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ARTICLE

The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law

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Abstract The rise of abusive constitutionalism in Central and Eastern Europe (CEE) has hit the domestic judiciaries particularly hard. Viktor Orbán expanded the size of the Constitutional Court and then packed it, made sure that he can install a new president of the Constitutional Court, ousted the Supreme Court president through a constitutional amendment, disempowered the existing judicial council and created the new institution with power over ordinary judicial appointments. Jaroslav Kaczyński followed the same playbook in Poland. While most scholars have focused primarily on effects of abusive constitutionalism upon the constitutional courts, we argue that the keys to the long-term control of the judiciary are presidents of ordinary courts and judicial councils . The dismissal of the Hungarian Supreme Court President is a perfect example of this logic—by this move Orbán got rid of the most important court president in the country, the head of the Hungarian judicial council and his most vocal critic. Yet, András Baka lodged an application to the ECtHR and won. This article analyses the Grand Chamber judgment in Baka v. Hungary, its implication for the rule of law, and the limits of what the ECtHR can achieve against abusive constitutionalism. It concludes that the Grand Chamber failed on all key fronts. It overlooked the main structural problem behind Mr. Baka's dismissal (the broad powers of court presidents in CEE), it has blurred the Convention's understanding of the concept of the rule of law, and it failed in delivering a persuasive judgment firmly based on the existing ECtHR's case law .

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When Viktor Orbán's Fidesz won constitutional majority in 2010, Orbán immediately started dismantling the existing checks and balances.[1] He curbed the powers of the Hungarian Constitutional Court, increased its membership and packed it with his protégés. Moreover, he dismissed the most senior judges by abruptly reducing the compulsory retirement age for judges,[2] hollowed out the powers of the existing judicial council, and vested judicial appointments and court administration into a newly created body staffed by Fidesz's people.[3] All of those measures were dubious from a rule of law point of view.

However, Orbán did not stop there and also decided to dismiss the sitting Chief Justice of the Hungarian Supreme Court, András Baka,[4] who criticized the judicial reforms adopted by Orbán's government and publicly pointed out their deficiencies. But András Baka did not give up easily and challenged his removal before the European Court of Human Rights ("ECtHR" or the "Strasbourg Court"). As a result, the ECtHR had a unique opportunity to address this frontal attack on the rule of law.

Its Grand Chamber judgment in *Baka v. Hungary*[5] is particularly important since the ECtHR could for the first time[6] take a stance on a textbook example of abusive constitutionalism,[7] which has been on the rise in Central Europe. In fact, Poland witnessed a similar scenario after the victory of Jaroslav Kaczyński and his Law and Justice party in the 2015 parliamentary elections. Kaczyński's Government, apart from tinkering with the composition of the Polish judicial council, also went after court presidents and, in particular, harassed the president of the Polish Constitutional Tribunal.[8] Ukrainian authorities have recently dismissed the judge of the Supreme Court[9] as well as the president of the influential Kyiv Administrative Court of Appeal.[10] Moreover, other countries such as Czechia, Croatia, and Macedonia witnessed similar attacks on their apex court presidents in the past.[11]

[1] See Halmai (2012), p. 367, Landau (2013), p. 208–211, Tushnet (2015), pp. 433-435, Uitz (2015).

[2] Gyulavári and Hős (2013) p. 290. See also Belavusau (2013) p. 1145.

[3] Kosař (2016), p.134.

[4] See Vincze (2015), pp. 445–456; and the literature cited in note 1.

[5] ECtHR, 23 June 2016, Baka v Hungary, no. 20261/12.

[6] See also the earlier Grand Chamber judgments concerning the parliamentary immunity of the members of political opposition: ECtHR, 17 May 2016, Karácsony and Others v. Hungary [GC], no. 42461/13 and 44357/13.

[7] We are aware of the fact that similar terms such as "authoritarian constitutionalism", "illiberal states", "hybrid regimes" and "simulated democracies" have been used to portray this phenomenon (see in particular note 1 above). For the sake of simplification, we will treat them as synonyms in this article.

[8] See e.g. Garlicki (2016), Koncewicz (2016), and Koncewicz (2017).

[9] See Volkov v. Ukraine, 2013-I Eur. Ct. H.R. 73.

[10] This case (Denisov v. Ukraine, no. 76639/11) is pending before the Grand Chamber of the ECtHR.

[11] See Part 4.

Hence, Orbán's attack on the president of the apex court was not unique. This widespread practice raises several uneasy questions. We may ask why the political leaders in Central and Eastern Europe (CEE) go after the presidents of apex courts so often? Which principles of the rule of law such assaults affect and how? How has the ECtHR responded to this situation? Does it have the proper tools to address this challenge to the rule of law or is it somehow limited by its institutional design? And ultimately how can the Strasbourg Court fight abusive constitutionalism effectively? We need to know the answer to these questions since the *Baka* case is just the tip of the iceberg, operating as a magnifying glass of the assaults on separation of powers and judicial independence in CEE.[12]

We argue that the ECtHR must be at its best when it tackles a sophisticated version of abusive constitutionalism such as the *Baka's* dismissal. However, it has failed. First, the ECtHR's power to stay the political changes or prevent structural interferences into the domestic judiciary are very limited and thus it must rely on the power of persuasion. But in *Baka*, instead of relying on the well-established case law and providing clear and nuanced arguments, the Grand Chamber has stretched the Convention, broadened the scope of judges' freedom of speech, failed to acknowledge the difference between dismissal of a judge from the position of a court president and dismissal of a judge from the judicial office, and excessively relied on the non-binding soft law created primarily by judges. Second, the Strasbourg Court did not address the main policy issue, which is the wide powers of court presidents in CEE, and overlooked that the CEE court presidents have used these powers to pursue both good and bad goals. Third, it missed the opportunity to clarify the concept of the "rule of law" in the Convention. In fact, the rule-of-law reasoning in Baka is unclear and provides more questions than answers.

This article proceeds as follows. Part 1 contextualizes the broader background of Viktor Orbán's judicial reforms and his well-designed court-packing plan. Part 2 analyses the events leading to the dismissal of András Baka from the position of the Supreme Court president and his replacement. Part 3 discusses the Grand Chamber judgment in *Baka v. Hungary* and its repercussions. It shows that the Grand Chamber's judgment suffers from several deficiencies and its reliance on the rule of law is controversial. Part 4 shows that dismissals of apex court presidents is an important rule of law problem and argues that if the Strasbourg Court wants to fight the effects of abusive constitutionalism it must directly address the root cause of the *Baka* case (wide powers of court presidents in CEE), and not just the symptoms (his dismissal). Otherwise, the ECtHR can cause more harm than good in the long run. Finally, Part 5 argues that the ECtHR, due to its limited jurisdiction and inherent individual-human-rights lenses, is not well-equipped to tackle structural rule of law challenges such as the dismissal of András Baka from the Supreme Court presidency. Part 6 concludes.

[12] See note 1 above.

1 Orbán's Court-Packing Plan

The 2012 constitutional changes brought a fundamental shift in the Hungarian attitude towards constitutionalism.[13] Ever since the right-wing party, Fidesz, came to power after the April 2010 election, the constitutional system witnessed a series of swift reforms which gradually strengthened parliamentary sovereignty and weakened its constraints and counterweights.[14] The coalition of Fidesz and the Christian Democrats, a satellite party of Fidesz,[15] won a two-thirds majority in the Parliament, allowing them to push through fundamental legislative changes, culminating in 2011 with the adoption of a new constitution—the Fundamental Law.

The constitutional amendment in itself was long discussed, with Hungary being the last post-communist country to adopt a new constitution after 1989. Nevertheless, the preparatory works on the Fundamental Law, led by Orbán, soon attracted criticism[16] for the unusually swift adoption process, limited public discussion, and some controversial provisions. The most heated debate revolved around the transitional provisions accompanying the Fundamental Law and a set of cardinal laws introducing structural changes into the judiciary and targeting its independence.[17]

Constitutional amendments fuelled a conflict between Orbán's government and the Hungarian Constitutional Court, which escalated after the Constitutional Court struck down most of the controversial Transitory provisions to the amendment.[18] Orbán's government fought back and adopted the Fourth Amendment to the Fundamental Law, which not only reintroduced most of the struck down provisions, but also retaliated against the Constitutional Court.[19] The effect of the Fourth Amendment was far reaching: the Court was stripped of its competence to review constitutional amendments and its previous case law was effectively *erased,* since the Fourth Amendment declared cases interpreting the old Constitution as inapplicable to the new Fundamental Law.[20] The changes in Hungary caught Europe off-guard. Until then, Hungary had been the poster child of the most open Central European economy with relatively smooth democratic progress[21] and one of the strongest constitutional courts in the region.[22]

[13] Sólyom (2015), p. 5.

