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David Kosař and Katarína Šipulová

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Masaryk University, Faculty of Law
Veveří 70, Brno 611 70
Czechia

Abstract

This chapter conceptualises judicial governance, addresses its main challenges and identifies the new trends in this field. Building on both legal and political science scholarship, it posits three core arguments. First, it argues that it is necessary to look beyond the executive and judicial councils and study also other actors within judicial governance such as chief justices, lower court presidents, judicial associations and judicial academies. Second, it shows that the problem of politicisation does not cease to exist with a creation of judicial councils or judicial appointment commissions. Many informal networks and practices survive formal institutional changes, and, new channels of politicisation, including pressures within judicial self-governance bodies, may emerge. The international pressure to standardise and judicialise judicial governance has so far failed to understand this complexity. Third, the chapter argues that informality and gender norms are crucial for understanding the politics of judicial governance.

Keywords

Judicial governance; Judicial self-governance; Selection and appointment of judges; Judicial councils; Judicialisation; Politicisation of judiciary; Informal judicial institutions

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Politics of judicial governance*

David Kosař and Katarína Šipulová♣

The power of courts has increased worldwide at an unprecedented pace. At the same time, judicial governance has changed as well. Most importantly, several regions have witnessed a steady rise in judicial self-governance. While in 1985 only around 10 per cent of jurisdictions in the world had judicial councils or judicial appointment commissions, in 2015 these bodies participated in the selection of judges in almost 60 per cent of countries (Garoupa and Ginsburg 2015).

This phenomenon is truly global. Many common law countries introduced judicial appointment commissions, which eventually became a dominant model in the Commonwealth (BIICL 2015), spanning from Australia (Bunjevac 2020) to South Africa (Oxtoby 2021; Brett 2022) and England and Wales (Gee, Hanzell & Malleson 2015). Even within the United States several states implemented the so-called 'merit plan' (or 'Missouri plan'), which resulted in the rise of merit commissions involved in the selection of state judges (Volcansek 2009; Goelzhauser 2018). Several African and Asian countries entrenched a judicial service commission (e.g. Kenya, South Africa and Malaysia) or a judicial council (e.g. Tunisia and Bangladesh) in their constitutions (Oxtoby 2021; Bari 2022). Judicial councils spread also in Latin America, where they started to compete with the supreme courts over influence within the judiciary (Hammergren 2002; Bill Chavez 2005; Pozas-Loyo & Ríos-Figueroa 2018). Europe has gone even further. Many countries, such as France, Italy, Portugal, Spain, the Netherlands, and most recently Ireland have introduced judicial councils voluntarily (Kosař 2018; Castillo-Ortiz

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♣ David Kosař is a Professor of Constitutional Law at Masaryk University (david.kosar@law.muni.cz). Katarína Šipulová is Assistant Professor and Director of the Judicial Studies Institute at Masaryk University (katarina.sipulova@law.muni.cz). The research leading to this project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (INFINITY, grant no. 101002660).

2019). Virtually all post-communist states in Central and Eastern Europe did so under pressure from the European Union during the accession process (Bobek and Kosař 2014; Kosař 2016; Parau 2018).

The key element of all these reforms was the transfer of powers concerning judicial governance from political branches to judges and bringing in the expert element. The new judicial self-governance bodies decide primarily on issues concerning the careers of individual judges. Judicial councils usually have broader powers, spanning from decisions concerning the selection, promotion, and disciplining of judges to various housekeeping functions (Garoupa & Ginsburg 2015; Kosař 2016). Judicial appointment commissions have a narrower mandate as they decide merely on the selection of judges.

However, selection, promotion, and disciplining of judges and other decisions concerning the careers of individual judges are just a snapshot of judicial governance, which has undergone important developments in other areas, too. Judicial training has professionalised, and new specialised judicial academies have been introduced in many countries. Digitalisation, hastened by the COVID-19 pandemic, brought with it new tools and software. Even administrative decisions on the courts' functioning, such as the overall number of judges assigned to a court, the number and composition of panels at each court, the overall number of assigned administrative personnel and law clerks, case allocation, and judicial performance evaluation, were overhauled. Moreover, there is an increasing institutional variety in exercising administrative governance within the judiciary, as these tasks can be implemented not only by traditional bodies such as judicial councils, the Supreme Court, court presidents, and the 'US-style' judicial conference complemented by the Director of the Administrative Office of the U.S. Courts, but also by the novel agencies such as the Court Service (Geyh 2021) and the 'Israeli-style' Director of Courts (Lurie et al. 2019; Bunjevac 2020).

This development reflects the growing demands from a modern client-oriented judiciary in the twenty-first century. The judiciary must be flexible and respond to novel challenges such as the COVID-19 pandemic, digitalisation, and calls for greater diversity. At the same time, old challenges have not disappeared. Politicians are still willing and able to tinker with the judiciary and align their decision-making with their preferences. Think of Hugo Chavez's frontal attacks on the Venezuelan judiciary (Taylor 2014), Recep Erdoğan's

abrupt changes in judicial governance and purges within the Turkish judiciary after the failed coup d'état (Özbudun 2015; Esen & Gumuscu 2016; Varol, Pellegrina & Garoupa 2017; Olcay 2017), the Modi government's interference with judicial appointments in India (Khaitan 2020), or Benjamin Netanjahu's recent judicial reform proposal curtailing Supreme Court's constitutional review competence and imposing executive control over judicial appointments (Weiler 2023). Even within the European Union we can see a backlash against the rise of judicial self-governance as several judicial councils in Central and Eastern Europe were hollowed out (Jakab 2020) or captured (Śledzińska-Simon 2018; see also chapter 33 by Petra Bárd, Nóra Chronowski and Zoltán Fleck in this volume).

These examples of a straightforward backlash against judicial self-governance by populist or authoritarian regimes show that the increasing involvement of judges in judicial governance is not a linear development. However, even in consolidated democracies some politicians as well as scholars have criticised the rise of judicial self-governance. They usually argue that the judiciary lacks democratic legitimacy, that too much judicial self-governance may lead to self-replication, non-responsiveness and corporativism of judges, and, more pragmatically, that judges do not have the necessary political capital to negotiate with other ministries the budgetary issues nor the political leverage to push through the necessary legislation in the parliament. These concerns resulted in including civil society members and non-lawyers in judicial appointment commissions (Gee et al. 2015), reducing the number of judges on a judicial council (Vauchez 2018), as well as retaining certain powers within the Ministry of Justice (Vasek 2022). This pushback against judicial self-governance took place in good faith and the relevant changes were made incrementally. Therefore, it should be distinguished from the backlash exercised by populist or authoritarian regimes.

