JUDICIAL INDEPENDENCE AND ACCESS TO JUSTICE

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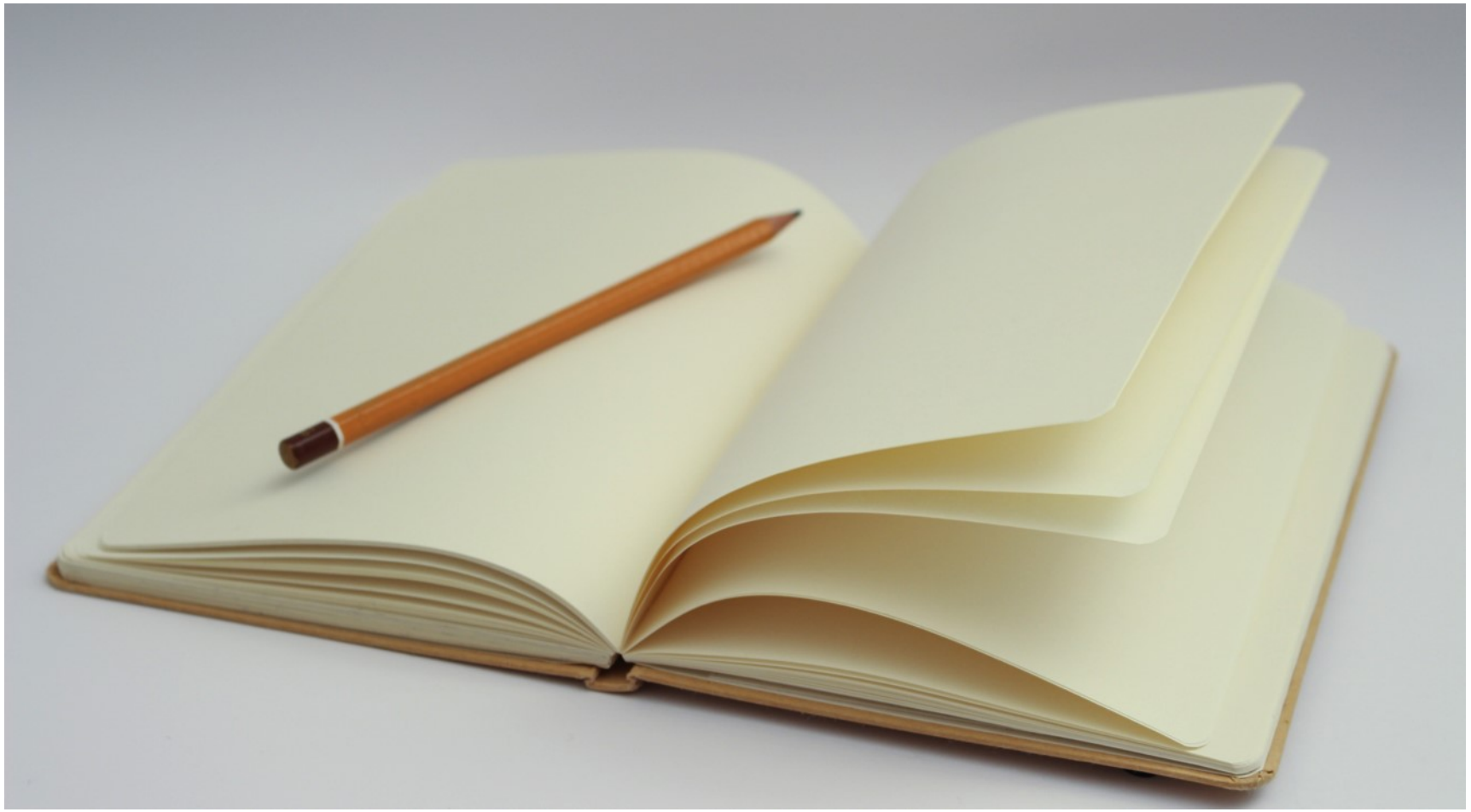
PLAN OF THE SESSION

