



A Method for Assessment of the Independence and Accountability of the Judiciary

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Abstract

The method outlined in this paper consists of a systematic assessment of the level of independence achieved in practice by national judicial systems throughout Europe, for the purpose of improving the design of judicial arrangements. Accountability of the judiciary is assessed alongside independence as those two concepts are intricately linked. Judicial independence and accountability are both evaluated in relation to the judicial system as a whole, as well as in relation to individual judges. Judicial independence is considered both objectively and subjectively. Specific indicators have been identified for each of these assessments. The whole methodology was applied to the judicial systems of 23 countries in Europe. The main findings of this exercise are summarised in this paper, with the strengths and weaknesses of these judicial systems and the most acute risks to judicial independence identified below.

Key words

Judicial Independence and Accountability, Measurement, Indicators, European Network for Councils of the Judiciary

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I. INTRODUCTION

Judicial independence is key to a properly functioning judicial system. It allows judges to make impartial decisions in accordance with law and evidence only, shielding them from inappropriate outside influence, whether from other branches of Government, the public, or the private sector. Independent judges are expected to be incorruptible and fearless; they should be able, where necessary, to decide cases in ways that may upset governments, media and public opinion. The impartial adjudication of disputes is a crucial component of the rule of law, and is essential to a peaceful, prosperous and democratic society. An independent judiciary promotes that citizens do not feel the need to take justice into their own hands, and that they can take short and long term financial decisions with confidence. This only works when the population actually observes and is convinced that justice is served in the way described. To make this possible the judiciary needs to function in a transparent and accountable manner, especially elucidating arrangements that impact directly independence, such as the manner in which cases are allocated to judges.

Judicial independence is entrenched in many legal instruments, such as the Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms², and we take it here as starting point, including the connection between independence and accountability.³ Given the centrality of these concepts, it is important to have a clear understanding not only of what is required for judicial independence and accountability, but also to what extent these requirements are met in practice and to what extent judges actually behave independently. On the basis of this knowledge, the need for judicial reform can be assessed objectively, and informed decisions can be taken about the direction of judicial reform. This understanding feeds into the frequent dialogues that take place within the judiciary and between the judiciary and the other branches of government about the need of reform.

Opinion surveys by, in particular, the European Commission, World Justice Project and World Economic Forum show that judicial independence cannot be taken for granted.⁴ However, apart from such general surveys and the scientific literature discussed in this article, little has been done empirically to assess in depth the level of independence and accountability reached amongst the judicial systems of European Union member states, for the purpose of judicial reform. The European Commission's largely descriptive "Justice Scoreboard" has made a start in that direction⁵ while the Council of Europe has gathered data about some aspects of independence.⁶ In addition, a large literature exists that foremost aims at measuring judicial independence as a 'variable' to explain social/economic development.⁷ Central features are the distinction between 'de iure' and 'de facto' independence, and a search for measurable indicators of both (see further section III 3). While this literature contributes in many respect to the conceptualization and measurement of independence in general, it does not address the detailed design of judicial institutions. For the purpose of guiding judicial reform in practice, there is, therefore, a lack of systematic and comprehensive information about the diverse aspects of independence. It is for this reason that the European Network of Councils of the Judiciary ("ENCJ") set out in 2013 to make judicial independence, in combination with accountability, measurable, and in ensuing years developed its approach experimentally such that the results of this work can now be usefully presented for critical scrutiny and as contribution to the empirical analysis of judicial systems.

To be more precise, the ENCJ has developed a set of indicators based on European and international standards for judicial independence and accountability, using available data and collecting data otherwise. After a pilot application of this method in four sample states, the indicators were applied to 25 judiciaries in 2014-2015. A survey among the judges of Europe was part of the exercise. The results were evaluated and the indicators were improved and applied again in 2016-2017. For the ENCJ the indicators are primarily useful for improving judicial systems at the national level. Secondly, the indicators provide insight into the overall situation of the judiciary in Europe. From this exercise, we have also been able to identify risks to the independence of the judiciary.

