

# Chapter 5

## Conclusions and Some Policy Reflections



### 5.1 The Complex Relationship Between Judicial Governance and Democracy: Summary of Findings of This Research

In this book, I have analysed the relationship between models of judicial governance and democracy. To do so, I have relied on a newly gathered database of all models of judicial governance in all European countries—except for the smallest countries—which is to the best of this author’s knowledge the first comprehensive database of these organs in the region (see Table 1.1 and Appendix A).

My findings point at the relationship between judicial governance and democratic quality being rather complex so that explaining such relationship will require some nuances. At first sight, European countries relying on a judicial council have on average democracies of worse quality than countries relying on models such as the courts service. This was the case even for those judicial councils whose design provided, at least formally, some insulation from political actors. This is striking, as the judicial council model has become the standard recommendation by European institutions and international best practice when it comes to managing the judiciary.

However, such a negative correlation between democratic quality and the presence of a judicial council seemed to be hiding the impact of other factors. Judicial councils were often implemented in Europe in countries in transition from authoritarian regimes to democracies. According to modernization theory,<sup>1</sup> democratization is strongly linked to economic development. Nevertheless, countries do not have equal levels of economic development, which could translate into different levels of democratization. With this background, this research hypothesized that at equal levels of economic development, having a judicial council might not be negatively correlated to democratic quality after all. My results in Chap. 3 pointed in that direction.

---

<sup>1</sup> See Inglehart (2018); Lipset (1959).

In fact, as suggested by my configurational models in Chap. 4, judicial councils that were at least *de jure* independent from political actors were not always logically relevant to democratic quality. Many countries had high levels of electoral democracy quality regardless of their model of judicial governance. But conversely, countries with low levels of democratic quality never had an independent judicial council, and the absence of this institution was part of the logically sufficient path to such outcome. The impact of judicial governance on democratic quality, thus, cannot be discarded, even if this might be occurring in forms that are frequently counterintuitive and in different ways for different types of countries.

In this chapter, I take stock of the findings of this book. In the next section, I do this at the policy level, presenting some evidence-based reflections to be taken into account when designing models of judicial governance. In the following section, I discuss the main limitations of this research and the challenges that lie ahead for research about judicial governance. Next, I warn against the idea that only democratic quality matters when assessing the adequacy of models of judicial governance. The final part concludes the chapter and the book.

## 5.2 Some Evidence-Based Policy Reflections

So far there has been a significant amount of academic and political discussion about judicial governance and democracy. However, unfortunately, little evidence has been provided at the empirical level about the relationship between these two questions. The aim of this book was to contribute to filling this important gap. Evidence-based approaches can help policymakers improve models of judicial governance. In particular, empirical evidence can help design judicial governance in such a way that it provides for better quality democracies, at a time at which democratic systems of government seem to be under stress in several countries. Based on the findings of this research, some reflections can be put forward. These reflections should however be taken with a grain of salt: they are based on the provisional evidence gathered in this research. Such evidence is, I believe, robust, even if I have tried to phrase it and present it in the most cautious possible way. But as it is the case in general in the social sciences, my findings will need further research and confirmation (see more on this in the last part of this chapter).

### 5.2.1 *Ensuring Independent, Non-corrupt Judiciaries*

In my QCA analyses, the independence of the court system seems to be particularly important when understanding the quality of electoral democracy of the countries.

Countries with a high quality of electoral democracy were very frequently countries in which (high) courts were highly independent and levels of judicial corruption were low, even if these conditions alone were not logically sufficient to such outcome. Instead, they were combined with other conditions such as high GDP and EU membership.

