The Rise of Judicial Self-Government in Europe: Changing the Architecture of Separation of Powers without an Architect (JUDI-ARCH)[1]

Organized by: Judicial Studies Institute (Faculty of Law, Masaryk University)

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WORKSHOP WITH EXPERTS

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WORKSHOP REPORT

compiled by the JUDI-ARCH team

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Session 1: Project Introduction

David Kosař & Marína Urbániková
From Judicial Councils to Judicial Self-Government: Forms and Rationales and Effects

In the first part of the presentation, **David Kosař** introduced the JUDI-ARCH project. He first introduced the Judicial Studies Institute (JUSTIN), initially established with the help of the ERC Starting Grant (JUDI-ARCH, 2016-2021) in September 2016, and currently housing other research projects too, as well as its 11 members: 6 postdocs and 3 PhD researchers, 1 project manager (apart from the Principal investigator. He also introduced the project's advisory board, which is composed of five leading scholars in their fields (A. von Bogdandy, A. Føllesdal, T. Ginsburg, R. Hirschl, and M. R. Madsen).

Subsequently, David explained the raison d'ètre of the JUDI-ARCH project as a whole as well as its components, namely the four Work Packages: WP1 (conceptual analysis), WP2 (socio-legal), WP3 (quantitative) and WP4 (devoted to theorizing about the separation of powers more broadly). David also clarified some of the most vexing issues of the project, such as the conceptualization of judicial self-government (see David's and Marina's presentation for further details).

In the second part of the presentation, **Marína Urbániková** focused on the sociological dimension of the JUDI-ARCH project and discussed some of the conceptual issues related to the concepts of trust and public confidence. She explained that the second work package of the project (WP2) will pursue a qualitative socio-legal analysis, which will build on the conceptual knowledge gained in WP1 through the work of the national experts. The purpose of WP2 is to understand and compare the perceptions of the key actors involved in judicial governance, namely politicians, judges and lawyers (25 respondents in each jurisdiction). From the methodological point of view, WP2 will rely on in-depth elite interviews. Ten countries will be covered (two per each model of court administration), plus the European Court of Human Rights and the Court of Justice of the European Union.

Subsequently, Marína clarified that the interest of the research team in the relationship between the judicial self-government (hereinafter only "JSG") and public confidence, as one of the key values in judiciary, rests on the assumption that having the confidence of the public is of fundamental importance for the judiciary. When the citizens do not trust the courts that administer the law, they may indeed resort to other means to resolve their disputes, and they may also not accept judicial decisions.

Assessing the relationship between the changes in JSG and the level of public confidence in the judiciary is a rather difficult task though. Data from public opinion polls describe the level of public confidence in judges, courts or judiciary, and their changes over time, but of course, they do not provide us with much information about the underlying reasons and causes of these changes. It is therefore important to emphasize that the potential effects of modifications in JSG *can be only hypothesized*.

Based on the theories explaining the origins of public confidence, changes in JSG can have an *indirect* effect only. This may happen for example by affecting courts' and judges' performance, which in turn determines the level of public trust. Also, the vast majority of citizens lack first-hand experience of the justice system, and do not feel well-informed about it. Thus, from the viewpoint of public confidence, perceived performance of the judiciary (e.g. mediated via media) seems to be more important than its actual performance. Next to performance, public confidence seems to be influenced by broader historical and socio-political developments, as well as ad-hoc events and issues, most notably scandals and affairs. The best source of longitudinal and comparative data on the level of public confidence is probably Eurobarometer, covering this issue from 2001 to the present time, with the exception of the period between 2011 and 2013. Accordingly, the level of public trust in the old EU member states is rather high: in the majority of the countries, the majority of the population claims to trust the national justice system, with the exception of Italy and Spain. It can also be noted that in the majority of the countries the level of public trust is on the rise: it is higher in 2017 than it was in 2001. In the new EU member states and the neighboring countries, the level of public trust is considerably lower: Turkey is

the only country where the share of trusting citizens exceeds the share of the distrusting ones, and the Czech Republic is pretty close to this point. In the rest of the countries, the public confidence in judiciary is very low. The difference between the "old" and the "new" EU member states can be at least partially explained by the historical and socio-political development, most notably the communist legacy, and the turbulent period of transformation and transition. During communism, trusting the state and its political institutions, including courts and judges, was perceived as naïve and stupid. Moreover, judicial profession suffered from low prestige (both in social and financial terms) and was considered as non-attractive and corrupt. It appears that judiciaries in many post-communist countries did not manage to get rid of their bad name, regardless of the establishment/non-establishment of judicial councils or other JSG bodies.

