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Attack or reform: Systemic interventions in the judiciary in Hungary, Poland, and Slovakia

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Abstract

Is it possible to distinguish whether a government is willing to eliminate its accountability or aims for public trust or efficacy growth? Moreover, which elements in the government's actions differentiate valid criticism from an attack on the independence of the judiciary? This paper proposes an original approach toward recognizing an attack on the judiciary. While previous approaches focused on the reformer's motivation, adherence to international standards, or the requirement of the "tribunal established by the law," this approach is looking for a kernel of judicial independence and finds it in sufficient conditions for a judge's free and impartial decision. In the paper, changes in Hungary and Poland will be compared to the Slovak judicial reform since 2020. While after three decades after the fall of state socialism, Hungary, Poland, and Slovakia face similar problems of backsliding of the rule of law and emerging populism, different motivations, interpretations, and outcomes of the judicial reforms can be seen in Slovakia.

Key words

Central and Eastern Europe; judicial independence; Slovak reform of the judiciary 2020; attack and reform

Resumen

¿Es acaso posible distinguir si un gobierno está dispuesto a eliminar su responsabilidad o si aspira a la confianza pública o al crecimiento de la eficacia? Por otro lado, ¿qué elementos de las acciones del gobierno diferencian una crítica válida de un

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ataque a la independencia del poder judicial? Este documento propone un enfoque original para reconocer un ataque al poder judicial. Mientras que los enfoques anteriores se centraban en la motivación del reformador, la adhesión a las normas internacionales o el requisito del "tribunal establecido por la ley", este enfoque busca un núcleo de independencia judicial y lo encuentra en las condiciones suficientes para la decisión libre e imparcial de un juez. En el documento, los cambios en Hungría y Polonia se compararán con la reforma judicial eslovaca desde 2020. Si bien después de tres décadas de la caída del socialismo de Estado, Hungría, Polonia y Eslovaquia se enfrentan a problemas similares de retroceso del Estado de Derecho y populismo emergente, en Eslovaquia se observan diferentes motivaciones, interpretaciones y resultados de las reformas judiciales.

Palabras clave

Europa Central y del Este; independencia judicial; reforma judicial eslovaca 2020; ataque y reforma

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1. Introduction

Particularly in new democracies, where the rule of law institutions are still relatively new, and the balance between judicial independence and accountability is still in process, it is difficult to recognize an attack in its initial stages. Political power represented by the parliaments and administration may be tempted to have control over the judiciary. Such a control secures that the courts will not turn down governmental policies (Bugarič and Ginsburg 2016). It creates a temptation for unaccountable administration, particularly the ambition of administrations whose actions are on edge or clearly against the law or constitution. Such an effort leads to "dikastophobia" - a dangerous populist strategy to prevent judges from controlling the executive and legislative powers being controlled by the judicial authority (Gajda-Roszczynialska and Markiewicz 2020).

How is it possible to recognize if the administration is willing to avoid its accountability or is only looking for a growth of public trust and efficiency of the judiciary?

Any change of the status quo, which establishes more accountability of the judges or any court-packing strategy, alarm that something sneaky might be going on. However, such steps are sometimes necessary to maintain public trust if the trust in the judiciary is low. Other instruments of judicial accountability are necessary for the effective administration of justice (Kosař 2016). So when the parliamentary majority announces the judicial reform, is it necessarily an attack, or might a reform be happening?

In liberal constitutionalism, it is a standard that the executive and legislative branches accept to be under the administrative and constitutional judiciary review. It signifies the accountability of political branches of the state power to the law. However, the "bad" populists operate by removing the accountability that was once established (Halmai 2019). The essence of populism aiming for authoritarian order builds on a capacity to enter legal rules and legal decision-making processes when these are perceived as unpopular. In order to prove this capacity, the populist must either disempower the controlling mechanism or amend it to a favorable outcome.

Three decades after the fall of state socialism, Hungary, Poland, and Slovakia face similar problems of backsliding the rule of law and emerging populism (Halmai 2012, Pech and Scheppele 2017, von Bogdandy 2018). However, different motivations, interpretations, and outcomes of judicial reforms can be seen in Slovakia.

Section 2 of this article proposes a differentiation between an attack and a reform. Moreover, it elaborates on the concept of judicial independence, which plays a crucial role in this categorization. Section 3 presents summaries of the development of the judiciary in Hungary since 2010 and in Poland since 2015. Section 4 compares the development in Slovakia since 2020 to the former cases. Finally, Section 5 detects the crucial elements constituting attacks on the judiciary in all three cases.

2. What constitutes an attack

In everyday language, we use the word reform as a positive change that removes faults and abuses in the pre-reform system. On the other side, we use an attack as a harmful and illegitimate interference against the rules and possibly accompanied by physical or symbolic violence.

There might be several points of view on what differentiates an attack as illegitimate from reform as legitimate interference with the judicial system.

Firstly, a distinguishing characteristic of an attack on judiciary independence might be the legislator's intention (Sajó 2021). Does the legislator want to subordinate the judiciary to its benefit, or does it want to make legal decision-making more predictable and effective? This ground for differentiation resembles the concept of parrhesia. Parrhesia is a concept that originated in ancient Greece, signifying "truth-telling" or "free-spokeness". It was, according to Michel Foucault (Foucault 2010), a core of ancient democracy. The institutional check of parrhesia was that the speaker risked ostracism or death if caught by the lie. In the modern age, it resembles the concept of the legitimacy of the state representatives in their actions. However, as Foucault admits, the parrhesia system fell apart after Pericles' death. It was not possible to distinguish between good and bad parrhesia.

Similarly, parrhesia does not comply with populist rhetoric nowadays. Populist politics may repeat the demand of the people and act upon it, but populist politics may also solely pretend to act upon it while furthering private interest. Also, populist leaders may be sincere in their pursuit while attacking the rule of law under false pretenses (Mudde and Kaltwasser 2017). Sincerity in announced goals cannot give a satisfactory answer in distinguishing legitimate from illegitimate interference.

Secondly, formal compliance with international recommendations might be a decisive element. When looking at the recommendations of the Consultative Council of European Judges (CCJE; see Magna Carta of Judges, 2010), the European Network of Council for the Judiciary (ENCJ; see ENCJ 2017), or the European Commission for the Efficiency of Justice (CEPEJ; see Council of Europe 2011), these models propose how the judiciary should be positioned in order to be fully independent. However, the judiciary may be very independent on the paper while still under pressure from within the judiciary or indirect political influence (Moliterno *et al.* 2018). On the other hand, it may contradict basic principles of independence, such as the selection and appointment of judges by political branches of state power, and still maintain factual independence (Moliterno *et al.* 2018).[1] This option does not provide satisfactory differentiation as it cannot tell a qualitative difference in deviations from the model solution.

Some help could be used by deriving the differentiation from the case law of the European Court for Human Rights (ECtHR) and its interpretation of article 6 of the European Convention on Human Rights (ECHR), particularly the interpretation of "the independent and impartial tribunal established by law". However, the ECtHR claimed that the Convention does not require Member States to comply with any theoretical constitutional concept of interactions of state power branches. The ECtHR guideline does not provide clear borders of an attack as it is building its interpretation on individual cases.

In this article, a different categorization will be proposed. An attack on the judiciary interferes with the essential quality of the judiciary, *telos* of the third branch in the democratic state. It is a legislative or administrative step that robs the judiciary of its essential role, depriving it of its very essence. Such interference will be referred to as a

[1] For example, federal judges appointed by the art. III of the US Constitution.

golden egg. The golden egg is "a source of continual or guaranteed success, profit, or wealth."

