

## EDITORIAL COMMENTS

### *Hungary's new constitutional order and "European unity"*

"Tout est convenance, c'est l'Europe!  
C'est la sécurité. C'est l'inaliénable."<sup>1</sup>

Hungary has been in the spotlight on the European scene for the past two years, ever since the conservative-nationalist Fidesz Party and its ally, the Christian-democrat KDNP party, won the general election of April 2010. Since then much has been written regarding what may be termed "the Hungarian problem". Nonetheless, there are reasons to tread carefully when commenting on the matter in this editorial. The problem appears to go well beyond its legal and even political dimensions. It has deep and intricate historical, social and cultural aspects. When discussing such a problem, we must always remind ourselves of our lack of knowledge concerning the specific cultural background; and we should recall the sensitivity of this multifaceted situation.

At one level, it is a complex political problem. The 2010 elections were preceded by mass demonstrations against the then government and collective disenchantment with politics in general. On another level, it is a serious social and economic problem. Hungary suffered severely from the financial and economic crisis and entered into negotiations with the IMF and the EU on a programme of financial assistance. On yet another level, it is a moral problem (still political, but in a broader sense), for what has been experienced in Hungary in the last two years, albeit unique in many ways, resonates with a moral attitude that is spreading within several societies in Europe. This attitude is one of "respectable" nationalism and "reasonable" anti-Europe and anti-immigration policies, adopted by various European governments, often under pressure from the rise of far-right parties. It is not only Hungarians, and not only neighbouring countries where Hungarian ethnic communities are located, that face this problem. Rather, we believe the issue confronts any committed European. It is an imperious European problem.

1. Lévinas, *Sur Maurice Blanchot* (Ed. Fata Morgana, Montpellier, 1975), p.61. This can be rendered approximately as: "Everything is fine: we have Europe, we have moral security; we have inalienable rights".

To treat the situation of Hungary as a European problem does not simply mean exhaustively identifying the incompatibilities between the new Hungarian constitutional order and European standards of democracy and human rights. This important task has been undertaken by the Council of Europe and its Venice Commission.<sup>2</sup> As a European problem, Hungary raises the issue of a disruptive constitutional order in a context of alleged “constitutional homogeneity”.<sup>3</sup> It raises the issue of two opposing constitutional cultures within a shared legal and political space, and therefore calls into question the intellectual and moral security that membership in the European Union is supposed to afford Europeans. That is not all. Hungary is not just a symbol or a symptom: it is a real society where people suffer severely from the impact of the economic crisis. Accession to the Union created expectations in terms of wealth and “well-being” that were not entirely fulfilled. Moreover, the development of value-laden and progressive policies by the Union, in particular in the field of anti-discrimination, may have raised concerns in some traditional parts of Hungarian society.

The Hungarian problem found its juridical form on 25 April 2011, when the New Fundamental Law of Hungary was promulgated at the same time that the Hungarian Government held the Presidency of the Council of the EU. The date was carefully chosen by the governing party to coincide with the first anniversary of the 2010 elections. Ironically, this was also the day chosen by the Commission to take decisive steps in its proceedings against Hungary over two pieces of legislation implementing the new Constitution. On 25 April 2012, the Commission brought Hungary to the Court of Justice for infringements of EU law regarding the independence of the data protection authority and the status of the judiciary. Some acts prefigured the legislation currently under scrutiny. An act relating to Media regulation that established a powerful Media Authority (the head of which was appointed by the prime minister for a term of nine years) was adopted immediately following the general election on the basis of a constitutional amendment enacted by the new parliament. The Commission expressed concerns about the compliance of this piece of legislation with EU law as of January 2011. The enactment of the new Constitution and the adoption of legislation implementing it only increased and broadened the concerns.

2. Between March 2011 and April 2012, the Council of Europe’s Venice Commission has delivered several opinions concerning the process of writing the new Constitution, the contents of the new Constitution and the key cardinal laws implementing the Constitution (available at <[www.venice.coe.int/](http://www.venice.coe.int/)>).