This article is structured as follows: Section II sets out the problem and the research questions that follow, and describes the methodology used to address these questions. Section III reviews the existing principles and standards about independence and the available data about independence to identify the elements needed for independence. It also examines the connection between independence and accountability, and the elements required for accountability. Section IV presents the indicators. It explains the content of the indicators and the method used for measurement. The results are presented in Section V, while in Section VI the application that can be made of these results at national level is demonstrated with the example of the Netherlands. The more general use of these results is also discussed in that Section, focusing on the risks to judicial independence. Section VII gives our conclusions on the effectiveness of this methodology.

2 UDHR art10 and ECHR art6.

3 The conceptualization of accountability is the subject of a large literature (see e.g. F. Contini and R. Mohr (2007), Reconciling independence and accountability in legal systems. *Utrecht Law Review*, <http://www.utrechtlawreview.org>, 3/2). As implied already, we use accountability in a broad sense to comprise - in the terminology of Contini and Mohr - foremost legal-judicial accountability and only secondarily managerial accountability.

4 EC, 'Perceived independence of the national justice systems in the EU among the general public' (2016) Flash Eurobarometer 435 and EC, 'Perceived independence of the national justice systems in the EU among companies' (2016) Flash Eurobarometer 436. World Justice Project (2018), Rule of Law Index 2017-2018. World Economic Forum (2016), *The Global Competitiveness Report 2016 – 2017*.

5 EC, 'The 2017 EU Justice Scoreboard' (2017) COM 167 final.

6 For instance, data about the appointment of judges. Council of Europe CEPEJ, 'European Judicial Systems - Efficiency and Quality of Justice' (2016) CEPEJ Studies No. 23.

7 For a summary see: J Rios-Figueroa, JK Staton, 'An Evaluation of Cross-National Measures of Judicial Independence' (2014) 30 JLEO 104.

II. PROBLEM DEFINITION AND METHODOLOGY

To establish the need and direction of judicial reform in Europe a clear understanding of independence and accountability, theoretically and foremost practically, is necessary. This leads to three concrete questions.

1. What is required for a judge to be independent and accountable in a broad sense, personally and organizationally?
2. To what degree are the requirements met in the (candidate) member states of the EU, and are their judges actually independent and accountable? Do they behave accordingly?
3. What can be done to improve their independence and accountability?

As will be discussed in the next section, consensus exists at an abstract level about the answer to the first question among professionals and politicians in the international context of the UN, Council of Europe and international judges associations. It shows that independence and accountability are both multidimensional concepts that relate to how a wide range of matters are arranged in the law and applied in practice, and also how independence is perceived by (sections of) the population. Question 2 is another matter. Given the multi-dimensionality of both concepts, it requires the measurement of independence and accountability in a comprehensive manner. To what degree are the diverse requirements for independence and accountability met and does that actually lead judges to fulfil their duties independently and in an accountable manner? While some useful components are available that will be discussed later in the review of the literature, a comprehensive assessment nor a methodology how to do so are available. Emphasis is on this empirical question. The answer to question 3 follows from 2, in as far 2 provides sufficient insight in the underlying mechanisms.

The methodology followed can be summarized in five steps:

Step 1: identify the relevant aspects of independence and of accountability and their constituent parts on the basis of the existing international sets of principles and complemented by the actual experience of judges within the ENCJ.

Step 2: determine per aspect and component to what degree actual arrangements and practices are conducive to independence and accountability and rank them accordingly. Define the arrangements to be strived at.

Step 3: condense 1 and 2 into a set of indicators, consisting of (1) sub indicators that each can be categorized and (2) scoring rules to map the categories on quantitative scales. The indicators are about formal and factual arrangements on the one hand and about perceptions on the other hand. The formal and factual arrangements can be categorized and scored, at the level of sub indicators, directly and, in principle, unambiguously by any knowledgeable observer. The indicators that relate to perceptions of (aspects of) independence derive from opinion surveys, and are therefore quantitative by nature.

Step 4: gather all data for the countries of Europe that participate. As to the indicators about formal and factual arrangements the categorization was done by the Councils of the judiciary and, where Councils do not exist, by alternative governing bodies, such as ministries of Justice. As to the indicators about perceptions existing, primarily international surveys were used. In addition, a survey was held among the judges of Europe about their independence. The scoring of the indicators was done by the project staff, led by the Netherlands Council for the judiciary. The results are presented in the form of country profiles of the independence and accountability of the 25 judiciaries of 24 nations.⁸

Step 5: establish for which aspects outcomes for all participating judiciaries individually fall short of the aspiration levels, and identify potential remedies.

