Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice

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Judicial independence – Judicial accountability – Court presidents – Judicial politics – Separation of powers – Court administration – Judicial councils – Selection of judges – Czechia – Central Europe

When the communist regimes of Central and Eastern Europe collapsed in the late 1980s, each state in the region was faced with the tasks of restoring judicial independence and reforming its system of the administration of justice. The European Commission teamed up with the Council of Europe and eventually came up with a new template, the 'Judicial Council Euro-model'.[1] The central

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[1] For further details of this model and its rise in Europe *see* A. Seibert-Fohr, 'Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle', 52 *German Yearbook of International Law* (2009) p. 405; L. Müller, 'Judicial Independence as a Council of Europe Standard', 52 *German Yearbook of International Law* (2009) p. 461; C. Parau, 'The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe', 49 *Representation* (2013) p. 267; and M. Bobek and D. Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 15 *German Law Journal* (2014) p. 1257.

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feature of this model was a new institution – a judicial council[2] which was supposed to be granted most powers regarding the careers of individual judges.[3] This model was then endorsed in the accession process as the only 'right' solution capable of eradicating the vices of the post-communist judiciaries.[4] As a result of this pressure, most countries in Central and Eastern Europe, including Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia, adopted this 'pan-European template'.[5]

Not Czechia. It became the 'black sheep' of the region and the only post-communist EU Member State without a judicial council. Czechia thus became an 'outlier case'[6], with its judiciary exhibiting a relatively high level of independence from the executive, despite functioning within the Ministry of Justice model of court administration, yet at the same time very limited internal independence. Such a combination is puzzling. This article argues that the most important phenomenon since the Velvet Revolution, which explains this puzzle, is the rise in power of court presidents who play an intriguing twin role in ensuring judicial independence. It shows that Czech court presidents have managed, step-by-step, to erode the Minister's sphere of influence and have themselves become the most powerful players in the Czech judiciary, able to wield the most effective 'stick' (disciplinary motion) and 'carrot' (promotion) against individual judges. The Czech court presidents are thus both protectors of judicial independence and simultaneously a threat to it. More specifically, while court presidents have generally managed to gain independence from the Ministry of Justice and increase judicial autonomy, some have also misused their

[2] Judicial councils can be roughly defined as intermediary bodies between the political branches and the judiciary that have advisory or decision-making powers mainly in the appointment, promotion and discipline of judges. For a succinct categorisation of judicial councils *see* N. Garoupa and T. Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence', 57 *American Journal of Comparative Law* (2009) p. 103.

[3] For the purposes of this article, the 'Judicial Council Euro-model' means a particular model of judicial council which meets five criteria, namely: (1) it is entrenched in the Constitution; (2) it ensures that judges have at least parity in it; (3) real decision-making power is vested in it; (4) most competences regarding a judge's career are transferred to it; and (5) the Chief Justice or his/her equivalent is selected as its chairman (*see* Bobek and Kosař, *supra* n. 1, p. 1262-1264).

[4] *See* the literature in *supra* n. 1.

[5] *See* e.g. M. Popova, 'Why the Bulgarian Judiciary Does Not Prosecute Corruption?', 59 *Problems of Post Communism* (2012) p. 35 (on Bulgaria); A. Bodnar and L. Bojarski, 'Judicial Independence in Poland', in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) p. 667 (on Poland); R. Coman and C. Dallara, 'Judicial Independence in Romania', in ibid. p. 835 (on Romania); Z. Fleck, 'Judicial Independence in Hungary', in ibid. p. 793 (on Hungary); and D. Kosař, *Perils of Judicial Self-Government* (Cambridge University Press 2016) p. 236-333 (on Slovakia).

[6] For more details on the 'outlier case' logic and on why outlier cases are particularly important for theory-building research *see* R. Hirschl, 'The Question of Case Selection in Comparative Constitutional Law', 53 *American Journal of Comparative Law* (2005) p. 125 at p. 146-152.

newly-accrued powers against rank-and-file judges with the intent of keeping them compliant and loyal. This article concludes that court presidents wield huge powers, either directly or indirectly, also in other countries in Central and Eastern Europe, and, thus, the problem of limited internal independence of judges from court presidents permeates the entire region. Ultimately, it is impossible to understand judicial politics in Central and Eastern Europe and to reform their judiciaries without acknowledging the central role of court presidents.

The contribution of this article to the existing literature is two-fold. First, it shows that the post-communist judiciary can achieve significant judicial autonomy even without a judicial council. The Czech development suggests that court presidents may *de facto* fulfil the tasks of the judicial council in preserving the independence of the judiciary from political branches. In other words, several paths lead to judicial autonomy, and a judicial council is just one of them. Second, greater judicial autonomy is not in itself sufficient for achieving the independence of individual judges. While Czech judges are relatively well shielded from external threats to their individual independence coming from the executive and legislative branches, they are left unprotected against internal threats from court presidents, and may become, *de facto*, dependent on them. We must thus accept that the independence of the judiciary and the independence of individual judges are two different things, and that increasing the former does not automatically improve the latter. This forces us to rethink our strategies aimed at increasing judicial independence and to acknowledge that judicial autonomy, ensured by the judicial council or autonomous court presidents, is neither necessary nor sufficient to achieve individual judicial independence. More specifically, this article argues that we should pay more attention to the independence of individual judges irrespective of the model of court administration in which they operate, because such a strategy is more resistant to abusive constitutionalism.

This article proceeds as follows. First, it introduces the key players in Czech judicial politics after the Velvet Revolution. Then it demonstrates how court presidents have gradually managed to free themselves from the Minister of Justice, and analyses the ensuing political backlash. Subsequently, it illustrates how the court presidents managed to contain this backlash, which resulted in a fragile balance between court presidents and the Ministry of Justice. Finally, it discusses the broader repercussions of the Czech case study. It concludes that court presidents in other countries in the region also wield huge powers, that the internal independence of judges from court presidents must be increased, and that it is necessary to shift attention from the independence of the judiciary to the independence of individual judges.

Setting the scene: key players in Czech judicial politics

To understand Czech judicial politics, it is necessary to identify its *de facto* key players. As will be shown, it is not enough to rely on the Constitution and

statutory law, as some of those players are rather informal bodies. Moreover, written law does not tell us much about the real powers of, and mutual relations between, formal organs.

In a nutshell, since the fall of the Austro-Hungarian Empire the Czechoslovak model of court administration, like those of other countries in Central Europe,[7] always rested on two pillars: the Ministry of Justice and the court presidents.[8] Even the communist regimes relied heavily on these two actors.[9] These two pillars did not change after the division of Czechoslovakia, since Czechia has not established a nation-wide judicial council.[10] In addition to the Ministry of Justice and the court presidents, six more actors intervene in Czech judicial politics: the Czech President; the government; the Parliament; the Constitutional Court; the judicial boards[11] and the Judicial Union. This section will briefly sketch the role of these eight players.

Czech court presidents have accumulated significant powers vis-à-vis individual judges. They have the best overview of what is going on within the judiciary and this information asymmetry works in their favour. Their big advantage is that they remain in office much longer than the Ministers of Justice.[12] They can make use of the most important 'stick' available to civil law judiciaries (disciplinary motion), play a major role in handing out the most important 'carrot' (promotion of judges), and have an important say, together with the Minister of Justice, in the

[7] *See* e.g. S. Frankowski, 'The Independence of the Judiciary in Poland: Reflections on Andrzej Rzeplinski's Sadownictwo w Polsce Ludowej (The Judiciary in Peoples' Poland) (1989)', 8 *Arizona Journal of International & Comparative Law* (1991) p. 33 at p. 40–47; and I. Markovits, 'Children of a Lesser God: GDR Lawyers in Post-Socialist Germany', 94 *Michigan Law Review* (1996) p. 2270 at p. 2292–2293.

[8] *See* M. Bobek, 'The Administration of Courts in the Czech Republic – In Search of a Constitutional Balance', 16 *European Public Law* (2010) p. 251 at p. 252-254; and Z. Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Brill 2011) p. 1-4 and 7–8.

[9] *See* e.g. A. Bröstl, 'At the Crossroads on the Way to an Independent Slovak Judiciary', in J. Přibáň et al. (eds.), *Systems of Justice in Transition: Central European Experiences since 1989* (Ashgate 2003) p. 141 at p. 143; and E. Wagnerová, 'Position of Judges in the Czech Republic', in ibid., p. 163 at p. 167.

[10] Due to space constraints, this article cannot get into the details of why the 2000 constitutional bill, which was intended to introduce the judicial council model of court administration in the Czech Republic, was rejected by the Czech Parliament. For further details *see* Bobek, *supra* n. 8, p. 269; and Kosař, *supra* n. 5, p. 182-185.

[11] A judicial board is a 'self-governing' judicial body created at every Czech court that consists exclusively of regular judges of a given court. Court presidents and vice-presidents cannot sit on judicial boards.