The golden egg of the attack on the judiciary is an element allowing manipulation of the decision-making. It might also be a legal possibility to interfere with the decision-making or to threaten judges with sanctions if they do not comply with the desired interpretation of the law. The egg is the kernel of the interference, while other changes in the judiciary may be designed to protect this kernel from change and make this kernel function. These auxiliary parts may weaken the judiciary's independent position, but they do not establish an attack if applied separately. These auxiliary changes will be referred to as transmission belts.

The golden egg's presence may change the interpretation of the interference. If the golden egg appears in the interference, all other steps may appear to be a transmission belt for exploiting the golden egg. On the other hand, if the golden egg is not present, other steps do not necessarily need to be seen as transmission belts. For example, court packing has a negative connotation, but it does not need to be necessarily connected to manipulate the rules (Kosař and Šipulová 2020b).

For this article, the attack on the judiciary is defined as illegitimate interference from political branches of power to manipulate the decision-making in individual cases. The attack aims at judicial independence with an ultimate goal of interfering with judicial decision-making and so avoid government accountability for particular deeds according to a need.[2] The attack will therefore be considered a change in safeguards of independence of the judiciary which allows the executive or legislative power directly or indirectly, for example, via a court president, to put a thumb on the scales in individual cases. The attack is a change in the judge's position as a neutral arbiter, which allows any influence outside the judge to manipulate her impartiality. Some interferences in the independence of the judiciary have the intensity and capacity to interfere with judicial impartiality, and some do not. An attack will be considered an interference that has such capacity.

2.1. Not every interference with independence constitutes an attack on the judiciary

It is essential to define the concept of judicial independence to identify attack-capable interference. This paper does not focus on various notions of judicial independence, such as the distinction between internal and external and the policies that should secure the formal independence of the courts and the judge. It focuses on the kernel of independence as the condition for the judge to decide a case impartially to satisfy a right to a fair trial. A legitimate legal system has to assure subjects that there will not be a party whose arguments would prevail only because of the superior position towards the arbiter. It has to guarantee that no one stands above the law to prove itself. It has to be guaranteed that the arbiter will be provided conditions to be impartial and bring a decision based on rules officially agreed upon and published beforehand. The kernel of independence is these conditions for impartial decision.

Judicial independence is insulation from interference by the electorate and the legislative and executive branches with a judge's decision-making (Moliterno and Paton 2014).

[2] In a way how it is defined by the CJEU in *Associação Sindical dos Juízes Portugueses* (C 64/16), par.44.

However, it is not only about threats from outside the judiciary. Independence must be secured from the executive, parliament (*Gerovska*, 2016, no. 48783/07), and judiciary members (*Agrokompleks*, 2011, par. 137). Although judicial independence is often discussed as a universal cure for problems of new democracies,[3] it is not an essential attribute of a judge. Though it substantially enhances the opportunities for judicial impartiality, especially when the government's interests are implicated in the case over which the judge presides.

Judicial independence is not a purely academic concept. It is also created and modeled by case law. For some time, the concept of independence of the judiciary was developed mainly by the institutions of the Council of Europe and the ECtHR, elaborating on the interpretation of art. 6 ECHR (*Sramek*, 1984, *Langborger*, 1989, *Zielinski et al.*, 1999, *Mcgonnell*, 2000, *Kinský*, 2012, *Astráðsson*, 2020, *Xero flor*, 2021). Only recently, the Court of Justice of the European Union (CJEU) became passionately interested in the issue of the independence of the judiciary as well.[4]

Judicial independence became the Lacanian *objet petit a* of liberal constitutionalism. The concept has grown more significant and developed and become more robust than isolating the third branch from the influence of the other two to secure conditions for impartial decision-making. The courts, judicial associations, and academia developed the concept of judicial independence that also spread to the processes of judicial appointments (*Ástráðsson*, 2020), training, qualification (*Gurkan*, 2010), or length of the term (*Le Compte* et al., 1981). However, there is a difference between interference which amends the former and manipulating the outcome of the court proceedings.

Therefore it is necessary to recognize a difference between a breach of independence when representants of executive, legislative or judicial power seek to affect the outcome of cases pending before the court (*Sovtransavto*, 2002) via the removal of judges (*Brudnicka*, 2005), sanctioning of judges (*Baka*, 2016), or instructing of judges (*Agrokompleks*, 2011) from the auxiliary breaches of independence that reside in the insufficient separation of the branches of state power. While both are breaches of judicial independence, the severity of their outcomes is different. There is a qualitative difference between them.

3. Developments in Hungary and Poland

Readers might have witnessed several years of reports from Central and Eastern Europe that the rule of law is under attack, particularly in Hungary and Poland (Directorate-General for Justice and Consumers 2020). On the other hand, the responses from the officials of these countries denied any resemblances of attacks, invoking that they are doing reforms, reforms that are essential for the correct functioning of the state power (aw/PAP 2017, Balogh 2019).

[3] Visible for example in the opinions of the CCJE: Consultative Council of European Judges 2022.

[4] *Associação Sindical dos Juízes Portugueses* (C-64/16), *Minister of Justice and Equality* (C-216/18), *Commission v Poland – Independence of the Supreme Court* (C-619/18), *Commission v Poland – Independence of ordinary courts* (C-192/18), *AK v Krajowa Rada Sądownictwa* (C-585/18, C-624/18 & C-625/18), *Miasto Łowicz v Wojewoda Łódzki* (C-558/18 and C-563/18), *AB v Krajowa Rada Sądownictwa* (C-824/18), *Repubblika v Il-Prim Ministru* (C-896/19), *Romanian Judges Forum* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19), etc.

In the following lines will be provided argumentation that although political interferences in Hungary, Poland, and Slovakia included court-packing strategies at both constitutional and general courts, changes in judges' disciplinary procedures, and changes in Councils for the Judiciary, these three cases are very different.

3.1. Hungary

The situation in Hungary has been attracting academic attention for years (Kosař and Šipulová 2018, Kovács and Scheppele 2018, Drinóczi and Bień-Kacala 2019, Gardos-Orosz 2021, Szente 2021, Bencze 2021, Fleck 2021). The systemic attack on judicial independence in Hungary has been profound. Armed with a supermajority in parliament, the government has amended the constitution (International Federation of Human Rights – FIDH – 2016, Balogh 2019). The situation in Hungary is shaped by the results of the last four parliamentary elections, which took place in 2010, 2014, 2018, and 2022, when the political party Fidesz and Christian Democratic People's Party received enough votes to adopt a new constitution and to amend the institutional structure in Hungary. It was possible to start with the changes on the constitutional level, which enabled the parties in power to pass legislative amendments smoothly.

3.1.1. Firstly, New Constitution – Fundamental Law was adopted

Just one year into its term, the governing coalition amended its inherited constitution twelve times (Kovács and Scheppele 2018). Finally, the National Assembly adopted a new constitution. This step might not have been viewed with an alarm. The Hungarian People's Republic adopted the previous constitution in 1949,[5] and Hungary was the last country of the CEE to have not created a new constitution after the fall of Communism.

Nevertheless, the constitution-making process was criticized (Venice Commission 2011) for lack of transparency, omission of civil society from discussions, shortcomings in the dialogue between the majority and the opposition, insufficient opportunities for public debate, and a brief timeframe for creation (Venice Commission 2011).

