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Judicial Self-Government in Czechia: Europe's Black Sheep?

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Abstract

This paper maps judicial self-government in Czechia and argues that although Czechia is sometimes perceived as a black sheep of Europe for not introducing any form of judicial council into its judicial system, there is in fact a substantial amount of judicial self-government exercised by several bodies, the most important being the court presidents, and it is therefore a mistake to conflate judicial self-government with judicial councils. The most notable changes to judicial self-government are then introduced and their impact on values crucial for the functioning of the judiciary assessed. And, as the judicial self-government in Czechia is primarily exercised by court presidents, the narrative of changes to judicial self-government and their impact is presented as a narrative of changes affecting court presidents and of their effects on the wider legal, social and political fields. The dominance of court presidents, built in part on informal powers, is a mixed blessing however, as it can have both positive and negative impact on the crucial values and may prove rather fragile in the future.

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At first sight, Czechia does not differ from most European countries as far as the organization of justice is concerned. Its judicial system consists of the Constitutional Court and the 'ordinary' court system, which is comprised of the Supreme Court (SC), the Supreme Administrative Court (SAC), high courts, regional courts and district courts. Apart from the top two courts and the district courts, all the ordinary courts decide on criminal,[1] civil and administrative matters. However, there is something that makes Czechia special – unlike many of its European counterparts, Czechia has never had a judicial council, i.e. a body that centralizes the administration of courts in the hands of judges. In this sense Czechia, when it comes to judicial self-government (JSG), is the proverbial "black sheep".[2] During the 1990's and 2000's, when many of the candidate-countries for accession to the European Union adopted the Euro-model of judicial council, Czechia resisted and retained its Ministry of Justice model with roots in the Austro-Hungarian Empire.[3]

Even though there is no judicial council as yet and many hold the opinion that its introduction is long overdue, it cannot be said that there is no JSG in Czechia. In fact, quite the contrary is true.[4] Two crucial actors stand at the center of the Ministry of Justice model, in whose hands lie most of the personal, administrative and financial affairs of the judiciary: the Ministry of Justice (MoJ) and the court presidents (CPs).[5] Several other actors complement them. They are the President of the Czech Republic, who formally appoints judges and CPs (and in the past also attempted to dismiss them), disciplinary panels (the only body with the power to dismiss judges), judicial boards functioning as a consultative body at each court, and the Judicial Academy, responsible for educating present and future judges.[6] It is thus clear that actors from within the judiciary play a rather important role in the matters of judicial government (see Table 1 below).

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[1] Note that prosecutors do not form a part of the Czech judiciary but are independent from it.

[2] *See* David Kosař, *Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice,* 13 EUROPEAN CONSTITUTIONAL LAW REVIEW 13, 97 (2017).

[3] Michal Bobek, *The Administration of Courts in the Czech Republic – In Search of a Constitutional Balance*, 16 EUR. PUB. L. 251 (2010); and, generally, Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GERMAN L.J. 1257 (2014).

[4] We define a JSG body as a body with at least one judge whose primary function, entrenched in a legal norm, is to decide about issues regarding court administration and/or the career of a judge, and/or advise those who decide about such issues.

[5] DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES 176 (2016).

[6] For further information regarding the Czech judicial environment and its actors *see* especially Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries,* 14 EUR. PUB. L. 99 (2008); Bobek, *supra* note 3; KOSAŘ, *supra* note 5; Zdeněk Kühn, *The Democratization and Modernization of Post-Communist Judiciaries, in* CENTRAL AND EASTERN EUROPE AFTER TRANSITION 177 (Alberto Febbrajo & Wojciech Sadurski eds., 2010); ZDENĚK KÜHN, THE JUDICIARY IN CENTRAL AND EASTERN EUROPE: MECHANICAL JURISPRUDENCE IN TRANSFORMATION? (2011); Zdeněk Kühn, *Judicial Administration Reforms in Central-Eastern Europe: Lessons to be*

The aim of this article is to provide complex insight into the functioning of JSG in Czechia and an overview of its effects on the wider legal, social and political fields. We claim that the case of Czechia proves it is a mistake to conflate JSG only with judicial councils, and that JSG can exist without them. In Czechia, it was the CPs who built and preserved a great deal of JSG, but, at the price of a lack of transparency and fragility of the balance between all actors involved. Section A thus provides an overview of the actors and a historical context of their evolution; Section B tracks the impact of changes in JSG on values that are critical for the functioning of the judiciary, namely judicial independence, accountability, transparency, public confidence and legitimacy; and Section C assesses the influence the JSG had on the separation of powers and the democratic principle. Section D then briefly concludes.

Table 1: Bodies and actors of judicial government and self-government in Czechia

<table>
<tr><th colspan="2">Judicial Self-Government</th><th>Judicial Government</th></tr>
<tr><td rowspan="2">Court presidents</td><td>College of presidents of regional courts</td><td rowspan="3">Minister of Justice</td></tr>
<tr><td>Trinity of top court presidents</td></tr>
<tr><td colspan="2">Judicial boards</td></tr>
<tr><td colspan="2">Judicial Academy</td><td rowspan="2">President of the Czech Republic</td></tr>
<tr><td colspan="2">Disciplinary panels</td></tr>
</table>

A. Of Court Presidents… and Others: Forms and Rationales of Judicial Self-Government

This section maps the key JSG bodies in Czechia; their powers, composition and functioning are discussed in the first part. The following part then traces, where relevant, rationales behind the introduction of those bodies and key changes made to them (i.e. critical junctures in their development). The overall picture is that even though there are several JSG bodies, the primary role is played by the CPs, and the narrative of changes to JSG is predominantly a narrative of changes in CP powers or attempts to take powers away from CPs.

Learned, in JUDICIAL INDEPENDENCE IN TRANSITION 613 (Anja Seibert-Fohr ed., 2012); and HLEDÁNÍ OPTIMÁLNÍHO MODELU SPRÁVY SOUDNICTVÍ PRO ČESKOU REPUBLIKU (Jan Kysela ed., 2008).

I. Overview of Judicial Self-Government Bodies

Court presidents are arguably the most important and powerful JSG actors inside and outside the judiciary in Czechia.[7] Firstly, they are key players in personal JSG, as they play a significant role in the careers of judges from beginning to end and have a say in judges' appointments, secondments, reassignments and promotions[8] and hold the power to file a disciplinary motion.[9] More specifically, the consent of[10] or consultation with[11] CPs is de jure needed for the appointment of a judge to "their" courts.[12] Nonetheless, due to the lack of formal legal criteria, it is the CPs themselves who de facto create the criteria for selecting judges, and they hand-pick them,[13] thus serving as gatekeepers to the judiciary.[14] Court presidents also wield significant managerial powers regarding their courts, ranging from staffing the courts with administrative personnel and controlling the court's budget[15] to creating rules for case assignment, assigning judges to panels and selecting judges for grand chambers at top courts (administrative and financial JSG).[16]

Secondly, CPs form two informal groups which also exert strong influence outside the judiciary (normative JSG): the *college of presidents of regional courts* and the *trinity of top courts presidents*. The college of presidents of regional courts consists of the presidents of all eight regional courts who meet four times a year. Their significance is underlined by the

[7] Kühn 2012, *supra* note 6, at 609.

[8] Art. 73 of the Law No. 6/2002 Coll., On the Courts and Judges.

[9] Art. 8(c) to (g) of the Law No. 7/2002 Coll., the Code of Disciplinary Procedure with Judges and Prosecutors.

[10] This goes for the Supreme Court and the Supreme Administrative Court, *see* art. 70 of the Law No. 6/2002 Coll., On the Courts and Judges, and art. 124 of the No. 150/2002 Coll., the Code of Administrative Justice.

[11] This goes for the presidents for high and regional courts; *see* art. 73 of the Law No. 6/2002 Coll., On the Courts and Judges. Assignment to the district courts needs to be in consultation with the presidents of the respective regional courts, who are thus "masters" of district courts as well.

[12] An attempt by the former president of the Czech Republic, Václav Klaus, to circumvent this rule was thwarted by the Czech Constitutional Court; for a concise description of the circumstances, *see* KOSAŘ, *supra* note 5, at 174–175, and Bobek, *supra* note 3, at 263–265.