3. The concept was coined by Schorkopf, *Homogenität in der Europäischen Union: Ausgestaltung und Gewährleistung durch art. 6 abs. 1 und art. 7 EUV* (Berlin, Duncker & Humblot, 2000).

Outside Hungary, this “constitutional transformation” was regarded with various degrees of intensity.<sup>4</sup> But there is something that perhaps has escaped us: this new constitution invokes the motto of European constitutionalism, that Europe is “united in its diversity”, and it links this motto with *culturalism* and *nationalism*. “We believe that our national culture is a rich contribution to the diversity of European unity”, proclaims the preamble. Article E (1) reads: “In order to enhance the liberty, prosperity and security of European nations, Hungary shall contribute to the creation of European unity”. The Hungarian Constitution considers European unity not as a community of universal and abstract values, but as a cultural and historical reality.<sup>5</sup> The “scandal” and the importance of this new Constitution is that, in historicizing and culturalizing the domestic constitutional order, it forces nationals as European citizens to think of themselves as participating in “the creation of European unity” defined in a cultural and historical sense.

*Is Hungarian constitutionalism compatible with European constitutionalism?*

Hungary is the only post-Communist country that did not adopt a new constitution after the fall of the Berlin Wall. The Socialist 1949 Constitution was turned into a liberal democratic Constitution through intensive use of constitutional amendments supplemented by the activist interpretative role of the Constitutional Court. The Constitution resulting from this process was described as an “interim Constitution”.<sup>6</sup> Indeed, the adoption of a new constitution has been on the agenda for twenty years following the transition. During the 2010 elections, the leader of the Fidesz and now Prime Minister, Viktor Orbán, announced that he would provide a brand new constitution for the nation, if the electorate gave him the two-thirds parliamentary majority

4. Kávacz and Tóth, “Hungary’s Constitutional Transformation”, 7 *EuConst* (2011), 183. US Secretary of State Hillary Clinton expressed concerns over Hungary’s new constitution in a letter sent to the Hungarian prime minister; French Foreign Minister Alain Juppé told French public television that the situation in Hungary is problematic and called on the Commission to consider measures.

5. Fleck, Gadó, Halmai, Hegyi, Juhász, Kis, Körtvélyesi, Matjényi, Attila, Tóth (editors: Arato, Halmai, Kis), *Opinion on the Fundamental Law of Hungary* (June 2011, at 38), available at <lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf>.

6. Arato, “Post Sovereign Constitution-making in Hungary: After Success, Partial Failure, and Now What?”, available at <lapa.princeton.edu/conferences/hungary11/post\_sovereign\_constitution-making\_in\_hungary.pdf>.

required to amend the Constitution.<sup>7</sup> After the elections, a group of three politicians was set up to draft the text of the new Constitution. This group was presided over by József Szájer, a member of the European Parliament affiliated to the governing party and former member of the Convention on the Future of Europe. The text was released on 14 March 2011 and, after a short period of debate in parliament, the Constitution was adopted and promulgated.

In the Fundamental Law of Hungary (FLH) we see the deployment of three sets of discourse that are at odds with the discourses and values enshrined in the Treaty on European Union.<sup>8</sup> The first of these discourses is a discourse of rupture, a rupture aimed at restoring an historical continuity. The new Fundamental Law is presented as a new constitutional order, a self-actualization of the nation. Soon after the elections, the new power posited the need for a “constitutional revolution”, calling for the “strength” and the “renewal” of the nation.<sup>9</sup> Thus the Constitution starts with a preamble called “The National Avowal” which, according to Article R(3) of the Constitution, guides the interpretation of the provisions of the Fundamental Law, together with its purposes and “the achievements of our historical constitution”. The preamble has a twofold purpose. On the one hand, it glorifies the country’s past. Beyond any historical accidents, the country is affirmed “part of Christian Europe”, a part built one thousand years ago by “our King Saint Stephen”. The continuity of the country’s statehood is represented over and above a disastrous void, the interruption lasting from the first day of German occupation on 19 March 1944 to the first day of the first session of the post-Communist elected parliament on 2 May 1990. The communist constitution of 1949 is therefore declared “invalid”. On the other hand, it exalts the particularity of the nation. It no longer refers to the “Hungarian people” as in the previous constitution, but to the “Members of the Hungarian nation”. A distinction is drawn between Hungarians, including those living abroad (Art. D FLH), and “the nationalities living with us” which are part of “the Hungarian political community” but not of the nation. The nation is defined as a cultural, ethnic and social community, whose courts rely on “common sense” in interpreting the law (Art. 28 FLH). The integrative power of the Constitution is thereby limited.<sup>10</sup> This conception sits uneasily