3.1.2. Limitation of the Constitutional Court

Hungary has a unicameral system, with the Constitutional Court (CC) as the strongest check in the constitutional structure. Three strategies were followed to limit the CC. The first was limiting the CC on what cannot be referenced in decision-making (The Fundamental Law of Hungary, Closing provisions, par.5.). Here, the CC is limited in referring to its case-law dated before 1 January 2012.

Secondly, a court-packing strategy was used to amend the personnel composition of the CC (Kosař and Šipulová 2020b). Court-packing was initiated even before the Fundamental Law came to force. In 2011 the original number of judges of the CC increased from 11 to 15 (Act CLI, Section 7, par. 1). In addition, the term of the judges was extended from 9 to 12 years, and the retirement age of 70 was abolished. In 2013, 11 out of 15 judges had been nominated by the ruling coalition of Fidesz-KDNP.

Thirdly, commands were set out to order what must be considered by the CC in its decision-making. The third strategy was primarily directed toward the general courts,

[5] Although it was heavily amended in 1989.

although it affected the Constitutional court significantly. In 2018 the National Assembly adopted the Seventh Amendment to the Fundamental Law of Hungary. In addition to creating administrative courts, the amendment also stated that the starting point for judges interpreting the law has to be an explanatory memorandum attached to legislative proposals (Fundamental Law, art. 28).

3.1.3. Supreme court and ordinary courts

The second in line for dramatic change was the Supreme Court, which reverted to an older name, Kúria, and received a new normative and personnel framework.

The lowering of the age limit from 70 to 62[6] caused an exodus of many judges.[7] The fact that the age limit for judges was decided to be invalid by the Constitutional Court did not stop the reform from succeeding in its intention. In 2013 judges could seek compensation or reinstatement, but many dismissed from Kúria were either unwilling to return or had already passed the age of 70 by the time the CJEU released its decision.[8] The reform resulted in only a few judicial administrative leaders over 62 left in the judiciary after 2012 (Meszaros 2020).

The president decides on the number of sitting judges and the appointment of new judges (Section 128(3) of Act CLXI of 2011). Moreover, the president assigns judges and presiding judges to chambers, appoints heads of department, and establishes the case allocation scheme among chambers (Section 9(1) of Act CLXI of 2011). The Kúria president also has significant powers as regards the role of the *Kúria* in ensuring the uniform application of the law by courts.[9] The position of the president is tightly connected to politics. The parliament elects the Kúria president on the proposal of the country's president from the pool of judges with a minimum of five years of judicial experience.

3.1.4. Courts' Administration

For the strategy of court-packing the Kúria and general courts, it was crucial to control the selection and appointment of new judges, as the old judges were forced out due to

[6] *Commission v Hungary* (judicial retirement age), Case 286/12, EU:C:2012:687. "Declares that, by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 - which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursue.

[7] Article 12 of the Transitional Provisions of the Fundamental Law. More specifically, the new maximum retirement age rules led to the de facto dismissal of 20 out of 74 Supreme Court judges (Kosař and Šipulová 2018). "The vast majority of senior judges between 10 and 15% of all judges in the country, and disproportionately including judges in the leadership of the courts were forced to leave the bench almost immediately" (Kovács and Scheppele 2018).

[8] In 2012 the Constitutional Court ruled, before the international criticism from CJEU, the provisions of the Law on the Legal Status and Remuneration of Judges that lowered the mandatory retirement age of judges to the general retirement age as of 1 January 2012 are unconstitutional. Decision 33/2012. (VII. 17.), CJEU decision *Commission v. Hungary*, Case 286/12: "Declares that, by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 - which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursue.

[9] Regarding the later, in 2019, Kúria decided that the motion for preliminary rulling to CJEU was unlawful due to its non-connection with the actual case that was decided. This decision also opened possibility for a disciplinary sanction following such motion. This step also contributes to the isolation of judges and their indirect criticism towards *Kúria's* binding interpretation. See Judgment of the CJEU, *IS* (C-564/19).

the lowered age limit. This part of the chain was supposed to be filled with the president of the National Office for the Judiciary (NOJ), which parliament established in 2012 (Act CLXI of 2011) as a one-person decision-making body for recruitment, promotion, management of the court budgets, and disciplinary matters.[10] The body elected by judges - the National Council of Judiciary lacked any significant power, and the power of the NOJ was criticized as unbalanced due to the strong position towards judges.[11]

Moreover, because of strong resistance from judges, the public, and the international community against the influence of the justice minister on the new administrative courts, the plan to establish an administrative judiciary in 2020 was abandoned.[12]

3.2. Poland

The situation in Poland is now well-documented (Zoll and Wortham 2018, Sadurski 2018, 2019b, Śledzińska-Simon 2018, Mazur and Žurek 2018, Wyrzykowski 2019, Gajda-Roszczynialska and Markiewicz 2020, Pech *et al.* 2021).

Before winning a majority of parliamentary seats in the 2015 election, PiS (Law and Justice Party) announced a significant piece of its philosophy: "legal impossibilismus" (Davies 2018). This concept means that major reform cannot be undertaken in post-communist countries because of various elites', including judges, entrenched interests, and power. Adherence to this philosophy set the stage for PiS's efforts to disempower the courts, ostensibly to make its reforms possible.

Unlike in Hungary, where the majority in the single-chambered National Assembly enjoyed a constitutional majority, in Poland's two-chambered parliament, the United Right acquired the "only" plain majority in the elections in 2015 and 2019. Therefore, the parliamentary majority in Poland lacked the numbers necessary to change the constitutional framework and had to follow up with reform via legislation, decisions of the lower chamber of parliament, presidential appointments, and appointments of the government and minister of justice.

The Polish majority in parliament led the intervention through the Constitutional Tribunal reform, the courts' administration, the Supreme Court (SC), and finally, ordinary courts.

[10] Fundamental Law, Art. 25, par. 5. Initial concerns were conveyed already in 2011 by Commissioner for Human Rights. See Hammarberg 2011, Commissioner for Human Rights 2012. The Venice Commission sent also their concerns in March 2012 about the power of the president of the NOJ. The position of the NOJ was criticized for having "crucial decision-maker in practically every aspect of the organization of the judicial system".

[11] The position of the NOJ was criticized for having "crucial decision-maker in practically every aspect of the organization of the judicial system" (Venice Commission 2012, par. 118).

[12] Even though already incorporated in the Fundamental Law via Seventh Amendment in 2018. The Parliament adopted Act LXI of 2019 on Postponing the Entry into Force of the Act on Administrative Courts, which prevents Act CXXX of 2018 on Administrative Courts. At this moment the intention of establishing the administrative courts has been stopped. See Kovács 2019.

3.2.1. Constitutional Tribunal

The Polish case started with a quite momentous court-packing strategy. As the ruling majority did not have a constitutional majority, it could not increase the number of judges (Kosař and Šipulová 2020b).

In June 2015, the Civic Platform government changed the law under which the tribunal judges were elected. Although the existing rule had been that the parliament could only fill a seat on the final day of a judge's term, the new rule stated that the parliament could elect judges months ahead of an actual opening on the court (Kovács and Scheppele 2018). The parliament elected five candidates to tribunal seats on October 8th, but the president did not appoint them. One of the first steps of the newly elected eighth parliament was to pass a law on the tribunal to reverse the previous government's nominations of those five candidates (Sadurski 2019a).[13]

Subsequently, Sejm, the lower chamber of the parliament, revoked the former election of the candidates and nominated new candidates, who were immediately appointed to the position of tribunal judge by the president.[14]

In reaction, a Constitutional tribunal ordered to appoint three judges that the seventh-term parliament had elected in October. The seats of the other two judges were to be filled by the newly elected eighth Sejm. Neither the president nor Sejm followed this decision.[15]

3.2.2. Changes on the Council for the Judiciary

The next step was the politicization of the Council for the Judiciary. As the Council is supposed to safeguard the independence of courts and judges (Constitution of Poland, art. 186, par. 1), the takeover of this body is essential to seeking control over the judiciary. The Council has a strong position in the recruitment and promotion of judges (Act of 8 December 2017, Constitution of Poland Art. 179). The Polish Council for the Judiciary consists of 25 members (Constitution of Poland, Art 187). Before 2017, 15 of the 25 members were elected by their peers from a pool of judges. Four others were representatives of Sejm, and two were representatives of the senate. The president appointed one member, and the president of the Supreme Administrative Court, the president of the Supreme Court, and the justice minister were members.

