



# HUNGARIAN HELSINKI COMMITTEE

Budapest, 22 April 2024

**Council of Europe**  
**DGI – Directorate General of Human Rights and Rule of Law**  
**Department for the Execution of Judgments of the European Court of Human Rights**

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**Subject: NGO communication under Rule 9(2) of the Rules of the Committee of Ministers concerning the execution of the judgment of the European Court of Human Rights in the case of *Baka v. Hungary* (Application no. 20261/12)**

Dear Madams and Sirs,

The **Hungarian Helsinki Committee** (HHC) hereby respectfully submits its observations and recommendations under Rule 9(2) of the *“Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements”* regarding the execution of the judgment of the European Court of Human Rights in the **Baka v. Hungary case** (Application no. 20261/12, Judgment of 23 June 2016, hereinafter Baka Judgment), in advance of the next meeting (June 2024) (DH) of the Ministers’ Deputies on the execution of judgments.

The HHC is an independent human rights watchdog organisation, working towards defending the rule of law in Hungary. The HHC submitted (together with other Hungarian NGOs) a third-party intervention in the Baka v. Hungary case and submitted several communications to the Committee of Ministers in relation to the non-execution of the Baka Judgment, since 2019.

The present communication concerns the execution of the judgment, in particular the implementation of the general measures prescribed by the Interim Resolution CM/ResDH(2022)47 of the Committee of Ministers (CM) adopted in March 2022 (hereafter: **2022 CM Resolution**)<sup>1</sup> and the latest Decision Decision CM/Del/Dec(2023)1483/H46-17 adopted by the CM in December 2023 (hereafter: **2023 CM Decision**).<sup>2</sup>

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<sup>1</sup> See: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680a597f9](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a597f9)

<sup>2</sup> See: [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2023\)1459/H46-11E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2023)1459/H46-11E)

## I. PRELIMINARY NOTES AND RECOMMENDATIONS

It is recalled that, in the present case, the European Court found violations of the European Convention on Human Rights (Convention) on account of the undue and premature termination of the applicant's mandate as President of the former Hungarian Supreme Court through *ad hominem* legislative acts of constitutional rank and therefore beyond judicial control, prompted by views and criticisms the applicant had expressed on reforms affecting the judiciary, and exerting a "chilling effect" on the freedom of expression of other judges and court presidents (violations of Articles 6 and 10 of the Convention).

### I.1. All measures available to the Committee of Ministers and other relevant Council of Europe institutions should be weighed to persuade the Hungarian authorities to execute the judgment

Almost eight years have passed since a final judgment on the Baka case was delivered on 23 June 2016. Over the years, the Baka-case has become a *par excellence* negative example of the non-execution of judgments of the European Court of Human Rights (ECtHR). The implementation of the judgment requires Hungary to pass legislative measures that guarantee the irremovability of judges and their freedom of expression, which are both key components of the independence of the judiciary, a fundamental constituent of democracy and the rule of law.<sup>3</sup> The stakes of non-execution are extremely high not only because the case is crucial for the rule of law both at national and at Council of Europe level, but also because only an independent judiciary is capable of enforcing compliance with the undertakings of the Convention vis a vis state authorities.

It is underlined that the implementation of the judgment does not require complex general measures, but only the passing of Convention compliant legislation that safeguards the irremovability of judges and their freedom of expression. Despite the enhanced supervision of the execution of this judgment by the Committee of Ministers, after six CM decisions -- including an interim resolution -- and almost a dozen Rule 9 submissions by different civil society actors calling attention to the urgent need for the implementation of the judgment and the detrimental consequences of non-execution, there is still no progress in the case. Hungarian authorities *de facto* ignore the CM decisions and refuse to abide by the final judgment by failing to adopt general measures. The ruling political majority holds constitutional power in the Parliament for 14 years now, therefore the reluctance to pass the procedurally and substantially non-complex legislation required for the execution of the judgment can be translated as a clear political message of disrespect towards human rights, democracy and the rule of law. On the contrary, new developments that will be presented below fly to the face of the letter and spirit of the judgment, thus generating even less Convention-compliant results instead of remedying the violations established by the Court. In all its aspect, the stat of play in respect of the present judgment thus constitutes an alarming model-case for explicit denial of a respondent State's obligations under Article 46 of the Convention, thus directly undermining the effectiveness of the monitoring mechanism set up by the Convention system, which all 46 CoE Member States, including Hungary, recommitted to uphold less than a year ago, in the context of the 4<sup>th</sup> Summit of Heads of State and Government of the Council of Europe (Reykjavík Summit).<sup>4</sup>

**For the above reasons, the HHC respectfully recommends that the CM continues examining under the enhanced supervision procedure the effective implementation of the Baka Judgment as regards both violations established by the ECtHR under Articles 6 and 10 of the Convention, and that it considers all measures available to the Committee of Ministers and other relevant Council of Europe institutions, to ensure that the Hungarian authorities meaningfully engage with the implementation**

<sup>3</sup> The non-implementation of the Baka-case was highlighted in the European Commission's 2023 Rule of Law Report. [https://commission.europa.eu/system/files/2023-07/40\\_1\\_52623\\_coun\\_chap\\_hungary\\_en.pdf](https://commission.europa.eu/system/files/2023-07/40_1_52623_coun_chap_hungary_en.pdf)

<sup>4</sup> See the 2023 [Reykjavík Declaration "United around our values"](#), in particular Appendix IV, pp. 17-19.

**procedure in a result-oriented spirit, and that they refrain from continuing undermining the effectiveness of the Convention mechanism by failing to implement this landmark judgment.**

## I.2. All key arguments put forward in previous submissions remain relevant

### (A) *The Hungarian authorities' dismissive approach persists*

The dismissive approach taken by the Hungarian authorities in the procedure pending before the CM persists. The Hungarian authorities did (i) neither respond to the CM's invitation to submit an updated action plan by 28 March 2024 [see point 6 of the 2023 CM Decision]; (ii) nor present an evaluation of the domestic legislation on the status of judges and administration of courts, including an analysis of the impact of all legislative and other measures adopted and foreseen on judges' freedom of expression, to enable the Committee to make a full assessment whether the "chilling effect" has been abated [see point 4 of the 2023 CM Decision]. Non-implemented general measures are related to both the **violation of Article 6** of the Convention (lack of "*safeguards in connection with ad hominem constitutional level measures terminating a judicial mandate*") and the **violation of Article 10** of the Convention (lack of "*safeguards against abuse when it comes to restriction of judge's freedom of expression*") established in the *Baka v. Hungary* case.

### (B) *Key statements of former Rule 9 Submissions remain relevant*

Since the Hungarian authorities fully ignore the decisions of the CM and refuse to take the general measures recommended, the arguments put forward in previous NGO Rule 9 submissions must be maintained. For ease of reference, we refer briefly to the following key statements of our former submissions:

- (i) The general context of the execution of the Baka judgment has considerably changed during the time lapsed since the removal of András Baka (in 2012) and the delivery of the judgment (in 2016). **Therefore, the general measures recommended by the CM should reflect the changes that have occurred in the context of the execution of the judgment.**<sup>5</sup> In particular:
- (ii) The status and role of the Kúria President has remarkably changed, together with the change of the person holding the mandate, thus entailing the radical politicisation of the position in 2020. This requires heightened scrutiny in assessing the adequacy of the general measures prescribed. **The CM should pay particular attention to the changed role and activity of the current Kúria President as part of the context of proper execution when assessing the general measures to be taken by Hungarian authorities, especially the ones that should serve to lift and counter the chilling effect on the freedom of expression of judges.**<sup>6</sup>
- (iii) The judicial reform passed in Hungary in 2023 (the 2023 Judicial Reform) exclusively served compliance with the specific conditions set by the European Union for Hungary's access to frozen union funds. Although the 2023 Judicial Reform could have been an opportunity to execute the *Baka v. Hungary* judgment, **the Hungarian authorities did not take any steps to implement the judgment in the framework of the 2023 Judicial Reform.**<sup>7</sup>

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<sup>5</sup> See section I.2. of the Rule 9 Submission of the Hungarian Helsinki Committee of 3 October 2023. [https://hudoc.exec.coe.int/?i=DH-DD\(2023\)1245E](https://hudoc.exec.coe.int/?i=DH-DD(2023)1245E)

<sup>6</sup> See section I.2. and III.2. of the Rule 9 Submission of the Hungarian Helsinki Committee of 3 October 2023. [https://hudoc.exec.coe.int/?i=DH-DD\(2023\)1245E](https://hudoc.exec.coe.int/?i=DH-DD(2023)1245E)

