When Councils of the Judiciary Become a Threat to Judicial Independence. A mvQCA Analysis

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Abstract

Councils of the Judiciary have spread in Europe under the assumption that they contribute to the independence of courts and judges under their authority. However, empirical evidence suggests that in many instances judges perceive these institutions as disrespectful of their autonomy. With the aid of QCA, this paper explains the causes of this paradoxical phenomenon. It is argued that judges hold such negative opinions of Councils of the Judiciary as the result of the interaction between conditions like the range of powers of the Councils, their control by political elites and interest groups, and the degree of judicial corruption.

Key words

Councils of the Judiciary – Judicial independence – Judicial associations – Judicial Politics - Qualitative Comparative Analysis (QCA)

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I. Introduction. The paradoxical relation between Councils of the Judiciary and judicial independence.

In the last decades, Councils of the Judiciary have consolidated in Europe as one of the most wide-spread mechanisms for the governance of the judicial branch. In the words of Beers (2012: 51) these institutions can be defined as 'constitutionally mandated bodies endowed with the legal authority to manage the careers of judges, independent of government influence and oversight'. According to Bell (2006: 27) the concept of Judicial Council was invented in France in the late 19th Century, linked to the idea of an institution designed to protect the independence of the judiciary. With this background, the first modern Judicial Council was the French *Conseil Supérieur de la Magistrature* of 1946, followed by the Italian *Consiglio Superiuore della Magistratura*, authorized in 1948 but implemented in 1958 (Haley, 2006: 86). In the current European context, the importance of these institutions is reflected in the existence of a European Network of Councils of the Judiciary, formed by 22 members.

Despite it being one of the foundational goals of Judicial Councils, the contribution of these institutions to the maximization of judicial independence remains in fact a contested issue. General definitions of Councils of the Judiciary insist in their *a priori* function of safeguarding the judiciary from political influences. Garoupa and Ginsburg (2009a: 106) state that Councils of the Judiciary are 'designed to insulate the functions of appointment, promotion and discipline of judges from the partisan politics process while ensuring some level of accountability'. In the same vein, Beers (2012: 51) considers that these institutions are 'designed to insulate the judiciary from overt political influence while placing the responsibility of governing and monitoring judicial behavior in the hands of independent judicial authorities'. From this perspective, Councils of the Judiciary should generally be perceived by judges as a guarantee for the protection of their independence. However, at the same time a strand of literature has argued that, far from improving judicial independence, Councils of the Judiciary have often failed in achieving such goal (Haley, 2006:87; Bobek and Kosar, 2013:4) or even have sometimes contributed to continuing political control over the judiciary (Beers, 2012: 54).

A recent survey of the European Network of Councils of the Judiciary (2014-2015) added further mystery to this academic controversy, showing that judges in different countries have largely divergent views of their Councils. When asked whether they perceived that their Council of the Judiciary had respected their independence in the last years, the share of negative responses was extremely low –just 3 per cent- for Councils such as the Belgian, Polish or Danish ones. However, that share was much higher for some countries: it was of 10 per cent in Italy, 15 per cent in Bulgaria, 21 per cent in Portugal, and a shocking 36 per cent for the case of Spain. How can we explain this variation and, in particular, what explains the paradoxical cases of significant judicial distrust in an institution original designed to protect the independence of judges?

This paper is aimed at answering this question. At the academic level, such response will contribute to our knowledge of clearly under-studied judicial institutions such as Judicial Councils. Despite their central role in the judicial and political systems of many European countries, our knowledge of Councils of the Judiciary, especially at the empirical level, is extraordinarily limited. At the practical level, solving the research puzzle has the potential to contribute with evidence-based inputs to the debate about the improvement of our judicial systems. In particular, it can help us understand which features of the Councils facilitate a smooth relation with judges, and which concrete aspects of those institutions have a negative effect on the judicial perception of respect to their independence. To so, this article analyses 15 European Councils of the Judiciary through the use of multi value QCA (mvQCA). The evidence found suggests that the solution to the research puzzle lies in the interaction of different aspects of the Councils. On the one hand, in certain key elements of the design of these institutions, which structure their relations with both political actors and with the judiciary, such as the range of powers of the Council and the mechanism for appointment of members. On the other hand socio-political and socio-legal aspects, such as the role played by interest groups operating within the judiciary and practices of judicial corruption, also seemed to play an important role.

The remainder of this article is as follows. After this introduction, the theory and configurational hypotheses of the research will be presented. Subsequently, the main methodology of the article (mvQCA) will be explained, and the sources and operationalization of the phenomena will be described and justified. Next, the empirical section of the article presents the analyses of sufficient conditions for the multi-value outcome –judges' assessments of respect of Councils of the Judiciary for judicial independence-. The last section concludes.