Since the reform of 2017 (*Id*.), the 15 members that peer judges had elected were now elected by Sejm. This created an imbalance. Previously, 17 out of 25 members of the

[13] The Act of 19 November 2015 Amending the Act on the Constitutional Court, The Amendment modified the provision in section 137 on appointment: as the candidate had to take the oath before the president of the Republic "within thirty days of the date of [his or her] election". And that "The taking of the oath shall commence the term of office of a judge of the Constitutional Court."
On 25 November 2015, during its second session, the eighth-term Sejm adopted five respective resolutions on "the lack of legal effect" (w sprawie stwierdzenia braku mocy prawnej) of the resolutions on the election of five judges of the Constitutional Court adopted by the previous Sejm on 8 October 2015. It also requested that the president of the republic refrain from receiving the oath from those judges (See *Xero Flor v Poland*. Par.18.). the Amending Act of 19 November 2015".

[14] The president of the republic received the oath from four of the judges on the night of 2-3rd December, and from the fifth judge on 9 December 2015. See Venice Commission 2016.

[15] Moreover, they were denied for publishing by the government, what creates the final sage to fulfil the requirement for a ruling to become valid and binding.

Council were chosen from within the judiciary, but after 2017, 23 out of 25 members were selected by the political branches of power.[16]

3.2.3. Supreme Court

A 2017 law on the Supreme Court (SC) lowered the retirement age limit from 70 to 65.[17] This step had significant consequences, for it signaled the end of service for almost 40% of the judges on the Supreme Court. It also received a clear response from the CJEU, which concluded that the policy constituted discrimination (ECJ 24 June 2019, Case C-619/18). Later, the Supreme court seats were also increased by a typical court-packing strategy (Sadurski 2018).[18]

Moreover, the law on the SC created two new chambers that the Council for the Judiciary filled right after the alteration of its member composition. These chambers were the Disciplinary Chamber (DC) and the Extraordinary Control and Public Affairs Chamber. The DC was supposed to deal with Supreme Court judges' disciplinary cases and appeals of judges' disciplinary cases from ordinary courts. The fact that the Council, elected mainly by political actors, selected the DC was a ground for the Commission to bring action against Poland before the CJEU in 2019. The CJEU responded that DC's independence and impartiality was doubtful (Joined Cases C-585/18, C-624/18, C-625/18). The CJEU confirmed the principle of the primacy of the EU law and claimed that national courts had the right and obligation not to grant jurisdiction to a court that did not fulfill the requirements of independence and impartiality. The CJEU openly stood by the Polish judges seeking help outside their country (*Commission v Poland*, C-791/19, Judgement of 15 July 2021).

3.2.4. Ordinary courts

The ordinary courts were not exempt from PiS modifications. The retirement age of the ordinary courts' judges and the prosecutors' retirement age was set to 65 years for male and 60 years for female judges.[19]

As of 2016, the justice minister (JM) (Act of 28 January 2016) also holds the position of the Public Prosecutor General, and this superposition's strength (Venice Commission 2017) raised concerns. Behind the claim of further accountability of the Public Prosecutor's Office might easily be a goal of exerting political influence over public prosecutors (Venice Commission 2017). The JM was also granted the power to dismiss the lower courts' presidents and appoint his chosen candidates. He received the power to assign new judges, to establish divisions and branch divisions of courts, to establish or abolish courts, to determine territorial competency areas, to authorize transfers of

[16] Act of 12 May 2011 on the National Council of the Judiciary, as amended: Article 9a. 1. The Sejm selects fifteen members of the Council from among the judges of the Supreme Court, common courts, administrative courts and military courts for a common four-year term of office.

[17] The retirement age was set to 65 years for male and 60 years for female judges, who submit a declaration for retirement.

[18] "[F]rom 82 to 120. this, according to conservative assessments, creates vacancies of about 60 percent of all judges on the SC, to be filled of course by a 'new' KRS".

[19] The CJEU concluded that the provision on various retirement ages constituted discrimination and a failure to provide sufficient remedies to ensure compliance with the right to effective judicial protection in areas covered by EU law (*EC v Poland*, Case C-192/18).

judges to other courts or reassignments to other state institutions, to request disciplinary proceedings against a judge, and to launch an appeal against decisions of a disciplinary court (Sadurski 2018). The JM dismissed nearly 160 presidents and vice presidents. A powerful card was put in the hands of the prosecutor general/minister in the form of an institution called an extraordinary appeal, which is a judicial review of final decisions, including decisions issued before the validity of the law. The claimed goal of this institution is to "ensure compliance with the rule of law" (Tatała *et al.* 2020). It gave the JM the power to reopen any case decided in the last 20 years (Act of 8 December 2017, Art. 115 par. 1).

3.2.5. Muzzle law

In December 2019, the ruling majority approved an amendment to the law on Supreme Court and law on ordinary courts, known as the "muzzle law."[20] Based on this amendment, disciplinary proceedings can be started against judges who resisted the changes in the judiciary. The amendment bans criticism from a judge that might represent "*undermining the principles of the functioning of the authorities of the Republic of Poland and its constitutional organs*." The Supreme Court's DM has been criticized for being politically dependent as the politically appointed Council for the Judiciary creates it.

Since the reforms enacted in 2017 and, finally, with the adoption of the "Muzzle Law" amendment, Poland might be considered a country that lacks an independent judiciary (Pech *et al.* 2021). The Venice Commission commented that the amendment was responsible for "seriously curtailing freedom of speech and association of judges, preventing judges from examining whether other courts within the country are 'independent and impartial' under the European rules" (Venice Commission 2020).

4. Slovakia

4.1. Threema Scandal

In the Slovak context, we can try to understand two recent events. The first is the attacks from private and state actors that led to the "Threema" scandal revealed in 2019. Second is the intervention from the parliamentary majority in December 2020 as a reaction to the judiciary's failure during the "Threema" scandal. In this chapter, we will not focus on the previous interventions of political leaders in judiciary proceedings. However, there is a pattern of the justice minister replacing court presidents, and the politicized election of the chief justice (Blisa and Kosař 2018, Kosař and Spáč 2021) has been a severe problem. We will instead focus on the consequences of these political interventions revealed in 2019.

In August 2019, Slovak newspapers first published news about the communications of the infamously corrupt businessman Marian Kočner using the Threema application. After seizing Kočner's phone, the Slovak police and Europol decoded encrypted messages that Kočner had sent through Threema in 2017 and 2018. Transcripts of the conversations that appeared in the press suggested far-reaching manipulation of court

[20] A bill amending the Act on the Organization of Ordinary Courts, the Act on the Supreme Court and the Act on the National Council of the Judiciary from 20 December 2019.

cases in Kočner's favor, and communications published later detailed instances of inappropriate communication between the judges and Kočner. In sum, nineteen judges were accused of corruption, and several advocates are facing charges of corruption and obstruction of justice (Raábová 2018, Spectator staff and TASR 2019, Spectator staff 2019a, 2019b, 2019c, 2020a, 2020b, Valček 2020).

