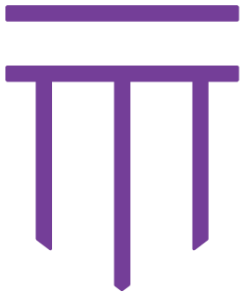

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Court Presidents: Power Through Informality

David Kosař and Katarína Šipulová

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Abstract

This chapter conceptualises the roles of court presidents and explains their complex interaction with other actors involved in judicial governance, such as politicians, individual judges and other judicial self-governance bodies. It shows that court presidents can play a positive role (by effective governance of their courts, ensuring informational flows, providing an early warning system against political interferences, and acting as bulwarks against democratic decay), but they may also use their powers to the detriment of judicial independence (by succumbing to corruption and clientelism). Our argument is two-fold. First, in order to understand the true role of court presidents in a given system, it is crucial to go beyond their formal powers, as court presidents are often embedded in various informal networks that make them more important actors than they seem on paper. Second, court presidents are strategic actors who respond to varied institutional conditions and political circumstances.

Keywords

court presidents, chief justices, judicial independence, judicial governance, administration of courts, judicial politics

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Court Presidents: Power Through Informality

David Kosař and Katarína Šipulová*

1 Introduction

Court presidents and vice-presidents play a crucial role in judicial governance. In many countries, they are the key gate-keepers of selection processes. They sit on judicial councils or represent the judicial power vis-à-vis other political actors. They have direct political channels to the parliament, often with competence to comment on any legislation that addresses procedural codes and the regulation of courts. Despite the primus-inter-pares myth, court presidents also frequently have a comparatively larger impact on the development of jurisprudential doctrines – and this is particularly the case with chief justices, the presidents of apex (i.e. supreme, constitutional or international) courts. Although their formal functions are mostly of a managerial character, they are often selected to the position by reason of their expertise or impact within the legal community. Even small, seemingly mundane competences, such as control over the docket, work schedule or formation of panels (most impactful where court presidents create panels specialised on a particular agendas), often gives them immense strategic influence. They are the primary spokespersons of courts. While courts have the power to create a narrative of political events,[1] court presidents are the loudspeakers that pass this narrative on to the media and the broader public.

The combination of these formal and informal powers, however, makes court presidents also very prone to politicisation. Many political actors become

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[1] M Urbániková and K Šipulová, 'Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?' [2019] 19 GLJ 2105-2136; K Šipulová and D Kosař, 'Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries' [2023] 24 GLJ 1577-1595.

eager to get rid of them, turn them into transmission belts, or to install their own protégés into these positions. Politicisation and capture of courts, which affect court presidents prominently, is a global phenomenon. We saw this very clearly in Pakistan after General Pervez Musharaff suspended Chief Justice Iftikhar Chaudhry[2] or when Hugo Chavez removed the Vice-President of the Venezuelan Supreme Court, Justice Arrieche.[3] When Viktor Orbán and Jarosław Kaczyński initiated their crusades to control and weaponise domestic judiciaries, they also knew very well how powerful court presidents are. As a result, they soon went after the presidents of their supreme and constitutional courts. Nowadays, everybody knows the names of the ousted Chief Justice of the Hungarian Supreme Court, András Baka,[4] and the Polish Supreme Court President, Małgorzata Gersdorf. The twists and turns of the presidencies of the Polish Constitutional Tribunal and the Hungarian Constitutional Court are more difficult to follow, but they have also been heavily medialised.[5]

However, Pakistan, Venezuela, Poland and Hungary are far from being isolated cases where political leaders have attempted to execute judicial overhaul through the "selective packing" of court presidents. Similar political attacks targeting court presidents appear across political regimes. We have seen evidence in Croatia,[6] Slovakia,[7] Czechia,[8] Ukraine[9] and, very recently, also in Israel.[10] Other controversies have taken place in Latin America.[11]

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[2] Shoaib A Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf', [2010] 35 LSI 985.

[3] Matthew M Taylor, 'The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chavez', [2014] 46 JLAS 229, 254.

Attila Vincze, 'Dismissal of the President of the Hungarian Supreme Court: ECtHR Judgment 'Baka v. Hungary'', [2015] 21 EPL 445.

[5] Wojciech Sadurski, *Poland's Constitutional Breakdown* (2019) and A. Vincze, 'Schrödinger's Judiciary—Formality at the Service of Informality in Hungary' [2023] 24 GLJ 1432-1448.

[6] Alan Uzelac, 'Role and Status of Judges in Croatia', in Paul Oberhammer (ed.). *Richterbild und Recthsreform in Mitteleuropa* (MV 2001).

[7] David Kosař, 'Perils of Judicial Self-Government in Transitional Societies', [2016] CUP; Report of the Special Rapporteur on the Independence of Judges and Lawyers on His Mission to the Slovak Republic (November 27–29, 2000), E/CN.4/2001/65/Add.3, paras. 27–33.

8 Michal Bobek, 'The Administration of Courts in the Czech Republic – In Search of a Constitutional Balance' [2010] 16 EPL 251.

9 Maria Popova, 'Can a leopard change its spots? Strategic behavior versus professional role conception during Ukraine's 2014 court chair elections' [2020] 42 LP 365.

[10] Tom Pavone, 'Agendas, Decisions, and Autonomy: How Government Lawyers Shape Judicial Behavior' in Epstein, Grenstad, Sadl & Weinshall (eds.) *The Oxford Handbook of Comparative Judicial Behavior* (OUP 2023).

[11] Matthew C. Ingram Crafting Courts in New Democracies: *The Politics of Subnational Judicial Reform in Brazil and Mexico*, (CUP 2015); Matthew C. Ingram, 'Networked Justice: Judges, the Diffusion of Ideas, and Legal Reform

Even consolidated democracies have witnessed politically contested selections, dismissals and resignations of court presidents. Tim Carmody's appointment as Chief Justice of Queensland by Premier Campbell Newman in 2014 tore the Australian legal profession apart and eventually evolved into Australia's greatest judicial crisis.[12] The United States also saw several skirmishes concerning court presidents at state level.[13] Other common law jurisdictions have also started to acknowledge the importance of court presidents in judicial governance, especially in the context of ongoing judicial reforms[14] or crises.[15] Even in Norway, where judicial politics have rarely been discussed in public, the most recent appointment to the position of the Chief Justice drew severe criticism from the political opposition and scholars, as well as the insiders.[16]

Interestingly, scholars have paid less attention to court presidents than have politicians. The existing works are largely casuistic and focus on a single jurisdiction or on individual court presidents.[17] Moreover, the vast majority of the literature focuses on chief justices, who play a special role within the judicial system,[18] or presidents of constitutional courts, who are again very

Movements in Mexico', [2016] 48 JLAS 739; Andrea Pozas-Loyo and Julio Ríos-Figueroa, 'The Transformations of the Role of the Mexican Supreme Court', In Andrea Castagnola and Saúl López Noriega eds., *Judicial Politics in Mexico: The Supreme Court and The Transition to Democracy* (2016) 8.

[12] R Ananian-Welsh, G Appleby and A Lynch, *The Tim Carmody Affair: Australia's Greatest Judicial Crisis,* (2016); Reid Mortensen, 'How many chief justices? Judicial appointments and ethics in Queensland', [2017] 20 LE, 64-88.

[13] Marin K Levy, 'Packing and Unpacking State Courts' [2020] 61 WMLR 1121.

[14] Patrick O'Brien, 'Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland' [2018] 19 GLJ 1871; T Wilhelm and others, 'Judicial Reform in the American States: The Chief Justice as Political Advocate' [2020] SJ; Wilhelm, T., Vining, R. L., Boldt, E. D., & Black, B. M. 'Judicial Reform in the American States: The Chief Justice as Political Advocate' [2020] 20 State Politics & Policy Quarterly 135.