[12] Note that Czech court presidents were appointed for life (until September 2008) and then for a term of 7 to 10 years (since October 2008). In contrast, the average length of the term of the Czech Minister of Justice since 1993 has been less than two years; *see also infra* n. 59.

secondment of judges. Moreover, they also completely control several small-scale[13] mechanisms which usually escape scholarly attention, such as case assignment, the reassignment of judges among the panels, and the selection of judges for grand chambers at top courts. These mechanisms may at first seem marginal, but they have tremendous consequences in the long run for the judges affected. Moreover, court presidents gradually became gatekeepers to the judiciary, as it is they, and not the Minister of Justice, who hand-pick new judges.[14] Finally, it is important to stress that court presidents play a dual role within the Czech judiciary: they act as both managers vested with the above-mentioned administrative tasks and as judges who decide cases like any other judge.[15] Court presidents can thus exploit this 'functional schizophrenia' and portray any action against them by the executive as not only taking aim at their administrative function, but as an attack on their judicial function.[16]

However, court presidents as a group do not comprise a uniform body. Two important informal bodies within the ranks of court presidents have gradually emerged: the college of presidents of regional courts and the trinity of top court presidents. The 'college of presidents of regional courts' is an informal group that consists of the presidents of all eight regional courts. They usually meet four times a year to discuss current issues within the judiciary.[17] Regional court presidents decided to create the college in 2001[18] for two reasons: to discuss practical issues that affected all regional courts, and from a sense that they had to take the lead in judicial reform.[19] Initially, the college focused on the former, but it soon shifted its attention to the latter. Even though the college has no statutory underpinning[20] and operates on a purely informal basis, it is an influential body in Czech judicial politics. Minutes from its meetings are sent to and regularly

[13] On the importance of such small-scale mechanisms in general *see* A. Vermeule, *Judicial Mechanisms of Democracy: Institutional Design Writ Small* (Oxford University Press 2007).

[14] *See* Kosař, *supra* n. 5, p. 188-191 and 215-216.

[15] In most civil law systems, court presidents have a reduced case load due to their numerous administrative tasks.

[16] I am grateful to an anonymous reviewer for this insight.

[17] Interview with a former president of a regional court (who was one of the co-founders of the college) of 6 May 2015.

[18] According to one of the 'founding fathers' of the college, the idea of creating an informal association of regional court presidents was suggested to them by Mr Jean-Michel Peltier, a French liaison magistrate in Prague (ibid.).

[19] Interview with a former president of a regional court (who was one of the co-founders of the college) of 6 May 2015.

[20] Note that in 2007 presidents of regional courts attempted to formalise the college and entrench it into the Law on Courts and Judges. However, both the Minister of Justice and the presidents of the top courts rejected that idea, and the relevant amendment to the Law on Courts and Judges was not adopted (ibid.).

discussed within the Ministry of Justice.[21] The key media take the college's position seriously as well.

More recently, the presidents of the Constitutional Court, the Supreme Court and the Supreme Administrative Court have created an informal 'trinity of top court presidents'.[22] The presidents of these three top courts, each in his or her way, have always exercised their influence on the Czech judiciary. However, they only formed a truly cohesive group in 2015. This was prompted by the resignation of the then Supreme Court President Iva Brožová[23] in January 2015,[24] to be eventually replaced by Pavel Šámal. Šámal soon found common ground with the President of the Constitutional Court, Pavel Rychetský, and, in particular, with the President of the Supreme Administrative Court, Josef Baxa.[25]

The Ministry of Justice is the second key player. It has historically played the most important role in court administration and in holding judges to account. The interwar Czechoslovak judiciary, based on the Austrian bureaucratic model,[26] was strictly hierarchical[27] with the Minister of Justice at its apex. During the communist era, the Ministry of Justice became the transmission belt[28] of the Communist Party and the Minister of Justice was himself subject to supervision by the General Prosecutor.[29] However, after the Velvet Revolution Czechia soon

[21] For further details on the emergence of the college of presidents of regional courts *see* Kosař, *supra* n. 5, p. 179-180.

[22] This term has not been coined in Czech. Nevertheless, policy makers as well as journalists often speak of the consensus among the '*trojice*' of the court presidents of the Czech top courts.

[23] This was in fact a strategic resignation as her successor was agreed upon beforehand.

[24] Note that Iva Brožová was often out of sync with Pavel Rychetský and Josef Baxa.

[25] Pavel Rychetský and Josef Baxa have known each other well since the late 1990s as Josef Baxa was a Vice-Minister of Justice in the Government of Miloš Zeman (1998-2002), whose Vice-PM was Pavel Rychetský.

[26] *See* Kühn, *supra* n. 8, p. 1-4 and 7–8; and Bobek, *supra* n. 8, p. 252-253.

[27] On the distinction of the hierarchical and coordinate ideal of authority *see* M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986) p. 16-46 and 181-239.

[28] The 'transmission belt' metaphor suggests that the Czechoslovak court presidents, who could be recalled by the Communist Party anytime at a whim, were the conduit of the Communist Party influence over individual judges. The main role of the court presidents was thus to 'transmit' orders from the Communist Party to individual judges in sensitive cases. For the discussion of the 'transmission belt' argument in the Czech Republic after the Velvet Revolution, *see infra* n. 53.

[29] Note that under the Soviet model of *prokuratura* the General Prosecutor was the main guardian of the socialist legality who, apart from vast powers in civil and criminal trials, was also responsible for the court administration and supervising judges. *See* Art. 6 of Constitutional Law No. 64/1952 Col., on Courts and Procuracy; Wagnerová, *supra* n. 9, p. 167; and Kühn, *supra* n. 8, p. 43-45 and 61-62 (all regarding the communist Czechoslovakia). On the Soviet *prokuratura* more generally, *see* e.g. G. Smith, *The Soviet Procuracy and the Supervision of Administration* (Springer 1978) and J. Hazard, *Communists and Their Law* (University of Chicago Press 1969).

returned to the interwar model and vested significant powers in the Ministry of Justice. The Minister of Justice *de jure* nominates candidates for judicial office to the President,[30] but due to high turnover and information asymmetry most ministers have outsourced the actual selection of new judges to court presidents.[31] The Minister of Justice can also initiate disciplinary motions, but again due to information asymmetry he has, in practice, not wielded this stick as often as court presidents have. In addition, the Minister *de jure* proffers the most tempting carrot (promotion of individual judges) and has a final say regarding the secondment of judges, but court presidents have *de facto* taken control of these mechanisms as well.

The President of the Czech Republic also has his say in Czech judicial politics as he *de jure* wields wide powers as regards the judiciary. According to the Czech Constitution, he appoints all judges of the ordinary courts, appoints the presidents and vice-presidents of the Supreme Court and Supreme Administrative Court[32] and, upon approval by the Senate, appoints all judges of the Constitutional Court.[33] Thus, he *de jure* exercises a significant influence over both ordinary courts and the Constitutional Court. The Supreme Administrative Court and the Constitutional Court eventually curtailed the President's discretion in appointing judges of the ordinary courts[34] and in dismissing the court presidents of apex courts,[35] but the extent of the President's discretion in selecting court presidents and vice-presidents of top courts[36] remains unclear.[37]

[30] Since the late 1990s a new constitutional convention has emerged. The Minister of Justice first presents the list of candidates to the Government, which votes on the list and then submits it to the Czech President who formally appoints the judges (Art. 63(1)(i) of the Czech Constitution).

[31] *See supra* n. 14.

[32] *See* Art. 62(f) of the Czech Constitution.

[33] *See* Art. 84(2) of the Czech Constitution.

[34] Due to space restrictions, it is not possible to discuss this line of case law in detail here. In a nutshell, the Supreme Administrative Court held that the President of the Czech Republic had to either appoint a judge nominated by the Government or issue an administrative decision that provides reasons for not appointing a given judge. This administrative decision is then, according to the Supreme Administrative Court, reviewable by administrative courts (*see* Judgment of the Czech Supreme Administrative Court of 21 May 2008, No. 4 Ans 9/2007-197). However, the then Czech President, Václav Klaus, refused to implement this judgment and never issued such a decision. As a result, the scope of administrative review in such cases is unclear. For further details *see* Bobek, *supra* n. 8, p. 260-263.

[35] *See* Judgments of the Czech Constitutional Court of 11 July 2006, case no. Pl. ÚS 18/06; of 12 December 2006, case no. Pl. ÚS 17/06; of 12 September 2007, case no. Pl. ÚS 87/06, §§ 40-41 and 70; and of 6 October 2010, case no. Pl. ÚS 39/08, §§ 62-69. All of these judgments are discussed in more detail below.

[36] Since 2008 the President has also appointed presidents of high courts and regional courts, in both cases upon nomination by the Minister of Justice.

[37] *See* Bobek, *supra* n. 8, p. 260-263.