II. Theory and configurational hypotheses

Judges' assessment of the extent to which Judicial councils respect their independence is one of the dimensions in which we can evaluate the functioning of these institutions. As Judicial Councils are designed to protect judicial independence, perceived lack of respect to their autonomy by judges can be seen *a priori* as dysfunctional. Furthermore, understanding the causes of this dysfunction is extraordinarily relevant in order to contribute to the debate on the reform of judicial institutions with evidence-based arguments. Drawing on the most relevant literature in the field, this section puts forward four potential explanations which can account for judicial perception of respect to their independence by Judicial councils. Far from being competing and mutually exclusive, it is argued that these four explanations combined among themselves producing different results in each case.

- Appointment. In their pieces on this topic, Garoupa and Ginsburg (2009a: 131) argued that both independence and political accountability were desirable institutional goals when designing Councils of the Judiciary, but they also suggested that in pursuing accountability Councils may end up suffering an excess of political control (Garoupa and Ginsburg, 2009b: 77). The forms of appointment of the members of the Councils of the Judiciary are central to this idea. These forms of appointment register a wide variation across countries, ranging from parliamentary appointments to different forms of election by the members of the Judicial Branch. Despite this diversity, the control of appointment by the very judiciary has consolidated as a good practice. The European Network of Councils of the Judiciary stated in a recent report that 'the mechanism for appointing judicial members of a Council must be a system which excludes any executive or legislative interference and the election of judges should be solely by their peers' (ENCJ, 2010-2011: 5). The importance of the mechanism of appointment is also acknowledged by academic literature. According to Guarneri (2013: 350) 'at least in principle, judicial independence will be stronger with a higher ratio of members chose directly by and from the judiciary'. Thus, it can be theorized that political control over the appointment of members of the Council will drive to a higher perception of the institution as a disrespectful of judicial independence.

- Range of powers. According to Hall and Taylor (1996:939), one of the core features of neo-institutionalist theories is that they seek 'to elucidate the role that institutions play in the determination of social and political outcomes'. Together with the procedure of appointment of members, one of the core aspects of the institutional design of Judicial Councils is their range of powers. Indeed, this aspect is essential to understand judges' perception of

respect to their independence. As suggested by Guarneri (2013:350), it can be expected that the more extensive their functions, the stronger the role of the Councils. However, powerful Councils are Janus-faced. On the one hand, when a Council of the Judiciary accumulates power over judges it might be taking that power away from political actors. On the other hand, however, the same powers that should allow Councils to protect judicial independence might be potentially used to curtail it. In this line, Garoupa and Ginsburg (2009a: 120) argued that competences such as those related to the organization and running of the judiciary, appointment or performance evaluation provide material incentives that can be used to reward certain sorts of judges. Bobek and Kosar (2013:14) went even further; for the authors, the powers of the institution can be easly misused: 'The Euro-model shields the judiciary from external influence, but it pays little attention to improper pressure on individual judges (…) [It] empowers only a narrow group of judges who in turn may favour their allies and shape the judiciary according to their views'. Therefore, a wider range of powers of the Councils should drive to a higher a perception of the institutions as detrimental of judicial independence.

- Associations of judges. The associations of judges are another phenomena largely underexplored in international research. In the words of Beers (2012:51), they can be defined 'voluntary organizations designed to serve the professional interests of judges'. The nature and types of associations are not however homogeneous across Europe. Bell (2006: 371) distinguishes two different models of judicial associations, one in which these represent the different political views of judges and another one in which they behave like professional associations with the aim to bringing together all members of the judiciary. Beers (2012: 51) has considered associations as institutions of judicial self-government, but has also acknowledged the 'potentially harmful impact' of poorly functioning ones. This is important to the explanation of Judicial Councils because judicial associations often play a role in the life of these institutions. Indeed, as put by Guarneri (2013: 350), certain Councils have strengthened their role, so that associations 'organise the participation of judges in elections to the council'. Thus, it can be considered that judicial associations that are perceived as detrimental of judicial independence will drive to a higher perception of Councils of the Judiciary as disrespectful of such independence.

- Judicial corruption. A final explanatory argument deals with judicial corruption, which has recently emerged as one of the newest concerns of literature in the field (see *inter alia* Guarneri, 2007: 209; Beers, 2012; Popova, 2012). Case-based literature has suggested that the extensive powers

of a Council and its insulation from any form of accountability is causally linked to judicial corruption (Popova, 2012). In a similar vein, the introduction of a Judicial Council has been blamed as responsible for increasing judicial nepotism (Bobek and Kosar, 2013:25). From a theoretical viewpoint, if a Council is corrupt it will be perceived by judges as a threat to their independence. Councils will be also perceived as detrimental of judicial independence if they are unable to protect the judiciary from external sources of corruption. In the latter case, they will be deemed as unable to fulfill its basic function of protecting the integrity and reputation of the judiciary, and blamed for the deterioration of the Judicial Branch. Thus, a higher perception of corruption should contribute to a higher perception of the Councils as detrimental of judicial independence.

