

Chapter 2

The Trade-Offs of Judicial Governance



2.1 Introduction

In the previous chapter of this book, I began to analyse the relationship between different approaches to judicial governance and democracy. The approaches to judicial governance scrutinized were the judicial council model, the courts service model, and the Ministry of Justice model, in addition to a general category of hybrid and other models. This taxonomy reflects which actors have in each jurisdiction powers over the judicial branch, and what is the extent of those powers.

Such taxonomy, however, ignores an important dimension of judicial governance: the extent to which organs like judicial councils or courts services are independent from political actors. This dimension matters because it can affect the actual role that organs of judicial governance play in a political system. A clear example is that of judicial councils, for which institutional independence becomes crucial. Since judicial councils were created, among other goals, to increase judicial independence,¹ political control over these institutions might undermine their capacity to fulfil this fundamental task. Independence and power are thus two central dimensions for organs of judicial governance, and it is only by taking both into account that we can understand the role and contribution of these institutions to democratic systems.

In fact, these two dimensions are important because they are associated with trade-offs in institutional design. According to Garoupa and Ginsburg, organs for judicial governance face a dilemma between independence and accountability: institutions such as judicial councils were created to increase judicial independence vis-à-vis politicians, but in so doing they partly undermine the accountability of the judicial branch.² Additionally, organs for judicial governance face an intersecting trade-off: more powerful institutions are more capable of defending the judiciary from political

¹ See Garoupa and Ginsburg (2009a, b).

² Ibid.

actors, but in accumulating such powers they might become themselves a threat to the independence of individual judges.³

Trade-offs and institutional dilemmas matter because they force us to choose between political values that are important and, simultaneously, mutually exclusive. Such trade-offs compel institutional designers to confront important political choices. In this chapter, I will analyse such dilemmas of design of organs for judicial governance and how they affect the role of these institutions in democratic political systems.

2.2 Independent or Accountable Organs for Judicial Governance

Literature in law and politics suggests that two values are particularly important for judiciaries: independence and accountability. Albeit the independence and accountability of the courts are not the same as those of the organs for judicial governance, the former and the latter may frequently be connected.

Larkins defines independence as conflict resolution by a ‘neutral third (...) someone who can be trusted to settle controversies after considering only the facts in relation to relevant laws’, a ‘judge who has no relation to the litigants and no direct interest in the outcome of the case’.⁴ Van Dijk emphasizes that ‘it is generally believed that a high degree of judicial independence is necessary for people to appreciate and trust the courts (...). In turn, trust is seen as necessary for courts to be able to function, if only to incite people to bring their disputes to court, to cooperate with the court and to accept judgements willingly’.⁵ The independence of the court system seems thus central to its successful operation.

Judicial accountability is more difficult to define, but in general it can be deemed as referring to responsiveness by courts and judges to other actors for their decisions and behaviour. This definition, however, opens two questions: which are the standards that must be used to assess accountable judicial behaviour, and to whom should judges be accountable?

On the first question, Contini and Mohr state that accountability should not be limited to verifying the productivity or efficiency of judges, but should also include values such as legality, equality, independence, and impartiality.⁶ On the second question, Burbank argues that judges should be accountable to the public, to politicians, and to the judiciary as an institution.⁷ From this perspective, the public matters because it has an interest in proceedings that are open and decisions that are accessible. Accountability to politicians would matter because they fund the court system

³ Castillo-Ortiz (2017).

⁴ Larkins (1996), p. 608.

⁵ Van Dijk (2021), p. 1.

⁶ Contini and Mohr (2008), p. 31.

⁷ Burbank (2007), p. 912.

and pass the laws the judges enforce. And accountability to the judiciary as an institution would be relevant because the independence of individual judges exists to protect the independence of the judiciary as a whole.