If, as the models in this book seem to suggest, high court independence and absence of judicial corruption matter, then policy efforts around judicial governance have good reasons to focus on the achievement of these two values. This is so for two reasons. First, because judicial independence and absence of corruption are normatively valuable in themselves. Second, also, because if the analyses in this research point in the right direction, judicial independence and absence of corruption might be important ingredients of the recipe for solid democracies. Note, however, that countries with high levels of high court independence and low levels of corruption were not always countries following the model of independent judicial councils. And also note that such model of judicial governance was logically irrelevant to the outcome ‘high quality of electoral democracy’. All this points to one interesting conclusion: the struggle for independent and non-corrupt judiciaries is very strongly connected to, but is not the same thing as, the push for the dissemination of the judicial council model. I elaborate more on this below.

### ***5.2.2 The Judicial Council Model is not a Bad Arrangement after all ...***

Earlier in this book I discussed different mechanisms of judicial governance, as well as their theoretical advantages and disadvantages. My analyses in Chap. 3 presented evidence against the idea that they could be negatively associated to the quality of democracy. The analyses in Chap. 4 showed that, albeit the model of independent judicial councils is irrelevant to explain high levels of electoral democracy quality, its absence is a logically necessary condition for low levels of electoral democracy quality, and part of the sufficient path to such outcome.

The model of independent judicial councils is thus, after all, not a bad arrangement. Countries with low levels of electoral democracy quality had all in common the absence of this approach to judicial governance. With similar background conditions (lower levels of GDP and lack of EU membership), countries with an independent judicial council (and low levels of judicial corruption) displayed better levels of democratic quality than countries without it. And the logical irrelevance of the model of independent judicial councils for high quality of electoral democracy does not mean that this arrangement is detrimental to democratic quality, but simply that such outcome occurred in the sample with or without it.

### ***5.2.3 ... but Alternatives to the Judicial Council Model Should not be Discarded***

The judicial council model is thus not a bad arrangement. But what happens with the other approaches to judicial governance?

Many countries will not be willing to implement the model of strong and independent councils at all. And this might not be a problem. As explained, the model of independent judicial councils appears in my analysis to be irrelevant to high levels of quality of electoral democracy. Put differently, countries can achieve exemplary electoral democracies without this approach to judicial governance. In fact, this finding is in line with the most recent literature in the field regarding the relationship between judicial governance and judicial independence. In their work, Šipulova et al. showed evidence that judicial empowerment is possible in the absence of the existence of the judicial council model, and even under the Ministry of Justice model.<sup>2</sup>

For that reason, in some cases, the existence of other models of judicial governance might be a legitimate choice. Put in other terms, for countries that have a functional model of judicial governance different from that of strong and independent councils, preserving it might be a good idea. This could be the case, for instance, if that model of judicial governance performs well with regards to the maximization of values such as judicial independence, accountability, efficacy, or democracy protection.

The idea that countries can opt for alternatives to the model of independent judicial council is, however, subject to some conditions. This model was not part of the sufficient path for high electoral democracy quality. But other conditions were a combination of high GDP, membership of the EU, and independent, non-corrupt judiciaries. Absent these or other conditions that might lead to high quality of electoral democracy, countries should be cautious in dispensing with the model of independent judicial councils, given that the absence of this institution was a necessary condition for a low quality of electoral democracy.

Furthermore, models of judicial governance that undermine aspects such as judicial independence or that allow judicial corruption can be, for that reason, a risk to democratic quality. Countries with high levels of electoral democracy quality should thus be cautious too, and ought to avoid the implementation of such models of judicial governance if they want to remain high-quality democracies.

---

<sup>2</sup> Šipulova et al. (2022:1).

### 5.3 'Then, are We Sure that We Understand the Relation Between Judicial Governance and Democracy'. Limitations of this Research and Future Research Challenges

As I advanced in Chap. 1, when preparing this book I had three aims in mind. My first aim was to make an academic contribution to the understanding of the complex, paradoxical, and often counterintuitive relationship between judicial governance and democracy. My second aim was to put forward some policy reflections, contributing to the debate about how to achieve better and more resilient models of judicial governance. Last but not least, I wanted to contribute to the public debate about judicial governance, providing explanations that are as clear as possible on this subject.