In contrast to the Minister of Justice and the President, the Czech government has very few powers regarding the judiciary. Its one real power allows it to approve the list of candidates for judicial office as drafted by the Minister of Justice before the list is submitted to the President, who then formally appoints all judges in the Czech Republic.[38] In practice, the government has only rarely intervened in the Minister's list. As a result, the Government as a collegiate organ has so far not played a significant role in the judicial career matters.

The Czech Parliament has even less power regarding the careers of ordinary judges.[39] It does not play any role in their selection, promotion or disciplining. Hence, the Parliament's options for intervention in daily judicial politics are extremely limited. However, the Parliament holds the law-making power and may amend the Law on Courts and Judges and other laws affecting the status of courts and judges. As will be shown below, such statutory amendments may significantly reshuffle the cards in Czech judicial politics. The Czech Parliament may also ultimately amend the Czech Constitution, but it has not resorted to a wide-scale[40] constitutional reform of the judiciary so far.[41]

The Czech Constitutional Court, based upon the German centralised model of constitutional adjudication,[42] is another important player. It is a powerful institution that is not shy of striking down constitutional amendments[43] and even of openly clashing with the European Court of Justice.[44] The fragmented political scene in Czechia makes the Constitutional Court even stronger. The interferences of the Constitutional Court in 'judicial design issues' are so numerous that it is

[38] *See supra* n. 30.

[39] Note that the Czech Parliament plays a key role in staffing the Czech Constitutional Court, as its upper chamber, the Senate, confirms all Justices of the Czech Constitutional Court (by simple majority) upon the nomination of the President of the Czech Republic (*see supra* n. 33).

[40] All changes to Chapter Four (the Judicial Branch) of the Czech Constitution adopted since 1993 have been rather cosmetic in nature.

[41] Note that the only attempt to change the large-scale structure of the Czech judiciary, the 2000 constitutional Bill which was supposed to introduce the judicial council, was rejected by the Czech Parliament in 2000. *See also supra* n. 10.

[42] D. Kosař, 'Conflicts between Fundamental Rights in the Jurisprudence of the Czech Constitutional Court', in E. Brems (ed.), *Conflicts Between Fundamental Rights* (Intersentia 2008) p. 347 at p. 348–351. For a broader comparative context *see* W. Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014) p. 13-27 and 91-117.

[43] *See* Y. Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act', 8 *Vienna Journal on International Constitutional Law* (2014) p. 29.

[44] *See* R. Zbíral, 'A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires (Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12)', 49 *CMLR* (2012) p. 1475; and M. Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure', 10 *EuConst* (2014) p. 54.

impossible to deal with them here.[45] Virtually any 'judicial design issue' ends up before the Constitutional Court and that Court has adopted the most stringent level of judicial review in these matters.[46]

Judicial boards[47] were established at all Czech courts in 2002.[48] They have a statutory basis and comment primarily on the promotion and secondment of judges to a given court, on the division of the court's case load and on the system of case assignment.[49] Judicial boards are 'self-governing' bodies as they consist of judges of a given court, but their powers are only advisory and court presidents are not bound by their advice.[50] In sum, the powers of judicial boards are narrow and limited to a particular court. These boards thus should not be confused with a country-wide judicial *council*.[51]

Finally, the Judicial Union is a professional association of judges which was established in 1990. The Judicial Union claims that it represents approximately one third of Czech judges, most of whom come from lower courts.[52] The main goals of the Judicial Union include protecting judicial independence, participating in the continuous education of judges, representing the interests of the judiciary, contributing to the democratic legal order, promoting modern models of court administration and cooperation with similar bodies abroad. The Judicial Union has been particularly vocal in promoting the judicial council model of court administration and its members have taken a leading role in challenging judicial reforms before the Constitutional Court.

These eight institutional players interact in many ways. Sometimes they cooperate, sometimes they fight each other. Their powers are not static. Their strength has been tested in many political battles and influenced by judgments of the Constitutional Court as well as by statutory amendments. As a result, the role

[45] For a snapshot of these interventions *see* Bobek, *supra* n. 8.

[46] *See* ibid.

[47] Given the nature and composition of these bodies, the more appropriate translation into English would be 'judicial assemblies', but all materials on the Czech judiciary in English, including the accession reports of the European Union, use the term 'judicial board'. Hence, in order to avoid confusion, this article will also refer to these bodies as 'judicial boards'.

[48] Small district courts are an exception, as there is no judicial board at district courts with fewer than 11 judges. Instead, the plenary session consisting of all the judges fulfils the tasks of a judicial board. For further details *see* Arts. 46-59 of Law no. 6/2002 Coll., on Courts and Judges.

[49] Arts. 50-53 of Law No. 6/2002 Coll., on Courts and Judges.

[50] The central position of court presidents is further buttressed by the fact that they set the agenda for judicial board meetings.

[51] This mistake was made even by the European Commission. *See* the 2002 Accession Progress Report on the Czech Republic, p. 22: 'The … [2002 Law on Courts and Judges] introduced a first step towards self-government of the judiciary by the creation of *Judicial Councils* which have the status of consultative bodies at all court levels' (emphasis added).

[52] I am grateful to the President of the Judicial Union, Daniela Zemanová, for this information.

of each of these players has waxed and waned. Nevertheless, all anecdotes left aside, one can easily see the major trajectory of the Czech politics of judicial independence and judicial accountability. This trajectory will be sketched out in the two sections that follow.

Gradual emancipation of court presidents from the executive and the subsequent Backlash

The key players in Czech judicial politics are the Minister of Justice and court presidents, since they, acting together, control most mechanisms of judicial independence and judicial accountability. It is thus crucial to understand the relationship between these two actors. It would seem that, if the Minister of Justice can appoint court presidents and then dismiss them at will, he could then easily induce them to comply with his wishes. In the most extreme situation, court presidents could even operate as 'transmission belts' for the executive.

The 'transmission belt' argument goes as follows. Until the mid-2000s, Czech Ministers of Justice[53] could, *de jure*, dismiss court presidents without providing any reason. Thus, rank-and-file judges held to account by court presidents were indirectly held to account by the Minister of Justice, since Ministers of Justice *de jure* decided on who would be named court president. Thus, as the 'transmission belt' argument suggests, court presidents were the conduit of executive influence over individual judges. That would mean that the main role of court presidents, comparable to the communist era,[54] was to 'transmit' orders to individual judges in sensitive cases.

However, this 'transmission belt' argument does not work in Czechia. Even though the 1991 and 2002 laws on courts and judges gave the Minister of Justice the power to dismiss court presidents of the district, regional and high courts, he used his power rarely. Why? First, the political costs of dismissing court presidents became extremely high. Most ministers desperately wanted to avoid this type of confrontation, which would hand the opposition parties the proverbial stick with which to beat the Minister and the ruling coalition. In the 1990s some Ministers dared to take the risk. For instance, when Otakar Motejl became the Minister of Justice in 1998, he soon dismissed five of the eight regional court presidents.[55] However, Motejl's gravitas was rather unique. He was himself the

[53] Note that the 'transmission belt' argument has a different twist regarding the apex courts, where it was the Czech President (and not the Minister of Justice) who could, *de jure*, recall the presidents of the Supreme Court and the Supreme Administrative Court. However, the logic remains the same.

[54] However, there was one difference: court presidents were supposed to follow the orders of the executive and not the Communist Party. On the role of court presidents during the communist Czechoslovakia, *see supra* n. 28.

[55] *See* J. Kolomazníková and L. Navara, 'Pravým důvodem odvolání soudců je zřejmě jejich minulost', *IDnes.cz*, 17 March 1999.

former Supreme Court President, and thus his actions had the necessary veneer of legitimacy. Yet even Otakar Motejl, whose stature and reputation were unquestionable, faced severe criticism from the new Supreme Court president Eliška Wagnerová, the remaining lower court presidents, and the media for this move. Moreover, the court presidents, who felt threatened by the active use of this power by the Ministers of Justice, eventually fought back and fiercely attacked Motejl's ultimately unsuccessful proposal for a High Council of the Judiciary.[56] In the early 2000s, while subsequent Ministers of Justice also occasionally resorted to the dismissal of court presidents, none of them did so on as large scale as Motejl. In 2006 the Czech Constitutional Court put an end to the practice altogether.[57]

Second, the ministers actually needed court presidents in order to conduct meaningful policy and to make well-informed decisions on promotions and other personnel matters. There are no individualised judicial statistics and no performance evaluations of individual judges, and virtually no judgments of the lower courts were published.[58] The high turnover of ministers of justice further tipped the balance. There were 16 ministers of justice between 1993 and 2015 and the average length of their term was less than two years.[59] In contrast, most court presidents held office for more than a decade. Due to this information asymmetry, the ministers simply had to rely on the judgment of the incumbent regional court presidents who had hands-on daily experience with individual judges and who had held office for many years or even decades.[60] As a result, they started to treat the presidents of regional courts like partners.[61] Pavel Rychetský, the Vice-Prime Minister (1998-2003) and the Minister of Justice (2002-2003), put it frankly. When asked 'What is the personal politics of a minister of justice?' he replied 'The one that fulfils the wishes of the regional court presidents'.[62]

[56] For the reasons of this failure *see* Bobek, *supra* n. 8, p. 256; and Kosař, *supra* n. 5, p. 182-185.