As said above, rather than having individual impacts on the outcome of the research these four conditions combined in different forms in each case. Indeed, some of these combinations were particularly apt to drive to certain outcomes. Take for instance the relation between the powers of the Council and the mechanism of appointment of its members. In line with rational choice institutionalism, political actors might be assumed to be rational actors seeking to maximize their power under institutional constraints (*inter alia* Kato, 1996: 568, Shepsle, 2006: 28). In the instance explored by this article, the control of the Council gives politicians power over the judiciary as a whole: powerful councils appointed by politicians enhance rather than limit political control over judges. As Magalhes (1999: 44) suggested, institutional designs influence the extent to which political majorities can affect the composition of courts 'by allowing or preventing the appointment of judges whose preferences are known to be close to the majorities' and therefore by increasing or decreasing the likelihood of judicial decisions that favor their interests'. In this regard, the range of powers of the Council might become a tool for political subjugation: 'The rules regarding the management of judicial careers influence the responsiveness of judiciaries to dominant political actors' (Magalhaes, 1999: 44). For that reason, the first configurational hypothesis would pose that:

H_1. Councils with a wide range of powers and whose members are appointed by political actors will be perceived by judges as disrespectful of their independence

The second hypothesis links the range of powers of the Council with the general perception of corruption in the judiciary. When a Council has a wide range of powers, it is its responsibility to hold judges accountable for their actions. In these cases, it is the task of the Councils to keep the judiciary free from unethical practices, and therefore cases of corruption can be deemed as the result of the Councils ineptitude, inaction or

even acquiescence. Furthermore, when the Council has a wide range of powers and it is not subject to political control, it might be the very Council which engages in practices of corruption. In all these cases, the loss of independence that judges experience as a result of the constraints put by corruption upon the judiciary will be blamed on the Council, which might be seem as a direct or indirect threat to such independence. For that reason the second configurational hypothesis would suggest that:

> *H_2. Councils with a wide range of powers in countries where there is a high perception of judicial corruption will be deemed by judges as disrespectful of their independence.*

III. Data and methods

To account for judges' assessments of their Judicial Councils this article used the survey recently carried out by the European Network of Councils of the Judiciary (ENCJ). The ENCJ sent a questionnaire to national Councils of the Judiciary, which these distributed among their national judges. The response rates ranged from 3 per cent (Portugal) to more than 40 per cent (Scotland), so the sample sizes are proportionally much larger than those of most surveys in neighboring disciplines such as electoral behavior. This data was extremely valuable given that it is the only available source of information on this topic so far. However, it had two important caveats.

First, given that national judges were free to respond or not to the survey, the possibility of a self-selection bias cannot be ruled out. For that reason, and although a recent empirical study of the Dutch Judicial Council has also made use of this database (van Dijk, van Tulder and Lugten, 2016), the results of this article must be read with caution. The data of the ENCJ survey was used as it was the only source of information available to give a preliminary answer to the research question. While it was useful on such purposes, the conclusions of the article should be deemed only as a provisional first step in this direction.

Second, the responses of the individual judges to the survey were not made publicly available. While the ENCJ was willing to grant this data to individual researchers, its general distribution was not allowed, and this impeded replicability of any individual-level analysis. For this reason, this research uses only aggregated data and country-level explanatory conditions to carry out the analysis. At a theoretical level, the article does not exclude the explanatory capacity of individual level variables, which simply could

not be tested due to the limitations in the data available. Instead, the research focuses on country-level (or 'council-level') data in the belief that it will still tell an important part of the story. The analyses in the empirical section seemed to confirm this intuition.

To test the research hypotheses this article uses Qualitative Comparative Analysis (QCA), as this methodology is particularly powerful in examining causal relations for small and moderate N datasets, and more efficient than stochastic techniques in samples of such size. Additionally, the epistemological assumptions of QCA are especially apt to understand complex causation and the interaction between explanatory conditions, and turned out to be very useful in analyzing a meso level object of study such as the Councils of the Judiciary scrutinized by this article. While this section cannot explain in detail the functioning of QCA, it will provide for an explanation of key concepts and justification of the modalities of analysis and operationalization of the conditions used, in line with the best practices in the use of the methodology (Schneider and Wagemann, 2010). Readers willing to learn more about QCA will find useful some of the many handbooks and user guides about this set of techniques (*inter alia*, Rihoux and Ragin, 2009a; Schneider and Wagemann, 2012).

QCA takes a configurational approach to causation, in which it is the interaction between explanatory conditions –rather than their autonomous impact- what drives to outcomes (Rihoux and Ragin, 2009b: xix). As put by Berg-Schlosser *et al*. (2009: 6) in QCA 'each individual case is considered as a complex combination of properties, a specific "whole" that should not be obscured in the course of the analysis'. Given the nature of the object of study of the research, this article uses the 'multi-value' variant of QCA. The reason is that this allowed to better capture the subtleties of some of the conditions and the outcome. For instance, the condition 'appointment of members' admitted three qualitatively different forms of appointment (judicial, political, and hybrid). Likewise, the option for a multi-value outcome allowed a more fine-grained understanding of the phenomena explored, distinguishing cases of low, moderate, and high perception of disrespect for judicial independence. To perform the analysis, the recently released QCA-GUI pack (see Dusa, 2007) for R was used. This novel software presents two important advantages when performing mvQCA analysis vis-à-vis previously existing software. First, it includes coverage and consistency indicators for the mvQCA solutions. Second, it allows the specification of directional expectations when working with logical reminders.