In reading this book, social scientists will understand that the empirical findings are, like all findings in our disciplines, subject to shortcomings and limitations. But since I want to make a contribution to public debate about judicial governance, the general readership of this book deserves some transparency in these regards. In particular, contributing to the public debate with this book involves acknowledging that my analyses should also be subject to criticism and scrutiny. In particular, I suggest my readers pay attention to a number of aspects.

First, classifying countries into models of judicial governance is a difficult task. As I said earlier in this book, any classification is apt for contestation, perhaps even controversy. And this is not only because definitions—such as those of judicial councils, courts services, or Ministry of Justice models—have always an inherent degree of vagueness that we can minimize but not eradicate. It is also because the sources of information are always limited, and because cases are frequently so *sui generis* that they are difficult to classify. As my analysis is built upon those difficult and contestable classifications, they should always be taken cautiously.

A second aspect that I wanted to remark on is that my analysis captures a static picture of the relationship between judicial governance and democracy. I focused on organs of judicial governance and indicators of democratic quality as they were at the time of writing this book. A longitudinal study—that is to say, one which takes into account the time dimension and the historical evolution of the object of study—would be a better alternative. However, unavoidable limitations in the research—including, but not limited to, the availability of information and resources—suggest this would be a fruitful avenue to explore in the future. Still, it is necessary to admit that including the historical dimension in the analyses would be much more informative and make the findings much more robust.

Something similar happened with the geographic scope of this book. The analysis of this research, restricted to European countries, was interesting for several reasons. First, the variation within the sample of countries with regards to types of approaches to judicial governance and democratic quality allowed me to carry out meaningful analysis. Additionally, regional specific factors, such as the Europeanizing pressures in favour of the implementation of the judicial council model, rendered the countries

in my sample particularly suitable for this type of exploration. However, for obvious reasons, analyses covering other world regions—perhaps the whole of the globe—would be a fantastic development to the research undertaken in this book.

The research choices made also matter. For instance, to account for whether an organ for judicial governance was *de jure* ‘politically independent’ I focused on the organ appointing its members. I believe that this was the right choice: after all, literature on Judicial Politics has discussed the phenomenon of ‘loyalty to the appointer’ in judicial-type institutions,<sup>3</sup> so there were reasons to think that such phenomenon takes place also in organs for judicial governance. However, this was not the only operationalization option available: a different operationalization could have focused, for instance, on the professional background of members of the organs, rather than on their appointers.

Finally, there are inherent limitations to some of my specific analysis. These often had to do with the small size of my sample: with only 46 cases, I opted for a conservative approach to many of these analyses, trying to minimize the number of variables used—that is to say, trying to explore only a small number of explanations at the same time. Fortunately, the use of QCA as a complement to statistics allowed me to include more factors and explanations in my models, thus accounting for the complexity of the object of this study.

### 5.3.1 *Judicial Governance Beyond Democratic Quality*

One final warning about this book has to do with its focus: the relationship between judicial governance and democratic quality. Democratic quality is extremely important, and it should be taken into account when designing models of judicial governance. But democratic quality, important as it is, is not the only thing that matters. Judicial governance might have implications for many other important aspects of democratic societies. Does the model for judicial governance of a certain country contribute to achieving an efficient judiciary? What about an independent judiciary? And what about the fight against judicial corruption?

I will provide an example of why these questions are important. We can think about Spain, where an ongoing controversy exists on the question of who should appoint the members of the Judicial Council.<sup>4</sup> If the findings of this book are correct, it might be thought that democratic quality is not a strong argument in favour or against the current system of appointment, where the parliament appoints the members of the *Consejo General del Poder Judicial* by a super-majority. This is because for high-quality democracies (like Spain) the model of judicial governance seemed to be scarcely relevant, as it disappeared from the solution for the sufficiency of that outcome. This would be also the case because the statistical analyses were not able to

---

<sup>3</sup> For instance, Garoupa et al. (2021).

