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Baka v. Hungary case

and the chilling effect on the
freedom of expression of judges

Baka v. Hungary case

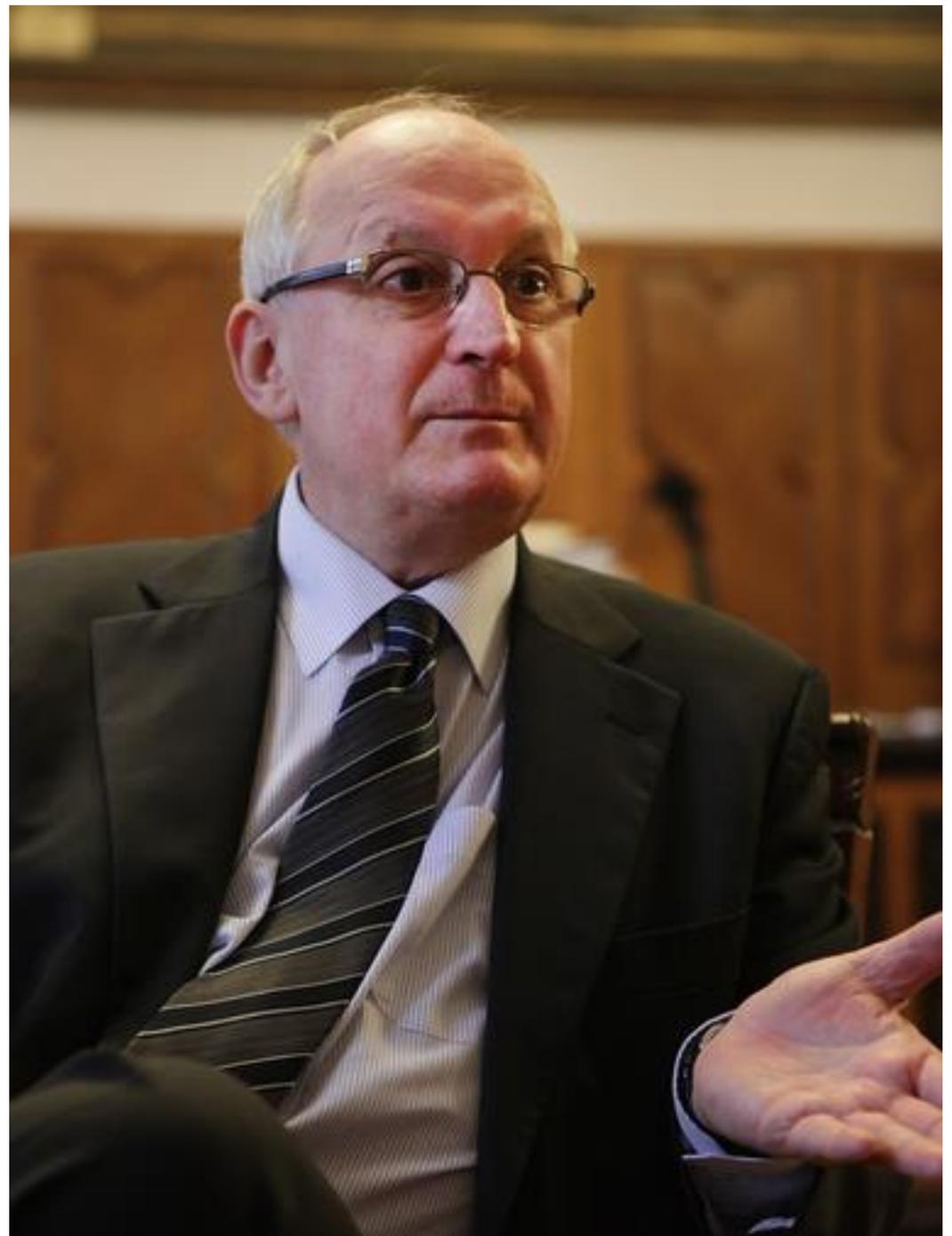
2016

Violation of Article 6 ~ undue and premature termination of Judge Baka's mandate as President of the Supreme Court through *ad hominem* legislative acts of constitutional rank and therefore beyond judicial control

Violation of Article 10 ~ was prompted by views and criticisms he expressed on reforms affecting the judiciary

Exerting a 'chilling effect' on other judges discouraging them from participating in public debate on legislative reforms affecting the judiciary and on issues concerning the independence of the judiciary

~ EXECUTION PENDING SINCE 2016





HUNGARIAN
HELSINKI
COMMITTEE

Article 6 ~

No remedy against removal

Unique or persisting violation?