[14] Chronowski and Varju (2016), p. 271.

[15] Magone (2010), p. 456.

[16] See several infringement proceedings initiated by the European Commission in 2012, e.g. European Commission (2012), http://europa.eu/rapid/press-release_IP-12-24_en.htm?locale=en, accessed on 3 May 2017.

[17] For the discussion of further measures, see Marthoz (2012) or Scheppele (2012b).

[18] See e.g. Hungarian Constitutional Court, Decision no 6/2011 or Decision no 12/2013.

[19] Chronowski and Varju (2016), p. 282. For criticism of the reform as undermining the democratic system of checks and balances, see also Venice Commission, Opinion No 720/2013.

[20] Sonnevend, Jakab and Csink (2015), p. 90.

[21] Rupnik (2012), p. 134.

[22] Sólyom (1994) and Sólyom (2003).

However, the procedural changes narrowing the competences of the Hungarian Constitutional Court were only one of the techniques Orbán's regime employed to tame the courts. In fact, Orbán's court-packing plan affected virtually all levels of the judiciary. First, Orbán's government changed other essential features of the Constitutional Court, as well as the number of Constitutional Court Justices, their term length and selection mode. It increased the number of Constitutional Court Justices from 11 to 15, prolonged the term from 9 to 12 years, and modified the nomination of Justices from consensual to governing majority rule.[23] The cumulative effect of these modifications, coupled with the approaching retirement of several Justices, allowed Orbán to handpick more than half of the Constitutional Court's judges.

Second, the Orbán's régime lowered the retirement age of all judges across the board,[24] justifying the step with "purging the judicial system of old communist judges" rhetoric.[25] This reform had a far-reaching impact on the Hungarian judiciary. It resulted in the termination of employment of 277 out of the 2996 judges by the end of 2012.[26] Furthermore, these judges belonged to the highest echelons of the Hungarian judiciary, as the eldest generation of judges in the career judiciaries tends to occupy the most important positions within the judicial hierarchy. More specifically, the new maximum retirement age rules led to the de facto dismissal of 20 out of 74 Supreme Court judges[27] and several court presidents at the lower courts.[28] As a result, Orbán's Government could replace almost one tenth of the Hungarian judiciary and fill the most important positions with their own appointees.[29]

This lowering of retirement age was questioned by the Venice Commission[30] and challenged before courts. Both the Hungarian Constitutional Court and the Court of Justice of the European Union[31] eventually found the amendment in violation of the Hungarian Constitution and EU law, respectively, albeit for different reasons. While the Hungarian Constitutional Court criticised the legislation on account of its interference with judicial independence,[32] the CJEU found the lowering of the retirement age of judges in violation of the principle of non-discrimination.[33]

[23] See Article 24- of the Fundamental Law of Hungary (2011). See also Halmai (2012), p. 369; and Landau (2013), p. 209–210.

[24] Act LXVII on the legal status and remuneration of judges.

[25] Scheppele (2015), p. 111.

[26] Gyulavári and Hős (2013), p. 290.

[27] Ibid.

[28] We are grateful for this insight to Gábor Halmai.

[29] Note that appointment of judges in Hungary (with the exception of the Supreme Court judges) is controlled by the President of the newly established National Office for the Judiciary. See note 37 below.

[30] European Commission for Democracy through law (Venice Commission), Opinion on Act CLXII of 2011 on the legal status and the remuneration of judges, and on Act CLXI of 2011 on the organization and administration of the courts in Hungary, Opinion No. 663/2012, 19 March 2012, para. 106.

[31] CJEU, Commission v Hungary, 6 November 2012, C-286/12.

[32] Judgment No. 6/2011.

[33] CJEU, Commission v. Hungary, C-286/12.

Nevertheless, although Hungary eventually struck down the relevant legislation, the judgments came too late and only very few judges actually returned to their positions.[34]

Third, the system of judicial appointments changed in the meantime as well. Orbán's Government created the brand new National Office for the Judiciary (NOJ, *Országos Bírósági Hivatal*), which to a large extent replaced the role of the National Judicial Council (NJC, *Országos Bírói Tanács*). More specifically, the new Act on the Organisation and Administration of the Courts[35] and Act on the Legal Status and Remuneration of Judges[36] introduced at the beginning of 2011 split the competences between NOJ and NJC, allegedly with the aim of dividing judicial and managerial functions of these two bodies and lowering the influence concentrated in the hands of the Supreme Court President.

As a result of this split of competences, the President of the NOJ, elected by the Parliament for 9 years, got the very powerful competence of assigning the judges to the Kúria (new Supreme Court) and participating in the appointments of other high courts judges.[37] At the same time, the reform significantly reduced the powers of the NJC, which no longer plays a major role in selection of judges and in fact exercises very limited supervision over the President of the NOJ.[38] Not surprisingly, Orbán installed a loyal supporter to the position of the president of the NOJ—Tünde Handó, a former labour court judge, a long-time friend of Orbán and the wife to Jóyzsef Szájer, a Fidesz founder.

In sum, although reducing the concentration of power in the hands of the Supreme Court President might have been a step in a positive direction,[39] Orbán's government misused this laudable rationale in order to disempower the existing judicial council (NJC) and get control over the judicial appointments and the court administration more generally. The creation of new NOJ was just a tool to achieve this end and it soon delivered the "goods" to Orbán. The NOJ, packed with Fidesz people, took over the court personnel policies and budgetary questions, drained the competences of the reformed NJC and turned the NJC into a mere bystander. What is more, due to the abrupt lowering of the compulsory retirement age of judges, the Fidesz-installed NOJ president could in fact appoint over 250 new judges.[40]

By adopting these three far-reaching structural changes, Orbán tamed the Constitutional Court and thus immunized his reforms from a potential constitutional

[34] Von Bogdandy, Antpöhler, Dickschen, Hentrei, Kottmann and Smrkolj (2015), p. 235-256.

[35] Act CLXI of 2011 on the Organization and Administration of the Courts, 1 January 2011.

[36] Act CLXII of 2011 on the Legal Status and Remuneration of Judges, 1 March 2011.

[37] See note 35, Art. 76(5). Some of the competences of the NOJ eventually changed due to the Venice Commission criticism. Yet, the changes were still considered unsatisfactory. See Transparency International (2013), The Government reacts with pretence solutions, available at (https://transparency.hu/en/news/tovabbra-sem-garantalt-az-igazsagszolgaltatas-fuggetlensege/).

[38] Venice Commission 2011 (CDL-AD(2011)016).

[39] See Bobek and Kosař (2014): pp. 1271–1272; Kosař (2016): 401; and Kosař (2017): pp. 114–122 (who claim that it is critical to ban the simultaneous exercise of the office of the Supreme Court President and the chairmanship of the judicial council, since such accumulation of power increases the incentives to install the loyal person to this position as well as the likelihood of the abuse of these powers).

[40] See notes 26-28 above.

challenge, installed his nominees in the most important positions within the ordinary judiciary, and acquired control over the selection of new judges. However, one stronghold of opposition within the judiciary still remained to a large extent untouched. Despite tinkering with its composition,[41] Orbán had limited control over the Supreme Court. Moreover, he had no leverage over the Supreme Court President András Baka, a vocal critic of Fidesz judicial reforms and an internationally well-known jurist.[42] Therefore, Fidesz had to develop a new plan on how to remove the Hungarian Chief Justice.

2 Path to Baka's Removal from the Position of the Chief Justice

The pretext for the removal of Mr. Baka was the restructuring of the Supreme Court and the abovementioned division of labour between the existing National Judicial Council and the newly established National Office for the Judiciary. In this Part we first briefly summarize the source of disagreement between András Baka and Viktor Orbán. Subsequently, we explain how Orbán managed to get rid of András Baka by a constitutional amendment. Both issues are critical for understanding the ECtHR's Grand Chamber judgment which will be discussed in Part 3.

2.1 Baka versus Orbán

On 22 June 2009, the Hungarian Parliament elected András Baka as the President of the Supreme Court[43] for a six-year term. He also became ex lege the chairman of the National Judicial Council and thus his role was both judicial and managerial.