[15] Shane Phelan, 'Chief Justice tells Seamus Woulfe he should resign, but judge refuses to go', [2020] II <https://www.independent.ie/irish-news/chief-justice-tells-seamus-woulfe-he-should-resign-but-judge-refuses-to-go-39727402.html>.

[16] Anine Kierulf, 'Norway: New Chief Justice Appointed to the Supreme Court', [2016] IC <http://www.iconnectblog.com/2016/03/norway-new-chief-justice>.

[17] See e. g. Kosař, *supra* n.7; 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', [2017] 13 ECLR 96–123; Popova, *supra* n.9.

[18] Jennifer A Widner, 'Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa', [2019] WWNC 2001; Powell, 'South Africa', [2019] 19 Constitutional Court Review 1; D Kosař and S Spáč, 'Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?' [2021] 13 HJRL 107; M A Rivera León, 'Undermining Judicial independence' in Smith, Rhona and others (eds.), *Judicial independence in transitional democracies, Routledge, Forthcoming*, (2024); D Danelski and A Ward, 'The Chief Justice: Appointment and Influence', [2016] UMP.

specific creatures as these courts operate outside the general judiciary.[19] Much less attention has been paid to systematic removals of lower court presidents, partly because this turnover was skillfully executed through seemingly neutral measures such as the reduction of the compulsory retirement age for judges[20] or retention elections.[21]

That said, constitutional scholars have recently begun to explore the idea of judicial leadership more broadly. Towering Judges, a collection edited by Rehan Abeyratne and Iddo Porat, explores individual judges with exceptional influence on their countries' constitutional jurisprudence and their intellectual leadership at their respective courts.[22] These towering judges often tend to be chief justices or court presidents, but this institutional element has been explored only peripherally. Another forthcoming collection on constitutional heroines, edited by Erin Delaney and Rosalind Dixon, focuses on female-identifying judicial leaders in courts around the world. Much of this scholarship, however, focuses on judges as intellectual rather than institutional leaders. And where it explores the institutional dimension to the question, it does so through a quite particular lens – such as feminist influence or "towering" status.

However, some pioneering works suggest that lower court presidents might be an overlooked yet important piece of the puzzle in understanding the dynamics of judicial governance, owing to their gate-keeping powers in the selection of new judges,[23] frequent engagement in politics and corruption

[19] See e,g. Kim L Scheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe', [2006] 154 UPLR 1757; Stefanus Hendrianto, 'The Rise and Fall of Historic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia', [2016] 25 WILG 489; Stefanus Hendrianto, 'Law and Politics of Constitutional Courts: Indonesia and The Search for Judicial Heroes', [2018] Routledge; J Sindhu and V A Narayan, 'Institution Matters: A Critical Analysis of the Role of the Supreme Court of India and the Responsibilities of the Chief Justice', [2018] 51 Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 290–331.

[20] Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs: Commission v. Hungary', [2013] 50 CMLR 1145; T Gyulavári and N Hős, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts', [2013] 42 ILJ 289; Gábor Halmai, 'The early retirement age of the Hungarian judges', in F Nicola and B Davis (eds.) 'EU Law Stories. Contextual and Critical Histories of European Jurisprudence', [2017] OUP 471–488.

[21] Anna Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition' [2018] 19 GLJ 1839; and Popova, *supra* n.9.

[21] Rehan Abeyratne, Iddo Porat (eds.) 'Towering Judges' [2022] CUP.

[22] *Ibid*.

[23] Samuel Spáč, 'The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia', [2022] 69 PPC 528; Kosař and Spáč, *supra* n.18.

networks,[24] and their jurisprudential impact.[25] We build on this literature and develop it further.

This chapter is the first global treatment of court presidents that looks at them holistically. It conceptualises the roles of court presidents and explains their complex interactions with other actors involved in judicial governance, such as politicians, other judicial self-governance bodies and individual judges. By doing so, it shows that court presidents can play a positive role (by governing their courts effectively, ensuring informational flows, and providing early warning systems against political interferences), but they may, if they become too powerful, also use their powers to the detriment of judicial independence (by succumbing to corruption and clientelism). Our argument is three-fold. First, in order to understand the true role of court presidents in a given system, it is crucial to analyse both their formal and informal powers. This analysis must also include various informal networks court presidents are embedded in, as these networks often make them more important actors than they seem on paper. Only such a holistic conceptualisation of their roles can fully comprehend their role in judicial governance and particularly their impact on the internal judicial independence of rank-and-file judges. Second, the selection and dismissal of court presidents are becoming increasingly contested, and even judicialised in several parts of the world. Finally, the roles of court presidents are gendered, and their decisions can heavily affect the careers of female judges. These three perspectives help us understand the position of court presidents in its complexity, and uncover the hidden role of court presidents in judicial decision-making.

This chapter proceeds as follows. Section II conceptualises the roles of court presidents. It goes beyond their formal powers and shows the importance of the informal powers they have and the informal networks they are embedded in. By doing so, it highlights the role of court presidents in the development of judicial decision-making, beyond what their formal position and role in the judicial system tells us. It also points out that many of the ideational roles of court presidents are gendered. Section III zeroes in on the interactions of court

[24] Maria Popova, 'Prosecuting High-Level Corruption in Eastern Europe', [2018] 51 CPCS 231; Nino Tsereteli, 'Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia's Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Positions', [2022] 47 RCEEL 167.

[25] A Blisa and D Kosař, 'Court Presidents: The Missing Piece in the Puzzle of Judicial Governance', [2018] 19 GLJ 2031.

presidents with other actors, both within and outside the judiciary. It explains why court presidents are easily identifiable as salient by political actors. Section III concludes.

2 The Roles of Court Presidents

Why are court presidents so important? Contrary to the primus-inter-pares narrative common in many jurisdictions, court presidents actually hold significant powers over the development of judicial decision-making thanks to their influence in judicial governance. Compared to the rest of the judges, court presidents have many responsibilities to maintain the effective functioning of courts, which extrapolates also on their jurisprudential influence.[26] Hunter and Rackley[27] organised court presidents' powers into four types of judicial leadership: administrative, jurisprudential, social and community leadership. While administrative roles refer to judicial governance and jurisprudential to ideational decision-making influences, social and community leadership reflect the position of court presidents within a collegial court and their embeddedness in social and professional groups and networks, as a part of intra- and extra-judicial activities.

Blisa and Kosař unpacked the roles and powers of court presidents in even more detail when they organised court presidents' powers within seven areas: influence over judicial careers, finances, administration (court housekeeping), jurisprudence, ambassadorial (representation vis-à-vis politicians), medial and ancillary powers.[28] All these areas and the competences within them, even then often not autonomously held, help court presidents to have a profound influence over judicial politics and extrapolate them in their doctrinal leadership.

The role of court presidents in judicial governance has deep historical roots. Although power over the selection and appointment of judges was a typical dominion of executive power, courts' presidents enjoyed a wide area of delegated competences ministries of justice were unable (or unwilling) to execute. They typically enjoyed autonomous influence over the assignment of judges to particular courts, promotion and transfers, case assignment, the

[26] Blisa and Kosař, *supra* n.25; Popova, *supra* n.9.
[27] R Hunter and E Rackley, 'Judicial Leadership on the UK Supreme Court', [2018] 38 LS, 191–220.
[28] Blisa and Kosař, *supra* n.25.

creation of work schedules or accountability mechanisms.[29] In European bureaucratic models of Austro-Hungarian heritage, for example, these factors put court presidents into an exceptionally powerful position.