7. This was foreseen by Art. 24(3) of the 1989 Constitution which is, despite the rhetoric of the so-called “constitutional revolution”, the legal basis of the new Fundamental Law of Hungary (see Closing provisions, para 2).

8. The text can be found at: <[right2info.org/resources/publications/laws-1/fundamental-lawofHungary.pdf](http://right2info.org/resources/publications/laws-1/fundamental-lawofHungary.pdf)>.

9. Quoted by Kávacs and Tóth, op. cit. *supra* note 4, at 196.

10. Grimm, “Integration by Constitution”, 3 I-CON (2005), 193.

with the model of an open and inclusive society promoted in Article 2 of the Treaty on European Union.<sup>11</sup>

The second discourse to be found in the text is a kind of “adapted” modern constitutionalism. Apparently, the Fundamental Law subscribes to the logic of parliamentary democracy and to the guarantees of the rule of law. Articles B and C state that Hungary’s form of government is a republic governed by the principles of representative democracy and the separation of powers. The president and the prime minister are elected by the parliament (Art. 1(2) FLH). As regards individual rights, the Constitution draws inspiration from the EU Charter of Fundamental Rights. Fundamental rights are recognized and their protection is elevated to the “primary obligation” of the State (Art. I(1) FLH). And yet, the new Constitution introduces some adaptations to the liberal tradition. Neither democracy nor the rule of law emerges intact from this text. With respect to parliamentary democracy this occurs in two ways. First, severe limitations are introduced on discretion in relation to fiscal policy and the adoption of the budget; democracy is adapted to a so-called “manageable” State.<sup>12</sup> Note, however, that this trend is not completely contrary to the Union requirements that budgetary deficits should be managed by means of “permanent” and “preferably constitutional” constraints.<sup>13</sup> Secondly, and more importantly, democracy is undermined by the numerous references to the so-called “cardinal laws”, organic laws requiring a two-thirds majority in parliament. The Hungarian government has made extensive use of this system to entrench new arrangements in a broad range of relatively mundane issues (taxation, pensions, family law...). Future governments that lack the necessary parliamentary support are thus unlikely to be in a position to change these laws. As regards the rule of law, the Fundamental Law reshapes the traditional structure inherited from the EU Charter insofar as the exercise of certain rights is made entirely dependent on responsibilities and obligations.<sup>14</sup> It is true that EU law is often accused of privileging rights over duties, thereby undermining the culture of individual responsibility. However, what is troubling in the Hungarian Constitution is that, in some critical

11. The values of the European Union “are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

12. See the video “Debating the Hungarian Constitution”, European University Institute (Florence): Intervention by József Szájer, available at <[www.youtube.com/watch?v=q3Jxobiv9A](http://www.youtube.com/watch?v=q3Jxobiv9A)>.

13. See Art. 3 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. Yet, the constraints stemming from the Hungarian Constitution are not totally in line with the requirements imposed by Art. 126 TFEU.

