

Signature Scent of the Rule of Law Backsliding

Peter Čuroš, PhD. (VIA IURIS, Polish Academy of Sciences)

For International Network of Judicial Reformers, 27.5.2024

Similarly, like the brands have their signature pieces or signature scents, administrations have also signature way of fulfilling their ambitions. When an authoritarian government comes to power and democratic values are threatened, it might be interesting to observe, what channels are used for their purpose. Following pages will offer a signature scent of the backsliding happening in Slovakia.

Focus on three pathways through which Slovakia experiences democratic backsliding:

- A) Steps against independence of the judiciary
- B) Steps towards deterioration of the democratic legislation process – creating „the exception“
- C) Steps towards disqualification of associating towards common interest – attacks on civil society organizations

These steps are monitored since October 2023, when the fourth administration of the Prime Minister Robert Fico came to power.

Prequel:

Slovak judicial reform of 2020 vs. Hungarian and Polish reform

Firstly, Slovakia experienced a judiciary reform in 2020 that the European Union mainly praised. However, some controversial parts will be compared with Hungarian and Polish reform.

In the Slovak context, we can see two main events that led to the judiciary's reform. The first was the long-term influence of private and state actors on the judiciary, which escalated in the outbreak of the "Threema" scandal, which was revealed in the 2019 massive corruption scheme among the judiciary, law enforcement, politicians, and business members. It led to the public's discontent, which resulted in a strong mandate awarded in the election in February 2020, which gave the new government enough votes in the National Assembly to take over a significant reform of the judiciary.

The outrageous crisis of the legitimacy of the judiciary provided a perfect opportunity for the interference of the legislative and executive power with the judicial power. Both scenarios were possible at that moment, particularly – the authoritarian way and establishment of political control over the judiciary or making the judiciary more accountable to retrieve its legitimacy in the eyes of the public without enhancing political control.

Reform plans had been attempted for years, but only after the Threema scandal did public attitudes embrace the idea of enacting significant changes in the judiciary. Here is a summary of the reform that started its journey on the soil of the National Assembly with the constitutional amendment in December 2020 and finished with the enactment of the new court map in April 2022.

The reform of 2020 was perceived relatively positively by international institutions, European Union representatives and international academia. However, it was strongly criticized by the representatives of judges and parliamentary opposition at that time. Out of all amendments, we bring to discussion those, that raised valid questions:

1. Reform of the Judicial Council of Slovak Republic (JCSR)

The announced reform called for the reform of the role, composition, and powers of the Judicial Council. The JCSR finally acquired its constitutional definition, as it was before, only implied by the Constitutional Court (CCSR). The JCSR became "the constitutional body of judicial legitimacy." It is now considered the institution where judicial politics are realized. The Constitution's wording was changed not to prioritize autonomy or independence but legitimacy.

The quota of members nominated by the National Assembly, the President of the country, and the government remained the same, with three seats for each. However, these bodies are no longer allowed to nominate judges. Altogether, judges nominate nine members from a pool of judges and other branches of power, also nine members of non-judges.

A more controversial part of the reform may be the overruling of the CCSR 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. This step clarified that the members of the JCSR are representatives of the body that selected them. At this point, CCJE saw a problem of violation of autonomy.

2. Disabling of Review on the Compliance of Constitutional Acts with the Constitution

In 2019, the Constitutional Court of the Slovak Republic (CCSR) strengthened the rigidity of the Constitution with its decision PL US. 21/2014, saying that not everything included in the Constitution falls within the amending competence of the political majority. As a reaction to PL US. 21/2014, the National Assembly amended the Constitution, writing down explicitly that the CCSR does not have the competence to review the compliance of constitutional acts with each other or with the Constitution. The President of the CCSR communicated his strong disapproval.

The lengthy discussion on the duty of the CCSR to protect the "material core" that has not been mentioned in the Constitution explicitly has been divided among those who support the "power of the sovereign" and those who support the CCSR as "a guardian of the rule of law." After the constitutional amendment, the answer is clear. Even if there is "the material core," there is no authority to enforce it.

3. 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 that unlawfully benefited one of the parties. The Criminal code amendment stated that "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."