The introduction of judicial councils was a game-changer in this regard. The distribution of powers shifted from ministries to new collective self-governing bodies. In some, court presidents (and chief justices in particular) still had a key position, although their decisions were now subsumed to majoritarian decision-making. In others, such as in Slovakia, Georgia, Ukraine and Italy, judicial councils were eventually reformed to diffuse the impact and potential politicisation of court presidents and to weaken the links between them and political actors. However, the introduction of judicial councils did not bring the anticipated results and its overall effect was relatively mild. Judicial councils failed to abolish the informal powers and leadership roles of court presidents, particularly at the level of apex courts. Although court presidents lost a relatively large portion of their powers, particularly in the area of judicial careers, they still remain gatekeepers of the bench. Five factors explain this result: (1) the influence of court presidents over less salient areas of governance; (2) the ability of court presidents to appropriate powers by regulating new dimensions and policies of judicia governance; (3) the informational asymmetry between court presidents and the rest of the actors of judicial governance; (4) access to channels and intra- and extra-judicial networks; and (5) gender and gendered ideational roles.

First, judicial governance is often simplified to mean the making of key decisions on the selection, appointment, promotion or disciplining and removal of judges. However, the field is much more vibrant and continuously growing,[30] in terms both of the actors involved in governance and the policies needed for effective regulation.[31] Even in those countries that slowly excluded court presidents from key personnel policies, court presidents still retained significant say over career decisions of seemingly lesser public salience: transfers within the courts, promotions and demotions. In many countries, the assignment of a judge to the apex court requires the agreement of the

[29] Blisa and Kosař, *supra* n.25.

[30] David Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe', [2018] 17 GLJ 1567–1612.

[31] Šipulová and others, 'Judicial Self-Governance Index: Towards better understanding of the role of judges in governing the judiciary', [2023] 17 RG 22.

particular court president. Furthermore, court presidents have an important role in accountability mechanisms, as they often enjoy a power to initiate disciplinary proceedings, sometimes not confined to their apex courts and extended to any judge in the country. Although court presidents do not have decisive power over disciplining judges, they play an important role in accountability mechanisms, as they often have a mandate to initiate disciplinary proceedings. The practice of many countries has shown that the mere initiation of such proceedings can have a strong chilling effect on a judge.[32]

Furthermore, court presidents dominate the court administration, which means that in some countries they create judges' work schedules and have a role in case assignment. They also impact on the subject-matter specialisation of judges and can reassign them to a different agenda.[33] They play a role of a creation and personal composition of the grand chamber. In some countries, this competence is made conditional upon the approval of other actors, typically a judicial council or a small intra-court council of judges. In others, it is the exclusive decision of a chief justice and allows her to administer the agenda of the court. Of course, the drawback to the competence held by the court president is that she or he obtains significant influence over the workload and specialisation of individual judges and as a result, has a significant power over the future direction of the court's jurisprudence.

Second, court presidents often appropriate new fields of judicial governance and take responsibility over the new roles of courts. The executive power keeps informally delegating the regulation of judicial governance because it often lacks deeper insight into the courts' workings. The growth of AI, new technologies and digitalisation challenge the traditional administration of courts and increase the demand for speedy decisions and the availability of information. Courts also face pressures to change their usual forms of communication (or lack of it), provide more transparent information on their work, and find a new language in which to explain their activity to the public. They are at the centre of debates on the advancement of education, they decide on areas that require new expertise which is often well beyond the

[32] Kosař, *supra* n.7.

[33] The threat of a misuse of power was one of the reasons while court presidents in Italy cannot execute court administration autonomously and must rely on the consent of the High Council for the Judiciary, even in questions as a work schedule and case management. Interview, May 2022.

curricula of law faculties. Yet, these essentially political demands remain in the blind spot of the political powers. Without appropriate regulation, it is most often court presidents who are forced to self-regulate these fields, and who, by doing so, appropriate new powers.

Third, the process of appropriation therefore increases the informational asymmetry between courts and the state,[34] and it empowers the court presidents in areas that are neglected by public regulation, but also increases their influence on shaping the direction and modernisation of judicial governance and the informational asymmetry between court presidents and political actors.

Fourth, the leadership roles of court presidents cannot be conflated with their formal powers. They may in practice have direct access to parliamentary hearings and political actors. The networks court presidents take part in provide them with diplomatic resources and shape their ability to influence important decisions well beyond their explicit competences. They are, however, formed by the overall design of the judiciary and its governance – how many actors and veto players are acting in the field, how concentrated the power is and how autonomously individual actors can play. Typically, hierarchical systems have easier options to create important nodes around court presidents, as well as greater means to enforce loyalty among incoming young judges and judicial candidates.[35]

If we return to Blisa and Kosař's conceptualisation of court presidents' roles, three categories of power the authors mention reflect the informal powers and role of informal networks around those presidents: jurisprudential, ambassadorial and medial.[36] For example, seemingly minor administrative or managerial roles court presidents have in case management, when combined with their ideational powers and reputation, give them significant control over the content of courts' decision-making. The jurisprudential role reflects the combination of the court president's expertise, social capital and case administration powers. Just by controlling the work schedule in courts with relatively small specialised panels, court presidents can have a relatively high

[34] Kosař (2017), *supra* n.7.
[35] Samuel Spáč, 'The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia', [2022] 69 PPC 528; and Popova, *supra* n.
[36] Blisa and Kosař, *supra* n.25.

level of control over the assignment of cases to particular or a small group of judges. The ambassadorial role describes the diplomatic representation of the judiciary vis-à-vis other political branches or the public. It is therefore a typical role of chief justices, particularly so in systems without a centralised judicial council. While in some countries the power of the court president is purely ceremonial,[37] in others court presidents have an absolute, exclusive power and channel they can use to talk to politicians and voice the concerns of and make requests on behalf of the judiciary.[38] This is very much also reflected in court presidents' media roles, their communications on behalf of courts on the most salient cases, new policy changes or, sometimes, even constitutional development.

Fifth, the social leadership of court presidents, i.e. the way they use their persuasiveness, technical expertise and formal and informal influence, is typically gendered. Although we have seen more and more female judges rise to the presidency of prestigious courts such as the Supreme Courts of Canada and Israel, the Constitutional Chamber of the Costa Rican Supreme Court[39] and the International Criminal Court, these are still just a few examples. Women judges are underrepresented in positions of power at domestic apex courts, judicial councils and among court presidents in general.[40] This observation holds even for those countries where female judges outnumber male judges. In many post-communist countries, for example, female judges seldom rise to positions of court presidents, and if they do, they occupy less important positions at small district courts, or are appointed as vice-presidents where they are tasked with relatively mundane house-keeping tasks.[41]

The representation and access of female court presidents to informal networks is also different. In many countries, informal networks between judges and politicians, patronage and corruption culture, have strong masculine elements, such as *guanxi* in China[42] or the selection of judges to

[37] A typical example would be European countries with a francophone legacy such as Italy, France and Romania.
[38] This is typical for Latin America and Africa.
[39] CEPEJ [2022] <https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279> 70.
[40] Mónica García Goldar, 'The glass ceiling at the highest levels of the Spanish judiciary', [2020]. 27 IJLP 189-202.
[41] This is typical for the post-communist judicial systems. See B Havelková, D Kosař and M Urbániková, 'The Family Friendliness That Wasn't: Access, but Not Progress, for Women in the Czech Judiciary, [2022] 47 1106-1136.
[42] C Zheng, J Ai and S Liu, 'The Elastic Ceiling: Gender and Professional Career in Chinese Courts', [2017] 51 LSR 168-199.

vacancies by (typically male) supreme court justices in Mexico.[43] In South Africa, the Judicial Service Commission expects judicial candidates to have experience of acting as judges in the court they are applying for, but the acting appointments system is based on patronage and these offers are disproportionately made to men.[44]

Lastly, the leadership roles also depend on further systemic and individual factors: the extent of court presidents' autonomy vis-à-vis political actors (created by the method of their selection or potential removal), the ability and willingness of court presidents to use their powers. Either court presidents appropriate the role of primus inter pares, in such case they are very self-constrained in how they utilise their powers - they will seek consultation and often delegate part of their own competences to other actors, or they channel their power and maximise existing channels to appropriate the positions of "bosses" of the judiciary. In the next section, we unpack the systemic aspects as well as some of the informal networks that make judiciaries and court presidents more easily susceptible to politicisation.