<sup>7</sup> See section I.3. of the Rule 9 Submission of the Hungarian Helsinki Committee of 3 October 2023. [https://hudoc.exec.coe.int/?i=DH-DD\(2023\)1245E](https://hudoc.exec.coe.int/?i=DH-DD(2023)1245E)

- (iv) In order to provide clear proof that Hungary has eliminated the possibilities of undue interference with the removal of judges [the violation established under Article 6 of the Convention] and the exercise of their freedom of expression [the violation established under Article 10 of the Convention], **the Hungarian authorities have to proceed with the evaluation of the domestic legislation on the status of judges and the administration of courts, including an analysis of the impact of all legislative and other measures adopted and foreseen on judges' freedom of expression to make 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, as requested on several occasions by the CM.**<sup>8</sup>
- (v) Despite the fact that the CM keeps reminding Hungarian authorities of the paramount importance of ensuring that a decision to remove a judge is subjected to effective oversight by an independent judicial body, **the Hungarian Parliament continues failing to introduce new legislation that would foresee judicial control over the removal of the Kúria President, thus continuing to uphold, almost eight years after the delivery of a final judgment in the Baka case, legislation that has been found by the ECtHR to be non-Convention-compliant.**
- (vii) The rules governing the status of the Kúria President allow undue political pressure on (and via) the highest judicial position.<sup>9</sup> Considering the fact that the Kúria President holds key powers within the judiciary, the possibility of the Parliament to remove (or keep in position) the Kúria President allows the legislature to exert undue pressure on the chief justice and through the position, on the whole judiciary. **For the above reasons the HHC respectfully recommends the CM to put emphasis on the non-execution of the Baka judgment as part of the wider pattern that aims to put undue political pressure on the judiciary.**
- (viii) From the perspective of the freedom of expression of judges, not only the legislation governing the removal of the Kúria President but also the rules that allow the Parliament to keep them in office are relevant. These may induce an unwillingness on behalf of the Kúria President to speak up against legislation undermining judicial independence in exchange for being kept in position even after his mandate terminates. **Therefore, the CM should consider requiring general measures that remedy holistically the possibilities of undue interference in the mandate of the Kúria President, including the removal of the legislature's possibility to keep him in position for an indefinite term.**
- (ix) In addition to the focus on the safeguards regarding the status of the Kúria President, 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. The general measures prescribed to lift and counter the chilling effect on the freedom of expression of judges and rebuild the confidence of Hungarian judges in their ability to express their opinions without fear of negative consequences should primarily **require the Hungarian authorities to introduce legislative**

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<sup>8</sup> The Hungarian authorities undertook to evaluate the Hungarian legislation in 2020. Since then, Interim Resolution CM/ResDH(2022)47 and the latest 2023 CM Decision have also reminded Hungarian authorities of their

<sup>9</sup> According to these provisions: (a) a blocking minority in Parliament can prevent the election of a new president and keep the incumbent Kúria President in office for an undetermined period of time; (b) the legislation allows the Kúria President to stay in office beyond the statutory retirement age for judges, leaving it to a one-third minority in Parliament to decide on the termination of the mandate; (c) the same blocking Parliamentary minority can keep the Kúria President in office (even after the mandate terminates, for an indefinite period) which can prevent the Kúria President from being removed from office (even if called out for being unworthy); (d) the legislation leaves it fully to political actors, without the involvement of a judicial body to launch the relevant procedure and to decide on the removal of the Kúria President.

measures that guarantee beyond doubt the exercise of the freedom of expression and provide adequate legal remedy against its breaches.<sup>10</sup>

## II. UNDUE INTERFERENCE IN THE STATUS OF JUDGES [ARTICLE 6 OF THE CONVENTION]

### II.1. Academic research proves the possibility of undue internal pressure

In October 2023, an academic research paper<sup>11</sup> was published, which – partially – relied on interviews conducted with Hungarian judges. One of the aims of the article was “to add insights and nuance to existing accounts of judicial (in-)dependence in Hungary.”<sup>12</sup> While the article thoroughly describes methods of undue pressure within the Hungarian judicial system, it also contains valuable descriptions of personal experiences and opinions from the interviewed judges. Below we provide relevant quotes that demonstrate in a telling manner the presence of internal pressure within the Hungarian judiciary.

With respect to the role and powers of court leaders, the article cites the following insightful testimonies: “Professionally, I think the president of the court has no influence, it's a red line that the president has no power to intervene in professional matters [decision-making], but in administrative matters she has almost unlimited powers. The president has a very big role in terms of day-to-day work conditions, and has a very big role regarding the workload of a particular judge, the colleagues she works with, the workplace she gets, the computer equipment she gets, the quality of transcribers, whether she has an assistant or a clerk assisting her, or is allowed to work at home or not and have to be in the courthouse all the time. [...] These decisions are basically discretionary, and there is no remedy against them.”<sup>13</sup> According to another interviewee: “The tolerance for minor mistakes like not keeping deadlines and the use of disciplinary proceedings for infringements very easily coincide with loyalty, sympathy and antipathy between judge and court president.”<sup>14</sup>

With respect to the Kúria President’s role and activity, the article sets forth the following: “The red line of not interfering directly in judgments has come under pressure since the appointment of the new Chief Justice of the Kúria, who ‘doesn't respect the rules of the game, the written and unwritten norms’.<sup>15</sup> ‘And that's the trouble, that's absolutely the way he thinks. He thinks like a politician. He doesn't think like a judge’.<sup>16</sup> Several participants reported that he made a judge accountable for a decision. He yells at judges, ‘when there is something important that needs to be implemented and he could not manage to get [an important] case for himself’.<sup>17</sup> He yells if he does not favour a decision and if judges dare to not support a motion he puts forward. Moreover, he openly questions their intellectual and professional capabilities or attributes to them political allegiance to the opposition (and in doing so questions implicitly their neutrality). A participant reported that Varga Zs. took cases from judges in sensitive matters – like referendums – if they were not ready to write the expected decision. If that does not work, judges report being pressured to sign decisions by withholding appointments and promotions or threatening them with assignments to other branches of law (from administrative law to civil law for example). The judges are rather perplexed how to react. ‘There was no precedent for this in the

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<sup>10</sup> [...]

<sup>11</sup> Etienne Hanelt and Attila Vincze: A Hybrid Judiciary in a Hybrid Regime: a Case Study on Hungary, JUSTIN Working Paper Series, David Kosař & Katarína Šipulová, Co-Editors in Chief ISSN 2336-4785, [https://www.mabie.hu/attachments/article/1696/Hanelt%20and%20Vincze%20A%20hybrid%20judiciary%20in%20a%20hybrid%20regime%20\(2023\).pdf](https://www.mabie.hu/attachments/article/1696/Hanelt%20and%20Vincze%20A%20hybrid%20judiciary%20in%20a%20hybrid%20regime%20(2023).pdf)

<sup>12</sup> Ibid, p. 7.

<sup>13</sup> Anonymous Hungarian judge, cited in: Etienne Hanelt and Attila Vincze: A Hybrid Judiciary in a Hybrid Regime: a Case Study on Hungary, JUSTIN Working Paper Series, David Kosař & Katarína Šipulová, Co-Editors in Chief ISSN 2336-4785, [https://www.mabie.hu/attachments/article/1696/Hanelt%20and%20Vincze%20A%20hybrid%20judiciary%20in%20a%20hybrid%20regime%20\(2023\).pdf](https://www.mabie.hu/attachments/article/1696/Hanelt%20and%20Vincze%20A%20hybrid%20judiciary%20in%20a%20hybrid%20regime%20(2023).pdf) p. 18.

<sup>14</sup> Ibid, p. 19.

<sup>15</sup> Anonymous Hungarian judge, cited ibid, p. 20.

<sup>16</sup> Anonymous Hungarian judge, cited ibid, p. 20.

<sup>17</sup> Anonymous Hungarian judge, cited ibid, p. 20.

*past, and judges don't [know how to fight], and that's the great good fortune of this man [András Zs. Varga]. So there really is no opposition and most likely there will not be any'.<sup>18/19</sup>*

The article as a whole and the examples highlighted above (together with other personal statements not cited here) are yet another proof that undue interference in the status of judges is present within the Hungarian judiciary and capable of discouraging judges from expressing their views, either in their decision-making, or outside the courtroom, in the wider public with respect to laws, the legal system and the independence of the judiciary.

