciary[46] might be held accountable by national (constitutional) courts.

The advisory bodies such as the Venice Commission already criticizing several provisions of the constitution during the constitution making process may have seemed to be weak, toothless and unimportant as their opinion was not binding and Hungary could have adopted its constitution of doubtful content without taking into account any of the critiques expressed by the international advisory bodies. However, the present cases also show that there is always a way to make a government accountable and the critiques of advisory bodies cannot be disregarded as easily as the Hungarian Government thought.

45 Cf. Franz C Mayer, "The European Constitution and the Courts" in: Armin von Bogdandy, *supra* note 41 at 281, 291-305.

46 As the case of the Czech Constitutional Court shows see A Vincze, *Das tschechische Verfassungsgericht stoppt den EuGH, zum Urteil des tschechische Verfassungsgerichts* Pl. ÚS 5/12 vom 14. 2. 2012' *Europarecht* 2013, 194-204, *Jan Komárek* Czech constitutional court playing with matches: the Czech constitutional court declares a judgment of the court of justice of the EU ultra vires *EuConst*, 2012, 323