Articles

Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe

By David Kosař[*]

Abstract

A few years ago, judicial councils composed primarily of judges were viewed as a panacea for virtually all problems of court administration in Europe. The burgeoning literature on judicial councils has shown that this is not necessarily the case. This article builds on this literature, but it argues that judicial self-governance is much broader phenomenon than judicial councils and may also take different forms. Therefore, it is high time to look beyond judicial councils and to view judicial self-governance as a much more complex network of actors and bodies with different levels of participation of judges. To that end this article conceptualizes judicial self-governance and identifies crucial actors within the judiciary who may engage in judicial governance (such as judicial councils, judicial appointment commissions, promotion committees, court presidents and disciplinary panels). Subsequently, it shows that both the forms, rationales, and effects of judicial self-governance have varied across Europe. Finally, this article argues that it is necessary to take into account the liquid nature of judicial self-governance and its responsiveness to political, social, and cultural changes. Moreover, the rise of judicial self-governance is not necessarily a panacea, as it may lead to political contestation and the creation of new channels of politicization of the judiciary.

* David Kosař is the Director of the Judicial Studies Institute (JUSTIN) at the Law Faculty of Masaryk University, Brno. Email: david.kosar@law.muni.cz. The research leading to this article has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant no. 678375-JUDI-ARCH-ERC-2015-STG).

A. Introduction

A decade ago, the state of judicial self-governance in Europe was a subject of discussions among judges within judicial associations and transnational judicial communities,[1] at the Venice Commission,[2] and among a few connoisseurs in academia.[3] The accession of the Central and Eastern European countries to the European Union had been completed, judicial councils had been established, and the future looked bright and shiny. Fast forward to 2018. Judicial self-governance is challenged in several EU Member States, it fills the pages of major newspapers,[4] and virtually every supranational organization has a project or two on this topic.[5] Even both European supranational courts have become increasingly entangled in this area. [6]

[1] The Consultative Council of European Judges (*Conseil consultatif de juges européens*, hereinafter also "CCJE") and the European Network for the Councils of the Judiciary (hereinafter also "ENCJ") have been particularly active in this area.

[2] The number of the Venice Commission's Opinions concerning judicial self-governance is so high that I cannot enumerate them here. For a broader understanding of the role of the Venice Commission in this area, see Maartje De Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*. 63(4) AMERICAN JOURNAL OF COMPARATIVE LAW 963–1008 (2015); and Valentina Volpe, *Drafting Counter-majoritarian Democracy. The Venice Commission's Constitutional Assistance*, 76(4) HEIDELBERG JOURNAL OF INTERNATIONAL LAW 811–843 (2016).

[3] For rare exceptions of scholars who engaged with this topic much earlier, *see* THIERRY S. RENOUX, LES CONSEILS SUPERIEURS DE LA MAGISTRATURE EN EUROPE (1999); CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY (2002); and Wim Voermans & Pim Albers, *Councils for the Judiciary in EU Countries*, EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE, CEPEJ (2003).

[4] *See* e.g. Christian Davis, *Polish MPs pass judicial bills amid accusations of threat to democracy*, THE GUARDIAN (Dec 8, 2017), https://www.theguardian.com/world/2017/dec/08/polish-mps-pass-supreme-court-bill-criticised-as-grave-threat; Patrick Kingsley, *After Viktor Orban's Victory, Hungary's Judges Start to Tumble*, THE NEW YORK TIMES (May 1,2018), https://www.nytimes.com/2018/05/01/world/europe/hungary-viktor-orban-judges.html;; James Shotter & Evon Huber, *Poland's top court steps up its challenge to judges being 'purged'*, FINANCIAL TIMES (Aug 2, 2018), https://www.ft.com/content/7965ad18-9658-11e8-b67b-b8205561c3fe; and Benjamin Novak & Patrick Kingsley, *Hungary Creates New Court System, Cementing Leader's Control of Judiciary*, THE NEW YORK TIMES (Dec 12, 2018), https://www.nytimes.com/2018/12/12/world/europe/hungary-courts.html.

[5] *See* e.g. the projects of the Organization for the Security and Cooperation in Europe (https://jobs.osce.org/vacancies/expert-judicial-self-governance-vnodic00667), the European Committee on Legal Co-operation(https://www.coe.int/en/web/cdcj/co-operation-projects/judicial-self-governance-training-azerbaijan); and the International Commission of Jurists (https://www.icj.org/new-icj-report-analyses-the-transition-to-judicial-self-governance-in-serbia/). *See* also projects of the CCJE and ENCJ.

[6] *See* Başak Çalı & Stewart Cunningham, *Judicial Self Government and the sui generis case of the European Court of Human Rights*, in this issue; and Christoph Krenn, *Governing the European Court of Justice: Self-governance as a Model for Success*, in this issue.

In fact, the last two years have been particularly eventful. Law and Justice, the ruling party in Poland, announced and implemented controversial reforms of the Polish Supreme Court and the National Council of the Judiciary.[7] The Court of Justice stepped boldly into the debate in the "Portuguese Judges" case (*Associação Sindical dos Juízes Portugueses*), when it held for the first time that domestic judicial design is within its purview.[8] Soon after the "Portuguese Judges" case, the Court of Justice engaged with the abovementioned Polish judicial reforms – it decided the *Celmer* case[9] and ordered Poland to suspend the application of the provisions relating to the lowering of the retirement age for Supreme Court judges.[10] The ECtHR did not lag behind. While it has engaged with domestic judicial design for much longer[11] than the CJEU, its two recent Grand Chamber judgments in *Denisov v. Ukraine*[12] and *Ramos Nunes de Carvalho e Sá v Portugal*[13] have raised the stakes to a whole new level.

While most eyes are now watching Poland and the response of both supranational courts to developments therein, judicial reforms have taken place in other jurisdictions too. Romania[14] and Turkey[15] adopted controversial reforms affecting the composition of judicial

[7] *See* Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, in this issue.

[8] ECJ, 27 February 2018, Case C-64/16 *Associação Sindical dos Juízes Portugueses*. For further details *see* Matteo Bonelli & Monica Claes, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses*, 14(3) EUROPEAN CONSTITUTIONAL LAW REVIEW 622–643 (2018).

[9] Case C-216/18 PPU, Reference for a preliminary ruling from the High Court (Ireland) made on 27 March 2018 — Minister for Justice and Equality v LM. For an in-depth discussion of this judgment, *see* a symposium on VefBlog at https://verfassungsblog.de/category/focus/after-celmer-focus/.

[10] Interim Order of the Vice-President of the ECJ in Case C-619/18 R Commission v Poland, 19 October 2018.

[11] *See* David Kosař & Lucas Lixinski, *Domestic Judicial Design by International Human Rights Courts*, 109(4) AMERICAN JOURNAL OF INTERNATIONAL LAW 713–760 (2015).

[12] Denisov v Ukraine, EUR. CT. H. R. (Judgment of 25 September 2018, app. no. 76639/11) (concerning the president of the influential Kyiv Administrative Court of Appeal).

[13] Ramos Nunes de Carvalho e Sá v Portugal, EUR. CT. H. R. (Judgment of 6 November 2018, apps. nos. 55391/13, 57728/13 and 74041/13) (concerning the disciplining of a judge of the first instance court, the composition of the Portuguese High Council of the Judiciary, and the powers of the President of the Supreme Court of Portugal).

[14] *See* Venice Commission, *Romania. Preliminary Opinion on Draft Amendments to Law no. 303/2004 on the Statute of Judges and Prosecutors, Law no. 304/2004 on Judicial Organization, and Law no. 317/2004 on the Superior Council for Magistracy*, CDL-PI(2018)007 of 13 July 2018; and Bianca Selejan-Guțan, *Romania: Perils of a "Perfect Euro-Model" of Judicial Council*, in this issue.

councils and other aspects of judicial governance. Viktor Orbán's regime in Hungary witnessed a brief revolt of judges in the National Judicial Council,[16] but it soon recovered and adopted a complete overhaul of the administrative judiciary that cements Viktor Orbán's control of the judiciary.[17] Other reforms are in the pipeline. The *Dáil*, the lower chamber of the Irish parliament, passed the Judicial Appointments Commission Bill in the most dramatic fashion.[18] The coalition agreement between the leaders of the *Lega* and *Movimento Cinque Stelle* parties who will run Italy for its next legislative period also promises reform of the elections for members of the Italian judicial council (*Consiglio Superiore della Magistratura*).[19]

Why is it important to analyze this development so thoroughly? If anything, the recent judicial reforms in Hungary, Poland, and Turkey show that authoritarian and populist political leaders care about the control of judicial self-governance bodies.[20] Therefore, we should care as well. If we want to prevent (or at least slow down) the capture of the judiciary by authoritarian leaders and limit the damage caused by populist regimes, we need to know how judicial self-governance bodies work, why they were established, what effects they have brought about, why they are challenged, and where the potential channels of politicization of the judiciary via these bodies lie.

The fact that the state of judicial (self-)governance is in constant flux in many jurisdictions presents a big challenge for this special issue, but each contribution is well embedded in the broader societal and historical context, and thus this special issue will remain a key reference for quite some time. This article of course cannot do justice to the richness of 19 contributions to this special issue. It merely reflects on some common themes regarding the forms, rationales, and effects of judicial self-governance in Europe. Along the way, it identifies emerging trends and suggests avenues for further research.

---

[15] Başak Çalı & Betül Durmuş, *Judicial Self-Government as Experimental Constitutional Politics: The Case of Turkey*, in this issue.

[16] *See* Kingsley, *supra* note 4.

[17] *See* Novak & Kingsley, *supra* note 4.

[18] *See* Michael O'Regan, *Judicial appointments Bill passes in Dáil and now goes to Seanad,* THE IRISH TIMES (May 31, 2018), https://www.irishtimes.com/news/politics/oireachtas/judicial-appointments-bill-passes-in-d%C3%A1il-and-now-goes-to-seanad-1.3515540?mode=amp.

[19] Maximilian Steinbeis, *Festa della Repubblica,* VERFASSUNGSBLOG, (Jun 2, 2018), https://verfassungsblog.de/festa-della-repubblica/.

[20] *See* Śledzińska-Simon, *supra* note 7; Çalı & Durmuş, *supra* note 15; and David Kosař & Katarína Šipulová, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law*, 10 HAGUE JOURNAL ON THE RULE OF LAW 83 (2018).

The argument of this article is three-fold. First, it argues that it is high time to look beyond judicial councils and to study the role of judges in governance of the judiciary holistically. This requires focusing on de facto judicial self-governance, the identification of other actors within the judiciary who may engage in judicial governance (such as judicial appointment commissions, promotion committees, court presidents and disciplinary panels), and broadening the studied spheres of judicial self-governance. Second, it is necessary to take into account the liquid nature of judicial self-governance and its responsiveness to political, social, and cultural changes. Finally, it is crucial to acknowledge that the rise of judicial self-governance is not necessarily a panacea, as it may lead to political contestation and the creation of new channels of politicization of the judiciary.

In order to make sense of these arguments, it is also important to clarify the scope of this special issue. It deliberately adopts a broad definition of judicial self-governance.[21] For the purposes of this special issue, "judicial self-governance body" includes any institution (in which a judge or judges sit) that has some powers regarding court administration and/or judicial careers. More precisely, a "judicial self-governance body" is a body with at least one judge whose primary function, entrenched in a legal norm, is to (a) decide about issues regarding court administration and/or the career of a judge, and/or (b) advise those who decide about such issues. This definition thus includes not only judicial councils, but also court presidents, the Court Service, specialized domestic judicial appointment commissions, as well as the Article 255 TFEU Panel for the selection of Court of Justice judges and the Committee of Ministers (CM) Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR.[22] At the same time, owing to limited space this special issue focuses only on judicial self-governance regarding *ordinary* courts and *ordinary* judges, and leaves aside administrative and special tribunals, specialized constitutional courts,[23] and public prosecutors.[24]

---

[21] Note that, on reflection, I simply prefer the term governance to government as the former is better for studying judiciaries beyond the state and signifies a change in the meaning of judicial self-government, referring to *new* processes of governing the judiciary, *changed* conditions of ordered rule, and *new* methods by which society is governed. Due to the limited space, I cannot engage with this conceptual debate here. Importantly, I did not impose this view on the contributors to this special issue (some of them use judicial self-*governance*, while others prefer judicial self-*government* or even use both terms). Please keep this in mind when reading this special issue.

[22] *See* Part C for further details.

[23] I am aware that judicial self-governance at these courts raises different issues and often differs significantly from the judicial self-governance of ordinary courts. But these differences can also be abused, *see* the creation of the new parallel system of specialized administrative courts in Hungary (analyzed by Novak & Kingsley, *supra* note 4).

[24] Even though, as you will see below, especially the Mediterranean jurisdictions consider prosecutors on par with judges and often involve both groups in joint judicial self-governance bodies.