[57] *See infra* nn. 63-71.

[58] The access to decisions of the Czech lower courts improved significantly in the late 2000s, but not all are available.

[59] The term of the current Minister of Justice, Robert Pelikán, who has held the office since March 2015 is not taken into account. *See also supra* n. 12.

[60] That explains why Ministers of Justice needed *particular* court presidents. i.e. those who already held the office (incumbents), and could not replace the sitting court presidents easily. In other words, the sitting court presidents were well embedded and regarded in the system, and thus it was difficult to dismiss them.

[61] Note that Jiří Pospíšil held the office of the Minister of Justice twice (2006-2009 and 2010-2012) and thus he is counted twice.

[62] P. Rychetský, 'Pohled ministrů spravedlnosti' in J. Kysela (ed.), *Hledání optimálního modelu správy soudnictví pro Českou republiku Searching for the Optimal Model of Czech Court Administration* (Senát ČR 2008) p. 20 at p. 22. The contributions of other three ministers of justice – Otakar Motejl (1998-2000), Karel Čermák (2003-2004) and Jiří Pospíšil (2006-2009 and 2010-2012) – confirm Rychetský's view (*see* ibid. at p. 15, 18, and 28-31).

However, that was not the end of the emancipation process. A few years later, Czech court presidents started to challenge their dismissals before administrative courts and the Constitutional Court, and eventually won.[63] In 2005 the Prague Municipal Court annulled the decision of the Minister of Justice to remove the President of the District Court for Prague-West on the ground that it was not sufficiently reasoned.[64] Less than year later, the Czech President, Václav Klaus, dismissed Iva Brožová from the position of President of the Supreme Court[65] with a terse letter that did not state any reasons for her dismissal, and appointed Jaroslav Bureš to the post instead. It was the first time the Czech President had ever dared to do so. Iva Brožová immediately challenged her dismissal before the Constitutional Court, and she also won. The Constitutional Court based its judgment on the principles of the separation of powers and the independence of the judiciary. It struck down Article 106 of the Czech Law on Courts and Judges, declaring that it was unconstitutional for the executive to dismiss the presidents and vice presidents of courts.[66] Subsequently, the Constitutional Court also annulled the very assignment of Jaroslav Bureš to the Supreme Court (as a regular Supreme Court judge),[67] since the appointment was made without the consent of the President of the Supreme Court (Iva Brožová),[68] and voided his subsequent appointment to the position of Vice-President of the Supreme Court.[69] Iva Brožová thus not only managed to keep her position as President of the Supreme Court,[70] but also blocked the appointment of Jaroslav Bureš to any position at the Supreme Court.[71]

[63] For further details including more doctrinal analysis of these cases *see* Bobek, *supra* n. 8, p. 263–265.

[64] Judgment of the Municipal Court in Prague (Administrative Division) of 24 July 2005, Case 5 Ca 37/2005-42.

[65] Note that Brožová was stripped 'only' of the position of *court president*. She was not dismissed from *judicial office* and thus she still remained a judge of the Supreme Court.

[66] Judgment of the Czech Constitutional Court of 11 July 2006, case no. Pl. ÚS 18/06.

[67] Judgment of the Czech Constitutional Court of 12 December 2006, case no. Pl. ÚS 17/06.

[68] This consent is required by Art. 70 of Law on Courts and Judges, but the Czech Constitution does not contain such rule and merely stipulates that the Czech President appoints judges (Art. 63(1)(i) of the Czech Constitution).

[69] *See* Judgment of the Czech Constitutional Court of 12 September 2007, case no. Pl. ÚS 87/06, §§ 40-41 and 70.

[70] However, her conflicts with politicians did not fade away. After the unsuccessful dismissal of Brožová in 2006 by the President Václav Klaus the Czech Parliament attempted to shorten her term of office as Supreme Court President via the statutory amendment in 2008. Nevertheless, this statutory amendment was again quashed by the Constitutional Court in 2010 (*see* Judgment of the Czech Constitutional Court of 6 October 2010, case no. Pl. ÚS 39/08, § 68). So Brožová won yet again. But she became increasingly tired of the constant battles with politicians and eventually resorted to a strategic resignation in 2015 (*see also supra* n. 23).

[71] Jaroslav Bureš eventually became the Vice-President of the High Court of Prague. For further details *see* Kosař, *supra* n. 5, p. 173-175.

As a result of the Brožová cases, the dismissal of court presidents became unconstitutional. This significantly altered the constitutional balance between the executive and the judiciary. The emancipation of Czech court presidents seemed to have reached its final stage, since after the rulings of the Constitutional Court the Ministers of Justice had very few means to force them to cooperate.[72]

However, this triumph for court presidents did not last long. The emancipation of the court presidents from the Ministry of Justice and their major victories before the Constitutional Court did not escape the attention of Czech politicians. Even the Constitutional Court Justices realised that they had stretched the Czech Constitution to its very limits in the Brožová cases.

Court presidents thus soon witnessed a backlash. A first and unexpected blow came from the Czech Parliament, which reacted to the Constitutional Court rulings prohibiting the dismissal of court presidents by introducing limited terms for all court presidents.[73] Until 2008, court presidents were appointed by the Minister of Justice for an indefinite period. The only exception applied to court presidents of the two highest courts, the Supreme Court and the Supreme Administrative Court, who also enjoyed an indefinite term, but were appointed by the Czech President.[74] The 2008 Amendment to the Law on Courts and Judges put an end to indefinite terms for all court presidents.[75] Since 2009, court presidents of district courts, regional courts and high courts have been appointed for seven year terms,[76] whereas the Presidents of the Supreme Court and the Supreme Administrative Court are appointed for a term of ten years.[77] During this term, which was originally renewable once, court presidents can be removed only by a disciplinary panel. This means that the Minister of Justice and the President lost their power to dismiss court presidents. Therefore, the 2008 Amendment to the Law on Courts and Judges in fact did two things. It introduced term limits

[72] This is in stark contrast with the post-Soviet judiciaries. On the latter *see* e.g. A. Ledeneva, 'From Russia with *Blat*: Can Informal Networks Help Modernize Russia?', 76 *Social Research* (2009) p. 257 at p. 276 and M. Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge University Press 2012) p. 139-145.

[73] The same limited terms also apply to vice-presidents. However, vice-presidents are vested with only limited competences and hence this article focuses primarily on court presidents, who wield real power.

[74] The same procedure applies to the Vice-Presidents of the Supreme Court and the Supreme Administrative Court.

[75] Note that the 2008 Amendment to the Law on Courts and Judges (Law No. 314/2008 Coll., amending Law on Courts and Judges) introduced the same limited terms also for vice-presidents. *See also* Bobek, *supra* n. 8, p. 263-265.

[76] *See* Arts. 103(2), 104(2), 105(2) and 106(2) of Law on Courts and Judges.

[77] *See* Art. 102(2) of Law on Courts and Judges; and Art. 13(3) of Law No. 150/2002 Coll., the Code of Administrative Justice.

for court presidents and at the same time guaranteed them security of tenure. This was a true paradigm shift.

The introduction of limited terms for court presidents caused an outcry among then incumbent court presidents, whose position had been challenged for the first time since the independence of Czechia. Some court presidents realised that they would have to become rank-and-file judges again at some point down the road. A group of senators eventually echoed their concerns and challenged this part of the 2008 Amendment before the Constitutional Court.

However, there came another blow, which was even more unanticipated. To the surprise of many court presidents, the Constitutional Court sided with the politicians regarding the introduction of limited terms for court presidents. In fact, it even increased the turnover among court presidents. It not only found that the introduction of limited terms for court presidents [78] and the application of the limited terms to the incumbent court presidents[79] were constitutional, it also struck down, for fear of potential personal corruption of sitting court presidents seeking re-appointment, the provision that allowed the re-appointment of the same court president for a second term.[80] By adopting this unexpected position the Constitutional Court *de facto* ordered a complete overhaul of the Czech judicial leadership as *all* presidents and vice-presidents of Czech ordinary courts were required to leave their posts by 2018 at the latest. Court presidents of 86 district courts, 8 regional courts and 2 high courts had to do so by September 2015,[81] the two court presidents of the Supreme Court and Supreme Administrative Court by September 2018.[82] By now, all then-incumbent court presidents except for the President of the Supreme Administrative Court[83] are gone,[84] which is the most important change within the Czech judiciary since the Velvet Revolution.