Session 2: Early Birds

Davide Paris & Simone Benvenuti
Italy

In their presentation, **Davide Paris and Simone Benvenuti** first described the High Council of the Judiciary in Italy/ Consiglio Superiore Della Magistratura (CSM) as the main JSG body and its internal functioning, outlining the discussion within the Constituent assembly and further developments. Next, they focused also on the Ministry of Justice as the second most important body in judicial governance. Focusing on the impact of JSG, Davide and Simone pointed out that the overall separation of powers structure is not affected. However, the way the High Council of the Judiciary and other JSG bodies developed and performed their role over time had a knock-on effect on some other aspects, both positively and negatively.

The same applies to independence and accountability, where the impact is multidimensional, and legitimacy, too. However, more clarification on the relationship between JSG on one hand, and transparency and public confidence on the other was asked for since there is no direct influence discernible.

The presentation was followed by **Hubert Smekal**'**s** commentary, who considered the paper to be a rich source of information that is bubbling with ideas, and praised the elaborate discussion of the JSG effects on the CIATL values. By CIATL values we understand: confidence in, independence, accountability, transparency and legitimacy of courts. His suggestions entailed: invest more effort into structuring and framing the paper with a proper introduction; provide better definition of the concepts, notably that of autonomy of the judiciary in Italian constitutional law; include explanation of the situation with *correnti* (and its origins), which seems unusual in other jurisdictions; pay more attention to other JSG bodies than the High Council of the Judiciary.

Subsequently, the discussion unfolded with a query whether the institutional setting and features allow the vice-presidents of the High Council of the Judiciary in Italy to build a strong position in the body; however, this rather results from unusually strong personalities over time. The discussant was puzzled by the fact that, according to the paper, accountability concerns arose already in the phase of the recruitment of judges. Furthermore, a question was raised as to whether media attention almost automatically leads to lower social legitimacy, as the authors seem to imply.

In turn, **Christoph Krenn** pointed out that the Italian case is interesting in that (very differently from the case of Turkey) it results in a slow incremental process of reform; yet, more information about the crucial turns would be welcome as these were surprisingly overlooked, such as the role of the establishment of constitutional courts, post-fascism ideas, etc. How does this translate into JSG? It seems that there is one contextual element that transcends the Italian case: corporativism. The structure of the associations, how political they are, who is standing behind them, etc. are all essential elements to take into account to be able to understand JSG. Christoph also considered the stress on *internal* independence to be a very interesting aspect. When deciding whether this can be considered a success story, the authors emphasized that it is not easy to definitively evaluate something which unfolded over

a period of 70 years. Whether we consider it to be a success story or not, the point is that the Italian system and the High Council of the Judiciary in Italy is often misunderstood, and the Council is wrongly considered as being representative of the judiciary. In short, Italy can be seen as an example of how to reform JSG and Turkey how not to.
In the last part of the discussion on the Italian paper, **David Kosař** brought up another intriguing issue, namely the position of Italian judges (and prosecutors) in the social tree. In this regard, the two authors did not provide a consistent answer to this issue. Despite the fact that Italian judges are very well treated and formally in a position of authority, the recruitment process and the size of the judiciary generate scepticism and create a situation where a distinction among judges can be made. Definitely, such position cannot be compared to that of judges in other countries, such as the United Kingdom.