3 Interaction between Court Presidents and Other Actors

The previous sections have shown that court presidents may wield significant powers. To be sure, the depth and breadth of their powers vary from one jurisdiction to another and depend on, among other things, the institutional design of the judicial system,[45] mode of selection of judges,[46] legal culture,[47]

[43] A Pozas-Loyo and J Ríos-Figueroa, 'Anatomy of an informal institution: The 'Gentlemen's Pact' and judicial selection in Mexico, 1917–1994' [2018] 39 IPSR 647-661.

[44] Masengu Tabeth, 'The Judicial Service Commission and the appointment of Women: More to it than meets the eye', [2020], 27 IJLP 161-174.

[45] In "vertical" judicial systems (with a single supreme court) court presidents wield more power than in "horizontal" judicial systems (with several apex courts).

[46] Court presidents may arguably exercise more influence over young judges in career judiciaries who enter the Court presidents may arguably exercise more influence over young judges in career judiciaries who enter the judiciary soon after graduating from the law school with little experience outside the courtroom than over experienced middle-aged judges in recognition judiciaries who have not been socialized within the judiciary for their entire career (on the distinction between career and recognition judiciaries see Nicholas Georgakopulos, 'Independence in the Career and Recognition Judiciary', [2000] 7 UCLSR 2005; N Garoupa and T Ginsburg, 'Hybrid Judicia Career Structures: Reputation Versus Legal Tradition', [2011] 3 JLA 411; J H Merryman and R Perez-Perdomo, 'The Civil Law Tradition? An Introduction to the Legal Systems of Europe and Latin America', [2007] SUP.

[47] The role of court presidents in career judiciaries, which rely on hierarchical ideal of officialdom, may differ significantly from the role of court presidents in recognition judiciaries, which stick to coordinate ideal of officialdom (on the distinction between these two ideals of authority see Damaška 1986).

historical legacies,[48] the interplay between formal and informal institutions, surrounding circumstances, ideology and self-preservation. However, despite these differences, cunning and politically savvy court presidents may leave an imprint on their judicial systems, in both positive[49] and negative[50] terms.

This section thus expands on the claim that court presidents may wield significant powers and shows that court presidents are strategic actors who respond to varied institutional conditions and political circumstances. More specifically, we argue that court presidents have traditionally played a dual role. In their first role, they have run their courts and exercised their internal powers over rank-and-file judges. In their second role, they have interacted and communicated with external political actors. Therefore, court presidents have operated, to a greater or lesser degree, as both agents (vis-à-vis political elites) and principals (vis-à-vis rank-and-file judges). However, the rise of judicial councils, judicial appointment commissions, court services and other judicial self-government bodies has changed the landscape. Not only has the number of important actors in court administration multiplied. These new bodies have also blurred the picture and challenged the role and powers of the traditional actors, including court presidents. We argue that court presidents in virtually all countries have had to react to the rise of other judicial self-government bodies, yet their strategies vary.

3.1 Interaction with Political Actors: Dangerous Liaisons

Court presidents are quite often the mouths and faces of their respective courts, as they communicate and deal in their courts' names, and sometimes even in the name of the judiciary as a whole, not only with the rest of the judicial power, but especially with the other two branches of state power. This position of court presidents exposes them to interaction with political actors. They often advise politicians on various issues, not necessarily limited to those of appointing and promoting judges. In countries without a judicial council,

[48] For instance, communist legacies are still strong in CEE.

[49] The prototypical example is a former Chief Justice of Canada, Beverly McLachlin. See I-Connect Symposium on the Legacy of Beverley McLachlin, Chief Justice of Canada; and in particular Lawrence David, 'The Face of an Institution: Beverly McLachlin's Reinvention of the Role of the Chief Justice of Canada', [2017] I-Connect <http://www.iconnectblog.com/2017/12/david-on-chief-justice-mclachlin>.

[50] *Harabin vs Slovakia* ECHR [2012] 58688/11.

court presidents also operate as brokers linking politicians with the judiciary.[51] In Czechia, the trinity of top court presidents as well as the college of the regional courts presidents often negotiate with the Minister of Justice and interpret their role as the representation of the whole judiciary.[52] In Ireland,[53] it is the Chief Justice who plays a similar role. In Germany,[54] the close ties between the political powers and the judiciary are further supported by an institutionalised practice of judicial internships at the ministry of justice.

Usually, this interaction with politicians is consensual, follows the principle of comity among the branches, and is filled with mutual respect. However, sometimes these political affairs of court presidents go astray, and can even get nasty. The ambassadorial role of court presidents becomes a high-risk activity once court presidents raise intense criticism vis-à-vis the governing elite.

We saw this most clearly in Pakistan after General Pervez Musharaff suspended Chief Justice Iftikhar Chaudhry.[55] Only after lawyers across Pakistan had taken to the streets and begun boycotting all court proceedings in protest at the suspension, did Chief Justice Iftikhar Chaudhry resume his work in that office.[56] In 2022, the Kiribati government suspended the New Zealand judge acting as the Chief Justice of Kiribaty over an article published in the international journal for judges, *Judicature,* in which Chief Justice Hastings criticised the governmental steps that, according to him, undermined the rule of law.[57]

Some court presidents who displeased ruling politicians successfully fought their dismissals before the courts. For instance, the President of the Czech Supreme Court, Iva Brožová, challenged her dismissal by Czech President

[51] N W Williams and M Hanson, 'Captured Courts and Legitimized Autocrats Transforming Kazakhstan's Constitutional Court', [2022] 47 LSI 1201-1233; Alexei Trochev, 'Judicial Chiefs and Clientelism in Authoritarian Regimes: Evidence from Kazachstan' [2023].

[52] See A Blisa T Papoušková and M Urbániková, 'Judicial Self-Government in Czechia: Europe's Black Sheep?', [2018] 19 GLJ 1951-1976.

[53] Patrick O'Brien, supra n14.

[54] Anja Seibert-Fohr, 'Judicial Independence in Germany', in 'Judicial Independence in Transition' [2012] 457.

[55] Shoaib Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf', [2014] 35 LSI 985.

[56] Ibid.

[57] RNZ, 'Kiribati suspends its chief justice over article', [2022], RNZ <https://www.rnz.co.nz/international/pacific-news/470451/kiribati-suspends-its-chief-justice-over-article>.

Václav Klaus before the Czech Constitutional Court. She won and remained in office until her voluntary resignation nine years later.[58]

Hungarian and Polish court presidents who crossed swords with their political leaders, Viktor Orbán and Jarosław Kaczyński, faced a higher hurdle as their constitutional courts had been captured in the meantime.[59] They thus had to seek rescue at supranational courts. The dismissed president and vice-president of the Hungarian Supreme Court eventually won before the European Court of Human Rights.[60] The Polish Chief Justice, Małgorzata Gersdorf, when facing dismissal instigated by Kaczyński's ruling coalition, was able successfully to rely on the European Court of Justice, which prevented her dismissal by means of a preliminary measure[61] and then found Kaczyński's judicial reform reducing the maximum retirement age of judges to be in violation of EU law.[62] In contrast, lower court presidents in these two countries often had neither the stamina nor the social capital to challenge judicial reforms that led to their dismissal before supranational courts. As a result, Orbán managed to get rid of many lower court presidents (by reducing the compulsory retirement age for judges).[63] A few years later, Kaczyński's Minister of Justice, Zbigniew Ziobro, replaced almost 150 court presidents and vice presidents.[64] Anatoliy Denisov, the President of the Kyiv Administrative Court of Appeal, won his case before the ECtHR after an unlawful dismissal that was the culmination of the string of political interferences and intimidations from the political party ruling in Ukraine in 2009.[65]

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[58] Michal Bobek, 'The Administration of Courts in the Czech Republic – In Search of a Constitutional Balance' [2010] 16 EPL 251; and Kosař (2017) *supra* n.7.