Table 1. Source and calibration of conditions

Condition	Source	Operationalization
Council is disrespectful to independence [outcome]	ENCJ 2014-15 Report, question 8.4: *During the last two years I believe that my independence as a judge has been respected by the Council for the judiciary (disagree/strongly disagree).*	{0} = x<4.5 {1} = 4.5>x<9.5 {2} = x>9.5
Association disrespectful of independence	ENCJ 2014-15 Report, question 8.7: *During the last two years I believe that my independence as a judge has been respected by the Association of Judges (disagree/strongly disagree).*	{0} = x<6.5 {1} = x>6.5
Powers of the Council	EU Justice Scoreboard 2016, Figure 50: *Powers of the Councils for the Judiciary*.	{0} = x<6 {1} = x>6
Corruption	Global Corruption Barometer 2013 and 2010-11: *To what extent do you perceive the following institutions in this country [judiciary] to be affected by corruption? (1-not corrupt at all, 5-extremely corrupt).*	{0} = x<3.8 {1} = x>3.8
Appointment	EU Justice Scoreboard 2016. Figure 49 ENCJ website (Member factsheets). Secondary literature.	{0} = Mainly judicial {1} = Hybrid {2} = Mainly political

Table 1 reports all the conditions used in this research, the sources of information used and the operationalization of the conditions. Since missing values are generally problematic in configurational analysis, the research is circumscribed to the Councils of the Judiciary covered by all the sources of information. When more than one council existed for a judiciary, the more general one was used. For instance, for Italy the *Consiglio Superiore della Magistratura* was taken as reference, leaving aside the more specialized *Consiglio di Presidenza della giustizia amministrativa*. The size of the resulting sample was of 17 institutions, although the analysis showed a contradiction between two of them: the councils of Scotland and Northern Ireland, which had the same value in all conditions but had different outcomes. This research opted for a conservative approach and did not include contradictory configurations in the minimization, so the final analyses covered 15 cases. By way of hypothesis, some idiosyncratic factors mentioned by the literature for the case of Northern Ireland might account for the contradiction with Scotland: *inter alia* the very small size of its judiciary, the importance of interpersonal relations in this context, or the 'long period of political

conflict and violence' which 'has inevitably been a defining feature of the institutional and cultural shape of the judiciary' (Gee et al.2015:226). Additionally, note that for the condition 'corruption' only values for the UK as a whole were available, so the three British councils had the same value and it was not possible to differentiate Northern Ireland and Scotland.

As said earlier, for the outcome the source of data was the recent 2014-15 report of the European Network of Councils of the Judiciary on 'Accountability of the Judiciary and of the Prosecution'. The question to judges whether they felt that their Judicial Council had respected their independence was used. In particular, the outcome was constructed taking into account the share of negative responses to that question, excluding from the operationalization positive responses or NS/NA responses. This means the research explains the causes of the existence of specific groups of judges considering their Councils as disrespectful of independence, rather than the perceptions of national judiciaries as a whole. The first value of the outcome ({0}) included cases with less than 4.5 per cent of negative responses, the second value ({1}) included cases with shares ranging from 4.5 to 9.5, and the third value ({2}) included cases with a share of negative responses higher than 9.5. This allowed a more fine-tuned analysis of the outcome, distinguishing cases of low, moderate and high perception of disrespect to judicial independence. At the same time, the operationalization allowed a balance distribution of cases in each of the three values of the outcome. As QCA-GUI is prepared to work with multi-value conditions but not with multi-value outcomes, three databases were created, using a crisp-set for each of the values of the outcome, the values of the rest of conditions remaining unaltered.

To account for the threat posed by judicial associations, the 2014-15 Report of the ENCJ was used again. In particular, the source of data was the question 8.7 that asked judges whether they perceived their judicial association had respected their independence. Same as with the outcome, the operationalization of the condition took into account the share of negative responses. Such negative responses registered a significant cross-country variation, and ranged from 1 to 11 percent of surveyed judges. The dichotomization point chosen was 6.5, a point which marked the transition towards the existence of a significant minority perceiving associations as disrespectful of independence, and that allowed a balanced distribution of cases at each side of the threshold.

To assess the powers of the Councils, the index provided by the 2016 EU Justice Scoreboard of the European Commission was followed. This index aggregated eleven issues, giving each of them a score of 1 point, so that the index could range from 0 to 11. The dichotomization point was 6, the point in which the largest gap in the data was observed, and which again allowed a balanced distribution of cases in the presence and absence of the condition.

For corruption, the question about judicial corruption of the Global Corruption Barometer was followed. In general, the most recent edition (2013) was used, except for those cases not included on it, for which the previous edition (2010-11) was used. The

possible responses ranged between 1 and 5, although actual national averages usually did not take extreme values and most cases had high values of 3 or more. The dichotomization point was set at 3.8, with the aim of differentiating cases with a very high perception of corruption from the rest.