The third blow came from the Minister of Justice, Jiří Pospíšil, who served his second term as the minister between 2010 and 2012. He attempted to rebalance the relationship between the Ministry of Justice and court presidents and, to this

[78] Judgment of the Czech Constitutional Court of 6 October 2010, case no. Pl. ÚS 39/08, §§ 62-64.

[79] Ibid., §§ 67-69.

[80] Ibid., §§ 65-66.

[81] That is within seven years from October 2008, when the 2008 Amendment to the Law on Courts and Judges entered into force. *See supra* n. 76.

[82] That is within 10 years from October 2008, when the 2008 Amendment to the Law on Courts and Judges entered into force. *See supra* n. 77.

[83] Note that the incumbent President of the Supreme Court, Iva Brožová, resigned voluntarily in January 2015. *See supra* n. 24.

[84] The situation regarding the vice-presidents is slightly different. For the sake of brevity, this issue is not addressed here.

end, in 2012 prepared a new Bill which was supposed to amend the Law on Courts and Judges. Even though Jiří Pospíšil eventually failed and his 2012 Bill was not adopted,[85] it was an important milestone in the bargaining game between the Minister of Justice and court presidents. This Bill intended, among other things,[86] to change the mode of selection of judges and court presidents. More specifically, it proposed the creation of mixed commissions, composed of both members of the Ministry of Justice and the judiciary, who would select new judges as well as new court presidents. This move was perceived by court presidents as an attempt to strengthen the position of the Minister of Justice, since prior to this Bill new judges were *de facto* selected by regional court presidents alone and new court presidents were agreed upon behind closed doors.[87] Understandably, court presidents vigorously opposed this change. Jiří Pospíšil, in turn, increased the tension by freezing all judicial nominations until the new mode of selection of judges was agreed upon and the 2012 Bill had passed. By freezing all judicial nominations Pospíšil wanted to show raw power and force court presidents to accept his Bill.

Towards a fragile balance between the Ministry of Justice and court presidents

It took court presidents several years to recover from these three blows and to contain the backlash which endangered their privileged position. Regarding the third blow, court presidents got lucky as Jiří Pospíšil was dismissed as Minister of Justice in June 2012 before he could present the 2012 Bill in Parliament. The new minister of justice, Pavel Blažek, had less radical views regarding judicial reform, wanted to maintain a friendlier relationship with court presidents, and thus scrapped the 2012 Bill.[88] That means that the selection of judges did not change at all and that court presidents had thus preserved their power. Similarly, the selection process for new court presidents was not explicitly introduced in the Law on Courts and Judges. As a result, each Minister of Justice adopted his own selection method, which again *de facto* preserved the status quo.

[85] *See* the next part of this article.

[86] The 2012 Bill also intended to introduce judicial performance evaluation and financial declarations of judges. Both of these tools would give the Ministry of Justice the necessary information to counter the existing information asymmetry (which worked, until then, in favour of court presidents) and to make more informed decisions regarding the promotion of judges. These two tools would thus also work to the disadvantage of court presidents, who would lose their competitive edge.

[87] *See supra* n. 14.

[88] *See* J. Hardoš, ' Blažek odložil zavedení výběrových řízení na nové soudce' *Blažek put the competitive selection procedure for new judges on the shelf*, *Právo*, 2 August 2012, p. 4.

It has proved more difficult to repair the perceived damage caused by the 2008 Amendment and the subsequent ruling by the Constitutional Court. Nevertheless, the court presidents still managed to deflect these two blows to their status and powers. But before we explain the techniques employed by Czech court presidents, we need to explain why they felt so threatened by the introduction of a non-renewable limited term and fought back to dismantle it. Their motivation was two-fold.[89] First, they wanted to preserve their influence within the judiciary. Second, they wanted to keep additional privileges attached to the office of court president such as a significant salary increase, reduced case load, wide secretarial support and extra law clerks. In fact, some long-serving court presidents were no longer able to operate without these privileges. They could not imagine themselves shouldering a normal case load (in terms of both quantity and composition) with the aid of fewer law clerks. They were no longer judges in the true sense. It is this dual rationale that explains why they were challenging a non-renewable limited term so vigorously.

So, how did court presidents contain the perceived damage caused by the 2008 Amendment and the subsequent ruling of the Constitutional Court? Soon after the Constitutional Court ruled to prohibit renewable terms for court presidents, the court presidents of lower courts started to forge informal alliances with the presidents of higher courts in order to secure their positions after the expiration of their current terms. Whether out of professional courtesy for their fellows or for other reasons, many presidents of regional courts were willing to fill the vacancies at their courts with lame duck district court presidents. Likewise, the presidents of high courts started providing the same 'shelter' to regional court presidents whose mandate had expired. Some of those promoted incumbent lower court presidents soon became the vice-presidents or presidents of the higher courts to which they were promoted.[90]

However, the number of vacancies at higher courts is limited, and not all of them could be filled by ousted lower court presidents. Therefore, court presidents had to devise other strategies. Initially, they came up with the argument that having the court president and vice-president of a given court merely switch positions would satisfy the requirements of the Constitutional Court ruling, even though it defied the logic of the argument of the Constitutional Court that wanted to prevent the dependence of court presidents on the politicians (the Minister of Justice and the Czech President) who appoint them.

[89] *See also* Kosař, *supra* n. 5, p. 403 (describing how the same two-fold motivation 'forced' Slovak court presidents to fight back against the introduction of the Judicial Council of the Slovak Republic and explaining why Slovak court presidents eventually captured the Judicial Council of the Slovak Republic).

[90] *See* L. Derka, 'Pro soudní funkcionáře právo neplatí?', 4 *Soudce* (2015) p. 7.

Later on, some court presidents 'temporarily' authorised the incumbent vice-president to govern his or her court section even after the mandate of the incumbent vice-president had expired. By doing so, these court presidents bypassed the approval of the Minister of Justice (which was necessary for a formal appointment of a new vice-president) and managed to *de facto* defy the non-renewability of the term of vice-presidents. Finally, court presidents started openly defying the Constitutional Court ruling by nominating incumbent vice-presidents for a second successive term. They eventually succeeded, as some weak Ministers of Justice wanted to avoid quarrels with judicial leadership and eventually approved these nominations.[91] These appointments stand, as no one is willing to challenge them. In truth, although some of the above-mentioned techniques required 'mutual cooperation' between the given court president and the Minister of Justice (and hence both were complicit in defying the Constitutional Court ruling),[92] all of these actions were invented and pushed through by court presidents who had managed to 'corner' the weak Ministers of Justice.[93]

All of these techniques in turn opened a crack in the implementation of the Constitutional Court ruling. Several court presidents had already suggested that, despite its clear wording, this ruling did not prevent the reappointment of incumbent court presidents.[94] The court presidents and vice-presidents involved also suggested by their actions that they did not feel bound by the judgments of the Constitutional Court, which sent a bad signal to Czech society.[95] The silence[96] of other key actors within the judiciary – the Judicial Union, the college of regional court presidents and the trinity of the top court presidents – further undermined the Constitutional Court ruling. This solidarity between court presidents across different tiers of the Czech judiciary also had another deleterious side-effect. It conveyed the message to regular judges that it is futile to compete with an incumbent or a former court president for a position of court president or vice-president or for promotion to a higher court as there is no chance of winning anyway. As a result, several great candidates from among the regular

[91] Ibid.

[92] I am grateful for this insight to an anonymous reviewer.

[93] For instance, some court presidents used their informal powers and made sure that only the incumbent vice-president responded to the call for a new vice-president. This left the Minister of Justice in a difficult position, as he or she did not have anyone else to choose from, and issuing a new call would leave the position of the vice-president vacant for a long time (without the guarantee that more candidates would participate in the second call).

[94] *Supra*, n. 90.

[95] Ibid.

[96] This does not mean that these actors ignore or defy the Constitutional Court ruling. Many of them actually respect the ruling, but they do not want to openly criticise their colleagues.

judges have not applied.[97] In the worst-case scenario, various 'clans', not unlike *correnti* within the Italian judiciary,[98] could emerge[99] within the Czech judiciary.

Yet, despite the above-mentioned efforts of court presidents to contain the backlash, they have not managed to avoid the consequences of the 2008 Amendment and the subsequent Constitutional Court ruling completely. The relationship between the Minister of Justice and court presidents has thus reached a new stage that can be characterised as a fragile balance. This means three things. First, court presidents have started to unite across hierarchical layers and across branches of the Czech judiciary to create greater leverage vis-à-vis the Minister of Justice. District court presidents cooperate with regional court presidents, regional court presidents team up with high court presidents, and the presidents of the Constitutional Court, the Supreme Court and the Supreme Administrative Court have established the informal 'trinity of top courts presidents'[100] to coordinate their actions. Second, both the Minister of Justice and court presidents try to exploit their powers fully while waiting for the other side to make mistakes. In other words, the weaker the Minister of Justice, the stronger the court presidents, and vice versa.