Such a broad definition has several advantages.[25] However, I am also aware that our broad definition of "judicial self-governance body" adopts a particular take on several contested issues. It is for instance clear that our definition treats judicial self-governance as a matter of degree rather than a binary variable. Therefore, for us it is still judicial *self*-governance when judges have parity[26] on judicial self-governance bodies (such as judicial councils) or are even in the minority,[27] when prosecutors sit on judicial self-governance bodies as well,[28] when a lay member or the head of state presides over the judicial self-governance body,[29] when judges themselves do not elect judicial members to the judicial self-governance body and judicial members are thus not truly "representatives" of judges,[30] when judicial self-governance is dominated by court presidents at the expense of rank-and-file judges,[31] and when senior judges (or apex court judges) have the upper hand on the judicial self-governance body and thus this body does not proportionally represent all tiers of the judiciary.

More controversially, even if judges from other jurisdictions sit on the judicial self-governance body, we still treat it as a judicial *self*-governance body. This is the case of the ECtHR and the CJEU because, technically speaking, active CJEU judges do not sit on the Article 255 TFEU Panel. Similarly, the relevant resolution of the Committee of Ministers makes clear that only former international judges can sit on the CM Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR.[32] Hence, one may argue that these two panels are not examples of "judicial *self*-governance". However, there is a fine line between "judicial *self*-governance" and "judicial governance" at the ECtHR and the

[25] *See* Part C.

[26] *See* e.g. judicial councils in the Netherlands and the de iure also in Slovakia.

[27] *See* e.g. judicial councils in Spain and France, and the Judicial Appointments Advisory Board in Ireland.

[28] *See* e.g. judicial councils in Italy, France, and Romania.

[29] *See* e.g. judicial councils in Italy and Turkey.

[30] *See* e.g. judicial councils in Poland and Spain.

[31] This was the case in the Judicial Council of the Slovak Republic between 2003 and 2014 (*see* Samuel Spáč, Katarína Šipulová & Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia,* in this issue). *See* also Ireland, where court presidents are the only representatives of the judiciary on the Judicial Appointments Advisory Board (*see* Patrick O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* in this issue).

[32] *See* para. 2 of Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (2010).

CJEU. Both expert panels often include former ECtHR and CJEU judges and other "friends" of these two courts. Moreover, the CJEU's and ECtHR's presidents have a major say in the composition of these two panels. The CJEU President selects the majority of the members of the Article 255 TFEU panel and the ECtHR President selects all the members of the CM Panel. Therefore, we include these two bodies in our analysis as well. Not everyone agrees[33] with this approach, but we at least know on what we disagree.[34]

This article will proceed as follows. Part B situates the special issue in the existing literature, explains its structure, and briefly summarizes individual contributions. Part C maps the common themes that have emerged from the contributions to this special issue and problematizes the forms of judicial self-governance in Europe. Part D analyzes the rationales behind the rise and fall of judicial self-governance in Europe. Part E zeroes in on the effects of judicial self-governance on public confidence in courts, judicial independence and accountability, and on transparency and legitimacy of the judiciary. Part F concludes.

B. Setting the Scene

The power of courts has increased worldwide at an unprecedented pace. At the same time, there has been a parallel rise in judicial self-governance. In Europe, this has happened on both national and supranational levels. On the national level, many European countries have introduced judicial councils either voluntarily (France,[35] Italy,[36] the Netherlands,[37] Portugal,[38] Spain,[39] and Turkey[40]) or under pressure from the European Union and the

[33] Actually, several contributions to this special issue show that domestic understanding of judicial self-governance can be much narrower.

[34] I did not impose this view on the contributors to this special issue nor do I want to do so on the readers.

[35] Antoine Vauchez, *The Strange Non-Death of Statism: Tracing The Ever Protracted Rise of Self-Government in France,* In this issue; Antoine Garapon & Harold Epineuse, *Judicial Independence in France*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 273, 285–286 (Anja Seibert-Fohr ed., 2012).

[36] *See* Simone Benvenuti & Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model,* in this issue.

[37] *See* Elaine Mak, *Judicial Self-Government in the Netherlands: Demarcating Autonomy,* in this issue. However, note that the Netherlands cannot be easily squeezed into the judicial council model – it introduced the Council for the Judiciary, but powers concerning appointing, promoting and disciplining judges do not lie with the Council for the Judiciary, but sometimes with the government, sometimes with the judiciary authorities, and sometimes they are shared.

[38] Ramos Nunes de Carvalho e Sá v Portugal, *supra* note 13; and especially concurring opinion of Judge Pinto de Albuquerque therein.

[39] *See* Aida Torres Pérez, *Judicial self-government and judicial independence: the political capture of the General Council of the Judiciary in Spain*, in this issue.

Council of Europe during the accession process (all post-communist states in Central and Eastern Europe[41] except for Czechia[42]). Other countries have opted for the Court Service systems, often combined with a special body for judicial appointments (Denmark, Ireland,[43] and Scotland). Even in the countries where political branches still have the major say (Austria, Czechia,[44] and Germany[45]), the power of judges in judicial governance has increased gradually. On the supranational level, the expert element was also introduced, namely the Article 255 TFEU Panel for appointments to the Court of Justice of the European Union (hereinafter the "CJEU")[46] and the Committee of Ministers Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (hereinafter the "ECtHR").[47]

While the unprecedented rise of the decision-making power of courts has been exhaustively addressed in the literature, the increasing power of judges in selecting their peers and in court administration more generally has attracted far less attention so far. This is so despite the fact that the rise of judicial councils and other judicial self-governance bodies is difficult to overlook. The huge policy implications of this phenomenon are also beyond doubt, as evidenced by a plethora of European policymaking bodies involved in this area - not only the European Network of Councils for the Judiciary and the Consultative Council of European Judges, but the Venice Commission and the European Commission have also issued numerous guidelines and developed good practices regarding judicial councils.[48]

---

[40] Çalı & Durmuş, *supra* note 15.

[41] *See* Selejan-Guțan, *supra* note 14; Matej Avbelj, *Contextual Analysis of Judicial Governance in Slovenia,* in this issue; Śledzińska-Simon, *supra* note 7; and Spáč, Šipulová & Urbániková, *supra* note 31.

[42] For explanation why Czechia is a "black sheep", *see* Adam Blisa, Tereza Papoušková & Marína Urbániková, *Judicial Self-Government in Czechia: Europe's Black Sheep?,* in this issue.

[43] O'Brien, *supra* note 31.

[44] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[45] *See* Fabian Wittreck, *German Judicial Self-Government: Institutions and constraints of self-government in Germany*, in this issue.

[46] *See* Krenn, *supra* note 6.

[47] *See* Çalı & Cunningham, *supra* note 6.

[48] The vast number of these guidelines and policies cannot be addressed here. *See* the individual contributions to this special issue. *See* also note 2.

Legal scholars have somewhat lagged behind these developments. To be sure, the literature on judicial independence[49] and judicial reforms[50] more generally has often touched upon judicial self-governance issues. Another important strand of research concerning the selection of judges has also acknowledged a growing role of judges in selecting their peers.[51] There is also a small but burgeoning scholarly literature on judicial councils,[52] and an even smaller set of studies on the role of Chief Justices and court presidents more generally.[53] However, a holistic view of judicial self-governance on the domestic level has been missing.

There is even less on judicial self-governance at supranational and international courts, despite the fact that these courts have far more autonomy in court administration, given the fact that they adopt their statutes by themselves and that they do not face a powerful executive and legislature. Only a few studies have analyzed the functioning of the Article 255 Panel, which plays a key role in screening new ECJ judges. Some commentators think

[49] The literature on judicial independence is so numerous that it cannot be addressed here. For recent contributions to this literature that devoted significant attention to judicial self-governance, *see* in particular POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE (2012); and ANJA SEIBERT-FOHR (ed.), JUDICIAL INDEPENDENCE IN TRANSITION (2012).

[50] *See e.g.* DANIELA PIANA, JUDICIAL ACCOUNTABILITIES IN NEW EUROPE: FROM RULE OF LAW TO QUALITY OF JUSTICE (2010); MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE (2012); Ramona Coman, *Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe*, 66 EUROPE-ASIA STUDIES 892 (2014).

[51] For an overview of this literature, *see* Samuel Spáč, *Recruiting European judges in the age of judicial self-government*, in this issue.

[52] *See* e.g. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. OF COMP. LAW 103 (2009); Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY JOURNAL OF INTERNATIONAL LAW 53 (2009); Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15(7) GERMAN L.J. 1257–1292 (2014); Andrea Pozas-Loyo & Julio Ríos-Figueroa, *The Politics of Amendment Processes: Supreme Court Influence in the Design of Judicial Councils*, 89(7) TEXAS LAW REVIEW 1807–1833 (2011); Matthew C. Ingram, *Crafting Courts in New Democracies: Ideology and Judicial Council Reforms in Three Mexican States,* 44(4) COMPARATIVE POLITICS 439–358 (2012); Cristina E. Parau, *Explaining judiciary governance in Central and Eastern Europe: external incentives, transnational elites and Parliament inaction*, 67 EUROPE-ASIA STUDIES 409 (2015); DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016); Denis Preshova, Ivan Damjanovski & Zoran Nechev, *The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms*, 2017(1) CLEER PAPERS (2017); and Pablo José Castillo Ortiz, *Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe*, 9(2) HAGUE JOURNAL ON THE RULE OF LAW 315–336 (2017); Peter H. Solomon, *Transparency in the Work of Judicial Councils: The Experience of (East) European Countries*, 45 REVIEW OF CENTRAL AND EAST EUROPEAN LAW (2018). *See* also note 3.

[53] For an overview of this literature, *see* Adam Blisa & David Kosař, *Court Presidents: The Missing Piece in the Puzzle of Judicial Governance,* in this issue.

that this Panel could be seen "as a germ of a council of judiciary within the Union"[54] or "some embryonic form of unintended judicial self-government",[55] or at least suggest that there is the potential for a "subtle move" in the direction of judicial self-governance.[56] Marc van der Woude's recent proposal goes even further and proposes a European Council of the Judiciary.[57] However, EU law scholars rarely engage with the role of CJEU President and other forms of judicial self-governance. The same applies to the ECtHR[58] and other international courts.[59] There are some studies on the selection of their judges,[60] but not much beyond that.[61]

In sum, despite the growing body of literature, there are still very few in-depth studies on judicial self-governance bodies and their interaction with other actors. Moreover, from the conceptual point of view, the current scholarly debate zeroes in on the impact of strong judicial councils advocated by the EU and the Council of Europe in Central and Eastern Europe, and to a great extent overlooks other forms of judicial self-governance such as a moderate judicial council in the Netherlands and the Court Service in Ireland. The rise of judicial self-governance within the traditional executive systems of court administration in Germany and Czechia attracted even less attention. Therefore, we still lack a comprehensive conceptual understanding of judicial self-governance in both "new" and "old" EU Member States and its dynamics over time. We know even less about the

---

[54] Jean-Marc Sauvé, *Selecting the European Union's Judges: The Practice of the Article 255 Panel*, in SELECTING EUROPE´S JUDGES 78 (Michal Bobek ed., 2015). Even though from the conceptual point of view it is an example of judicial government rather than judicial *self*-government, since no CJEU judge sits on the Art. 255 TFEU Panel.

[55] Alberto Alemanno, *How Transparent is Transparent Enough? Balancing Access to Information versus Privacy in European Judicial Selections,* in SELECTING EUROPE´S JUDGES 204 (Michal Bobek ed., 2015).

[56] Tomas Dumbrovský, Bilyana Petkova & Marijn Van der Sluis, *Judicial appointments: the article 255 TFEU advisory panel and selection procedures in the Member States*, 51 COMMON MARKET LAW REVIEW 455 (2014).

[57] Marc van der Woude, *Towards a European Council of the Judiciary: Some Reflections on the Administration of the EU Courts,* in DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION. ESSAYS IN HONOUR OF JAPP W. DE ZWAAN 63 (Flora A.N.J. Goudappel & Ernst M. H. Hirsch Ballin eds., 2016).

[58] *See* Çalı & Cunningha, *supra* note 6; and MICHAL BOBEK (ed.), SELECTING EUROPE´S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (2015).

[59] *See* Nino Tsereteli & Hubert Smekal, *The Judicial Self-Government at the International Level: A New Research Agenda,* in this issue.

[60] For an overview of the literature, *see ibid*.

[61] For a rare exception, *see* Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Practices: Opening the 'Black Box' of International Courts,* MICHIGAN JOURNAL OF INTERNATIONAL LAW (forthcoming).

rationales behind the rise and fall of judicial self-governance bodies[62] and about the effects of judicial self-governance.[63]

One may object that the rise and fall of judicial self-governance has little bearing on the greater scheme of things, especially in comparison to attacks on constitutional courts and open assaults on the judiciary such as criminal prosecution of "recalcitrant" judges,[64] reducing the retirement age of judges,[65] or jurisdiction stripping.[66] However, as I argued earlier, the recent judicial reforms in Hungary, Poland, and Turkey show that authoritarian and populist political leaders care about the control of judicial self-governance bodies and thus we should care as well.[67] Similarly, one often hears at the European level recently that it is all about the individuals and the institutional design does not matter. Yet several contributions to this special issue show that institutions actually matter. Therefore, we need to know how judicial self-governance bodies work, why they were established, what effects they have brought about, why they are challenged, and where the potential channels of politicization of the judiciary via these bodies lie.