The judges involved in the allegations were delivering judgments on demand. Some of them did so for financial gain, while others acted under the threat of pressure. In Slovakia, this event showed widespread judicial corruption.

After the revelations of 2019 and 2020, the Slovak public learned that organized crime bosses, like Kočner, have had a high level of control over a cadre of Slovak judges through the medium of the state secretary and some court presidents (Láštic 2020). No cautious observer thinks these are new developments or even as recent as the Kuciak murder (Urbániková and Haniková 2021). from which evidence of judicial corruption has emerged. On the contrary, the public sees the tip of the corruption iceberg existing under the surface for decades.

This outrageous crisis of legitimacy within the judiciary provided a perfect opportunity to reform or attack the judicial branch through political power. Such interventions had been attempted for years, but after the Threema scandal, the public embraced the idea of enacting significant changes in the judiciary. As the following sections will explain, Slovakia is unique within our classification of attacks.

4.2. Constitutional reform in 2020

It is difficult to pinpoint when a particular attempt to amend the rules of judicial power gets out of the joint. Is it the date of the validity of the law that successfully limits the judiciary or extends political power over the courts? Or is it already written in the unsuccessful attempts of the third branch to resist prior intervention? Perhaps it can be dated to when the judicial body steps on the foot of the political power in a manner that had before been considered taboo. In the current period of Slovak constitutional reform, we will consider the initial point to be the Constitutional amendment of 2014. First, we present some context.

The Slovak Constitution is polytextual: it consists of the Constitution in the form of a charter and several separate documents called constitutional acts. These indirectly supplement the law existing on the constitutional level. The main body of the constitution may be amended directly via the constitutional act. Altogether, there have been 19 direct amendments to the constitution and more than 20 indirect acts on the constitutional level. All amendments and the primary document of the constitution have equal validity and legal force. With an increasing number of these additions, there is also an increased risk of contradictions on the constitutional level.

The Constitution of the Slovak Republic is one of the least rigid constitutions in Europe. It requires three-fifths of the members of the parliament to vote in favor of a constitutional act. Lawyers dedicated to constitutional law have discussed whether, with such a low requirement for amending the constitution, there should be a core of the constitution that is untouchable and, therefore, unamenable (Orosz 2005, Tomoszek 2010, Breichová-Lapčáková 2013, Balog 2014, Preuss 2016).

Since the fall of state socialism in 1989, the Federal Czechoslovak Constitutional Court and the Constitutional Court of the Slovak Republic (CCSR) built their case law on the premise that the National Assembly does not consider for amendment "the material core" of the constitution, and the CCSR does not open the question of the compliance between constitutional acts and the constitution itself. "Scholars have argued that certain indirect constitutional, such as acts on shortening the term of the Parliament, and occasionally even direct amendments do contradict the master-text Constitution, but there has never been a suitable case to test this argument" (Drugda 2019).

The practice worked until 2014 when the National Assembly passed a constitutional act as a direct amendment of the constitution containing the vetting procedure for new judges and control mechanisms for sitting judges (Constitutional Act no. 161/2014 Coll). The legislator concluded that suspicions surrounding the judiciary needed to be addressed, and social developments in Slovakia needed to be considered on the constitutional level (Explanatory report to the Constitutional Act 161/2014 Coll.).

Based on the explanatory report, the amendment aimed to improve the judiciary's functioning, efficacy, and quality by limiting the immunity of judges and removing the need for the consent of the CCSR[21] to prosecute judges. After this change, judges retained immunity for decision-making - functional immunity. Furthermore, the amendment extended the competence of the Judicial Council of the Slovak Republic (JCSR) and separated the position of the chair of the JCSR from the chief justice.[22]

The most controversial part of amendment 161/2014 was the transitional provision on preconditions of judicial abilities, which included the termination of the office of a judge appointed before July 1st, 2014, as a legal consequence of non-fulfillment of the preconditions (Slovak Constitution, art. 154d, par.3.).

Based on the amendment, the preconditions for judicial abilities guarantee that judges will perform their function correctly. The Judicial Council was supposed to decide whether requirements were met to allow the candidate or judge to exercise the judicial office independently. This decision was based on documents obtained from a body protecting classified information (*Ibid*. art. 154d, par. 1.). In practice, the information included a person's private and family life, prior work experience, and social contacts (Ľalík 2017).

The chairwoman of the JCSR filed a complaint to the CCSR and challenged, inter alia, the retroactive part on the judges who have already been appointed. Based on the argumentation on retroactive results towards sitting judges, the CCSR suspended these provisions in decision no. PL. ÚS 21/2014.

[21] It was a precondition, the judge could have been convicted only with the consent of the Constitutional Court.

[22] As before the amendment was the chair of the Judicial Council and the president of the Supreme Court connected.

4.2.1. The decision of the CCSR no. PL. ÚS 21/2014, known under the popular title as "material core of the constitution"[23]

The CCSR stated that the constitution does not explicitly regulate the amenability of some of its articles, as other countries' constitutions do.[24] Because the constitution does not contain explicit provisions concerning unamendable articles, the material core of the constitution is an implicit concept, the scope of which is determined by the case law of the Constitutional Court.[25] The CCSR concluded that the independence of the judiciary and the related independence of judges must also be considered as principles inherent in the rule of law (Principle of the rule of law in Art.1 par. 1 of the Slovak Constitution). Independence does not mean that judges cannot be controlled, but this control must be balanced and proportionate (Decision of the CCSR no. PL. ÚS 21/2014, par. 116.). The method of control introduced by the legislation in question did not meet those criteria, for the sensitive information obtained by the National Security Authority (NSA) could be misused to influence judges and the decision-making activities of the courts. Standard methods of controlling the activities of judges (disciplinary, civil, and criminal liability) exist but must be used properly (Decision of the CCSR no. PL. ÚS 21/2014, par. 138.). The decision PL US 21/2014 is controversial because it went further than previous attempts of constitutional courts in other European countries when deciding over the compliance of constitutional acts with the constitution itself on substantial grounds, not procedural.[26]

4.2.2. Constitutional Amendment 2020

The CCSR strengthened the rigidity of the constitution with its decision that not everything included in the constitution falls within the amending competence of the political majority. The answer from the National Assembly came after the close of the seventh term. After the election of 2020, the new majority decided to play the ball that was now in their possession. After the "Threema scandal" in 2019 and 2020, one of the new government's priorities was to fight corruption, including that of the judiciary.

The Ministry of Justice prepared a proposal for significant constitutional reform focused on the judiciary. The proposal was ambitious, and its planned constitutional amendment was to be extensive. The president of the CCSR communicated his disapproval when "This is an essential intervention in the constitution. Please reconsider if it is necessary… this proposal is absolutely unacceptable" (Prušová 2020). Some parts of the amendment appeared to be genuine attempts to raise the judiciary's efficacy and balance accountability with independence, while others recalled the attacks in Poland and Hungary. Four parts of the amendment, to which the CCJE responded, will be compared to interferences in Hungary and Poland (CCJE 2020).

[23] PL. ÚS 21/2014, 30.1.2019, For detailed analysis, see Domin 2019.

[24] For example, Art. 79 § 3 of the German Basic Law, Constitution of Norway, Article 121, Constitution of Portugal, Article 288.