Both being important judicial-political values, the relationship between independence and accountability is nonetheless controversial. For Burbank, ‘judicial independence is merely the other side of the coin from judicial accountability’, both being complementary.⁸ However, for Garoupa and Ginsburg, the relationship between these two values is more complex: ‘while adequate institutions might enhance judicial independence and minimize the problems of a politicized judiciary, increasing the powers and independence enjoyed by judges risks creating the opposite problem of over-judicializing public policy (...) as more and more tasks are given to the judiciary, there is pressure for greater accountability because the judiciary takes over more functions from democratic processes’.⁹ The authors describe organs for judicial governance as situated in an intermediate point between total judicial autonomy—with no accountability—and total political control of the judiciary—with no judicial independence.¹⁰ For the authors, accountability requires that ‘the judiciary as a whole maintain some level of responsiveness to society, as well as a high level of professionalism and quality on the part of its members’.¹¹

The relationship between independence and accountability is thus ambiguous. These two values could be thought of not only as two extremes of a continuum but also as two independent values that might sometimes—yet not always—collide. As suggested by Contini and Mohr, whether there is a trade-off between independence and accountability depends on how we define these concepts.¹² On many levels, independence and accountability can coexist and even reinforce each other. For instance, a judiciary subject to more stringent standards of good practice will gain diffuse support, which it can then use to make decisions that run counter to the preferences of political majorities. But there is at least one dimension in which these two values are in a trade-off relationship in the context of the design of organs for judicial governance: the more independent organs for judicial governance are from political actors, the less accountable they are to them. This causes a tension, because judicial independence is a desirable value, but unaccountable judiciaries can become excessively activist or can incur in bad practices. For instance, it has been argued that accountability would be particularly important in developing countries, as ‘leaving the judiciary unchecked by external actors (...) might easily lead to corruption’.¹³

This is therefore the first dilemma of judicial governance. When designing organs for the governance of the judiciary, political actors may opt between having independent organs that are less subject to political accountability, or politically accountable institutions that are less independent than would be desirable.

⁸ *Ibid.*, pp. 911–912.

⁹ Garoupa and Ginsburg (2009a, b), pp. 117–118.

¹⁰ *Ibid.*, p. 106.

¹¹ *Ibid.*, p. 106.

¹² Contini and Mohr (2008).

¹³ Bobek and Kosar (2014), p. 1271.

2.3 Powerful or Harmless Organs for Judicial Governance

The second aspect of institutions for judicial governance that presents important trade-offs is their range of powers. Institutions for judicial governance present a wide variation in the amount of powers that they hold. In principle, institutions with a wide range of powers should be a good thing: in accumulating powers over judicial careers and judicial management, they take these powers away from the hands of political actors, thus maximizing judicial independence. However, there is a downside to having powerful institutions for judicial governance. When these institutions are very powerful they indeed might have the capacity to defend judges from political actors, but this is at the cost of rendering such institutions themselves a potential threat to the independence of individual judges.

A recent study provides some preliminary evidence in this regard. Using an empirical approach, the work showed that countries in which judges felt more frequently that their judicial council had not respected their independence were often countries with strong judicial councils.¹⁴ Therefore, powerful organs for judicial governance also come at a price, as it is these very institutions that might become a threat for the autonomy of individual judges.

This is then the second dilemma of judicial governance. Constitution-makers and policymakers can opt between having strong organs for judicial governance that can become an internal threat for the autonomy of individual judges, or weak institutions that cannot protect judges from external pressures. This is a tragic dilemma, as both options involve sacrificing political-constitutional values that are central to the construction of judiciaries in a healthy democracy.

2.4 A Typology of Institutions

The analysis above identified two trade-offs in the design of organs for judicial governance: the powerful-harmless dilemma and the independent-accountable dilemma. These two theoretical dilemmas translate, in the practice of empirically existing organs for judicial governance, into choices regarding the design of the institutions: organs for judicial governance can be designed as either more or less powerful and as either more independent or more accountable. Furthermore, elements of institutional design intersect: the two dilemmas of the institutional design of organs for judicial governance interact, giving rise to four types or categories of organs.

In order to classify organs for judicial governance into such four categories, I gathered data about such organs in the countries of my sample and assigned values to each country (see Appendix A). For the powerful-disempowered dimension, I took into account whether the organ for judicial governance had significant powers over judicial careers or not. That is to say, I took into account whether it was a judicial council or a courts service institution. Countries following the Ministry of

¹⁴ Castillo-Ortiz (2017).