When Orbán announced his structural changes in the judicial system and substantive shifts of the rule of law, András Baka became a vocal critic of Orbán's judicial reforms and repeatedly addressed, in his official capacity, the Parliament where he contended that the new laws negatively affected the judiciary.

Baka's conflicts with the Orbán's government regarding the legislative proposals can be summarized into four themes. The first conflict resulted from the so-called the Nullification Act adopted in February 2011, which annulled the final convictions for violence committed during the 2006 mass protests and dispersal of crowds. Baka criticized the Act proposed by Fidesz MP István Balsai, later on a Constitutional Court judge, for its retroactivity.[44]

The second conflict was triggered by the forced retirement of judges. Fidesz MP János Lázár managed to introduce the provision allowing the lowering of the compulsory retirement age in the constitutional amendment only on 4 April 2011, a few days before the final voting in the Parliament. This proposal immediately

[41] See note 29 above.

[42] Note that prior to his appointment as the President of the Hungarian Supreme Court Mr. Baka, among other things, served as a judge at the ECtHR for 17 years.

[43] Decision of the Hungarian Parliament No. 55/2009.

[44] Press release of the Supreme Court President's spokesman of 12 February 2011.

prompted critical reactions across the judiciary.[45] Between 7 and 14 April 2011, Baka himself wrote three letters to all constitutional actors and to Orbán himself in which he criticised the proposed changes and pointed out possible problems regarding the relocation of cases and court management.

The third conflict concerned the Amendment of the Criminal Procedural Code that provided for the competence of the General Prosecutor to prolong the length of the detention and limit the contact between the accused and his lawyer. Baka not only communicated his reservations to the Parliament, but also initiated a judicial review before the Constitutional Court, which eventually found this amendment unconstitutional.[46]

Finally, the forth dispute related directly to structural changes in the judiciary and two cardinal acts on administration and remuneration of judges. Baka himself prepared a long detailed analysis of these laws and presented this criticism on the floor of the Parliament on 3 November 2011. In his speech he asserted that the amendments did not address the real challenges faced by the judiciary (case overload, financial conditions, etc.), but on the contrary masked the efforts to influence the court management as a judicial reform.[47]

2.2 Reforming the Supreme Court

The transformation of the Supreme Court resulted from 2011 Act CLXI (T/4743) on the Organisation and Administration of Courts. This Act stressed that the judicial system remains unchanged, apart from the changes already envisaged by the Fundamental Law,[48] such as reverting back to the original names used for Hungarian courts before the Second World War. This renaming affected the entire judicial system and, as a result, the title of the Supreme Court was to be changed to Kúria. The only minor substantive change, in comparison with the Supreme Court, concerned the Kúria's new competence to decide on local governance issues. Otherwise, the competences of Kúria remained the same.

The idea that Article 16 of the Act provides for a mere change in taxonomy followed also from official statements of the members of government. Róbert Répássy, secretary of state in the Ministry of Justice, stated in a 19 October 2011 interview with ATV that the Act changed only the name of the institution and did not have any legal basis for the change in the person of the President of the Supreme Court.[49] The government also explicitly ensured the Venice Commission that the drafted transitional provisions of the Fundamental Law would in no way shorten the office terms of judges and other officials appointed and elected under the previous system.[50]

[45] Scheppele (2012a).

[46] Decision of the Constitutional Court No. 166/2011(xII.20.)AB of 19 December 2011.

[47] Baka, A (2011) Speech. 3 November 2011.

[48] Act No. CLXI, Article 16.

[49] See ECtHR, Baka v Hungary [GC], para. 25..

[50] Position of the Government of Hungary on the Opinion on the Fundamental Law of Hungary adopted by the Venice Commission at its 87th Plenary Session. 17-18 June 2011, Cdl-AD(2011)016).

This line of argumentation however changed in autumn 2011, very shortly after Baka's open criticism of the constitutional amendments. Between 19 and 23 November 2011, Fidesz MPs submitted several proposals for the termination of Baka's mandate. On 19 November, Gergely Gulyás submitted a proposal amending the old Constitution (article 79) by providing that the Parliament was to elect the President of the Kúria by 31 December 2011 at the latest.[51] Subsequently, Fidesz MPs János Lázár and Péter Harrach proposed a transitional provisions amendment of the Fundamental Law. It stated that (Article 11) the Kúria was the legal successor of the Supreme Court and the National Judicial Council, and (Article 11.2) the mandate of the President of both institutions was to be terminated when the Fundamental Law came into force.[52] The very final proverbial nail, however, came with the 23 November proposal for an amendment of Articles 185 and 187 of the Act on the Organisation and Administration of the Courts including an exception from the rule that the mandate of court presidents and vice-presidents elected before 1 January 2012 was to last until the end of their original mandate. The new version of the proposal terminated *ex lege* the mandate of the President and Vice-President of the Supreme Court on the day the Fundamental Law entered into force.[53] The Parliament approved and adopted both Acts on 28 November 2011, effectively shortening the mandate of President Baka by more than a half (by three and a half years out of six).

Moreover, another constitutional amendment made Baka ineligible for the new position of the President of the Kúria, as it introduced a new criterion for the office of Kúria President, which required a candidate to have served at least 5 years as a domestic court judge.[54] This final change excluded Baka, who had 17 years of experience at ECtHR but only a year of practice at the Budapest Court of Appeal and two years and a half as a Supreme Court judge, from the pool of potential candidates for the office. On 9 December 2011, President János Áder proposed the election of Péter Darák as President of the Kúria and Tünde Handó as President of the National Office for the Judiciary. Both candidates were elected on 13 December 2011.[55] Mr. Baka remained at the Kúria only as a regular judge. As he could not challenge his dismissal from the position of Supreme Court President before the Hungarian Constitutional Court, his only hope was the European Court of Human Rights.[56]

[51] ECtHR, Baka v Hungary [GC], para. 28.

[52] Ibid, para.29.

[53] Ibid, para. 30.

[54] Note that this constitutional amendment was adopted only on 29 November 2011 and came into force on 2 December 2011, that is few days before the election of the new Supreme Court President.

[55] Ibid, para. 35.

[56] Halmai (2017), pp. 471-488.

3 The Strasbourg Court Steps In

Mr. Baka challenged his early termination from the presidency of the Supreme Court primarily on two grounds.[57] First, he argued that he was dismissed because of his critical remarks towards the judicial reforms prepared by Orbán's Government, which amounted to a violation of his freedom of expression guaranteed by Article 10 ECHR. Second, since his removal was exempted from judicial review, he complained that he was deprived of the right to access to a court in violation of Article 6(1) ECHR.

3.1 Summary of the Judgment

The Grand Chamber[58] eventually sided with Mr. Baka on both counts. Regarding the right to a fair trial, the ECtHR held that since Mr. Baka had no domestic remedy available to contest his removal from the office of the Supreme Court President through constitutional reform, there was a violation of his right to access to a court.

However, before the ECtHR could discuss the merits of the right to access to a court, it had to determine whether the civil limb of Article 6 was applicable at all, which was actually the key issue under Article 6. In assessing the "civil" nature of Mr. Baka's right, the ECtHR relied on the so-called "Eskelinen test",[59] according to which excluding a civil servant from Article 6 protection complies with the Convention only if two conditions are met simultaneously: (1) national law must have *expressly* excluded access to a court for the relevant post; and (2) the exclusion must be justified on objective grounds in the State's interest.[60]

On the first "Eskelinen criterion", the ECtHR observed that before the 2011 reform of the Supreme Court Mr. Baka could challenge his dismissal before the Service Tribunal,[61] but his access to a court was impeded by the fact that the premature termination of his mandate as the President of the Supreme Court was included in Transitional Provisions of the Fundamental Law.[62] In a critical move, the Grand Chamber held that "it must determine whether access to a court had been excluded under domestic law before, rather than at the time when, the impugned measure concerning the applicant was adopted".[63] To hold otherwise, "would open the way to abuse, allowing Contracting States to bar access to a court in respect of individual measures concerning their public servants, by simply including those measures in an ad hoc statutory provision not subject to judicial review".[64]

[57] As the ECtHR did not address the other articles invoked by Mr. Baka on the merits, we will leave them aside here.

[58] Due to limited space, we focus exclusively on the 2016 Grand Chamber judgment and leave aside the earlier chamber judgment (see ECtHR, Baka v Hungary, 27 May 2014).