Betül Durmuş (presenting co-author) & Başak Çalı
Turkey

In her paper, **Betül Durmuş** offered a historical and a context-based in-depth description of the evolution of the Turkish JSG, focusing mostly on the judicial council, the institution at the core of the system of judicial administration in Turkey. She presented seven main turning points (1924, 1961, 1971, 1982, 2010, 2014, and 2017). Moreover, she paid special attention to the Justice Academy, whose recent changes in 2014 and 2016 confirm the trends defined in relation to the judicial council. Interestingly, the original inclusion of a judicial-council type of institution in Turkey was inspired by the Italian legal system discussed above. As in the case of Italy, and even more, its developments strongly related to the evolution of the political and the State system. The last part of the presentation sketched the variable impact of JSG on independence, accountability, legitimacy and the separation of power.

During the discussion, **Hubert Smekal** appreciated the way the author set the scene and identified the key issues of interest, in particular the overview of the main formal (legal) changes and the context in which they occurred. He suggested, nonetheless, to concentrate more on the "real" functioning (practice) of the JSG bodies, which he was missing in the paper. The same applies to the discussion of the CIATL values. Hubert also considered valuable to highlight the role of the court presidents, which is a topic of special interest by itself. Next, two other points were raised: First, it would be helpful to explain why the 2010 constitutional amendment brought about the move from the hierarchical model. Second, the paper makes use of Hirschl's concept of hegemonic preservation but does not do so in a completely consistent manner, it would therefore be useful to add a discussion on the applicability of the concept to Turkey.

Finally, **Christoph Krenn** observed that Turkey (similarly to Italy) has witnessed a long history of JSG, however, with one major difference: while Italy opted for slow and small changes, Turkey has experienced many large scale ruptures. What is striking about the Turkish case is how issues at stake vary over time. What makes the Turkish system so unstable? What is behind the constant transformation and instability? Lastly, it seems that JSG in Turkey shifts dependence of judges from one actor to another and back. Therefore, the idea of judicial independence itself is almost unconceivable.

Session 3: Worshippers

Bianca Selejan-Gutan
Romania

Bianca Selejan-Gutan's presentation provided a full picture of the Romanian system, explaining the centrality of the judicial council, and at the same time underlined the relevance of other bodies: the judicial inspection, the National Institute of Magistracy (which displays the important French influence on the Romanian legal system), and court presidents. She also offered a detailed analysis of the CIATL values and separation of powers, including other aspects not directly related to JSG.

According to **Elaine Mak**, the Romanian case shows that having a judicial council *per se* might not be the solution, because it does not change the underlying culture that in the end is essential in explaining how certain values operate in a system. In her work, Anja Seibert-Fohr similarly puts forward that judicial councils only work if people adhere to democratic values. This is why we see problems in how judicial councils work in post-communist countries: the risk is that of creating a very strong judicial council that is then influenced by people who are themselves threats to judicial independence. As a result, the main question stemming from this discussion was: how can judges and their values be europeanised? For this reason, it would be interesting if the author of the paper could possibly elaborate on the role of the EU in shaping Romanian judicial institutions.

Samuel Spáč & Katarína Šipulová
Slovakia

Samuel Spáč and **Katarína Šipulová** helped to elucidate the turbulent development of the Slovak judicial administration since the fall of the communist regime. They identified three main periods of the administration of the judiciary in Slovakia after the fall of communism: 1993-2001, 2001-2011 (the establishment of the judicial council and a Euro-model of court administration), and the period after 2011 (the introduction of various committees on matters related to professional careers with considerable supervision provided by political branches). Subsequently, **t**he speakers showed that the relationship between the existence of a judicial council and its separation from the influence of other branches of power is not as clear-cut as presented by the prevailing literature.

The role of the Constitutional Court in sustaining institutional *de jure* independence was strengthened, but this did not help *de facto* dimensions, with possible consequences for output independence. In general, it appears that the legacy and legal culture of the Communist regime easily survived over time. Surprisingly, the implementation of JSG in some other post-communist countries, similarly to Slovakia, enabled people who did not share the ideals of independence, accountability, and legitimacy of judiciary to take up core judicial posts. Consequently, this prevented Slovakia from adopting a system of judiciary adhering to principles and requirements of a democratic regime. The increase of transparency since 2001 and especially after 2011 cannot be directly linked to JSG.