[13] For further details on the selection of judges, *see* KOSAŘ, *supra* note 5, at 188–191 and 215–216. The rules for the selection of judges for the Supreme Court and the Supreme Administrative Court are set out in publicly available court presidents' memoranda; at the regional court level, the situation is rather chaotic, *see* Kristián Léko, *Výběr českých soudců ovládá chaos*, LIDOVÉ NOVINY, June 5, 2017.

[14] Kühn 2012, *supra* note 6, at 612; and Kosař, *supra* note 2, at 97 and 100.

[15] Arts. 124 to 127 of the Law No. 6/2002 Coll., On the Courts and Judges; Art. 29 of the Law No.150/2002 Coll., the Code of Administrative Justice.

[16] Kosař, *supra* note 2, at 100.

fact that it is reportedly difficult to push any change without the approval of the college.[17] The trinity of top courts presidents[18] is formed by the presidents of the Supreme Court, the Supreme Administrative Court and the Constitutional Court. Each of the presidents has always exercised a significant influence on the Czech judiciary,[19] and since 2015, they solidified their position by sharing their views at regular informal meetings.[20]

Judicial boards are advisory bodies that, since 2002, exist at almost every court.[21] Judicial boards are composed of three to five judges of the respective court elected by all the court's judges for a five-year term. Their task is to comment on various issues concerning the functioning of the court: candidates for the positions of the president and vice-president of the court, temporary and permanent secondment of judges, drafts of work schedules setting rules for case assignment etc.[22] Owing to the non-binding nature of judicial boards' recommendations and the fact that CPs partly set their agenda, the strength of judicial boards depends primarily on the personality of the CPs and their willingness to cooperate and listen.[23] Nevertheless, the fact that they must be at times mandatorily consulted gives them some, albeit informal, power.

The *Judicial Academy* prepares and educates future judges and provides continuing education for current judges and other persons serving in the judicial system (clerks, advocates, notaries, public prosecutors etc.),[24] thus playing a crucial role in educational JSG. The Judicial Academy, established in 2002, is led by the Director of the Judicial Academy, appointed by the MoJ,[25] and the Board of the Judicial Academy which determines the content of the education provided by the Judicial Academy. The Board has 15 members and is composed of judges and public prosecutors, who are required to have

[17] The minutes from the meetings of the college are sent to the MoJ and discussed there, *see* KOSAŘ, *supra* note 5, at 179–181, and Kosař, *supra* note 2, at 100–101.

[18] This term for the group has not been coined officially.

[19] The most vocal one is Josef Baxa, President of the SAC, who is also an ardent supporter of introducing a judicial council model of JSG.

[20] This is also due to the common ground found between the three presidents, Josef Baxa (SAC), Pavel Šámal (SC), and Pavel Rychetský (CC); *see* Kosař, *supra* note 2, at 101.

[21] Where there is fewer than 11 judges, the plenary session consisting of all the judges fulfils the tasks of a judicial board; *see* Arts. 46 and 47 of the Law No. 6/2002 Coll., on Courts and Judges.

[22] Arts. 50–53 of the Law No. 6/2002 Coll., On the Courts and Judges.

[23] Kosař, *supra* note 5, at 178–179.

[24] Art. 129 to 133 of the Law No.6/2002 Coll., On the Courts and Judges.

[25] Art 130(3) of the Law No.6/2002 Coll., On the Courts and Judges.

majority together, and persons from other legal professions such as academics, advocates or notaries.[26]

Disciplinary panels are the last JSG body to be mentioned. Since 2008, there are separate mixed disciplinary panels composed of three judges and three non-judges functioning under the Supreme Administrative Court.[27] The panels have broad powers regarding a judge's career, as the sanctions they can impose on disciplined judges include not only a reprimand or several types of salary reductions, but also their dismissal. A Disciplinary panel's role is further strengthened by the fact that its decisions cannot be appealed. Nevertheless, this role is conditioned by the activity of those entitled to initiate the disciplinary proceedings – the Minister of Justice, CPs and the President of the Czech Republic.[28]

II. Critical Junctures: Changes to Judicial Self-Government

The Czech model of court administration has long rested on three pillars – the MoJ, CPs and disciplinary panels – to which new ones – judicial boards and the Judicial Academy – were added only recently. The MoJ-CPs-disciplinary panel model of court administration was present in Czechoslovakia ever since its formation after the fall of the Austro-Hungarian Empire. In a nutshell, apart from both introducing judicial boards that only play an advisory role and cannot, de jure, decide on anything and establishing the Judicial Academy, which has powers related only to a narrow dimension of court administration, there were no significant changes to the JSG in Czechia since the Velvet Revolution. None of the events that led to the introduction of nation-wide judicial councils in other countries had such an impact in Czechia. Neither the revolution itself, nor the subsequent democratization of the country resulted in the introduction of a new model of court administration. Neither did the EU Accession Process: in 1997, the European Commission concluded simply that "[t]he Czech judiciary [was] independent" and it thereafter devoted little attention to the system of court administration and separation of powers in the accession progress reports on Czechia. Therefore, it is fitting to instead discuss the partial modifications of the long existing model within which CPs can be considered the primary

[26] Art 130(2) of the Law No.6/2002 Coll., On the Courts and Judges. As of 2017, judges alone do not have a majority on the board, although the rules permit it: there are 7 judges, 2 public prosecutors, 3 academics, 1 advocate, 1 lawyer from the MoJ, and a former constitutional justice/ombudsman.

[27] The panel is composed of one judge from the SAC, one judge from the SC, one judge from regional or district court, one attorney, one state prosecutor, and one academic; *see* Art. 4(1) of the Law No.7/2002 Coll., the Code of Disciplinary Procedure with Judges and Prosecutors, as amended by the Law No. 314/2008 Coll. (hereinafter "2008 Disciplinary Code"). For more info on disciplinary panels, *see* DAVID KOSAŘ & TEREZA PAPOUŠKOVÁ, KÁRNÁ ODPOVĚDNOST SOUDCE V PŘERODU: PONAUČENÍ Z ČESKÉ REPUBLIKY (2017).

[28] Art. 8(2) and (3) of the 2008 Disciplinary Code. Note that the Public Defender of Rights can initiate disciplinary proceedings as well, but only in the case of court officials.

JSG actors, and where disciplinary panels, judicial boards and the Judicial Academy play rather a marginal, but still JSG related, role.

Let us concentrate on the marginal JSG bodies first. *Disciplinary panels* existed since the very founding of the Czech Republic[29] and their functioning has changed only twice – in 2002 and 2008.[30] The power to initiate disciplinary proceedings has always been entrusted to CPs and the Minister of Justice.[31] Since 2008, the President of the Czech Republic and the Public Defender of Rights[32] also have this power, however they use it very rarely.[33] Whereas disciplinary panels have always been empowered to use the harshest sanction possible – dismissal of the judge facing discipline – as well as to decide on salary reductions or impose reprimands, since 2002 they have lost the power to reassign a judge to a court of the same or lower level. Between 1993 and 2008 disciplinary proceedings were two-tiered,[34] with high courts or, until 2002, regional courts serving as the first instance and the Supreme Court serving as the appellate one.[35] Since 2008, there is only one disciplinary tier – the Supreme Administrative Court. It has always been the case that disciplinary panels were composed of judges, however, since 2008 non-judges were added to the panels and the parity of them and judges was introduced.[36] The official rationale behind this change was to increase the objectivity of disciplinary panels' decision-making and to enrich disciplinary proceedings with views that cannot be expected of judicial members of disciplinary panels.[37] The real aim was then to tighten the proceedings.[38]

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[29] In fact they existed even before, in Czechoslovakia. *See* MICHAL PRINC. SOUDNICTVÍ V ČESKÝCH ZEMÍCH V LETECH 1848–1938 (SOUDY, SOUDNÍ OSOBY, DOBOVÉ PROBLÉMY) 143–149 (2015).

[30] *See* the Law No. 412/1991 Coll., on Disciplinary Liability of Judges, the Law No. 7/2002 Coll., the Code of Disciplinary Procedure with Judges and Prosecutors (hereinafter "2002 Disciplinary Code") and the 2008 Disciplinary Code.