This special issue aims to fill these gaps and addresses the implications of judicial self-governance for the "new" and "old" EU member states, for Turkey, as well as for the CJEU and the ECtHR. I am aware of the pitfalls of studying governance of the two European transnational[68] *courts* and governance of domestic *judiciaries* together.[69] Yet both

[62] *See* Part D of this article.

[63] *See* Part E of this article. For exceptions, *see* Kosař, *supra* note 52; Castillo Ortiz, *supra* note 52; and Solomon, *supra* note 52.

[64] *See* Çalı & Durmuş, *supra* note 15; and Tom Ruys & Emre Turkut, *Turkey's Post-Coup 'Purification Process': Collective Dismissals of Public Servants under the European Convention on Human Rights*, 18(3) HUMAN RIGHTS LAW REVIEW 539–565 (2018).

[65] *See* the deleterious impact of these mechanisms in Poland (Śledzińska-Simon, *supra* note 7) and Hungary (Uladzislau Belavusau, *On Age Discrimination and Beating Dead Dogs: Commission v. Hungary*, 50(4) COMMON MARKET LAW REVIEW 1145–1160 (2013); Tomás Gyulavári & Nikolett Hős, *Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts*, 42(3) INDUSTRIAL LAW JOURNAL 289–297 (2013); Gábor Halmai, *The early retirement age of the Hungarian judges*, in EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 471-488 (Fernanda Nicola & Bill Davies eds., 2017).

[66] For instance, after the rise of Viktor Orbán in Hungary, the Hungarian Constitutional Court was early on stripped of its power to exercise constitutional review over budgetary and tax issues. See Michaela Hailbronner, *How Can a Democratic Constitution Survive an Autocratic Majority? A Report on the Presentations on the Judiciary,* VERFASSUNGSBLOG (Dec. 8, 2018), https://verfassungsblog.de/how-can-a-democratic-constitution-survive-an-autocratic-majority-a-report-on-the-presentations-on-the-judiciary/.

[67] *See supra* notes 8-10.

[68] In order to avoid lengthy conceptual debate, I am using the term "transnational courts" so as to cover both the ECtHR (which is an international court) and the CJEU (which is often treated as a supranational court sui generis).

theoretically and empirically there is much to gain from comparisons between these two levels.[70] Moreover, the CJEU and the ECtHR have been an integral part of the European legal space, as the current cases concerning the Polish and Hungarian judiciaries show,[71] and their governance might be used (and perhaps even misused) as a template on the domestic level. Therefore, this special issue zeroes in on judicial self-governance not only in 12 domestic European jurisdictions (Czechia, France, Germany, Ireland, Italy, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, and Turkey), but also at the European Court of Human Rights and the Court of Justice of the European Union.

Apart from the introductory article you are reading, this special issue consists of two parts: the abovementioned 14 case studies on judicial self-governance in individual jurisdictions and 5 cross-cutting articles that address common themes that have emerged from the contributions on individual jurisdictions. Each case study discusses the forms, rationales, and impact of judicial self-governance in a given jurisdiction. The horizontal articles analyze the role of court presidents, selection of judges, the specifics of judicial self-governance of international courts, the motivation of individual judges and how they act as a group, and the impact of establishment of a judicial council on public confidence in courts.

In what follows you will find a brief summary of each contribution, but I invite you to read all of the articles themselves, as I sincerely believe that in order to understand how the judiciary operates in a particular jurisdiction one must dig more deeply into the minds of lawyers, and particularly those of legal thinkers, in those legal systems to see how each of *them* understands their judiciary and its place within their legal systems. Only then may we 'try to understand the other legal system[s] on [their] *own terms*'.[72]

The special issue part focusing on case studies starts with the early birds of judicial self-governance – France, Italy, and Turkey. Antoine Vauchez[73] carefully traces how judicial self-governance fares in the country where the fear of the "*gouvernement des juges*" has haunted the political imagination for more than two centuries. He shows that judicial

---

[69] It is obvious that the governance of the entire judiciary raises different issues than governance of a single court (and vice versa). *See* Çalı & Cunningham, *supra* note 6; Krenn, *supra* note 6; Tsereteli & Smekal, *supra* note 52. *See* also Part C of this article.

[70] On reflection, it would have been great to include in this special issue an article on judicial self-governance of domestic constitutional *courts*, which might be closer to judicial self-governance of the ECtHR and the CJEU than judicial self-governance of the general *judiciary*. However, it is for other researchers to fill this gap.

[71] *See supra* note 20.

[72] William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"*, 46 AM. J OF COMP. L. 701 (1998).

[73] Vauchez, *supra* note 35.

governance *à la française* aims at striking a balance between an unacceptable judicial subordination to politics and an equally unacceptable corporatism. Despite the fact that this balance changes over time, the *Conseil supérieur de la magistrature* has so far not managed to erode the historical duopole mode of judicial governance relying on senior magistrates and high civil servants from the *Chancellerie* (the Ministry of Justice).

Simone Benvenuti and Davide Paris[74] show how the *Consiglio Superiore della Magistratura*, arguably the best Italian institutional export product, operates in its original setting. They argue that the success of the Italian judicial council model has depended on many endogenous and exogenous factors. In fact, it took 15 years to free the appointment of judges from the influence of the Ministry of Justice, and more than three decades to loosen the grip of senior judges and improve the internal independence of Italian judges. However, this came at the price of creating another potentially dangerous body – judicial associations (the so-called *correnti*) who now play an unprecedented role in Italian judicial governance.

Başak Çalı and Betül Durmuş[75] provide a fascinating account of the development of judicial self-governance in Turkey, which experimented with diverse forms of judicial governance ranging from no judicial self-governance, a co-option judicial council model, a hierarchical judicial council model, the executive controlled judicial council model and a pluralist judicial council model. All of these changes were driven by domestic causes and should be seen as a part of a larger trajectory of constitutional politics, marked by contestation with regard to the appropriate role of the judiciary in the Turkish political context. This difference of opinion deepened after the gradual entrenchment of a competitive authoritarian form of governance under the rule of the Justice and Development Party (AKP) and reached its climax after the failed coup attempt in 2016. As a direct response to the failed coup, the AKP not only curbed judicial self-governance, but also purged one quarter of the judiciary on the grounds that they had links to the Fetullahist Terrorist Organization.

Most Central and Eastern European countries established high councils for the judiciary during the accession process to the European Union. Both Slovakia and Romania are prime examples that closely followed the Euro-Model of judicial council, advocated by the European Commission and the Council of Europe. However, each of these two countries has struggled to cope with the new model. Bianca Selejan-Guțan[76] explains that the Superior Council of Magistracy strengthened corporatist features of the Romanian judiciary

[74] *See* Benvenuti & Paris, *supra* note 36.

[75] Çalı & Durmuş, *supra* note 15.

[76] *See* Selejan-Guțan, *supra* note 14.

with all the accompanying negative effects such as the lack of transparency and minimal accountability. Yet she argues provocatively that, given the high level of corruption that plagues Romanian society and the culture of obedience within the Romanian judiciary, this is a "lesser evil". Samuel Spáč, Katarína Šipulová, and Marína Urbániková[77] provide a more skeptical picture about the Slovak judicial self-governance as they conclude that, with the help of politicians, the Judicial Council of the Slovak Republic was hijacked by judges who used their powers to capture the judiciary from inside. These judges have used their powers in such a manner that helped them to protect their interests. Yet the increasing transparency of the Slovak judicial governance shows signs of hope.

The next group of cases include jurisdictions that have recently moved from the traditional model of judicial governance with the central role of the Ministry of Justice, but have not embraced the idea of a strong judicial council based on the Euro-template. Aida Torres Pérez[78] shows how the selection of judicial members of the General Council of the Judiciary by politicians and the Council's internal practices led to its politicization, which has in turn contributed to undermining public confidence in the Spanish judiciary.

Elaine Mak[79] explains how the new public management theories of governance transformed the Dutch judiciary institutionally as well as mentally. The Netherlands abandoned the original flat organizational structure for a centralized and more hierarchical management, with the key role of the Council for the Judiciary and the Management Boards. However, the new more "business like" approach to judicial governance, which praises efficiency, effectiveness, and client-oriented mindset, has sometimes collided with the traditional rule of law of values. This in turn led to occasional skirmishes, revolving around claims of autonomy, between judges and the Council for the Judiciary as well as between the Council for the Judiciary and the Ministry of Justice and Security.

But these skirmishes are incomparable to the frontal assault on the judicial branch and the judicial self-governance in Poland, as Anna Śledzińska-Simon[80] attests. The 2017 package of judicial reforms pushed by the Law and Justice Party through *Sejm* not only altered the mode of electing its judicial members of the National Council of the Judiciary, but also concentrated the power over the judiciary in the hands of the executive branch. This

[77] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[78] *See* Torres Pérez, *supra* note 39.

[79] *See* Mak, *supra* note 37. However, note that the Netherlands cannot be easily squeezed into the judicial council model – it introduced the Council for the Judiciary, but powers concerning appointing, promoting and disciplining judges do not lie with the Council for the Judiciary, but sometimes with the government, sometimes with the judiciary authorities, and sometimes they are shared.

[80] *See* Śledzińska-Simon, *supra* note 7.

allowed the Polish political leaders to replace important court presidents and pack the Supreme Court. The remaining two jurisdictions in this group show that in smaller countries personal relations and informal networks play a more important role than the institutional design.

Patrick O'Brien[81] argues that judicial independence and judicial self-governance in Ireland depend on the support of politicians and a culture of mutual respect. If personal relationships break down (as they did between 2011 and 2013), essential relationships between government and the judiciary can be difficult to operate. He also shows that politicians as well as court presidents value the potential for patronage involved in judicial appointments and thus have been unwilling to relinquish control in that area. He concludes that to understand the recent debates about the Judicial Appointments Commission and the Judicial Council, getting the politics right is a key.

Matej Avbelj[82] exposes the significant gap between the Slovenian judicial self-governance in the books and the way it is conducted in practice. He demonstrates how the remnants of the communist totalitarian past and the dense formal and informal networks in a relatively small Slovenian legal and political community have been used to manipulate the legal system of judicial self-governance so as to detract from rather than to contribute to the values associated with the judiciary in a well-functioning constitutional democracy.

The remaining two domestic jurisdictions represent the "black sheep" that have so far resisted the introduction of any form of a judicial council. Contrary to general wisdom, both Germany and Czechia show a significant dose of judicial self-governance. Fabian Wittreck[83] rebuts the myth that Germany is a persistent objector to judicial self-governance. In fact, German court administration features as many as eight judicial self-governance bodies. These bodies range from Presidia, councils of judges (*Richterräte*), two judicial appointment committees and court presidents to service courts, penal courts, and civil courts deciding on the civil liability of judges. Germany thus advances a different conception of judicial self-governance, which reflects the prevailing German understanding of democratic legitimacy and separation of powers.

In a similar vein, Adam Blisa, Tereza Papoušková, and Marína Urbániková[84] argue that judicial self-governance cannot be conflated with judicial councils as Czech judges have

[81] O'Brien, *supra* note 31.

[82] *See* Avbelj, *supra* note 41.

[83] *See* Wittreck, *supra* note 45.

[84] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

their say in many issues of judicial governance. They show how Czech court presidents have gradually managed to erode the role of the Ministry of Justice and how they became key players in court administration. However, this comes at a price – the Czech judicial (self-)governance is opaque and rests on the fragile balance between the court presidents and the political actors.

Finally, the last two case studies analyze judicial self-governance at the European Court of Human Rights and the Court of Justice. Başak Çalı and Stewart Cunningham[85] show that the scope of judicial self-governance at the ECtHR is highly variable. While judicial self-governance at the point of judicial selection is at best 'embryonic', since this process continues to favor the primacy of the Parliamentary Assembly of the Council of Europe, sitting ECtHR judges, once elected, enjoy unbounded powers with respect to the management of the ECtHR's judicial activities. In particular, the President of the Court as well as Section Presidents, alongside the Jurisconsult and the Registry, exercise judicial self-governance in managing the Court's work and giving it jurisprudential direction. Başak and Stewart's central argument is twofold. First, in terms of values, they suggest that the current practices of judicial self-governance at the ECtHR are better at promoting legitimacy and judicial independence but far weaker on transparency and accountability. Second, the differences in reach and form of judicial self-governance at the pre- and post-election processes strike a careful balance in respecting the separation of powers and the democratic principle, but this balance should not be taken for granted.

Christoph Krenn[86] then traces the development of the governance model of the Court of Justice of the European Union, which builds heavily on the International Court of Justice template. He argues that this has led to communal judicial self-governance, which has fostered professionalism and strengthened the loyalty of the CJEU's judges and advocates general towards the institution. However, two challenges to this governance loom large – the growth of the CJEU (and especially the effective inclusion of the General Court in the CJEU's governance structure) and the CJEU's controversial active participation in the EU's legislative process.

After these rich case studies on judicial self-governance in particular jurisdictions, this special issue picks up important horizontal issues that run through most of the contributions. Adam Blisa and David Kosař[87] argue that court presidents are a missing piece in judicial governance. They conceptualize the powers of court presidents, create the Court Presidents Power Index, and identify the contingent circumstances that affect to what

[85] *See* Çalı & Cunningham, *supra* note 6.