The legislator perceived functional immunity as a refutation of decision-making accountability. After the amendment, judges are still protected against criminal prosecution if they act bona fide, but they can face charges for "*bending the law*" - the arbitrary application of the law.

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. 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. Creating the Supreme Administrative Court of the Slovak Republic (SACSR) and a New Court Map

Based on the explanatory report, the SACSJR ought to "contribute to the protection of constitutional principles, rights, and values, in particular in the context of feedback to public authorities." The SACSJR, often labeled as a small constitutional court, was supposed to become the apex court of administrative judiciary, to relieve the CCSR from a part of the extensive agenda, and become a body of disciplinary judiciary for judges and prosecutors, and in the future, possibly advocates.

The creation of the SACSJR 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 SACSJR were only the first sign of resistance from judges. Poor participation of judges in selection for the positions of judges at the SACSJR 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 SACSJR. This requirement caused 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 SACSJR with only 21 judges instead of the planned 30.

The central part of the judicial reform was a reduction of first-instance courts from 54 to 30 and appellate courts from 8 to 3. The primary object of the reform has been to improve the effectiveness of the courts. The Justice Minister 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. Other goals were to improve accessibility, the speed of proceedings, the quality of decisions, and efficacy.

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." 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 31, 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 getting financial support for 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. 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 Justice Minister following the plans in the Matovič government program statement and judges, local interests, and judicial associations. However, after the resignation of Justice Minister Mária Kolíková, who fought for the implementation of the reform, and after the departure of the liberals from the Heger's government, it is difficult to predict the survival of the reform. The new Justice Minister 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.

To be sure, not all government-proposed judicial branch-restricting plans are attacks on judicial independence. While the motive and effect of the Polish and Hungarian government restructuring of

the judiciary were to capture control over judicial decisions in matters of importance to the government-in-power, Slovakia has not observed such a turnover yet.

However, 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 parliamentary majority intervening in the judiciary. Although the limitation of the Constitutional Court (CCSR) on the review of 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 has happened in Slovakia yet. The outcome has confirmed that the constitution-giving power is above constitution-interpreting power. The primary motivation for such limitation of the CCSR was, to some extent, the controversial use of a powerful instrument of implicit option to decide on the unconstitutionality of constitutional act that was present in the Constitution on the matter, which proved to be more controversial than expected (since the decision was delivered only several weeks before the departure of 9 out of 13 judges, most of them returning to the positions at the general courts).

In the beginning of 2019, luckily, CCSR resisted the ambitions of the former three-time Prime Minister 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 Constitutional Court judges. Unlike the restructuring of that process in Hungary and Poland, the Slovak proposal alters the process to be more transparent and more 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 Constitutional Court. Moreover, the rule was adopted to avoid a situation when most Constitutional Court 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. The proposal mutes rather than enhances the power of the government to control the success of candidates for the Constitutional Court.

While the Supreme Administrative Court of the Slovak Republic (SACSR) was established, it did not meet the same fear of possible political intervention as in Hungary. The power to select judges for the newly established Supreme Administrative Court was given to the Judicial Council of the Slovak Republic (JCSR) as a power awarded for this only occasion. Filling the rest of the empty positions at the SACSR will be in the competence of its President. And although rules on appointment and removal in the JCSR have been amended, the judiciary still selects half of the members for the JCSR.

Contrasting to Poland, where the Judicial Council became politicized, or to Hungary, where the control over judges was put in the hands of the President of the National Office for the Judiciary, Slovakia has not experienced such a political intervention in JCSR yet. While political power strengthened its influence on the JCSR through the possibility of removing 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 Judicial Council, without any intervention of the executive power, which accommodates the Constitutional Court's objection. The outcome of the amendments of the Judicial Council has blended in as the polarization and partisanship between the executive/legislative branch representatives and judges have already been there. On the side of the judges is the situation stable. Strong opponents of the proposed changes still represent judges. The option of removing the representative has not been used yet, as the representatives appointed by the previous government and National Assembly stepped down from their positions before the new law.

New court map proposal from the government in Slovakia appears not targeted at governmental control over judicial decisions or their effects. Instead, it re-draws the geographic seats of appellate courts, ostensibly aimed at trimming nepotism and corruption centered on the prior appellate court locations.