- INTRODUCTION
- MAIN PARTS OF THE LECTURE
- Q&A

OBJECTIVES

- Identification of the key elements of the judicial independence from the perspective of the ECHR
- Recognition of the latest developments in the jurisprudence of the European Court of Human Rights relevant to the independence of the judiciary
- Identification of the key links of the fair trial standards connected with the rule of law standards and judicial independence
- Identification of the links/differences between the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union

I. INTRODUCTION



Rule of law and judicial independence

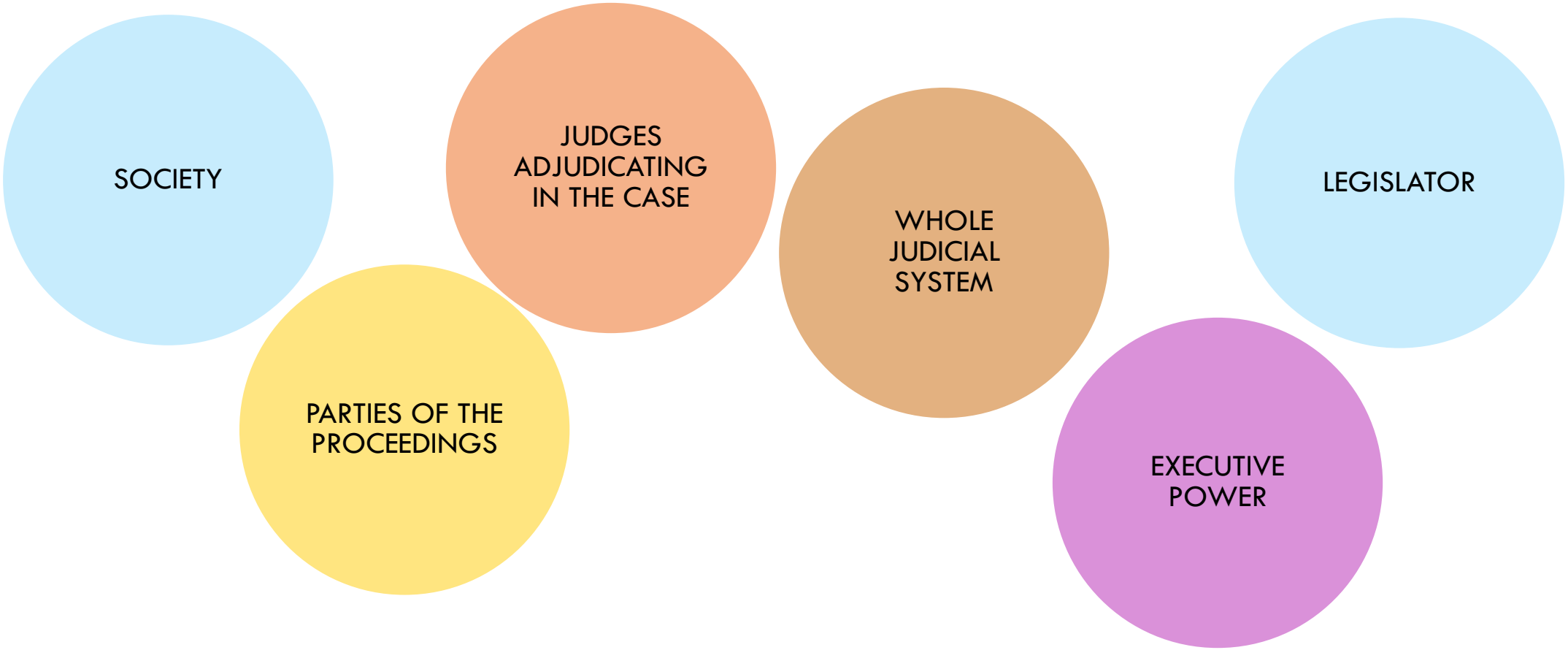
- *'While there is no abstract definition of the rule of law in the Court's case-law, the Court (note: the European Court of Human Rights) has developed various substantive guarantees which may be inferred from this notion. These include the principle of legality or foreseeability, the principle of legal certainty, the principle of equality of individuals before the law, the principle that the executive cannot have unfettered powers whenever a right or freedom is at stake, the principle of the possibility of a remedy before an independent and impartial court and the right to a fair trial. Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State'*

- R. Spano, Conference on The Rule of Law in Europe: Vision and Challenges, available at: https://echr.coe.int/Documents/Speech_20210415_Spano_Seminar_Rule_of_Law_ENG.pdf.