[59] ECtHR, Baka v Hungary [GC], paras. 103-106.

[60] ECtHR, Vilho Eskelinen and Others judgment ([GC], no. 63235/00, para. 62.

[61] ECtHR, Baka v Hungary [GC], para. 114.

[62] Ibid, para. 115.

[63] Ibid, para. 116 (emphasis added).

[64] Ibid, para. 116.

The Grand Chamber justified this position with the appeal to the concept of the rule of law[65] and found that since the Transitional Provisions of the Fundamental Law did not meet this standard, the first condition of the *Eskelinen* test was not met and Article 6 applied under its civil head, irrespective of the result regarding the second *Eskelinen* condition.

The Grand Chamber thus could proceed to assessing the compliance of the Transitional Provisions of the Fundamental Law with the right to access to a court. It reiterated that the lack of judicial review of the early termination of Mr Baka's office was the result of legislation whose compatibility with the requirements of the rule of law was doubtful[66] and stressed the overall importance of procedural fairness of any decisions affecting the removal or dismissal of judges from their office.[67] Hungary thus impaired the very essence of Mr. Baka's right to access to a court and violated Article 6(1) ECHR.

Regarding the freedom of expression, the Grand Chamber confirmed applicability of Article 10 to measures against members of the judiciary.[68] The heart of the dispute, atypically for a freedom of expression case,[69] was whether there was actually interference with Mr. Baka's freedom of expression.[70] More specifically, the key issue was whether the early termination of his office was motivated by his criticism of the governmental judicial reforms or whether it resulted from structural modification of the Hungarian Supreme Court. Due to the sequence of the events, the ECtHR found that there was *prima facie* evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate.[71] The burden of proof thus shifted to the Government, which, according to the Grand Chamber, failed to show convincingly that the functional changes of the Kúria or the tasks of its President required the premature termination of the applicant's mandate.[72]

The Grand Chamber thus moved to assessing the legal basis for terminating Mr. Baka's office. It again expressed doubts whether the legislation in question was compliant with the requirements of the rule of law, but moved forward on the assumption that the interference was "prescribed by law" for the purposes of Article 10(2) of the Convention.[73] Subsequently, the ECtHR focused on whether the interference pursued one of the legitimate aims stipulated in Article 10(2) of the Convention. It flatly rejected the Government's argument that the termination of Mr. Baka's mandate as President of the Supreme Court was aimed at maintaining the

[65] Ibid, para. 117 (citations omitted).

[66] Ibid, para. 121.

[67] Ibid, para. 121.

[68] Ibid, paras. 140–142.

[69] The existence of interference is rarely disputed in the ECtHR judgments concerning freedom of expression. Most Article 10 cases are decided in the final stage of the Article 10 test, that is, on whether the impugned interference was "necessary in democratic society".

[70] ECtHR, Baka v Hungary [GC], paras. 143–152.

[71] Ibid, para. 148.

[72] Ibid, para. 150.

[73] Ibid, para. 154.

authority and impartiality of the judiciary, since "rather than serving the aim of maintaining the independence of the judiciary, the premature termination of the applicant's mandate as President of the Supreme Court appeared to be incompatible with that aim".[74]

The ECtHR could have stopped here, but due to the particular circumstances of the present case it considered it important to also examine whether the impugned interference was "necessary in a democratic society". Under this criterion, the Grand Chamber emphasized that "questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 … [and] even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter".[75] Then it took into account the specifics of the present case. It observed that Mr. Baka expressed his views on the legislative reforms at issue in his professional capacity as President of the Supreme Court and of the National Judicial Council,[76] his criticisms focused exclusively on constitutional and legislative reforms affecting the judiciary,[77] his publicly expressed views did not undermine the impartiality of or public confidence in the judiciary,[78] and his statements did not go beyond mere criticism from a strictly professional perspective.[79] All of these circumstances allowed for a narrow margin of appreciation.[80] Furthermore, the Strasbourg judges held that premature termination of the applicant's mandate undoubtedly had a "chilling effect" on other judges and court presidents as well and must have discouraged them from participating in public debate on legislative reforms affecting the judiciary in future.[81] Therefore, the Grand Chamber found a violation of Article 10 ECHR as well.

3.2 Problematic Aspects of the Grand Chamber *Baka* Judgment

The Grand Chamber judgment in *Baka* confirms the old proverb that "hard cases do not make good law".[82] The major problem[83] stems from the fact that Mr. Baka's premature termination from office, similarly to the removals of other apex court presidents in the region,[84] primarily raised issues of domestic separation of powers,

[74] Ibid, para. 156.

[75] Ibid, para. 165 (citations omitted).

[76] Ibid, para. 168.

[77] Ibid, para. 171.

[78] Ibid, para. 170.

[79] Ibid, para. 171.

[80] Ibid, para. 171.

[81] Ibid, para. 173.

[82] For a similar observation in another recent Grand Chamber judgment against Hungary, see para. 45 of Joint Dissenting Opinion of Judges Nußberger, Hirvelä, Bianku, Yudkivska, Møse, Lemmens and O'Leary in ECtHR, 13 December 2016, *Béláné Nagy v. Hungary* [GC], no. 20261/12.

[83] For a similar conclusion, see Vincze (2015), pp. 451-453.

[84] See Part 4 and 5.

over which the ECtHR has no jurisdiction.[85] The Grand Chamber thus had to play with a limited number of cards, reframing the issues in the *Baka* case as an individual human rights claim. But treating the separation of powers case through a human rights lens comes at a cost[86] and the Grand Chamber judgment suffers from various deficiencies.

First, the majority reasoning under Article 6 is unpersuasive. The conclusion that the Hungarian domestic law did not *expressly* exclude Mr. Baka's access to the constitutional court is simply a stretch. The ECtHR got around this by a simple trick. The Grand Chamber did not say it explicitly, but it considered the Transitional Provisions of the Fundamental Law terminating Mr. Baka's mandate as a "non-law", since it is a de facto Bill of Attainder,[87] which violates a key principle of the rule of law—generality.[88] In other words, the Transitional Provisions of the Fundamental Law, despite being public, unambiguous and allowed only one interpretation, lacked the minimum features of a "law" in a state governed by the rule of law.[89] By doing this, not only the Strasbourg court de facto exercised an abstract review of *supraconstitutionality*, but recreated the legal conditions which would have been applied had the Transitional Provisions not exist, i.e. de facto struck down the Transitional Provisions with ex nunc effect.

Second, it is unclear why the ECtHR has not relied primarily on the second condition of the "Eskelinen test" rather than on its first condition. The second *Eskelinen* criterion provided much firmer ground for ECtHR's conclusions without any need to stretch the Convention provisions. This criterion requires that the exclusion from protection must be justified on objective grounds in the State's interest.[90] Given the importance of the independence of the judiciary, it is relatively easy to argue that excluding dismissals of apex court presidents from judicial review cannot be justified on objective grounds in the State's interest. In fact, the Grand Chamber de facto says it in other parts of its judgment.[91]

This finding actually relates to the third problem in the Grand Chamber *Baka* judgment. The leap from the independence of judges to the independence of *court presidents* is too quick and not sufficiently reasoned. It is important to keep in mind that Mr. Baka remained a judge of the Hungarian Supreme Court (*Kúria*). In this aspect, the *Baka* case should be distinguished from the *Volkov* and *Kudeshkina* cases in which the applicants were dismissed from judicial office, as well as from the *Wille* and *Olujic* case, where the applicants were removed both from the positions of the court president and the office of a judge. Moreover, none of the soft-law instruments relied on by the Grand Chamber in the key parts

[85] See part 5 and Kosař (2012), pp. 37–39.

[86] Even though we agree that some individual human rights have a structural character; see Varol (2017).

[87] A Bill of Attainder is a legislative act that singles out an individual or group for punishment without a trial. See e.g. Article I, Section 9, paragraph 3 of the Constitution of the United States.

[88] On the principle of generality, see e.g. Tamanaha (2004), pp. 93–94; Kramer (2007), pp. 109–113 and 144–150; and Raz (2009), pp. 215–216.

[89] See Joint concurring opinion of judges Pinto de Albuquerque and Dedov, para. 15.

[90] See note 60.