The most controversial happens to be the step of the parliamentary majority toward the limitation of judicial immunity. A new kind of criminal offense called "bending of law" may cause pressure on the judge in politically exposed cases. Even though it argued that an independent and impartial court would try accused judges, the criminal complaint, regardless of how frivolous, is likely to create pressure on the judge. The criticism against the law stemmed from fear that the anti-corruption campaign might lead to excuses "to justify limitations of judicial independence," The CCJE saw danger in the vague definition that immunity belongs only to "*legal opinion expressed in a decision unless a criminal offense has been committed thereby.*" and "*vexatious pursuit of criminal proceedings against a judge who is disliked.*" The President of JCSR 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."

Finally, there have been no attempts in Slovakia for any "muzzle law" or restrictions of the preliminary question to CJEU on the independence of the courts as in Poland and Hungary. There are no 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.

Some elements of the reform were, surprisingly, received without controversy and media attention, for instance, the term of constitutional court judges, 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. Although the imposition of an age limit might resemble measures taken in Poland and Hungary, it did not raise controversy in Slovakia. The constitutional amendment introduced the age limit for judges of general courts at 67 years and judges of the Constitutional Court at 72 years, followed by the termination of the position of judge and judge of the Constitutional Court *ex constitutione*. While the rule setting an age limit of 65 was in the Constitution since 1992, it had been left to National Assembly and, since 2001, the JCSR to decide whether or not a judge could remain after reaching 65. The age limit replaces the arbitrary power of these agents to decide which judges they would like to retire.

A. Interference in judiciary since October 2023:

1) Prime Minister Fico attacks the Constitutional Court Chief Justice Fiačan.

The plenum of 12 judges decided, albeit not unanimously, to suspend all the Penal Code changes and some changes to the Criminal Procedure Law. Specifically, the Court sees a danger in reducing penalties, shortening the statutes of limitations, and at the same time rewriting the criminal damage classification, but also in reopening previously approved plea bargains and using illegally obtained evidence in a criminal proceeding only in favor of the charged.

In reaction, Prime Minister Fico verbally attacked the Chief Justice for leaking the decision to the media before the Constitutional Court officially published it on its website. Fico publicly demanded that Chief Justice Fiačan step down or the next elected Slovak President dismiss the Chief Justice. Such an action from the Prime Minister is perilous for the independence of the Constitutional Court.

2) Undermining the independence of judges of the Supreme Court

Over the past five months, the attacks on judicial independence in Slovakia have not just escalated, but reached a critical point. The Minister of the Interior, Šutaj-Eštok, issued a direct threat of disciplinary proceedings against a judge of the Bratislava Municipal Court. Prime Minister Robert Fico accused the Slovak Constitutional Court of coordinating its decisions with the presidential palace. Fico even went as far as threatening the President of the Constitutional Court with a dismissal. These actions

were not just a clear threat, but an alarming one, to the independence of the judiciary. Lately, Fico addressed Supreme Court judge Juraj Kliment: „Being Mr. Kliment, I would pack today. But he probably wants to go through all the legal procedures our legal system requires.” This represents a serious allegation and a harsh attack on the judiciary by the executive power, undermining its independence in a significant way.

3) A motion for dismissal of the members of the Judicial Council elected by the National Council.

After the dismissal of the Chairman of the Council for the Judiciary, Ján Mazák, the majority of parliament members immediately filed a motion to remove two members elected by the parliament. These two members – former chairman Ján Mazák and Andrej Majerník, were elected by the parliament in 2020, and their term would end in 2025. The arguments of the parliamentary majority were rather arbitrary and vague. The majority argued with the decisions of the Constitutional Court (PL.US 8/2022 and PL.US 12/2022), which do not mention the arguments that the majority claimed.

Moreover, the main argument for the dismissal was that these members “*did not protect judicial independence*” during the adoption of the judicial reform in 2020. However, the reform was received prevalently well by the European Commission and legal experts, and the step criticized by the Commission and CCJE was particularly the possibility of the premature dismissal of the Council for the Judiciary. Based on the current legislation, premature removal of the Council for the Judiciary members is legally possible. Still, the practice is highly criticized by the European Commission, the professional organization of judges CCJE, and the Slovak Constitutional Court. Despite this controversy, Fico’s coalition, having a majority in the parliament, has done it repeatedly. For instance, the replacement of three members of the Judicial Council elected by the government happened even before the vote of confidence in the parliament in September 2023.