[31] Note that from 2002 to 2008 a judge accused of an offense could request that the offense be dealt with in disciplinary proceedings. Previously, the law enforcement authorities could refer the matter to the disciplinary panels.

[32] Nevertheless, she can initiate the disciplinary proceedings only against court officials.

[33] David Kosař & Tereza Papoušková, *Přinesla "Pospíšilova" reforma kárného řízení skutečně zpřísnění kárného postihu českých soudců?* 25 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI 219 (2017).

[34] From 1993 to 2002, the proceedings were only one-tiered for judges of the Supreme Court.

[35] Art. 5 of the Law No. 412/1991 Coll., on Disciplinary Liability of Judges and art. 3 of the 2002 Disciplinary Code.

[36] For information on composition of the panels *see supra* note 27.

[37] *See* the Explanatory Memorandum to the Law No. 314/2008 Coll., amending, among else, the Law No. 7/2002 Coll., the Code of Disciplinary Procedure with Judges and Prosecutors.

[38] KOSAŘ & PAPOUŠKOVÁ, *supra* note 27.

Judicial boards as well as the *Judicial Academy* were established by law[39] in 2002. The rationale of the establishment of the Judicial Academy was simple – to ensure the quality of judging by centralizing and regulating the life-long education of judges. As this aim was widely supported, there were no real competing proposals and the only discussion concerned the issue of the hegemonic position of the JA.[40] Nevertheless, the Constitutional Court found the provisions obliging judges to complete further education of a specified length, provided by a determined body and resulting in the evaluation of a judge that could lead to her dismissal unconstitutional.[41] Another rationale going beyond this aim, added into the relevant bill only later, was to empower the JA to also ensure that people entering the judiciary as law clerks are of certain professional quality. However, although the JA is to express its views on a judicial trainee, who is, in the end, selected by the president of the relevant regional court, it hardly ever does so.[42] The rationales and consequences of the introduction of judicial boards are discussed a bit later along with the limitations placed on the leeway CPs have for exercising their powers.

We now turn to the crucial JSG body, *court presidents*. As already emphasized, CPs always had the major say in court administration and the careers of individual judges. Nevertheless, the entities that could determine or influence the way they exercised their powers differed. At first, until 1989, CPs de facto served as the "transmission belt", as they could be recalled by the Communist Party anytime at a whim and had to "transmit" orders from the Communist Party to individual judges in sensitive cases. This changed after the Velvet Revolution. Not only was the MoJ no longer under the control of the Communist Party, but it practically stopped exercising its influence on CPs, even though it de jure could, as the Minister still had the power to recall CPs at any time.[43] There are two major reasons why the "transmission belt" argument no longer worked in Czechia. First, 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.[44] Second, as CPs remained in office much longer than the Ministers of Justice[45]

[39] Law No. 6/2002 Coll., on Courts and Judges.

[40] In the end, judges can fulfil their obligation to educate themselves also by attending education events organized by other courts and universities.

[41] Judgment of the Czech Constitutional Court of 18 June 2002, case no. Pl. ÚS 7/02.

[42] *See* the next Section on the issue of selection of judicial personnel.

[43] Note that presidents of top three courts (the Supreme, the Supreme Administrative and the Constitutional) are appointed and recalled by the President of the Czech Republic. Nevertheless, analogical argumentation applies.

[44] 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. However, Motejl's gravitas was rather unique.

[45] There were 16 ministers of justice between 1993 and 2015 and the average length of their terms was less than two years. In contrast, most CPs held office for more than a decade.

they had the best overview of what was going on within the judiciary and this information asymmetry worked in their favour. Therefore, after 1989, no other entity was able to significantly influence the way CPs exercised their JSG-related powers.

This changed in 2002 with the introduction of judicial boards. Entrusted only with consultative function, judicial boards were meant to "address the issue of the involvement of judges in the court administration"[46] and to advise CPs on how they should administer their court and treat its judges. When the government submitted the relevant bill, judicial boards were also supposed to evaluate judges and submit proposals for the assessment of their professional competence. However, discussions in the Chamber of Deputies' Constitutional Law Committee, to which representatives of the judiciary were also invited, resulted in the compromise conclusion that judicial boards were to have only advisory competences. The lack of will to create any new JSG body and the urge to take a step that would at least simulate its creation were the results of the 2000 rejection of the constitutional bill establishing a nation-wide JC with relatively substantive powers that will be discussed below.

The year 2002 brought yet another modification. An informal body potentially able to influence the way CPs exercised their powers emerged. This entity was formed by the eight presidents of regional courts who decided to meet regularly[47] to discuss practical issues that affected all regional courts and take the lead in judicial reform.[48] Although this informal body – the college of regional court presidents – had no statutory basis,[49] the costs of its meetings were and still are covered by the regional court budgets and, more importantly, its voice is often heard not only in professional circles, but also in public debates.

Another modification, this time greatly influencing the position of CPs, came in 2008, when the limitation of their term of office was enacted.[50] It is true that until then the law gave

[46] Explanatory Memorandum to the Law No. 6/2002 Coll., on Courts and Judges.

[47] *See* Kosař, *supra* note 2, at 100, who claims that according to one of the "founding fathers" of the body, 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.

[48] *Id.*

[49] *Id.* In 2007, presidents of regional courts attempted to formalize the college, but both the Minister of Justice and the presidents of the top courts rejected that idea.

[50] Law No. 314/2008 Coll., amending, among other things, the Law on Courts and Judges. Note that this very amendment also transferred the power to discipline judges from exclusively judicial panels at high courts (and the Supreme Court acting as the appellate body) to mixed panels (composed of three judges and three non-judges) at the Supreme Administrative Court.

the Minister of Justice the power to dismiss CPs at any time,[51] however this power was, for the reasons outlined above, de facto non-exercisable.[52] The enactment of a 7-year limit for officials of ordinary courts and a 10-year limit for officials of the two supreme courts[53] came as a reaction to CPs' efforts to secure their irrevocability, also de jure. In the mid-2000s, Czech CPs started to challenge their dismissals before administrative courts and the Constitutional Court, and they eventually won.[54] Moreover, in 2006, the Czech President, for the first time ever, dared to dismiss the President of the Supreme Court. She immediately challenged her dismissal before the Constitutional Court. The Constitutional Court decided not only in favour of the dismissed president, but also struck down the relevant article of the Czech Law on Courts and Judges declaring that it was unconstitutional for the executive to dismiss court officials.[55] The Constitutional Court influenced the 2008 JSG modification one more time when in 2010 it not only found that the introduction of limited terms for CPs and the application of the limited terms to the incumbent CPs were constitutional, but also struck down the provision that allowed the re-appointment of the same court president for a second term.[56] Consequently, all then-incumbent CPs[57] are now gone, which is the most important change within the Czech judiciary since the Velvet Revolution.

The last significant modification of JSG constituted by CPs took place in 2015. This is the year the presidents of the Constitutional Court, the Supreme Court and the Supreme Administrative Court created an informal "trinity of top court presidents". 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 then Supreme Court President Iva Brožová in January 2015,[58] who was eventually replaced by Pavel Šámal. Šámal soon found common ground

[51] Note, again, that the President of the Czech Republic could have dismissed the presidents of the top three courts.

[52] Compare *supra* note 46. For details *see* Otakar Motejl, *Pohled ministrů spravedlnosti, in* HLEDÁNÍ OPTIMÁLNÍHO MODELU SPRÁVY SOUDNICTVÍ PRO ČESKOU REPUBLIKU 13 (Jan Kysela ed., 2008).

[53] Note that officials of the Constitutional Court are selected from among the constitutional justices, who are appointed for a period of ten years (that is, as the tradition has it, once renewable), therefore their office has always been limited in this sense.

[54] For further details including more doctrinal analysis of these cases *see* Bobek, *supra* note 3, at 263–265.

[55] Judgment of the Czech Constitutional Court of 11 July 2006, case no. Pl. ÚS 18/06. For further details *see* KOSAŘ, *supra* note 5, at 173–175.

[56] Judgment of the Czech Constitutional Court of 6 October 2010, case no. Pl. ÚS 39/08.

[57] The former President of the Supreme Court, Iva Brožová, resigned voluntarily in January 2015.