For appointment, there was not a previous quantitative indicator that could be operationalized, so the direct method of assignment (xxxx) was followed. One category ({0}) included cases in which the appointment was essentially controlled by the judiciary (Denmark, Ireland, Italy, Latvia, Lithuania, Poland, Romania). Another category ({2}) included cases in which political actors had the last word for the appointment of the majority of members (Spain, Portugal and The Netherlands). Finally, another category ({1}) was created for hybrid or mixed procedures of appointment (Belgium, Bulgaria, Slovakia, Slovenia, England and Wales, Scotland, Northern Ireland). To assign the scores, the main sources of information were the member factsheets of the official ECNJ website, complemented with literature on the cases.

IV. Analysis

a. Cases of high perception of disrespect for judicial independence

For cases such as Spain, Italy, Portugal, and Bulgaria, the share of judges reporting that they felt that their Council of the Judiciary was disrespectful of their independence was notably higher than the average. To different extents, these cases show the existence of a paradox that questions the performance of Judicial Councils: institutions created to protect the autonomy of judges were perceived by these as disrespectful of their independence. This subsection aims at finding out the causes of this striking phenomenon. To produce a QCA model capable of explaining such causes, four conditions were introduced in the analysis of sufficient conditions: powers of the Council, appointment, corruption and associations. When introducing directional expectations, following the theoretical framework set out above, all the dichotomous conditions were expected to contribute to the outcome when present ({1}) and, in the case of the procedure of appointment, when controlled by political actors ({2}).

Table 2. Analysis of sufficient conditions for high perception of disrespect to independence

	incl	**PRI**	**cov.r**	**cov.u**	**cases**
ASSOCIA_THREAT{1}*POWERS{1} *APPOINTMENT{2}	1.000	1.000	0.200	0.200	Spain
ASSOCIA_THREAT{1}*POWERS{1} *APPOINTMENT{0}	1.000	1.000	0.200	0.200	Italy[1]
POWERS{1}*CORRUPT{1} *APPOINTMENT {1}	1.000	1.000	0.200	0.200	Bulgaria
POWERS{1}*CORRUPT{1} *APPOINTMENT {2}	1.000	1.000	0.200	0.200	Portugal
Model	***1.000***	***1.000***	***0.800***		

The resulting model provided for four different paths, covering each of them a different case. Overall, the model had a perfect inclusion (1.000) and a very high coverage (0.8000), as only the Northern Irish case –excluded due to its contradiction with Scotland- was not could not be explained.

With a 36 per cent of judges denouncing disrespect to their independence, the Spanish council is by far the one obtaining the worse assessment in the survey. The first path explains the factors behind these clearly suboptimal results. It combines a political procedure of appointment of members of the Council with a wide range of powers held by such institution and highly distrusted judicial associations. The path is in line with the first research hypothesis, although adding further complexity as it also includes the role of judicial associations. It seems to reflect Guarneri's (2013: 347) depiction of some civil law countries in which 'The influence of the executive –and to some extent, also the legislature- on the judiciary has been exerted mainly thanks to senior judges in control of judicial promotions and owing their position to governmental influence', even if the Spanish council is not exclusively formed by senior members of the judiciary. In this case, both political actors and judicial associations had traditionally a great control over the process of nomination and appointment of members of the *Consejo General del Poder Judicial*. From the eighties onwards, both chambers of the

[1] The software offered an alternative to this model, which was exactly the same in everything except for the path explaining Italy. Indeed, such alternative model gave almost the same explanation for the Italian case, only adding the absence of corruption to the path ('ASSOCIA_THREAT{1}*POWERS{1}*CORRUPT{0}*APPOINTMENT{0}'). Given that this alternative solution was less parsimonious and less theoretically sound, it was discarded.

Spanish parliament have had a leading role in the appointment of members. According to Andrés Ibáñez (2003: 157), this allowed political parties to control the institution and, in the same vein, Nieto (2003:388) denounced its politicization. This political control is especially delicate as this Council is a powerful institution, with a very wide range of powers over essential aspects of the judiciary. The path also includes the perception of associations a disrespectful of independence. Associations, often linked ideologically to political parties (Nieto, XXXX: XX), had traditionally also had a leading role in the appointment of members of the council, as they controlled the nomination of candidates among which the parliament would appoint members. A recent reform of the Spanish council, however, has relatively disempowered judicial associations, so it would be no surprise if future surveys to Spanish judges showed different perceptions of these institutions.