[86] *See* Krenn, *supra* note 6.

[87] *See* Blisa & Kosař, *supra* note 53.

extent court presidents may exploit their powers in practice. Based on these insights they also question the widely held opinion that the Western and the Eastern Europe view the roles of court presidents differently. In fact, powers of court presidents diverge significantly both within the Western Europe and within the Eastern Europe, and hence it is difficult to draw the easy line along the West/East axis on this ground.

Samuel Spáč[88] focuses on the selection of judges in the age of judicial self-governance and tracks down the increasing involvement of judges in selecting their peers. To explain the latter phenomenon he suggests viewing the process of recruiting judges as a funnel, which consists of four stages, where candidates are gradually eliminated until only one or a few remain. Then he argues that in order to analyze judicial recruitment and its consequences we need not only to understand the formal rules and identify the actors involved in the process, but also to study their preferences and pay attention to the stages of the process in which they shape the recruitment. Only then can we reveal the real influence of judicial self-governance on the composition of the domestic bench.

Marína Urbániková and Katarína Šipulová[89] draw a novel concept map of factors influencing public confidence in the judiciary and offer a unique view on the relationship between judicial councils and the level of public confidence in courts on their own. They raise doubts about the ability of judicial councils to enhance confidence in courts, since the EU countries without judicial councils are better off in terms of public confidence. More specifically, they conclude that the existence of judicial councils does not make a difference regarding public confidence in the judiciary in the new EU member states, while in the old EU member states judicial systems with judicial councils enjoy lower levels of public confidence than the ones without them. This does not necessarily mean that the existence of a judicial council is to be blamed for lower public confidence. Instead, the authors argue that judicial councils have only limited power to deal with the structural causes of low public confidence in courts, which often has deeper cultural and societal roots.

The remaining two articles focus on international courts. Hubert Smekal and Nino Tsereteli[90] draw attention to judicial self-governance at the international level and provide a unique analysis of the selection, promotion, and removal of judges of as many as 24 international courts. They show that while judicial self-governance manifests itself relatively strongly in the promotion and removal of international judges, it is limited in

[88] Spáč, *supra* note 51.

[89] *See* Marína Urbániková & Katarína Šipulová, *Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?,* in this issue.

[90] See Tsereteli & Smekal, *supra* note 52.

their selection. However, sitting judges of some international courts have become increasingly involved in the expert bodies that decide or advise on selecting new judges, and thus we can witness the gradual rise of judicial self-governance even in this area.

Finally, Shai Dothan[91] moves from the institutional design issues to the actual behavior of judges on the international bench. He shows that the states' influence on the selection of international judges raises the concern that judges are biased in favor of their home states. He argues that this concern cannot be refuted merely by the fact that the international courts usually sit in large and diverse panels, since judges may start forming coalitions among themselves, giving judges with national biases a practical opportunity to change the results of cases. Building on insights from the judicial behavior literature he analyzes how international judges act together as a group and eventually concludes that one way of limiting the national bias of international judges is to increase judicial self-governance (e.g. by allowing judges or presidents of international courts to have greater influence on the appointment of their future peers).

C. Forms of Judicial Self-Governance

Based on the insights from the contributions to this special issue, this Part problematizes the forms of judicial self-governance in Europe. More specifically, it argues that it is high time to look beyond judicial councils and study and to view judicial self-governance as a much more complex network of actors and bodies with different levels of participation of judges. This requires focusing on de facto judicial self-governance, the identification of other actors within the judiciary who may engage in judicial governance (such as judicial appointments commissions, promotion committees, and court presidents), taking into account the liquid nature of judicial self-governance, and acknowledgment of the fact that the rise of judicial self-governance may lead to political contestation and the creation of new channels of politicization of the judiciary. Subsequently, it identifies dimensions of judicial self-governance that should allow us to see judicial self-governance more sharply in future.

I. From Judicial Councils *to Judicial Self-Governance* Bodies

As mentioned above, the existing literature on judicial self-governance suffers from several limits. First, it focuses predominantly on judicial councils and neglects *other forms* of judicial self-governance such as the Courts Service[92] or specialized judicial appointments

[91] Shai Dothan, *The Motivations of Individual Judges and How They Act as a Group*, in this issue.

[92] *See* the analysis of the functioning of the Court Service in Ireland (in O'Brien, *supra* note 31).

bodies.[93] A related problem is that there is too much emphasis on judicial self-governance bodies operating at *national* level. Virtually all contributions to this special issue show that we also need to look at judicial self-governance bodies operating at each court such as court presidents,[94] management boards,[95] personnel councils,[96] judicial boards,[97] and presidia (*Präsidien*).[98]

The second drawback of the existing literature is that it attempts to squeeze all forms of JSG into the existing "models" (such as the judicial council model, the Ministry of Justice model, and the Court Service model)[99] of court administration that do not do justice to the richness and diversity of judicial self-governance. Moreover, this approach overlooks the fact that in many countries there are *several* JSG bodies (such as the Court Service coupled with the Judicial Appointments Advisory Board and court presidents,[100] judicial council coupled with national selection committee and court presidents,[101] the judicial council coupled with court presidents,[102] or court presidents coupled with judicial boards[103]). From the conceptual point of view, it is critical to acknowledge this fact and understand the dynamics between these bodies and their personal overlaps rather than trying to put each judicial system under the rubric of a certain ideal model.

---

[93] *See* the Judicial Appointments Advisory Board in Ireland (in O'Brien, *supra* note 31), or *Präsidialräte* and *Richterwahlausschüsse* in Germany (in Wittreck, *supra* note 45). However, note that selection of the CJEU's and ECtHR's judges

[94] *See* Blisa & Kosař, *supra* note 53.

[95] *See* Mak, *supra* note 37.

[96] *See* Avbelj, *supra* note 41.

[97] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[98] *See* Wittreck, *supra* note 45.

[99] I should acknowledge that I myself contributed to this simplification. *See* Bobek & Kosař, *supra* note 52.

[100] *See* the situation in Ireland analyzed in O'Brien, *supra* note 31.

[101] *See* Mak, *supra* note 37.

[102] *See e.g.* the situation in Slovakia dealt with in Spáč, Šipulová & Urbániková, *supra* note 31.

[103] *See* e.g. the situation in Czechia analyzed in Blisa, Papoušková & Urbániková, *supra* note 42.

The other drawbacks are also well known. Most of the literature written in English[104] focuses on judicial councils in *Central and Eastern Europe*, which frames the debate and gives it (owing to the specifics of post-communist judiciaries) a peculiar shape. Moreover, a significant part of the policy guidelines and scholarship on judicial self-governance suffers from *normative bias*, as many scholars and policymakers have presumed that the rise of judicial self-governance is a one-way path and an unquestionable good. However, the developments in Hungary (where Viktor Orbán created the brand new National Office for the Judiciary, chaired by his loyal supporter Tünde Handó, and hollowed out the powers of the existing the National Judicial Council[105]) and Poland (where Jaroslav Kaczyński packed the National Council of the Judiciary with his supporters and even threatened to revert to the Ministry of Justice model[106]) show that judicial self-governance can be reduced and even abused to the detriment of individual judges.[107] This brings us to the final limit of the existing literature, which is the *static* view of judicial self-governance. Even if we leave aside Poland, where one judicial reform follows the other, virtually every contribution to this special issue shows that judicial self-governance has developed over time. Some countries even modified judicial self-governance back and forth several times.

In order to avoid these drawbacks, this special issue deliberately adopts a broad definition of judicial self-governance. For its purposes, "judicial self-governance body" is a body with at least one judge whose primary function, entrenched in a legal norm, is to (a) decide about issues regarding court administration and/or the career of a judge, and/or (b) advise those who decide about such issues.[108]

Such broad definition has several advantages. First, it includes not only judicial councils, but also judicial appointments commissions and similar bodies, the Court Service, court presidents, Supreme Courts (if vested with court administration), management boards or

[104] There is of course relevant literature in local languages (see e.g. DANIELA PIANA & ANTOINE VAUCHEZ, IL CONSIGLIO SUPERIORE DELLA MAGISTRATURA 142 et seq. (2012); ERIK LÁŠTIC & SAMUEL SPÁČ (EDS.), NEDOTKUNTEĽNÍ? POLITIKA SUDCOVSKÝCH KARIÉR NA SLOVENSKU V ROKOCH 1993 – 2015 (2018); FABIAN WITTRECK, DIE VERWALTUNG DER DRITTEN GEWALT (2006); and LEA C. FAISSNER, DIE GERICHTSVERWALTUNG DER ORDENTLICHEN GERICHTSBARKEIT IN FRANKREICH UND DEUTSCHLAND 251 et seq. (2018), but it is to a large extent not accessible to English speaking readers.

[105] *See* Kosař & Šipulová, *supra* note 20; and Benjamin Novak, *Two Hungarian law school professors discuss Hungary's deteriorating political and legal culture*, THE BUDAPEST BEACON (Apr. 6, 2018), https://budapestbeacon.com/two-hungarian-law-school-professors-discuss-hungarys-deteriorating-political-and-legal-culture/?_sf_s=fleck.

[106] *See* Śledzińska-Simon, *supra* note 7.

[107] The recent reports that in Hungary and Poland "disloyal" judges are increasingly threatened with disciplinary sanctions confirm it. *See* Hailbronner, *supra* note 66.

[108] *See also supra* notes 21-23.

judicial boards at each court, *Präsidia* in Germany, *commissions d'avancément* in France, as well as the Article 255 TFEU Panel for selection of Court of Justice judges and the CM Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR. This in turn gives a more accurate picture of the degree of judicial self-governance in each jurisdiction than the traditional focus on judicial councils. In fact, it makes clear that judicial self-governance cannot be conflated with judicial councils (and vice versa). Second, it exposes personal overlaps between various judicial self-governance bodies. For instance, court presidents are themselves judicial self-governance bodies, but they may often also sit on judicial councils or selection and promotion committees. This "judicial self-governance nesting" cannot be addressed here, but should be the subject of future research.

Third, it allows us to see the actual role of judges in the governance of the judiciary rather than the role assigned to them on paper. In fact, it fully exposes that the reality defies traditional models of court administration. For instance, Başak Çalı and Betül Durmuş show that the Ministry of Justice (1971-2010) and later on the Presidential administration (2017-now) can be dominant even under the judicial council model.[109] Similarly, a theoretically strong Slovenian judicial council is rather weak and the real decisions regarding judicial governance are made elsewhere.[110] Conversely, German and Czech contributions rebut the myth that Czechia and Germany are persistent objectors to judicial self-governance. In fact, Czech as well as German judges, each group in its own way, have been very influential in governing the judiciary, despite the nominally prevailing Ministry of Justice model. German judges sit on eight judicial self-governance bodies that have significant say in the appointment and promotion of judges, case assignment, the disciplining of judges as well as in many other issues of judicial governance.[111] The Czech version of judicial self-governance is more fragile since it relies primarily on Czech court presidents, who managed to erode the role of the Ministry of Justice and became key players in court administration.[112] Contrary to general wisdom, judicial self-governance can actually be practiced at the Ministry of Justice. For instance, the most powerful public servants within the Austrian Ministry of Justice (so called "Sektionschefs", heads of large departments within the Ministry of Justice) are actually judges temporarily assigned to the Ministry of Justice.[113]

[109] Çalı & Durmuş, *supra* note 15.

[110] Avbelj, *supra* note 41.

[111] *See* Wittreck, *supra* note 45.

[112] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[113] I am grateful to Markus Vašek for this insight.

Other contributions also expose gaps between de iure and de facto judicial self-governance. In Slovakia, the constitutional design of its judicial council supposes a parity of judges elected by their peers with non-judicial members appointed/elected by political actors, but in practice judges have always had a majority on the Judicial Council of the Slovak Republic, since political actors decided to nominate judges as their candidates.[114] Among the many repercussions of this development are the collision between "political" judicial members and "judicial" judicial members on the judicial council and the gradual rise of judicial associations.

Due to our broad definition, even judicial self-governance at the CJEU and the ECtHR can be seen in a different light. If we go beyond the Article 255 Panel and take into account the role of the CJEU's president, who is one of the strongest court presidents in Europe,[115] the significant financial[116] and administrative[117] autonomy of the CJEU, and a de facto legislative role in regulating its own affairs,[118] then we realize that this is not just "some embryonic form" of judicial self-government"[119] or a "subtle move" in the direction of judicial self-governance.[120] It is rather a different type of judicial self-governance than the one we associate with judicial councils. Similarly, the ECtHR has relatively weak levels of judicial influence on the selection of judges, it enjoys a high degree of control over court administration,[121] and the ECtHR's President also wields significant powers, albeit not as strong as his CJEU counterpart.[122]

These findings confirm that judicial self-governance is a far more complex phenomenon than judicial councils and there might be significant dissonance between de iure and de

[114] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[115] Blisa & Kosař, *supra* note 53.

[116] *But see* Christoph Krenn, *The European Court of Justice's Financial Accountability. How the European Parliament Incites and Monitors Judicial Reform through the Budgetary Process*, 13 EUROPEAN CONST. LAW R., 253 (2017) (who argues that the European Parliament checks for CJEU's mismanagement and gives political guidance on broader issues of CJEU's administration through the EU's budgetary process).