At the same time, political interferences with judicial governance triggered the proliferation of various international standards on the global[1] as well as

[1] See e.g. Arts. 9 and 13 of the 2010 Magna Carta of Judges (https://rm.coe.int/2010-ccje-magna-carta-anglais/168063e431), Arts. 2.3 and 3 of the 1999 Universal Charter of the Judge (https://www.iaj-uim.org/universal-charter-of-the-judge-2017/), Art. 32 of the 2010 Report on the Independence of the Judicial System (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e), Bangalore principles of Judicial Conduct of 2006 https://www.judicialintegritygroup.org/images/resources/documents/ECOSOC_2006_23_Engl.pdf.

regional[2] level. These international standards were initially treated as soft law, but their normative weight has increased over time. This development has also contributed to the judicialisation of judicial governance on the domestic as well as supranational level. On the domestic level, constitutional tribunals and supreme courts started reviewing judicial appointments, the disciplining of judges, and case assignment more thoroughly. On the supranational level, regional human rights courts, especially the Inter-American Court of Human Rights and the European Court of Human Rights, have been keen to shape domestic judicial design by creative interpretation of their founding documents (Kosař & Lixinski 2015). The European Court of Justice jumped on the bandwagon as well and developed a whole new set of requirements for judicial governance in order to respond to the attacks against the rule of law and judicial independence in Hungary, Poland, and Romania (Kochenov & Pech 2021; Kosař & Vincze 2022; Bustos 2022).

The aim of this chapter is to conceptualise judicial governance, address the main challenges (both old and new) it faces, and identify the new trends therein. In doing so we bring insights from law as well as political science. We also look beyond the formal rules and institutional templates and emphasise the politics of judicial governance and the role of informal institutions. Our major argument is three-fold. First, we argue that we must go beyond the executive and judicial councils and also study other actors of judicial governance such as chief justices and judicial associations. Second, we show that channels of politicisation of the judiciary never disappear completely. The creation of a 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 politicisation of the judiciary are created (Spáč, Šipulová and Urbániková 2018; Spáč 2020). Third, informal institutions and gender norms are crucial for understanding judicial governance.

This chapter proceeds as follows. Section 16.1 conceptualises judicial governance and identifies its dimensions. Section 16.2 zeroes in on the growing number of relevant actors in judicial governance. Section 16.3 analyses its changing channels of politicisation. Section 16.4 identifies three recent trends in judicial governance (judicialisation, internationalisation, and

[2] European Network of Councils for the Judiciary (2017). Performance Indicators 2017. Available at: https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_ia_ga_adopted_ga_13_6.pdf.

standardisation) and their repercussions. Section 16.5 discusses informal aspects of judicial governance, which are often overlooked, yet form a proverbial glue that allows the smooth administration of the judiciary. Section 16.6 then demonstrates the importance of understanding the gender aspects of judicial governance. Section 16.7 concludes.

16.1 Judicial governance and its dimensions

Judicial governance has been the buzzword for more than two decades. Questions on how best to balance principles of judicial independence and accountability, how to distribute the power between judges and politicians, insulate courts from political interference, prevent court-packing and telephone justice, and how to discourage judicial corruption and clientelism gradually increased in importance and became a salient topic of judicial studies scholarship as well as judicial reforms (on the clash between judicial independence and accountability see also chapter 15 by Vanberg, Broman and Ritter in this Volume). It is becoming evident that even the writ-small mechanisms such as panel composition, case allocation, and the internal flow of case files matter (Leloup & Kosař 2022).

Yet, the term judicial governance itself is often misunderstood and wrongly simplified to decisions on the selection and promotion of judges, or their disciplining and removal (Malleson & Russell 2006; Lee 2011; Bobek 2015; Castillo-Ortiz 2019). These issues are important, but judicial governance is a much broader field that concerns every single aspect of courts' functioning, including efficiency, transparency, ethical issues, and a more mundane day-to-day agenda of court administration, as well as more structural issues concerning the relationship of the judiciary with the executive and the legislature.

In order to plausibly capture and understand the politics of judicial governance, this chapter therefore opts for a broad holistic understanding of judicial governance developed in the latest scholarship (Börzel & Risse 2010; Kosař 2018, Castillo-Ortiz 2019; Bunjevac 2020) that defines it as 'a structured model of social coordination which produces and implements a set of institutions, rules, and practices which are collectively binding and which regulate how the judicial branch exercises its functions' (Šipulová et al. 2022). Judicial self-governance then captures the extent to which judges and courts participate in judicial governance.

While most scholarship on judicial governance, quite understandably, focuses on personal aspects concerning the careers of individual judges, such as the selection, promotion, and disciplining of judges, the concept of judicial governance is much broader. In order to see the developments within judicial governance more clearly, it is thus helpful to unpack judicial governance into smaller dimensions, each of them raising a specific set of issues and undergoing potentially different development (Kosař 2018; Bunjevac 2020).

Tentatively, there are eight such distinctive dimensions: regulatory, personal, administrative, financial, educational, informational, digital, and ethical (Kosař 2018; Bunjevac 2020; Šipulová et al. 2022). These eight dimensions are visualised in Table 16.1. Each of them aggregates a set of individual competences related to judicial governance.

So far, the most comprehensive list of such competences has been introduced in 'the Judicial Self-Governance Index', an analytical tool measuring the participation of judges in individual dimensions of judicial governance, irrespective of the institutional design of the field (Šipulová et al. 2022). The Judicial Self-Governance Index relied mostly on competences previously addressed or reflected by qualitative and quantitative scholarship[3] deriving the competences from existing literature on judicial governance (Kosař 2018), governance of agencies (Verhoest 2013; Lurie et al. 2020; Mathieu et al. 2017), judicial independence, and effectiveness, as well as data collected by CEPEJ[4] and EU Justice Scoreboard.[5]

[3] Smithey and Ishiyama's index (2002) for example mentions regulatory dimension, Hayo & Voigt (2016) indexed the selection, nomination, approval, and dismissal of judges. Gutmann & Voigt (2018) correlated the transfer of judges and cases, and Feld & Voigt (2003) operationalised powers related to the transparency and publication of case law as part of judicial governance. Similarly, budgetary arrangements, determination of judges' salaries, promotions, evaluations, and management of courts' tasks were included in older indices of judicial independence (Van Dijk 2021).

[4] European Commission for the Efficiency of Justice, regular evaluation of European judiciaries available at https://www.coe.int/en/web/cepej.