Justice model are excluded from the analysis in this part of the research, because in these countries there is no independent organ for judicial governance or this is less relevant. Hybrid approaches are also excluded, as their idiosyncratic features make classification unviable.

For the accountable-independent dimension, I took into account whether a majority of members of the organ had been formally appointed or not by political actors. In this latter regard, my analysis differs from that of Garoupa and Ginsburg, who measure politicization by taking into account how many members of the institution are judges, lawyers, or non-judges, regardless of who appointed them.¹⁵ My operationalization thus focuses essentially on *de jure* independence of the organs for judicial governance vis-à-vis other actors, especially politicians. For this reason, my main source of information on this aspect has been the formal regulation of organs for judicial governance, often contained in constitutional or legal sources. For this point, it is important to recall that *de jure* independence does not always equal *de facto* independence.¹⁶ For instance, this is the case if an institution is in practice controlled by external actors such as politicians, even when its regulation proclaims and even provides formal guarantees of independence. Yet, while both *de jure* and *de facto* independence are important, my focus on the former derives from an interest in studying the impact of formal rules in the practice of these organs and of the politics where they are created.

As with Table 1.1, the operationalization and assignment of values in this chapter made acknowledging that the classification of organs for judicial governance into types is complex, as there are many borderline and ambiguous cases. However, to maximize transparency and rigour, the final Appendix A provides justification and sources for each of the countries classified.

After assigning values to each institution for judicial governance in each of the two dimensions of institutional design, I constructed a Truth Table (Table 2.1). The Truth Table identifies all combinations of the two dimensions of design of organs for judicial governance, indicating which institutions belong to each configuration, as well as the number of cases and share of the total included in each configuration.

Own elaboration (see Appendix A for sources)

As can be seen in Table 2.1, out of those countries with a special organ for judicial governance, the most frequent type is that of powerful and formally independent councils for the judiciary, adding up 53% of the cases. The second most frequent model is that of formally independent courts services (23% of the cases). Powerful but not independent judicial councils comprise 15% of the total, while the proportion of the model of non-independently appointed courts services is 9%.

With the information provided in Table 2.1, some patterns seem to emerge. First, the general picture is one of organs for judicial governance that, at least in their formal design, are politically independent. Judicial councils and courts services that are *de jure* independent add up 76% of the cases. There are however important

¹⁵ Garoupa and Ginsburg (2009a, b), p. 122.

¹⁶ See for a discussion Voigt (2021).

Table 2.1 Truth table showing the typology of organs for judicial governance

Powers	Independence	Number	Share (%)	Cases
Yes	Yes	18	53	Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, France, Georgia, Greece, Italy, Kosovo, Lithuania, Moldova, Montenegro, North Macedonia, Romania, Slovakia, Slovenia, Ukraine
No	Yes	8	23	Belgium, Denmark, Iceland, Ireland, Latvia, Malta, Netherlands, UK*
Yes	No	5	15	Poland, Portugal, Serbia, Spain, Turkey
No	No	3	9	Finland, Norway, Sweden

* The UK includes the different courts services for England and Wales, Scotland, and Northern Ireland

exceptions to this rule, adding up almost one quarter of the cases. Second, the model of independent judicial councils is by far the most frequent approach to judicial governance among the countries covered by the table. It is interesting, however, that this model exists in Italy, France, and in a number of Central and Eastern European countries (in Greece a weaker version of the judicial council exists). This reinforces the idea that this model—based mostly on the Italian experience—disseminated to countries in transition from authoritarian regimes to democracy in Central and Eastern Europe, aided by European institutions.¹⁷ Without such dynamics of dissemination, this model, which is nowadays the most frequent approach to judicial governance in Europe, might have been an idiosyncratic trait of countries like Italy, France, and to some extent Greece.

Finally, there is one additional element to be taken into account. There are countries in the sample that have been classified as having an institutional design which makes their organs for judicial governance less independent from political actors: Poland, Portugal, Serbia, Spain, Turkey, Finland, Norway, and Sweden. But the variation within this group of countries is very sharp and has important consequences.