- Speech by Robert Spano President of the European Court of Human Rights10 September 2021
- „Judicial independence has both de jure and de facto components:
  - *As to de jure independence, the law itself must provide for guarantees in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.*
  - *But de jure independence, that is independence of the judiciary set out in legislation, does not alone guarantee nor secure judicial independence. What is also needed, and perhaps even more crucially, is de facto independence. In concrete terms this means that the scope of the 'State's obligation to ensure a trial by an "independent and impartial tribunal" under Article 6 § 1 of the Convention is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. In particular, ad hominem attacks on individual judges for their decisions or attempts at pressuring the judiciary to deliver politically acceptable outcomes is not acceptable in a democracy governed by the rule of law".*

- **Article 6.**
- Everyone is entitled to a fair public hearing within a reasonable time by **an independent, impartial tribunal.** All persons charged with an offence shall be presumed innocent until proven guilty. They have the right to be defended by a lawyer.

Different or one common perspective?



LITIGATION PERSPECTIVE

LITIGATION ON BEHALF OF:

- **PARTIES OF THE PROCEEDINGS**
  - „Civil” in the meaning of the Convention
  - „Criminal” in the meaning of the Convention
- **JUDGES**
  - shortening the term of office
  - disciplinary proceedings
  - criminal proceedings

„TRIBUNAL ESTABLISHED BY LAW”

- *“a tribunal established by law” reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols. “Law”, within the meaning of Article 6 § 1, comprises in particular the legislation on the establishment and competence of judicial organs”*

Guide on Article 6 of the European Convention on Human Rights

„TRIBUNAL ESTABLISHED BY LAW”

- *„The object of the term “established by law” in Article 6 of the Convention is to **ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from parliament** (see Coëme and Others, cited above, § 98, and Gurov v. Moldova, no. 36455/02, § 34, 11 July 2006)”.*

Guide on Article 6 of the European Convention on Human Rights

„TRIBUNAL ESTABLISHED BY LAW”

- *„The phrase “established by law” covers not only the legal basis for the very existence of a “tribunal” but also the composition of the bench in each case (see Buscarini v. San Marino (dec.), no. 31657/96, 4 May 2000, and Posokhov v. Russia, no. 63486/00, § 39, ECHR 2003-IV). A tribunal established by law must satisfy a series of conditions such as the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards (see Coëme and Others, cited above, § 99)”.*

Guide on Article 6 of the European Convention on Human Rights

JURISPRUDENCE OF THE COURT

- „A review of the Court's existing case-law reveals that compliance with the requirement of a "tribunal established by law" has so far been examined in a variety of contexts – under both the criminal and civil limbs of Article 6 § 1 – including, but not limited to, the following:
- (i) a court acting outside its jurisdiction (*Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, §§ 107-09, ECHR 2000-VII, and *Sokurenko and Strygun*,, §§ 26-28);
- (ii) the assignment or reassignment of a case to a particular judge or court (see *DMD GROUP, a.s.,*, cited above, §§ 62-72; *Richert*, cited above, §§ 41-57; *Miracle Europe Kft*, cited above, §§ 59-67; *Chim and Przywieczerski v. Poland*, nos. 36661/07 and 38433/07, §§ 138-42, 12 April 2018; and *Pasquini v. San Marino*, no. 50956/16, §§ 103 and 107, 2 May 2019);
- (iii) the replacement of a judge without providing an adequate reason as required under the domestic law (*Kontalexis*, §§ 42-44);
- (iv) the tacit renewal of judges' terms of office for an indefinite period after their statutory term of office had expired and pending their reappointment (see *Gurov*, cited above, § 37, and *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 152-56, ECHR 2013);
- (v) trial by a court where some members of the bench were disqualified by law from sitting in the case (*Lavents*, cited above, § 115, and *Zeynalov v. Azerbaijan*, no. 31848/07, § 31, 30 May 2013);
- (vi) trial by a bench the majority of which was composed of lay judges despite the absence of a legal basis in domestic law for the exercise of judicial functions as a lay judge (see *Gorguiladzé*, § 74, and *Pandjikidzé and Others*, § 110);
- (vii) the participation of lay judges in hearings in contravention of the relevant domestic legislation on lay judges (*Posokhov v. Russia*, no. 63486/00, §§ 39-44, ECHR 2003-IV);
- (viii) trial by lay judges who had not been appointed in compliance with the procedure established by the domestic law (see *Ilatovskiy v. Russia*, no. 6945/04, §§ 38-42, 9 July 2009);
- (ix) delivery of a judgment by a panel which had been composed of a smaller number of members than that provided for by law (*Momčilović v. Serbia*, no. 23103/07, § 32, 2 April 2013, and *Jenița Mocanu v. Romania*, no. 11770/08, § 41, 17 December 2013);
- (x) conduct of court proceedings by a court administrator who was not authorised under the relevant domestic law to conduct such proceedings (*Ezgeta*, § 44)."