Third, a side-effect of this continuing struggle is the increasing public scrutiny of the actions taken by the Ministry of Justice and court presidents. Before the Brožová cases the Ministry of Justice as well as court presidents enjoyed great leeway, due to limited public scrutiny of the actions of the Minister of Justice and limited knowledge of the real powers of court presidents. However, the proverbial 'veil of ignorance' has been lifted. Any skirmish between the Minister of Justice and court presidents is subject to intense media scrutiny, the powers and influence of the college of presidents of the regional courts and the trinity of top court presidents have become common knowledge, and the appointment of any president or vice-president from the level of the regional court upward is widely discussed.

These three novelties – open conflicts between the Ministers of Justice and court presidents, greater unity among court presidents, and increased public scrutiny – may have important consequences, but the results are difficult to predict. What is clear, though, is that Czech judicial politics has entered a new era characterised by a fragile balance and bargaining between court presidents and the Ministry of Justice, in the shadow of the law. This bargaining in the shadow of the law can itself be characterised

[97] In fact, usually there is only one candidate, which: (1) makes the competition meaningless; and (2) reduces the power of the President and the Minister of Justice (who formally appoint court presidents and vice-presidents) as they cannot choose from several candidates. *See also supra* n. 93.

[98] *See* C. Guarnieri, 'Judicial Independence in Europe: Threat or Resource for Democracy?', 49 *Representation* (2013) p. 347 at p. 348.

[99] Some Czech court presidents admit that such clans already exist.

[100] *See supra* n. 22.

as a repeated game played between the two key players in Czech day-to-day judicial politics, the Minister of Justice and court presidents, against a backdrop of vague constitutional and statutory provisions concerning the judiciary.[101] These two players engage in bargaining which consists of an exchange of demands and offers to divide up the power of the Czech judiciary. If the demands of one player do not exceed the offers of the other player, they reach settlement. However, when they do not, court presidents go to the Constitutional Court and administrative courts, whereas the Minister of Justice initiates (or threatens to initiate[102]) legislative change. These moves result in a period of uncertainty as both Parliament and the Constitutional Court, each in its own way, may change the laws governing the judiciary and reshuffle the cards in the Czech judicial politics. Once the cards are reshuffled, the Minister of Justice and court presidents again start bargaining, now against a backdrop of the revised law.

Broader repercussions: the critical importance of internal independence of individual judges

The Czech case study provides three important insights that are relevant far beyond Czechia. First, court presidents are the most powerful actors in the Central and Eastern European judiciaries, irrespective of which model of court administration is in place. Several earlier studies have shown that court presidents had a major role in the post-communist countries, establishing a strong judicial council, an autonomous body composed primarily of judges which was vested with the power to decide on most aspects of a judge's career.[103] According to Piana, court presidents play a significant role in holding judges to account in Hungary, Poland, Bulgaria and Romania[104] (which all adopted the judicial council model) as, aside from their *de jure* powers, they are 'endowed with cognitive resources (information about the situation of the court, information about the local social system with which the courts interact), but also with political resources (leadership within the court, prestige, eventually acknowledgement from the academy or the other legal actors)'.[105] A similar pattern has been reported in

[101] Note that this is a significantly different 'bargaining in the shadow of the law' than in the context of divorce (*see* R. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88 *Yale Law Journal* (1979) p. 950) or pre-trial bargaining more generally (*see* R. Cooter et al., 'Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior', 11 *Journal of Legal Studies* (1982) p. 225), where the metaphor was originally used.

[102] *See supra* nn. 86-87.

[103] For further details of the rise of this pan-European model of judicial council *see supra* nn. 1-5.

[104] D. Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Ashgate 2010), p. 43–44.

[105] Piana, *supra* n. 104, p. 44.

Slovakia[106] and Croatia,[107] which both have strong judicial councils. Court presidents in all of these countries aptly used these cognitive and political resources to gain control over the newly-established judicial councils. This has happened either directly, when court presidents themselves became the members of the judicial council, or indirectly, when they promoted their protégés. In some countries, for instance Slovakia between 2009 and 2014, the Supreme Court President and his allies managed to capture the judicial council completely, exercising almost unlimited control over the entire Slovak judiciary.[108] In other words, while judicial councils in Central and Eastern Europe disempowered the Ministers of Justice and the legislatures, rather than empowering regular judges, they increased the power of court presidents.

This case study then attests[109] that, contrary to general wisdom, court presidents may enjoy significant powers even within the Ministry of Justice model of court administration. Czech statutory law granted a major say regarding most mechanisms of judicial accountability to the Minister of Justice, yet the court presidents eroded the Minister's sphere of influence step-by-step while broadening their own powers. Information asymmetry and hasty legislation in the early 1990s left many gaps in statutory law. This gave court presidents room in which to manoeuvre, and they fully exploited that opportunity. When losing ground in confrontation with the Minister of Justice, their ultimate strategy was to appeal to the public at large, to the administrative courts or to the Constitutional Court, raising the flag of judicial independence.[110] They not only managed to preserve their powers, but also managed to emancipate themselves from the Minister of Justice.

These findings challenge earlier claims that Czech court presidents have little power.[111] Contrary to claims in the literature, Czech court presidents have a major say in the mechanisms of institutional and managerial accountability.[112] They control the assignment and reassignment of judges between chambers, case assignment, and the appointment of chamber presidents, and initiate the majority of disciplinary motions against judges.[113] In addition, they process complaints

[106] *See* e.g. Bobek, *supra* n. 8, p. 253–254; and Kosař, *supra* n. 5, p. 236-333.

[107] *See* e.g. A. Uzelac, 'Role and Status of Judges in Croatia', in P. Oberhammer (ed.), *Richterbild und Rechtsreform in Mitteleuropa* (Manzsche Verlags 2001) p. 23 at p. 43-57.

[108] *See infra* nn. 126-130; and Kosař, *supra* n. 5, p. 317-329 and 355-361.

[109] The Slovak case study in the period before the introduction of the Slovak Judicial Council yields similar results. *See* Kosař, *supra* n. 5, p. 264-299 and 334-339.

[110] *See* the previous two sections of this article.

[111] Piana, *supra* n. 4, p. 43-44 (Table 1.8).

[112] At the same time, Piana overestimates the power of judicial boards and court managers that are in fact marginal players in Czech judicial politics. They are either advisory bodies to court presidents (judicial boards) or their subordinates (court managers) and thus they are far less influential.

[113] Of the 246 disciplinary motions lodged from 2003 to 2010 court presidents initiated 213 (87%); *see* Kosař, *supra* n. 5, p. 227.

from court users and *de facto* decide, jointly with the Minister of Justice, on the appointment, promotion and secondment of judges. Therefore, Czech court presidents have *de facto* similar powers to their counterparts in Poland and Hungary, even though the former operate within the Ministry of Justice model of court administration whereas the latter two work within the judicial council model.[114] In sum, court presidents are the masters of Central and Eastern European judiciaries, irrespective of the model of court administration.[115]

The Czech development thus shows that court presidents may *de facto* fulfil the tasks of the judicial council in preserving the independence of the judiciary from the other political branches and that the post-communist judiciary can achieve a significant judicial autonomy even without a judicial council. Identifying the circumstances under which this may happen remains a vexing question for many post-Soviet republics. The Czech case study suggests that the following conditions induce the emancipation of court presidents: a vigilant constitutional court that is easily accessible to court presidents, a high turnover of Ministers of Justice, relative unity among court presidents, strong information asymmetry working in favour of court presidents, and a competitive political regime with fragile majorities in the parliament. However, it is necessary to test these criteria on other case studies to see whether they are necessary and sufficient conditions.

The second insight follows naturally from the first. Once we acknowledge that court presidents have broad powers vis-à-vis regular judges, and that they can misuse those powers, the next step is to provide mechanisms to protect regular judges against the arbitrary actions of court presidents. This means that we should approach both the external and internal accountability of judges with the same level of caution.[116] While some documents dealing with judicial independence and judicial councils acknowledge that improper pressure on a judge can stem from within the judiciary,[117] they take for granted that internal pressure is somehow less dangerous. Recent scholarship also proceeds from the assumption

[114] For a similar conclusion *see* Z. Kühn, 'The Democratization and Modernization of Post-Communist Judiciaries', in A. Febbrajo and W. Sadurski (eds.), *Central and Eastern Europe After Transition* (Ashgate Publishing 2010) p. 177 at p. 190.

[115] This also explains why so many cases regarding the dismissal of court presidents reach the Strasbourg Court. *See* e.g. ECtHR 5 February 2009, Case No. 22330/05 *Olujić* v *Croatia*; ECtHR 21 January 2016, Case No. 29908/11 *Ivanovski* v *FYROM*; and ECtHR 23 June 2016, Case No. [GC] 20261/12, *Baka* v *Hungary*.

[116] On this distinction *see* Part IV (External Controls) and Part V (Internal Controls) in G. Canivet et al. (eds.), *Independence, Accountability and the Judiciary* (British Institute of International and Comparative Law 2006).