14. See Council of Europe’s Venice Commission, *Opinion on the New Constitution of Hungary*, No. 621/2011, at para 57.

passages, duties are not directed towards other individuals but towards the national community as a whole.<sup>15</sup>

The third kind of discourse regards Europe itself. Article E welcomes participation by Hungary in the European Union, and cooperation with other “European nations”, alongside “every country of the world”.<sup>16</sup> As in many other Member States’ constitutions, the European Union is seen as an intergovernmental structure where transferred competences are exercised jointly with other Member States. Still, as commented by Varju and Fazekas, Article E “puts European integration among the basic principles of Hungarian constitutionalism”.<sup>17</sup> However, it is clear that it does not fully incorporate the justifications of European integration adopted by the Union itself, stated most clearly in the preambles to the Treaty establishing a Constitution for Europe and to the Charter of Fundamental Rights. The preamble of the Hungarian Fundamental Law refers to Europe as “Christian Europe” of which that country is part and which it defended over the centuries. It claims that the Hungarian nation is proud of its contribution to the enrichment of “Europe’s common values”, of the contribution of its culture to the “diversity of European unity”. Accordingly, the Constitution protects traditional values and refers to the cultural specificity of the continent.<sup>18</sup> The European Constitution similarly emphasized that the peoples of Europe are “proud of their own national identities and history”. However, it linked the past of Europe to the future of the European Union, presented as a means by which the “peoples of Europe” could “transcend their former divisions”. In the Union, European peoples converge on a commitment to promote together the values of human rights, democracy and the rule of law and to strengthen them “in the light of changes in society, social progress and scientific and technological development” (EU Charter). The affirmation of national identity is subject to this commitment. Belonging to the Union is also to be seen as an instrument for European nations to rework their particular traditions in light of universal

15. See Art. O, P, XII, XIII FLH. Cf. the preamble of the EU Charter, claiming that “Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations”.

16. Art. Q FLH.

17. Varju and Fazekas, “The reception of European Union law in Hungary: The Constitutional Court and the Hungarian judiciary”, 48 CML Rev. (2011), 1954, at 1951.

18. By way of illustration, consider the general non-discrimination clause which does not expressly include sexual orientation as a ground of prohibited discrimination (Art. XV) contrary to Art. 21 of the EU Charter (and see recently Case C-147/08, *Römer*, judgment of 10 May 2011, para 60); Art. L which defines marriage as the union of a man and a woman, compared with the more neutral formulation of Art. 9 of the EU Charter; Art. II which ensures the protection of embryonic and foetal life from the moment of conception (compare Art. 2 of the EU Charter and, recently, Case C-34/10, *Brüstle*, judgment of 18 Oct. 2011).

principles.<sup>19</sup> The structure of the Treaty on European Union, combining Article 2 and Article 4, clearly indicates that national identity is not simply seen as contributing to European unity, but that national identities are also conditional upon the respect of the fundamental values of the Union.

Hungarian and European constitutional orders share the same vision of constitutionalism. Both dress themselves up as “orders of values”.<sup>20</sup> They are not the kind of constitution that simply sets limits to power and sets out guaranteed rights. In addition, they claim to reflect the deepest structures and purposes of society and make strong commitments to moral principles. However, as pointed out, they differ regarding the structure, substance and priorities of these commitments. One might take the view that either one or the other should prevail. But such a scenario is hardly conceivable. Two constitutionalisms coexist in Europe, and even though they are hardly reconcilable, the Union must live with both. How can the Union account for a constitutional order it does not fully recognize? How to intervene without risking a reactivation of nationalist and anti-European feelings?<sup>21</sup> Is the Union legitimate and properly equipped to deal with such a unique situation?