Guðmundur Andri Ástráðsson v. Iceland [GC], 2020, § 217.

“Independent and impartial tribunal”

- Findlay v. the United Kingdom, 1997, § 73

  - in order to establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (the Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A, p. 15, para. 37).

  - As to the question of "impartiality", there are two aspects to this requirement.

    - First, the tribunal must be subjectively free of personal prejudice or bias.
    - Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see the Pullar v. the United Kingdom judgment of 10 June 1996, Reports 1996-III, p. 792, para. 30).

“Independent and impartial tribunal”

- The principles applicable when determining whether a tribunal can be considered “independent and impartial” **apply equally to:**
  - professional judges
  - lay judges
  - jurors
- *Holm v. Sweden, 1993, § 30*
- The guarantees of independence and impartiality under Article 6 § 1 concern only the body called upon to decide on the criminal charge against an applicant and **do not apply to the representatives of the prosecution who are only parties to the proceedings**
- *Kontalexis v. Greece, 2011, § 57; Haarde v. Iceland, 2017, § 94; Thiam v. France, 2018, § 71*

II. LATEST DEVELOPMENTS

Latest developments in the jurisprudence of the ECtHR

- **Starting point – Astraddsson v. Iceland**

Factual background:

- The Court of Appeal was established in Iceland, whose judges were to be elected through a complex procedure;
- There were some irregularities in the course of the appointments:
  - The Minister, without due justification, ignore part of the list of candidates rated highest by the committee of experts,
  - Moreover Parliament carried out a cumulative vote instead of an individual one;
- The Supreme Court found that there had been an error of law and ordered the Treasury to compensate the non-appointed candidates;
- In a later case, however, the Supreme Court ruled that these breaches of law did not translate into the invalidity of the judges' acts of appointment and did not lead to the invalidity of their sentences.

Subject of the individual case:

- A man convicted by a court involving an improperly appointed judge filed a complaint with the ECtHR.

THREE STEPS TEST

- **The first step:**
  - There must, in principle, be a *manifest* breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such. The Court would in general cede to the national courts' interpretation as to whether there had been a breach of the domestic law, unless the breach was "flagrant" – that is, unless the national courts' findings could be regarded as arbitrary or manifestly unreasonable. However, the absence of a manifest breach did not as such rule out the possibility of a violation of the right to a tribunal established by law. There might be circumstances where a judicial appointment procedure that was seemingly in compliance with the relevant domestic rules nevertheless produced results that were incompatible with the object and purpose of that Convention right. In such circumstances, the Court must also pursue its examination under the second and third limbs of the test.

THREE STEPS TEST

- **The second step of the test:**
  - The breach in question had to be assessed in the light of the object and purpose of the requirement of a “tribunal established by law”, namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Therefore, only those breaches that relate to the fundamental rules of the procedure for appointing judges – that is, breaches that affect the *essence* of the right to a “tribunal established by law” – were likely to result in a violation of that right

THREE STEPS TEST

- **The third step of the test:**
  - The review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments played a significant role in determining whether such breach amounted to a violation of the right to a "tribunal established by law", and thus formed part of the test itself. Such review must be carried out on the basis of the relevant Convention standards, adequately weighing in the balance the competing interests at stake. In particular, a balance had to be struck to determine whether there was a pressing need – of a substantial and compelling character – justifying the departure from the principles of legal certainty and irremovability of judges, as relevant, in the particular circumstances of a case. Where the domestic review had been Convention-compliant and the necessary conclusions had been drawn, the Court would need strong reasons to substitute its assessment for that of the national courts.