The second path, covering the Italian case, shows almost the same combination of conditions as for Spain, but now we observe a process of appointment of members of the council dominated by judges, rather than politicians. Despite being a model for many of its counterparts in Europe, the Italian Council has been criticized 'for corporativism, a lack of judicial accountability and suboptimal efficiency' (Bobek and Kosar, 2013: 13). As indicated by the first path, the Italian Council is a powerful institution, and the literature suggests it 'controls virtually all aspects of judicial appointment and promotion for the ordinary judiciary', to the point that its composition 'was altered in 2002 to increase the influence of the Parliament' (Garoupa and Ginsburg, 2009a: 108). The problem, however, seems to be related to the capacity of interest groups to capture the institution and control its power. As indicated by the path, precisely because the process of appointment of members was depoliticized and given to judicial associations, the latter have exercised an enormous control over the institution. The influence of the Italian judicial associations on the Council was recently acknowledged by noting that 'no judicial member of the Higher Council of the Judiciary (Consiglio superior della magistratura) is likely to be elected without the backing of one of this groups' and since 'decision making in the Higher Council is heavily dependent on alignments among them' (Guarneri, 2007: 196; see also Garoupa and Ginsburg, 2009b: 76). At the same time, far from purely apolitical, many associations in Italy have a clear ideological nature as well as links with the political parties (Garoupa and Ginsburg, 2009c: 466). They provide a clear instance of what Bell (2006: 371) calls the 'Latin model' of judicial associations in which these 'represent the divergent social and political outlooks among judges', and that could also be found in the Spanish case.

The third and fourth paths are relatively similar, and combine a powerful Council, a high perception of judicial corruption, and hybrid (Bulgaria) or political (Portugal) procedures for the appointment of members of the institution. The paths, in fact, are in line with the second research hypothesis, although adding further complexity in including appointment procedures. The Bulgarian case is particularly interesting, as it

had the worse perception of corruption in the sample. Following the pressures of the EU, in 2003 and 2007 the Bulgarian Council was empowered with inspection and dismissal powers (Noutcheva and Bechev, 2008: 133-135). According to Popova (2012: 38-39) the overall picture is one of a highly independent and powerful judiciary in Bulgaria. At the same time, however, the Global Corruption Barometer (2013) suggests that Bulgaria is outstanding for its level of judicial corruption. Popova (2012) links these two phenomena. For the author, the high judicial insulation of the judiciary of Bulgaria prevents the other branches of government or the public from punishing corrupt magistrates (Popova, 2012:43). This might explain the relevance of the 'hybrid' procedure of appointment, in which political elites have a certain role but no total control. In the Bulgarian case, thus 'Judicial insulation seems to have removed the main incentive the judiciary has to undertake an anticorruption campaign' (Popova, 2012: 46).

b. Cases of low perception of disrespect for judicial independence

When analyzing the responses to the question whether the Councils respected judicial independence, it was observed that for a number cases the share of negative responses was in fact relatively low. All of them were Northern European countries, except for Poland. This subsection shows the combinations of conditions that drove to this more positive assessment of judicial councils by judges. In analyzing this (the absence of the outcome), the same four conditions as in the previous subsection were introduced in the model. Directional expectations were right the opposite to those for the presence of the outcome: all crisp conditions were expected to contribute to the absence of the outcome when absent ({0}). The multi-value 'appointment' condition was deemed to contribute to the outcome when controlled by the judiciary ({0}).

Table 3. Analysis of sufficient conditions for low perception of disrespect to independence

	incl	**PRI**	**cov.r**	**cov.u**	**cases**
ASSOCIA_THREAT{0}*POWERS{0}* CORRUPT{0}	1.000	1.000	0.857	-	Denmark, Ireland, Poland, Belgium, England and Wales, Netherlands
Model	1.000	1.000	0.857		

The model had a perfect inclusion (1.000) and a very high coverage (0.857, given the exclusion of the contradictory case of Scotland). The path points at Councils of the Judiciary with limited powers, in which judicial associations are not perceived as a threat and with judiciaries perceived as scarcely corrupt. Given the limited scope of competences of these institutions, most of them are closer to what Bobek and Kosar (2013: 16) referred to as 'court service model', in which the main functions of the councils refer to administration and management, or even 'hybrid models', than to the model of strong Judicial Councils. Additionally, and in contrast with countries such as Italy or Spain, some of these countries had associations of a more professional than ideological profile, in line with the characterization provided by Bell (2006: 371).

The Dutch is a very interesting example. Created in 2002 (Garoupa and Ginsburg, 2009a: 111), its powers are limited to adopting ethical standards, the promotion of judges, allocation of budget to courts and implementation of ICT in courts (European commission, 2016: 39). It lacks most of the possible competences, including for instance disciplinary decisions, appointment or dismissal of judges, etc. Equally interesting is the case of Poland, where according to Piana (2009) the council was born with limited powers, which were only moderately extended in the 2000's. At the moment, its competences are limited to adopt ethical standards, and to propose appointments and dismissal of 1st instance judges (European commission, 2016: 39). Additionally, the share of Polish judges considering their associations as not respecting their autonomy is insignificant (only 1 per cent).With this background, and in line with the theoretical expectations set above, the Polish council is among those receiving a better assessment by judges, with only 3 per cent considering it as disrespectful of independence. This places the Polish council at the same level as others like the Dutch or the Belgian ones, and in a better position than any other council of a postcommunist country in the sample.