[117] *See* Krenn, *supra* note 6.

[118] On the regulatory self-governance of the CJEU, see Part C.II below.

[119] Alemanno, *supra* note 55.

[120] Dumbrovský, Petkova & Van der Sluis, *supra* note 56.

[121] *See* Çalı & Cunningham, *supra* note 6.

[122] *See* Blisa & Kosař, *supra* note 53.

facto judicial self-governance. It goes without saying that de facto judicial self-governance matters more, but in order to know more about it we need to go beyond the de iure composition and formal powers of judicial self-governance bodies. To be sure, it is important to know whether judges have a majority,[123] parity[124] or minority[125] in judicial councils and other collective judicial self-governance bodies, and who nominates the other members. However, it is also necessary to ask further and examine other factors that shape judicial self-governance bodies: who are the "other members" of these bodies, who selects the judicial members and from which echelons of the judiciary do these judges come, who presides over judicial self-governance bodies, what tiers of the judiciary we are talking about, and what are their informal relations.

For instance, judges and prosecutors are indistinguishable in France, Italy, Romania, and Turkey, but there is a world of difference between them and the roles of court prosecutors in these countries.[126] Polish, Spanish, and Turkish contributions show that when politicians can select the judicial members of judicial councils, that inevitably leads to the politicization of the judiciary,[127] or at least to the perception of "distance" between judges and the judicial council.[128] However, even if judges can elect their representatives, that does not mean that political ties do not matter. In France and Italy, judicial associations, often associated with a certain political party or at least a certain worldview, actually have a major say on who sits on judicial self-governance bodies and how these bodies decide important issues.[129] Slovakia then serves as a cautionary tale, as it shows that the judicial council can also be captured from inside by one of the factions within the judiciary.[130]

[123] *See* e.g. judicial councils in Italy, Romania, and de facto also in Slovakia.

[124] *See* e.g. judicial councils in the Netherlands (however, the judicial member who is the president of the Dutch judicial council has a casting vote) and de iure also in Slovakia.

[125] *See* e.g. judicial councils in Spain and France, and the Judicial Appointments Advisory Board in Ireland.

[126] *See* Vauchez, *supra* note 35; Benvenuti & Paris, *supra* note 36; Selejan-Guțan, *supra* note 14; and Çalı & Durmuş, *supra* note 15.

[127] *See* Śledzińska-Simon, *supra* note 7; Torres Pérez, *supra* note 39; and Çalı & Durmuş, *supra* note 15.

[128] *See* Mak, *supra* note 37.

[129] *See* Vauchez, *supra* note 35; Benvenuti & Paris, *supra* note 36. Judicial associations are also strong in Slovakia and Spain (Spáč, Šipulová & Urbániková, *supra* note 31; and Torres Pérez, *supra* note 39).

[130] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

Who presides over the judicial self-governance body is equally important. For instance, some judicial councils are chaired by the head of state,[131] while in other jurisdictions the chair is usually a lower court judge,[132] a former court president,[133] or the Chief Justice who presided[134] or presides[135] over the judicial council. Interestingly, the dual role of the Chief Justice (in particular the presidency of the Supreme Court and the chairmanship of the judicial council) has become increasingly problematic, in both Eastern and Western Europe. The Slovak contribution explains how this dual role, which concentrated too much power in the hands of one person, contributed to the capture of the Judicial Council of the Slovak Republic and selective disciplinary motions against judges who dared to criticize the Chief Justice.[136] One may object that this is due to the peculiar personal characteristic of the Slovak Chief Justice, Štefan Harabin. However, the recent Grand Chamber judgment of the ECtHR in *Ramos Nunes de Carvalho e Sá v Portugal* fully reveals that this is actually a structural problem.[137] Therefore, it comes as no surprise that several countries have divided these two roles and vested the judicial council chairmanship in someone other than the Chief Justice.[138]

Similarly, it matters who are the judicial members of the judicial self-governance bodies. In some countries lower court judges dominate judicial self-governance bodies,[139] while elsewhere apex court judges[140] or court presidents[141] have a major say. We may then

---

[131] This is the case of Italy. Until the 2008, the head of state chaired also the French judicial council.

[132] *See* Bogdan Iancu*, Perils of Sloganised Constitutional Concepts, Notably that of 'Judicial Independence'*, 13(3) EUROPEAN CONST. LAW R. 582, 593 (2017) (explaining that Romanian judicial council's "three ex officio members (Minister of Justice, President of the High Court of Cassation and Justice, Prosecutor General of the General Prosecutor's Office attached to the High Court of Cassation and Justice) have no right to vote in the two sections, which serve as first instance disciplinary courts for judges and prosecutors, respectively.").

[133] This is currently the situation at the Dutch judicial council.

[134] This was the case of Slovakia until the 2014 reform.

[135] The Chief Justice chairs, among others, judicial councils in France and Spain.

[136] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[137] *See* Ramos Nunes de Carvalho e Sá v Portugal, *supra* note 13; and especially concurring opinion of Judge Pinto de Albuquerque therein.

[138] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[139] This is the case of judicial councils in Italy and Romania.

[140] The best example is the Turkish judicial council during its hierarchical judicial self-governance period (1961-2010) and the Romanian judicial council between 1991 and 2003. For further details see Çalı & Durmuş, *supra* note 15; and Selejan-Guțan, *supra* note 14.

speak of hierarchical and non-hierarchical judicial self-governance bodies,[142] depending on the composition of the "judicial element" of these bodies. Finally, it is important to know over which tiers of the judiciary each judicial self-governing body rules. For instance, while in some countries judicial councils decide on matters of judicial governance at all tiers of the judiciary,[143] in other jurisdictions a judicial council has no say over issues concerning the Supreme Court.[144]

This wide variety of judicial self-governance bodies in Europe, in terms of both their composition and their powers, is actually consequential and can guide our debates on constitutional resilience.[145] The standard approach to constitutional resilience of the judiciary vis-à-vis political attacks, prompted primarily by the events involving the judiciary in Hungary and Poland, is to increase and entrench judicial self-governance. Based on the insights from the contributions to this special issue, I would like to caution against such rosy view of judicial self-governance.

First, in terms of competences, the rule of thumb is that the more power a given judicial self-governance body has, the more attention it attracts from politicians. Politicians usually do not care about Judicial Academies or less influential judicial self-governance bodies such as judicial boards in Czechia or the Judicial Appointments Advisory Board in Ireland. These bodies often operate below their radar. However, politicians care about strong judicial councils and powerful court presidents. As a result, the diffusion of powers in the area of judicial governance among different bodies, perhaps even with a different composition, might be a better solution than the creation of the strong judicial council, which concentrates virtually all powers into one institution, because the former solution is more resistant to capture.

Second, the creation of the judicial self-governance body does not make the power disappear or the dangers evaporate. Power is just transferred to other hands and new channels of politicization of the judiciary are created.[146] These channels differ from one

---

[141] This was the case of the Slovak judicial council until 2014.

[142] *See* also Garoupa & Ginsburg, *supra* note 52; and Carlo Guarnieri, *Judicial Independence in Europe: Threat or Resource for Democracy?*, 49(3) REPRESENTATION – JOURNAL OF REPRESENTATIVE DEMOCRACY 347, 348 (2013).

[143] *See* e.g. judicial councils in Poland, Romania and Slovakia.

[144] This is the case of the Netherlands.

[145] *See* the ongoing symposium on constitutional resilience at Verfassungsblog (Christoph Grabenwarter, *Constitutional Resilience,* VERFASSUNGSBLOG (Dec 6, 2018), https://verfassungsblog.de/constitutional-resilience/).

[146] *See* also Wittreck, *supra* note 45 (arguing that "The mechanisms of self-government merely shift the dangers for individual judicial independence by shifting power.").

jurisdiction to another. The Slovak judiciary was politicized through the dominant role of the Chief Justice in the judicial council.[147] The Polish judiciary has recently been politicized not only by the Minister of Justice, but also through court presidents and the new members of the National Council of the Judiciary elected by the parliamentary majority.[148] In France and Italy, the major channels of politicization of the judiciary are arguably not the non-judicial members of their judicial councils, but judicial associations.[149] In Germany, the main channel of politicization are the promotion committees.[150] In Hungary, the major channel of politicization of the judiciary is the new National Office for the Judiciary.[151] In Spain and Turkey, politicization of the judiciary has flourished due to the (s)election of judicial members of the judicial council by political branches. The difference is that while the Spanish judicial council has been captured by political parties,[152] in Turkey it is the presidential administration that currently has the major grip over the judicial council.[153] In Ukraine, the main threat arguably comes from prosecutors who sit on the judicial council.[154] Prosecutors have a strong position also in the Romanian judicial system.[155] In fact, tinkering with their independence could be more attractive than trying to influence judges, simply because the latter would arouse a lot more opposition.[156]

Third, the Slovak case study shows that judicial councils can be captured not only from the outside, but also from the inside.[157] Unfortunately the Polish scenario attests that

[147] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[148] Śledzińska-Simon, *supra* note 7.

[149] *See* Guarnieri, *supra* note 142; and Benvenuti & Paris, *supra* note 36 (on *correnti* in Italy); and Vauchez, *supra* note 35 (on judicial associations in France).

[150] *See* Wittreck, *supra* note 45.

[151] *See* note 105.

[152] Torres Pérez, *supra* note 39.

[153] Çalı & Durmuş, *supra* note 15.

[154] Denisov v Ukraine, *supra* note 12.

[155] *See* Selejan-Guțan, *supra* note 14.

[156] *See* Anne van Aaken, Lars P. Feld & Stefan Voigt, *Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation Across 78 Countries*, 12(1) AMERICAN LAW AND ECONOMICS REVIEW, 204-244 (2010); and Stefan Voigt & Alexander J. Wulf, *What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence*, JOURNAL OF INSTITUTIONAL ECONOMICS, 1-22 (2017).

[157] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

politicians always find some judges who are willing to cooperate with them, no matter how obvious the intentions of the judicial reform are.[158] As I argued elsewhere, the wide role of the Ministry of Justice in judicial governance may sometimes be a lesser evil, since it is the "the devil we know", Minister's abuses are more visible, and it is easier to mobilize people against them.[159]

Finally, one should not forget informal networks that may capture judicial self-governance bodies. While Tünde Handó's proximity to Viktor Orbán is well-known,[160] to uncover such informal relations in other jurisdictions might be extremely difficult, yet crucial. For instance, in Slovenia one can hardly assess the functioning of the judicial council without knowing the dense web of informal networks that made important decisions outside the judicial council.[161] In France, Italy, and Spain it is crucial to know who belongs to which judicial association.[162] In Czechia court presidents created several informal groups that have a major say in key areas of judicial governance.[163] Shai Dothan shows that informal coalitions may emerge also among judges of the ECtHR.[164] Samuel Spáč then carefully analyzes how informal networks may affect different stages of recruitment of judges.[165] Fortunately, recent scholarship has made significant progress in conceptualizing and analyzing such informal networks[166] and it is high time to apply these insights to European judiciaries as well.

---

[158] *See* Śledzińska-Simon, *supra* note 7.

[159] *See* Kosař, *supra* note 52. Note that Hungarian judges often refer to the period between 1990 and 1996, when the court administration was the responsibility of the Ministry of Justice as to the „golden era" (https://budapestbeacon.com/two-hungarian-law-school-professors-discuss-hungarys-deteriorating-political-and-legal-culture/?_sf_s=fleck)

[160] *See supra* note 105.

[161] *See* Avbelj, *supra* note 41.

[162] *See* Vauchez, *supra* note 35; Benvenuti & Paris, *supra* note 36; and Torres Pérez, *supra* note 39).

[163] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[164] *See* Dothan, *supra* note 91.

[165] *See* Spáč, *supra* note 51.

[166] *See* Björn Dressel, Raul Sanchez-Urribarri & Alexander Stroh, The Informal Dimension of Judicial Politics: A Relational Perspective, 13 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 413 (2017); and the special issue on 'Courts and Informal Networks' in Volume 39(5) INTERNATIONAL POLITICAL SCIENCE REVIEW (2018).

II. From Judicial Self-Governance Bodies *to Judicial Self*-Governance

Most judicial self-governance studies focus on the *bodies* involved in judicial self-governance. This special issue follows this approach and the case studies as well as Part C.I of this article are framed around judicial self-governance bodies. However, several contributions to this special issue invite more thorough thinking about the *dimensions* of judicial self-governance.[167] The major advantage of this approach is that while judiical self-governance bodies either exist or do not exist (hence it is a binary variable), judicial self-governance is a matter of scale and also encompasses informal judicial actors, which in turn allows us to better analyze the extent of control judges can exercise over the judiciary.

Until recently, most studies focused primarily on *personal* self-governance, which concerns judicial careers (namely issues of selection, promotion, and disciplining of judges) and *administrative* self-governance, which covers issues such as panel composition and case assignment. The rise of specialized judicial academies and involvement of judges in educating their peers (i.e. *education* self-governance) are also well documented.[168] Virtually every case study in this special issue discusses these dimensions as well.