## II.2. New Sovereignty Protection Authority may exert undue external pressure on judges

In December 2023, the Hungarian Parliament adopted Act LXXXVIII of 2023 on the Protection of National Sovereignty<sup>20</sup> which established a new Sovereignty Protection Office (SPO) with effect as of 1 February 2024. Over 100 civil society organisations,<sup>21</sup> more than 15,000 citizens,<sup>22</sup> and 10 independent media outlets<sup>23</sup> strongly criticised the new law. The Council of Europe Commissioner for Human Rights<sup>24</sup> called for the abandonment of the proposal, the UN Special Rapporteur on Freedom of Expression and the Special Rapporteur on Human Rights Defenders<sup>25</sup> noted the imminent negative implications of the adoption of the proposal in their joint communication to the Hungarian Government. The European Commission announced that it decided to launch an infringement procedure against Hungary for violating EU law on the Defence of Sovereignty.<sup>26</sup> The Venice Commission requested Hungary to repeal the act.<sup>27</sup>

Although it was primarily designed to silence independent media, civil society organisations and citizens, the SPO can severely interfere with the independence of Hungarian judges as well, on and off the bench. The SPO is mandated to: (i) investigate activities carried out *“in the interests of a foreign body, organisation or natural person regardless of its legal status,”* including activities influencing the decision-making process of persons exercising public authority if such activities could harm or threaten the sovereignty of Hungary;<sup>28</sup> (ii) investigate individual cases and publish on its website the results of its case-by-case investigations, including the facts found during the investigations, as well as the findings and the conclusions based thereon;<sup>29</sup> (iii) prepare an annual national sovereignty report including on legislation affecting national sovereignty and the effectiveness of its application, problems of implementation and enforcement, and analysis of enforcement and administrative practice and recommendations to the competent bodies and an assessment of how the competent bodies have taken into account previous reports and recommendations.<sup>30</sup> The SPO prepares an annual report that identifies legislation affecting national sovereignty. This allows the SPO to create a pool of national legal provisions, the applicability of which cannot be questioned without endangering national sovereignty. The SPO can prevent judges from expressing their views on laws and the justice system by formulating recommendations to judges on protecting national sovereignty. Recommendations may entail that judges refrain from speaking out for being exposed to the investigation of an administrative authority. These new powers of the SPO may be used to silence judges, for example, if

<sup>18</sup> Anonymous Hungarian judge, cited *ibid*, p. 20.

<sup>19</sup> *Ibid*, p. 20.

<sup>20</sup> <https://nit.hu/jogszabaly/en/2023-88-00-00>

<sup>21</sup> <https://civilizacio.net/en/news-blog/over-100-ngos-protest-against-the-defence-of-sovereignty-law>

<sup>22</sup> <https://szabad.ahang.hu/petitions/a-demokracia-nem-veszelyeztet-i-magyarorszag-szuverenitasat>

<sup>23</sup> <https://insighthungary.444.hu/2023/12/13/the-sovereignty-protection-authority-is-harmful-and-against-the-rule-of-law-yet-it-cannot-intimidate-independent-media>

<sup>24</sup> <https://www.coe.int/ca/web/commissioner/-/hungary-the-proposal-for-a-defence-of-national-sovereignty-package-should-be-abandoned>

<sup>25</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28661>

<sup>26</sup> [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_24\\_301](https://ec.europa.eu/commission/presscorner/detail/en/inf_24_301)

<sup>27</sup> [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2024\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2024)001-e)

<sup>28</sup> Act LXXXVIII of 2023 on the Defence of National Sovereignty, Article 3(a)(ac)

<sup>29</sup> Act LXXXVIII of 2023 on the Defence of National Sovereignty, Article 6(1)

<sup>30</sup> Act LXXXVIII of 2023 on the Defence of National Sovereignty, Article 6(2)



a Hungarian judicial association raises concerns with respect to a planned legislation, the SPO might initiate investigations against the association in protection of national sovereignty. Therefore, the creation and the powers of the SPO also pose potential risk to the rights of judges under Article 10 of the Convention.

**In this context, the HHC respectfully recommends the CM to critically assess all 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 and to require that the Hungarian authorities take effective measures to guarantee the freedom of expression of judges.**

### III. FREEDOM OF EXPRESSION OF JUDGES [ARTICLE 10 OF THE CONVENTION]

#### III.1. Research by the Hungarian Association of Judges amongst Hungarian judges on the freedom of expression of judges and the presence of the chilling effect in their ranks

##### *(A) Anonymous research amongst judges*

In November 2023, the largest Hungarian association of judges, the **Magyar Bírói Egyesület (MABIE)** initiated a research amongst Hungarian judges with respect to their freedom of expression and in particular, the presence of the chilling effect in their ranks. The research was conducted via an online anonymous survey disseminated at first only amongst the members of MABIE. To be able to reach all Hungarian judges, MABIE turned to the National Judicial Council (NJC) to request the assistance of the NJC in distributing the survey. The NJC supported the request and resolved in December 2023 to contact all Hungarian judges via e-mail to inform them of the ongoing survey and encourage them to fill it out.<sup>31</sup>

##### *(B) The Kúria President questioned the appropriateness of the content of the survey and prejudiced its outcome*

Commenting on the involvement of the NJC in encouraging judges to give their opinion on their own freedom of expression, the Kúria President (who is *ex officio* member of the NJC and was present when the NJC resolved on supporting the research initiated by MABIE) claimed that *“As it is usual for the most sensitive issues to provoke a debate sooner or later, I would suggest that both the association [MABIE] and the NJC indicate in their call with respect to the survey, that there are limits to the freedom of expression provided for in the LSRA [Act CLXII of 2011 on the Legal Status and Remuneration of Judges], and in case of judicial leaders, in the OAC [Act CLXI of 2011 on the Organisation and Administration of Courts]. The constraints provided by in the law, however, should not be perceived as causing anyone a “jingling” effect, [a sarcastic and not easily translatable pun made by the Kúria President<sup>32</sup> who tends to question the presence of the chilling effect amongst Hungarian judges] so that judges do not report on not liking the fact that, for example, administrative leaders have to implement certain decisions and therefore they are restricted by the fact that they have to implement them, instead of scolding them. We [the NJC] must refer to the legal framework established by the LSRA and the OAC. We do not express an opinion as private individuals when we express an opinion, but as judges, and there is a legal framework for this.”<sup>33</sup>*

<sup>31</sup> See the minutes of the meeting of the NJC held on 5-6 December 2023 <https://obt2018.hu/2023-12-05-06/> p. 27.

<sup>32</sup> András Zs. Varga as Kúria President often makes sarcastic jokes about the chilling effect on the freedom of expression of judges. This time, the sarcastic joke was made by translating the English term “chilling effect” as “jingle” (in Hungarian: “csilingelő”) effect into Hungarian. On an other occasion, he joked that “it would be simpler to talk about the weather, which is getting colder from today, one might say, causing a chilling effect.” [The Kúria President made this joke after MABIE : [https://kuria-birosag.hu/sites/default/files/sajto/2024\\_01\\_08\\_a\\_kuria\\_elnokenek\\_beszede.pdf](https://kuria-birosag.hu/sites/default/files/sajto/2024_01_08_a_kuria_elnokenek_beszede.pdf) ]

of putting on a jacket to be protected against the chilling effect on the freedom of expression of judges, because it is very cold.

<sup>33</sup> See the minutes of the meeting of the NJC held on 5-6 December 2023 <https://obt2018.hu/2023-12-05-06/> p. 27.

By this remark, the Kúria President (i) trivialised the concerns raised by MABIE with respect to the freedom of expression of Hungarian judges and the presence of the chilling effect amongst them (making a joke out of it); (ii) implied that the prohibitive legislative provisions should be interpreted in a manner that excludes the right of judges to express their opinion; (iii) hinted at the fact that Hungarian judges perceive as chilling effect their obligation to comply with these provisions; (iv) suggested that the survey should not provide an opportunity for judges to criticise the Hungarian legislation that limits their own freedom of expression, and this way – quite absurdly – (v) exerted undue pressure on judges with respect to the survey, which was precisely intended to assess the extent of the presence of the chilling effect.

The above interpretation of the Kúria President is at odds with the Baka Judgment and points out in the most imperative manner possible, to the necessity of constitutional-level legislative modifications to guarantee beyond doubt the freedom of expression of judges as required by the ECtHR's jurisprudence.

Contrary to the interpretation provided by the Kúria President, in the spirit of the Baka judgment, judges should be entitled to give their opinion on laws, they should be free to fill out a survey that also covers their opinion on the Hungarian legislation governing their freedom of expression. If Hungarian legislative provisions must be interpreted in a manner that excludes or limits anyhow the right of judges to give their opinion on the legislative provisions governing their own freedom of expression and the presence of the chilling effect, then the Hungarian legislation does not comply with the requirements established in the Baka Judgment.