Denmark is also included in this path, and if fact in probably represent better than any other case the combination of conditions driving to low perception of threat to independence. The Danish council had the lowest rate of perceived judicial corruption (an average of 1.7 in a 1 to 5 scale). It is also a relatively weak institution, with very limited powers (European Commission, 2016: 39), which makes it an interesting instance of the 'court service model' (Bobek and Kosar, 2013: 16). And finally, in Denmark the perception of judicial associations as a threat to independence is notably low. The interaction among these conditions explains the high perception of the institution as respectful of judicial independence, fitting again the theoretical expectations of this article.

Finally, beyond the peculiarities of the cases, there are two aspects worth underlining in this model. Firstly, the irrelevance of the procedure of appointment, which as said above disappeared after minimization. When all other conditions had the appropriate sign, judges did not perceive their councils as disrespectful of their independence regardless of the type of procedure of appointment and the actors involved on it. For instance, the Netherlands were included in this path, even if the Minister of Justice has the last word on appointments. In this regard, Garoupa and Ginsburg (2009b:78) have stated that 'the Dutch case is a good example of a judicial system in which no serious concerns about excessive politicization have arisen'. Secondly, it is interesting to note the institutional disempowerment as part of the configuration. This is important as obviously councils with limited competences have less tools to threat judicial independence, but this is at the cost of becoming a weaker institution. For instance, they might be potentially weaker to protect judicial independence from other actors. This is not to say that in countries with disempowered councils judicial independence is always more likely to be undermined, as this might be eventually ensured through other institutional arrangements. But it is also important to underline that, in the absence of these other institutional arrangements, depriving councils from their powers in the hope that this will improve judicial assessments of the institution might be counter-productive.

c. Cases of moderate perception of disrespect for judicial independence

A number of cases, all of them in post-socialist countries, displayed moderate assessments of disrespect to judicial independence, ranging from 5 to 9 per cent of surveyed judges. All of these councils represented intermediate instances between the two sets of institutions analyzed in the two previous subsections. For these cases, in fact, it was not appropriate to establish directional expectations, because what was expected to drive to moderate outcomes –as opposed to very high or very low- were actually different combinations of positive and negative conditions counter-balancing one another in different ways. For this reason, a conservative approach was taken and no remainders were included in the minimization.

Table 4. Analysis of sufficient conditions for moderate perception of disrespect to independence

	incl	**PRI**	**cov.r**	**cov.u**	**cases**
ASSOCIA_THREAT{0}*POWERS{0}*CORRUPT{1}*APPOINTMENT{1}	1.000	1.000	0.200	0.200	Slovakia
ASSOCIA_THREAT{0}*POWERS{1}*CORRUPT{0}*APPOINTMENT{1}	1.000	1.000	0.400	0.400	Romania, Slovenia
ASSOCIA_THREAT{0}*POWERS{1}*CORRUPT{1}*APPOINTMENT{0}	1.000	1.000	0.200	0.200	Lithuania
ASSOCIA_THREAT{1}*POWERS{0}*CORRUPT{0}*APPOINTMENT{0}	1.000	1.000	0.200	0.200	Latvia
Model	***1.000***	***1.000***	***1.000***		

The model included four different paths, which together had a perfect inclusion (1.000) and coverage (1.000). The first path, covering Slovakia, included a disempowered Council and low perception of disrespect to independence by associations, but a high perception of corruption and a hybrid model of appointment. The second path, covering Romania and Slovenia, had low perceptions of corruption and of disrespect to independence by associations, but powerful councils and hybrid models of appointment. The third path, covering Lithuania, had good assessments of judicial associations and a procedure of appointment controlled by the judiciary, but a powerful council and a high perception of corruption. And the final path, covering Latvia, had a scarcely powerful council with a procedure of appointment controlled by the judiciary and a low perception of corruption, but with a high perception of associations as threats to independence. As advanced above, different combinations of conditions going in opposite directions provoked intermediate results.

Individual examples can illustrate the functioning of some of the cases covered by the model. The Slovak Council (*Súdna rada Slovenskej republiky*) is covered by the first path. While it is relatively disempowered, its procedure of appointment is hybrid, the perception of corruption is high, as well as the share of judges perceiving associations

as disrespectful of their independence. Bobek and Kosar (2013:24 ff.) provide qualitative information about this case. While their depiction of this institution as a powerful does not fit the information provided by the European Commission report (2016: 39), their assessment of this council is generally in line with the path. As the model does, they mention the high perception of corruption and public distrust in the Slovak judiciary. They also mention a perception of politization of the judiciary despite the theoretical insulation that the Council should have provided, with clear links between politicians and the council. A limited range of competences is key to a low perception of disrespect to independence The Slovak case is an example of how, even despite having limited powers, and institution may rise the share of negative assessment by its judges when other aspects of its design and functioning are flawed, thus driving to suboptiomal results.