### *The enforcement challenge*

The problem of Hungary once again brings out the discrepancy between, on the one hand, the self-understanding of the Union as founded on universal values and as the guarantor of their protection within the Union’s territory and, on the other hand, the limited capacities of the European Union to involve itself and intervene in the internal orders of its Member States.<sup>22</sup> This incapacity is rendered even more visible when compared with the action undertaken by the Union to promote fundamental rights in its external affairs and in the context of pre-accession.<sup>23</sup> Admittedly, Article 7(1) TEU provides an enforcement mechanism to address any clear risk of a serious breach by a Member State of the values referred to in Article 2. The threshold for activating this procedure is the existence of a risk of a breach of “the values

19. See Kumm, “Why Europeans will not embrace constitutional patriotism”, 6 I-CON (2008), 117.

20. Pierré-Caps, “La Constitution comme ordre de valeurs”, in *La Constitution et les valeurs. Mélanges en l’honneur de D.G. Lavroff* (Paris, Dalloz, 2005), p. 283.

21. Capelle-Pogăcena, “Une réaction nationaliste de cité assiégée”, <www.nouvelle-europe.eu>, 1 Feb. 2012.

22. See generally Von Bogdandy et al, “Reverse Solange: Protecting the essence of fundamental rights against EU Member States”, 49 CML Rev. (2012), 489.

23. See “Editorial comments, Fundamental rights and EU membership: Do as I say, not as I do!”, 49 CML Rev. (2012), 481.



themselves” and that the risk “must go beyond specific situations and concern a more systemic problem.”<sup>24</sup> Arguably, this threshold was met in the present case. In this respect, the Union could rely on the reports of the Venice Commission’s delegation which visited Budapest. The possibility to use this procedure was expressly contemplated by the European Parliament in a Resolution adopted on 16 February 2012.<sup>25</sup> However, it soon became obvious that the European Peoples Party, which holds the majority in the Parliament, was reluctant to take action on this ground. In any event, given the current European political context, it is unlikely that the Council would be willing to enforce the mechanism.

In such circumstances, the Commission’s role, as guardian of the Treaties and the fundamental values enshrined therein, takes on particular significance. Immediately after the adoption of the new Constitution, the Commission committed itself to monitor closely the situation in Hungary. Following several exchanges with the Hungarian authorities on the drafting of cardinal laws implementing the Constitution, it finally decided to react by launching three infringement procedures pursuant to Article 258 TFEU. The Commission identified infringements in relation to measures that appeared to undermine the independence of the national central bank, the independence of the judiciary and the independence of the data protection supervisory.<sup>26</sup>

The difficulties facing the Commission’s action in such a context should not be underestimated. As is well known, EU fundamental rights do not produce their own conditions of applicability. They do not stand alone, but rely on trigger factors stemming from other EU law provisions. In addition, the Commission may be reluctant to bring an action regarding sensitive social or political matters.<sup>27</sup> On the other hand, the success of an infringement procedure depends on “objective” findings of a failure to fulfil obligations;<sup>28</sup> mere risks or bad intentions are not sufficient grounds for action. Despite the

24. Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003)606 final, para 1.4.1.

25. The European Parliament “instructs the Conference of Presidents ... to consider whether to activate necessary measures, including measures pursuant to Article 74e of the Rules of Procedures and Article 7(1) TEU” (Resolution on the recent political developments in Hungary) (2012/2511 (RSP)).

26. As regards direct actions, the expedited procedure is provided for by Art. 62 bis of the Rules of Procedure of the ECJ. See Barbier de la Serre, “Accelerated and expedited procedures before the EC Courts: A review of the practice”, 43 CML Rev. (2006), 783.

27. On recent Roma expulsions in France, see Dawson and Muir, “Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma”, 48 CML Rev. (2011), 751. On the difficulty to challenge a refusal to initiate an infringement procedure, see Order in Case C-408/05 P, *GISTI v. Commission*, [2006] ECR I-52\*.