[59] Renata Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary', [2015] 13 ICON 279; and Wojciech Sadurski, *Poland's Constitutional Breakdown* (2019).

[60] Vincze, *supra* n.4; and David Kosař, Katarína Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law', [2018] 10 HJRL 83.

[61] *Commission v Poland* [2018] C-619/18 R.

[62] See Petra Bárd, Anna Śledzińska-Simon, 'On the Principle of Irremovability of Judges Beyond Age Discrimination: Commission v. Poland', [2020] 57 CMLR 1555.

[63] *See* Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs: Commission v. Hungary', [2013] 50 CMLR 1145; T Gyulavári and N Hős, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts', [2013] 42 ILJ 289; Gábor Halmai, 'The early retirement age of the Hungarian judges', in F Nicola and B Davis, eds., 'EU Law Stories, Contextual and Critical Histories of European Jurisprudence', [2017] CUP 471–488.

[64] See Śledzińska-Simon, *supra* n.21; Adam Bodnar, Europe can save Poland from darkness', [2018] Politico <https://www.politico.eu/article/poland-judiciary-rule-of-law-europe-must-intervene>.

[65] *Denisov v. Ukraine,* [2018] 76639/11 [ECHR] .

Some court presidents whose position became vulnerable found support within their judicial or professional legal communities, which exerted pressure on the political powers to restore their independent offices. At the end of the 1990s, the High Court of Australia faced a political and medial backlash following its decision in which it recognised the native right to land of the indigenous peoples. The mounting derogatory comments by politicians led the Chief Justice to write a private letter to the Prime Minister which was immediately leaked and widely publicised.[66] In 2014, the post-Maidan government of Ukraine attempted to undo the previous court-packing as well as a large-scale patronage and corruption judicial network and increase the internal independence of judges by removing all court presidents. The selection of replacements was delegated to individual courts, which, however, re-elected the previous incumbents in the majority of the country.[67]

Intra-judicial groups and legal professional communities can however exert pressure also in the opposite direction, i.e. against a potentially problematic court-president. In Malaysia, the Malaysian Bar fiercely criticised the government's decision artificially to circumvent the rules regarding a retirement age of a chief justice, Sharif, and an appeal president, Makinudi, by appointing them as additional judges – and eventually pressured both into resignation.[68] The South African Constitutional Court ruled against the prolongation of the judicial term of Chief Justice Ngcobo by President Zuma.[69] The Mexican Supreme Court struck down Obrador's attempt to extend the term of office of his ally, Chief Justice Zaldívar.[70] A similar political attempt to lock in a friendly chief justices took place in Zimbabwe in 2021.[71]

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[66] Kirby, [1998] <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_maui.htm>.

[67] See Popova, *supra* n.9.

[68] George Varughese, 'Press Release: Resignation of Chief Justice and President of the Court of Appeal is a Precursor to Judicial Reform', [2018] Malaysian Bar <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-resignation-of-chief-justice-and-president-of-the-court-of-appeal-is-a-precursor-to-judicial-reform>.

[69] *Justice Alliance of South Africa v President of Republic of South Africa and Others* [2011] 5 SA 388 (CC).

[70] See Julio Ríos-Figueroa, ‚Democratic Backsliding and the Supreme Court in Mexico', [2023] Verfassungsblog <https://verfassungsblog.de/democratic-backsliding-and-the-supreme-court-in-mexico/>; and León Rivera, Arturo Mauro, 'Undermining Judicial independence' in Smith, Rhona et al. (eds.), Judicial independence in transitional democracies, Routledge, Forthcoming,' [2024].

[71] See Tonderai Matanda, 'Pacifying the Crises of (Un)Constitutional Amendments: The Case of Zimbabwe's Amendment (No.1) and (No.2) Acts' [2022] 7(1) Strathmore Law Review 75; P Leisure and D Kosař, 'Court-Hoarding: Another Method of Gaming Judicial Turnover' Law & Policy (forthcoming 2024).

In the early 1990s, Valery Zorkin, the chief justice of the Constitutional Court of Russia, repeatedly clashed with Boris Yeltsin over a number of transformational issues, including the ban on the Communist party (1992) and the dissolution of the Supreme Soviet of Russia (1993). Zorkin was credited with both decisions which declared Yeltsin's reforms unconstitutional. Yeltsin retaliated by suspending the work of the Court and forced Zorkin to resign as a chief justice (although he remained a judge of the court).[72] Zorkin's resignation was opposed by eight out of 12 judges of the Constitutional Court, for him only to be reappointed as a chief justice in 2003 by President Putin. A few years later, President Putin decided to get rid of the president of the Russian Supreme Commercial Court, Anton Ivanov, who became too autonomous for his liking. Putin eventually merged the Russian commercial courts, which were generally considered more independent than the civil and criminal courts, with the rest of the judiciary and replaced the Supreme Commercial Court with an Economic Collegium at the new "super" Supreme Court.[73] Not surprisingly, there was no room for Anton Ivanov at the newly established Supreme Court Economic Collegium.

As mentioned in the introduction, even in consolidated democracies court presidents have been increasingly drawn into political disputes and attacked by politicians. For instance, Chief Justice McLachlin was accused by the then Prime Minister of Canada, Stephen J. Harper, of having improperly interfered in the nomination of Marc J. Nadon,[74] a Federal Court of Appeal judge who was later disqualified from appointment on the basis of his ineligibility for one of three Supreme Court seats reserved for judges from the province of Quebec.[75] More recently, the Chief Justice of the United States became entangled in a bitter public dispute with the then President, Donald Trump. When U.S. District Judge Jon S. Tigar, who was appointed by President Barack Obama in 2012, temporarily blocked the Trump Administration from denying asylum to

[72] Alexei Trochev, 'Judging Russia The Role of the Constitutional Court in Russian Politics 1990–2006', [2008] CUP 102-104.

[73] See William Partlett, 'William. Judicial Backsliding in Russia' [2014] JURIST – Academic Commentary, <https://www.jurist.org/commentary/2014/09/william-partlett-russia-reform/> accessed 30 September 2014; and Katherine Hille, 'Putin tightens grip on legal system' [2013] FT, <https://www.ft.com/content/a4209a42-5777-11e3-b615-00144feabdc0> accessed 27 November 2013.

[74] See The National Post, 'Staff Convinced a seething Stephen Harper not to launch a full-on assault on Supreme Court: new book' <https://www.iconnectblog.com/david-on-chief-justice-mclachlin/#_ftn16 accessed 4 August 2015.

[75] Reference re Supreme Court Act, ss. 5 and 6, [2014] 1 S.C.R. 433, 2014 SCC 21.

immigrants crossing the southern border illegally, Donald Trump accused Tigar of being an "Obama judge" and called the 9th Circuit a "disgrace."[76] Chief Justice Roberts then, in a rare media statement, rebuked Trump and said that there are no "Obama judges or Trump judges".[77] Yet Trump hit back and escalated this extraordinary exchange by tweeting that "Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges,' and they have a much different point of view than the people who are charged with the safety of our country. It would be great if the 9th Circuit was indeed an 'independent judiciary'". [78]

Most of the abovementioned court presidents cared about their professional and judicial reputations and resisted political interferences in the judiciary, albeit sometimes unsuccessfully or partly unsuccessfully.[79] However, some court presidents embrace incorporation into the ruling patronage networks and advance the agendas of their political patrons.[80] To please their patrons they use various strategies, such as coopting and empowering loyal judicial bosses, threatening and weakening disloyal judicial bosses, replacing recalcitrant judges with more loyal outsiders, and allocating spoils to different competing bosses within a network.[81]

In autocratic or semi-democratic political regimes, a court president, often a president of the supreme or constitutional court, who becomes a truly powerful broker might even accumulate additional leverage with respect to

[76] Trump hits back at Chief Justice Roberts, escalating an extraordinary Exchange <https://www.politico.com/story/2018/11/21/supreme-court-chief-justice-john-roberts-calls-out-trump-for-his-attack-on-a-judge-1011203>.