[5] An EU tool, part of the Rule of Law Toolbox, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

Table 16.1 Dimensions of judicial governance

I. Regulatory	Competences related to establishment, abolition, or changes in the jurisdiction and procedural rules of a court
II. Administrative	Composition of a court (setting the number of judges, panels, and their composition), work schedules, case assignment
III. Personal	Selection and (re)appointment of judges, promotions, removals, and transfers of judges (permanent and temporary), disciplining of judges, civil and criminal prosecution, evaluations of judges
IV. Financial	Size of a court's budget, salaries of judges
V. Educational	Compulsory education (plan and structure) and further training and education of judges
VI. Informational	Publication of rulings, recordings of trials, annual reports, case assignment, disclosure of judges' property, political affiliation, and some personal information
VII. Digital	Placement of servers with online data
VIII. Ethical	Preparation and interpretation of the code of conduct, extrajudicial activities of judges, communication with media

Source*:* Šipulová et al. 2022.

The regulatory dimension relates to the entrenchment of courts and judicial systems in the constitution or statutory law. Due to their regulatory character, the powers belonging to this dimension (establishment or abolition of courts, changes in jurisdiction and courts' structure, statutes and legal procedural rules) are wielded mainly by legislative power (parliament). With subsequent judicial empowerment, however, we have witnessed increasing, although formally subtle, engagement of courts, courts presidents, and judicial councils. Once established, judicial councils (or potentially chief justices) can be consulted on any systemic legislative changes in the regulation (Kosař and Šipulová 2018). Although their positions are typically not binding, they offer judicial actors' bodies an important channel for stepping inside the regulatory framework and utilising informal powers and networks to influence this dimension of judicial politics.

The administrative dimension targets the seemingly mundane, day-to-day functioning of courts: decisions on the number of judges assigned to a court, the structure of single- and multi-judge panels, as well as their respective compositions. Administrative powers also include the number and quality of administrative personnel or clerks, oversight of the system of case assignment (and reassignment), or evaluation of courts' overall performance (quality of decisions, backlog, public spending). While the administrative dimension might seem less salient than selection and removal processes, it actually significantly impacts both the effectiveness of decision-making, as well as judicial independence itself. Many political or third-party interferences, particularly in democratizing regimes, attempt to utilise administrative powers to shift the balance at courtsand exert pressure on individual panels or judges. Case allocation is particularly sensitive administrative issue as some players might be tempted to attempt to assign their case to a friendly judge (Kosař 2016; Marcondes et al. 2019).

The personal dimension naturally attracts the most political and scholarly interest and lies at the very heart of judicial governance. This dimension covers all decisions on selection, the careers and removal of judges, including decisions on their accountability via disciplinary (or criminal) motions. The dimension also covers the evaluation of judicial performance and ties it to decisions on financial bonuses and similar measures. The personal dimension is the most contested one, as the transfer of power to select judges from political branches of power to the judiciary itself has to fulfil both pragmatic (insulation from political pressure) as well as theoretical and doctrinal (democratic legitimacy) tests of justification.

The financial dimension is much narrower and covers the financial or budgetary administration of courts: decisions on the size and allocation of a court's budget and judges' salaries. Financial competences are held almost exclusively by political actors, yet the distribution of power in this dimension is slowly attracting more attention and raising controversies in many, at least European, jurisdictions.

The educational dimension captures decisions on the compulsory education and training of judicial candidates and judges. In recent years, we have seen a significant transfer of power from the executive branch to judges and independent agencies (such as judicial academies and associations) that took

over many of the educational competencies previously carried out by ministries of justice (Wittreck 2018; Levi-Faur 2009; Lurie at al. 2019). There is a growing scholarship on judicial training (Dallara & Piana 2016), but the educational dimension has usually not been connected to the broader phenomenon of judicial governance (but cf. Parau 2018; Fagan 2019; Wittreck 2006; Benvenuti and Paris 2018). Yet, actors wielding educational powers both decide on the structure and content of these systems of education and significantly impact the pool of potential candidates eligible for the office of judge, as well as create expectations on the quality and scope of knowledge judges should have.

The informational concerns the relationship between judges (courts) and the public. Competences in the informational dimension set out decisions on the extent of transparency and visibility of judicial decision-making (publication and communication of cases, annual reports, and statistics) but also on the personal affairs of individual judges (disclosures of property, party affiliations, etc.).

The digital dimension is a rather young aspect of judicial governance. It results from the growing corpus of data and databases available at courts. For instance, the body that regulates the where the servers with the case-law and internal court documents are located has a wide-reaching impact both on the internal management of courts, and on the de facto degree of transparency courts can actually achieve (e.g. ability to manage their own clouds and servers, or the opportunity to create new search engines). The digital dimension can thus also contribute to the visibility and accessibility of information on courts.

Finally, the ethical dimension is very closely related to various disciplinary mechanisms against judicial misbehaviour. However, it is typically less formal, vested in the hands of a different actor (such as an ethical committee), and takes into account a different set of considerations than the traditional disciplinary measures. This dimension concerns, in particular, decisions on the preparation and interpretation of the code of judicial conduct, communication of judges with media or public (Ginsburg and Garoupa 2009), and the regulation of their extrajudicial activities.

Each of these eight dimensions of judicial governance has a different degree of political salience and a different relationship with judicial independence,

accountability, diversity, efficiency, and legitimacy. The transfer of some of these powers from the political branches to judges or 'fourth branch' institutions (and vice versa) can therefore be driven by different considerations and goals. For instance, the delegation of personal competences to judges pursues the goal of the insulation of judges from political pressure, but it still requires some extent of political engagement to give judges legitimacy and prevent corporativism and judicial corruption. Administrative competences are also predominantly held by judges, but in this dimension it is often a pragmatic decision that results from judges' greater expertise in the day-to-day functioning of the judiciary, the informational gap between ministries of justice and court presidents, and the need for greater responsiveness from administrative governance to the actual needs.

In sum, it is necessary to study each dimension of judicial governance separately and only then to make claims about judicial governance as a whole, since it is quite possible that within the same country several dimensions may undergo different development. Each dimension of governance might be organised around different interests, and individual competences can be distributed among different sets of actors (see Section 16.2). For instance, decisions on the establishment, abolition, merger, division, and jurisdiction of courts are typically under the control of the legislature, even though judges have increasingly gained the ability to comment on and sometimes even shape judicial reforms via judicial councils or other bodies, in which they have the majority. Similarly, administrative decisions on the courts' functioning, such as the overall number of judges assigned to a court, the number and composition of panels at each court, the overall number of administrative personnel and law clerks, case allocation, and judicial performance evaluation, can be exercised by a variety of actors – the executive, the legislature, a judicial council, the Court Service, court presidents, the 'US-style' judicial conference complemented by the Director of the Administrative Office of the US Courts, or the 'Israeli-style' Director of Courts. In other words, it is necessary to understand the variety of actors in judicial governance and their relationship, to which we turn next.