[25] Two fundamental decisions of the previous years appeared in argumentation. Firstly, the judgment of the CCSR PL. ÚS 7/2017 (the so-called Mečiar's amnesty), and the judgment of the CCSR PL. ÚS 17/08 (Special Court).

[26] Austrian Constitutional Court in VfGH. 16.327/2001 from 11.11.2001, Ukrainian CC in decision no. 1-45/2010 from 30.9. 2010, Hungarian CC in decision no. 45/2012 AB from 28. 12. 2012 or Czech CC in decision no. Pl. ÚS 27/09 z 10.9. 2009.

4.2.3. Reform of the Judicial Council

The amendment called for a reform of the composition and powers of the JCSR, including the professionalization of the function of the vice president of the JCSR. The JCSR finally acquired its constitutional definition, as it was before, only implied by the CCSR.[27] The JCSR became "the constitutional body of judicial legitimacy."[28] Now, it is considered the institution where judicial politics are realized (Národná rada 2020). The wording of the constitution was changed not to prioritize autonomy or independence (Art. 141a, par.1 of the Slovak Constitution) but legitimacy. Therefore the appointment of members was amended, too. The quota of members appointed by the National Assembly, the president of the country, and the government remains the same, with three seats belonging to each (Act on Judicial Council no. 185/2002, art.3, par.2.). The judges elect nine members from the pool of judges, and other branches of power appoint nine members of non-judges. Therefore, for a successful decision in the JCSR, at least one member from the opposite pool must be convinced to vote for the other side's proposal (Kosař 2016). A more controversial part of the ruling may be the overruling of the CCSR (Decision of the CCSR PL. ÚS 2/2018 from 19 September 2018) to adopt an explicit constitutional rule allowing for the dismissal of a member of the Judicial Council before the expiration of his term of office without a need to provide reasons (Art. 141a, par.5 of the Slovak Constitution).

The CCJE published concerns almost immediately (CCJE 2020). Objections to the removal of members of the JCSR were focused on the requirement of the CCJE Opinion no.10 (CCJE 2007), which requires the independence of the members of the JCSR and does not distinguish between the judges and non-judges:

> Members of JCSR often have to make decisions that are unpopular or will not please judges or authorities who elected or appointed them. In subjecting them to an unrestricted power of removal, their independence will be seriously reduced, making them too dependent on the wishes of those who elected or appointed them, and thus removing them from their role of pursuing the goals of an independent and efficient judiciary. (CCJE 2007)

Also, the CJEU prefers the enaction of formal conditions of dismissal (*Repubblika*, C-896/19, para. 66).

The Ministry of Justice claims that JCSR is the body of legitimacy within the judiciary and considers the appointed members of the JCSR as fulfilling the interest of the nominating body instead of safeguarding the judiciary's autonomy. The chairman of the JCSR Ján Mazák, a representative of the National Assembly in the JCSR, responded that the fundamental right to good administration, against which every decision of a body of public power must be reasoned, includes the decision to remove an appointed

[27] Firstly was JCSR defined as "sui generis" body of judicial autonomy (I. ÚS 62/06), later as "highest authority of judicial power" (PL. ÚS 102/2011), body of guarantee of independence of the judiciary See also US Pl 2/2012. Pl US, 2/2018.

[28] This perception of the body of the legitimacy was there among the academics and members of the Council even before, however Most Slovak judges still do not see the difference between judicial boards 136 on the one hand and the JCSR on the other, and they think of the JCSR as an organ of self-government of the judiciary (Kosař 2016).

representative. Such a decision falls under the review of the CCSR or the Supreme Administrative Court. That secures judicial scrutiny, after all (Súdna rada 2020).

Although the dismissal of the members has not been used yet in the last two years,[29] the current silence on the conditions of dismissal from the JCSR corresponds to the idea of a place "where judicial politics are realized" and where the legislative, executive, and judicial power apply their goals.

4.2.4. Adjustment of Proceedings Before the Constitutional Court and Prevention of Decisions on the Compliance of Constitutional Acts with the Constitution

Explicitly limiting the CCSR in its review of the amendments being applied to the constitution in such a dramatic scope may appear suspicious. Here the amending actors relied on such criticism of applying the amenability doctrine in Slovakia, as voiced in academia and dissenting opinions of CCSR judges in the case PL. ÚS 21/2014 (Drugda 2020).

As a reaction to PL US. 21/2014, the National Assembly wrote explicitly that the CCSR does not have the competence to review the compliance of constitutional acts with each other or a constitution (Slovak Constitution no. 460/1992, art. 125, par. 4.).

The CCJE raised concerns about this step, but the body did not elaborate on how an infringement was created. The lengthy discussion on the duty of the CCSR to protect the "material core" that has not been mentioned in the constitution explicitly is divided among those who support the "power of the sovereign" and those who support the CCSR as "a guardian of the rule of law." The response from the chairman of JCSR supports the former, as he recalls:

> It had arisen among plenty of members of academia, former judges of the Constitutional Court and practicing lawyers immediately after issuing the finding in which the Court for the first time had concluded that the part of the Constitution was at odds with the same Constitution. (Súdna rada 2020)

4.2.5. Functional Immunity of Judges

The initiative on the functional immunity of judges aimed to create more accountability. Such a step is likely a consequence of the "Threema" scandal, where some judges were accused of arbitrary decisions. A judge could face disciplinary and criminal liability for delivering a legal opinion that is arbitrary, unsubstantiated, or otherwise ignoring the wording of legislation or case law (Sec. 326a of the Slovak Criminal Code) (IACL-AIDC 2020).

The preparatory report claims that society has undergone significant developments to reach this stage when judicial immunity is not necessary anymore (Národná rada 2020). The lawmaker perceived functional immunity as a refutation of decision-making accountability. After the amendment, judges are still protected against criminal prosecution if they act in a bona fide manner. However, they can face charges for "*bending the law*" - the arbitrary application of the law.[30] Here lies what is possibly the

[29] As there was no election in between.

[30] The explanatory report mentions that the new crime in Criminal Act is based on the German criminal law, art. 339.

most controversial issue of the amendment. It is possible to admit some sympathies to the government, as the "Threema" scandal brought on more profound levels of distrust in judicial decision-making. Nevertheless, it is perilous to open the option to prosecute judges based on their decision-making.

The CCJE wrote in its reaction to the Slovak amendment that it fears that the anti-corruption campaign might lead to excuses "to justify limitations of judicial independence, strongly opposes this approach, which threatens to influence the judicial system(s) by limiting judicial independence" (CCJE 2020). The CCJE argues that the proposal of the Ministry of Justice infringes on the principles of judicial independence[31] and impartiality. Functional immunity is a safeguard of independence, offering security that a judge will not be prosecuted for decisions made in good faith (Venice Commission 2010). The CCJE sees the potential risk of a "vexatious pursuit of criminal proceedings against a judge who is disliked" (CCJE 2020).

Ján Mazák argued in his response that 'bending the law' follows the German paradigm. He sees sufficient guarantees if the interpretation "of the wording (on the crime "bending the law") is in the hand of an independent judiciary" (Súdna rada 2020).

After one year, this instrument of accountability remains to be controversial. The proponents of judicial autonomy and civil society organizations highlight the possibilities of misuse of this instrument (TASR 2022). This institute's most visible examples of usage are those used against judges in cases that have dealt with politically visible figures and therefore criticized as misused for political pressure.

4.2.6. Creating the Supreme Administrative Court of the Slovak Republic (SACSR)

Based on the explanatory report, the SACSR ought to "contribute to the protection of constitutional principles, rights, and values, particularly in the context of feedback to public authorities" (Národná rada 2020). However, the establishment of the new court was not received well by the Slovak judges.