THE IMPORTANCE OF THE ASSTRADSSON V. ICELAND

- Clarifying the standard on the 'right to a court established by law';
- The impact of irregularities in the judicial appointment process on the right to a court:
  - how serious must the irregularity be for a court to cease to meet the standard of 'being established by law' within the meaning of Article 6 ECHR?
- Suggestions how, in accordance with the Convention, to deal with improperly appointed judges:
  - on the one hand, judges are protected from removal from office, on the other hand, their adjudication may lead to a violation of Article 6 ECHR

RECZKOWICZ V. POLAND

- In July 2017 the applicant, a barrister, was suspended from her duties for a period of three years in connection with various breaches of the Code of Bar Ethics as a consequence of disciplinary proceedings.
- Her case was examined at the last instance by the newly established Disciplinary Chamber of the Supreme Court following the reorganisation of that court effected through the 2017 Amending Act on the National Council of the Judiciary ("the NCJ") and the 2017 Act on the Supreme Court as part of the large-scale legislative reform of the Polish judicial system initiated by the government in 2017.
- The Disciplinary Chamber was composed by judges appointed through the procedure involving the new NCJ.
- **The applicant complained that the judges of that Chamber had been appointed by the President of Poland upon the NCJ's recommendation in manifest breach of the domestic law and the principles of the rule of law, separation of powers and independence of the judiciary.**

ADVANCE PHARMA V. POLAND

- The company complained that Civil Chamber of the Supreme Court, which had decided on a case concerning it, had not been a “tribunal established by law” and had lacked impartiality and independence.
- It complained in particular that the Civil Chamber of the Supreme Court had been composed of judges appointed by the President of Poland on the recommendation of the new National Council of the Judiciary (“the NCJ”).
- The new NCJ has been the subject of controversy since the entry into force of new legislation providing, among other things, that its judicial members are no longer elected by judges but by the Sejm (the lower house of Parliament).

XERO FLOR V. POLAND

- The ECtHR held that the adjudication of the Constitutional Court with the participation of a person elected to a seat already taken violates Article 6(1) of the European Convention on Human Rights, and that such a body would not meet the requirement of a "court established by law".
  - "The discontinuation of **the constitutional complaint** proceedings by the Constitutional Court adjudicating with the participation of one of the persons irregularly elected in December 2015 by the 8th Sejm violated the applicant company's right to have its case heard by a tribunal established by law (Article 6(1) of the European Convention on Human Rights)."

OTHER FACTORS

- Lack of outside influence
- Impression of independence
- Different judicial functions in the same case

INDEPENDENT JUDGES – INDEPEDENT COURTS

INDEPENDENT JUDGES – INDEPEDENT COURT

- **BACKGROUND**
  - András Baka, a former judge of the European Court of Human Rights (1991-2008), was elected by the Hungarian Parliament in 2009 as President of the Supreme Court of Justice for a six-year term, which was due to end in June 2015.
  - In this capacity, he was also the President of the National Judicial Council and had a legal obligation to speak on draft laws affecting the judiciary.
  - In the period between February and November 2011. Mr Baka criticised certain legal reforms, including the proposal to lower the retirement age for judges from 70 to 62. He expressed his opinions through the Ombudsman, in public letters and press releases, as well as in an address to parliament.
  - As a consequence, his six-year term of office was brought to an end, three and a half years before its normal date of expiry, through the entry into force of the Fundamental Law (the new Constitution), which provided for the creation of the Kúria, the highest court in Hungary, to succeed and replace the Supreme Court.

BAKA V. HUNGARY

- The Court held that there had been a violation of Article 6 § 1 of the Convention.
  - Hungary had impaired the very essence of the applicant's right of access to a court.
  - The premature termination of the applicant's term of office had not been reviewed by an ordinary tribunal or by another body exercising judicial powers, nor was it open to review.
  - The lack of judicial review had resulted from legislation whose compatibility with the requirements of the rule of law was doubtful.