16.2 Actors of judicial governance: beyond the executive and judicial councils

The politics of judicial governance is often narrated through the 'judges vs politicians' lenses. The whole debate on the ideal distribution of power is thus framed via the question, *Which branch of state power should have more powers in (a given dimension of) judicial governance?.* However, this false dichotomy prevents us from understanding the complexity of actors, networks, and interests affecting judicial governance, and offers only a limited picture of how much impact judges actually have on judicial governance.

The eight-dimensional structure of judicial governance includes a constellation of actors and institutions, typically represented by state bodies, judges, lawyers, politicians, and what we call 'judicial self-governance bodies': institutions established to take part in individual judicial governance competences, including at least one judge (Kosař 2018). These are typically judicial councils, court services, judicial appointment commissions, the Supreme Court, the chief justice, court presidents, judicial associations, and judicial academies.

Understandably, judicial councils have attracted most attention recently, because they are most visible and epitomise the judicial empowerment movement. They are also heavily promoted by supranational institutions that have considered them as the best bulwark against political interferences with the judiciary and an institutional guarantee of judicial independence. The burgeoning scholarship on judicial councils, which offers various categorisations of their strength and powers, showed though that their contribution to judicial independence or the quality of democracy is less clear and certainly not linear in all cases (Garoupa & Ginsburg 2015; Castillo-Ortiz 2019).Others show that their success is based on contingent circumstances such as embedded norm of professionalism in the Brazilian judiciary (Pozas-Loyo & Ríos-Figueroa 2023).

However, it is also necessary to stress that judicial councils still do not exist in many countries, and even in those where they do, they offer only a fragment from the whole picture of how judicial governance works and how individual competences are organised among multiple actors. Although we can observe a certain convergence of supranational recommendations towards the strong judicial council dominated by judges (see Section 16.4), the models of judicial

councils established across the world are actually quite diverse. They differ in composition (ratio of judges, politicians, and experts), powers (the number of judicial governance dimensions they are involved in), as well as in actors with whom they share these powers. The same claim applies to judicial appointment commissions, prevalent in the common law world, as their rationale and design vary a lot from one country to another (BIICL 2015; Bunjevac 2020; Brett 2022).

In fact, the mere existence of a judicial council or a judicial appointment commission does not tell us much about the participation of judges in the judicial governance, since in all countries representatives of the ministry of justice, court presidents, the Supreme Court, judicial associations, politicians, and/or prosecutors participate in judicial governance to a certain degree as well. This became even clearer during the COVID-19 pandemic, when the ministers of justice used emergency powers to curtail court operation and shape judicial governance more broadly (Lurie 2021). The influence of judges on judicial appointments is not static either. Modi's and Netanjahu's judicial reforms show that politicians want to regain their powers and shape judicial appointments without the major input of judges (Khaitan 2020; Weiler 2023).

The most recent scholarly works have also documented the rise of smaller actors such as judicial academies, directors of courts, and chief justices (Verhoest 2013; Lurie et al. 2020; Kosař & Spáč 2021). Judicial networks, which operate on both domestic and transnational level, became important actors of judicial governance (Dallara & Piana 2016), who are sometimes criticized for the lack of democratic legitimacy (Parau 2018). Combined with the creation of new areas of regulation, judicial governance is becoming a significantly decentralised field with a high level of power distribution.

Interestingly, even in the countries where political branches still have the major say in judicial governance, such as Austria, Czechia, and Germany, judges can play a significant role. In Austria that is so because the key positions within the ministry of justice are actually filled by judges who are temporarily assigned to the ministry (Vasek 2022). In Czechia, it results from the fact that the ministry of justice informally delegated significant powers to court presidents who, due to their expertise, are better equipped to supply the short-term needs of judiciaries (Blisa et al. 2018). Contrary to general wisdom, Germany also shows a significant dose of judicial self-governance, since it

features as many as eight judicial self-governance bodies. Germany just advances a different conception of judicial self-governance (than a judicial council model) which reflects the prevailing German understanding of democratic legitimacy and separation of powers (Wittreck 2018).

This means that judicial empowerment is not a phenomenon exclusive to the establishment of judicial councils, but may permeate all institutional constellations of judicial governance (Šipulová et al. 2022). Vice versa, the creation of a strong judicial council dominated by judges does not prevent the further engagement of political actors in judicial governance as the executive may still decide on the court budgets, regulate the internal functioning of the court, appoint court presidents, or take part in the selection or promotion of judges.

In sum, three interim conclusions can be made. First, the model of judicial governance does not in itself tell us who controls a given dimension of judicial governance. Second, the division of competences between politicians and judges is never absolute. Instead, both politicians and judges have a say in judicial governance. Judicial self-governance is thus a matter of degree and operates on the continuum rather than in the 'either-or' fashion. Third, judicial empowerment is not necessarily linear, as many countries have recently witnessed pushbacks against it (Uitz 2015).

These findings also suggest that the binary 'judges vs politicians' logic, employed by the dominant judicial governance scholarship (Parau 2018; Castillo-Ortiz 2019; Mikuli et al. 2019), is flawed because it ignores other actors of judicial governance that do not come from any of these three branches of power. Very recent scholarship has observed a new trend of 'agencification' (Lurie at al. 2019). The gradual growth in the powers of many judicial governance actors has been accompanied by the increasing autonomy of their position vis-à-vis the judiciary, the legislature, as well as the executive (Jordana & Sancho 2004; Mathieu et al. 2017). This is very true even for some judicial councils and the perception of their role by other judicial governance actors. In the end, the majority of judicial councils are of mixed composition, opening up a vexing question which branch of power individual members represent, or to what extent they execute their offices as completely independent agencies. Compared to supranational recommendations, which clearly identify judicial councils as *judicial* bodies, the question to be pursued by

theoretical scholarship is what position individual actors of judicial governance have within the system of separation of powers (Kadlec, Šipulová & Kosař 2022).

16.3 Channels of politicisation: old and new

The ideological alignment of judges, especially at supreme and constitutional courts, is an important benefit for every government. To make it happen, the executive and the legislature in the past often used their influence over the sword or the purse[6] to shape judicial governance. The Ministry of Justice, the Presidential administration, and the monarchy, each in its own way, found channels for politicising the judiciary. Politicisation of the judiciary reached its apex in the communist countries where the omnipotent Party carefully screened new judges, kept the elected judges on a short leash by short renewable terms and oversight by the General Prosecutor, dismissed or persecuted judges who dared to stand in the way of the socialist legality, gave instructions to judges on how to decide politically salient cases (a practice colloquially referred to as 'telephone justice'), and assigned those salient cases to reliable hard-core communist judges in order to achieve the 'right' outcome (Kühn 2011; Ledeneva 2008).