During the discussion, **Adam Blisa** found the title of the section "Worshippers" quite fitting, because both countries had been presented with the judicial council as if it were a religion working as a cure, but the faith was not rewarded. In both cases, the judicial council created perversions – while in Slovakia the judicial council was hijacked by the Supreme Court president, in Romania, the judicial council strengthened corporatist tendencies in the judiciary and insulated it to the point that it became a "black box". Thus, judicial independence served only as a slogan as David Kosař's book *Perils of Judicial Self-Government in Transitional Societies* and Bogdan Iancu's review of David's book suggest, and the results were not delivered. As a result, Adam proposed that since both cases, the Slovak and the Romanian one, offer strong narratives, this aspect should be emphasized in the papers.

In her comments, **Elaine Mak** asked the authors of the paper whether younger generations of judges bear the promise of change regarding the culture in Slovakia, however, the answer was negative. Furthermore, referring to judicial independence, Elaine asked for clarification whether the relevant provisions of the Slovak Constitution have been complemented by sufficient provisions on a statutory level.

Session 4: Neighbours

Elaine Mak
The Netherlands

Elaine Mak started her presentation with an explanation that the creation of the Dutch judicial council around fifteen years ago was very peculiar compared to all the other countries considered until now. Interestingly, it is a rather odd type of a council due to the fact that it consists of only four members

with very specific competences, and is considered to take its place in between the courts and the Ministry, not as a representative of the judiciary. No issues of independence, at least not directly, neither the relationship between the judiciary and the political élite were disputed at that time. Specifically, the reform dealt with effectiveness and efficiency concerns, addressing the state of Dutch courts at that time, from the internal workings to the most visible ones like buildings and court structures. The Dutch judicial council is therefore built on the paradigm of New Public Management (NPM) drawn from the administration studies. Furthermore, one cannot reduce the Dutch system to the judicial council, as the administration is institutionally fragmented in the hands of different bodies. These include the management boards of the courts, the Education and training centre, including some national sector-specific consultation bodies of judges.

From a longitudinal perspective, the author also identified two periods: 2002-2012 (integral management), and from 2012 on, the achievement of a more efficient management structure. In this last period, certain reforms and projects related to the Dutch system of judicial administration generated growing politicization of judicial administration issues. This happened notably very recently, in relation to the redefinition of a number of courts in the country in 2013, which raised public protests by the judges themselves. In connection with this, the author also referred to the role of an informal body, the Dutch Association for the Judiciary, which became an object of criticism. The same holds true for the Council in the last several years.

Yet, public confidence in courts is generally very high. During the discussion, **Samuel Spáč** aptly noted that the Dutch system, together with the German system, share a degree of general trust towards judges, which does not correspond much to the levels of JSG achieved there. He also raised a question about the rationales for the establishment of the Dutch Judicial Council, which was not overly addressed in the presentation. **David Kosař** then brought up the issue of the role of the court presidents in the Dutch judicial system and asked why the perceived interference of the Dutch judicial council in their selection stirred so much debate. Moreover, **David and Elaine** also discussed how the Dutch public perceived judges' vocal protests and why this engagement of judges in "partisan politics" is regarded to be compatible with judicial independence and impartiality in the Dutch legal culture.

Fabian Wittreck
Germany

Fabian Wittreck provided a thorough description of the peculiarities of the German system, although from a different perspective than the Netherlands. Notably, the German system is the flagship system of the so-called Ministry of Justice model. Accordingly, German judges are appointed by the relevant Minister (given that we deal with a federal country) and judicial appointments are mostly in the hands of non-judicial bodies – at least formally. The reality is, nevertheless, very different and according to the author, Germany is a country where JSG is very much present, in both formal and informal ways. In relation to this, Fabian pointed to the paradox that some actors ask for more JSG, namely the German Association of Judges (*Deutscher Richterbund*) and the New Association of Judges. Next, he also mentioned a number of JSG bodies holding significant powers: Presidia, Councils of Judges, Councils of Judicial Appointment, Executive Judges, and many others. In Germany, JSG goes together with a higher degree of trust of the population in courts and judges.