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

with the President of the Constitutional Court, Pavel Rychetský, and, in particular, with the President of the Supreme Administrative Court, Josef Baxa.[59]

Apart from the five modifications of CPs' position within the judiciary, there were several attempts to take away some of their powers and vest them in a nation-wide JSG body. These attempts were, however, except for the establishment of the Judicial Academy, unsuccessful. The first one came in 1999 when Otakar Motejl, the then Minister of Justice, introduced a judicial reform package[60] which consisted of a Constitutional Amendment[61] and two brand new laws[62] on courts and judges and whose aim was to replace the MoJ model of court administration with the Judicial Council Euro-model. More concretely, Motejl suggested establishing a High Council of the Judiciary consisting of sixteen members – eight judges and eight members from other legal professions – elected for five years and giving it broad powers concerning the selection and nomination of candidates for judicial office, the appointment and dismissal of judicial officials as well as the training of judges.

The majority of deputies rejected Motejl's reform.[63] There are various explanations for this failure. The most widely accepted one is that politicians did not consent to the transfer of such broad powers to the judiciary, because they were afraid of judicial corporatism and elitism.[64] However, several commentators suggested that the proposal failed because it required a significant amendment of the Czech Constitution,[65] as Motejl was an independent minister without sufficient political support even within the Social Democratic Party that appointed him, as judges themselves were divided and many of them disagreed with the judicial reform package and as many politicians feared that Motejl had become "too big" and successful.[66] Motejl also alienated regional CPs by dismissing five of them in

[59] 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) at the same time Pavel Rychetský was Vice-PM.

[60] *See* the document entitled *Návrh koncepce reformy soudnictví* [The Conception of the Reform of the Judiciary] of 16 June 1999 (no. 1097/99-L), approved by the Czech Government by the decision no. 686 of 7 July 1999. An outline of the reform proposal was published as a special supplement in 5 PRÁVNÍ ROZHLEDY 1, 1–8 (1999).

[61] *See* the Constitutional Bill No. 541/0.

[62] These two statutes were Law on Courts (Bill No. 539/0) and Law on Judges and Lay Judges (Bill No. 540/0).

[63] The Constitutional Bill was rejected in the second reading – 114 MPs voted for the rejection of the bill, 68 MPs voted for the bill – and the other two bills soon followed the same fate – one of them was rejected by 71 MPs (69 opposed the motion to reject it) and the second one by 85 MPs (81 opposed).

[64] *See* Bobek, *supra* note 3, at 269.

[65] The Constitutional Bill, apart from introducing the High Council of the Judiciary, also introduced a maximum age limit for ordinary judges and Constitutional Court Justices, prohibited a renewal of the term of Constitutional Court Justices, changed the status of the Czech National Bank and amended several other provisions of the Czech Constitution.

[66] These explanations are based on informal interviews with former and current politicians and CPs, but they cannot be corroborated by the hard data.

1999. He himself in retrospect blamed the "judicial oligarchy" for the failure of his judicial reform.[67]

The second attempt to establish a new JSG body came in 2002 when Minister of Justice Jaroslav Bureš prepared the new Law on Courts and Judges, which, besides establishing the judicial boards, strove to introduce the Council for Assessing Professional Competence of Judges. This body was to be divided into three sub-bodies, each of them constituted by four non-judicial members and five judicial members elected by judges of selected courts for a three-year period, and was to be empowered to assess the professional competence of judges whenever asked to do so by authorized proposers; the decisions of the body were to be appealed before the Supreme Court. Nevertheless, the Constitutional Court struck the relevant part of the law down. It did so for several reasons, the crucial ones being that the competence of judges should be assessed, due to the need to preserve their independence, only before their appointment and that the body could decide on the non-competence of a judge in the presence of only seven members, four of which could have been the non-judicial members appointed by the executive power (the Minister).

The last attempt to establish a new JSG body came in 2012. This time the Minister of Justice (Jiří Pospíšil) prepared a bill which was to change the method for selecting judges and CPs.[68] More specifically, it proposed the creation of mixed commissions, composed of both members of the MoJ and the judiciary, who would select new judges as well as new CPs. However, Pospíšil was dismissed as Minister of Justice before he could present the bill in Parliament. The new minister of justice had less radical views regarding judicial reform, wanted to maintain a friendlier relationship with CPs, and thus scrapped the bill altogether.[69]

To summarize, while there were five successful and three unsuccessful attempts to modify the position of CPs, who are the primary JSG actors, little has changed as far as their powers are concerned. Only one new JSG body that took away some of the CPs' powers, the Judicial Academy, was introduced. However, the Judicial Academy was vested only with very specific powers regarding educational administration of the judiciary and therefore could not change the existing model of court administration, which, in Czechia, rests on three pillars – the MoJ, CPs and disciplinary panels. The motives for preserving such a model are simple: the executive was hesitant to give up its powers and the Czech judiciary was unable to agree on the one way it wanted to govern itself.

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[67] Motejl, *supra* note 52, at 14.

[68] The 2012 Bill also intended to introduce judicial performance evaluation and financial declarations of judges. Both of these tools would give the MoJ the necessary information to counter the existing information asymmetry and to make more informed decisions regarding the promotion of judges.

[69] *See* Jiří Hardoš, *Blažek odložil zavedení výběrových řízení na nové soudce,* PRÁVO, August 2, 2012, at 4.

B. Changes of Judicial Self-Government and the Impact on the Wider Environment

This section maps the impact of the changes of JSG on the wider legal, political and social environment. We map the impact by examining the effect the changes had on five basic values that we consider critical for the proper functioning of the judiciary and its relationship with rest of the society: judicial independence, accountability, legitimacy, transparency and public confidence. We have already said that there was no "big bang" related to JSG in Czechia; furthermore, the changes we identified in the previous section are not necessarily connected to one another and are difficult to arrange into a coherent narrative. Nevertheless, the overall picture emerging from this section is that the judiciary is capable of functioning and sustaining self-governance and the mentioned core values even without a judicial council in place. On the other hand, maintaining such state depends largely on CPs keeping their powers as well as a carefully balanced relationship with other actors of judicial government and government in general.

I. On Mandates, Powers and Independence

Even though there was no JSG "big bang" in Czechia, three notable changes in JSG occurred that may have had some impact on judicial independence, concerning selection of judges, CPs' mandates, and work schedules. All the changes touched the powers or mandates of the CPs, proving that CPs have a substantial potential to influence judicial independence. And although their position gives them the opportunity and resources to guard the external judicial independence from other branches of power during "peaceful times",[70] the setup might at the same time leave individual judges vulnerable and create a space for possible encroachment on internal judicial independence.[71]

Selection and appointment of judges, the first power that was influenced by a change in JSG, is a problematic point of both de jure and de facto independence. As no transparent and detailed de jure criteria for the selection of judges exist, the selection lies de facto primarily in the hands of CPs. Among those, the presidents of regional courts play a prominent role as the law specifies that they control the way district court presidents exercise their powers.[72] The process therefore differs from one supreme or high court to another or from one district of a regional court to another,[73] which creates a potential space for personal corruption and later encroachment of output independence due to the

[70] The recent developments in Hungary and Poland prove that if the other branches of power launch a large-scale offensive on the judiciary, there is little that actors from within judiciary can do.

[71] Kosař, *supra* note 2, at 115–122.

[72] Art. 126 para. 1 letter h) of the Law No.6/2002 Coll., On the Courts and Judges.

[73] Being appointed therefore equals a win in a lottery to a certain degree, *see* Léko, *supra* note 13.

personal loyalty of the selected judges to the relevant CP.[74] A change occurred when apex court presidents set out criteria for selecting judges in the form of memoranda[75] and some regional court presidents even introduced an open selection procedure based upon tests run by the Judicial Academy.[76] This step led partly to a more objective and merit-based selection process and potentially limited the space for favouritism. The change was, however, quite small and happened only in a few courts thanks to a few "enlightened" CPs. As the degree of openness lies almost exclusively in the hands of CPs, however, there are still regions with no open selection procedure whatsoever, and the changes that already took place may be easily reversed.