In consolidated democracies, many channels of politicisation of the judiciary have closed or have been exposed to public scrutiny. In the United States, the selection of Article III federal judges has remained deeply political, many aspects of judicial governance have been depoliticised, and the decisions thereon transferred to the Judicial Conference of the United States and the circuit judicial councils. In most Commonwealth countries, judicial appointment commissions took charge of many judicial governance issues. A similar trend of growing judicial self-governance took place in Europe and Latin America.

However, the creation of a judicial self-governance body does not make the power disappear or the dangers of politicisation evaporate. Power is just transferred to other hands and new channels of politicisation of the judiciary are created. These channels differ from one jurisdiction to another. European experience is particularly insightful in this regard. The Slovak judiciary was politicised through the dominant role of the Chief Justice in the judicial council

[6] Hamilton in Federalist No. 78.

(Spáč, Šipulová and Urbániková 2018). The Polish judiciary has recently been politicised 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 (Śledzińska-Simon 2018). In France and Italy, the major channels of politicisation of the judiciary are not the non-judicial members of their judicial councils, but judicial associations (Guarnieri 2004; Benvenuti and Paris 2018; Vauchez 2018). A recent scandal in Italy showed that politicians used judicial associations as a proxy for protecting their interests (Sallusti & Palamara 2021). In Germany, the main channel of politicisation is the promotion committees (Wittreck 2018). In Hungary, the major channel of politicisation of the judiciary is the new National Office for the Judiciary that took the key powers away from the Hungarian judicial council (Uitz 2015). In Spain and Turkey, politicisation of the judiciary has flourished due to the selection 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 (Torres 2018), in Turkey it is the presidential administration that currently has the major grip over the judicial council (Çalı & Durmuş 2018).

Outside Europe, politicisation of judicial governance came from both the political branches and the judiciary. While Hugo Chavez used virtually all means to get the Venezuelan judiciary under control (Taylor 2014), in Mexico it was the Supreme Court judges who created patronage networks that maintained their grip over the judiciary (Pozas-Loyo & Ríos-Figueroa 2018). In Georgia, judicial selection has been dominated by judicial oligarchies using judicial councils to channel their power and influence (Tsereteli 2020). In China, the communist party controls the courts via party committees, party meetings, and training, opening the floor to growing judicial corruption (Wang & Liu 2021). In Zimbabwe, president Mugabe employed several techniques aimed to control the judiciary, from packing the Supreme Court to the removal of judges who refused to resign (Castagnola 2018). In Senegal, Uganda, and Madagascar, attempts at judicial review of election results led to episodes of violence (Llanos 2015), assassination (The Judiciary Insider 2018), or seizures of judges' property (Llanos 2015).

In sum, the Ministry of Justice model of judicial governance is increasingly viewed as an anachronism, a remnant of the past that should be replaced by an autonomous self-regulated and depoliticised judiciary (Mikuli et al. 2019).

However, lessons from across the globe tell us that judicial councils and other judicial self-governance bodies do not necessarily close the channels of politicisation of the judiciary. Judicial councils can be captured not only from the outside (Popova 2010; Torres 2018), but also from the inside (Pozas-Loyo & Rios-Figueroa 2018; Spáč, Šipulová and Urbániková 2018). Unfortunately, the Polish scenario also attests that politicians always find some judges who are willing to cooperate with them, no matter how obvious the sinister intentions of the judicial reform are (Śledzińska-Simon 2019).

16.4 Standardisation, judicialisation, and internationalisation of judicial governance

There are three major trends in judicial governance that go hand in hand: standardisation, judicialisation, and internationalisation. The standardisation encompasses various efforts to unify certain aspects of judicial governance and turn them into recommendations and later on into universal or at least regional standards. At the universal level it is difficult to find consensus and thus there has been little progress since the United Nations Bangalore Principles of Judicial Conduct (2002), despite the efforts of the United Nations Special Rapporteur on the independence of judges and lawyers. Other organisations and associations try to fill this gap. Mt. Scopus International Standards of Judicial Independence (2008) are probably the most advanced.

At the regional level, there has been more development recently, especially in Europe. The Venice Commission, the European Commissions as well as the advisory bodies such as the Consultative Council of European Judges and the European Network of Councils for the Judiciary have produced dozens of opinions, declarations, and reports on most aspects of judicial governance (Bobek & Kosař 2014; Kosař 2016; Parau 2018; ENCJ 2021, Visser 2015). Even more recommendations, guidelines, standards exist on the domestic level.

Once the standards are at place, courts have the benchmarks for reviewing the legislative and executive acts concerning the judiciary. This in turn reinforces judicialisation of judicial politics. Of course, constitutional tribunals and supreme courts reviewed judicial reforms that interfered with judicial interference even before the supranational standards emerged. However, they usually focused on few selected issues such as disciplining, impeachment and removal of judges. That is no longer true, and we can see an increasing judicialisation of other areas of judicial governance across the globe. The

Canadian Supreme Court declared the appointment of its new member, Marco Nadon, to be unconstitutional (Mathen 2015). The Indian Supreme Court struck down the constitutional amendment that changed the system of selection of supreme courts judges by transferring this power from the collegium of supreme court judges to the National Judicial Appointments Commission (Sengupta and Sharma 2018). The Italian Constitutional Court formulated the basic principles of constitutional conformity for process of cutting salaries of judges.[7] The Spanish Supreme Court abolished the salary bonuses,[8] the German Federal Administrative Court allowed the judicial review of case assignment.[9] In Central and Eastern Europe as well as in Latin America virtually every judicial reform ends up before constitutional courts too (Kosař 2017; Sadurski 2019; Helmke 2017).

Judicialisation is further reinforced by internationalisation of judicial governance. In the Global South, the World Bank and the International Monetary Fund have been particularly active in shaping domestic judicial governance by their rule of law and judicial independence initiatives (White 2009). More recently, regional human rights courts, especially the European Court of Human Rights and the Inter-American Court of Human Rights, have been increasingly moving beyond their original mandates, and making determinations about the design of national courts and their governance, encouraging domestic judicial reforms (Kosař & Lixinski 2015; Leloup & Kosař 2022).[10] In the European Union, the level of internationalisation and judicialisation of judicial governance reached a whole new level after the European Court of Justice abandoned its deference to Member States in this area and delivered the landmark *Portuguese Judges* judgment (Bonelli & Claes 2018). Since then, the European Court of Justice developed a massive case law that set several requirements for judicial governance in new as well as old European Union Member States (Leloup 2020; Kochenov & Pech 2021, Moraru & Bercea 2022; Kadlec & Kosař 2022) The European Court of Human Rights tries to catch up and these two supranational courts now thus engage in

[7] See Judgment of the Italian Constitutional Court sp. No. 223/2012 of 11.10.2012.