28. Case 301/81, *Commission v. Belgium*, [1983] ECR 467, para 8.



fact that the appointment of party loyalists to central public positions may appear highly problematic, it is difficult to challenge them as long as substantive guarantees have not been formally dropped. Moreover the disastrous effects of the “Austrian Crisis” of 2000 showed how delicate a task it can be to act on behalf of the European community of values. The collective defence of European values may well result in people or States feeling threatened, a sentiment that in turn may reinforce a willingness to differentiate and to opt out from the community of Europeans.<sup>29</sup>

The Commission’s response to these challenges was to take concrete action on limited but decisive points. This means, to start with, that a large number of equally contentious issues were discarded.<sup>30</sup> It means secondly that the “angle of attack” was carefully selected. Independence is the keyword here. The value of independence is under challenge in every sector of social and public life in Hungary today. Independence is at the crossroads of the regulatory and societal model promoted by the Union. It is a guarantee of impartiality, of detachment *vis-a-vis* strong national preferences (supranational institutions), political actors with a short-term view (European System of Central Banks), economic interests capable of capturing legislatures (independent authorities), or the claims of biased parties (courts). Moreover it is a way, so to say, of detaching regulatory and executive national authorities from their domestic political environment, thereby releasing them from national constraints and national hierarchies, and making them loyal to the law and objectives of the EU. Independent courts are the main vectors of EU law authority and legitimation.

The Commission’s action has already been partly successful. This is not due to the persuasiveness of its legal analysis. In this instance, it relied on other instruments of persuasion, namely the financial instruments of the EU. Hungary has been subject to an ongoing excessive deficit procedure since its accession to the Union in 2004.<sup>31</sup> On a proposal of the Commission, the Council decided in March to suspend a grant of 495 million euro from the Cohesion Fund due to take effect from 1 January 2013.<sup>32</sup> This decision is unique in the history of European integration. However, it was based exclusively on persistent failure to address an excessive deficit. Formally, no

29. See Magnette, “How can one be European?”, 13 *ELJ* (2007), 664.

30. This includes, among other things, the modification and curtailment of the Constitutional Court’s competences, the extensive use of cardinal laws, the restructuring of the system of ombudsmen, the new regulation concerning freedom of religion and the status of churches. On all this see the recent opinions of the Venice Commission on Hungary.

31. Council decision of 5 July 2004 on the existence of an excessive deficit in Hungary (O.J. 2004, L 389/27).

32. Council Implementing Decision 2012/156/EU of 13 March 2012 (O.J. 2012, L 78/19). The decision is based on Art. 4 of the Cohesion Fund Regulation 1084/2006.

link was made to the infringement proceedings relating to Hungary's constitutional order. For the latter purpose, the Union relied instead on the negotiations started with Hungary concerning balance-of-payments assistance.<sup>33</sup> Over the last months, the negotiations over the bail-out aid with the Union and the International Monetary Fund were at a stalemate, subject to the condition that the independence of the national central bank is ensured. Under pressure, Hungary promised to change its legislation on this point. This was enough for the Commission to decide to suspend the infringement proceedings on this ground. This sort of blackmail is readily justifiable in political terms; in legal terms, it is more debatable. One might argue that the efficient use of EU resources is conditional on basic economic structures being in place that conform to the European model. An independent central bank is a central element of these structures. Note, however, that the International Monetary Fund does not appear to show the same willingness to help Hungary cope with its national debt. On 26 April, it said that negotiations can only restart after Budapest actually resolves concerns about the independence of the central bank.

It may prove more difficult for the Commission to achieve success in its other two actions. The first case concerns the independence of the data protection authority as required by Article 28 of Directive 95/46/EC. After successive interventions by the Commission and a notable decision of the Hungarian Constitutional Court, Hungary finally amended its legislation on 3 April 2012 to make the new National Agency for Data Protection independent in line with EU law.<sup>34</sup> There remains the problem of the personal independence of the national data protection supervisor. According to the Commission, Hungary violated its independence by ending the Data Protection Commissioner's term of office two years and nine months earlier than foreseen by law. Much will depend on the willingness of the Court to interpret broadly the concept of independence developed in its decision in *Commission v. Germany*, also about the data protection authority. According to the Court, "independence" means, in this context, "a status which ensures that the body concerned can act completely freely", independently of any "direct or indirect influence of the State". On the other hand, the Court admits that, in accordance with the democratic principle, the absence of any parliamentary or governmental influence is "inconceivable". As a result, "the management of the supervisory authorities may be appointed by the

33. In November 2011, the European Commission received a request from Hungary for possible EU financial assistance on the basis of Art. 143 TFEU and Council Regulation (EC) No 332/2002 of 18 Feb. 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments. The Hungarian authorities have sent a similar request to the International Monetary Fund.