The second change in JSG to be mentioned is the 2008 implementation of CP term limits; these may have had the biggest impact on the judicial independence of the judiciary so far, both positively and negatively. This move first of all meant that no CP could exert his influence for too long. Moreover, the dynamics between CPs and the MoJ changed – CPs had to find a new balance in the relationship with the MoJ, inventing various and sometimes dubious strategies to preserve their privileges along the way. After the expiration of their mandate, some of them arranged their promotion to a higher court, some switched their position with vice-presidents and some even openly defied the rules completely and nominated some vice-presidents for second terms.[77] The change therefore clearly created space for various political bargains, posing significant challenges also to judicial independence. The actual impact remains to be seen.

The last change in JSG concerned work schedules, issued by CPs and containing detailed rules for case assignment. For a long time, the attention paid to this instrument was rather limited,[78] which created a space for possible corruption and attempts to circumvent case assignments.[79] Recently, however, work schedules again came under academic and public scrutiny,[80] as it came to light that some CPs had rigged the assignment of bankruptcy cases, an area especially prone to corruption.[81] A change came from the Constitutional Court that

[74] Note that there is no research or direct evidence proving that this claim holds true, which is why we present it only as a potential threat to judicial independence.

[75] The Supreme Administrative Court introduced the memorandum in 2012, the Supreme Court in 2017.

[76] This concerns the Municipal Court in Prague, which introduced the testing in 2014. Some other regional courts use the testing as well (Regional Court in Pilsen, Regional Court in Brno); *see* Léko, *supra* note 13.

[77] *See* Kosař *supra* note 2, at 110–114.

[78] The exception was the early and mid-1990s; *see* e.g. 9 PRÁVNÍ PRAXE (1995).

[79] David Kosař, *Rozvrh práce: Klíčový nástroj pro boj s korupcí soudců a nezbytný předpoklad nezávislosti řadových soudců*, 12 PRÁVNÍK 1060, 1060–1066 (2014).

[80] *See id.*, at 1049–1076, and the newspaper articles cited there.

[81] The term "bankruptcy mafia" was coined for a group with alleged influence in the area. *See id.*, at 1050.

significantly curtailed the CPs' power to set the criteria.[82] Although this change may seem marginal, the impact of the ruling is considerable: by narrowing the space for rigging a case assignment, it potentially boosted the output independence of individual judges and reduced the possibility of corruption.

Despite the abovementioned changes, there was no significant shift in the CPs' powers *vis-à-vis* individual judges. For a long time, the position of CPs could be seen to be the key challenge in Czechia, a challenge that is rarely addressed or thoroughly discussed outside of academic circles. There are not many reported accounts of abuse of CPs' powers,[83] and we cannot be sure how many remain unnoticed; moreover, the case of Slovakia shows that unchecked powers of CPs, combined with other actors, may yield truly pathological results.[84] However, as the cases of Poland and Hungary show, the external threat to judicial independence is gaining momentum and may become an urgent problem in a very short time, once again shifting the focus to the relationship of the judiciary with the other branches of power.

II. On Powers to Discipline

Only two of the JSG related modifications discussed in the first section had considerable impact on judicial accountability – the 2002 and the 2008 reforms that changed the way judges were disciplined. However, there certainly were changes in (the use of) other accountability mechanisms available in Czechia – reassignment within the same court, case assignment, promotion to a higher court, promotion to the position of chamber president, appointment to the grand chamber of the SC, secondment, temporary assignment outside the judiciary, the appointment of a judge to the position of court president or vice-president or the complaint mechanism.[85] Nevertheless, these changes either had other causes[86] or were practically untraceable as they were not changes to de jure mechanisms and hard data on de facto use of these mechanisms are missing.

Therefore, we concentrate on both de jure and de facto changes in the way judges were disciplined after the 2002 and the 2008 reforms and only briefly discuss some changes to

[82] *See* especially the judgment of the Czech Constitutional Court of 15 June 2016, case no. I. ÚS 2769/15; as well as judgments of 27 May 2004, case no. IV. ÚS 307/03; judgment of 27 September 2005, case no. I. ÚS 93/99; judgment of 21 April 2009, case no. II. ÚS 2747/08; judgment of 28 May 2009, case no. II. ÚS 2029/08; judgment of 20 April 2011, case no. IV. ÚS 1302/10; and judgment of 1 November 2012, case no. IV. ÚS 2053/12.

[83] For an account of some of such incidents, *see* Kosař, *supra* note 2, at 117–118.

[84] *See* KOSAŘ, *supra* note 5, at 236–333.

[85] *See* KOSAŘ, *supra* note 5, at 187–235.

[86] *See* the case of changes to case assignment (work schedules) caused by a ruling of the Constitutional Court described above.

informal accountability. The 2002 reform brought three significant changes to de jure accountability of judges. First, the presidents of the Supreme Court and the Supreme Administrative Court got the power to initiate proceedings not only against judges of "their" courts, but also against the judges of all lower courts. As the presidents of high and regional court already had such a power, the 2002 reform finalized the hierarchical model of initiating disciplinary proceedings. Second, the disciplinary proceedings became unified. Previously, district court judges had been disciplined by regional courts and could appeal to the SC, regional and high court judges had been disciplined by high courts and could also appeal to the Supreme Courts and Supreme Court judges had been disciplined by this very court and thus could not appeal. Afterwards, all judges were disciplined by the high court and could appeal to the Supreme Court. Third, the set of sanctions available was reduced and, after the 2002 reform, disciplined judges could no longer be reassigned to a court of the same or lower level. The 2008 reform also changed several de jure aspects of disciplinary proceedings. First, since 2008, not only could the CP of the relevant or a higher court and the Minister of Justice initiate the proceedings, but so could the President of the Czech Republic.[87] Second, the composition of disciplinary panels changed significantly. Whereas before the 2008 reform judges were judged (disciplined) only by judges, after the reform mixed panels composed of 3 judges and 3 members of other legal professions were introduced.[88] Third, whereas before the reform there was a possibility to appeal against the decision issued in the disciplinary proceedings,[89] there was no such possibility afterwards.[90] Fourth, a new type of disciplinary offense was introduced in 2008 – the breach of CP duties.[91]

As regards de facto accountability, both reforms seem to have had some impact on the frequency, reasons and/or ways judges were actually disciplined. Kosař and Papoušková came to the following conclusions when analysing decisions issued in disciplinary

[87] Compare art. 8 of the 2002 Disciplinary Code and of the 2008 Disciplinary Code. Note also, that the Public Defender of Rights could initiate the proceedings against court officials.

[88] Compare art. 4 of the 2002 and 2008 Disciplinary Codes.

[89] Note that from 1991 to 2002 judges of the Supreme Court had no such possibility, as in this period disciplinary panels were assembled pursuant to a hierarchical pattern – disciplinary panels at regional courts decided on motions against judges of district courts; disciplinary panels at high courts decided on motions against judges of regional courts as well as against judges of the relevant high court; and disciplinary panels at the Supreme Court decided on motions against judges of the Supreme Court. In the next period, i.e. from 2002 to 2008, all first-instance disciplinary proceedings were held at high courts. Comp. art. 5 of the Law No. 412/1991 Coll., on Disciplinary Liability of Judges (hereinafter "1991 Disciplinary Code") and art. 3 of the 2002 Disciplinary Code.

[90] Compare art. 21 of the 2002 and 2008 Disciplinary Codes.

[91] *See* art. 87 of the Law No. 6/2002 Coll, on Courts and Judges, as amended by the Law No. 314/2008 Coll. Otherwise judges could still be disciplined for infringing upon dignity of the judicial office or threatening public confidence in independent, impartial and just decision-making of courts.

proceedings initiated from the beginning of the year 1993 till the end of the year 2014.[92] First, both reforms seem to have influenced the number of disciplinary motions. Whereas before the 2002 reform on average 26 motions a year were filed, after the reform this number increased to 33 and dropped again to 28 after the 2008 reform. Second, the 2008 reform brought a slight increase in the proportion of proceedings initiated by the Minister of Justice. In the period 1993-2002, 10 % of proceedings were initiated by the Minister and in the following period the number was nearly the same (9 %), but in 2008-2014 it increased to 16 %. Third, after the 2008 reform judges were less often prosecuted for having caused delays in court proceedings and more often for disciplinary offenses related to judicial independence and ethics. More concretely, whereas before 2002 reform 61 % and before the 2008 reform 66 % of disciplinary proceedings were initiated based on the first grounds and 7 and 9 % based on the second, after the reform it changed to 54 and 20 %. Fourth, the 2008 reform also brought a significant decrease in the proportion of disciplinary proceedings that resulted in the imposing of a sanction. The proportion was 55 % in the period of 1993-2002; this increased to 60% in the next period and dropped to 40% after the 2008 reform. All in all the successfulness of the disciplinary motions, measured as the proportion of proceedings that resulted either in the imposing of a sanction or the resignation of the disciplined judge, also dropped significantly after the 2008 reform, as it was 53 %, whereas in 1993-2002 it was 68 % and in 2002-2008 even 71 %.