[8] See Judgment of the Spanish Supreme Court no. 2004\30 (STS, 3ª) of 7. 3. 2006. See also Contini, Francesco & Mohr, Richard. Reconciling Independence and Accountability in Judicial Systems. *Utrecht Law Review*. 2007, vol. 3, no. 2, pp. 34–35.

[9] See the judgment of German Federal Administrative Court of 28. 11. 1975 (BVerwGE 50, 11 = NJW 1976, 1224).

[10] The nature and effects of this European transnational judicial dialogue is further discussed by Law in chapter 17 of this volume.

intensive cross-fertilisation of judicial governance ideas that sometimes go too far (Leloup & Kosař 2022; Karlsson 2022).

Of course, not all countries are witnessing all of these three developments, at least not to the same degree. While European Union contributed heavily to all three trends, the United States have been resistant to all of them. Other regions show that supranational pressure may work well even without judicialisation. A typical example is Southern Africa, where several countries replaced opaque informal appointment systems inherited from the colonial era by merit-based system with judicial appointment commissions (Brett 2022). Brett shows that the rise of the merit orthodoxy in this region does not result primarily from judicialisation, but rather from the mix of domestic and supranational pressures that reflect broader social development in the decolonisation context. Finally, these three developments do not get through uncontested and are not irreversible. In fact, even within the European Union there is a considerable backlash against some of these trends, for instance in Kaczinski's Poland and Orbán's Hungary (Sledzinska-Simon 2018; Sadurski 2019; Uitz 2015). These two leaders want to dejudicialise politics in general and the politics of judicial governance in particular (Petrov 2022).

What is important to note is, however, that all three trends largely ignore the complexity of judicial governance as a field. Repeated political tinkering with courts' composition and independence, and increasing democratic backsliding encouraged standardisation of judge-dominated judicial governance and the vigorous judicial protection of this judicial design, but it overlooks the negative empirical experience of post-communist, post-authoritarian and developing countries (Hammergren 2002; White 2009; Kosař 2018; Šipulová et al. 2022). The international standards, now backed by supranational courts, perceive judicial governance as best organised by judges, ideally in a judicial council. This understanding is based on a conflation of judicial interests with interests in independent, fair and rule of law governed judiciary. Very few supranational bodies recognise and reflect threats of corporativism and judicial corruption, since they mostly rely on judges and self-governance as a bulwark against political interferences.

16.5 Judicial governance and informality

It is generally accepted that there is a great deal of informality in politics, but this wisdom is often forgotten when it comes to judicial politics. Informal

exercise of power politics in judicial governance is perhaps even more important, as the decisions behind the closed doors in this area of governance may have significant repercussions for the rule of law (Zgut 2022). It is thus particularly important to discern what 'the proverbial room where it happens' is,[11] who sits at its table, and what informal rules those sitting at the table apply.

When discussing the engagement of actors, transfers of power, or politicisation channels in judicial governance, we often noted de facto powers or the ability of various players to utilise their informal influence. From the conceptual point of view, there are three standard ways in which the scholarship engages with informality and informal institutions in judicial governance: (1) through the prism of constitutional conventions; (2) from the institutional perspective which focuses on informal rules and practices; and (3) from a relational perspective that studies informal networks.

Constitutional conventions are typically explored by legal scholarship (Stephenson 2021; Sirota 2011). Although they are not framed as capturing the informal dimension of judicial governance,[12] they do entail a large portion of informality and rely on deeply rooted and repeated practices and rules that do not have a clear bearing in the written law. The majority of constitutional conventions related to the area of judicial governance revolve around the selection and appointment of apex courts' judges or chief justices (Melton and Ginsburg 2014), or questions of judicial independence (Grove 2018). In Israel, the President appoints judges 'in accordance with the selection of the Committee for the Selection of Judges.' The unwritten convention is that the President is in fact bound by the opinion of the Committee and cannot deviate from the Committee's list. Similar practices have been recently confirmed by the European Court of Human Rights at the backdrop of Icelandic system of appointment of judges (Karlsson 2022). In Germany, a constitutional convention concerning the election of Federal Constitutional Court judges allocates each of the major political parties a seat on the Bench to nominate an occupant on (Taylor G. 2014; Kischel 2015). The Supreme Court of Canada

[11] Hamilton musical.

[12] Technically, conventions may include both formal and informal institutions. Therefore, they cannot easily be categorised as a subgroup of informal institutions (Stephenson 2021; Sirota 2011).

recognised a constitutional convention related to remuneration of judges as part of the rule of law and judicial independence guarantees.[13]

In sum, constitutional conventions are typically unwritten, yet socially followed and perceived as binding. They fill the gaps in written law and sometimes even get 'absorbed by law' (Sirota 2011), if recognised as binding by domestic courts. For example, in 2020 the Supreme Court of Israel acknowledged the enforceable character of the constitutional convention according to which the Knesset appoints one governmental and one opposition member for the two parliamentary seats in the Committee for the Selection of Judges (Lurie 2022). The major puzzle related to conventions is whether they are more fragile and vulnerable to arbitrary change or expropriation (and can easily lead to swift constitutional decay;Issacharoff & Morrison 2020), or to the contrary, whether they are so deeply embedded and socially shared that they can resist the attempts to change them through new legislation.

On the other hand, informal institutions are a domain of social science research. They are often described as the invisible social glue of political systems (Jakab 2020, Dunoff & Pollack 2018), filling in the gaps of formal regulation. They are created outside officially sanctioned channels (Helmke & Levitsky 2004). Their interaction with formal rules and practices is quite complex: they can complement, accommodate, but also compete with or even replace formal institutions (Helmke & Levitsky 2006). They emerge either where formal institutions exist but are incomplete, ineffective, too difficult to change, or contradictory to actors' (publicly non-acceptable) goal (Helmke & Levitsky 2005; Lauth 2015), or in the space where formal institutions do not exist at all (Lauth 2015).

Informal institutions are essential for judicial independence and the rule of law. Depending on their consonance with values underlying formal institutions, they can either subvert or protect the rule of law and the quality of democracy. The dissonance between formal and informal rules and practices is sometimes described as the hollowing out of democratic institutions. For example, 'gentlemen's agreements' between judicial associations may compete with or even substitute for formal rules governing the selection and promotion of judges (Pierson 2000; Pozas-Loyo & Rios-

[13] See *Remuneration of Judges of the Provincial Court (PEI)* [1997] 3 SCR 3 (SCC).