*(C) The government-aligned propaganda media intended to discredit the survey*

On 20 December 2023, an article<sup>34</sup> appeared in the government-aligned propaganda outlet Mandiner with the clear aim to discredit the research initiated by MABIE. According to the title of the article: *“Judges are measured by a survey that can be filled out by anyone, the NJC which holds parties with Pressman, also encourages judges to fill it out. Moreover, the data is collected on US servers.”*<sup>35</sup> The article claimed that the anonymous survey is accessible to anyone so that “judges and non-judges alike can freely fill in the questionnaire. This could also make the final outcome open to manipulation.”<sup>35</sup> The article presented the survey as serving foreign interests by connecting it to the extensive smear campaign directed against representatives of the NJC – Tamás Matusik and Csaba Vasvári – for meeting US Ambassador David Pressman back in 2022.<sup>36</sup>

The results of the survey have not been published until the date of submission of the present Rule 9.2 Communication.

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<sup>34</sup> <https://mandiner.hu/belfold/2023/12/barki-altal-kitoltheto-kerdoiven-szondazzak-a-birakat-a-pressmannal-partizo-obt-is-a-kitoltesre-buzdit>

<sup>35</sup> According to the minutes of the meeting of the NJC held on 10 January 2024, after the President of the NJC disseminated the survey amongst all Hungarian judges via e-mail, the link of the survey appeared on the website of MABIE as well and was removed later on. See: <https://obt2018.hu/2024-01-10/> p. 10 and 11.

<sup>36</sup> See Section III.1. of the Rule 9 Submission by Amnesty International Hungary and the Hungarian Helsinki Committee of 26 January 2023 [https://hudoc.exec.coe.int/?i=DH-DD\(2023\)157E](https://hudoc.exec.coe.int/?i=DH-DD(2023)157E) p. 5.



### III.2. Assessment of the Hungarian legislation governing the freedom of expression of judges

#### (A) Prohibitive provisions dominate in the laws

While the execution of the Baka judgment would require a high degree of protection for the freedom of speech with respect to democracy, the rule of law and the independence of the judiciary, even in public debate and irrespective of political implications, Hungarian legislation lacks provisions guaranteeing judges' freedom of expression to the extent required. The legislation does not expressly provide for the right of judges to give their opinion on laws, the legal system, the administration of justice and the operation of courts. Provisions that explicitly establish the duty of judges to promote and protect judicial independence as required by the ECtHR's case-law [see: Zurek v. Poland, No. 39650/18, 16 June 2022] are fully absent.

Besides the general provision of the Fundamental Law guaranteeing that *"everyone shall have the right to freedom of expression"*<sup>37</sup> all legislative provisions (most of them cardinal laws<sup>38</sup>) governing judges' right to express views stipulate broadly formulated restrictive provisions. According to Hungarian laws: *"Judges may not be members of political parties or engage in political activities."*<sup>39</sup> *"A judge may not, outside his or her official capacity, publicly express an opinion on a case pending or formerly pending before a court, in particular with regard to cases which he or she has decided."*<sup>40</sup> *"Statements of interpretation of the law which are not authorised by law may not be published in the name of a panel of judges, heads of court or consultation of judges."*<sup>41</sup>

The generally formulated ban on political activities allows for an interpretation that unduly restricts the scope of permissible extrajudicial activities of judges and goes against the requirement that judges should have the right and the duty to speak out for the protection of their own independence, even if it has political implications.

#### (B) The interpretation of the laws by the NJC and the Code of Judicial Ethics adopted by the NJC

The only norm containing permissive provisions with respect to the freedom of expression judges is the Code of Judicial Ethics (Code of Ethics) adopted by the NJC<sup>42</sup> and in force since 15 July 2022. Nevertheless, the Code of Ethics does not qualify as law, just a collection of recommended ethical norms which, by its very nature, does not have the enforceability of legislation or of instruments of public law. According to the Code of Ethics, *"judges should not engage in political activity and should refrain from political statements. Judges can attend public events organized in accordance with the law but their participation should not create the perception of political commitment."*<sup>43</sup> *"Judges are free to express their opinion on laws, the legal system and the administration of justice, in particular, they can publish, give lectures and teach."*

Although the Code of Ethics adopted by the NJC intended to ensure Hungarian judges' freedom of expression in line with the Baka Judgment, the interpretation adopted by the Kúria President and the

<sup>37</sup> Article IX (1) of the Fundamental Law.

<sup>38</sup> Cardinal laws are laws requiring a two-thirds majority for adoption or modification.

<sup>39</sup> Article 26 (1) of the Fundamental Law also repeated by Article 39 (1) of Act CLXII of 2011 on the Legal Status and Remuneration of Judges (LSRJ).

<sup>40</sup> Article 43 of LSRJ.

<sup>41</sup> Article 27/A of the OAC.

<sup>42</sup> According to Article 103 of the OAC "(1) In the field of general court administration the NJC [...] e) adopts the Code of Judicial Ethics and publishes it on the central website." The Code of Ethics is available in Hungarian at:

[https://fovarositorvenyszek.birosag.hu/sites/default/files/field\\_attachment/etikai\\_kodex.pdf](https://fovarositorvenyszek.birosag.hu/sites/default/files/field_attachment/etikai_kodex.pdf) According to the Preamble: „the Code of Ethics for Judges applies to all judges appointed in Hungary.”

<sup>43</sup> Article 2 (1) of the Code of Ethics.

fact that the Kúria President challenged it before the Constitutional Court is capable of discouraging judges from relying on the provisions of the Code of Ethics.

In January 2024, in an interview given before the expiry of his mandate as member and President of the NJC, judge Tamás Matusik called attention to the fact that the prohibitive legislative provisions can be interpreted in a manner that it forbids judges to criticise the judicial system. He claimed that “we [the NJC as a body] *interpreted the legislative prohibition in a sense that it is not a political activity to criticise the judicial system. This is the European standard, and in the view of the NJC it is not contrary to the Fundamental Law either. [...] It is only in Hungary that the climate is such that expressing views with respect to the judicial system immediately carries the stigma of politicisation. When we drafted the Code of Ethics, we were aware that this is not politicisation, but the general standard, which should be interpreted in the same way in Hungary. This is why we included it in the Code of Ethics. The Kúria President challenged the decision in the Constitutional Court. Not only for that, but also for a variety of other reasons. It is a pending case before the Constitutional Court.*”<sup>44</sup>

The fact that expressing of views with respect to the judicial system carries the stigma of politicisation was formerly also confirmed by MABIE, in an article published in September 2022 according to which: “[...] *judges are not allowed by law to engage in political activity, nor do they actually engage in it. The problem arises from the fact that judges' expressions of opinion are often - in public discourse and within the judiciary - perceived as political. As a result, judges often do not even publicly criticise their own status, their remuneration, the administration of the courts or the organisation of the courts, nor do they react to attacks on their personal conduct. If they do, they must suffer the adverse consequences.*”<sup>45</sup>

*(C) The interpretation adopted by the Kúria President and the need for continuing examining the Article 10 violation established by the ECtHR as a separate issue requiring the adoption of general measures*

In contrast to the interpretation suggested by MABIE, adopted by the NJC and the Code of Ethics, the Kúria President is of the opinion that the restrictions contained in the cardinal laws must be interpreted as precluding any type of political activity, including public criticism of laws, the legal system and judicial administration. The compilation of his public statements and activities in all his different roles – as an academic, as the representative of the Hungarian judiciary, as member of the NJC, as judge and as judicial leader – all point towards a restrictive interpretation that fully contradicts the spirit of the Baka Judgment. [See Annex I. of the present Rule 9 Submission].

This shows that adequate safeguards against the removal of the Kúria President may be insufficient in themselves for guaranteeing the freedom of expression of Hungarian judges in general, as they only provide protection if the Kúria President uses his/her position and powers to promote the freedom of expression of judges. The continuous, undue and non-Convention-compliant interferences with the freedom of expression of members of the judiciary demonstrate that concrete legislative steps must be taken to remedy the breach caused in the freedom of expression of judges. In order to lift and counter the chilling effect on judges who seek to engage in public debate over the laws, the justice system and the rule of law in general, the debate around the interpretation of the prohibitive provisions needs to be clarified via constitutional level legislation, narrowing the scope of banned political activities and new permissive provisions should be adopted to provide stronger guarantees

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<sup>44</sup> See: <https://www.szabadeuropa.hu/a/a-biro-a-sajat-fuggetlenseget-megvedheti-matusik-tamas-a-lekoszono-orszagos-biroi-tanacs-elnoke/32775192.html>

<sup>45</sup> <https://www.mabie.hu/index.php/1661-a-birokkal-kapcsolatos-sajtoiban-megjeleno-velemenyek-margojara>

for judges' free speech in those areas where their communication on public matters is permissible under the relevant European standards.