[77] Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge' <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

[78] Trump hits back at Chief Justice Roberts, escalating an extraordinary Exchange <https://www.politico.com/story/2018/11/21/supreme-court-chief-justice-john-roberts-calls-out-trump-for-his-attack-on-a-judge-1011203>.

[79] For instance, Valery Zorkin resigned from the chairmanship of the Russian Constitutional Court in a trade-off with Boris Yeltzin to keep the Russian Constitutional Court, See Trochev, *supra* n.72 and later on was dismissed by the Constitutional Court for engaging in politics. Yet Zorkin was reelected the Chairman of the Russian Constitutional Court in 2003 (re-elected in 2006, 2009, 2012, 2015 and 2018). Since then he has unprecedently shaped the constitutional jurisprudence in Russia as well as Russian relations with the ECtHR, see Mikhail Antonov, 'Philosophy behind human rights: Valery Zorkin vs the West', [2017] CUP.

[80] These allegations have been made against the pro-PiS President of the Polish Constitutional Tribunal, Julia Przyłębska, see Wojciech Sadurski, '*Poland's Constitutional Breakdown',* [2019].

[81] Alexei Trochev, 'Patronal politics, judicial networks and collective judicial autonomy in post-Soviet Ukraine' [2018] 39 IPSR 662; Tsereteli, *supra* n.24; Nino Tsereteli, 'Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia', [2023] 24 GLJ 1469-1487.

the regime, providing him with an opportunity to prove his political value beyond the judiciary. For instance, Valery Zorkin has been a helpful ally of Putin's administration in its resistance to the ECtHR.[82] In Georgia, court presidents, who act like "judicial oligarchs" colluded with ruling party politicians, which in turn weakened the checks and balances and allowed the ruling party to operate without constraints.[83] The Chief Justice of the Venezuelan Supreme Court of Justice, Maikel Moreno, raised the support of the governing regime to a different level. In March 2017, his court – faced with the unwillingness of the opposition-controlled National Assembly to accept some of the previous decisions of the Supreme Court of Justice – issued a ruling in which it stated that "in order to preserve the country's rule of law", it felt forced to transfer to itself ("or to the entity that the Court decides") all the powers enjoyed by Parliament,[84] and a day later it stripped the members of the National Assembly of their immunity.[85] By doing so he effectively disempowered the political opposition to his patron, Venezuelan President Nicolas Maduro.

3.2 Interaction with Rank-and-File Judges: the Court President as a Primus Inter Pares or a Boss

The second crucial type of relational network is the interaction of court presidents with judges of their courts. There are two archetypes of court presidents' relationships with other judges. In the first, the court president qua the "first among equals," the court president has limited influence over the careers and lives of individual judges and relies primarily on his leadership skills. This type of court presidency is often associated with the common law world.[86] In the second archetype, the court president as a "boss", the court president decides on case assignment, evaluates the judges of her court, decides when judges should be disciplined, and controls various discretionary perks such as vacation packages, help in obtaining apartments or getting children into schools or nurseries. This model is typical for post-Soviet states.

[82] See L Mälksoo and W Benedek (eds.) 'Russia and the European Court of Human Rights. The Strasbourg Effect', [2017] CUP.
[83] Tsereteli, *supra* n.81.
[84] Javier Couso, 'Venezuela's Recent Constitutional Crisis: Lessons to be Learned From a Failed Judicial Coup D'etat' [2017] IJCLB.
[85] Ibid.
[86] Peter H Solomon, 'Authoritarian legality and informal practices: Judges, lawyers and the state in Russia and China' [2010] 43 CPCS 351, 354.

As Solomon has pointed out, "[t]he chair of the court in Russia is and remains a 'boss', a super authority who manages his domain and represents the court in the outside world, including in informal dealings with local authorities, whose support still matters for the well-being of the court".[87]

These two archetypes can be seen as two ends of a continuum. Most European judiciaries lie somewhere in between these two poles. Irish court presidents fit the "first among equals" model best. They do play an important role in the disposal and allocation of cases and setting the policy, but they have limited powers only vis-à-vis their colleagues on the bench. This internal independence of rank-and-file judges vis-à-vis court presidents is further buttressed by "a very strong cultural conception of *individual* judicial independence, which has traditionally overshadowed corporate or collective judicial independence",[88] and the fact that Irish judges are not socialised within the judiciary and instead join the bench as already successful leading figures of the Bar and other legal professions.

From the civil law jurisdictions, Germany arguably comes closest to the common law model of *primus inter pares*.[89] Post-war German jurists have placed strong emphasis on the independence of individual judges and set strict limits on how court presidents may interact with rank-and-file judges. Cases are assigned strictly on a random basis according to criteria set in advance.[90] Even the general rules on case assignment are not stipulated by court presidents, but by the Judicial Board (*Präsidium*) of each court. Though the court president is a member of this board, regular judges have a majority on it.[91] Moreover, regular judges can challenge the assignment of a particular case before the administrative courts if they believe that the rules of case assignment were breached.[92] The Judicial Service Courts have also forbidden court presidents from making any remarks that might influence the future

[87] Solomon [2010], *supra* n. 86; see also Peter H. Solomon, 'The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability', in Anja Seibert-Fohr (ed.), 'Judicial Independence in Transition', [2012] Springer 909–935.
[88] Patrick O'Brien, supra n14.
[89] For a similar opinion, see also Solomon [2012] *supra* n.87.
[90] See Seibert-Fohr, '*supra* n.54.
[91] See *Gerichtsverfassungsgesetz* [GCLC] Art. 21a.
[92] See GFAC [1975] BVerGE 50, 11 = NJW 1976, 1224.

performance of judges, even on matters of case management and efficiency.[93] Similarly, any evaluation of judges must deal only with the outer order of judicial business, and not its core, or how the law is applied.[94] The only exceptions are where court presidents have arguably retained their informal powers regarding promotion, as several commentators suggest that German judges who seek promotion may be tempted to adjust their decision-making according to the views of their court presidents.[95] Similarly, the powers of Dutch court presidents have been diluted over time. They no longer act alone, but chair the three-member Management Board, which decides on the division of the court into chambers, the allocation of cases, and the day-to-day management, organisation and operations of the court.[96] Dutch court presidents thus have rather limited influence over the lives and careers of individual judges.

By comparison, the broad powers of court presidents in the post-communist countries explain the incentives for the political elites to install their own people into the court presidencies as well as those for judges to become court presidents. Judges are keen on becoming court presidents because they want to be "above" their colleagues – their superior who decides their fate – as well as to increase their public profile, including media attention, and professional reputation. Politicians want to have loyal persons among court presidents, because through them they can influence or sideline their critics on the bench and suppress judicial dissent. In the worst case scenario, politicians may use court presidents as their transmission belts openly to advance their agendas.[97] By "outsourcing" judicial interferences to court presidents, political rulers also protect themselves from criticism for meddling with the affairs of the judiciary,

[93] Johannes Riedel, 'Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany' in Giuseppe Di Federico (ed.), 'Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe, [2005] IRSIG-CNR 69-126, at 98-107.

[94] Anja Seibert-Fohr, 'Constitutional Guarantees of Judicial Independence in Germany' in Eibe H. Riedel & Rüdiger Wolfrum (eds.), 'Recent Trends in German and European Constitutional Law', [2006] Springer 267-288, at 271.