Following up on the presentation, **Samuel Spáč** inquired about the reasons for the generally high trust in judges. In the author's view, to understand this, one should first take into account the German constitutional peculiarity of a State historically resting on the concept of *Rechtstaat*, which precedes democracy, and the relevant status of the eternity clause. As a consequence, German judges are considered to be highly apolitical (with some exceptions of certain *Länder*). On the other hand, the recruitment of judges is an important aspect in itself. Indeed, the apolitical character is related also to a highly selective recruitment process, which is shared with other legal professions, and developed around the building of an efficient and competent State bureaucracy. In this light, **David Kosař** emphasized once again the importance of looking at who judges are, and their position in the "social tree". He also discussed with Fabian whether the German theory of the (democratic) legitimacy chain *(Legitimationskettentheorie)* still works in practice in the case of the German judiciary. Finally, David

briefly addressed the issue of German resistance to judicial self-government and the implications of the eternity clause in the Basic Law. Entering the discussion, **Samuel Spáč** asked for further elaboration on the accountability mechanisms, which were in the presentation centred on how judges can object to a breach of their independence, rather than how litigants can object to the alleged breach of judicial independence.

Session 5: Moderates

Anna Sledzinska-Simon
Poland

Anna Sledzinska-Simon devoted the first part of her presentation to the central JSG actor in Poland, the National Council of the Judiciary. Interestingly, in Poland, the Council was established as early as 1989, with no debate on this subject matter among the parties. Anna also pointed out that in the Polish scholarship, the council is not considered to be a representative of the judiciary. After a description of the competences, composition and other institutional related aspects, the presenter focused on the main topical theme, namely the recent judicial reforms in Poland that largely affect the judicial self-government. The process is still ongoing, fueled by increased friction between the President and the Ministry of Justice from recent days. The second part of the presentation revolved around the impact of JSG and the latest attempts to change the system in order to enhance independence and separation of powers.

Subsequently, **Simone Benvenuti** initiated a discussion by raising a point that while the Polish case is undeniably an example of a backlash against JSG, this is related to the exceptional historical circumstances challenging the assumption of the rise of JSG. Next, he suggested that restructuring the paper might be of some help, particularly Part II, where a great deal of insights is included, and thus could potentially be used for building the missing sections on some of the values in question. Moreover, he also highlighted the interesting clash between the President and the Ministry of Justice, a JSG-related issue that may be relevant for the section dealing with the separation of powers. In Simone's view, further explanation on the underlying reasons for the early establishment of a judicial council would be useful to include in the paper. The commentator then posed a set of questions including: the arguments on which the Polish scholarship builds its understanding of the council as not being a representative of the judiciary, considering the overwhelming majority of judges therein; the reason why no specific expertise was required for one to become a member of the council, which does not correspond to the trends in other countries (France, Italy, Netherlands). Regarding the substance, Simone considered somewhat remarkable the fact that the Polish turbulent debate partly stems from the clash between different generations of judges, which can be witnessed in other former communist or socialist countries too (see Slovenia) and characterized Italy in the 1960s as well. The last question of the discussion concerned the council's opinions on the parliamentary bills, an issue that was mentioned in connection with Italy and Romania, and relates to what can be labeled as "normative self-government".

Roundtable discussion

David Kosař
Summary of findings and future publication plans

David Kosař presented two main options for publishing the results of the papers presented at this workshop. The first one is to opt for a special issue in the German Law Journal, an online, open access and high quality journal with a wide audience. This option would be less expensive, but the final peer review would be managed by the GLJ editors. This would involve a lack of control of the publication process, and each author would be directly responsible for his/her own contribution. The second option

is an edited book, which would be more cohesive. However, the book would be a much more expensive enterprise and its audience would inevitably be more limited. The majority of workshop participants preferred the GLJ option, save for Fabian Wittreck, who would give precedence to the cohesiveness of the edited book over the wider accessibility of the special issue in GLJ.

The following publication timeline was proposed and approved:

15/11/2017	first round of comments by JUSTIN team
15/01/2018	draft papers EXPERTS
31/01/2018	second round of comments by JUSTIN team
31/01/2018	GLJ call for special issues deadline
28/02/2018	draft cross-cutting papers
31/03/2018	revised papers
30/04/2018	proofreading/editing/checking for consistency
30/06/2018	submission to the GLJ (in the ideal world)
2019	publication

Session 6: The Resistance

Adam Blisa & Tereza Papoušková
Czechia

Presenting the Czech report, **Tereza Papoušková** and **Adam Blisa** first briefly introduced all the bodies involved in court administration together with their powers, and then highlighted those of them that can be characterized as self-governmental. Subsequently, the speakers depicted the major changes that these bodies underwent and assessed their impact.