But some contributions go beyond that and provide interesting insights about other dimensions of judicial self-governance. For instance, the Czech and German contributions raise important issues regarding *digital* self-governance. Fabian Wittreck explains that the electronic file and other measures of digitization of the judiciary may profoundly change the working-place of judges.[169] Authors of the Czech case study concur.[170] However, challenges in digital self-governance may also take other forms. For instance, Czech judges have had trouble searching for information online as the Czech Ministry of Justice blocks many websites on computers in the court buildings on dubious grounds.

Participation in the budget negotiation and discretion regarding the distribution of the court budgets is perhaps even more important, as budget cuts are a subtle but effective tool for shaping the judiciary, in both good[171] and bad[172] ways. Hence, *financial* self-

[167] I leave aside the abstract conceptual disputes regarding term governance. Governance, much like government, is notoriously difficult to define as it has at least four meanings in the literature: a structure, a process, a mechanism and a strategy (*see* David Levi-Faur, *From "Big Government" to "Big Governance"?,* in THE OXFORD HANDBOOK OF GOVERNANCE 3-18 (David Levi-Faur, 2012)).

[168] *See e.g.* CRISTINA DALLARA & DANIELA PIANA, NETWORKING THE RULE OF LAW: HOW CHANGE AGENTS RESHAPE JUDICIAL GOVERNANCE IN THE EU 87–110 (2016).

[169] *See* Wittreck, *supra* note 45.

[170] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[171] *See* Krenn, *supra* note 6.

governance comes to the fore. Both transnational courts also exhibit significant *ethical* self-governance via their rules of procedure or court statutes.[173] More recently, the CJEU adopted its Code of Conduct in 2007[174] and revised it in 2016.[175] Similarly, in 2008 the ECtHR adopted the Resolution on Judicial Ethics that imposes only 'soft' standards for judicial behavior.[176] On the domestic level, judicial councils often take the lead in judicial ethics. For instance, the French judicial council responded to the judicial scandals in the early 2000s by adopting the ethical rules (*Recueil des obligations déontologiques du magistrat*), which provide guidelines on what "normal professional behavior" of French judges is.[177]

Several contributions have also shown the importance of *information* self-governance. For instance, in Czechia the Supreme Court and the Supreme Administrative Court have initiated the publication of all judgments online.[178] Slovakia went even further and provides a significant amount of information about the activity of individual judges[179] as well as about individual candidates for a judicial position.[180] The other contributions show that information self-governance covers a wide set of issues, and that the approach of European jurisdictions varies a lot in this respect. Therefore, this dimension of self-governance is particularly apt for further research. Moreover, in future the GDPR implementation can become a major issue as well.

Judicial self-governance at the ECtHR and the CJEU also provides a novel conceptual insight as one specific dimension of judicial self-governance that is not so visible at the domestic level emerges at the supranational level – *regulatory* self-governance. By *regulatory* self-governance I mean the unique power of the ECtHR's and the CJEU's judges to determine

---

[172] Financial pressure can be easily abused, for instance against a critical court president and "her" court.

[173] *See* Krenn, *supra* note 6; and Çalı & Cunningham, *supra* note 6.

[174] Code of Conduct [2007] OJ C223/1.

[175] Code of Conduct for Members and former Members of the Court of Justice of the European Union [2016] OJ C483/1. For more details see Krenn, *supra* note 6.

[176] European Court of Human Rights, Resolution on Judicial Ethics, 23 June 2008, http://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf. For more details see Çalı & Cunningham, *supra* note 6.

[177] *See* Vauchez, *supra* note 35.

[178] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

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

[180] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

the primary rules regarding their organization (such as organization of sessions and deliberations, setting up sections and chambers, and determining case allocation) and procedure as well as to regulate matters regarding the judicial careers of their members (such as disciplining and removal of judges, election of the court presidents and section presidents etc.).[181]

In contrast to domestic courts, where these primary rules are determined by the legislature (typically in the Law on Courts), at the transnational level it is the ECtHR and the CJEU themselves who play the major role in formulating the rules that govern their activities. They do so via the adoption of the court' statutes, rules of procedure, regulations, and guidelines governing the functioning of their courts and/or behavior of judges.[182] This unprecedented autonomy results from the lack of classical tripartite separation of powers at the Council of Europe[183] and a peculiar separation of powers in the European Union.[184] What is crucial for the conceptual understanding of judicial self-governance is that in some jurisdictions judges are not only granted administrative, financial and ethical self-governance, but are also vested with the power to determine the very scope of their powers in these areas. Moreover, regulatory self-governance gives transnational courts a competitive edge in judicial reform processes, for example, by proposing treaty amendments or commenting on governmental initiatives.[185]

Based on these insights, I suggest unpacking judicial self-governance into smaller units. This would allow us to study in which areas judges have their say and to what extent. This is in the end more important than knowing via which body judges could influence governance. The conceptual map of judicial self-governance that follows includes 8 components: personal self-governance, administrative self-governance, financial self-governance, educational self-governance, information self-governance, ethical self-governance, digital self-governance, and regulatory self-governance. It is by no means an exhaustive list,[186]

---

[181] I am grateful for this suggestion to Hubert Smekal and Nino Tsereteli.

[182] *See* Krenn, *supra* note 6; and Çalı & Cunningham, *supra* note 6.

[183] *See* Çalı & Cunningham, *supra* note 6.

[184] Note that the situation in the European Union is different from the Council of Europe in many aspects, as the European Commission and especially the European Parliament do play a role in shaping the CJEU, albeit by different means and less visibly than the domestic political branches. *See* Krenn, *supra* note 6; and Krenn, *supra* note 116.

[185] *Ibid*.

[186] One can also think of other dimensions such as media self-governance that would, among other things, include hiring spokespersons, handling social media, and having its own channels of medialization (such as TV channels, radio channels or own journals).

Table 1: Dimensions of judicial self-governance: a concept map.

JUDICIAL SELF-GOVERNANCE	Personal	selection of judges; promotion; disciplining; impeachment; relocation/reassignment; salaries and non-monetary benefits of judges
	Administrative	work schedules; composition of panels; initial case assignment; case reassignment; case load quotas; court performance evaluation; case flow; setting the number of judges per court; setting the number & the process of hiring law clerks; setting the number & the process of judicial personnel; transfer of jurisdiction; processing complaints
	Financial	setting of the budget of the judiciary; setting the budgets of individual courts; allocation of budget within courts; non-monetary support for courts (law clerks)
	Educational	training of judicial candidates; training of judges; organizing conferences; attending conferences; funding of further education; compulsory education
	Ethical	judicial ethics & codes of conduct
	Information	transparency mechanisms; recording trials; publishing judgments; financial disclosure; protection of personal data (GDPR implementation)
	Digital	administration of the files and judgments (data storage, clouds, servers); access to Internet; online search engines; e-justice
	Regulatory	rules of procedure; court statute

Source: author.

This conceptual map is by no means an exhaustive list of spheres of judicial self-governance,[187] but it could guide future research in this area in several ways. It could lead to a better understanding of where we stand regarding the scope of judicial self-governance in each jurisdiction. Later on, it would allow us to develop ideal types of judicial self-governance and the judicial self-governance index that would reflect changes over time.[188] It should also force us to rethink judicial self-governance in normative terms, as normative foundations for digital self-governance are quite different from normative foundations of personal or financial self-governance.

D. Rationales of Judicial Self-Governance

Judicial self-governance may be introduced, changed, and removed for several reasons. The ruling elites might want to entrench their influence within the judiciary. The key stakeholders may also believe that such solution will increase judicial independence, the accountability of judges, public confidence in the courts, the quality of justice, or the efficiency of the judicial system. Sometimes politicians might just want to get rid of cumbersome and time-consuming tasks that are below the radar of their political constituencies and the electorate. Or the rise and fall of judicial self-governance may be just a historical coincidence, a response to exogenous changes in the legal and political complex, the endeavor of a few influential individuals or transnational networks, the pressure from the European Union and the Council of Europe, a side-effect of a different reform project, or the result of an incremental drifting of power.

We need to know what the motivation behind the rise and fall of judicial self-governance is. If anything, it is necessary for the evaluation of the functioning of judicial self-governance bodies such as judicial councils and judicial appointments commissions. If we do not know why they were introduced and what was expected from them, we can hardly assess whether they met these expectations, in what they succeeded, and in what they failed. From a democratic perspective, we also need to hold these bodies to account, which is again a daunting task if we do not know for what they should be held to account and according to which standards. Finally, from a broader sociological perspective[189] we

[187] It merely reflects the contributions to this special issue. One can also think of other dimensions such as media self-governance that would, among other things, include hiring spokespersons, handling social media, and having its own channels of medialization (such as TV channels, radio channels or own journals).

[188] We have tried to develop such categorization and index regarding court presidents; *See* Blisa & Kosař, *supra* note 53.

[189] Interestingly, the sociology of professions has not rigorously studied judicial self-governance so far.

should be curious how such an important socio-legal phenomenon came into being and the driving force behind it.[190]

Unfortunately, the rationales of JSG have been undertheorized. To be sure, the growing scholarship on judicial councils has produced several theories such as the two-wave-theory of judicial councils, the external incentives theory of judicial councils, the transnational networks theory of judicial councils, and the dormancy of domestic parliaments in introducing judicial councils in CEE.[191] However, the existing theories are limited in several ways. First, they tend to apply only to judicial councils. Second, they are developed against the backdrop of experiences in Central and Eastern Europe, which has a peculiar historical and political trajectory. In contrast, judicial self-governance in Western Europe as well as at both European supranational courts has escaped theorizing so far. Third, the existing theories tend to treat the rise of judicial self-governance as a one-way path (with occasional bumps on the road) and overlook the possibility of counterreforms, pushback, backlash, and even rejection of judicial self-governance and the return to the previous "executive mode" of judicial governance. Fourth, these theories usually focus on why judicial self-governance is introduced, but less on why it is modified or even removed.

For instance, Daniela Piana has developed a "two-wave-theory" of judicial councils that builds on the distinction between the two waves of judicial reforms in Central and Eastern Europe: the "transition wave" that took place immediately after the democratic revolution (i.e. between 1989 and 1997), and the "pre-accession" wave that covered reforms adopted during the pre-accession period (i.e. between 1998 and 2006). Piana argues that those actors who emerged as winners from the first wave of reforms (the Ministry of Justice or the judicial council) were better placed in the second wave and exploited the opportunities provided by the European Union to entrench existing domestic allocations of power.[192] Other scholars have stressed the role of external incentives such as EU Accession conditionalities (external incentives theory of judicial councils), the role of the transnational "epistemic communities" of judges, scholars, and legal experts (transnational networks theory of judicial councils)[193] or the dormancy of domestic parliaments[194] in introducing judicial self-governance in Central and Eastern Europe.

---

[190] See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814 (1987); and Yves Dezalay & Mikael Rask Madsen, *The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law*, 8 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 433 (2012).

[191] *See* more below.

[192] Daniela Piana, *The Power Knocks at the Courts' Back Door – Two Waves of Postcommunist Judicial Reforms*, 42 COMPARATIVE POLITICAL STUDIES 816 (2009); or Piana, *supra* note 50, at 162–165.

[193] *See* Dallara & Piana, *supra* note 168.

Even if we limit our analysis to rationales of judicial councils in Central and Eastern Europe, we can see the limits of these predictive theories. Czechia actually defies all four theories. When we look at recent developments in Hungary and Poland, it is clear that there is a third wave, and the two-wave theory should be modified accordingly. Likewise, domestic parliaments are no longer dormant, and the role of external incentives for Central and Eastern European countries do not play as significant a role as originally thought.[195]

The case studies in this special issue do not provide any grand theories. They provide a more sober assessment of rationales of why judicial self-governance bodies came into being. In most countries the major rationale behind the introduction of new judicial self-governing bodies was to protect judicial independence and guarantee separation of powers.[196] Only in few countries, the establishment of major judicial self-governance bodies was motivated by improving other values such as judicial accountability or effectiveness of the judiciary.[197]

However, that does not mean that politics do not play a role in shaping JSG. On the contrary, virtually all case studies show that the foundations of judicial self-governance are political. In many countries, judicial councils were established in the wake of authoritarian[198] and totalitarian regimes.[199] Başak Çalı and Betül Durmuş show that the development of judicial self-governance in Turkey has also been a response to changing political conditions.[200] In Ireland, political crises also serve as the main driving force of judicial reforms touching upon judicial self-governance. The French and Italian case studies then show how judicial self-governance in these countries has been shaped by high-profile judicial scandals.[201] Even in the Netherlands, the establishment of the judicial council has

---

[194] *See* Cristina E. Parau, *The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe*, 49 REPRESENTATION – JOURNAL OF REPRESENTATIVE DEMOCRACY 267 (2013).

[195] Or more precisely, these external incentives are of a short-term nature. Once the CEE country joins the EU, the incentives for CEE countries to *keep* judicial self-governing bodies meeting the EU standards are much weaker.

[196] This article cannot do justice to historical trajectories in all 14 jurisdictions. For a brief analysis *see* Table 1 in Urbániková & Šipulová, *supra* note 89.

[197] The Dutch judicial council is a rare example (*ibid*.).

[198] This is the case of the Spanish and Portuguese judicial councils.