No remedy against removal (2012)

- Judge Baka' removal was not open to judicial review
- **general measures required**
 - providing guarantees for procedural fairness in cases involving the removal of judges
 - ensuring that measures leading to the removal of judges will be open to effective review

Excuse for non-execution

„those measures which were criticised and put under scrutiny in the case of Baka, all resulted from a one-time constitutional reform”

- this excuse is not valid

Still no remedy against removal (2023)

- the chief justice can be removed from office without legal remedy by 2/3 majority of the Parliament
- the decision on impeachment is political and not subject to judicial remedy

Part of a wider pattern?

Political context

- one party holding constitutional majority since 2012
- legislation applied as a tool to redress

Repeating patterns of **political pressure** on the judiciary

1. removal of **judge Baka** through *ad hominem* legislation
2. removal of senior judges by **forced early retirement** via legislative acts
3. election of **new Kúria President** through *ad hominem* legislation
4. [removal of a lower-court judge](#) from the bench (case of judge Szabó) after she turned to the CJEU
5. possibility of **impeaching** the Kúria President without judicial remedy
6. **overruling** judicial decisions

Judicial Reform of 2023

Hungary passed a judicial reform in May 2023

- to fulfil undertakings towards the European Union
- a possibility not taken to implement the Baka judgment
- no new rules on the impeachment procedure, still no remedy
- new rules on the eligibility and election of the Kúria President and Vice-president
- more guarantees against undue interference by court administration

Hacking the requirement of excluding re-election of the Kúria President

- cannot be re-elected, but can remain in office for an indefinite period
- undermines the whole reform regarding the status of the Kúria President

KEEP POLITICAL PRESSURE VIA THE KÚRIA PRESIDENT

Article 10 ~ Chilling effect on freedom of expression of judges

The context of execution

New Kúria President

2020 ~ election of a new Kúria President

- through *ad hominem* legislative acts of constitutional rank
- without former experience as judge
- against objection of the National Judicial Council

UN Special Rapporteur

„an attack against the independence of the judiciary”

„in violation of the principle of separation of powers”

EC Rule of Law Report

„not in line with European standards”

~ POLITICISATION OF THE POSITION



The active role of the new Kúria President

- joined smear campaigns against members of the NJC claiming that *„decisions, communications and public appearances of the NJC are political activities”*
- upheld the legal force of [the precedent of the Kúria](#) according to which a preliminary question to the CJEU can be unlawful even after it was found incompatible with EU law
- [questioned the right of judges to criticise legislation](#)
- [challenged the new Code of Ethics](#) before the Constitutional Court



My question is: when will
Hungarian judges be able to turn



The Code of Ethics

The Csárdás ~ one step forward, two steps backwards



- the NJC adopted a new Code of Ethics to implement the Baka judgment
- the new Code significantly extends the freedom of expression of judges especially with respect to criticising legislation
- the Kúria President challenged the new Code before the Constitutional Court
- requesting its annulment and questioning the legal authority of the NJC to adopt the Code

STILL PENDING

Chilling effect



In the Baka case

- prevents judges from speaking out publicly against measures undermining the independence of the judiciary

The concept in general

- national measures (smear campaigns, political attacks, legal measures, abusive lawsuits)
- adopted and/or applied with the aim to dissuade or deter natural persons from fulfilling their professional duties
- aiming at creating a self-censorship

General measures expected

CM decisions (since 2017)

- fully guarantee and safeguard judges' freedom of expression
- take measures to lift and countervail the chilling effect
- evaluate the domestic legislation regarding guarantees against undue interferences

None of the expected measures were taken

- the situation has not been addressed but rather aggravated

Faces of resistance in Hungary (2022)