Apart from the abovementioned changes, judicial accountability also evolved in its informal aspect. Judges are more and more often scrutinized by the media and the broader public[93] and, as CPs will eventually lose their offices, they may feel the urge to please the judges of the court in which they preside, i.e. their future colleagues. However, only the last of these evolvements can be directly related to a concrete event, let alone to a concrete modification in JSG in Czechia.

III. On Mandates, Selection and Legitimacy

It is hard to put a finger on a concept like judicial legitimacy alone, and it may prove even more difficult to cover the effects that JSG changes had on it.[94] Nevertheless, it is possible to say that it is following the (legal) rules in the first place which provides any organ with a basic source of legitimacy. In this respect, it can be argued that limiting CPs' mandates may have indirectly caused a decrease of judicial legitimacy in its legal dimension.[95] Although

[92] KOSAŘ & PAPOUŠKOVÁ, *supra* note 27.

[93] In 2010, a website platform for discussing personal experience with individual judges and opinions on them was launched. *See* znamysoudce.cz.

[94] To avoid overlap with the account of impact on public opinion, we omit the social dimension of judicial legitimacy.

[95] This understanding connects legitimacy with legality and claims that judiciary is legitimate when it adheres to legal rules; *see* e.g. CARL SCHMITT, LEGALITY AND LEGITIMACY (2004); and DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL

the change of law and the intervention of the Constitutional Court did not cause a decrease in legal judicial legitimacy, the subsequent conduct of several CPs, who circumvented these rules to retain their mandates,[96] surely did have some impact.

Two other changes in JSG had potential influence on the normative dimension of judicial legitimacy.[97] In the first place, we must mention the selection of judges, which is arguably the area with the greatest importance for judicial legitimacy, the current state of which is one of the biggest legitimacy issues. As the rules for selection are in the hands of (some) CPs and are rather opaque at most courts, any improvement here should boost judicial legitimacy.[98] Despite partial improvement in this area (notably regarding the selection of judges at the SC, the SAC, and the Municipal Court in Prague[99]), the rules are still far from unified and transparent. The 2003 change in the age limit for a judge's eligibility for office from 25 to 30 years may have resulted in a minor boost in legitimacy.[100] Secondly, the introduction of judicial boards in 2002 promised that at least some of the courts would be run somewhat more democratically, constraining to a certain degree the monocratic CPs and possibly boosting legitimacy. Whether this in fact happened depends significantly on the person of the CP.

There are other judicial legitimacy issues in Czechia, although non-JSG related, that are worth mentioning. The foremost of these is the composition of the judiciary and its changes after the fall of the communist regime. After the Velvet Revolution, the new regime attempted to purge the judiciary from judges directly involved in the execution of the "communist justice".[101] Still, many judges who were former members of the Communist Party remained in the judiciary[102] and a list of them was published after an intervention by the CC,[103] which may be seen by many as delegitimizing the judiciary.

SCHMITT, HANS KELSEN AND HERMAN HELLER IN WEIMAR (1999); and various contributions in LEGITIMACY IN INTERNATIONAL LAW (Rudiger Wolfrum & Volker Roeben eds., 2008).

[96] *See* Kosař, *supra* note 2, at 110–112; Ladislav Derka, *Pro soudní funkcionáře právo neplatí?* 4 SOUDCE 7 (2015); Viktor Derka, *Ústavnost opakovaného jmenování soudních funkcionářů,* 23 JURISPRUDENCE 3 (2014).

[97] *See* e.g. Peter G. Stillman, *The Concept of Legitimacy*, 7 POLITY 32 (1974).

[98] Better rules for selection could have a sort of "trickle-down effect", as it may improve also the quality of judges and, subsequently, of the judicial process and decisions.

[99] *See supra* notes 75 and 76.

[100] Before, many may have had the impression that "kids" with little life, to say nothing of legal, experience, sit on the bench; *see* Kühn 2012, *supra* note 6, at 614.

[101] For an overview, *see* KOSAŘ, *supra* note 5, at 167–173; and David Kosař, *The Least Accountable Branch,* 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 234, 251–252 (2013).

[102] At the beginning, almost two thirds of judges were ex-communists.

[103] *See* the judgment of the Czech Constitutional Court of 15 November 2010, case no. I. ÚS 517/10.

Secondly, the Czech judiciary has often been criticized for the excessive length of proceedings.[104] Even though this criticism lacks objective foundation,[105] the "slow judiciary" myth seems to persist.[106]

The third legitimacy issue is corruption inside the judiciary, which always delegitimizes judiciary as a whole, especially when it seems to be systemic and organized, as in the case of the so-called "bankruptcy mafia".[107] Lastly, several high-profile criminal cases with (former) politicians[108] accused of corruption have been making their way through the judiciary recently. Although cases of political corruption are understandably difficult to judge and take a long time, a high degree of disagreement between courts often results in higher courts quashing the decisions of lower courts. This in turn may create in some people the impression that courts are both unable to "finish" the cases because they are corrupt as well, and that criminal justice is being politicized and serves a different purpose than it should.

IV. On Transparency

There is only one change in judicial transparency that may be connected with (changes in) JSG[109] and that is the opening up and standardizing of the selection procedure for judges at one of the eight regional courts in Czechia. This change is related to the establishment of the Judicial Academy, as the president of the Municipal Court in Prague agreed with the JA that it will administer written tests and score the candidates and thus determine who will be invited for an interview.[110] As noted above, although one of the de jure aims of the JA is to "participate in the selection of persons who apply for a position of a law clerk",[111] except

[104] For this, Czechia was criticised many times by the European Court of Human Rights.

[105] The length of proceedings in Czechia is, if compared to other EU countries, average. *See* the European Commission's 2017 EU Justice Scoreboard, at 7–11.

[106] *See* for example Kristián Léko, *Soudci by se „pod lupou" víc snažili*, LIDOVÉ NOVINY, July 17, 2017, at 5, where one of the respondents, a professional lawyer, claimed that "*If the judiciary is slow, at least make it transparent*."

[107] *See supra* note 81.

[108] This includes e.g. the former Prime Minister Petr Nečas and his spouse Jana Nečasová, former Minister of Health David Rath, and Marek Dalík, an influential lobbyist and an advisor to the former Prime Minister Mirek Topolánek.

[109] Note that we are speaking mainly about systemic changes, as "local" (i.e. court specific) changes in judicial transparency may appear any time a new court president is appointed and thus has an opportunity to adopt a new transparency policy.

[110] *See*, for instance, Léko, *supra* note 13.

[111] *See* art. 132 of the Law 6/2002 Sb., on Court and Judges.

for the case just mentioned neither this very aim nor its modification consisting in the participation in the selection of judges was actually ever fully realized.[112]

Other changes in judicial transparency were connected rather with two other evolvements – the adoption of Law No. 106/1999 Coll., on Free Access to Information, and the advancement in information and communications technologies. The first evolvement, for instance, opened a way to find out which judges were members of the Communist Party before 1989[113] or which constitutional justices deal with the cases assigned to them in the most timely and responsive manner.[114] The second evolvement mainly brought the possibility to publish court decisions online. So far, only the top three courts have taken full advantage of this possibility.[115] The decisions of other Czech courts have been published since 2011, but only to a very limited extent.[116] While the non-apex courts were instructed by the Ministry to publish every important decision, in 2015, for instance, they published only 75 of them.[117] Another step that was made possible due to the advancement in ICT was the 2007 launch of the "eJustice" (electronic justice) project. The project resulted in the creation of an online form for filing an electronic payment order and for making any other submission to a court; the publication of dates, times and venues of court hearings and of information regarding the state of court proceedings; and in the aggregation and publication of statistics on the activity of individual courts.[118] Last but not least, since 2015 all courts publish information on their contracts and paid invoices in a central online database that is accessible free of charge.[119]

All these developments influenced not only the way relevant information is made available and findable but they also had an impact on who uses it. It is logical that before launching

[112] Only three more of the eight regional courts organize an open selection procedure for law clerks, but they do so without assistance of the Judicial Academy.