4) Justice Minister Susko ordered lustration at the apex courts

The Minister of Justice instructed to conduct an inspection at the Supreme Court and the Specialized Criminal Court to examine the random selection of judges in the allocation of individual cases. While the Supreme Court refused to make the entire database of files available to the Ministry of Justice, the Specialized Criminal Court handed over a copy of the system from 2005.

Chief Justice of the Supreme Court Ján Šikuta explained that the inspection from the Ministry of Justice required all the files from 2001. When they found out how many terabytes of data it includes, the inspection changed the requirement for all files since 2019. Such interference from executive power to judicial power is unprecedented and is one of the strongest attacks on the judiciary.

5) Verbal attacks on judges

Recently, the parliament passed a resolution condemning the assassination attempt on Prime Minister Robert Fico, urging political entities to ease social tensions and contribute to unity and stability in Slovakia. However, just 13 days after this resolution, Vice-Chairman of the Slovak Parliament Ľuboš Blaha launched a verbal attack on a specialized criminal court judge, questioning her independence and criminalizing her role. Reacting to this incident, the Judiciary Initiative for an Open Judiciary condemned the Vice-Chairman’s statements, emphasizing the importance of respecting and protecting the judiciary's independence. Such assaults on judicial independence by government officials threaten individual judges and the entire judicial system, undermining the rule of law and social respect for legal institutions. The ongoing public attacks on judges risk inciting dangerous actions against them and eroding Slovakia's fundamental rule of law principles.

B. Steps towards deterioration of the democratic legislation process

1) Most of the law is adopted in fast-track legislative proceedings

Laws are being approved without discussion, even worse than during the pandemic, as the fourth government of Robert Fico is passing nearly 60% of laws through fast-track legislative proceedings with no apparent justification. This significant increase in expedited laws indicates today's coalition's lack of respect for democratic lawmaking processes, prioritizing authoritarian decisions over quality expert debate. The rush in passing laws often leads to significant errors, necessitating corrections during parliamentary readings, diverging from the intended purpose of minor technical reviews. The expedited laws have limited public engagement, reducing the opportunity for legal experts, organizations, and the public to provide input and compromising legislation's quality, clarity, and comprehensibility. The trend of sidelining comprehensive expert discussions poses risks to the quality of laws and legal certainty, ultimately restricting citizens' rights without thorough consideration and input.

2) Fico IV administration bypassed the President's decision on the Chief of the Secret Service.

Several weeks after Fico IV came to power, it sent several signals to the public discourse about their intention of proposing Tibor Gašpar for the Chief of the Secret Service position. Tibor Gašpar, an indicted former police president, has been facing serious criminal charges. President Zuzana Čaputová publicly proclaimed she would have a problem appointing a person under charges.

Amidst the controversy, the Fico IV administration put forward a new candidate-Pavol Gašpar, the son of Tibor Gašpar. However, this move only added fuel to the fire, as Pavol Gašpar himself was charged with giving a false statement and lying under oath. He was also suspected of providing a €60,000 bribe to police officers. President Čaputová, in a clear stance, declared that she would defer the decision of appointing Pavol Gašpar to the next president, who would assume office in June 2024.

In a move that further raised eyebrows, the Fico IV administration amended the statute on the Slovak Secret Service. This revision shifted significant powers from the Chief to the Chief Deputy, a position now held by Pavol Gašpar. The extent of Gašpar's authority, however, remains a mystery, as the Secret Service statute is a confidential document. This secrecy breeds uncertainty and erodes trust, both domestically and on the international stage, in the Fico IV administration's actions.

3) Limitation of Freedom of Information Act

The nationalist party seeks to restrict citizens' fundamental right to information by proposing fees for handling information requests currently accessible for free. The proposed legislative changes could introduce charges for receiving non-confidential information from state authorities, limiting access based on financial means. Without clear definitions or guidelines, the proposal raises concerns about the discretion officials may wield in deciding which information warrants "extensive searches" and becomes subject to fees, effectively creating a paywall for critical information. The bill's lack of transparency and accountability opens avenues for authorities to selectively impede access to information, potentially hindering journalists, organizations, or political opponents from obtaining crucial data. By mirroring a flawed Czech model of information accessibility fees, the proposal risks granting unprecedented authority to state bodies, threatening democracy by curbing public access to vital information.