[91] See in particular ECtHR, Baka v Hungary [GC], paras. 121 and 172.

of the judgment[92] concern court presidents. The ECtHR simply assumes the principle of irremovability of judges should apply *in toto* to court presidents.[93] However, this position does not reflect the specific position of court presidents, different lengths of their terms, potentially different reasons for their dismissal and many other aspects regarding their powers and roles.[94] This is not to say that the Grand Chamber should have accepted the Hungarian Government's argument that the function of the President of the Supreme Court was more administrative than judicial in nature, and that Baka's removal from his position "should be assessed in the light of the rules governing the removal of political appointees rather than those governing the removal of judges".[95] The message this article wants to convey is that the Grand Chamber judgment lacks nuance.

Fourth, despite the growing Strasbourg case law there is no consensus on the scope of the freedom of expression of judges in Europe.[96] Open criticism of governmental policies by judges inevitably moves them into the political arena, with all the consequences. In many established democracies, judges exercise significant restraint vis-à-vis politicians, even on issues of judicial independence and regarding legislation affecting the judiciary.[97] Even the apex court presidents rarely criticize the Government vocally.[98] Moreover, the ECtHR itself is typically very self-constrained when deciding on the freedom of expression of judges, stressing the extraordinary position of judges and courts in the political system.[99]

Fifth, the Grand Chamber excessively relied on the non-binding soft law on judicial independence and read it into Convention too cavalierly.[100] Such use of the soft law to change the meaning of the Convention is not only deeply problematic from normative point of view,[101] but also fails to acknowledge the diversity and complexities of court administration in Europe.

In sum, the ECtHR failed to deliver a clear-cut case with convincing reasoning. Strasbourg judges should be at their best when fighting abusive constitutionalism.

[92] Ibid, paras. 114, 121, 168 and 172.

[93] For the confirmation of this view, see Joint concurring opinion of judges Pinto de Albuquerque and Dedov, para. 11.

[94] We will revisit some of those issues in more detail in Part 4.

[95] ECtHR, Baka v Hungary [GC], para. 169.

[96] Dijkstra (2017).

[97] For instance, French judges are extremely reluctant to speak extrajudicially, which is an inherent feature of the French legal culture.

[98] Recall how careful Irish judges were in going public regarding the referendum on reducing judicial salaries (see Mac Cormaic (2016)); and how much controversy the Chief Justice of Canadian Supreme Court, Beverley McLachlin, stirred when she wanted to question in a private talk (sic!) the constitutionality of appointment of Justice Nadon by the Harper Government to the Canadian Supreme Court (see e.g. Aaron Wherry, Stephen Harper, Beverley McLachlin and an historic mess, Maclean's, May 6, 2014, available at http://www.macleans.ca/politics/stephen-harper-beverley-mclachlin-and-historic-mess/).

[99] See Kudeshkina v Russia, 26 February 2009, no. 29492/05, paras. 93-95; and *Di Giovanni v. Italy,* no. 51160/06, 9 July 2013, paras. 71 and 75-86. See also Mahoney (2012), p. 258.

[100] Baka v Hungary [GC], para. 114, 121, 168 and 172.

[101] See Kosař and Lixinski (2015); and, more broadly, Bobek and Kosař (2014). *Cf.* Joint concurring opinion of judges Pinto de Albuquerque and Dedov, para. 11.

They should be even more restrained and nuanced when deciding on the fate of a former colleague. This means that in such a scenario, the ECtHR must not overreact and instead should try to construct stellar legal arguments. In the *Baka* case the Grand Chamber has failed to meet this standard.

4 The Real Problem Lies Elsewhere

As previously discussed, the *Baka* judgment focuses on who dismissed the President of the Hungarian Supreme Court, for what reasons and according to which procedure. This is understandable, given the framing of this dispute before the ECtHR. However, the real problem regarding the dismissal of Mr. Baka lies elsewhere—in the broad powers of court presidents that provide an incentive for politicians to install their protégés into these positions and through them exercise influence within the judiciary or even on individual rank-and-file judges.[102] This becomes clearer if one looks at the fate of presidents of top courts in other Central and Eastern European countries.

In fact, most of those countries have witnessed different forms of political pressure, often culminating with the forced removal of the president of one of the apex courts. In 1998, the National Judicial Council dismissed Mr. Olujic, the President of the Croatian Supreme Court.[103] Two years later, the Slovak Parliament tried to impeach Mr. Harabin, the President of the Slovak Supreme Court.[104] Mr. Harabin eventually survived the impeachment motion, but it was a very close call. In 2006, Czech President Václav Klaus attempted to dismiss Iva Brožová, the President of the Czech Supreme Court, without providing any reason.[105] Iva Brožová fought back and won before the Czech Constitutional Court.[106] In 2011, the Macedonian Parliament dismissed Trendafil Ivanovski, the President of the Constitutional Court, for allegedly collaborating with the State secret police during the communist era. That same year, Orbán's regime replaced Mr. Baka. However, the story goes on even after Baka. After Jaroslav Kaczyński came to power in Poland in 2015, his Law and Justice party harassed the President of the Polish Constitutional Tribunal, Andrzej Rzepliński. It attempted to reduce his term and even threatened him with criminal prosecution.[107] Similarly to Hungarian scenario,

[102] The motivations of politicians and their techniques vary from replacing a vocal critic among court presidents and rigged case assignment to silencing critics among rank-and-file judges by initiating unsubstantiated disciplinary motions (by loyal court presidents) against them.

[103] See ECtHR, 5 February 2009, *Olujić v. Croatia*, no. 22330/05. For a broader political context of this dispute, see Uzelac (2001), pp. 45–51.

[104] Kosař (2016), pp. 289–290; and Report of the Special Rapporteur on the Independence of Judges and Lawyers on His Mission to the Slovak Republic (November 27–29, 2000), E/CN.4/2001/65/Add.3, paras 27–33.

[105] See Bobek (2010), pp. 263–265; Kosař (2017), pp. 107–108.

[106] As a result, she was reinstated to the position of Supreme Court President and thus this case never reached the Strasbourg Court.

[107] See Garlicki (2016); Koncewicz (2016), in particular at pp. 1756, 1759–1763; and Koncewicz (2017).

Kaczyński also changed the rules of selection of the new Constitutional Tribunal president and eventually installed his own protégé therein.

Therefore, the dismissal of Mr. Baka is not an isolated incident. Neither is it a novel phenomenon. There is actually a pattern of dismissals of apex court presidents in Central and Eastern Europe. While some of the ousted court presidents mentioned above were controversial figures,[108] most of them were dismissed because they wielded significant powers and the political forces behind their dismissal wanted to install their own person into that post who would be more loyal to their cause.

This widespread practice of political interferences with court presidents follows from their specific position. The powers of court presidents in CEE are vast. They assign and reassign judges between chambers, decide on case assignment, appoint chamber presidents, process complaints from court users, and may initiate disciplinary motions against rank-and-file judges.[109] They often also heavily influence the appointment, promotion and secondment of judges.[110] In Russia, Ukraine and other post-Soviet republics, court presidents also control important discretionary perks (vacation packages, help in obtaining apartments or getting children into schools or nurseries), handle the evaluations of judges and interpret data in letters of reference for potential advancement.[111] Various commentators thus referred to court presidents as "invisible masters of the CEE judiciaries",[112] a "presidential oligarchy",[113] "super authorit[ies] who manage[… their] domain and represent[…] the court in the outside world",[114] and suggested that "the comprehensive powers of court presidents are one of the most pressing issues and constitute structural deficiency in the countries of Eastern Europe".[115]

Due to the introduction of strong judicial councils in most CEE countries, presidents of the supreme courts became even stronger, as the supreme court president often became ex lege a chairman of the judicial council. This exacerbated the problem as it increased the potential scope of abuse of powers of the supreme court presidents, forced them to enter the political arena, and increased the incentives for politicians to tinker with their selection. It is telling that this accumulation of powers was present in the cases of both Mr. Baka and Mr. Olujic.[116]

To be sure, the president of the Supreme Court is a powerful figure even in established Western democracies. However, court presidents underwent a profound

[108] See Uzelac (2001), pp. 45–51 (regarding Krunoslav Olujić); and Kosař (2016), pp. 236–333 and 355–361 (regarding Štefan Harabin).

[109] See Piana (2010), pp. 43–44; Popova (2012), pp. 135–145; and Kosař (2016), pp. 390–395.

[110] See Schwartz and Sykiainen (2012), pp. 995–996, 1003, 1008–1009, 1012, 1018–1027 and 1031–1034; and Kosař (2017), pp. 115–116.

[111] Solomon (2010), p. 354. See also Popova (2012), pp. 136–137.