Smear campaigns

several waves, same pattern

target: judges as members of the National Judicial Council

method: discrediting members of the NJC as judges

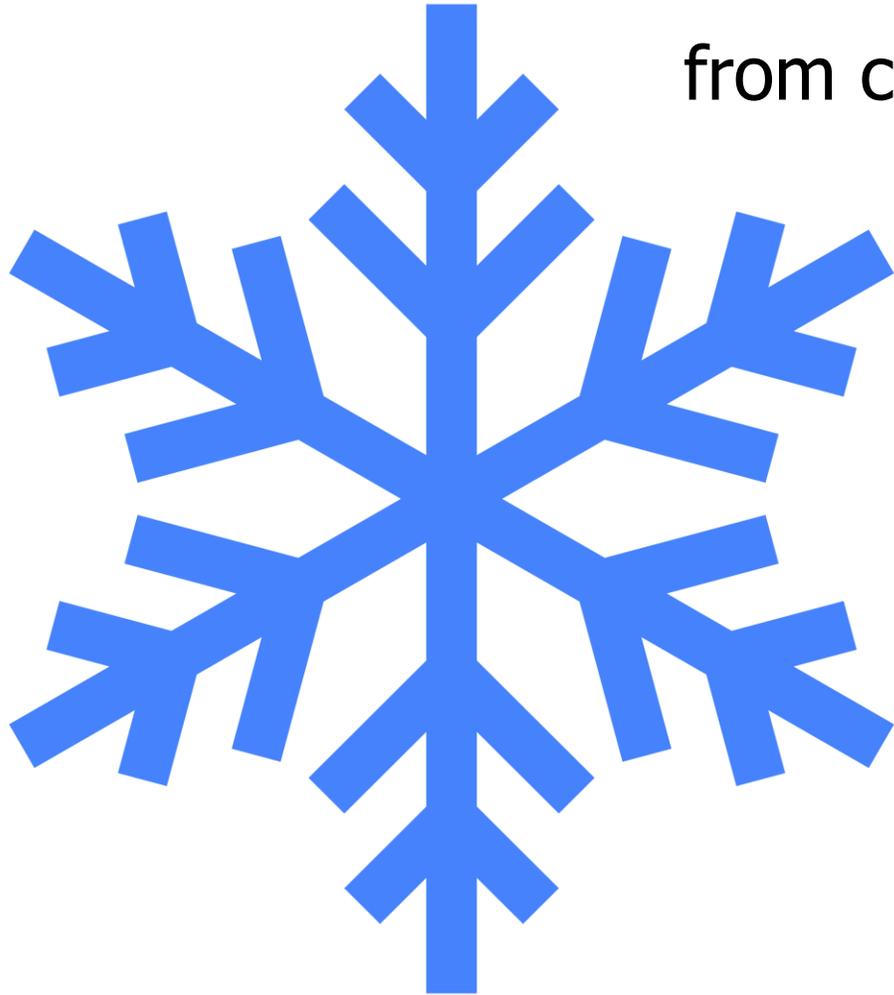
aim: discouraging judges from speaking out

[Black campaigns in the Hungarian propaganda media](#) (film 2023)

smear attacks continue even during the NJC elections

Elevation of the chilling effect

from chilling to freezing



- ❄ 0 °C removal of judge Baka
- ❄ - 39 °C forced retirement of judges
- ❄ - 112 °C smear campaigns
- ❄ - 174 °C undue interferences
- ❄ - 219 °C attacks on individual judges

- 273,15 °C election of a new Kúria President on political basis

Recommendations

1. continue examining the case under enhanced procedure
2. take into account the changed context of the execution
3. require legislative changes
 - to exclude political pressure through the Kúria President
 - to remove the possibility of prolongation of the mandate of Kúria President by political minority
 - to guarantee freedom of expression of judges in accordance with ECtHR judgments
4. require Hungarian authorities to refrain from
 - public critique of judicial decisions
 - legislative steps overruling judicial decisions
 - smear campaigns against judges
5. evaluate the domestic legislation regarding guarantees against undue interferences