Such variation refers, first, to the type of organ for judicial governance, with some instances having a courts service and other ones having a judicial council. This is very relevant because the problems associated to political control over the organ of judicial governance are lower if powers over judicial careers are held by other institutions. To mention just one example, we can refer to the situation of judicial independence in Norway. This country is based on the courts service model, and politicians have a priori a say in the composition of this institution. But the powers over judicial careers of the Norwegian Courts Administration are not significant. A separate Judicial Appointments Board exists in this country, Norway, achieving very high levels of judicial independence.

The differences between countries in this group do not end with that. They also refer to the level of democratic quality of the countries and to the type of connections between political actors and the institutions of judicial governance, that create

¹⁷ Bobek and Kosar (2014); Castillo-Ortiz (2019).

differences within groups of countries that have a priori similarities in their model of judicial governance. For instance, the members of the Spanish judicial council are appointed by the chambers of the Spanish Parliament, but the system requires a parliamentary majority of three-fifths for appointment. Thus, the procedure does not eliminate the connections between political actors and members of the institution, but minimizes the risk of single-party control of the judicial council. By contrast, the new system of appointment in Poland has a subtle but very important variation. Members of the Polish *Krajowa Rada Sądownictwa* are appointed by the Parliament by a three-fifths majority, but in case this threshold is not reached, a subsidiary simple majority can be used for the appointment.¹⁸ This, in the words of Sadurski, ‘gives the ruling party a decisive say in the composition of the KRS’.¹⁹

2.5 Ideal Types and Practical Examples

In the previous section, I identified four ideal types of organs for judicial governance defined by their range of powers and their independence vis-à-vis politicians. In this section, I provide a reflection on each of these types and present some practical examples of how they work in the real world. This analysis is provided while acknowledging that a wide variation exists within types.

2.5.1 *Powerful and Formally Independent: The Hegemonic European Model*

The first configuration in the Truth Table (Table 2.1) refers to institutions with powers over the careers of judges and a majority of whose members are appointed by actors other than politicians. The range of powers of these institutions varies, with some organs for judicial governance having more powers than others. But in general, all of these organs have sufficient competences over judicial careers as to be considered instances of the judicial council model.

Theoretically, these institutions should have a great advantage: being more powerful and independent, these organs for judicial governance have more capacity to protect judges from the political branches of government. But in exchange for this positive aspect, this institutional design comes with a number of risks. Among them, the possibility to exert great power without subjection to political accountability,

¹⁸ Sadurski (2018) Bad Response to a Tragic Choice: the Case of Polish Council of the Judiciary. In: VerfBlog. <https://verfassungsblog.de/bad-response-to-a-tragic-choice-the-case-of-polish-council-of-the-judiciary>. Accessed 10 September 2022.

¹⁹ Ibid.

which might lead to corporatism,²⁰ increasing influence over public policy and the judicialization of politics.²¹

Garoupa and Ginsburg describe how the cases of France and Italy, with strong councils insulated from political control, have given rise to debates or reforms in these countries around the need to increase the accountability of judges.²² The idea of an unaccountable council is particularly worrying when it interacts with other factors, such as a judiciary socialized under authoritarian values. Guarneri summarizes the situation: ‘as external independence increases, the likelihood also increases that courts will be more or less out of step with national political majorities. This fact can lead to serious tensions, especially in transitional or consolidating democracies, where the rule of law values are not always entrenched among the political class and the public and most judges have often been socialised in a non-democratic environment’.²³

Some instances also show an additional problem: that formal designs of councils maximizing independence hide informal practices subjecting the institutions to political control. The experience of North Macedonia is interesting in this regard. The council in this country has followed the French-Italian approach but literature suggests the existence of problems with the *de facto* level of independence of the organ. Preshova et al. have argued that ‘it is rather evident that the judiciary [of North Macedonia] was not ready for the high level of self-government’.²⁴ However, the analysis of the authors reveals that the problem in this country was not the excessive insulation of the North Macedonian judiciary, but rather precisely a failure in the mechanisms that should have ensured judicial independence. According to the authors, the problem in this country was one of ‘undue political pressure from the executive and ruling party elites (...) extensive political pressure on the judiciary and judicial council, often through informal networks and means of political control (...) [including revealed] informal mechanisms of governmental and party control over the processes of recruitment, promotion and dismissal of judges, as well as governmental influence over high profile court verdicts’.²⁵ The North Macedonian council is a paradox: it was designed as a strong and independent council, but informal mechanisms of political control show what happens precisely when independence is lost.