Figueroa 2018). These pacts may in turn entrench patronage (Guarnieri 2013; Benvenuti & Paris 2018; Vauchez 2018), nepotism (Spáč 2020) and vertical gender segregation (Sofos 2020). Similarly, politically savvy chief justices can tweak the formal rules and forge informal alliances with politicians (Kosař & Spáč 2021), with other court presidents (Kosař 2017), or with transnational judicial networks (Dallara & Piana 2015; Parau 2018). Informal practices like corruption (Popova 2012b), telephone justice (Popova 2012a; Ledeneva 2008), and clientelism (Popova & Beers 2020) may undermine existing formal institutions.

On the other hand, many informal institutions also have positive effects. Well-functioning informal institutions may increase the efficiency and quality of judicial decision-making, and, in the long run, also increase the resilience of formal democratic institutions. Interestingly, compared to legal research which perceives conventions as too susceptible to revision, social scientists argue that informal institutions are more difficult to change (than formal frameworks) because they are deeply embedded in social behaviour and less transparent to individual actors (North 1991). Judges typically take part in various informal networks, learning best practices across supranational levels (Dothan 2021). Overall, however, the informal rules and practices with neutral or positive effects are much less explored, with only a few pioneering studies engaging with judicial associations and transnational networks, norms diffusion, and inter-court dialogues.

Yet, the workings of informal institutions, particularly in European jurisdictions, are heavily under-studied. The existing scholarship so far has focused mostly on negative repercussions of informality in Latin America (Pozas-Loyo & Ríos-Figueroa 2018) and South-East Asia (Dressel, Urribarri & Stroh 2017; Harper & Colliou 2022) and the detrimental effects of corruption, nepotism, and patronage on selection processes and judicial independence. Only a few studies have explored the role of judicial culture in democratic decay in European countries (Jakab 2020; Zgut 2022), or the role of informal networks in selection processes in the USA (Bird & McGee 2022). The largest number of studies on informality engaged with probability and patterns of judicial decision-making (Randazzo 2008).

Overall, a little more attention, although largely incidental, has been paid to informal networks created among actors of judicial governance. From the

relational perspective (Dressel, Urribarri & Stroh 2017), it is important to acknowledge that judges are embedded in various circles of social interactions and their behaviour (on and off bench) is shaped by relational flows in networks to which they belong. This observation is mostly ignored by legal scholarship as well as the supranational approach to judicial governance, that prefers to see judges as independent, autonomous on other actors, and unburdened by any polarising interests apart from the delivery of justice. As studies from the post-communist countries however show, judicial networks and networks judges take part in significantly shape clientelistic relations inside the judiciary, and manage to deform the results of formal designs of merit-based selection processes (Tsereteli 2022).

Although the relational perspective allows us to see also many positive informal institutions, leading to stronger judicial dialogues, social responsiveness, or the legitimacy of courts, it is the networks interfering in judicial independence that attract more academic interests. Yet, uncovering extra-judicial networks (connections of judges to politicians and third actors) is extremely difficult. While Tünde Handó's proximity to Viktor Orbán is well known (Uitz 2015), 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 about the dense web of informal networks that made important decisions outside the judicial council (Avbelj 2018). In France, Italy, and Spain it is crucial to know who belongs to which judicial association (Vauchez 2018; Benvenuti & Paris 2018; Tores Pérez 2018). In Czechia court presidents have created several informal groups that have a major say in key areas of judicial governance (Blisa et al. 2018). Informal networks may also affect different stages of the recruitment of judges, in both Europe (Spáč 2018) and the Americas. The rules and practices created within these networks can completely replace existing formal arrangements. For example, gentlemen's agreements between judicial associations more or less replaced formal rules on the selection and promotion of judges in Mexico (Pierson 2000; Pozas-Loyo & Ríos-Figueroa 2018), and significantly deform selection processes in Italy (Benvenuti 2018). In the post-communist area, politically savvy chief justices still manage to tweak the formal rules and forge informal alliances with politicians (Kosař & Spáč 2021; Tsereteli 2022), with other court presidents (Kosař 2017), or with transnational judicial networks (Dallara & Piana 2015; Parau 2018) In China,

institutional proximity between the Party, the administrative apparatus, and the courts facilitated judicial corruption (Wang Liu 2022).

Fortunately, recent political science scholarship has made significant progress in conceptualising and analysing such informal networks (Dressel, Urribarri & Stroh 2017, 2018), and it is high time to apply these insights in legal scholarship and, even more importantly, in practice. As we have demonstrated above, supranational bodies, particularly two European courts, are increasingly active in shaping the regulation and policies of judicial governance. Yet their monitoring of institutional systems remains blind to the informal sphere of politics (Zgut 2022). As we have demonstrated in this section, informal institutions are difficult to capture and change; however, they are crucial for understanding how the judiciary works in practice and they play an indispensable role in the effective and efficient functioning of formal democratic frameworks.

16.6 Judicial governance and gender diversity

Judicial governance can serve many goals. Constitutional and supranational courts tend to emphasise judicial independence and the rule of law.[14] However, new public management expects courts also to become accountable, transparent, efficient, and quality-oriented. Judicial governance thus should deliver, and in fact balance, these often-competing values (Mak 2008; Dunoff & Pollack 2017). To make things even more complicated, there is a growing consensus that courts should attend to the challenges of equality and diversity (Malleson 2009; Resnik 2021). Hence, judicial governance should be designed to promote not only the rule of law and new public management values, but also diversity of the judiciary (Maleson 2009; Grossman 2012; Rackley 2013). Gender diversity has gradually become the most prominent, albeit not the only one (Resnik 2021; Weinshall 2022), issue in diversifying the judiciary.

It is worth noting that the idea of (gender) diversity on the bench is generally accepted irrespective of its eventual impact on courts' decision-making, since the evidence on whether female and male judges decide cases differently is still conflicting (Boyd at al 2010: 392; Peresie 2005; Tate & Handberg 1991; Songer and Johnson 2007; Weinshall-Margel 2011; Eisenberg et al 2012). The

[14] See above.

arguments for gender diversity typically include positive effects on public trust in the judiciary (Resnik & Dilg 2006), structural impartiality of courts (Lawrence 2010; Chen 2003), a better diversity of experience and knowledge (Weinshall 2022; Resnik 2021), following by increased quality due to the enlarged pool of candidates (Rackley 2013: 25–27).