34. Decision No. 1746/B/2010, 19 Dec. 2011.

parliament or the government”.<sup>35</sup> Can this be taken to mean that such management may be legitimately removed from office, before the end of its term, if this removal is effected by a measure of general scope?

The premature ending of the term of public officials is also the target of the second Commission action. By reducing the retirement age of judges from 70 to 62 years, Hungary forces more than 200 judges to retire in 2012 alone, creating new positions to be filled by the new National Judicial Office, established and appointed by the current parliament. This measure also affects prosecutors and notaries. Interestingly, the Commission intends to rely exclusively on Directive 2000/78/EC on equal treatment in employment, which prohibits discrimination on the ground of age. However, the more general issue is about the independence of the judiciary.<sup>36</sup> The measure has obvious and adverse effects on judicial independence.<sup>37</sup> From that point of view, Article 19 TEU as introduced by the Lisbon Treaty in the provision relating to the organization of the EU judiciary, in combination with Article 47 of the EU Charter, might have provided a further argument for the Commission. There is no doubt that the “remedies sufficient to ensure effective legal protection” that Member States shall provide refer to an impartial and independent judicial system.<sup>38</sup> Notably, in contrast with a traditional stance according to which there is a “clear separation of functions” between EU and national courts, the Court recently adopted a “fusional” view of the EU’s judiciary, by stating that “the national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed”.<sup>39</sup> If this is so, then in the same way that national central banks are completely independent as part of the European System of Central Banks, one might argue that national courts should enjoy a degree of independence equivalent to that guaranteed to the ECJ in the European judicial system.

35. Case C-518/07, *Commission v. Germany* [2010], paras. 18–19, 25 and 43–44.

36. The press release issued by the Commission is fairly ambiguous on this aspect (IP/12/395). It places this procedure under the general heading of “Measure affecting the independence of the judiciary” but then distinguishes “(i) Sudden reduction of the retirement age of judges” which is subject to action from “(ii) Independence of the judiciary” about which the Commission reserves the right to launch an action.

37. This is the view expressly taken by the Venice Commission in its opinion of 18 March 2012 on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLIX of 2011 on the organization and administration of courts (CDL-AD(2012)001).

38. It should be noted that the principle of the independence of the judiciary has been recognized by the Court in diverse contexts, in particular in Case C-224/01, *Köbler* [2003] ECR I-10239, para 42 and Case C-393/10, *O’Brien*, judgment of 1 March 2012, nyr, paras. 47–48.

39. Opinion 1/09, 8 March 2011, nyr, para 69. Contrast with Case 6/64, *Costa v. ENEL* [1964] ECR 585, where the Court speaks of “a clear separation of functions” between the EU and national courts; see also Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, para 21.