²⁰ Solomon (2018), p. 44.

²¹ Garoupa and Ginsburg (2009a, b), p. 61.

²² Garoupa and Ginsburg (2009a, b), p. 108.

²³ Carlo Guarneri (2013), p. 354.

²⁴ Preshova et al. (2017), p. 22.

²⁵ Ibid., pp. 22–23.

2.5.2 *Independent and Managerial: The Standard Courts Service Model*

The second configuration in Table 2.1 comprises institutions with limited powers over judicial careers and whose system of appointment includes at least half of its members not elected by political actors. These institutions have clear advantages. They are independent from political actors and, given their restricted range of powers, they have scarce possibilities to damage judicial independence themselves. The group includes institutions as diverse as the organs for judicial governance of the UK (including the separate organs for England and Wales, Scotland, and Northern Ireland), Denmark, Ireland, and Latvia, among others. Despite the diversity within this group, countries in this category generally have consolidated, high-quality democracies. It has been suggested that institutions for judicial governance have made in these countries a contribution to judicial independence.²⁶

The similarities among these organs for judicial governance should not obscure their differences. Bunjevac's explanation of the contrast between the Irish courts service and the model in England and Wales is particularly illuminating.²⁷ The author labels the Irish model as based in a 'majority partnership' because judicial members constitute the voting majority in the board of the institution, while the model of England and Wales is called 'minority partnership' because judicial participation constitutes less than half of the board.²⁸ Furthermore, in the English and Welsh model, the Lord Chancellor—appointed at the advice of the prime minister and member of the Cabinet—and the Lord Chief Justice—the Head of the Judiciary, appointed by a panel convened by the Judicial Appointments Commission—retain significant powers, to the point that when the board of the Courts and Tribunals Service cannot reach agreement by consensus they must refer the issue to them for a decision.²⁹ The Lord Chancellor and the Lord Chief Justice also approve the appointment of the board members and save those holding *ex officio* positions. Given the details of its design and the more preeminent position of the Lord Chief Justice, the model has been classified as one of independent judicial governance, but it clearly retains traces of hybridity.³⁰

The main risk for independent courts services has to do with a potential scenario of insertion into an illiberal political context. These organs seem to do well in a context of a functioning liberal democracy. But would they be able to protect judicial independence in a context of illiberal disregard for the rule of law? This points at the configurational nature of institutions. Similar institutions produce different results when interacting with different political and legal environments. The three UK courts services (for England and Wales, Scotland, and Northern Ireland), for

²⁶ Win Voermans (2003), p. 2141.

²⁷ Bunjevac (2020).

²⁸ *Ibid.*, pp. 35–39.

²⁹ *Ibid.*, p. 39.

³⁰ See also Castillo-Ortiz (2017).

instance, interact with a consolidated democracy in which there are formal and informal mechanisms to guarantee judicial independence. In the context of a liberal democracy, managerial institutions such as courts services can be useful organs. But a hypothesis is that those very institutions could become insufficient to protect judicial independence in countries with illiberal executives. The reason is that, deprived from powers over judicial careers, they would have little resistance to offer against authoritarian politicians. In such a context, the role and resilience of remaining institutions for judicial governance, such as judicial appointment organs, might become extraordinarily important.

2.5.3 *Powerful but Politically Appointed: Politicized Judicial Councils*

A third type of organ for judicial governance is featured by a wide range of powers over the careers of judges combined with *de jure* political control over the appointment of members. This type of council has an advantage: accountability—to politicians—is maximized in the design of the institution. In exchange for this ‘advantage’, these types of approaches can be problematic, because they run with the risk of undermining the independence of the organ for judicial governance.