In total, there are six bodies participating in the administration of courts (ordered according to their *de jure* importance): the Ministry of Justice (*de facto* mainly budgetary and disciplinary powers), court presidents (*de facto* whole range of personal, administrative as well as financial powers), the President of the Czech Republic (formally appoints judges), disciplinary panels (the exercise of their powers is conditioned by the motion of one of the three previous actors), judicial boards (consultative function only), and the Judicial Academy. With the exception of the Ministry of Justice and the President, the rest of the bodies is self-governmental. Addressing the changes in JSG bodies, the author identified three critical junctures. In 2002, judicial boards were implemented and somewhat limited the decision-making freedom of Court Presidents. Further changes were made to the disciplinary procedure and the range of possible sanctions. Also, the Judicial Academy was established. In 2008, the term of office of Court Presidents was limited, dismissal of Court Presidents by the Ministry of Justice was banned. This was followed by major modifications of the disciplinary procedure, and the composition of the disciplinary panels was altered (now composed of the same number of judges and non-judges). In 2010, re-appointment of Court Presidents was banned.

Katarína Šipulová's comments on the paper presentation touched upon several issues. She inquired about the role of the Ministry of Justice, which is largely missing in the current version of the paper. She also found that the authors could elaborate more on the explanation of the difference between the bodies governing the judiciary and self-governing bodies.

Furthermore, Katarína asked for clarification as to whether the court presidents sometimes act against the judicial boards and appoint judges despite their negative recommendation. Also, more data would be useful on the reasons why Ministers do not use recall competence, in contrast to Slovakia. As to the limitation of the court presidents' term, more background is needed, for example in the case of the dismissal of the Chief Justice Iva Brožová. Brožová was also involved in a severe dispute with the Ministry of Finance when the government attempted to exercise another leverage against the court president. Regarding the court presidents, Katarína suggested the authors dedicate more space to their gatekeeping role.

Then the commentator discussed the undue pressure exerted by regional court presidents on district courts concerning the selection of judges. Even Judge Drapal, a former judge of the Czech Supreme Court who left the Supreme Court in order to become the regional court president, claimed that he wanted to educate and create a whole new generation of judges, well skilled in civil procedural law. Furthermore, an inquiry was raised about the analysis of public trust, particularly why it was so low at the beginning of the 1990s when compared to Slovakia. Finally, Katarína suggested that the impact of JSG on transparency and on separation of powers should be clarified.

Another issue that was brought up was that there is currently an ongoing reform of case assignment (electronic registry), in which the judiciary is very much involved. The important message is, therefore, that the judiciary is standing behind the final design of many changes.

As to the substance, the trinity of court presidents should not be overestimated, as it is a very informal and relatively new body. Moreover, the three presidents are not always united in their views. In relation to independence and the limited terms of court presidents, the Czech Constitutional Court salvaged the situation, and the judiciary itself strengthened its independence.

Betül Durmuş then stated that in the paper, she lacked the historical background of the strong role of the court presidents in the paper as well as more detailed information on how they were actually selected and who they were (were they all men?). She also asked a question on how individual judges or the media reacted to the non-transparent way judges were selected in the Czech Republic, especially with regards to the appointment of court presidents. Finally, she suggested including the rationales behind the establishment of informal associations of Czech judges and court presidents in the paper. **Christoph Krenn** expressed his curiosity as to who looks at the proposals for appointments within the Ministry of Justice system, such as in the Czech Republic. **David Kosař** argued that perhaps the Czech Republic was experiencing rosy times when the problematic aspects of the Ministry of Justice model were not fully exploited by political actors, something that might change after the parliamentary elections, when attacks on the judiciary may occur. In other words, the Czech model of court administration is fragile as it relies on de facto conventions that can be easily abandoned.