[117] *See* e.g. European Network of Councils for the Judiciary, 'Independence and Accountability of the Judiciary', ENCJ Report, 2013-2014, p. 17.

that independence from politicians is at the heart of the normative importance of independent courts to the rule of law.[118]

This article challenges this view and argues that internal pressure can be as dangerous as direct pressure from politicians.[119] The Czech court presidents decide on the general rules of case assignment,[120] may reassign cases on vague criteria such as the 'even distribution of caseload',[121] may reallocate judges of their courts to another court section,[122] may unilaterally promote judges to the position of chamber president,[123] and may deny the promotion of a judge to a higher court.[124]

The exercise of this power often goes unchecked, and thus some court presidents may abuse it. For instance, when a judge of the district court in Prague resisted her reassignment from a civil law to a criminal law chamber in the early 1990s, the court president immediately initiated a disciplinary motion against her and the disciplinary panel mercilessly imposed the harshest sentence – dismissal from judicial office – for violation of judicial duty.[125] This pattern persists. In 2011 a judge of the regional court who had specialised in civil and corporate law for 20 years was transferred without his consent to the criminal law section by the court president. This judge challenged his reallocation before the administrative courts, but lost. The Supreme Administrative Court eventually found the issue non-justiciable and thus *de facto* upheld the unlimited discretion of the court presidents.[126] Similarly, when one judge of the high court openly criticised the promotion of what he argued was a sub-standard regional court judge to the high court in 2013, the president of the high court transferred this 'recalcitrant' judge outside his specialisation from the

[118] *See* e.g. Popova, *supra* n. 72.

[119] Note that politicians may also use court presidents as their 'transmission belts' and exercise their influence over individual judges indirectly (*see supra* n. 28 and nn. 53-62). The most recent scholarship even suggests that clientelistic rulers may intentionally transfer significant powers over individual courts and the rest of the judiciary to the loyal court presidents in exchange for favourable rulings (*see* R. Ellett et al., 'Chief Justice as a Political Agent: Evidence from Zambia, Venezuela, and Ukraine', paper presented at the ECPR General Conference in Prague on 9 September 2016 (on file with author)).

[120] This has started to change only in 2016 due to the new case law of the Czech Constitutional Court (*see* Judgment of the Czech Constitutional Court of 15 June 2016, case no. I. ÚS 2769/15).

[121] The power of court presidents to reassign cases has also been limited only recently due the new case law of the Czech Constitutional Court (*see* ibid.).

[122] This power of court presidents was recently confirmed by the Czech Supreme Administrative Court. *See infra* n. 126.

[123] Promotion to the position of chamber president not only increases the reputation of a given Czech judge, it also comes with a significant salary rise.

[124] This power of court presidents was confirmed by the Czech Constitutional Court in the Brožová cases (*see* in particular *supra* nn. 67-68).

[125] Decision of the High Court of Prague of 29 June 1994 *Judge S. W.*

[126] Judgment of the Czech Supreme Administrative Court of 19 September 2012, No 1 As 48/2012-28.

commercial section of the high court to the insolvency section.[127] The reassigned judge again had no means of challenging this reprisal. The Czech court presidents can also postpone or even deny the promotion of judges to the position of chamber president. Regular judges again have no chance of challenging this and thus their promotion is fully dependent on the court president.

The situation got even worse in Slovakia, which had adopted the judicial council model, after the election of Štefan Harabin to the position of President of the Slovak Supreme Court in 2009. Soon after he became the Supreme Court president, Harabin started to settle the score with his critics at the Supreme Court. He bought the support of his allies at the Supreme Court with huge salary bonuses while at the same time denying bonuses to the Supreme Court judges who were critical of him.[128] One of the Supreme Court judges, Peter Paluda, who was on Harabin's 'black list' expressed it clearly: 'Harabin produces loyal judges by threatening them and at the same time by pleasing them with salary bonuses and allowing them to function normally if they are obedient'.[129] He also increased the case loads of his critics and reassigned them to panels outside their area of expertise,[130] and initiated disciplinary motions against his opponents at the Supreme Court.[131] Last but not least, 'recalcitrant' judges faced further reprisals that are difficult to quantify, such as poor working conditions, slow computers or denial of reimbursement for attending judicial training.[132] Some of these techniques, such as selective case assignment and reassignment, have permeated other judiciaries in the region too.[133]

[127] Email from a judge of the High Court of Prague of 26 September 2015 (on file with author).

[128] *See* L. Kostelanský and V. Vavrová, 'Harabinovi sudcovia zarobili viac ako premiér', *Pravda*, 12 August 2010; E. Mihočková, 'Šikanovanie v talári', *Plus 7 dní,* 12 December 2011, <www.pluska.sk/plus7dni/vsimli-sme-si/sikanovanie-vtalari.html>, visited 14 December 2016; and K. Staroňová, 'Rovní a rovnejší Štefana Harabina', *Trend.sk*, 1 June 2009, <blog.etrend.sk/sgi-blog/rovni-a-rovnejsi-stefana-harabina.html>, visited 14 December 2016.

[129] Mihočková, *supra* n. 126. *See also* P. Kubík and F. Múčka, 'Ako úraduje Štefan I. Čistič: Pôsobenie nového šéfa Najvyššieho súdu SR varuje pred rozširovaním jeho kompetencií', *Trend*, 30 September 2009, <ekonomika.etrend.sk/ekonomika-slovensko/ako-uraduje-stefan-i-cistic-2.html>, visited 14 December 2016; and P. Kubík, 'Keď losuje Štefan Harabin: Na Najvyššom súde majú rozhodnutia predsedu občas väčšiu váhu ako paragrafy', *Trend*, 11 March 2010, <ekonomika.etrend.sk/ekonomika-slovensko/ked-losuje-stefan-harabin-2.html>, visited 14 December 2016.

[130] Ibid.

[131] Harabin himself initiated 12 disciplinary motions against Supreme Court judges in 2009 and 2010 and one more motion was triggered by the JCSR, which was chaired by Harabin (some of these cases are reported in L. Bojarski and W. Stemker Köster, *The Slovak Judiciary: Its Current State and Challenges* (Open Society Fund 2011) p. 102–105). *See also* Kosař, *supra* n. 5, p. 319-320.

[132] *See* Mihočková, *supra* n. 126.

[133] *See* e.g. ECtHR 10 October 2000, Case No. 42095/98, *Daktaras* v *Lithuania* §§ 35-38; ECtHR 3 May 2007, Case No. 7577/02 *Bochan* v *Ukraine* § 74; ECtHR 9 October 2008, Case No. 62936/00, *Moiseyev* v *Russia* §§ 182-184; ECtHR 5 October 2010, Case No. 19334/03, *DMD*

As a result, it is critical to erect safeguards of internal independence that shield individual judges from the improper influence of court presidents. Due to existing abuses involving the distribution of cases in Central and Eastern European countries, cases should be assigned on a strictly random basis. Regular judges should also be allowed to challenge irregularities in the initial case assignment as well as subsequent reassignment either before administrative courts[134] or before a special administrative body, where court presidents do not have a majority.[135] Similarly, reassignment of a judge outside his specialisation is not merely a 'managerial decision' of a court president,[136] as it may interfere with individual judicial independence.[137] This means that such decisions should be subject to the consent of another body, such as judicial boards in the Czech context, and the transferred judge should be given extra time to become acquainted with the new area of law.[138] Finally, salary bonuses should be prohibited in order to avoid their misuse. Most of these measures will come at a price, but the independence of individual judges should prevail over the managerial aspects of judging, such as the efficiency and speed of justice.

More recently, even the European Court of Human Rights has started to acknowledge the importance of internal independence.[139] For instance, in *Gazeta Ukraina-Tsentr* v *Ukraine* a local journalist criticised Mr Y, the Chairman of the Kirovograd Regional Council of Judges. Mr Y subsequently lodged a civil claim for defamation and won before the courts of Kirovograd Region. The Strasbourg Court acknowledged the importance of the internal independence of judges and eventually found a violation of the right to a fair trial, because the material submitted by the applicant company demonstrated the possible risk that all judges in the Kirovograd region would be influenced by the threat of disciplinary proceedings or other career-related decisions by Mr Y.[140] In *Agrokompleks* v *Ukraine*, the president of the Higher Arbitration Court had given direct instructions to his deputies to reconsider the earlier court's ruling.

GROUP, a.s. v *Slovakia* §§ 65-71; ECtHR 3 May 2011, No. 30024/02, *Sutyagin* v *Russia* § 190; and ECtHR 12 January 2016, Case No. 57774/13, *Miracle Europe Kft* v *Hungary* §§ 53-63.

[134] Such a model operates, for instance, in Germany.

[135] Such a model operates, for instance, in Austria.

[136] This is a position commonly held by Czech court presidents.