<sup>4</sup> Castillo-Ortiz (2022); Hernández González (2022); Pérez (2018).

find a significant correlation between models of judicial governance and democratic quality in terms of net effects.

However, that idea (the irrelevance of the debate on judicial governance for a country like Spain) should be dismissed quickly. First, because the book actually shows that judicial governance does seem to matter in certain ways for democratic quality: for instance, the absence of independent judicial councils seemed to be a logically necessary condition for authoritarian rule. Furthermore, as said above, a model of judicial governance which undermined aspects such as judicial independence and increased judicial corruption could be a direct risk for democratic quality, as these factors do feature in my analysis as relevant in cases of high quality of electoral democracy. Given that countries can suffer from democratic erosion, even high-quality democracies should thus be wary of the idea that judicial governance is irrelevant for them.

The second reason is connected to the former. The debate about judicial governance (in Spain as in any other country) should not be only about how organs for the governance of the judicial branch directly contribute to democratic quality, even if that topic should always be a priority one. The debate should be also, as I said before, about other aspects, such as the contribution of the design of judicial governance to the fight for judicial independence, the rule of law, judicial efficiency, and against corruption. These aspects will often be related to democratic quality, but they also matter in themselves. Unfortunately, we still have very little empirical evidence on these important aspects.

## 5.4 Judicial Governance Matters

The politics of judicial governance are here to stay. Policymakers will always have to opt for competing designs of judicial governance. In so doing, they will have to evaluate how each model of judicial governance performs vis-à-vis the maximization of certain values. Democratic leaders will want to maximize judicial independence, accountability, and the capacity of the judiciary to protect democracy. Authoritarian leaders will prefer models of judicial governance that maximize judicial submission to the executive. Unfortunately, we have seen the latter approach in many of the countries explored in this book.

So far, we know very little about how each model of judicial governance actually performs in relation to their declared institutional goals. Organs for judicial governance should be assessed against a large number of standards, and in a number of different dimensions: from their capacity to efficiently manage resources to their ability to increase judicial independence or accountability. Their contribution to

democratic quality is only one of the institutional goals against which the performance of organs of judicial governance should be measured. But it is a very important one. At the end of the day, the question of judicial governance is present in many accounts of processes of rule of law backsliding.<sup>5</sup>

However, so far the evidence in this area had been scarce. We simply did not know very well which designs of organs of judicial governance have a better capacity to contribute to the quality of democracy in different countries, and why. With this book, I hope to have contributed to our understanding of this very important issue.

## References

- Castillo-Ortiz P (2022) El gobierno de la judicatura en España. In: Informe sobre la Democracia en España 2021. Fundación Alternativas, pp 33–44
- Garoupa N, Gili M, Gómez Pomar F (2021) Loyalty to the party or loyalty to the party leader: evidence from the Spanish constitutional court. *Int Rev Law Econ* 67:105999. <https://doi.org/10.1016/j.irl.2021.105999>
- Hernández González G (2022) La independencia de Consejo General del Poder Judicial en España: una perspectiva comparada con los países del entorno y propuestas de mejora. *Fund Altern*
- Inglehart R (2018) *Cultural evolution*. Cambridge University Press, UK
- Lipset SM (1959) Some social requisites of democracy: economic development and political legitimacy. *Am Polit Sci Rev* 53:69–105. <https://doi.org/10.2307/1951731>
- Pérez AT (2018) Judicial self-government and judicial independence: the political capture of the general council of the judiciary in Spain. *Ger Law J* 19:1769–1800. <https://doi.org/10.1017/S2071832200023233>
- Sadurski W (2019) *Poland’s constitutional breakdown*. Oxford University Press
- Šipulová K, Spáč S, Kosař D, Papoušková T, Derka V (2022) Judicial Self-Governance Index: towards better understanding of the role of judges in governing the judiciary. *Regul Gov*. <https://doi.org/10.1111/rego.12453>

**Open Access** This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter’s Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter’s Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.



<sup>5</sup> See, for instance, Sadurski (2019).