### III.3. Hungarian judges warn of chilling effect with respect to the Kúria President's extraordinary inspection in connection with the pardoning scandal

One of the latest examples of the Kúria President's active efforts at limiting judge's right to express views in their professional capacity was closely connected to the pardoning scandal that outraged the Hungarian public and led to the resignation and full withdrawal from politics of two leading ruling party politicians: the country's President of the Republic, Katalin Novák and the former Minister of Justice and leading ruling party MP Judit Varga.

In Hungary, the rules governing presidential pardon provide full discretion to the President of the Republic. Decisions on pardon are totally non-transparent, the President is not obliged to publish or reason them. In May 2023, the Pope visited Hungary, and on this occasion, the President of the Republic granted pardon to an accomplice to child sexual abuse. Endre K. had been a deputy director of children's home in the town of Bicske, and he was convicted for pressuring children to withdraw their testimonies against his boss, János Vásárhelyi, the director of the institution. The director himself is currently serving his prison sentence for sexually abusing children.<sup>46</sup>

The scandal burst out, in February 2024, almost a year after the pardon was granted. The case would have probably never come to light had it not been indirectly mentioned in a final decision of the Kúria<sup>47</sup> which was published in January 2024 as a judgment of principle importance in an official journal of the Kúria titled 'Kúriai Döntések' (Decisions of the Kúria).<sup>48</sup> This is a monthly journal edited by judges of the Kúria which compiles important decisions of the Kúria. An anonymous attorney-at-law discovered the decision and the reference to the presidential pardon and identified the case based on the available data.

Soon after the scandal caused the downfall of Katalin Novák and Judit Varga, a press release appeared on the website of the Kúria,<sup>49</sup> according to which the Kúria President initiated an extraordinary inspection in connection with the publication of the decision in the journal. As part of the administrative investigation, the Kúria President ordered to suspend the editing of the journal. The press release did not provide a reasoning for the initiation of the investigation or the order on suspension.

Almost immediately after the suspension of the journal, MABIE expressed concerns over the inspection and the decision on suspending the journal by the Kúria President. According to MABIE, *"the suspension of the publication of the journal and the ordering of an investigation seems to be an attack on the independence of the judiciary, which could have a chilling effect on the future decisions of all judges. For these reasons, MABIE has asked the Kúria President to inform the judges and the public as soon as possible of the reasons for and purpose of the order to investigate and to suspend the editing and publication of the journal."*<sup>50</sup>

Within a couple of days, the Kúria President closed the inspection<sup>51</sup> and restored the editing of the journal. The results of the inspection were published accompanied by a presidential brief. According to the Kúria President, the inspection was 'necessary' to answer certain questions raised by

<sup>46</sup> <https://444.hu/2024/02/02/novak-katalin-kegyelmet-adott-a-bicskei-gyerekotthon-pedofil-exigazgatojat-fedezo-buntarsnak>

<sup>47</sup> Decision no. Bfv.1191/2022/13 of the Kúria, also available in the database of judicial decisions <https://eakta.birosag.hu/anonimizalt-hatarozatok>

<sup>48</sup> [https://kuria-birosag.hu/sites/default/files/kuriai\\_dontesek/72\\_evfolyam\\_1\\_szam.pdf](https://kuria-birosag.hu/sites/default/files/kuriai_dontesek/72_evfolyam_1_szam.pdf)

<sup>49</sup> <https://kuria-birosag.hu/hu/sajto/kuria-kozlemenye-5>

<sup>50</sup> <https://www.mabie.hu/index.php/1750-kerdes-a-kuria-elnokhez>

<sup>51</sup> <https://kuria-birosag.hu/hu/sajto/kuria-elnokenek-tajekoztatoja-kuriai-dontesek-birosagi-hatarozatok-folyoiratot-erinto>

independent media and the suspension of the journal was a ‘natural consequence’ of the ongoing investigation. The Kúria President rejected the claims that the investigation could have a chilling effect on judges on the basis of the argument that the editors carry out a distinct activity assigned separately to them, and this assignment falls out of their judicial mandate. In his view, the editing of the journal is not part of the official judicial service and therefore this activity should not be protected by judicial independence, despite the fact that editors are judges of the Kúria.

We regard this argumentation very weak for several reasons. Including the case concerned by the presidential pardon for publication in the journal clearly had severe political consequences for the ruling majority. Publishing the decision was practically the only way this whole scandal could be revealed (irrespective of whether the editors foresaw this consequence or not), therefore any administrative investigations around the publishing of a politically sensitive case have serious political implications and can be translated as a measure with a serious chilling impact on behalf of the Kúria President. The implied message that some professional breach or mistake might have been committed when a Kúria decision of this nature was selected for publication could in the future discourage the Kúria judges editing the journal from publishing important decisions that might have political implications.

At the same time, there is no justifiable professional reasoning behind ordering the investigation: if judges acted under a separate assignment, it is not clear how measures of court administration could have been applied with regard to them (instead of ordinary contractual consequences included in their assignment). The mere fact that judges fulfil a special assignment by editing the journal does not remove the activity from the scope of activities protected by judicial independence and the freedom of expressing views, especially because the editing of the journal and selecting important judgments for publication is very closely related to the adjudicating task of judges, and is an important tool in the professional communication between the judiciary and other legal professions. Judges should have the freedom to express their professional views on and off the bench. Expressing views may take implicit forms, such as selecting a case as an important for publishing. This should fall within the protected scope of activities of a judge and should in no way generate measures with a clear chilling impact on behalf of judicial leaders.

## IV. RECOMMENDATIONS

### IV.1. Procedural recommendations

The Hungarian Helsinki Committee hereby respectfully recommends that the Committee of Ministers

- (i) **continue examining under the enhanced supervision procedure** the implementation of the judgment in the *Baka v. Hungary* case as regards both violations established by the ECtHR under Articles 6 and 10 of the Convention;
- (ii) **adopt the appropriate language to respond not only to the absolute lack of progress in effectively implementing the present judgment for almost eight years, but also to the adoption of new measures which, on the contrary, fly to the face of the letter and spirit of the judgment**, thus generating even less Convention-compliant results instead of remedying the violations established by the Court;
- (iii) **in line with the commitments made in the 2023 Reykjavík Declaration, consider all measures available to the Committee of Ministers and other relevant CoE institutions to ensure that the Hungarian authorities** meaningfully engage with the implementation procedure in a result-oriented spirit and that they refrain from continuing undermining the effectiveness of the Convention mechanism by failing to implement this landmark judgment.

## IV.2. Substantive recommendations

The Hungarian Helsinki Committee respectfully recommends that the Committee of Ministers

- (iv) **take all necessary measures to ensure that the Hungarian authorities proceed with the evaluation of the domestic legislation** on the status of judges and the administration of courts, including an analysis of the impact of all legislative and other measures adopted and foreseen on judges' freedom of expression to make 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;
- (v) **address the issue of judicial independence holistically and comprehensively**, taking into account the changed general context of the execution of the present judgment, including the altered position of the Kúria President) and removing the possibilities of undue interference in the mandate of the Kúria President (including the possibility to keep him in position for an indefinite term);
- (vi) **adopt a strong stance against all forms of harassment, intimidation or retaliation against judges in Hungary**, including smear campaigns, and actions of the hierarchy of the judiciary, including the Kúria President, that aim to silence judges; and communicate clearly that while criticism of jurisprudence as a part of a public debate is necessary in a pluralistic society, personal attacks against judges are unacceptable;
- (vii) **duly assess and reflect into their decisions the information which demonstrates that the chilling effect is no longer an abstract risk prophesied by the present judgment, but a real and common experience of members of the judiciary**, a tangible result of the chilling effect of the above-mentioned non-Convention-compliant actions;
- (viii) require that the Hungarian authorities introduce legislative measures, possibly at the rank of cardinal laws that guarantee the exercise of the freedom of expression and provide adequate legal remedy against the breach thereof.