[95] Stephen Ross Levitt, 'The Life and Times of a Local Court Judge in Berlin', [2009] 10 GLJ 169, 197-198; and Seibert-Fohr, *supra* n.54, at 502.

[96] Elaine Mak, 'The European Judicial Organisation in a New Paradigm: The Influence of Principles of 'New Public Management' on the Organisation of the European Courts', [2008] 14 ELJ 718-73.

[97] This was typical for communist regimes in the Soviet satellites during the Cold War era. See Kosař and Spáč, *supra* n.18.

because using court presidents to advance their agenda is more opaque than purging the judicial corps or using coercion.[98]

It thus comes as no surprise that political leaders who wanted to make the judiciary more pliant, such as Viktor Orbán in Hungary and Jaroslav Kaczinski in Poland, have attacked court presidents particularly fiercely. They both started at the top by installing loyal presidents at the constitutional tribunals[99] and the supreme courts.[100] At the same time, Orbán and Kaczinski ousted lower court presidents in order to relieve themselves of the burden of continuously monitoring political allegiances at lower courts. In fact, their techniques, such as reducing the maximum compulsory retirement age for judges, were targeted primarily at court presidents.[101] However, even in other post-communist countries that have not undergone such large-scale changes in their political and legal landscapes, political leaders often (try to) dismiss the sitting court presidents from office and replace them with their own people.[102]

3.3 Interaction with Other Judicial Self-Governing Bodies: Closing the Circle

However, the unique position of court presidents has been challenged by the rise of other judicial self-governance bodies, especially judicial councils, that were introduced precisely to serve as a buffer between the political branches and the judiciary. Court presidents thus had to react to this situation.

There are essentially two paths that can be taken: either the court presidents have strong representation in the judicial council and therefore the judicial council is hierarchical (Slovakia), or they do not and it tends to be corporatist, as in Italy[103] or Romania.[104] To add a little more complexity, notwithstanding the composition of the judicial self-governance body, its institutional setting may be such as either to emulate the power of the court presidents,

[98] Trochev, *supra* n.81; Tsereteli, *supra* n.24; Tsereteli, *supra* n.81.
[99] See Wojciech Sadurski, *Poland's Constitutional Breakdown'* [2019]; and Renata Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary', [2015] 13 ICON 279.
[100] See Sadurski, supra n.99; Bárd and Śledzińska-Simon, *supra* n.62; Vincze, *supra* n.4; Kosař and Šipulová, *supra* n.60.
[101] See D Kosař and K Šipulová, 'Comparative court-packing', [2023] IJCL 80–126.
[102] Kosař and Spáč, *supra* n.18.
[103] Simone Benvenuti, 'The Politics of Judicial Accountability in Italy: Shifting the Balance' [2018] 14 EC 369.
[104] Bogdan Iancu, 'Perils of Sloganised Constitutional Concepts Notably that of 'Judicial Indepdence', Kosař (2016) *supra* n.7.

sometimes to a perverse degree (Slovakia), or, on the other hand, to tone down their powers and influence, even if they are strongly represented (Poland). Finally, the judicial council may be a mere rubber-stamping institution, approving decisions taken somewhere else, possibly by court presidents (Slovenia).

Let us begin with the countries where court presidents have very little influence in other judicial self-governance bodies. In Italy, the First President of the Court of Cassation is a member of the Council, but when it comes to filling other elected positions it is the judicial associations (*correnti*) that have a major say.[105] Moreover, the 2007 judicial reform set a limited term for court presidents (four years) which logically made presidents more dependent on the High Council for the Judiciary (the CSM), which selects most court presidents.[106] As a result, the High Council for the Judiciary tends to be corporatist. Benvenuti and Paris thus conclude that the High Council for the Judiciary in general weakened the influence of court presidents over ordinary judges, even though court presidents may have retained some power over certain aspects of case assignment and the assessment of judges. Similarly, in Romania, only the President of the High Court of Cassation and Justice is *ex officio* member of the Superior Council of Magistracy. While some court presidents of lower court were members of the Council in the past, they were in the minority and the Council has developed a strongly anti-hierarchical and corporativist culture.[107]

Several countries in Central and Eastern Europe (CEE) have developed significantly in this regard. In Poland, court presidents initially had a firm grip over the National Council for the Judiciary. However, in 2007 the Polish legislature banned court presidents from membership of its National Council of the Judiciary.[108] Since then only court presidents of the Supreme Court and the Supreme Administrative Court have been members of the National Council of the Judiciary. Moreover, the Polish Constitutional Tribunal ruled that they must vote in person and may not use a deputy in the National Council, which makes their presence compulsory. This rule is often impossible to meet due

[105] S Benvenuti and D Paris, 'Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model', [2018] 19 GLJ 1641-1670.
[106] *Ibid.*
[107] Iancu, *supra* n.104; Kosař (2016) *supra* n.7.
[108] A Bodnar and L Bojarski, 'Judicial Independence in Poland' in Anja Seibert-Fohr (ed.) *supra* n. 54, 673.

to apex court presidents' other duties.[109] These two changes, taken together, significantly reduce the role of court presidents in the National Council of the Judiciary.[110]

There was a similar scenario in Slovakia, where the President of the Supreme Court was ex lege also the chairman of the Slovak Judicial Council. Yet, after Slovakia witnessed an unprecedented abuse of this concentration of power in the hands of the court presidents, and especially the actions of the Supreme Court President Štefan Harabin, it adopted in 2011 an even stricter incompatibility rule affecting all court presidents. As a result, not only lower court presidents but also the Supreme Court President can no longer sit on the Judicial Council.[111] As a result, Slovak court presidents have no formal representation in the Slovak Judicial Council. This is not to say that they have all of the sudden lost all their influence. The culture of bureaucratic accountability and "mental path-dependence"[112] proved to be too strong, at least in the short term. Court presidents can still try to control the judicial council indirectly. For instance, they can suggest their preferred nominees to the judicial council to other judges and push them through to election using their authority,[113] or they can sometimes even install their puppets to the leadership of the judicial council.[114] Yet, in the long term, the abovementioned incompatibility rule inevitably weakens their position.

But judicial councils are not the only influential judicial self-governance bodies. Court presidents may have a strong position also in other judicial self-governance bodies, either by institutional design or owing to various informal factors. Thus, in Ireland, the Courts Service, a judicial self-governance body tasked with managing the courts, has 18 members among whom are the Chief

[109] Śledzińska-Simon, *supra* n.21.
[110] Ibid.
[111] See Art. 33(2) *in fine* of the 2004 Slovak Law on Courts, as amended by Art. III.2 of Law No. 467/2011 Z.z
[112] Michal Bobek, 'The fortress of judicial independence and the mental transitions of the central European judiciaries,' [2008] 14 EUROPEAN PULIC LAW, 14: 3-53; Peter Čuroš, Peter, 'Panopticon of the Slovak Judiciary – Continuity of Power Centers and Mental Dependence,' 22 GLJ 1247-1281.
[113] For instance, Štefan Harabin sent a letter to Slovak judges few days before the election of new judicial members to the JCSR in May 2012 in which he identified his preferred judges he would elect. See e.g. 'Harabin sudcom napísal, koho bude voliť do Súdnej rady', [2012] Pravda.sk <http://spravy.pravda.sk/domace/clanok/174535-harabin-sudcom-napisal-koho-bude-volit-do-sudnej-rady/> accessed 24. May 2012 or 'Harabin sudcom napísal, koho sa chystá voliť do súdnej rady', [2012] Aktuality.sk <http://www.aktuality.sk/clanok/207237/harabin-sudcom-napisal-koho-sa-chysta-volit-do-sudnej-rady/> accessed 24 May 2012.
[114] See Uzelac, *supra* n.6.