[137] Even though rank-and-file judges are often reassigned not for their judicial decision-making, but for their criticism of the current model of court administration or for criticising court presidents and their actions.

[138] This is exactly what the Slovak centrist government did in 2011 to prevent further misuse of powers by court presidents in Slovakia. *See* Art. 51a(2) of the Slovak Law No. 757/2004 Coll., on Judges (which introduced a two-month period for reassigned judges to get acquainted with the new area of law).

[139] *See also* cases cited in *supra* n. 133.

[140] ECtHR 15 July 2010, Case No. 16695/04, *Gazeta Ukraina-Tsentr* v *Ukraine* §§ 33-34.

The Strasbourg Court again found these acts of the court president contrary to the principle of internal judicial independence.[141] In another line of case law the European Court of Human Rights found the abuse of case assignment powers by court presidents in violation of the right to fair trial, because it made rank-and-file judges dependent on the will of court presidents.[142]

However, these cases are just the tip of the iceberg. More should be done at the institutional level. This brings us to the third insight. There has been too much emphasis placed on the independence of the judiciary recently, both in scholarly literature and in policy documents, whereas the independence of individual judges has been rather neglected. What is worse, sometimes the independence of the judiciary and the independence of individual judges have been conflated. This article suggests that it is high time for the pendulum to swing back, allowing us to refocus our attention on the independence of individual judges. That is what Germany did after the Second World War and the investment paid off.[143]

We should thus accept that the independence of the judiciary and the independence of individual judges are separate matters, and that increasing the former does not automatically improve the latter.[144] The Czech case study and the literature on other Central and Eastern European countries suggest that threats to the independence of judges coming from within the judiciary can be as dangerous as external threats. To make things worse, these threats coming from the court presidents are less politically salient than the actions of the Minister of Justice and are often excluded from judicial review.[145] Hence, if one wants to increase the independence of individual judges in Czechia, it will be necessary to reduce[146] or at least diffuse[147] the powers of court presidents. The same logic

[141] ECtHR 6 October 2011, Case No. 23465/03, *Agrokompleks* v *Ukraine* §§ 137-139. *See also* ECtHR 9 January 2013, Case No. 21722/11, *Volkov* v *Ukraine*.

[142] *See* the cases mentioned in *supra* n. 133.

[143] *See* e.g. A. Seibert-Fohr, 'Judicial Independence in Germany', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) p. 447 at p. 481-483; and J. Riedel, 'Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany', in G. Federico (ed.), *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe* (IRSIG-CNR 2005) p. 69 at p. 98-107.

[144] *See also* C. Guarnieri, 'Judicial Independence in Europe: Threat or Resource for Democracy?', 49 *Representation* (2013) p. 347 at p. 353.

[145] *See* e.g. *supra* n. 126.

[146] One option for reducing the powers of court presidents would be to adopt strictly random case assignment or to promote judges to the position of chamber president on the basis of seniority.

[147] One way to diffuse the powers of court presidents is to require the consent of judicial boards for certain actions of court presidents, such as the reassignment of judges, the reassignment of cases, or the promotion of judges to the position of chamber president.

applies to the Central and Eastern European countries[148] that transferred most of the powers regarding individual judges' careers to the judicial council.[149]

This need to distinguish judicial autonomy from the independence of individual judges is equally relevant beyond the post-communist countries. For instance, many judges in the United Kingdom interviewed in a recent book on British judicial politics suggest that greater formal judicial autonomy after the Constitutional Reform Act of 2005 could lead, paradoxically, to a loss of protection of judges' independence, because a new, more arms-length, Lord Chancellor in the executive will no longer serve as the protector of judicial independence from within the executive branch.[150] The Swedish judiciary serves as another counter-example arguing against the widely-held belief that there is a correlation between judicial autonomy and individual judicial independence, since Swedish judges enjoy significant protection, even though Sweden has never been characterised by particularly strong institutional independence.[151]

Finally, enhancing the independence of individual judges has one more advantage. It is more resistant to abusive constitutionalism, which has recently surged in Hungary and Poland.[152] In fact, both Orbán and Kaczyński have used similar techniques against the judiciary and, most importantly from the perspective of this article, both have tried to turn court presidents into their 'transmission belts'[153] who would subsequently exercise influence over individual judges. Orbán expanded the size of the Constitutional Court and then packed it,[154] ensuring that he could install a new president of the Constitutional Court,[155] ousted the Supreme Court president through a constitutional amendment,[156] created the new institution with power over ordinary judicial appointments,[157] and reduced the maximum retirement age of judges, which led

[148] *See supra* n. 5.

[149] *See* Popova, *supra* n. 5 (regarding Bulgaria); and Kosař, *supra* n. 5, p. 409-411 (regarding Slovakia).

[150] *See* G. Gee et al., *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge 2015) p. 50-55.

[151] *See* J. Nergelius, and D. Zimmermann, 'Judicial independence in Sweden', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) p. 185–229.

[152] *See* D. Landau, 'Abusive Constitutionalism', 47 *University of California Davis Law Review* (2013) p. 189 at p. 208-211; M. Tushnet, 'Authoritarian Constitutionalism', 100 *Cornell Law Review* (2015) p. 391 at p. 433-435; and G. Halmai, 'From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary', in W. Bedenek et al. (eds.), *European Yearbook of Human Rights* (2012) p. 367.

[153] *See supra* n. 28 and nn. 53-62.

[154] *See* Halmai, *supra* n. 150, p. 379; and Landau, *supra* n. 150, p. 209.

[155] *See* Halmai, *supra* n. 150, p. 379.

[156] *See* ECtHR 23 June 2016, Case [GC] No. 20261/12, *Baka* v *Hungary*.

[157] *See* Landau, *supra* n. 150, p. 209-210.

to the *de facto* dismissal of 20 of the 74 judges of the Supreme Court[158] and several court presidents at the lower courts.[159] Kaczyński followed the same rule book. He has attempted to pack the Constitutional Tribunal and reduce the term of the current Constitutional Tribunal president, tinkered with the composition of the Polish judicial council and exercised significant pressure on the court presidents.[160] Most scholars have focused primarily on changes that affect the constitutional courts, but the key to the long-term control of the judiciary is held by the presidents of ordinary courts and judicial councils. In other words, since court presidents and judicial councils exercise wide powers over individual judges, all that Orbán and Kaczyński need to do is to install their own court presidents, pack the judicial council, and turn both into 'transmission belts'. Conversely, by empowering individual judges against court presidents and judicial councils, and by setting up barriers to protect regular judges, it would have been significantly more difficult for Orbán and Kaczyński to gain control over the judiciary. It is perhaps too late to erect these barriers in Poland and Hungary, but it might still work in other Central and Eastern European countries.

Conclusion

This article focused on Czechia, which is the proverbial 'black sheep' among Central and Eastern European countries as regards judicial reform. It has not buckled under the pressure of the European Union and the Council of Europe and has not established a judicial council. The Czech case study shows that, contrary to general wisdom, court presidents became powerful actors and managed to achieve significant judicial autonomy even without the implementation of a judicial council. This has led to bargaining between the Minister of Justice and court

[158] T. Gyulavári and N. Hős, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts', 42 *Industrial Law Journal* (2013) p. 289 at p. 290. *See also* U. Belavusau, 'On Age Discrimination and Beating Dead Dogs: *Commission v. Hungary*', 50 *CMLR* (2013) p. 1145.

[159] In fact, court presidents were the main target of this move. I am grateful to Gábor Halmai for this insight.

[160] *See* e.g. A. Radwan, 'Chess-boxing around the Rule of Law: Polish Constitutionalism at Trial', *VerfBlog*, 23 December 2015, <verfassungsblog.de/chess-boxing-around-the-rule-of-law-polish-constitutionalism-at-trial/>, visited 14 December 2016; A. Śledzińska-Simon, 'Paradoxes of Constitutionalisation: Lessons from Poland', *VerfBlog*, 30 March 2016, <verfassungsblog.de/paradoxes-of-constitutionalisation-lessons-from-poland>, visited 14 December 2016; and W. Zuzek, 'The National Council of the Judiciary is under attack in different ways', *VerfBlog*, 11 October 2016, <verfassungsblog.de/the-national-council-of-the-judiciary-is-under-attack-in-different-ways/>, visited 14 December 2016. *See also* T. Koncewicz, 'Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond', 53 *CMLR* (2016) p. 1753.

presidents in the shadow of the law, and struck a particularly fragile balance between them. At the same time, some court presidents have abused their newly-accrued powers by bringing them to bear against rank-and-file judges, which in turn makes those rank-and-file judges dependent on court presidents. This development calls for rethinking the current understanding of judicial accountability and judicial independence, which requires acknowledging the wide powers of the court presidents, treating the internal independence of judges as being of equal importance as external independence from the actors outside the judiciary, and placing greater emphasis on the independence of individual judges rather than on the independence of the judiciary as a whole. What matters most is, ultimately, the independence of individual judges.