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The implementation of the Baka v. Hungary judgment: the freedom of expression of judges is at stake

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In the [Baka v. Hungary judgment](#), the European Court of Human Rights (ECtHR) concluded that András Baka, then President of the Hungarian apex court had been removed from his position in 2012 through ad hominem legislation due to his criticism of government-planned judicial reform. According to the ECHR this had amounted to a violation of not only his right to access to a court regarding his removal, but also of his freedom of expression, which exerted a chilling effect on all other judges potentially discouraging them from participating in public debate on legislative reforms affecting judiciary and issues concerning the independence of the judiciary. Accordingly, in the framework of the execution process, the Committee of Ministers (CoM) of the Council of Europe [called on Hungary](#) to not only provide safeguards against ad hominem constitutional-level measures terminating a judicial mandate, but also to show that there are safeguards in the Hungarian system protecting judges from undue interferences, and these are capable of dispelling concerns regarding the ‘chilling effect’ on the freedom of expression of judges caused by the violations in the Baka case. **Seven years into the execution process it is clear that at the moment, conscious attempts to exert a chilling effect on those judges who are critical of governmental and legislative measures aimed at undermining the judiciary are among the greatest dangers to judicial independence in Hungary. The present paper summarises why this is the case and argues that special emphasis must be given to the freedom of expression of judges – and not only, and not even primarily of high ranking judicial leaders – in the execution process of the Baka v. Hungary judgment.** A more detailed elaboration of the issues presented below can be found in the [Rule 9 submission](#) of Amnesty International Hungary and the Hungarian Helsinki Committee to the CoM.

The Baka-judgment

András Baka was the President of the Supreme Court of Hungary (the apex court of Hungary). In 2011, he publicly voiced concerns about planned judicial reforms that would have impacted judicial independence negatively. Because of this criticism, his mandate was terminated prematurely through legislative acts, as a result of which no judicial review of the dismissal could be requested.

In its 2016 judgment, the ECtHR held that this had not only constituted the violation of his right to a fair trial, but had also breached his freedom of expression. According to the ECtHR’s jurisprudence, questions regarding the judiciary and the functioning of the justice system fall within the public interest, the debate of which must enjoy high level protection under Article 10. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement fully and publicly on the matter. Therefore, Mr Baka was well within his rights when he voiced his criticisms of the planned reform, and the fact that he was removed was a violation of his Article 10 rights. Furthermore, what happened to him, exerted a chilling effect on other judges too, discouraging them from participating in the public debate on reforms affecting judiciary and issues concerning judicial independence.

One of the reasons the Baka-case became a leading case is exactly the ECtHR’s recognition that attacks directed against one individual judge may have far reaching impacts, violating the freedom of expression of all judges, preventing them from speaking out publicly against measures undermining their independence. This is reflected in the CoM’s decisions that firmly invite the Hungarian government to present “guarantees and safeguards protecting judges from undue interferences, to enable a full assessment [...] as to whether

the concerns regarding the ‘chilling effect’ on the freedom of expression of judges caused by the violations in these cases have been dispelled”.

However, more than six years after the delivery of the judgment, Hungarian judges expressing critical opinions on the functioning of the judiciary are attacked by government-affiliated media as well as high-ranking governmental officials, and suffer disadvantages, which has a serious chilling effect on their freedom of expression. This effect is made even more damaging by the fact that judicial leaders, including the incumbent President of Hungary’s apex court (now called the Kúria) also participates in the campaign aimed at silencing critical judicial voices.

The role of the Kúria President in silencing critical judges

The undue and premature termination of the mandate of András Baka was the first step in the series of systemic attacks against the independence of the judiciary in Hungary. Since then, for over a decade now, the governing majority has been systematically undermining the independence of the judiciary through legislative steps and court administration measures. One of these steps was the election of the incumbent Kúria President in 2019 through a series of ad hominem pieces of legislation (making it possible for András Zs. Varga to become President without any prior court room experience) and against the manifest opposition of the judicial self-governing body, the National Judicial Council (NJC).