[112] Kosař (2016), p. 390.

[113] Uzelac (2001), p. 43.

[114] Solomon (2010), p. 354.

[115] See Müller (2012), p. 965.

[116] At the moment of their dismissals, apart from being Supreme Court presidents Mr. Baka was a chairman of the Hungarian National Judicial Council and Mr. Olujic was a crucial member of the Croatian Judicial Council.

development there. Many Western democracies set strict limits on how court presidents may interact with rank-and-file judges, diluted their powers, and introduced random case assignment.[117] As a result, court presidents in Western Europe are much more benign actors than in the CEE, where court presidents retained their wide powers. Moreover, we should not forget that CEE court presidents were instrumental in keeping the communist judiciaries on a short leash. They operated as the transmission belts of the Communist Party: they ruled and supervised judges, fostered internal judicial dependence through nominations and promotions of lower court judges, implemented party resolutions and personified the subordination of the judicial system.[118]

While recent court presidents in CEE are not necessarily "transmission belts" of the ruling political parties, these communist legacies have not disappeared completely and some politicians want to control or at least neutralize the judiciary by installing their "own" loyal court presidents. But it would be fallacious to assume that politicians are always the "bad guys" and the supreme court presidents the "good guys". The situation in CEE is far more complicated. Some court presidents in this region abused their powers, initiated dubious disciplinary motions against their critics within the judiciary, and rewarded their protégés with early promotions and excessive salary bonuses.[119] Whether we like it or not, CEE politicians had to react to such abuses and, as a result, it is highly contestable to claim that the dismissal of a judge from the position of a court president must be governed by the same rules as the dismissal of a judge from the judicial office.

In other words, defining the powers of supreme court presidents and designing the rules governing their dismissals became one of the most vexing rule of law issues in CEE that raises important questions regarding separation of powers and institutional judicial independence and that defies easy answers. The next Part will examine whether the ECtHR sees this problem in its complexity and what paradigm it chose to tackle it.

5 The Strasbourg Court as a Defender of the Rule of Law: An Uneasy Task

The fear of democratic backsliding shook both the CoE and the EU, and their belief that their member states will maintain stable democratic regimes. This assumption proved to be wrong, as several CoE member states have recently witnessed and questioned the values and standards of the whole community. Interestingly, the continuing debates within the CoE and EU framed the discussion under the rule of

[117] See Seibert-Fohr (2012), pp. 481–483 (on Germany); and Garapon and Epineuse (2012), pp. 285–286 (on France). In general, see Solomon (2012), pp. 918 and 920–921. In some countries such as the Netherlands, court presidents still enjoy considerable powers, but they are constrained by conventions and also by a conceptualization and internalization of judicial independence applicable to their role.

[118] Bröstl (2003), pp. 141, 143. See also Frankowski (1991), pp. 40–47; Markovits (1996), pp. 2292–2293; and Wagnerová (2003), p.167.

[119] See e.g. the techniques used by the President of the Slovak Supreme Court, Štefan Harabin, between 2009 and 2014, described in Kosař (2016), pp. 236–333 and 355–361.

law umbrella, narrowing the structural problems of democracies into a more technical, and perhaps politically less controversial, issue.[120] The frequent use of the *rule of law* principle might however also relate to the problem of very vaguely defined democratization criteria imposed on the CEE candidate countries in the early 1990s.[121] Lists of the entry requirements for accession of these countries to the CoE and EU typically referred to the principle of the rule of law, again without a more precise definition of its components.[122]

Current constitutional crises of CEE democracies, targeting mostly separation of powers and the independence of the judiciary,[123] highlighted these problems stemming from the past, namely the ambiguous approach of CoE (and EU) towards the requirements of "democracy" and "the rule of law". The Baka case is no exception in this respect. With principles of institutional judicial independence or the separation of powers missing in the Convention,[124] the ECtHR framed the removal of the supreme court president as a freedom of expression case. This attempt not only opened questions of whether the ECtHR could and should have addressed the broader context leading to Baka's removal from the office of the supreme court president and the underlining problems of abusive constitutionalism in CEE states, but also hinted at some deeper conceptual problems and limits of the ECtHR's protection. The following subsections will discuss some of these issues in more detail.

5.1 The Baka Case: Freedom of Expression or the Rule of Law?

The position of the ECtHR was by no means easy, since it stepped into an extremely fragmented debate which has so far failed to come with a clear vocabulary for describing the Hungarian crisis, and which remains unsure which values of constitutional democracy are at stake.

The Convention itself is of little help. First of all, the Convention is not well suited to deal with the structural problems of transitional democracies.[125] It regulates individual human rights, stepping outside of the individual protection only in a limited number of occasions which typically revolve around Article 6 and the

[120] Democracy Reporting International: In Need of New Tools: Protecting Democracy in EU Member States (www.democracy.reporting.org).

[121] E.g. European Commission, 'Follow up to the European Parliament resolution on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), adopted by the Commission', 8 October 2013, SP(2013)627; European Parliament, 'Situation of fundamental rights in the European Union (2012)', 2013/2078(INI), see http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/2078(INI).

[122] Certain clarification of the rule of law requirements now appears in the 2016 Venice Commission check-list, The Venice Commission check-list identifies the core elements of the rule of law as legality (i.e. transparent, accountable and democratic legislative process), legal certainty, prohibition of arbitrariness, access to justice before independent and impartial courts, respect for human rights, and no-discrimination and equality before the law. See Venice Commission (2016). For more see also Dimitry Kochenov (2008), The EU Enlargement and the Failure of Conditionality (Kluwer Law International).

[123] Ginsburg and Moustafa (2008).

[124] Vincze (2015).

[125] Lautenbach (2013), p. 1.

access to independent and impartial courts.[126] However, it does not provide for institutional protection of the independence of judiciary in the context of the principle of the separation of powers. Soft law measures issued by CoE bodies are not much more helpful either. Although these measures invoke the rule of law principle, their definitions of this concept are only cursory and they alone can hardly be used as a basis for the Convention rights violation.

When it comes to the values underlining the rights encompassed in the Convention, only the Preamble offers a brief reference to the rule of law as a "common heritage" of European countries. The ECtHR, admittedly, confirmed that the rule of law is "one of the fundamental principles of a democratic society (…) inherent in all the Articles of the Convention"[127] and present in all CoE founding states[128] and their domestic legal orders. However, the concept of the rule of law in the Convention Preamble bas been non-justiciable so far and has not been treated as a self-standing value.[129] It merely guarantees the protection "against arbitrary interferences by public authorities with the rights safeguarded by the Convention."[130] Such a vague understanding naturally raises legitimate concerns whether the rule of law, as articulated by the Grand Chamber in *Baka*, can meaningfully protect any checks and balances against democratically elected majorities and their interferences with judicial power. Nevertheless, with no jurisdiction to decide in the domestic separation of powers, the lacking right to access to the public office and the missing structural principle of independence of the judiciary, the broadly worded principle of the rule of law remains the only textual hook in the Convention, should the ECtHR want to tackle abusive constitutionalism in its entirety.

The Grand Chamber judgment in *Baka* contains overall 61 references to the rule of law, reinstating the principle from different sources of international soft law.[131] Yet, the ECtHR's own reasoning fails to bring any clarity into the concept and is, at best, undertheorized. First, the Grand Chamber referred to the rule of law when assessing the first Eskelinen criterion under the Article 6(1) ECHR, stating that the compatibility of impugned Hungarian legislation with the rule of law requirements was doubtful.[132] Unfortunately, save for a single reference to the Venice Commission, the Grand Chamber does not discuss the content of these requirements any further.

In fact, the Grand Chamber tells us very little what criteria it used for determining that Article 11 (2) of the Transitional Provisions of the Fundamental Law was an ad hominem law. It just invoked the concept of the rule of law and concluded, rather generically, that "laws which are directed against a specific person are contrary to the rule of law".[133] There is neither any test for assessing the

[126] Kosař and Lixinski (2015).

[127] Káracsony and Others v Hungary (2006), app. no. 37494/02.

[128] ECtHR, Golder v the United Kingdom (1975), app. no. 4451/70. See also Greer (2006), p. 196.

[129] Černič (2016).

[130] ECtHR, Gillan and Quinton v UK (2010), App. no. 4185/05, para. 77.

[131] ECtHR [GC] Baka v Hungary.

[132] Ibid, para. 117.