The creation of the SACSR was portrayed as one of the essential parts of the reform. After the novelization of the Constitution and legislation, it became clear that the difficult part would not be to get enough votes in the National Assembly but to convince the judges to get on board. Problems with selecting the first president of the SACSR were only the first sign of resistance from judges. Poor participation of judges in selection for the positions of judges at the SACSR followed. The judges of the Supreme Court were supposed to pass interviews in the JCSR to move from the collegium of Administrative Law at the Supreme Court to the newly established SACSR. This requirement caused some judges to refuse to apply. On the one hand, this resistance allowed the JCSR select experts on administrative law from outside the judiciary. However, on the other, it resulted in the launch of the SACSR with only 21 judges instead of the planned 30.

[31] "Judicial independence shall be guaranteed 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 (CCJE 2010, par. 4).

4.2.7. New Court Map

Part of the judicial reform was to reduce first-instance courts from 54 to 30 and appellate courts from 8 to 3. The primary object of the reform was to improve the effectiveness of the courts. The JM planned to have at least three judges at each court for each kind of agenda. This objective seems to show the minister's priorities: the fight against corruption and the support of transparency, perhaps as a reaction to previous years' failures (Čuroš and Graver 2020). Additional goals are to improve accessibility, the speed of proceedings, the quality of decisions, transparency, and efficacy.

The CCJE expressed concern about the transfer of judges without their consent (CCJE 2010). After the constitutional amendment 422/2020 passed, the judge's consent will not be required if a transfer "is necessary to ensure the proper administration of justice, the details being provided by law" (Art. 148, par. 1 of the Slovak Constitution). The CCJE pointed to the need for assurance of security of tenure (CCJE 2010) and irremovability as crucial elements of the independence judges enjoy. Mazák answered that change of the system of the courts is in the public interest, as the historically high number of courts created atomization of the judicial map created in 1997 as an effort of then-prime minister Vladimir Mečiar to follow a court-packing strategy. He assured that "if any transfer of a judge to a lower court occurs, then it will be compensated by preserving all the benefits for a judge concerned" (Súdna rada 2020).

The part of the reform on the court map happened to be the last and the most challenging task. The judges' resistance was also empowered by the campaigning of the individual members of the National Assembly, both from the opposition and the majority coalition. Especially those members of parliament, coming from towns that were supposed to lose the court seat, were firmly against it.

The outcome has been labeled "halfway" (Prušová 2022). The number of regional courts was not reduced from 8 to 3 as planned; however, their agenda will be specialized. The new court map established a new branch of administrative courts detached from general courts. It also transformed eight district courts in the two largest towns – Košice and Bratislava – into five city courts (one in Košice and four in Bratislava, each with a specialized agenda). Furthermore, the reform reduced 54 district courts to 33, maintaining some former seats of district courts as organizational units. All these outcomes seem genuine in attaining the goal of centralization of the court agenda in order to provide higher specialization of judges and a higher standard of delivering justice.

The court map was also essential for financial support for the judicial reform from the EU's recovery plan. It was a missing piece of the whole puzzle of judicial reform necessary for the Slovak application for the first €458 million from the Recovery and Resilience Plan (Koreň 2022). Critics of the reform had argued that the lack of communication with municipalities and judges created a situation when the financial support from the recovery plan was endangered.

The judicial reform passed in a version that resembles a tough compromise between the JM following the plans in the Matovič government program statement[32] and judges, local

[32] Program Statement of the Government of the Slovak Republic for 2020-2024 of 19 April 2020.

interests, and judicial associations. After the resignation of JM Mária Kolíková, who fought for the implementation of the reform, and after the departure of the liberals from the Heger's government, it is, however, difficult to predict the survival of the reform. The new JM Viliam Karas, former chairman of the Slovak Bar Association, has not shared his views on reform. However, the Bar Association strongly critiqued the proposed changes during the implementation process.

Some elements of the reform that were received without controversy concerned the term of constitutional court judges,[33] an introduction of an age census for the termination of the function of a judge of the general court and judges of the constitutional court, and inspections of property relations of judges and judicial competence.[34]

5. Transmission belts and golden eggs

5.1. Hungary

Court-packing strategy is a particularly compelling phenomenon that is often a thin line between legitimate judicial reforms, those that aim at reconstructing the bench, and illegitimate interferences (Kosař and Šipulová 2020b). Court-packing, although always a suspicious step, does not qualify as an attack on the judiciary. Raising or reducing the number of judges does not have a direct influence on how they are going to decide particular cases. In other words, raising the number of judges at the court and then filling these spots with, for instance, conservative judges does not infringe on their impartiality. Nevertheless, almost every court-packing raises a red flag and foreshadows a shift in the decision-making paradigm (Kosař and Šipulová 2020b). However, it does serve as a transmission belt allowing the easter egg to function fully. Another transmission belt could also be considered the position of NOJ president. Although NOJ provides possibilities for arbitrary decisions about judicial careers,[35] it does not have the competence to limit impartiality.

In Hungary, the golden egg seems to be hidden in the competencies of the president of Kúria and court presidents of lower courts. The president of Kúria explicitly assigns judges to hear administrative cases in Kúria. The strong position of court presidents,

[33] See art. 134 and 154g, par. 9-11 of the Slovak Constitution. After the constitutional court crisis starting in February 2019, in October 2019 were candidates finally elected in the National Assembly and appointed by the president. One of the criticized facts was that the majority of the former judges finished their terms at the same time what created pressure on National Assembly and need for 18 candidates from who 9 new judges of the CCSR would be appointed. The amendment established the continuous change at the CCSR for the next generation of the judges of CCSR (see Ovádek 2018).

[34] Art. 141a, par. 6/h, of the Slovak Constitution. In reaction to the mentioned decision of the CCSR 21/2014, the amendment enables the Judicial Council to exercise active supervision over the fulfilment of the conditions of judicial competence by its own autonomous conduct and verification without substantial interference by another public authority, as before the decision 21/2019 this role was supposed to do National Security Authority.

[35] For example, in lack in transparency in announcement of vacant positions. Vacated judicial posts are not necessarily published, as the NOJ president may decide to transfer the post to another court, or to fill the vacancy without publishing a call for applications. Also the NOJ president has extensively used the exceptions allowed by the law to fill a vacancy without a call for applications'. See Venice Commission 2021, para. 59.

which has also been recently criticized,[36] empowers them not only over young judges, who seek their tenure through the recommendation of the court president to NOJ but also by disciplinary powers over judges at their court. In lower courts, judges are assigned to hear administrative cases by the president of NOJ upon the proposal of the court president (Section 30(1) and (3) of Act CLXII of 2011 and Sections 76(5)(e) and 77(1) of Act CLXI of 2011). This policy lacks official criteria for both assignment and termination. Therefore it allows the court presidents to remove a judge from the case without the judge's consent and creates pressure on the judges' decisions. Moreover, the case allocation scheme is established by the president of Kúria.[37]

Such policies undermine the judiciary's internal independence and allow direct pressure from court presidents and indirect pressure from political branches of power if court presidents are chosen to serve as transmission belts.

5.2. Poland

Although the court-packing strategy at the Constitutional Tribunal was an apparent interference (*Xero Flor v Poland,* 2021), it would not be counted as an attack on the judiciary here. It appeared to be a handy transmission tool for the PiS administration since the Constitutional Tribunal has doubted the compatibility of EU law (Decision P 7/20 from 14 July 2021 and Decision K 3/21 from 7 October 2021) and the ECHR (Decision K 6/21 from 24 November 2021 and Decision K 7/21 from 10 March 2022). The Constitutional Tribunal was therefore acting as a shield against the criticism of the legislative steps taken towards the judiciary (Kelemen and Pech 2018).