[199] This is the case of the Italian judicial council and virtually all judicial councils in the post-communist countries in Central and Eastern Europe.

[200] Çalı & Durmuş, *supra* note 15.

been driven by political demands to improve the management of the Dutch courts and increasing the efficiency of the judiciary.

Politics was also behind the creation of the expert panels at the ECtHR and the CJEU, as both of them responded to the enlargement of the respective Court and to the need to screen newly arriving judges from Central and Eastern Europe.[202] Politics also help to explain the resistance to judicial councils in Germany and Czechia. On the basis of both case studies[203] one may of course argue that judicial councils are not needed, as there is enough judicial self-governance anyway.[204] However, in Czechia the rise of court presidents, the key judicial self-governance body, also has political roots. This results from the high turnover of Czech ministers of justice, the Ministry's personal misery, and the gradual overall demise of the influence and gravitas of the Ministry of Justice in the Czech political system. Germany's resistance to judicial councils is based on a peculiar understanding of the principles of democracy and separation of powers, which is deeply embedded among the traditional German political parties.[205] However, this might change in the near future for two interrelated reasons: the rise of new political parties[206] and the pressing need to be prepared to respond "to the kind of challenges Polish and Hungarian institutions have confronted in recent years".[207] The proposal by *die Linke* in 2013 to amend the Basic Law with a clause providing for judicial self-governance failed to attract sufficient support, but there are growing calls in Germany[208] as well as in other established

---

[201] *See* Benvenuti & Paris, *supra* note 36; and Vauchez, *supra* note 35. *See* also Simone Benvenuti, *The Politics of Judicial Accountability in Italy: Shifting the Balance*, 14(2) EUROPEAN CONST. LAW R., 369–393 (2018)

[202] *See* Çalı & Cunningham, *supra* note 6; Bobek, *supra* note 58; and Mitchel de S-O-l'E Lasser, *Judicial Appointments, Judicial Independence and the European High Courts,* in THE TRANSFORMATION OR RECONSTITUTION OF EUROPE: THE CRITICAL LEGAL STUDIES PERSPECTIVE ON THE ROLE OF THE COURTS IN THE EUROPEAN UNION 121-150 (Tamara Perišin & Siniša Rodin eds., 2018).

[203] *See* Wittreck, *supra* note 45; and Blisa, Papoušková & Urbániková, *supra* note 42.

[204] *See supra* Part C.I.

[205] *See* Wittreck, *supra* note 45.

[206] The German judiciary has been afraid that with unknown political parties coming to power their independence might be in danger, and that might be the reason why some judges regard the concept of judicial self-government as tempting.

[207] Hailbronner, *supra* note 66.

[208] *Ibid*.

European democracies to conduct a "judicial stress test"[209] and entrench or even increase judicial self-governance.

That brings me to a related theme – it is not only the establishment of judicial self-governance bodies, but also their modification that is often driven by political determinants. Just think of the changing role of the presidency and the failed coup d'état in Turkey[210] and the rise of populist political leaders in Hungary[211] and Poland,[212] all of which were discussed above. In France, modifications of judicial self-governance responded to the judicial scandals in the early 2000s.[213] Similarly, the Italian parliament also reacted to the scandals within the judiciary. The same applies to Ireland, where a crisis of relations between judges and the political system and the resulting political row framed the debate regarding judicial self-governance. As O'Brien puts it, in order to understand judicial governance in Ireland and its reform, "getting the politics right is key".[214] This statement applies to all jurisdictions in this special issue.

Future research should acknowledge this dynamic and its repercussions. For instance, the case studies in this special issue show that the rise of judicial self-governance is not a one-way street and many countries have actually decreased judicial self-governance recently. More importantly, this happened not only in Hungary,[215] Poland,[216] and Turkey,[217] but also in France.[218] As a result, quite a few judicial councils do not meet the standards required by the international soft law on judicial governance, which is increasingly read into the European Convention on Human Rights by the ECtHR.[219] We also need to distinguish

[209] Eirik Holmøyvik & Anne Sanders, *A Stress Test for Europe's Judiciaries*, VERFASSUNGSBLOG (Aug. 23, 2017), https://verfassungsblog.de/a-stress-test-for-europes-judiciaries/.

[210] *See* Çalı & Durmuş, *supra* note 15.

[211] *See* Kosař & Šipulová, *supra* note 20; and literature in *supra* notes 4, 65 and 105.

[212] *See* Śledzińska-Simon, *supra* note 7.

[213] *See* Vauchez, *supra* note 35.

[214] O'Brien, *supra* note 31. However, this might change, if the Irisih Parliament adopts the Judicial council Bill.

[215] *See* Kosař & Šipulová, *supra* note 20; and literature in *supra* notes 4, 65 and 105.

[216] *See* Śledzińska-Simon, *supra* note 7.

[217] *See* Çalı & Durmuş, *supra* note 15.

[218] *See* Vauchez, *supra* note 35.

[219] *See* Kosař & Lixinski, *supra* note 11.

between various forms of resistance to judicial self-governance. Here the conceptualization of resistance to international courts, which distinguishes between backlash, pushback, and withdrawal (exit), is particularly helpful.[220] While the French change of the composition of the *Conseil supérieur de la magistrature* in 2008 implies pushback,[221] the significant institutional reforms in Hungary (in 2011), Poland (in 2017), and Turkey (in 2017) qualify as a backlash against judicial self-governance.[222] And if Polish political leaders implement their threat to return to the Ministry of Justice model of judicial governance and abolish the National Council of the Judiciary altogether, such reform would fall into the category of exit from judicial self-governance. Finally, we also need to learn more about the reasons behind the fall of judicial self-governance in Central and Eastern Europe and the motivations of the politicians who executed it. A careful analysis of the Polish scenario by Anna Śledzińska-Simon is a promising start of this endeavor.[223]

E. Effects of Judicial Self-Governance

Analyzing the effects of judicial self-governance is a daunting task for at least three reasons. It is extremely difficult to isolate these effects from other social, political, economic, judicial, and historical factors even if one compares two countries that are closest to the natural experiment we can get.[224] Just think of the political turmoil in Poland and Romania or the changing role of the presidency in Turkey, all of which have had serious repercussions for their respective judicial councils. Sometimes even unique events such as the failed coup d'état in Turkey can make a difference.[225] In social science terminology, there are simply too many independent variables. Hence, do not expect any causal claims or predictive theories here. Second, even if we agree on the effects on *what* values we want to focus on, the dependent variables defy easy definitions. As the readers of this journal know very well, we are not even close to generally accepted definitions of key values such as judicial independence and judicial accountability, not to speak of

---

[220] *See* Mikael Rask Madsen, Pola Cebulak & Micha Weibuch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14(2) INTERNATIONAL JOURNAL OF LAW IN CONTEXT 197 (2018).

[221] *See* Śledzińska-Simon, *supra* note 7; Çalı & Durmuş, *supra* note 15; and Kosař & Šipulová, *supra* note 20.

[222] *See* Śledzińska-Simon, *supra* note 7; Çalı & Durmuş, *supra* note 15; and Kosař & Šipulová, *supra* note 20.

[223] Śledzińska-Simon, *supra* note 7.

[224] *See* Kosař, *supra* note 52 (comparing the impact of judicial council in Slovakia on judicial accountability with the functioning of the Czech ministry of justice model of court administration).

[225] Çalı & Durmuş, *supra* note 15.

confidence in and transparency and legitimacy of the judiciary. Third, many values are actually interdependent and thus cannot be easily disentangled.

An article on the impact of the establishment of the judicial council on public confidence in courts exemplifies all these issue. Marína Urbániková and Katarína Šipulová grapple with the conceptual disagreement regarding public confidence and define its three levels (individual, institutional and cultural), painstakingly identify the factors that may influence public confidence in the judiciary, and acknowledge that the establishment and reforms of judicial councils usually relate public confidence to some other value: most frequently these are independence (Netherlands, Poland, Italy, Hungary, Ireland), accountability (Netherlands), and the perception of the effectiveness of the judicial system (Netherlands, Poland, Hungary, France, Ireland).[226] Only then can they study the effects of judicial councils on public confidence.

They are careful not to make any causal claims, but their findings provide a lot of food for thought as they show that the EU countries without judicial councils are in general better off in terms of public confidence. More specifically, they conclude that the existence of judicial councils does not make a difference regarding public confidence in the judiciary in the new EU member states, while in the old EU member states judicial systems with judicial councils enjoy lower levels of public confidence than the ones without them.[227] In other words, the ability of judicial councils to enhance confidence in courts is limited. This does not necessarily mean that the existence of a judicial council is to be blamed for lower public confidence. They merely argue that judicial councils have only limited power to deal with the structural causes of low public confidence in courts, which often has deeper cultural and societal roots

Marína Urbániková and Katarína Šipulová also summarize the impact of judicial councils on judicial independence, which is closely related to public confidence in courts.[228] In Romania, according Selejan-Guțan, the judicial council *"was not sufficient for protecting the true independence of the judiciary"*.[229] Regarding Slovenia, Matej Avbelj concludes that the judicial council has had a limited impact on independence, and there have even been cases in which its (in)action negatively affected it.[230] Slovakia serves as a cautionary tale regarding the impact of the establishment of the judicial council on judicial independence.

---

[226] *See* Šipulová & Urbániková, *supra* note 89.

[227] *Ibid*.

[228] *Ibid*.

[229] Selejan-Guțan, *supra* note 14.

[230] Avbelj, *supra* note 41.

While the Judicial Council of the Slovak Republic arguably increased the institutional independence of the judiciary, it failed to secure the independence of individual judges.[231] In fact, Slovak judges faced more reprisals from their colleagues who captured the judicial council than from the Minister of Justice before the introduction of the judicial council.[232]

Judicial councils in Spain and Turkey also failed to deliver judicial independence. Aida Torres Pérez argues that in Spain the judicial council has been captured by politicians, which in turn prevents it *"from fulfilling its goal and has contributed to undermining public confidence in the judiciary as a whole"*.[233] This in line with the empirical data that show that a shocking 36 % of Spanish judges think that the Spanish *Consejo General del Poder Judicial* disrespect their independence.[234] In Turkey, according to Çalı and Durmuş, it has been *"suspect, whether the different forms of JSG have promoted judicial independence, given the highly politicized conditions that led to many of the JSG reforms".*[235]

Judicial councils in France, Italy, and Poland show mixed results. Although they helped to secure independence, other problems arose. Vauchez concludes that even though the judicial council in France *"has undoubtedly gained competences and institutional autonomy, it remains firmly embedded in a dense web of links and dependences that secure its integration within the body of the State"*.[236] Similarly, Benvenuti and Paris claim that in Italy the High Council of the Judiciary played a crucial role in securing the independence of the judiciary from the executive power, but this does not apply to internal independence.[237] Finally, the Polish case is a sad story. Śledzińska-Simon shows that the Polish Judicial Council in general succeeded as a guarantor of independence, but it did not prevent the Law and Justice regime from pushing through its 2017 judicial reform, which allowed it to pack the judicial council with its protégés and turn it against "recalcitrant" judges.[238]

---

[231] Spáč, Šipulová & Urbániková, *supra* note 31.

[232] *Ibid*. *See* also Kosař, *supra* note 52

[233] Torres Pérez, *supra* note 39.

[234] *See* e.g. Castillo Ortiz, *supra* note 52, at 317 and 327-328.

[235] Çalı & Durmuş, *supra* note 15.

[236] Vauchez, *supra* note 35.

[237] Benvenuti & Paris, *supra* note 36.

[238] Śledzińska-Simon, *supra* note 7.

In countries without judicial councils or the court service, this assessment is also complex. Fabian Wittreck shows that German ministers rarely endangered individual judicial independence, while judicial self-government bodies, such as presidia and court presidents, have in some cases infringed the rights of individual judges.[239] According to him, "[t]*he mechanisms of* [judicial] *self-government merely shift the dangers for individual judicial independence by shifting power*".[240] At the moment, the major danger in Germany lies in promotion of judges.[241] In Czechia court presidents evolved into guardians against executive interferences with judicial independence, but due to the absence of sufficient safeguards they also present a threat to the independence of rank-and-file judges.[242] The "buffer" between court presidents and rank-and-file judges, which in Germany is represented in particular by presidia and service courts, simply does not exist in Czechia.

We know much less about the impact of judicial self-governance on other values. Regarding legitimacy, strong judicial self-governance bodies insulated from the elected branches of government inevitably reduce the democratic legitimacy of the judiciary.[243] However, legitimacy of the judiciary has its legal and social dimensions,[244] which should be studied in more detail in future.[245] Legitimacy warrants attention on its own, especially at the supranational level, since legitimacy was one of the principal reasons used to justify the judicial self-governance reforms at the ECtHR, particularly with regard to judicial selection.[246]

---

[239] *See* Wittreck, *supra* note 45.

[240] *Ibid*.

[241] *Ibid*.

[242] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[243] *See* Wittreck, *supra* note 45.

[244] *See* e.g. Peter G. Stillman, *The Concept of Legitimacy*, 7(1) POLITY 32–56 (1974); Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20(3) THE ACADEMY OF MANAGEMENT REVIEW 571–610 (1995); and Ian Hurd, *Legitimacy and Authority in International Politics*, 53(2) INTERNATIONAL ORGANIZATION 379–408 (1999).