The smear campaign against NJC members

Instead of speaking up against attempts to silence judges, Mr Varga, who [once called the judiciary the most dangerous branch of government, and said that judicial self-administration was the “consequence of a misunderstanding” and “a delusion”](#), has joined the ranks of those who publicly attacked two members of the NJC for meeting with the Ambassador of the USA to Hungary to discuss issues related to the NJC’s operation and the independence of Hungarian judges. The NJC has been active in raising awareness of the threats posed to judicial independence. Among others, the NJC voiced concerns in connection with a [high profile corruption case](#) which reached the courts, and which the head of the Hungarian court administration refused to investigate in a transparent manner. The body also voiced criticism with respect to the unlawful appointment practice of the Kúria President and the controversial secondment practice at the Kúria. As the NJC’s criticism came at a time when stakes became high for the Hungarian government, because rule of law issues - including problems related to the independence of the judiciary - could for first time easily lead to freezing or loosing European Union funds, a fierce smear campaign was started against the two NJC members in October 2022 for accepting the Ambassador’s invitation. As outlined in [HHC’s Rule 9 submission](#), over 450 discrediting articles were published in government-affiliated media outlets about the two concerned judges, and high-ranking government and party politicians also made condemning statements questioning their integrity.

When the NJC issued a [press release](#) in defence of its two members, the Kúria President (who is an ex officio member of the NJC) published [a letter on the Kúria’s official website](#) in which he declared among others the following : “I consider the attempt by the NJC to cover up the behaviour of some of its members, which has given rise to public concern, by issuing an untrue and offensive statement to be unacceptable. I inform you, Madam President, that I will make my own position public if the statement is issued, as I still do not wish to share the responsibility for the discrediting of the judiciary for the sole benefit of group interests.” This formulation suggests that the two representatives of the NJC (who voiced criticism against court administration measures undermining the independence of the judiciary) served group interests and discredited the judiciary by meeting the representative of a foreign country. When the NJC requested protection against attacks by ruling party politicians [at a meeting of the NJC](#), the Kúria President said “I am the President of the Kúria, and if any judge of the Kúria is attacked, I raise my voice without exception. [...] With respect to other courts, I have no responsibility to do so.”

The Code of Ethics

This is however not the only way in which the Kúria President has contributed to the efforts aimed at hindering the free expression of judicial opinions regarding subjects to which judges' freedom of expression extends according to the ECtHR jurisprudence. In March 2022, the Kúria President challenged the new Code of Ethics of Judges adopted by the NJC with the active participation of Hungarian judges and judges' associations, despite the fact that the new Code of Ethics was a remarkable step towards implementing the Baka judgment. As opposed to the old code, the new Code of Ethics (i) includes clearer wording for judges' freedom of expression, stating that a judge may participate in "public events organized in accordance with the law", with the limitation that their participation should not create the perception of political commitment; (ii) it also states that judges are free to express their opinions on "laws, the legal system and the administration of justice" which was at least doubtful in the previous code; and finally, (iii) it sets out more detailed ethical standards for court leaders (e.g. banning them from speaking on behalf of judges working in their courts).

However, after the adoption of the Code of Ethics, the Kúria President challenged the Code before the Constitutional Court requesting it to annul both the Code and the legal provision allowing the NJC to adopt the Code. By challenging the Code, the Kúria President did not only publicly question the Code itself, but he also challenged the NJC's competences to adopt a Code providing greater freedom for judges to express their views on matters related to the justice system and judicial independence. Thus, he further contributed to the amplification of the chilling effect.

Conclusion

The Baka v. Hungary judgment requires the holistic assessment of the freedom of expression of Hungarian judges, when it takes into account the chilling effect the Chief Justice's removal might have played on other judges. In 2021, the [notes](#) attached to the CM decision claimed that "It is recalled at the outset that the Court in the Baka judgment held under Article 10 that the premature termination of the applicant's mandate undoubtedly had a 'chilling effect' also on other judges and court presidents (see case description). It follows, therefore, that once the measures outlined above are taken to safeguard the right to freedom of expression on the most senior and prominent member of the judiciary, namely the President of the Kúria, this would be a major step forward in redressing the chilling effect created by the violations."

While in principle this is undoubtedly true, in practice, for the above stated reasons and the Kúria President's obvious unwillingness to stand up for the protection of judges' freedom of expression, besides focusing on safeguards regarding the removability of the Kúria President, **just as much attention should be paid in the execution process to those gaps in the legal framework that can contribute to the silencing of judges who would wish to raise their voice publicly in relation to judicial independence and the functioning of the justice system. In that context, the CoM should require the Hungarian government to take effective measures to guarantee the freedom of expression of judges**, including legislation that unambiguously regulates this issue in accordance with the ECtHR's jurisprudence and in the vein of the relevant provisions of the new Code of Ethics as adopted by NJC.