BAKA V. HUNGARY

- The Court reiterated its conviction that the applicant's loss of office was the result of his critical attitude towards the Hungarian government and his strong criticism of the ongoing judicial reform.
- The Court also emphasised the negative impact that the applicant's resignation must have had on other judges and judicial officials, discouraging them from participating in the public debate on judicial reforms and the operation of the judiciary as such. All these circumstances prejudiced the Court's renewed finding of a violation of Article 10 of the Convention.
- Taking into account the context
  - the circumstances in which the opinion was delivered
  - the subject of the opinion
  - the manner in which the opinion was presented
  - function/position held

BILGEN V. TURKEY

- **BACKGROUND OF THE CASE**
  - A senior judge at the Ankara Regional Administrative Court had been transferred without his consent to another court in a lower judicial district by a decree of the High Council of Judges and Prosecutors that had not been subject to judicial review.
  - The applicant complained of his having been denied the possibility of judicial review of the dismissal of his application for review of the decision to transfer him to another court.
- **JUDGMENT**
  - A violation of Article 6 § 1 of the Convention
  - The applicant's lack of access to a court, for an important career matter, had not pursued a legitimate aim.
  - The Court stressed the importance of separation of powers and the independence of the judiciary.

GRZĘDA V. POLAND

BACKGROUND

- **This case concerned the removal of the applicant, a judge, from the National Council of the Judiciary (NCJ) before his term had ended.**

JUDGEMENT

- The Court:
  - confirmed the inadmissibility of the arbitrary removal in 2018 members of the NCJ, elected in accordance with the Constitution.
  - emphasized a lack of judicial review of the unjustified shortening of their term of office.
  - emphasized, that it was fully aware of the context of the case – the weakening of judicial independence and adherence to ruleof law standards brought about by Government reforms.

III. NEW QUESTIONS

STILL OPEN QUESTION?

- Can Article 6 § 1 of the Convention be interpreted in such a way as to recognise a subjective right for judges to have their individual independence safeguarded and respected by the State?

STILL OPEN QUESTION?

- **The judge's personal right to independence?**
  - **CONCURRING OPINION OF JUDGE SICILIANOS – Baka v. Hungary (Grand Chamber)**
  - *„In my opinion, however, the rule of law is hardly imaginable without an obligation on the State to offer safeguards for the protection of judicial independence and, hence, without the corresponding right of judges themselves to independence. Moreover, as is clear from the entirety of the international-law materials cited in the present judgment, judicial independence is today an integral part of the general principles of international law which must be taken into account in interpreting the Convention. Equally, an interpretation of Article 6 § 1 which finds that it protects the judge's subjective right to independence would be perfectly compatible with that provision's object and purpose. In this connection, I subscribe to the idea, set out in the Magna Carta of Judges, to the effect that "[j]udicial independence and impartiality are essential prerequisites for the operation of justice" (text quoted in paragraph 7 above). Indeed, how can one hope that persons involved in court proceedings will enjoy the right to an independent judge if judges themselves are not afforded safeguards capable of ensuring that independence? In my opinion, a subjective right of this sort for judges is inherent in the safeguards of the first paragraph of Article 6, and in the concept of a fair hearing. I believe that this approach is borne out by the above-mentioned case-law of the Human Rights Committee and of the Inter-American Court of Human Rights".*

THE ANSWER IS COMMING…

- Example: Biliński v. Poland, application no. 13278/20

HOW PROPERLY IMPLEMENT ECtHR'S JUDGMENTS?

- The scale of violations
- The status of judgments v. the status of judges
- The duration of the implementation proces
- Pilot judgements before the ECtHR?

ROLE OF LAWYERS

- Identifying a problem connected with the rule of law and judicial independence in the case
- Determining that the problem is connected with ECHR
- Developing a detailed litigation strategy from the perspective of the client
- Making a submission to the national court with the motion for direct implementation of ECHR's standard (previously established)
- Submitting the application to the ECtHR

IV. CONCLUSIONS