Markus Vašek
Austria

In his presentation, **Markus Vašek** remarked upon the difficulty of talking about judicial self-government in Austria. Whereas the rise of this phenomenon is evident all over Europe, the Austrian legal system remains unaffected by it. Any mention of JSG encounters dismissive and at times even hostile reactions from virtually all relevant stakeholders, a fact for which Markus provided three main reasons. First, from a practical point of view, the executive system of judicial self-government has been tested and has worked reasonably well and is approved even by most of the judges themselves. Second, from a political point of view, a judicial council would be seen as a potential player within the political arena, dragging the judiciary into political conflicts. Third, from a constitutional point of view, the relationship between such council and the idea of structural independence of the judiciary may jeopardise the democratic principle enshrined in the Austrian Federal Constitution.

Markus then shed light on the process of the appointment of judges within the judiciary in civil and criminal matters in Austria. Here, the relevant provisions reveal a strong position of the executive branch complemented by the participation of a specific body composed of judges, the so-called *Personalsenate*. He then hinted at the democratic aspect, stating that, in his view, the democratic dimension benefits from the appointment procedure dominated by the executive branch.

Lastly, the author focused on one particular actor, the Austrian Association of Judges, as the only relevant proponent of judicial self-government in Austria. The proposals of this body rely heavily on international recommendations and experience. Throughout the last decade, these proposals have been quite influential in the political arena. In comparison with others countries, however, these proposals are not a reaction to an imminent problem but rather a blueprint adopted from various external sources.

During the discussion **Katarína Šipulová** asked whether the Austrian Association of Judges is really the only JSG actor. Next, she called for clarification of the statement claiming that appointments are virtually the only instance when there is an interaction between the judiciary and other political branches. She seemed sceptical in this regard, as there are plenty of other agendas related to judiciary, such as disciplinary proceedings, budgetary policies etc. Even if there is no judicial council, it is logical that some actors must decide on these issues. For example, are disciplinary proceedings managed from the outside, without any JSG? Katarína also asked for more details about the benefits stemming from a system in which the executive power nominates judges.

Betül Durmuş raised a question on whether we can, in fact, speak of JSG in Austria, and in this light pointed out that the presentation did not cover promotion and career-related issues. In the discussion, **Fabian Wittreck** sought to understand what happens when independence is breached, considering the fact that Germany has a mechanism that enables judges to complain if their independence is breached. In turn, **Christoph Krenn** asked about the difference between the democratic legitimacy claim in Germany and Austria and whether there has ever been a case in Austria related to political accountability for some appointments, considering that they are in the hands of political branches. In this regard, it appears that no minister has ever really interfered with the process, hence no accountability issues arose. On the issue of legal education, **David Kosař** asked for a comparison with the German case, where only the top 10% of students in universities can eventually become judges, and how it is ensured that only the best enter the judiciary.

Session 7: Supranationals

Christoph Krenn
Court of Justice of the European Union (CJEU)

Presenting his paper on the Court of Justice of the European Union, **Christoph Krenn** expounded the way in which JSG can be understood in relation to such an atypical jurisdiction. He started his presentation with an observation that the original institutional template was that of the main international court at that time, the International Court of Justice. This fact is often overlooked due to the importance of the French Council of State, undeniable as to the internal working of the Court. The author provided a historical account of the Court's administration and judges' appointments from the time of its creation, when it was a very different institution from the one existing today. Thus, originally, administrative meetings served as a form of collective self-government, but this coupled with resistance among the Member States and their strong grip on judges while in office. Today, one can witness a hierarchy among judges with a powerful role of the Court's President, and an institutional hierarchy between the CJEU and the General Court. Appointments are now governed by Article 255 Panel and conduct when in office is regulated, based on the New Public Management paradigm. Interestingly, the author pointed out that the article 255 brought about fears related to political nomination, notably from CEE countries.