[113] The MoJ published a list of such judges following to the judgment of the Czech Constitutional Court of 15 November 2010, case no. I. ÚS 517/10.

[114] *See* Tomáš Němeček, *Tajná data z Ústavního soudu*, LIDOVÉ NOVINY, February 28, 2011; Tomáš Němeček, *Zachraňte doktora Balíka*, LIDOVÉ NOVINY, March 5, 2012; and Tomáš Němeček, *Doktorka Lastovecká se topí*, LIDOVÉ NOVINY, February 23, 2013.

[115] The Supreme Court began publishing all its decisions online in 2000. The newly established Supreme Administrative Courts followed this path and started publishing all decisions online soon after its establishment in 2003. The Constitutional Court made this step in 2006.

[116] They are accessible through http://www.nsoud.cz/Judikaturans_new/judikatura_vks.nsf/uvod.

[117] The Office of the Public Defender of Rights, 2017. *Výroční zpráva 2016*, at 57: https://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Vyrocni-zprava2016_web.pdf

[118] For more details *see* the web http://www.reformajustice.cz/ejustice/ and other websites it references.

[119] *See* http://data.justice.cz/SitePages/DomovskaStranka.aspx.

the relevant databases only big entities like the MoJ or companies developing and selling legal information systems could make use of the information. However, currently also the media, researchers and civil society can easily utilize it. Nevertheless, despite all these changes, judicial transparency remains a much-debated issue as the public still lacks information on the activity of individual judges[120] or on individual candidates for a judicial position.[121]

V. On Public Confidence

Changes in JSG can have repercussions not only for the legal and political fields, but also for the wider social field, i.e. for the relationship between the judiciary and the public. In general, one of the most important indicators of this relationship is the level of public confidence, which can be described as the public's belief in the reliability, honesty and ability of courts and judges, and the belief that the courts act competently in the sense that they are able to perform the functions that are legally or constitutionally assigned to them.[122]

Public confidence in the judiciary stems from two broad groups of factors:[123] cultural (confidence originates in long-standing and deeply-seated beliefs that are rooted in cultural norms) and institutional (confidence is related to institutional performance). Thus, the influence of changes in JSG on the level of public confidence is predominantly indirect, and this only happens in the event that the changes somehow affect the performance of the courts and judges. As already mentioned, there was no JSG "big bang" in Czechia that would have had this power. However, the Czech example shows that a judiciary can enjoy a reasonable level of public confidence even without adopting a strong model of JSG or establishing a judicial council.

As pictured in Figure 1, trust in courts, measured continually since 1990, is gradually increasing. The trend seems to be influenced chiefly by broader historical socio-political development. In 1990, shortly after the fall of the authoritarian regime, public confidence in courts was very low, with a considerably higher percentage of distrusting respondents (almost double) than trusting ones. As summarized by Sztompka,[124] in communist countries, trusting the state and its political institutions, including courts and judges, was

[120] Note that, for instance, in Slovakia such information is available through the website https://otvorenesudy.sk/.

[121] However, *see* above for information on the quite transparent selection of judges for the two apex courts.

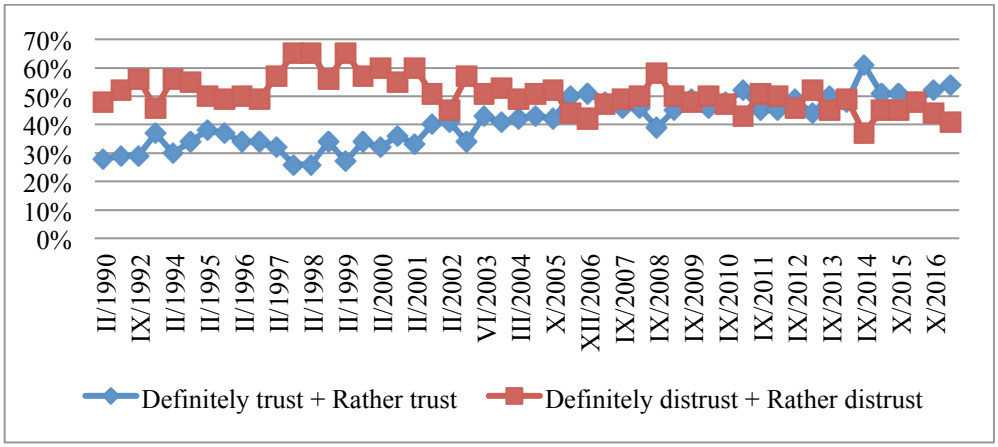
[122] George W. Dougherty, Stefanie A. Lindquist & Mark D. Bradbury, *Evaluating Performance in State Judicial Institutions: Trust and Confidence in the Georgia Judiciary*, 38 STATE AND LOCAL GOVERNMENT REVIEW 176 (2006).

[123] William Mishler & Richard Rose, *What Are the Origins of Political Trust? Testing Institutional and Cultural Theories in Post-communist Societies*, 34 COMPARATIVE POLITICAL STUDIES 30 (2001).

[124] PIOTR SZTOMPKA, TRUST: A SOCIOLOGICAL THEORY (2000).

seen as naive and stupid. Moreover, under the authoritarian regime, the judicial profession suffered from low prestige (both in social and financial terms)[125] and was considered to be unattractive and corrupt. After 1989, public confidence in courts has gradually been restored, probably a sign of a successful transformation that also included a turnover in judicial ranks. In 2006, the share of respondents trusting in courts exceeded the share of distrusting respondents for the first time and, after some volatility, this has become a stable pattern since 2014.

Figure 1: Trust in courts in Czechia, 1990-2017 (in %)[126]



In addition to institutional confidence, it is also important to assess public confidence in judges, as confidence in institutions can differ from confidence in individuals. Unfortunately, a continual measurement of public confidence in judges is missing in Czechia. As a proxy indicator, prestige of judges (as a profession), measured since 2004, can be used. As pictured in Figure 2, the social position of judges in the last almost fifteen years has been very high, with no significant swings. Judges belong to the group of top ten most prestigious professions according to the Czech public, together with doctors, teachers, scientists and nurses. Thus, it seems that after the damage to prestige and credibility of judges and courts caused in the previous regime, they have successfully reclaimed their social position, or are at least on the way to doing so.[127] This is probably an

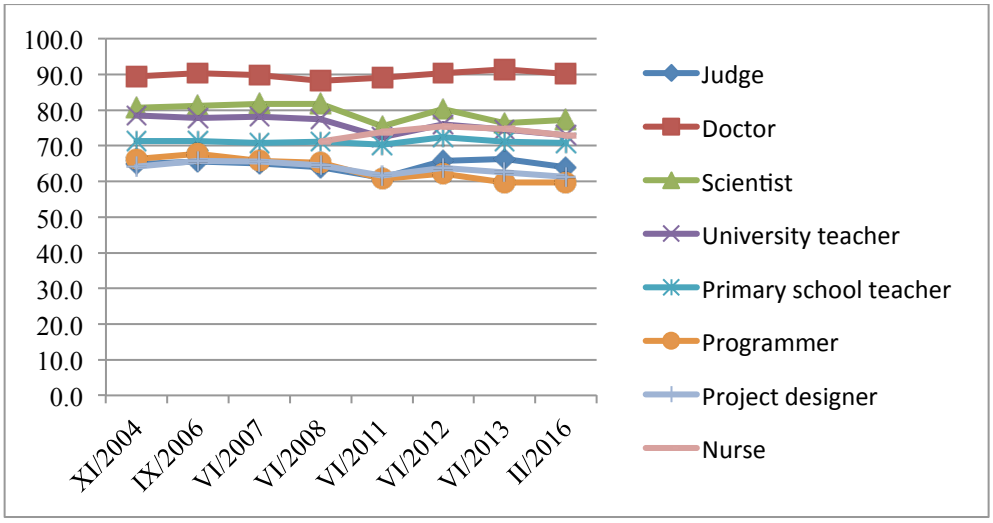
[125] *See*, e. g. KÜHN 2011, *supra* note 6, at 53.