*The legitimacy challenge*

The infringement procedure as conceived by the drafters of the original EEC Treaty was not meant to target the constitutional order of a State or the moral conduct of a government. Member States were trusted to be respectful of the common values of the liberal tradition and, in turn, European institutions were trusted to respect the integrity of the Member States. The new unexpected developments require a careful reflection on the legitimacy of the Union's action. Certainly, any State wishing to join the European Union must meet the conditions laid down in Article 49 TEU, which refers to the values enshrined in Article 2 TEU. Article 49 provides that the candidate State must be "committed to promoting" these values. The liberal identity of the State precedes its accession to the Union. That does not preclude the Union from monitoring and consolidating this aspect of its identity after the State's accession.<sup>40</sup> But, provided these values are guaranteed, the Union refrains from any interference and respects the constitutional identity and the political structures of its Member States.<sup>41</sup> Member States enjoy a status of constitutional and political autonomy within the Union, as is confirmed by the possibility provided for in Article 50 TEU to withdraw from the Union. But what if this status becomes a mere smokescreen? Articles 6 and 7 TEU require a minimum of "constitutional homogeneity" among the Member States. Even more, the Union may be in a position to dictate constitutional amendments affecting the political, economic and moral structures of the State, thereby steering the national *pouvoirs constituants* (which in turn are supposed to have ultimate control of the Union's constitution).<sup>42</sup> On the other hand, it might prove *de facto* economically and politically unfeasible for a Member State to leave the Union, given the current degree of European interdependence. This implies a new stage in Union membership, which poses a real challenge. This is particularly true for questions of values. Values are linked to identities. The demands and the struggle for the recognition of values are liable to affect the bond between the Union and the States and their citizens. The question then arises of how to enforce commitments to common values, whilst at the same time preserving the loyalty of the State to the Union and without undermining the confidence of national citizens in Europe.

40. Editorial comment, *op. cit. supra* note 23.

41. Díez-Picazo, "What does it mean to be a State within the European Union?", 12 *Rivista italiana di diritto pubblico comunitario* (2002), 651.

42. Reference is made in particular to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union which requires the introduction of "golden rules" into the law of the Contracting parties through "provisions of binding force and permanent character, preferably constitutional" (Art. 3) and provides an enforcement mechanism for this purpose (Art. 8).

It is important to find the right language and the right framework to address these issues. It would be an error to simply expand the culture of compliance and the framework of self-justification imposed on Member States under the traditional conception of integration through law. As rightly stated by Advocate General Poiares Maduro in *Centro Europa*, we are speaking now of obligations of Member States “as members of the Union” which concern questions of national identities and values, and not simply of obligations derived from the exercise of Union’s competences.<sup>43</sup> An exclusive reliance on a regime of legal integration based on the supremacy of EU law and the duty to comply is not an appropriate way to proceed in such situations. Instead, it is suggested that it would be better to rely on the mutuality of political and social bonds, as a characteristic of the Union. The regime of European mutual membership has not been explored sufficiently. It develops at several levels. It starts at the level of mutual involvement. The *droit de regard* into the “internal affairs” of another Member State is in course of normalization within the Union.<sup>44</sup> It should be given a firmer foundation. The regime of membership continues at the level of relationships between the Member States and between the principal domestic social actors who meet as peers at the European level. Interestingly, Vice-President of the Commission Reding announced that she will deal with some of the problems raised by the challenge to the independence of the judiciary in Hungary by convening a meeting of the Network of the Presidents of the Supreme Judicial Courts of the European Union, to which the political and judicial authorities of Hungary will be invited to explain the situation.

This kind of mutuality needs to be explored further. We get a hint of the problem in the pending case on the Slovak authorities’ denial of entry to the territory, in 2009, for the Hungarian President to participate in a ceremony inaugurating a statue of Saint Stephen – the founding King of the Hungarian State, and now solemnly mentioned in the preamble of the new Constitution.<sup>45</sup> Both the original decision of the Slovak authorities and the observations of the Hungarian Government before the Court rely on the status of citizens of the Union, treating the Head of the State “as also citizen of the Union”. This point is put forward on both sides for good reasons of strategy and legal argument. Nonetheless, at the same time, it demonstrates a clear failure to come to terms with their common membership of the Union.

43. Opinion in Case C-380/05, [2008] ECR I-349, para 20.

44. Cf. the recent reaction of the Commission after the first round of presidential elections in France, April 2012, which witnessed the rise of the *Front national*; or the reactions to a coalition with the Lega Nord in Italy in 2000.

45. Case C-364/10, *Hungary v. Slovakia*. The Opinion of A.G. Bot was delivered on 6 March 2012.