Sincerely yours,



András Kristóf Kádár  
co-chair  
Hungarian Helsinki Committee

## ANNEX I.

### Compilation of public statements and actions of the Kúria President capable of exerting a chilling effect on the freedom of expression of judges

The Kúria President consistently takes the position that the restrictions contained in the cardinal laws of Hungary must be interpreted as precluding any type of political activity, including public criticism of laws, the legal system and judicial administration. The below compilation of his public statements and activities in all his different roles – as an academic, as the representative of the Hungarian judiciary, as a member of the National Judicial Council, as judge and judicial leader – all point towards an overly restrictive interpretation of the Hungarian legislation that fully contradicts the spirit of the judgment delivered in the Baka case.

The Kúria President tends to mitigate the effect of his actions and statements: *“I don't know what others think, but I myself find it rather funny than a serious reaction when opinion-makers are concerned about Hungary's justice system because of the opinion of the Kúria President expressed within his statutory powers.”*<sup>52</sup> In reality, the Kúria President concentrates key powers within the judiciary both in the final adjudication of cases, in ensuring the uniformity of the jurisprudence of Hungarian courts and in the management of the apex court. The stance of the Kúria President has a serious weight against the Hungarian legislative background that exclusively contains prohibitive provisions, leaving margin for an extremely prohibitive interpretation capable of silencing critical voices within the judiciary and converting the chilling effect caused by the removal of judge Baka into total freezing.

#### **I. ACTIONS AND STATEMENTS OF THE KÚRIA PRESIDENT AS MEMBER OF THE NJC**

The Kúria President is *ex lege*<sup>53</sup> member of the highest judicial self-governing body, the National Judicial Council (NJC). Unlike the other 14 members of the NJC, the Kúria President is a political appointee, not elected by judge peers, but directly by the Parliament. As *ex officio* member, Chief Justice Varga is directly involved in the work of the highest judicial self-governing body mandated to supervise the administration of courts. The following examples prove that he has often put NJC members under pressure in making their decisions and formulating their opinions, claiming the exercise of their powers and their right to express views on the judiciary as political activity.

##### **I.1. The Kúria President claimed as political the opinion issued by the NJC on his nomination**

On 5 October 2020, just days after the European Commission's Rule of Law Report warned of the risks of the modified rules of election of the President of the Kúria,<sup>54</sup> Constitutional Court justice András Zs. Varga was nominated as Kúria President under the new rules. On 9 October 2020, the NJC held a hearing and adopted a non-binding preliminary opinion which by an overwhelming 13-1 majority rejected the nomination of Mr. Varga, holding that the fact that his appointment was made possible by two recent legislative amendments *“is at odds with the constitutional requirement that requires the head of the judicial system be a person who is independent of the other branches of power and who*

<sup>52</sup> [https://kuria-birosag.hu/sites/default/files/sajto/2024\\_01\\_08\\_a\\_kuria\\_elnokenek\\_beszede.pdf](https://kuria-birosag.hu/sites/default/files/sajto/2024_01_08_a_kuria_elnokenek_beszede.pdf)

<sup>53</sup> According to Article 88(3) of Act CLXI of 2011 on the Organisation and Administration of Courts (OAC), *“the National Judicial Council consists of 15 members: the Kúria President and 14 judges.”*

<sup>54</sup> European Commission, *2020 Rule of Law Report – Country Chapter on the rule of law situation in Hungary*, pp. 5-6.



appears impartial to an outside observer.”<sup>55</sup> They also highlighted that *“the facts that the candidate has never performed any judicial activity and has no courtroom experience, nor practical experience of litigation or court administration, cannot be overlooked. Since the transition (1989), all presidents of the Supreme Court (Kúria) served as judges previously at some point of time.”* The Parliament elected András Zs. Varga in complete disregard of the NJC’s objection and Chief Justice Varga took his presidential seat with effect from 1 January 2021, for a period of nine years.

On 19 January 2021, in his first interview with Mandiner.hu,<sup>56</sup> he was asked about the non-binding opinion of the NJC that rejected his nomination. Commenting on the circumstance that the NJC raised concerns with respect to the lack of courtroom experience, he labelled the well-reasoned opinion issued by the judicial self-governing body as unfounded political opinion: *“The essence of political discourse is that everyone says what they want, without having to back it up. Let’s consider this as a political opinion. Since I cannot make a political statement, I have to take note of the fact that some think that the Constitutional Court does not engage in judicial activity. True, the European Court of Human Rights has a different view, the Constitutional Court has a different view, I have a different view... But political opinion is political opinion, and I respect it.”*

## I.2. The Kúria President reprimanded a member of the NJC for expressing critical views on the independence of the Kúria in an article published in an online journal

Not long after being elected as Kúria President and therefore gaining membership in the NJC, Chief Justice Varga asked to speak before the agenda to reprimand Judge Viktor Vadász, the then member of the NJC for expressing *“seriously critical”* concerns with respect to the independence of the Kúria in an article<sup>57</sup> published at *Verfassungsblog.de* (an internationally recognised online journal of constitutional law). The article was co-authored by Judge András Kovács, presiding judge of the Kúria and expressed critical concerns with respect to the internal independence of the Kúria, claiming amongst others that *“a case allocation rule laid down by the court president without the effective control of judicial self-governance, the actual distribution of cases including human intervention, the lack of transparency and the lack of remedies in the procedure, and the wide possibility to reallocate cases contain the inherent risk that cases in Hungary might not be decided by a court ‘prescribed by law’.”*

On 3 February 2021, at the meeting of the NJC, the Kúria President reprimanded Judge Vadász for voicing criticism and asked whether he was going to publish a new article on the same website to correct the criticism on the basis that the Kúria’s case allocation scheme was about to be changed also asking whether he would inform the European Network of Councils for the Judiciary (ENCJ) and, through it, the European Commission on the correction. *“My question would be, Judge Vadász after it turns out that your concerns are unfounded, and therefore you have made unfounded criticism to [former Kúria President] Judge Darák and to me, whether you will write another article in Verfassungsblog admitting your mistake, and whether you will inform the ENCJ Board and through it the European Commission, or whether Hungary’s constitutional institutions will have to defend themselves against the unfounded accusation in their answers to the Rule of Law Report.”*<sup>58</sup> He also emphasized that through the article, the criticism expressed entered the political field: *“In this case, I have presented an incident where the line through which an issue entered the political field is quite clear, again, with the name of the NJC and the membership it carries.”*

<sup>55</sup> <https://obt2018.hu/az-obt-velemenyezte-a-kuriai-elnokenek-ivasolt-szemelyt/>

<sup>56</sup> <https://mandiner.hu/belfold/2021/01/kuria-nelkul-nincsen-jogallam-varga-zs-andras-a-mandinernek>

<sup>57</sup> András György Kovács and Viktor Vadász: *A game hacked by the dealer*, <https://verfassungsblog.de/a-game-hacked-by-the-dealer/>

<sup>58</sup> See the minutes of the meeting of the NJC held on 3 February 2021 <https://obt2018.hu/2021-02-03/> p. 4.

In view of the Kúria President, by indicating that he is a member of the NJC, Judge Vadász had given the impression that the article contained the opinion of the NJC.<sup>59</sup> By this remark, the Kúria President suggested misleadingly that there is a higher threshold for the freedom of expression of members of the NJC (who tend to be more active in matters concerning the judicial system) and that they can only express an opinion with respect to the justice system in case their opinion is backed by a decision of the NJC. This approach taken by the Kúria President unjustifiably restricts the scope of freedom of expression of judges who undertake membership in the NJC and may have a chilling effect on them in expressing their personal opinions outside their mandate as members of the NJC.

### **I.3. The Kúria President successfully prevented the NJC from delegating a judge to a discussion on judicial independence**

On 5 January 2022, at the meeting of the NJC the members considered an invitation to a discussion on a documentary on the situation of judges in Poland. The film *“Judges under Pressure”*<sup>60</sup> is about Igor Tuleya and other Polish judges put under pressure through suspension, disciplinary actions and other means by the Polish ruling party for standing up for the rule of law and judicial independence. The film was screened at the Budapest International Documentary Festival in January 2022. The NJC was invited to send a representative to a discussion held after one of the screenings where Igor Tuleya was also supposed to participate in person. Although initially there was a willingness to send a representative, the Kúria President and Róbert Répássy, the Secretary of State of the Minister of Justice (who is not a member of the NJC, but is invited to its meetings) argued that sending a representative to a discussion following a film about the undermining of the independence of the judiciary in Poland would be a *“political activity”*. The Kúria President warned the members: *“I’ll tell you what Facebook says it’s about. ‘Since 2015, the Polish Law and Justice Party has been steadily dismantling the system of the rule of law and the separation of the three branches of power. Polish judges face dismissal and even arrest if they stand up against the mud-slinging of the Constitution. The face of the resistance movement was Judge Igor Tuleya. The government considers him public enemy number one and the protesting citizens the main figure of the judicial resistance.’ And the description goes on.”*<sup>61</sup> After his intervention, a vote was taken, and with eight members against and seven abstaining, the NJC eventually decided not to send a representative to the discussion.