A good example of organs in this category is provided by the Spanish case. The Spanish *Consejo General del Poder Judicial* is featured by a wide range of powers together with a system of parliamentary appointment of all its members. As a result, according to Iñiguez Hernández, it is the leaders of the political parties who choose according to their proportional parliamentary strength the composition of the institution.³¹ The result, according to the author, is a Council scarcely effective vis-à-vis threats to independence from political actors.³² Note that the design of the Spanish judicial council does not necessarily translate into a subjugated judiciary. In a country like Spain, judges still enjoy a wide range of guarantees of independence, from the system of recruitment to the tenure character of their positions.

Other cases in this category are notably more problematic. After all, the supermajority required for the appointment of members of the Spanish judicial council minimizes the risks of the institution being controlled by a single party. That is not the case of other instances in this category. As explained earlier, Poland has become a paradigmatic example of rule of law backsliding in Europe. Central to this process has been the control by the ruling party of the judicial council and the judiciary of the country.³³ In this country, the process of appointment of members of the council has been modified by the ruling Law and Justice (PiS) party. Initially, the majority of members of the council, 15 judges, were elected by peer judges. But after a legislation passed in December 2017, the council members are to be elected

³¹ Iñiguez Hernández (2014), p. 149.

³² Ibid., p. 149; Pérez (2018).

³³ Kovács and Scheppele (2018); Sadurski (2019).

by the parliament by a 3/5 majority and, in case this threshold is not reached, by a simple majority.³⁴ Given that the powers of the Polish judicial council are slightly more limited than those of some European counterparts, these manoeuvres intended at controlling the institution might seem surprising. Sadurski's work on the process of rule of law backsliding in Poland is useful to understand this apparent paradox. Albeit institutionally weaker than other European judicial councils, the powers of the *Krajowa Rada Sądownictwa* (KRS) still include the nomination of candidates for a judicial position. According to the author, 'PiS from the very beginning of its campaign against the judiciary considered the judicial component of the KRS to be the main obstacle to its reform'.³⁵

2.5.4 *The Residual Type: Managerial and Politically Appointed*

A fourth type of organ for judicial governance is that of courts services, with little powers over the careers of judges, which are nonetheless formally under the control of political actors. This combination is not very frequent in the sample, and that might be for a reason: when organs for judicial governance have fewer powers 'different actors—including politicians—have fewer incentives to play battles over their control'.³⁶ The configuration covers organs such as those, Finland, Sweden, and Norway, countries which perform excellently in different indexes of democratic quality.

This category opens two interesting lines of inquiry. First, given the proximity of the Nordic countries covered by this type, it is not difficult to hypothesize that there might be some sort of cross-country observation that explains why Finland, Sweden and Norway (and only them) opted for this approach to judicial governance. The second has to do, again, with the capacity of institutions of this type to protect judicial independence in a—hypothetical—scenario of a country ruled by an executive of illiberal tendencies. In this case, the risk posed by the limited powers of the institution—as explained for the subtype of 'standard court services'—is complemented by the more political approach to the appointment of its members.

2.6 Powers, Independence, and Democratic Quality

Drawing on the information provided so far in this chapter, there are two issues that I would like to emphasize. The first of them is that organs for judicial governance

³⁴ Sadurski (2018), p. 39.

³⁵ Ibid., p. 38.

³⁶ Castillo-Ortiz (2017), p. 331.

are, with no exception, subject to inherent dilemmas of institutional design. The second is that, theoretically and a priori, the model of formally independent judicial councils seems well equipped when it comes to defending democracy and the rule of law against illiberal actors. This is because these institutions are designed to insulate judiciaries from political actors, protecting judicial independence and thus facilitating the role of courts systems as a constraint and a check on political power. This, however, contrasts with a fact: as shown in Fig. 2.1, countries following the model of independent judicial councils actually do not perform particularly well when it comes to democratic quality.