[126] Source: Czech Social Science Data Archive of the Czech Institute of Sociology. The remainder (to 100 %) are "do not know" answers. The question asked was: "Please tell us, do you trust or distrust the courts?" Possible answers: I definitely trust/I rather trust/I rather distrust/I definitely distrust them.

[127] The restoration of the social position of judges becomes evident also when looking at the rise of their salaries. In Czechoslovakia in the 1950s, judges' salaries were only slightly above the national average salary, and below e.g. miners' or bus drivers' salaries, *see* OTA ULČ, MALÁ DOZNÁNÍ OKRESNÍHO SOUDCE 76 (1974). In 2017, a judge's salary base is calculated by multiplying the average nominal monthly salary of individuals in the non-business

effect of a broader successful transformation process of the judiciary managed without blatant scandals or affairs eroding the emerging public confidence in courts or judges. However, the forms or levels of JSG do not seem to play any distinct direct role in this process.

Figure 2 Prestige of the top eight professions in Czechia, 2004-2016 (in %)[128]



VI. On Lateral Selection and Male Court Presidents

As there were few JSG changes that would significantly affect the CIATL values, it follows that such changes would have little impact on other values as well, apart from diversity. The professional diversity of the judiciary may have been influenced by the presidents' of the Supreme Court and the Supreme Administrative Court intentions to select judges not only from the ranks of professional judges, but also from the ranks of academics and other legal professions.[129] It was, however, only at the Supreme Administrative Court that the change was actually implemented; it remains to be seen whether this will be the case at the Supreme Court as well; there are no signs of such change happening at the lower courts.[130] Gender-wise, the Czech judiciary is quite constantly[131] a predominantly female

(public) sector by the coefficient of 3. The salary base is then in turn multiplied by a specific coefficient depending on the position of a judge etc.

[128] Source: Czech Social Science Data Archive of the Czech Institute of Sociology. Legend: The data in the figure represent the average score of prestige on a scale from 1=the lowest prestige to 99=the highest prestige.

[129] *See* the memos published by the CPs, *supra* note 75.

[130] Kühn 2012, *supra* note 6, at 613–616.

profession, with women occupying about 66% of the posts at the district courts, 57% of the posts at the regional courts, 44% of the posts at the high courts, and 25% at the apex courts,[132] although the positions of CPs and vice-presidents, especially at the higher courts, tend to be dominated by men.[133] Furthermore, there is no available data about the ethnic diversity of the Czech judiciary, but we may safely guess that it reflects the mostly homogeneous Czech population. Thus, no apparent changes, including those related to JSG, took place that would affect the gender or ethnic diversity of the judiciary.

C. Place of Court Presidents in the Separation of Powers and their Link to the People

In this final section, we take a step back from the five values and assess the impact of JSG on the modern state in a more general sense, namely on the architecture of the separation of powers and the democratic principle. Similarly to the previous parts, it is the position and powers of CPs, who most often come into contact with the other branches of power, which pose the biggest challenge to the separation of powers. This is caused by the fact that court administration in Czechia has traditionally belonged to the executive branch,[134] the telling proof of which is that the term "state's administration of courts" is used to this day.[135] We have already stated that the state administration of courts is a task of CPs together with the MoJ.[136] As there can be no doubt that MoJ is part of the executive, it is the role of CPs that may create confusion. Until 2008, it was safe to assert that CPs were part of the executive power, as they carried out a role that was traditionally understood as executive and the rules that apply in the administration applied to them as well.[137] After 2008, however, the position of CPs changed. The Constitutional Court declared that CPs' *specific* role is to ensure the proper functioning of the judiciary (separation of functions/institutions),[138] and, consequently, it struck down a provision that declared CPs part of the public administration for personal incompatibility.[139] As a result, CPs are on the

[131] Kühn 2010, *supra* note 6, at 191, reports that in 2001 the numbers were quite similar.

[132] *See* České soudnictví 2016: Výroční statistická zpráva, Ministerstvo spravedlnosti, 2017, at 12, 53, 94, 105, and 111. The causes of underrepresentation of women at the upper echelons of the Czech judiciary are not yet determined.

[133] *See* http://portal.justice.cz/Justice2/Soudci/soudci.html.

[134] This tradition dates to the times of Austro-Hungarian Empire; *see* PRINC, *supra* note 29, at 209–220.

[135] *See* Art. 119 of the Law no. 6/2002 Sb., On Courts and Judges; and art. 74(2) of the Law no. 6/2002 Sb., On Courts and Judges, which explicitly admits that the function of the court president is part of the public administration.

[136] Art. 119(2) of the Law no. 6/2002 Sb., On Courts and Judges.

[137] Especially the rule that who appoints, dismisses as well.

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

[139] Judgment of the Czech Constitutional Court of 4 May 2010, case no. Pl. ÚS 7/09.

one hand a part of the public administration with administrative powers, but on the other, their position is protected by judicial independence, which makes them what could be best described as *sui generis* members of the public administration. Accordingly, as the position of CPs was no longer of a predominantly executive nature, and the rules applicable in the executive no longer applied to them, we can now say that the role of CPs, and the separation of powers with it, was altered.

We now briefly turn to the democratic principle. This principle requires that the people are more or less directly connected with their representatives and it has always been a part of debates concerning the Czech judiciary, although different terms have often been used. For instance, during the 2017 parliamentary elections, almost all of the nine later elected political parties emphasized that the quality of judges and their work had to be subjected to public inspection and that judges had to be personally accountable for the judgements they issue.[140] These measures were to ensure that people knew who the judge deciding their case was and how well she performed her function. Therefore, although there has never been a proposal in Czechia to introduce the election of judges by the people or the Parliament, including people in the scrutiny of the judiciary has been always called for. So far, however, this has materialized only in the introduction of non-judicial members into the disciplinary panels and in the preservation of the Communist system of lay judges, i.e. laymen who are elected by municipal or regional councils and have a majority say in some matters decided at district and regional courts.[141] The legitimacy chain between the people and judges thus remains rather loose, which is even more true in the case of court presidents – the primary JSG actors – whose selection remains shrouded in mystery in Czechia.

D. Conclusion

This article argued that, despite having no judicial council, there is indeed judicial self-government in Czechia. Firstly, it showed that there are several bodies that take part in JSG, although the crucial role is played by the CPs, who hold substantial formal powers and informal influence *vis-à-vis* the judiciary and the other branches of power, namely the MoJ (Section A). Furthermore, the article stressed that the lack of institutionalized JSG in the form of a judicial council does not bar the judiciary from functioning properly in the wider legal, political and social environment, although there are some problematic points (Section B). Thus, the JSG in Czechia on the one hand facilitates, but, on the other hand, also potentially endangers judicial independence by concentrating power in the hands of CPs; similarly, JSG may have increased the number of disciplinary motions, but at the same time may have decreased their successfulness. By bringing transparency to the selection of judges, CPs may have given the judiciary a legitimacy boost; nevertheless, by not

[140] *See* e. g. http://www.ceskatelevize.cz/ct24/tema/484360-volby-2017-spravedlnost-a-stav-justice.

[141] *See* arts. 64 and further Law No. 6/2002 Coll., on Courts and Judges.

respecting the prohibition of their own reappointment and because of the lack of transparency in the informal JSG processes, the legitimacy may again suffer. As far as public confidence in judiciary goes, it remains fairly strong and apparently unaffected by the JSG issues. Finally, from a more general point of view (Section C), we have showed that the JSG influenced the separation of powers in Czechia in a peculiar way by making CPs *sui generis* actors belonging somewhere between the judiciary and the executive branch, while not contributing to the democratic connection between the people and the judiciary. To sum up, calling Czechia the "black sheep" for not establishing a judicial council may therefore not be appropriate, as the judiciary has been able to sustain a substantial amount of JSG. Whether it will be able to hold onto it and manage to guard the crucial values is a question that remains to be answered; whether a judicial council would help it in this task can only be hypothesized.