C. Steps against civil society

1) Civil society organizations propose solutions to the dangerous bill on „foreign influence.

Last month, the Slovak Parliament approved a proposal for amendments to the Non-Profit Organizations Act, Foundations Act, and Act on Non-Investment Funds, which was moved to the second reading. The bill allows for the cancellation of these organizations for additional reasons and mandates the disclosure of donors, contributors, and creditors. It introduces the label 'organization with foreign support' for NGOs receiving over 5,000 EUR from foreign sources or other labeled entities. This label must be used in all communications to increase funding transparency. Controversially, the bill may conflict with EU law. The Court of Justice of the European Union has ruled against similar labeling in the Hungarian Law on NGO transparency, questioning the bill's compliance with the principles of freedom of association and EU legal standards.

2) Public funding of civil society organizations goes under untransparent political control

The Ministry of Justice rejected addressing discrepancies in a decree that significantly alters the decision-making mechanism for human rights and freedom subsidies. A recent hearing at the Ministry of Justice of the Slovak Republic highlighted the strong opposition from various non-governmental organizations towards the proposed decree. The civil sector is concerned about the shift from an expert-assessed, transparent system to political decision-making without clarification. Ministry of Justice refused to maintain transparency and professionalism in subsidy evaluation. With the failure to compromise during the recent proceedings at the Ministry of Justice, a proposed amendment to Decree No. 322/2016 will now advance with a "discrepancy" to the Minister of Justice. This move is part of the government coalition's attempt to exert political influence over civil society, introducing changes like labeling organizations with foreign support. The Civil Platform for Democracy, backed by numerous NGOs and citizens, vows to utilize legal avenues to safeguard the civil sector's independence amidst these developments.

3) Prime Minister threatens parliamentary opposition, media, and civil society organizations.

Prime Minister Robert Fico, recovering from a shooting attack in May, released a video blaming parliamentary opposition, media, and civil society organizations for the assassination attempt, describing the attacker as an opposition activist driven by political hatred. Fico forgave the attacker and pledged not to take legal action against him. He also mentioned his severe health complications from the shooting but provided limited details. In the video, Fico accused anti-government media financed by George Soros, foreign NGOs, and the opposition for the attack, warning of further tragedies if aggressive politics continue unchecked. He criticized the EU and Western allies, highlighting differences in opinions and claiming a lack of respect for Slovakia's sovereignty. Fico predicted more violent incidents if the opposition and international parties did not alter their approaches, downplaying threats from opposition figures. The video helped SMER-SD to exploit the situation before the European Parliament election.

4) Assassination Law limits fundamental rights

Following the assassination attempt on Prime Minister Robert Fico, the government approved changes known as the 'lex atentát' (assassination law), which brought restrictions on public gatherings and introduced new benefits for government officials. The proposal, including a lifetime pension of €3,192

per month for Fico, fast-tracked through parliament with limited scrutiny. Fico will be the first Slovak prime minister to receive such benefits, with specific eligibility criteria that only he fulfills. The law also extends security entitlements to various political figures, including the president, prime minister, and ministers. Furthermore, there are restrictions on public gatherings near key governmental institutions to ensure smooth functioning without disturbances. Protests near designated officials' residences will be limited to maintain order and prevent disruptions. Concerns persist regarding the rushed and poorly drafted laws, lacking professional debates before being presented to parliament. Proposed amendments to the legislation include dropping penalties for municipalities hosting gatherings resulting in incidents, avoiding imprisonment for unpaid administrative fines, and the obligation for operators to share user metadata with the police for offensive online expression. The exclusion of key stakeholders and entities from contributing to crucial legislative discussions has led to poorly written drafts requiring last-minute revisions, diminishing the opportunity for public input or professional scrutiny. Critics highlight the danger of restricting expert discourse on laws that impact everyone, leading to flawed legislation and a limited channel for dissent beyond the streets in this peculiar interpretation of democracy.