Figure 2.1 shows all the approaches to judicial governance explored so far in this book. It also shows the average score in the V-Dem liberal democracy index of the countries by model of judicial governance. The group with the highest average democratic quality is that of countries with a formally dependent courts service model. These countries exhibit a significantly higher average democratic quality than countries with an independent judicial council. Furthermore, countries with judicial councils—either *de jure* dependent or *de jure* independent—do not compare very well with the rest of the groups. Formally independent judicial councils have a significantly lower average democratic quality than both formally dependent and independent courts services. And the group of dependent judicial councils has one of the lowest average levels of democratic quality in the sample.

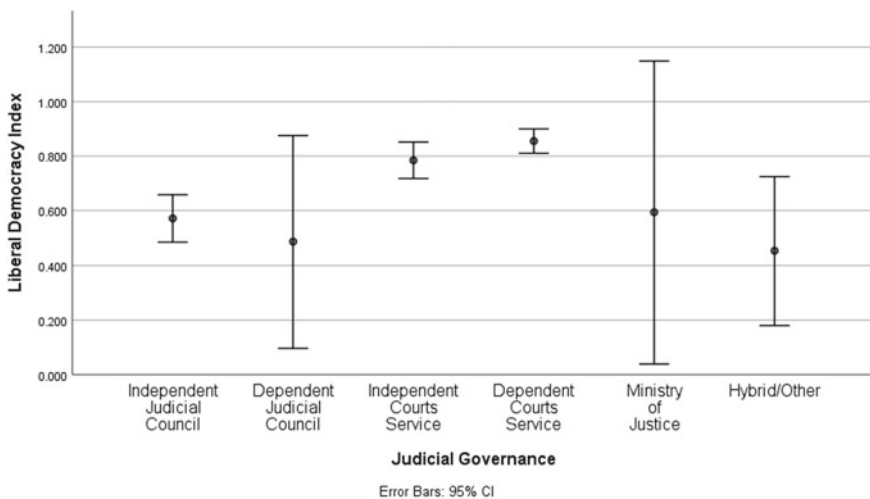


Fig. 2.1 Types of organs of judicial governance and democratic quality

2.7 Conclusion: Towards the Best Imperfect Model for Judicial Governance

This book explores the relationship between judicial governance and democracy. In this chapter, I have scrutinized the design of organs for judicial governance in Europe, analysing the trade-offs inherent in such institutional design. Precisely because these trade-offs are difficult to circumvent, designing good organs for judicial governance seems a difficult task. Judiciaries in liberal democracies are expected to display certain characteristics and to uphold a number of values. In designing organs for judicial governance, sometimes those values are in tension. On the one hand, democracy requires not only judicial independence but also judicial accountability. As stated by O'Donnell, 'The judiciary must be free of undue influences from executive, legislative and private interests, and if that is the case, the judiciary must not abuse its autonomy for the pursuit of narrowly defined corporate interests'.³⁷ However, in designing organs of judicial governance, we need to decide whether we want to create more independent but less politically accountable institutions or the other way around. On the other hand, democracy not only requires an independent judicial branch but also judges which are individually independent. In creating strong organs for judicial governance, the independence of the judiciary as a whole might increase vis-à-vis politicians, but such strong organs might undermine the independence of individual judges within the judiciary as a body.

Not all approaches to judicial governance necessarily make an equally good contribution to democracy. In theory, the model of powerful and formally independent judicial councils seems a priori very well-suited to these purposes. This is such because this type of institution is well equipped to protect the judiciary from the assault of authoritarian politicians. In accumulating powers over the judicial branch, powerful judicial councils take these powers away from the other branches of government. And in maximizing independence in their design, these councils become less amenable to political instrumentalization.

This expectation, that independent judicial councils are good at protecting democracy, is however subject to two caveats. First, the trade-offs inherent to judicial governance also affect these powerful and independent judicial councils. The second caveat is that the model of independent judicial councils does not seem to be correlated to higher levels of democratic quality (Fig. 2.1). This adds to the puzzle presented in Chap. 1 that showed that countries with judicial councils are in general associated to lower levels of democratic quality than countries with courts services. Overall, this forces us to confront a paradox: the model of independent judicial councils is theoretically particularly well equipped to protect democracy, but countries with this approach to judicial governance have in general democracies of worse quality. The next chapters provide a more detailed analysis of this paradox.

³⁷ O'Donnell (2004), p. 44.

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