[133] Ibid, para. 117 *in fine*.

generality of laws nor any attempt to apply this generic statement to the particular wording of Article 11 (2) of the Transitional Provisions of the Fundamental Law. This is striking since, in contrast to the *Wille* judgment,[134] there was no "smoking gun" in the *Baka* case.[135] Instead of a subjective and speculative assessment of facts,[136] the Grand Chamber should have come with clear criteria for assessing the rule of law principle of generality and under which circumstances, if any, the impugned law may affect specific persons.[137] It is too tempting to assume that since Article 11 (2) was applicable to one person only, there was no need of further justification. But such treatment of Article 11 (2) is simplified, if not simplistic. There was only one President of the Supreme Court in Hungary and hence *any* law affecting the supreme court president would affect only one person.[138] The fact that the ECtHR did not elaborate more on the principle of generality, is particularly unfortunate since the recent attack of the Orbán's regime on the Central European University raises the very same issue—was it a Bill of Attainder or not? [139]

The argumentation under the Article 10 does not bring any more clarity into the relevance of the concept of the rule of law either. While the applicant built the alleged violation of Article 10 directly on the rule of law principle (repeatedly stating that "in a democratic society governed by the rule of law no reconsideration, either by the legislature or by the executive, of the suitability of any elected judicial official could be allowed before the expiry of the term of office", that such an interference was arbitrary, abusive, and retroactive, and finally, that it was not necessary in a democratic society, as "the independence and proper functioning of the judiciary", the basic purpose of the rule of law, are questions of public interest[140]), the ECtHR did not address these issues and just repeated that compliance of the impugned legislation with requirements of the rule of law was dubious.[141] Furthermore, although the Grand Chamber stressed the necessity to look into the broader context of restructuring of Hungarian judiciary and the chilling

[134] See *Wille v. Liechtenstein* [GC], No. 28396/95, 28 Oct. 1999, paras 42–43 (where the "smoking gun" was the a letter of the Prince of Lichtenstein on heraldic paper in which the Prince clearly expressed that he considered the views of Mr. Wille presented in Wille's public lecture 'incredibly arrogant' and in his eyes the attitude of Dr Wille made him unsuitable for public office).

[135] For a similar conclusion see Vincze (2015): pp. 452–453.

[136] See ECtHR [GC] Baka v Hungary, paras 143–148.

[137] This assessment is not as simple as the Grand Chamber pretends. See e.g. the case law of the Supreme Court of the United States on the Bill of Attainder: American Communications Association v. Douds, 339 U.S. 382 (1950); United States v. Brown, 381 U.S. 437 (1965); and Nixon v. Administrator of General Services, 433 U.S. 425 (1977). Other supreme and constitutional courts have similarly complex jurisprudence.

[138] In other words, the Hungarian Supreme Court President was a "class of one" and hence it did not make sense to draft the relevant provision generally. See e.g. Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

[139] Uitz R (2017) Academic Freedom in an Illiberal Democracy: From Rule of Law through Rule by Law to Rule by Men in Hungary. 13October 2017, Verfassungsblog (http://verfassungsblog.de/academic-freedom-in-an-illiberal-democracy-from-rule-of-law-through-rule-by-law-to-rule-by-men-in-hungary/), accessed 17 October 2017.

[140] See ECtHR [GC] Baka v Hungary, para. 127.

[141] Ibid, para. 121 and 154.

effect of the legislation, the relationship of these remarks, used primarily to narrow the margin of appreciation under the Article 10, to the principle of the rule of law remains implicit and unclear.[142]

Instead, the ECtHR justified the application of Article 10 by the existence of the causal link between Baka's speeches and adopted legislative amendments. The problem with such an approach is that it reduces the *Baka* case to an incidental occurrence of sanctions against the judge for his public opinions, directly following the line of case law developed in *Volkov v Ukraine*.[143] However, Mr. Baka's situation differs significantly from the *Volkov* case in at least two aspects. First, Baka's dismissal resulted from the complex legislative changes rather than from individual disciplinary motion. Second, Mr. Baka was not stripped of his judicial office, but "merely" of his administrative public function. Both of these distinctions called for a different approach that could provide guidance for similar cases of abusive constitutionalism. Unfortunately, the freedom of speech framing of the *Baka* case will serve as a poor precedent to guide the path in future cases.[144]

In other words, treating the Baka case as a freedom of expression issue failed to tackle the broader context of the case and to see the issue of dismissal of the apex court presidents in their complexity.[145] This in turn raises the question of whether and how the ECtHR should approach structural changes and inferences into the independence of judiciary, whose roots go much deeper than simple repercussions for the open criticism of the government.[146]

5.2 Re-defining the Rule of Law in Strasbourg?

The concept of the rule of law has been debated for centuries.[147] Post-communist CEE regimes used the concept of the rule of law mostly to deal with the past and to reduce positivist and formalist rule of the written text that was dominant in their legal culture.[148] Hence, they prioritized "thick" conceptions of the rule of law.[149] However, there is no consensus on the content of the rule of law[150] and scholars remain heavily divided regarding substantive and procedural requirements of this concept.[151]

[142] See e.g. Judge Sicilianos who noted that "the rule of law is hardly imaginable without an obligation on the State to offer safeguards for the protection of judicial independence…"

[143] See note 9, para. 189, 208.

[144] The *Erményi v. Hungary* case discussed in Part 5.2 attests to it.

[145] See Part 4 of this article.

[146] For an elaboration on the role of the ECtHR in protecting the common standards and minimum level of compliance see Føllesdal (2016).

[147] See Tamanaha (2004).

[148] Czarnota (2016), p. 318; Přibáň (2009).

[149] For the distinction between the "thick" and "thin" conceptions of the rule of law see Tamanaha (2004), pp. 91-113; Møller & Skaaning (2012); and Krygier (2016), pp. 213-215.

[150] See Waldron (2002).

[151] See Craig (1997), Waldron 2008 and Taekema 2013.

It seems that international organizations have struggled to acknowledge these theoretical challenges and disagreements. This applies to the ECtHR as well. Its interpretation of the rule of law, perhaps constrained by a very limited reflection in the Convention, has so far neglected existing historical differences and theoretical discussions. The ECtHR is in the unique position to bridge this gap between "rule of law practitioners" and "rule of law theorists",[152] but it has not raised to this challenge so far.

Typically, the ECtHR implements the rule of law in two ways: The first is the legality of the legislation interfering with individual rights protected by the Convention. The rule of law principle requires that any interference has *a basis in domestic law* and *the quality of law*. The principle is invoked most frequently with Article 6 and procedural parts of articles 5, 7, and 13, but some substantive rights (especially Articles 2, 3, 8, 10 and 11) belong to this category as well.[153] Here, the rule of law is employed as one of the central values of democracy. However, the ECtHR does not draw a very clear boundary between the concepts of democracy and the rule of law,[154] observing only that the Convention was designed to maintain and promote the ideals and values of a democratic society. Moreover, both concepts seem to be used as yardsticks for the test of proportionality ('prescribed by the law' and 'necessary in the democratic society').[155]

The second method uses the rule of law as a guarantee of sufficient judicial safeguards on the domestic level. The rule of law "implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure".[156] Beyond the right to access to a court, the judicial safeguards under the principle of the rule of law cover the authority[157] and independence of the judiciary from other branches of power.[158] The principle of the separation of powers, although it is slowly gaining importance in the Strasbourg case law, is still invoked infrequently, mostly in the context of incompatibility of the judicial office with other positions and parliamentary immunities.[159]

Therefore, the rule of law under the Convention, as interpreted by the ECtHR in its 'legality' or 'judicial safeguards' meanings, is still restricted to interferences with individual rights. The Convention covers some of the structural problems,[160] but only if they lead to a systemic violation of individual rights.

[152] For a similar call, see Krygier (2016), pp. 222-223.

[153] Lautenbach (2013), p. 174.

[154] Ibid, p. 194.

[155] Lautenbach (2013).

[156] See Klass and others v Germany, judgment of 6 September 1978, para. 55, Rotaru v Romania, judgment of the Grant Chamber of 4 May 2000, para. 59, or Volokhy v Ukraine, judgment of 2 November 2006, paras. 52-54.

[157] Schöpfer v Switzerland, App no 25405/94, ECHR 1998-III, 20 May 1998, paras. 29–30; Nikula v Finland, App no 31611/96, ECHR 2002-II, 21 March 2002, para. 45; Stere and ors v Romania, 23 February 2006, at 53.