[245] *See* e.g. James L. Gibson, Gregory A. Caldiera & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92(2) THE AMERICAN POLITICAL SCIENCE REVIEW 343–358 (1998); Sidney W. Richards, *Survey article: the legitimacy of Supreme Courts in the context of globalization*, 4(3) UTRECHT LAW REVIEW 104–127 (2008); Yuval Shany, *Assessing the Effectiveness of International Courts: A goal-based approach*, 106(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 225–270 (2012); Başak Çalı, Anne Koch & Nicola Bruch, *The Legitimacy of Human Rights Courts, A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35(4) HUMAN RIGHTS QUARTERLY 955–984 (2013).

[246] *See* Çalı & Cunningham, *supra* note 6.

Information about the impact of judicial self-governance bodies on judicial accountability is also scarce, and thus it is difficult to deduce a clear pattern. This is again partly due to the significant disagreement among European scholars, judges, and policymakers regarding the concept of judicial accountability itself.[247] With this huge caveat in mind, we can still see that the majority of contributions do not support the view that judicial self-governance bodies increase judicial accountability. Some case studies suggest the contrary. Regarding Italy, Benvenuti and Paris conclude that in contrast to securing the independence of the judiciary, "*the Italian model of JSG has been far less effective in making the judiciary accountable*."[248] Other contributions claim that judicial self-governance did not change the current levels of judicial accountability. For instance, Patrick O'Brien suggests that in Ireland "*lines of accountability for the* [Court] *Service through the Minister for Justice and the parliamentary committee system remained intact.*"[249] Slovakia then serves as a cautionary tale since the Slovak judicial elite, and especially Chief Justice Harabin, abused accountability mechanisms in order to reward his allies (through salary bonuses and promotion) and to punish their critics (via disciplinary motions).[250]

The assessment of the impact of judicial self-governance on accountability is even more difficult at the supranational level. Christoph Krenn argues that the individual accountability of CJEU members is regulated in-house, while the institutional accountability is secured primarily by the European Parliament through the EU's budgetary process.[251] Accountability is even more limited at the Strasbourg Court, on both the institutional and individual levels.[252] In sum, judicial self-governance practices at the ECtHR

[247] *See* Samuel Spáč and David Kosař, *Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back*, 9(3) INTERNATIONAL JOURNAL OF COURT ADMINISTRATION (2018 forthcoming); and other contributions to this special issue that discusses the ENCJ's method of assessment of judicial independence and accountability. *See* also Kosař, *supra* note 52; and Benvenuti, *supra* note 201.

[248] Benvenuti & Paris, *supra* note 36.

[249] O'Brien, *supra* note 31. However, this might change, if the Irisih Parliament adopts the Judicial council Bill.

[250] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[251] In detail, Krenn, *supra* note 116.

[252] *See* Çalı & Cunningham, *supra* note 6.

clearly prioritize judicial independence at the expense of accountability,[253] which fully accords with the institutional setup and the "judicial trilemma" theory of the ECtHR.[254]

Finally, regarding the impact of judicial self-governance on the transparency of the judiciary, case studies in this special issue provide much richer information.[255] Here, some judicial self-governance bodies fare particularly well. In Spain, "*the Council has labored to provide the public with broad, easily available information and promote increased transparency regarding judicial activities*", including a special Website on Transparency.[256] Regarding Ireland, O'Brien argues that the Courts Service "*ha*[s] *increased the transparency of the courts system through the Courts Service website and annual reports. It is possible that these changes have played a small role in enhancing public trust and improving the legitimacy of judges and the courts."*[257] In Slovakia, the establishment of the Judicial Council of the Slovak Republic in 2003 led to a major improvement in the transparency of the Slovak judiciary, but the key transparency reform was adopted by the Slovak parliament in 2011, among other things, due to the opaque decision-making processes at the Judicial Council of the Slovak Republic.[258] Hence, judicial councils can improve transparency both directly and indirectly, and sometimes even their negative view of judicial transparency may prompt legislative reform.

In contrast, Fabian Wittreck argues that "*mechanisms of self-government have only a marginal effect on the (lacking) transparency of the* [German] *judiciary*", because their outputs are too technical.[259] This suggests that in studying transparency we should care not only about the accessibility of data about the judiciary and their findability (how easily these data can be located), but also about their understandability (e.g. their user-friendly format). Future research on judicial transparency should inquire into "the degree to which

[253] But note that according to Çalı & Cunningham, individual ECtHR's judges can be held accountable by way of naming and shaming tactics undertaken by external actors, for example, NGOs, commentators on Strasbourg jurisprudence, domestic supreme courts, parliaments and the executive. *See* Çalı & Cunningham, *supra* note 6.

[254] *See* Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 713–760 (2017).

[255] *See* also Solomon, *supra* note 52.

[256] *See* Torres Pérez, *supra* note 39.

[257] O'Brien, *supra* note 31.

[258] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[259] *See* Wittreck, *supra* note 45.

desirable (recorded) information about the judiciary is (perceived to be) made available, findable and understandable".[260]

Both contributions on transnational courts also raise interesting insights regarding judicial transparency. Regarding the ECtHR, Başak Çalı and Stewart Cunningham challenge the picture of ECtHR's wide transparency painted by the "judicial trilemma" theory of transnational courts.[261] According to them, when considered in light of the totality of judicial self-governance practices at the Strasbourg Court, they find that the effect of judicial self-governance in promoting transparency is more complex. More specifically, they argue while the output of Strasbourg judges is highly transparent information on how they work behind the scenes is much less clear.[262]

Finally, the Netherlands and Ireland provide optimistic insights regarding the impact on the *effectiveness* of the judiciary. It seems that in both countries, the judicial council[263] (the Netherlands) and the Court Service (Ireland) were established primarily to improve the management of the courts, and they were not expected to become the guarantors of judicial independence, also because in both countries the judiciary has traditionally enjoyed a high level of independence. Both O'Brien and Mak argue that this promise has been fulfilled. Regarding Ireland, O'Brien argues that *"the creation of the Courts Service has allowed the judiciary to improve the public image of the courts through improved facilities."*[264] Mak concludes that "*judicial self-government in the Netherlands can be assessed as functioning adequately"* on the basis of a combination of rule-of-law values and new public management values (effectiveness, efficiency, and a client-oriented system).[265] However, experience from these two countries also shows that there is a certain trade-off between the efficiency of courts and judicial independence. In particular in the Netherlands, the establishment and functioning of the judicial council led to

[260] In developing this definition I build heavily on Jenny De Fine Licht, Daniel Naurin, Peter Esaiasson & Mikael Gilljam, *When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship*, 27(1) GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY, ADMINISTRATION, AND INSTITUTIONS 111–134 (2014); and Greg Michener & Katherine Bersch, *Identifying Transparency*, 18 INFORMATION POLITY 233–242 (2013).

[261] *See* Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 713–760 (2017).

[262] *See* Çalı & Cunningham, *supra* note 47.

[263] But note that the Dutch judicial council, despite its nominal name, is actually very close to the Irish Court Service model. *See supra* note 79.

[264] O'Brien, *supra* note 31.

[265] Mak, *supra* note 37.

concerns that the new public management approach might encroach upon judicial independence at risk[266] and it took a while to find a proper balance.

In sum, the case studies in this special issue provide a lot of food for thought regarding the effects of judicial councils. Three insights emerge clearly. First, regarding the impact of judicial self-governance on judicial independence and accountability it is crucial to distinguish between the institutional and individual levels. Several case studies actually argue that the introduction of judicial self-governance increased the institutional *independence* of the judiciary, but did not improve or even negatively affected the independence of individual *judges*.[267] The same problem arises *mutatis mutandis* regarding the impact on accountability of the judiciary on the one hand and the accountability of judges on the other. Second, judicial councils failed to deliver in Central and Eastern Europe. In fact, case studies on Poland, Slovakia, and Slovenia show that they fare much worse than suggested by earlier research, which focused on the perception of independence by judges in these countries.[268] The major difference is that in Poland this is due to exogenous factors, while in Slovakia and Slovenia the explanation is primarily endogenous. The only contribution from Central and Eastern Europe which views the impact of judicial councils positively is Bianca Selejan-Guțan's assessment of the Romanian Superior Council of Magistracy. But even she identified many negative effects such as lack of transparency and minimal accountability and argues merely that the judicial council model is a "lesser evil".[269] Third, judicial councils as well as many other judicial self-governance bodies, in general, seem to be better at enhancing transparency and effectiveness[270] rather than judicial independence, judicial accountability, and public confidence. This goes against much of the existing scholarship, which focuses primarily on the impact of these bodies on judicial independence and judicial accountability.[271]

---

[266] For instance, some judges did not feel represented by the Council, objected to the temporary appointment procedure for new court presidents, and claimed that the assessment of judicial performance had come to emphasize output too much. For further details see *ibid*.

[267] On how impotant the distinction between these two levels is *see also* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999).

[268] *See* e.g. Castillo Ortiz, *supra* note 52 (suggesting that there is only moderate perception of disrespect of judicial independence in Slovakia and Slovenia and that there is low perception of disrespect of judicial independence in Poland).

[269] *See* Selejan-Guțan, *supra* note 14.

[270] But note that analysis of the determinants of judicial performance based on data provided by the European Commission for the Efficiency of Justice (CEPEJ) conducted by Voigt and El Bialy suggested that judicial councils were consistently correlated with a worse, rather than a better performance. *See* Stefan Voigt & Nora El-Bialy, *Identifying the determinants of aggregate judicial performance: taxpayers' money well spent?*, 41(2) EUROPEAN JOURNAL OF LAW AND ECONOMICS 283-319 (2016).

[271] *See* the literature in *supra* notes 50 and 52.

In future research, these insights should ideally be combined with rigorous empirical testing based on the well-defined indicators.[272] The reconstructive legal method applied by most contributions to this special issue has a lot to learn from the growing empirical research on judicial councils, and vice versa. These two groups of scholars have the same aim in the end – to get closer to the truth. They just tackle the same issue from a different angle.

F. Conclusion

Judicial self-governance has a long tradition in several European countries,[273] but it has increased significantly during the 1990s and the 2000s, especially due to the rise of judicial councils (broadly understood) in Central and Eastern Europe. However, in the same period judicial self-governance, albeit in different forms, has also gradually expanded in Western European countries as well as at the ECtHR and the CJEU. This has allowed us to see how different forms of judicial self-governance work in different environments and theorize about them.

This special issue takes stock of the forms, rationales, and effects of judicial self-governance in Europe. It has shown that judicial self-governance is a much broader phenomenon than judicial councils and may also take different forms. It has also questioned several assumptions about the effects of judicial councils and other judicial self-governance bodies. Most importantly, it exposed the liquid nature of judicial self-governance and its embeddedness in the political, social, cultural, and social context.[274] In contrast to the standard picture, in most European states the implementation of judicial self-governance has been non-linear and responded to political and social changes.

Each judicial self-governance body simply has to protect its turf against the political actors as well as against judges and other judicial self-governance bodies. If it fails, it may be

[272] *See* e.g. Castillo Ortiz, *supra* note 52; Stefan Voigt, Jerg Gutmann & Lars P. Feld, *Economic growth and judicial independence, a dozen years on: Cross-country evidence using an updated set of indicators*, 38 EUROPEAN JOURNAL OF POLITICAL ECONOMY 197–211 (2015); Jerg Gutmann & Stefan Voigt, *Judicial independence in the EU: a puzzle*, EUROPEAN JOURNAL OF LAW AND ECONOMICS 1-18 (2018); and ANDREAS LIENHARD & DANIEL KETTIGER, THE JUDICIARY BETWEEN MANAGEMENT AND THE RULE OF LAW: RESULTS OF THE RESEARCH PROJECT BASIC RESEARCH INTO COURT MANAGEMENT IN SWITZERLAND (2016).

[273] This is the case of Italy, Romania and partly also France. *See* Benvenuti & Paris, *supra* note 36; Selejan-Guțan, *supra* note 14; and Vauchez, *supra* note 35.

[274] This is in line with empirical findings that conclude that cultural traits are of fundamental importance for judicial independence and the quality of formal institutions more generally. *See* Gutmann & Voigt, *supra* note 272.

captured by political forces,[275] abused by judicial elites,[276] or become inconsequential.[277] If it succeeds, it may improve the efficiency and transparency of the judiciary,[278] and in the long term perhaps also public confidence in courts, judicial independence, and judicial accountability. All contributions to this special issue acknowledge this dynamic and openly address political contestations regarding judicial self-governance. It is up to future research to build on their insights and analyze under what circumstances judicial self-governance delivers the results we expect from them.

[275] *See* Spanish judicial council (analyzed in Torres Pérez, supra note 39).

[276] *See* Slovak judicial council (analyzed in Spáč, Šipulová & Urbániková, *supra* note 31).

[277] *See* the Hungarian judicial council (analyzed in note 105).

[278] *See* especially the Dutch judicial council (analyzed in Mak, *supra* note 37) and the Irish Court Service (analyzed in O'Brien, *supra* note 31).