However, until recently, gender aspects of judicial governance have been underresearched and most studies on female judges focused primarily on descriptive gender representation and barriers for access of women to judicial profession (Arana et al. 2021; Arrington et al. 2021). This research explains women's access to courts with different structural and institutional factors that are often interrelated. Female judges benefit from (1) improved educational possibilities in law for women increase the pool of eligible women judges (Williams and Thames 2008; Sonnevold 2017; Sonnevold & Lindbekk 2020), (2) changes in cultural gender norms towards leadership and family life (Duarte et al. 2014; Harwa 2016), and (3) recruitment of judges based on transparency, objective merit-based criteria, and formal rules rather than on discretion, opaqueness, and informal patronage networks that tends to benefit men (Schultz & Shaw 2013; Kenney 2013; Boigeol 2013). In other words, introducing more merit-based and transparent appointment procedures for judges based on competitive examinations has often helped women circumvent the largely male power networks that previously excluded them from the judiciary (Tøraasen 2022).

The problem of access of women to the judiciary permeates most common law countries. Civil law countries fare better in terms of overall gender representation in courts. However, if women have the same chances to enter the judiciary, it does not necessarily mean that they will progress like their male colleagues. Several studies actually show that in judiciaries with majority of female judges women still face 'glass ceilings' and struggle to reach the apex courts (Valdini & Shortell 2016; Goldar 2020). The barriers to progress are similar to barriers of access, namely (1) opaque and informal process of promotion of judges (Zheng et al. 2017, Pozas-Loyo & Ríos-Figueroa 2018; Escobar-Lemmon et al. 2021) and (2) gender norms resulting in different work-life balance of women and men (Schultz 2013; Kalem 2020; Havelková et al. 2021). A similar pattern applies to other important positions within the judiciary such as the chief justices and court presidents that tend to be

dominated by men (Havelková et al. 2021), even though Africa shows that a considerable progress is possible even this area (Dawuni & Kang 2015). Nevertheless, women still face more obstacles if they want to reach positions of power and influence within the judiciary.

So far only few studies analysed the impact of introducing expert bodies on gender representation. Existing studies concern mostly common law countries and judicial appointment commissions or merit commissions (Iyer 2013; Blackwell 2017; Dawuni & Masengu 2019; Masengu 2019; Escobar-Lemmon et al. 2021). They tell a cautionary tale. While replacing the executive models of judicial governance by judicial councils and judicial appointment commission might professionalise the selection and promotion of judges, it may do so slowly and incrementally (Iyer 2013) or only if other conditions are met (Malleson 2006). Moreover, expert bodies do not necessarily eradicate privilege and power dynamics since they may create a different type of dynamic that can be harmful for women (Masengu 2019). The existing research also shows that there is no one size fits all solution for consolidated, developing and post-conflict societies with widely diverging general gender norms. Counterintuitively, in some countries 'gender-neutral' judicial reforms aimed at strengthening the judiciary or the bureaucratisation of the judiciary have done more for women's judicial representation than explicitly gender-targeted policies that often meet stiff resistance (Jasper 2022; Tøraasen 2022). Finally, to our knowledge, the role of gendered norms in other areas of judicial governance beyond the selection and promotion of judges such as case assignment, composition of panels, judicial training, and extrajudicial activities of judges has not been studied thoroughly at all. Future research should explore these areas systematically as well.

16.7 Conclusion

The development of dynamics in judicial governance have mirrored the rise, pushback, and backlash against judicialisation politics and the increasing importance of the courts. In a few decades we have seen a shift from executive-led judicial governance models to judicial councils and other judge-dominated bodies (judicial self-governance) and, more recently, attempts to dilute judicial power in the governance and administration of courts by including civil society members and other non-partisan actors and to construct

judicial councils as more autonomous agencies standing beyond all three state powers.

Compared to international optimism accompanying the boom in judicial councils, recent empirical studies suggest that reliance on judge-dominated judicial governance is very problematic (Bobek and Kosař 2014; Bobek 2015, Kosař 2018; Spáč 2020; Kosař and Spáč 2021; Šipulová et al. 2022), that it does not bring with it more efficiency or judicial independence (Gutman & Voigt 2018; Hayo & Voigt 2016), nor does it offer better protection from political interferences (Varol et al. 2017). Strikingly though, in particular European supranational policies seem to continue ignoring these findings.

In this chapter we have provided a bird's eye view of the key policies and most contested issues of judicial governance. First, the judicial governance field is broad and should not be conflated with the selection and disciplining of judges. As we have demonstrated, it has dozens of areas organised in various dimensions whose importance is gradually increasing. Second, it is a multi-actor field. Recent trends demonstrate that we need to look beyond judicial councils as, even in governance models with judicial councils, several other actors, from ministries of justice to judicial academies, retain significant powers.

Third, the dynamics of judicial governance or the rise of judicial councils cannot anymore be explained solely through the binary judges vs politicians logic. Empirical experience from several countries suggests that (a) judges hold significant powers in ministerial as well as judicial council models, they are nested inside various bodies with mixed composition, and none of these actors operates in a vacuum – instead, they cooperate and share judicial governance powers; (b) studies from non-European regions suggest that the proliferation of judicial councils was, in fact, motivated not by power distribution within the three branches, but by social and supranational pressure (Brett 2022; Garoupa 2022).

Fourth, we noted two trends, agencification and power de-concentration, in the field of judicial governance, which suggest that individual judicial governance actors can no longer been squeezed into the three traditional state powers. Instead, they increase their autonomy gradually become a guarantor institution rather than body that represents any of the three traditional branches.

These considerations are important for a proper understanding of the power dynamics in the judicial governance field, particularly in the face of increasing challenges to judicial councils based on pragmatic (willingness of politicians to capture and control the courts) and normative (lack of legitimacy of courts to govern) considerations.

As we have demonstrated in this chapter, judicial governance is a highly complex phenomenon the contours of which go far beyond the selected model of court administration, since even judges in the Ministry of Justice model of court administration can have significant powers. The number of actors and agencies that participate in judicial governance has gradually increased, and has brought more expertise and less partisanship into the field (Kosař and Spáč 2021; Kosař and Blisa 2018). Accordingly, the focus of scholarship on judicial governance and politics should be redirected from judicial councils to other actors.

At the same time, judicial councils require more theorising. While if well designed they can eliminate some political interferences, they are also known to freeze informal rules and practices present within the judiciary. This brings us to the need to reconceptualise judicial councils at the backdrop of new literature on the fourth branch institutions and autonomous agencies (Tushnet 2021; Khaitan 2022). More attention should be paid to the perceptions and expectations of judicial councils in respect of interests they should represent (as a part of the judiciary, a coordination body between representatives of all three branches, or a post-branch institution that is completely autonomous on any of classical three powers, Kadlec, Šipulová and Kosař 2022).

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