[158] Stafford v United Kingdom (GC), App no 46295/99, ECHR 2002-IV, 28 May 2002, at 78,

[159] Lautenbach (2013), p. 157; and Kosař (2012).

[160] Kosař and Lixinski (2015).

The application of either of these two doctrines seems to be tricky, but not completely unreasonable, had the Court decided to treat the Baka case as a fair trial issue. As we pointed out before, the refusal to proceed with the second Eskelinen criterion was not well justified. Moreover, by this choice the ECtHR also gave up the opportunity to explore the separation of powers argument under the procedural guarantees of the right to a fair trial.[161] A judicial review of instrumental institutional changes such as the removal of apex courts' presidents could prove to be an important constraint on interferences with judicial independence. However, the ECtHR, by choosing to address the Baka case as a freedom of expression issue, missed an opportunity to interpret the principle of checks and balances as a principle inherently present under the fair trial, judicial independence, and rule of law doctrines as protected by the Convention. Still, it is important to stress that the hesitancy of the ECtHR might have stemmed from the unwillingness to broaden Article 6(1) to protect institutional safeguards, thus going well beyond the individual protection that is typically understood and guaranteed by the Convention.[162]

Nevertheless, this hesitancy necessarily brought negative repercussions. Most importantly, vague definitions and artificial stretching of Article 10 undermine the persuasive power of the *Baka* judgment. The problematic character of the ECtHR's approach became even more apparent in the subsequent judgment in *Erményi v Hungary*, which concerned the removal of Mr. Baka's colleague, Mr. Erményi from the office of Vice-President of the Hungarian Supreme Court.[163] The ECtHR reassessed the impugned dismissal under the Article 8 and disregarded applicant's arguments based on Article 6 altogether. The ECtHR stretched Article 8 and extended respect for private life to the right not to be dismissed. The apparent lack of any regard to the scope of Article 8 and a missing link to notions of family, home, or correspondence aggravated judge Kūris to such an extent, that he suggested the re-examination of the *Erményi* judgment by the Grand Chamber, calling the chamber reasoning a "fallacy of legal thinking" and an example of Court's militant step towards estrangement and alienation of the law.[164]

The use of the Article 8 path in the chamber judgment in *Erményi* might be understandable at first sight. The glitch in the *Erményi* case was that Mr. Erményi did *not* publicly criticize Orbán's judicial reforms[165] and he *had* access to the court as he could challenge his dismissal before the Hungarian Constitutional Court.[166] There was simply no room to speculate about the link between Mr. Erményi's views and his dismissal. Hence, the line of arguments used in the *Baka* judgment was not available. However, this does not justify expanding the Article 8 scope in

[161] For a potentially helpful theoretical support for this position, see Raz (1979), Waldron (2013), Waldron (2014) and Varol (2017).

[162] For the discussion of the resulting repercussions see Kosař and Lixinski (2015).

[163] ECtHR, Erményi v Hungary, judgment of 22 November 2016, app. no. 22254/14.

[164] Ibid, Dissenting opinion of judge Kuris, para. 15.

[165] In contrast to Mr. Baka who was obliged to comment on laws related to judiciary as a chairman of NJC, Mr. Erményi had no role in the NJC.

[166] Hungarian Constitutional Court, judgment no. 3076/2013, (III. 27.) AB, 13 March 2013.

Erményi.[167] In addition, it shows that framing of *Baka* as a freedom of expression case as well as framing *Erményi* as a right to private life case was artificial. The core problem lied elsewhere—in the broad powers of the supreme court president (*Baka*) and vice-president (*Erményi*)[168] and in the challenge to the separation of powers, institutional judicial independence and the rule of law.[169] The ECtHR should either have addressed this problem openly by reading these guarantees into the Convention[170] or should have delivered a narrow technical judgment firmly based on the existing Strasbourg case law.[171] Unfortunately, the ECtHR in *Baka* and *Erményi* chose a different path—it avoided the key structural problem behind their dismissals, it blurred the Convention's understanding of the concept of the rule of law, and at the same time, it twisted the meaning of Articles 8 and 10 with little support in the existing case law.

6 Conclusion

The Grand Chamber judgment in *Baka v Hungary* shows that in dealing with the "CEE version" of abusive constitutionalism the ECtHR has to address challenges that go well beyond individual human rights protection and that concern basic tenets of constitutionalism, namely separation of powers and the rule of law. More specifically, the *Baka* case represents one of the many instances in which hybrid regimes in CEE interfered with judicial power through the dismissal of the apex court presidents.

Such high-profile case was obviously closely watched. Although *Baka* was by far not the first attack on a president of a supreme court in CEE nor the first one that eventually ended up before the ECtHR, it was the first case that resulted from a large-scale constitutional reform cloaked in "legalistic terms", which was widely publicized and subject to harsh international criticism. The ultimate issue at stake was whether the ECtHR can somehow raise the stakes for domestic political leaders who interfere with the independence of the judiciary and attempt to silence court presidents or use them as transmission belts. Therefore, it was not only interesting to see how the ECtHR would navigate through the existing case law concerning the

[167] One may claim that *Erményi* simply follows *Volkov* and *Özpınar* in this respect (see Erményi v Hungary, para. 30). However, both Mr. Volkov and Mrs. Özpınar were dismissed from the *judicial office*, i.e. they lossed their job and income, which affected their relationships with other persons, their reputation and their "inner circle". But Mr. Erményi remained a judge of the Supreme Court with a decent salary (i.e. the loss of his income was marginal) and to claim that the status of a "supreme court vice-president" is so critical for one's reputation that it spills over into his private life is quite a stretch. The *Erményi* judgment thus does not follow *Volkov* and *Özpınar*, but expands them..

[168] See Part 4.

[169] See Part 5.1.

[170] For instance, the ECtHR could have done so through the second *Eskelinen* criterion under Article 6 ECHR in *Baka* (see Part 3.2 of this article).

[171] The latter is arguably what the Court of Justice of the European Union did in *Commission v Hungary*, 6 November 2012, C-286/12. See notes 2, 31 and 33 above.

dismissals of court presidents, but also how the ECtHR would react to the broader structural problems behind the dismissal of Mr. Baka.

We have argued that the Grand Chamber judgment failed on all key fronts. First, it failed in delivering a persuasive judgment firmly based on the existing ECtHR's case law. The Grand Chamber's reasoning in *Baka* provides questionable justification regarding the access to court under Article 6, and, moreover, stretches Article 10 in an almost unprecedented way (all the more with the use of international soft law, rather than the Convention itself)), and lacks deeper grounding in the previous case law.

Second, the Grand Chamber also failed to address the main structural problem behind Mr. Baka's dismissal (the broad powers of court presidents in CEE). More specifically, it overlooks the complexity of the powers and roles of court presidents in CEE. Instead, it applies without further ado (and with little support in "hard law") the principles governing the dismissal of judges from the judicial office to the dismissal of judges from the position of the court president. This lack of nuance and disregard of potential consequences beyond the Baka case in fact may cause more harm than good for future involvement of the Strasbourg Court in the region.

Third, instead of clarifying the Convention's understanding of the concept of the rule of law, ECtHR rather blurred it. Perhaps motivated by the approach of EU and CoE institutions, which already framed the debates on Hungarian constitutional crises in the rule of law vocabulary, it seems like the Grand Chamber followed the bandwagon and implicitly used the rule of law argument to significantly narrow the margin of appreciation in its proportionality test under Article 10(2) and to justify its conclusion that Mr. Baka had the access to the Hungarian Constitutional Court at the time of his dismissal. Yet, despite numerous references to the concept of the rule of law, the *Baka* judgment brought little clarity into the relevance of this concept and its principles. Most importantly, its reasoning regarding the principle of generality is shallow and sets aside a constitutional provision preventing judicial review of Mr. Baka's dismissal too cavalierly.

The accumulation of these shortcomings is so visible that the ECtHR gave Orbán the proverbial stick with which to beat it. Questionable reasoning provided by the Grand Chamber may even fuel critical voices challenging ECtHR's legitimacy to decide on such sensitive political issue as the dismissal of an apex court president. Moreover, and perhaps even more importantly, the limitations of the *Baka* judgment have further repercussions for the future. The Strasbourg Court provided little guidance for the fight against other instances of abusive constitutionalism emerging in the region. Put differently, it seems inevitable that the ECtHR will, sooner or later, have to revisit its position on the political interferences with court presidents again.

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