Compared to Slovakia, Romania –second path- is an interesting instance because it represents the opposite way to reach a moderate perception of disrespect to independence: the country was able to obtain this result even being a powerful institution. In this country, the *Consiliul Superior al Magistraturii* was deeply reformed in 2004 (see Noutcheva and Bechev, 2008: 134; Iancu, 2010: 41). The Romanian council has now nine out of thirteen possible competences in the European Commission Report (2016: 39), including appointment of judges, promotions and disciplinary measures. Although political actors continued to have a role in the appointment of members of the Romanian Council through Senate validation, the reform gave a wider role to judges in the appointment, expanded the number of judicial members of the Council to nine –more than half- and curtailed the powers of the Ministry of Justice (Beers, 2012:56). At the same time, the dominant association –'Association or Romanian Magistrates'- has been reluctant to have an active role in political issues and has rather focused on matters such as salaries and workload of judges (Beers, 2012:57). While other, more politically active associations have emerged, these continue to play a minor role (Beers, 2012:58), so the Romanian judicial associative life does not fully mirror yet the partisan logics of the other Latin European countries. Finally. the *Consiliul Superior al Magistraturii* has been involved in a number of corruption scandals (see Iancu, 2010: 43; Pinau, 2012:32-34), and Beers (2012:57) considers that these affected the reputation of the Council 'within the judiciary and among the public'. However, it is interesting to note that the perception of corruption of this institution in the Global Corruption barometer (3.7) was lower than for institutions like Bulgaria (4.4) Lithuania (4.3) or even Portugal (3.9). For just one decimal, Romania was excluded from the set of cases with high judicial corruption, but it is very likely that an improvement in the country's corruption indicator would drive to an even better outcome. In general, however, the result of Romania is interesting, as shows that very powerful institutions do not necessarily have to resign themselves with very high perceptions of disrespect to independence.

Indeed, at a cross-case level, this is probably the most remarkable feature of this model: the existence of councils that managed to obtain moderate assessments of disrespect to independence even in the presence of a wide range of powers. Cases like Romania, Slovenia and Lithuania, in paths two and three, illustrate this possibility. These cases show that powerful councils can still obtain acceptable results if combined with optimum values in the majority of other conditions. Furthermore, these powerful councils managed to obtain these acceptable results even in the presence of hybrid mechanisms of appointment (Romania, Slovenia) or very high perceptions of corruption (Lithuania). Theoretically, with better values in these conditions the outcome could have further improved. The importance of these cases is that they partially break the trade-off between institutional power and perception of respect to independence. They show that under the right conditions powerful councils can still obtain an acceptable assessment by national judges, or at least that they do not have to give up to negative assessments that pose serious questions over their relation with the judges whose independence they are supposed to protect.

V. Conclusion

To assess the functioning of Judicial Councils many different criteria could be used, such as their capacity to minimize corruption within the judiciary, public trust in the institution or their ability to manage judicial resources in the most efficient way, to mention just a few. This article focused on one important aspect: judges' perception of councils' respect for judicial independence. It can be legitimately argued that, when judges in a country perceive their Council of the Judiciary as disrespectful of their independence, the institution has become dysfunctional, at least in this regard. In the belief that debate on judicial institutions and their reform must be informed by evidence, this article has empirically analyzed the causes of this dysfunction, and in so doing it has shed some new light about this largely underexplored type of institution.

The analyses carried out in the above pages point at some interesting conclusions. To start with, they question the matching between powerful Councils of the Judiciary and protection of judicial independence. In fact, significant groups of judges might perceive these powerful institutions as disrespectful of independence when they are captured by political actors, interest groups and are unable to tackle corruption. Different combinations of these conditions drove to clearly suboptimal judicial assessments of the councils. A good example is the Spanish case: this council, powerful but traditionally controlled by political actors and judicial associations obtained the worst result in the sample. In a moment in which in Spain political debate over the functioning of the *Consejo General del Poder Judicial* spreads, this article provides an input of empirical information on which aspects of design of the institution should be tackled by any potential reform.

Judicial assessments of powerful countries are slightly better when more of the rest of conditions work in the positive direction: less politicization of the appointment of members, better assessments of judicial associations, and lower perception of corruption. Interestingly enough, it was showed that a disempowered institution was an essential part of the configuration driving to low perception of disrespect to independence, but also that even powerless councils worsen their assessment when other aspects of their design or socio-legal dynamics are suboptimal. Thus, stripping a council of its powers does not *per se* guarantee a smother relation of the institution with the judiciary, and in the absence of other institutional arrangements to protect judicial independence it could drive to unintended negative effects.

The discussion about the most efficient designs of Councils of the Judiciary is still in a very modest level of development. Probably due to the scarcity of data, empirical research on the topic is infrequent, which lowers the quality of the academic and social debates about these institutions. Although this article has made a step in the direction of overcoming this problem, much more is to be done. This work has made a preliminary exploration of the phenomena based on the only data existing so far, but future research will have to analyze these institutions in the light of new, more reliable data. Although the results of the analyses seemed coherent with plausible theoretical expectations and with the existing knowledge about the cases, such results must be only seem as provisional findings needed of confirmation.

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