Justice and the presidents of each of the courts.[115] Similarly, the Irish Judicial Appointments Advisory Board, which selects and recommends candidates for the office of judge, is chaired by the Chief Justice, and the presidents of the remaining courts are *ex officio* members.[116] A slightly different scenario emerges in Slovenia. It introduced the Judicial Council, but it is *de facto* a very weak institution, because none of its members really has the time to exercise the mandate properly as they have other full-time jobs.[117] As a result, other judicial self-governance bodies play the key role in the Slovenian judicial system. In particular, the Personnel Councils, which exist at every court and are presided over by their court presidents, are the real decision-making bodies, because the Judicial Council usually merely rubber-stamps their decisions.[118] As a result, there are numerous voices warning against the emergence of a judicial oligarchy in Slovenia.[119]

This picture reveals a clear pattern: the rise of judicial councils, judicial appointment commissions, court services, directors of courts and other judicial self-government bodies have changed the landscape of court administration. Not only has the number of important actors in court administration multiplied, but these new bodies have also blurred the picture and challenged the role and powers of the traditional actors, including court presidents. Court presidents all of a sudden have ended up "under pressure" and in virtually all countries have had to react to the rise of other judicial self-government bodies.

Yet their strategies differ. In some jurisdictions, court presidents have, more or less vigorously, protected their prerogatives and worked hard to make sure that new judicial self-government bodies would not encroach upon their powers. That has sometimes even meant that they have attempted to block the reform.[120] If court presidents won, the status quo prevailed.[121] Vice versa, if court presidents did not manage to block the creation of the new institution,

[115] Patrick O'Brien, supra n14.
[116] Patrick O'Brien, supra n14.
[117] Matej Avbelj, 'Contextual Analysis of Judicial Governance in Slovenia' [2018] 19 GLJ 1901.
[118] Ibid.
[119] Ibid.
[120] For instance, in Czechia court presidents blocked the introduction of a judicial council in 2000. Similarly, the then Slovak Chief Justice Harabin attempted to block, albeit unsuccessfully, the introduction of a judicial council in Slovakia in 2002. For further details, see Kosař (2016) *supra* n.7.
[121] This is the situation in Czechia after 2000. Kosař (2017) *supra* n.7.

they witnessed the transfer of some of their powers to the newly established judicial self-governance bodies.[122] For instance, in Israel, court presidents have to interact carefully with the Director of Courts, an administrative entity who "manages" the judiciary.[123]

But even if court presidents have lost, they have often managed to adjust to the new model of court administration and climbed to power.[124] This brings us to the set of jurisdictions where court presidents saw the rise of other judicial self-government bodies as an opportunity to consolidate or even expand their internal powers vis-à-vis rank-and-file judges, as well as their role vis-à-vis external actors. In Poland and Slovakia, court presidents made sure that they could sit on and have their say at the newly established judicial councils.[125] The presidents of the CJEU and the ECtHR have taken the leading role in selecting members of the new expert panels that advise on the selection of the new Strasbourg[126] and Luxembourg[127] judges. Finally, in the third group of countries, court presidents have accepted the rise of other judicial self-government bodies, often relying on their informal powers, and adjusted to the new era.[128]

[122] This is the situation in Slovakia after 2002. See Kosař and Spáč, *supra* n.18.

[123] G Lurie, A Reichman and Y Sagy, 'Agencification and the administration of courts in Israel' [2020] 14 RG 718-740.

[124] This was the situation in Slovakia between 2009 and 2014 (when the former Chief Justice of the Slovak Supreme Court and Minister of Justice Harabin returned to the position of Chief Justice again). See S Spáč, K Šipulová and M Urbániková, 'Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia', [2018] 19 GLJ 1741-1768; Kosař and Spáč, *supra* n.18.

[125] See Bodnar and Bojarski, *supra* n.108; Kosař (2016) *supra* n.7.

[126] See M. de S.-O.-L'E Lasser, 'Judicial Dis-Appointments: Judicial Appointments Reform and the Rise of European Judicial Independence', [2020] OUP; David Kosař, 'Selecting Strasbourg Judges: A Critique', in M. Bobek (ed.), 'Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts', [2015] OUP 120-161, 127-129; Koen Lemmens, '(S)electing Judges for Strasbourg: A (Dis)appointing Process?' in in M. Bobek (ed.), 'Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts', [2015] OUP 95-119; Başak Çalı and Stewart Cunningham, 'Judicial Self Government and the Sui Generis Case of the European Court of Human Rights', [2018] 19 GLJ 1977, 1991; and K Dzehtsiarou and A Schwartz, 'Electing Team Strasbourg: Professional Diversity on the European Court of Human Rights and Why it Matters', [2020] 21 GLJ 621.

[127] M. de S.-O.-L'E Lasser, 'Judicial Dis-Appointments: Judicial Appointments Reform and the Rise of European Judicial Independence', [2020] OUP; Bobek *supra* n.126; T. Dumbrovský, B. Petkova and M Van Der Sluis, 'Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States', [2014] 51 CMLR 455.

[128] See David Kosař, 'Judicial Self-Government in Europe', [2019] 19 GLJ Special Issue.

4 Conclusion

In this chapter, we have conceptualised the roles of court presidents and shown that they are often even more important players in both judicial governance and domestic politics more generally than it seems. This is because court presidents wield significant informal powers that cannot be captured by studying written law. Court presidents can play both positive and negative roles. On the one hand, they can contribute to the effective governance of their courts, ensure informational flows, provide an early warning system against political interferences, and even act as bulwarks against democratic decay.[129] On the other hand, they may also use their powers to the detriment of judicial independence by succumbing to corruption and clientelism. Court presidents are thus strategic actors who respond to a variety of institutional conditions and political circumstances and may take sides. The indirect effect of governance and managerial powers of court presidents reflects in their jurisprudential leadership. Understanding of the role of court presidents is therefore a crucial element in understanding the embedded elements of judicial decision making.

We have also indicated avenues for further research. First, most studies on court presidents focus on chief justices. However, in order to understand the role of court presidents in judicial governance and the dynamics within the judiciary, it is crucial to study lower court presidents as well.[130] Second, we still know relatively little about court presidents in non-democratic regimes, as most studies focus on consolidated democracies or transitional countries. We need to know, though, how they can carve out their autonomy without collaborating with autocratic regimes as transmission belts of the executive power. Third, another avenue for research could focus on retired court presidents. In common law countries in particular, they take judicial jobs in other Commonwealth countries, act as arbitrators in lucrative investment arbitration disputes or take government jobs.[131]

[129] On the latter, see the symposium on "Chief Justices under Stress: Responding to Democratic Crisis" (forthcoming in International Journal of Constitutional Law).

[130] For a good example of such research, see Popova, *supra* n.9.

[131] See Patrick O'Brien, 'Retired Judges, in this volume'; and S. Dam, 'Active After Sunset: The Politics of Judicial Retirements in India*', [2023] 51 FLR 31-57.

Finally, gender diversity among court presidents is severely understudied. The existing literature focuses primarily on the impact of gender on the selection of judges and their promotion to higher courts, but less so on promotion to the positions of court presidents.[132] Most recent research focuses on female chief justices,[133] but we need to look lower down and study to what extent lower court presidents are gendered. When studying the gendered roles of court presidents it is important to overcome one more limitation. So far, most qualitative studies on gender representation within the judiciary have relied exclusively on interviews conducted with women. However, that provides us with only a limited picture. Hence, we need to reach out to male judges, and especially male court presidents, and inquire how *they* perceive women judges and what *their* view is on what prevents them from reaching positions of power.

[132] For a rare exception, see B Havelková, D Kosař and M Urbániková., 'The Family Friendliness That Wasn't: Access, but Not Progress, for Women in the Czech Judiciary', [2022] 47 1106-1136.
[133] See the forthcoming collection on constitutional heroines, edited by Erin Delaney and Rosalind Dixon.