Despite the CJEU judgment (*Commission v Poland*, C-192/18), neither retirement age on judges does constitute an attack on the judiciary in this article, as this step only worked as a transmission belt. Nor changes in the creation process of the NCJ would be considered an attack on the judiciary. The changes have created legitimate doubts about its independence; however, the NCJ does not portray the kernel of an attack, but another shield, as the NCJ is in charge of recreating the judiciary's personnel. The NCJ is not required to be an "independent and impartial tribunal."[38] In its current position, it works as a transmission belt for political influence in the judiciary.[39] This politicization of the NCJ, strongly criticized by the ECtHR (*Dolińska-Ficek*, 2021), and CJEU (*AK v Krajowa Rada Sądownictwa* (C-585/18, C-624/18, C-625/18), *AB v Krajowa Rada Sądownictwa* (C-824/18)), happened to be another transmission belt for the usage of the kernel of the attack. The reason is simple. While the NCJ's independence is doubted, it does not directly impact judges' decision-making.

The golden egg of an attack in Poland is the enactment of the "Muzzle law" and establishment of the DC of the Supreme Court, which can decide on requests for the lifting of judicial immunity, as well as on matters of employment, social security, and retirement of Supreme Court judges, including sanctioning Polish judges for direct

[36] Joint contribution from Amnesty International Hungary and eight other CSOs for the 2022 Rule of Law Report, p. 4.
[37] Which the Venice Commission criticized; see Venice Commission 2021, para. 66, point b).
[38] According to art. 6 ECHR.
[39] It is visible in calling Prosecutor General for action against judges due to their decision-making - Statement of the NCJ of 14 April 2022.

application EU law protecting judicial independence, or for putting references for preliminary rulings on such questions to the CJEU. The DC became a very controversial institution since the members, mainly new judges, who were not at the Supreme Court before, appointed by the politicized NCJ, enjoyed quite a lot of autonomy. This golden egg allowed direct pressure on the deciding judge (*Commission v Poland*, C-791/19).

This golden egg, however, was promised to be changed under Recovery and Resilience Plan, according to which Poland must secure that all cases against judges, including disciplinary cases and decisions on the lifting of judicial immunity, will be adjudicated by a independent and impartial court established by law and that judges will not face retaliation due to motion for preliminary ruling the CJEU, or for the content of the decisions (COM/2022/622 final).

The role of the JM can also be considered a golden egg. The position of JM, who is also the public prosecutor, is entitled to play an active role in prosecutions, with a disciplinary role in respect of court presidents (*Minister of Justice and Equality v Celmer* (C-216/18)). In the case of the Retirement of ordinary judges (*Commission v Poland*, C-192/18, par. 122), the CJEU was not objecting to lowering the retirement age per se, but it was much more concerned with the JM's competence to authorize particular judges to resume their seats, despite the retirement age.

5.3. Slovak interference

Unlike in Hungary and Poland, in the Slovak reform, the kernel of an attack seems to be lacking. With even lower public trust in the judiciary than in Poland and Hungary, Slovakia was after the "Threema scandal" plainly at risk of state actors who might play on the judiciary's lack of accountability and history of corruption to justify its reforms along the lines pursued by PiS in Poland. However, the intervention undertaken in Slovakia does not resemble the Polish and Hungarian way of the intervention of the parliamentary majority towards the judiciary. Although the Constitutional Court's limitation on constitutional acts was stricter than in Hungary, where the Constitutional Court can review the adopting process of constitutional acts, unlike in Poland and Hungary, no suspicious court-packing happened in Slovakia. Luckily, CCSR resisted the ambitions of the former three-time PM Robert Fico to become the president of the CCSR. To avoid such political attacks in the future, the Ministry of Justice proposed changes to the election and appointment process for the CCSR judges. Unlike in Hungary and Poland, the Slovak proposal alters the process to be more transparent and predictable, with articulated requirements for candidates and procedures that should avoid blocking candidates either in parliament or by the president, as these two institutions play the leading roles in creating the CCSR. Moreover, the rule was adopted to avoid a situation when most CCSR judges finish their term simultaneously, leaving the court vulnerable to political court-packing. This rule will most likely be applied after 2030 for the first time. In this sense, the proposal mutes rather than enhances the power of the government to control CCSR candidates.

While the Supreme Administrative Court might remind a court-packing strategy,[40] the process of establishment of the new court was transparent. The power to select judges for the newly established Supreme Administrative Court was given to the JCSR as a power awarded for this only occasion. Although rules on the appointment and removal of JCSR members changed, the judiciary still selects half of the members for the JCSR.

Although the retirement age was set, in contrast to Hungary and Poland, it was raised from 65 to 67 without prolonging the tenure. In the outcome, it brought legal certainty and fairness in the departures of judges and reduced the ambiguous prolongations of individual judges.

In contrast to Poland, where the Judicial Council became politicized, or Hungary, where the control over judges was put in the hands of the president of the NJO, Slovakia has not experienced such a political intervention in JCSR. While political power strengthened its influence in JCSR through the possibility to remove the appointed representative in the JCSR by the appointing body at any time, the representatives of the judges and political representatives still have an equal number of seats in the Council. Furthermore, the controversial and unconstitutional vetting procedures of judges were left entirely in the jurisdiction of the JCSR, without any intervention of the executive power, which accommodates the CCSR's objection.

A new court map proposal from the government in Slovakia appears not to be targeted at governmental control over judicial decisions. Instead, the Slovak proposals re-draw the geographic seats of appellate courts, ostensibly aimed at trimming nepotism and corruption centered on the prior appellate court locations. In Košice,[41] for example, it has been accurately said that the chief qualification for a judge-applicant is his or her family name (Šípoš and Spáč 2013). Moving the appellate court seat to Prešov may have the positive effect of diluting the power of the Košice judicial-family elites (Čuroš and Graver 2020).[42]

The most controversial might be the step of the parliamentary majority toward the limitation of judicial immunity. A new criminal offense called "bending of law" was introduced. In case of the arbitrary application of the law, a judge could be criminally liable. In contrast with Poland, where judges may be disciplinarily prosecuted by the senates established by the politicized Judicial Council, in Slovakia, such judges would be tried by an independent and impartial court in a criminal trial. Moreover, the accused judge has a right to file a motion to the JCSR, which could stop criminal prosecution. If tried disciplinarily, in Slovakia, judges would fall under the disciplinary power of the SACSR, whose judges have been selected by the JCSR, where representatives of judges possess half of the seats or by the president of the SACSR.

Finally, there were no attempts in Slovakia for any "muzzle law" or restrictions of the preliminary question to CJEU on the independence of the courts. There are no

[40] As the new court was established and only 10 out of 21 judges of the court were judges of the previous Administrative collegium at the SCSR The rest of the members entered the SACSR through public hearing in the JCSR. Although the creation of a new court does not fall within categorization of court-packing strategies proposed by Kosař and Šipulová (2020a, p. 85).

[41] Second largest town, and the seat of the regional court.

[42] The appellate courts did not move in the enacted form of the reform. Both Košice and Prešov are still seats of the appellate courts.

guarantees that the current reform will not turn to attacks in the following months or years. However, recently, the intervention does not remind the interventions in the judiciary in Hungary and Poland, where the systemic steps from the limitation of the constitutional courts, court-packing strategies at all levels of courts, and politicization of the Judicial Council happened.

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