### **I.4. The Kúria President accused the NJC of making political criticism**

On 6 April 2022, three days after the fourth-in-a-row victory of the ruling Fidesz-KDNP party in the parliamentary elections, at the meeting of the NJC, the Kúria President addressed a speech to the members of the NJC accusing them of political activity and urging them to give up their critical stance. *“The Kúria and its President have not received any support from the NJC during the last 18 months - even today - only explicit attacks, in chorus with semi-political and political organisations [hinting at human rights NGO’s engaged in defending the independence of the judiciary] - sometimes the NJC made political criticisms, more often the NJC set the tone for political criticism, invoking judicial independence. This is anything but support for independence. The question is whether the NJC is willing to adapt its activities to the Hungarian Constitution instead of the ideas of various associations and whether it is willing to acknowledge that the independence of all judges, including the Kúria judges and even the Kúria President, must be protected, and whether it is willing to stop the attacks on the Kúria.*

<sup>59</sup> Judge Vadász in his reply clarified that the article *“has nothing to do with the NJC. There has been no such submission before the NJC, I have written submissions to the NJC, but not on this particular subject. Nowhere did I state or imply that this was the opinion of the NJC either.”* See the minutes of the meeting of the NJC held on 3 February 2021 <https://obt2018.hu/2021-02-03/>, p. 6.

<sup>60</sup> <https://www.idfa.nl/en/film/ffa59473-a174-4340-9668-8f07a64ba676/judges-under-pressure/>

<sup>61</sup> See the minutes of the meeting of the NJC held on 5 January 2022 <https://obt2018.hu/2022-01-05/>

*It would be timely to receive reassuring answers, not today, but from today onwards, continuously and above all not with rhetoric but with action.*"<sup>62</sup>

#### **I.5. The Kúria President claimed that the resolution taken by the NJC in its supervisory capacity breached the constitutional requirements on the freedom of expression**

On 6 July 2022, the NJC reviewed the appointments made by the Kúria President in 2021 for judicial and judicial leadership positions at the Kúria. Based on the detailed report prepared by the Kúria President, the NJC came to the conclusion that the Kúria President appointed several judges to the bench in ways circumventing the right to consent by the NJC.<sup>63</sup> The Kúria President created a loophole by opening several positions in one package and then manipulating the outcome of the application procedure by considering the applications in an arbitrary order. This way, while the illusion of a regular application procedure was maintained, judicial appointments were not granted in a transparent, foreseeable and objective manner.

On 28 July 2022, as a reaction to the resolution of the NJC, the Kúria President published a letter on the website of the Kúria.<sup>64</sup> In the letter - addressed to the NJC, but made accessible to the wider public - the Kúria President claimed that the opinion of the NJC did not meet the constitutional requirements governing the freedom of expression. *"Hungary's Fundamental Law guarantees the freedom of expression of individuals within very broad boundaries - and, within certain limits, even regardless of the truth and veracity of the opinion. This freedom applies to a much more limited extent to state bodies involved in the exercise of public authority, such as the National Judicial Council, which performs administrative functions. The position taken by the NJC in exercising its powers is not a private opinion and must therefore be based on facts and objective conclusions which comply with the rules governing the interpretation of the law. The position of the NJC taken with respect to the appointment practice of the Kúria President in 2021 of judges and judicial leaders does not meet constitutional requirements."*<sup>65</sup>

#### **I.6. The Kúria President labelled the supervisory activity of the NJC as political**

On 4 September 2022, the Hungarian Helsinki Committee published an article on the appointment practice of the Kúria President entitled *'Tribunal Established by Sleight of Hand'*<sup>66</sup>. The article revealed that Barnabás Hajas, a former state secretary without any prior judicial experience became a judge at the Kúria as a consequence of the unlawful appointment practice of the Kúria President. The article relied on data issued by the NJC.

On 7 September 2022, the Kúria President stayed absent from the meeting of the NJC. He sent a letter to the members of the NJC in which he warned that the activities of the NJC are political. *"Political activity is generally understood to be an interest-driven stance or action concerning the relations of a group, society or country, expressed in internal or international relations. There is no doubt, therefore, that many of the decisions, communications and public appearances of the National Council of the Judiciary are political activities. At most, the limits of the permissibility of such activity may be a matter of debate. However, it must be borne in mind that the effects of political activity and the reactions it provokes are no longer manifested within the constitutionally protected framework and rules of the judiciary, but are the result of the current customs of public life. This is particularly the case when the members of the NJC express themselves in cooperation with other, non-judicial, sometimes political*

<sup>62</sup> See the minutes of the meeting of the NJC held on 6 April 2022 <https://obt2018.hu/2022-04-06/> page 6.

<sup>63</sup> See the minutes of the meeting of the NJC held on 6 July 2022 <https://obt2018.hu/2022-07-06/> p. 25. See the report of the Kúria President [https://helsinki.hu/wp-content/uploads/2022/09/Kuria\\_elnok\\_tajekoztato\\_palyazatok\\_2021.pdf](https://helsinki.hu/wp-content/uploads/2022/09/Kuria_elnok_tajekoztato_palyazatok_2021.pdf)

<sup>64</sup> <https://kuria-birosag.hu/hu/sajto/kuria-eszrevetelei-az-obt-biroi-palyazatokkal-kapcsolatos-allasfoglalasara>

<sup>65</sup> [https://kuria-birosag.hu/sites/default/files/sajto/2022\\_07\\_22\\_kinevezesek\\_obt\\_level.pdf](https://kuria-birosag.hu/sites/default/files/sajto/2022_07_22_kinevezesek_obt_level.pdf)

<sup>66</sup> <https://helsinki.hu/en/tribunal-established-by-sleight-of-hand/>

*opinion-forming organisations. It also requires careful consideration as to whether such manifestations are certainly useful. In some cases, they may be particularly damaging to the Hungarian judiciary.*"<sup>67</sup>

The above statements of the Kúria President are particularly dangerous for the independence of the judiciary, because they depict the proper exercise of the supervisory functions of the NJC as political activity, thereby sending the misleading message to judges that taking a critical stance with respect to judicial administration qualifies as political activity, even if adopted in the course of exercising supervisory powers granted by law.

#### **I.7. The Kúria President discredited members of the NJC for fulfilling their supervisory role**

On 5 July 2023, the same day when the European Commission's 2023 Rule of Law Report was released, the Kúria President issued a statement<sup>68</sup> claiming that "[t]he Hungarian Country Chapter of the European Commission's 2023 Rule of Law Report regrettably adopted, without verification, the arbitrary opinion of the National Judicial Council, which lacks any factual basis, was repeatedly refuted with data, and personally violates the integrity of many judges. It can be said that not a single word of the findings is true." The statement went further in discrediting the members of the NJC for fulfilling their supervisory role. "All this is the result of the self-serving ambitions of some former and current members of the NJC. I find this very regrettable. I dissociate myself from these ambitions not only on behalf of the Kúria, but on behalf of all honest Hungarian judges."

## **II. ACTIONS AND STATEMENTS OF THE KÚRIA PRESIDENT AS REPRESENTATIVE OF THE HUNGARIAN JUDICIARY**

### **II.1. Challenging the Code of Ethics before the Constitutional Court**

On 2 March 2022, the NJC adopted the new Code of Judicial Ethics (Code) and decided to enter it into force with effect of 15 July 2022. The former Code of Judicial Ethics affirmed the restrictive provisions of the cardinal laws claiming that "judges should not engage in political activities, should not attend political gatherings and events, and should refrain from political statements in public. [...] Judges should not support any undertaking, charitable or non-governmental organisation which may be linked to political activity." These provisions - amongst others - were repealed and the new Code established new, permissive provisions with respect to freedom of expression of judges.