In relation to the impact of JSG on the values in question, the relationship between JSG and public confidence appears somewhat problematic given the scarce knowledge of the Court the general public has. The issue of trust mostly pertains to domestic judicial systems and the EU at large. As far as social legitimacy is concerned, the author proposed to rely on the concept of authority used by other scholars, i.e. acceptance of decisions and their use in future decision making, as well as compliance to them. From this perspective, social legitimacy mostly relates to external factors. However, in case of more specific constituencies such as domestic courts, the Article 255 panel and the code of conduct may have a more significant influence. As for the independence of individual judges, there is a gulf between fragile *de jure* independence and strong *de facto* independence. This seems to be influenced by JSG and by legal culture of fostering anonymity.

Next, **Davide Paris** warned the author that using the term career when speaking of the CJEU can be misleading, considering that it encompasses nothing more than a 6-year appointment, without any prospects of promotion/advancement (though he admitted the existence of some administrative positions such as that of the Court President). He also highlighted the fact that the rise of judicial self-

government at supranational courts has slightly different rationales, as it is driven not only by the need to select the best candidates (which requires expertise on the selection body), but also by the necessity to give voice to domestic legal communities. In general, Davide suggested that applying the framework of JSG to the international level could potentially bring about new conceptual challenges.

Regarding the suggestion to treat social legitimacy and authority/acceptance as synonyms, **Nino Tsereteli** argued that one should distinguish between these two concepts. Acceptance of judgments does not always mean that the relevant actors see the court or its judgments as legitimate. Conversely, failure to accept may be explained by factors other than perception of illegitimacy. However, in the end Nino admitted that in principle social legitimacy may facilitate acceptance.

Stewart Cunningham (presenting co-author) & Başak Çalı
European Court of Human Rights (ECtHR)

In the very last session, **Stewart Cunningham** described the European Court of Human Rights and then went on to point out that JSG is relevant for the Court with respect to judicial selection and court administration. As to the former, it is important to discriminate between the pre-2010 and post-2010 eras. The key moment was the introduction of the expert selection panel, which was created in order to increase quality and depoliticize judges. As to the latter, the autonomy of judges in administering the court is high, with the Council of Ministers having a bearing only on setting the budget. Judges generally enjoy wide independence both *de jure* and *de facto* and, according to scholarship, this results in output independence as well. Regarding accountability, there is a contrast between limited external accountability and the existence of internal accountability, encompassing both judicial and non-judicial behaviour. While one can say that the ECtHR decision making is fully transparent, its internal operation and functioning of the advisory panel (how decisions are arrived at) are not. Therefore, JSG reforms did not increase this value. Stewart also raised the subject of professionalization and gender balance.

Commenting on the two papers in question, **Nino Tsereteli** observed that there is much more in common between the evolution of JSG at the national level and the evolution of JSG at the international level than one may notice. First, there is a common trend towards de-politicization, empowering judges and disempowering political branches in the judicial selection processes. At both levels, this was motivated by concerns about the quality of judges and their independence. However, the lesson learnt from the national level seems to be that one should be careful to assume a direct connection between the establishment of such bodies and improved quality/independence of judges. Another key similarity lies in the area of the internal organization of courts, including the power of the court presidents. This has not been viewed as being problematic at the international level (e.g. in terms of how that affects internal independence of individual judges), unlike the national level.

According to Nino Tsereteli, while the developments at both European Courts appear to be similar, there are certain differences, such as the nature of the institutional arrangements (including how much power is given to the expert panels) and what kind of impact the changes have on the relevant values. She then paid attention to the differences of views of the two speakers. For example, the extent to which the establishment of expert panels could have influenced judicial independence in their respective jurisdictions or differences connected to the extent to which accountability of individual judges has been promoted in each of these jurisdictions. Some of the divergences may be explained by the trade-offs made when designing these institutions: thus, differences in terms of which values were meant to be maximized.

During the discussion, the speakers were asked to provide more information on the selection process of the expert panels' members, to elaborate more on the possible explanation of the varied degree of (informal) influence of the two expert panels involved in the selection of supranational judges, since the Art. 255 Panel appears to be more influential than the "Strasbourg expert panel". The participants of the workshop also discussed to what extent this difference can be attributed to the weight/reputation of the panel members.

Session 8: Concluding discussion moderated by David Kosař

In this session, David Kosař wrapped up the findings from the workshop and highlighted some of the key trajectories of JSG in Europe.