<sup>69</sup> On 5 April 2022, at the meeting of the NJC, the Kúria President raised concerns that the preamble of the Code omits reference to the Fundamental Law and claimed that its content is contrary to the constitution of Hungary: "since the previous Code of Ethics began with the Fundamental Law, and the Code of Ethics cannot be separated from the Fundamental Law, even if its content is contrary to it, I propose that it be included."<sup>70</sup> The Kúria President informed the members of the NJC that he is considering to challenge the Code before the Constitutional Court for violation of the Fundamental Law. "I don't want to keep it secret, we are currently weighing whether it [the Code of Ethics] can be challenged before the Constitutional Court. At the moment, there is one issue to be decided; it stands or falls on this, because the substantive violation of the Fundamental Law is explicit. That is not the question, the question is whether it [the Code of Ethics] has any normative force or whether it is a declaration. If it is a declaration by the NJC, it is not really worth challenging. According to the information we have at the moment, even the service courts do not consider it to be a legal norm, so

<sup>67</sup> See the minutes of the meeting of the NJC held on 7 September 2022 <https://obt2018.hu/2022-09-07/> p. 2.

<sup>68</sup> <https://kuria-birosag.hu/hu/sajto/kuria-elnokenek-kozlemenye-2>

<sup>69</sup> See the minutes of the meeting of the NJC held on 2 March 2022 <https://obt2018.hu/2022-03-02/>

<sup>70</sup> See the minutes of the meeting of the NJC held on 6 April 2022 <https://obt2018.hu/2022-04-06/> p. 17

*this text has absolutely no significance other than the fact that the NJC has adopted a self-symbolic declaration that is contrary to the Fundamental Law. I will tell you why it is explicitly contrary to the Fundamental Law, if for no other reason than I do not want to go on about it all night, but let me give you one example: the restriction of political activity to party political activity.”<sup>71</sup>*

In May 2022, before the entry into force of the new Code, the Kúria President challenged the Code before the Constitutional Court claiming that the provisions of the Code violated the Fundamental Law, especially the principle of hierarchy of laws and legal certainty. The Constitutional Court has not dealt with the complaint since May 2022 and thereby contributes to maintaining the chilling effect amongst the Hungarian judges. The adoption of clearly formulated permissible provisions of cardinal rank is necessary to create a clear situation and allow Hungarian judges to speak up in public.

## **II.2. According to the Kúria President speaking in public matters is prohibited by the Fundamental Law**

On 20 July 2022, in a radio interview given, the Kúria President commented on his decision to challenge the Code of Ethics saying that *“there is, of course, a difference between Western European and Central European rules. In Central Europe and especially in Hungary, the rules for judges are stricter. In our country, not only explicit party politicking, but politicking in general, if I really, really want to say it, speaking out on public affairs, is prohibited by the Fundamental Law and was prohibited by the previous Constitution.”<sup>72</sup>*

## **II.3. According to the Kúria President issues of the judiciary should not be subject of public debate**

On 3 July 2023, barely one month after the entry into force of the judicial reform adopted by the Parliament to gain access to frozen union funds, the Kúria President gave a radio interview<sup>73</sup> in which he claimed that the judicial reform was externally driven and forced on Hungarians, unapplicable, causing legal instability in the operation of the Kúria and was ultimately “ordered” to petrify the Hungarian judicial system. The interview outlined a new political narrative, according to which the sovereignty of Hungary needs to be protected against the actors requiring the country to adopt the judicial reform. The interview also contained well-placed messages to potential candidates and future members of the next term of the NJC suggesting that their right to give their opinion on the judiciary should be restricted. The Kúria President suggested that matters concerning the justice system and the judiciary shall not be debated in the public. *“What is missing from this system at the moment is elevation. And how could that be preserved? By not talking about these things publicly.” [...] “There should be a kind of restraint, that we try to settle the debates internally.”*

## **II.4. Exerting undue pressure on delegates electing the new members of the NJC**

At the end of 2023 and the beginning of 2024, the election of the members of the NJC became due for the upcoming six-year term starting on 30 January 2024. According to the OAC, the Kúria President is entitled to participate and speak at the final meeting of the delegates who elect amongst themselves the members (and substitute members) of the NJC, but the Kúria President does not have the right to nominate and vote.<sup>74</sup> Making use of this power, the Kúria President held a speech at the final meeting of delegates held on 6 January 2024. In his speech he made a sarcastic remark on the presence of the

<sup>71</sup> See the minutes of the meeting of the NJC held on 6 April 2022 <https://obt2018.hu/2022-04-06/> p. 17

<sup>72</sup> InfoRadio, Arena, András Zs. Varga, the Kúria President <https://infostart.hu/arena/2022/07/20/varga-zs-andras-a-kuria-elnok> (from 6:45)

<sup>73</sup> The forced judicial reform and the Kúria - András Zs. Varga, President of the Kúria, InfoRadio, Arena <https://youtube.com/watch?v=EspkKuhO4Zo>

<sup>74</sup> Article 98 (4) of the OAC.



chilling effect on the freedom of expression of judges. *“Exercising the right provided for in Article 98 (4) of Act CLXI of 2011 on the Organisation and Administration of Courts, according to which the Kúria President may participate and speak at the meeting of delegates electing the members of the National Judicial Council (NJC) without the right to nominate and vote, I would like to present - in my own opinion - the most important challenges and tasks facing the new members of the NJC to be elected today. First of all, I must explain why I feel it is necessary to state my position. Indeed, the public polemics that started before Christmas suggest that this is not without its dangers, and it would perhaps be easier if I just talked about the weather. Of course, it is also getting colder today, one might say chilling, so it would probably be a cause for debate. So let's talk seriously.”*

### III. STATEMENTS OF THE KÚRIA PRESIDENT AS AN ACADEMIC

Until his election as Kúria President, András Zs. Varga was an external actor from the point of view of the judiciary. Nevertheless, as an academic he often expressed his views with respect to the Hungarian judiciary and judicial independence and since his election as Kúria President, he prefers to rely on his academic position in expressing views on the judicial system and the laws of Hungary.

#### III.1. The Kúria President is an advocate for limiting the independence of the judiciary

As an academic, Chief Justice Varga proved to be an advocate for limiting the independence of the judiciary. In his view *“undoubtedly, the judiciary is the most dangerous branch of power”* and therefore *“it is an urgent task to re-discover and enforce the natural limits of judicial independence.”*<sup>75</sup> According to Chief Justice Varga, *“the concept of judicial self-administration is a consequence of a misunderstanding”* as *“judicial councils pose more risk than the benefits they provide”* and *“[t]heir only ‘benefit’ is to politicize the judiciary.”* He suggested that *“[i]t is worth reconsidering the domestic legislation in order to eliminate the weird misunderstanding of the role of judicial councils, the delusion of judicial self-governance.”*<sup>76</sup> With respect to the possibility of judges to criticize the legislation regarding the judiciary, he claimed: *“there is one thing a judge can never do: determine the law, because it is the ‘task of politics’.”*

#### III.2. According to the Kúria President, solidarity moves of judicial organisations are incompatible with judicial independence

Referring to the landmark solidarity march organised by Polish and international associations of judges and prosecutors in defence of the independent judiciary in Poland,<sup>77</sup> the Kúria President held that *“it is incompatible with the independence of the judiciary if judicial organisations or informal groups of judges request help from other social groups or the justices of other countries, or at least accept support of public (and politically sensitive) movements, or if justices participate in such actions in foreign countries. However, this is what happened in Poland and ‘in the interest of’ Poland.”*<sup>78</sup>

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<sup>75</sup> András Zs. Varga: ‘Valóban a legkevésbé veszélyes hatalom? Létezik-e természetes korlátja a bírói függetlenségnek?’ in: ‘A jog többretegűsége’, Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum XXX., (2020.), available in Hungarian at: [https://ajk.kre.hu/images/doc6/kiadvanyok/A\\_jog\\_tobbretegusege.pdf](https://ajk.kre.hu/images/doc6/kiadvanyok/A_jog_tobbretegusege.pdf), p. 91.

<sup>76</sup> See more: [https://helsinki.hu/wp-content/uploads/Now\\_its\\_time\\_to\\_worry\\_20210107.pdf](https://helsinki.hu/wp-content/uploads/Now_its_time_to_worry_20210107.pdf), p. 6.

<sup>77</sup> . See: [https://www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest?CMP=Share_iOSApp_Other)

<sup>78</sup> András Zs. Varga: ‘Valóban a legkevésbé veszélyes hatalom? Létezik-e természetes korlátja a bírói függetlenségnek?’ in: ‘A jog többretegűsége’, Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum XXX., (2020.), available in Hungarian at: [https://ajk.kre.hu/images/doc6/kiadvanyok/A\\_jog\\_tobbretegusege.pdf](https://ajk.kre.hu/images/doc6/kiadvanyok/A_jog_tobbretegusege.pdf), p. 91.