It should be noted that this approach attempts to generalize national experiences and therefore largely abstracts from historic, cultural and political background. This means that, before introducing reforms, decision makers in a nation have to assess whether short falls are actually problematic and remedies feasible under specific national conditions. Furthermore, one has to realize this is a first attempt at measuring independence and accountability in depth, and a critical examination of the country profiles is in order before embarking on reforms.

III. DEFINING AND MEASURING INDEPENDENCE AND ACCOUNTABILITY

1. Judicial independence in relation to the other powers of the state

The protection of judicial independence is guaranteed in core international instruments, in particular the Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms. Both set out a person's right to be heard by an independent and impartial tribunal in relation to criminal charges made against that person and/or the determination of that person's rights and obligations.⁹ From this follows directly the independence of the judge, but the independence of the judiciary as a whole is not immediate.

⁸ For the UK the judiciary of England and Wales and that of Scotland were distinguished.

⁹ UDHR art10 and ECHR art6.

In this regard the position of the governments of Europe together is expressed by the Committee of Ministers of the Council of Europe in its Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities'.¹⁰ It states i.a. that "The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such it is a fundamental aspect of the rule of law." This safeguard function is elaborated, for instance, in: "Where judges consider that their independence is threatened, they should be able to take recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy." The same is encapsulated in instruments and documents of the EC, in particular the EU Framework to strengthen the rule of law.¹¹ The argument for independence of the judiciary is also made by judges. Lord Thomas (2017) argues the independence of the judiciary, while stressing the interdependence of the state powers.¹² He sees as essential characteristics of interdependence a clear understanding by each state power of the constitutional functions and responsibilities of the other state powers, mutual support in carrying out these functions and no interference in each other's functions.

While the above resolution does not elaborate its reasoning, it is only logical that, for the judiciary to play its constitutional role in the checks and balances between the state powers in a democracy, it should not be under the control of the other state powers. In the often invoked metaphor of Ulysses and the Sirens in constitutional theory¹³: if Ulysses could order the untangling of the knot that binds him to the mast the whole idea of self-imposed self-restraint fails. If (new) governments or parliaments could intervene in the judiciary, either at the individual or organizational level, each time they did not like judicial decisions, the institutional arrangements are not fit for difficult times, and the balance of state powers fails. The result would be authoritarian rule with a subservient judiciary that cannot guarantee the fundamental rights mentioned at the start.

Interventions are generally at the organizational level such as reducing the pension age of judges and changing the selection/appointment procedures for Councils for the judiciary that are responsible for the selection, promotion and disciplining of judges. These examples are taken from recent events in Poland.¹⁴ Control over the judiciary can also be achieved by the other state powers through budgetary means, for instance, by underfunding the courts, as a result of which the courts cannot function properly. The duration of cases may become unacceptable for society or the courts cannot explain decisions to the public. In both situations public support for the judiciary is likely to decline, and this in turn facilitates further interventions.

The examples of appointments and budgets shows that there are always linkages between judiciary and the other state powers. Whether the independence of the judiciary is respected depends very much on the actual arrangements. The same holds with respect to organizational structure. The mere existence of a council of the judiciary is, for instance, no guarantee of independence. If the (judicial) members are selected by government or parliament, it is an extension of the other state powers within the judiciary. On the other hand if its members are elected by the judges, a council is a safeguard. Again, the actual arrangements are crucial. In the next section we explore these issues in detail by examining what exactly constitutes the independence of judge and judiciary.

2. Key Elements of Judicial Independence

What elements are required for judicial independence is the subject of a substantial set of documents, each more or less authoritative in nature. These documents exhibit considerable overlap, reflecting a broad communis opinio among governments and judges about what is needed for independence. Looking just at UN and European institutions related texts, the UN Basic Principles on the Independence of the Judiciary of 1985¹⁵ provides a useful starting point. It establishes the principle that judicial independence must be legally enshrined and universally respected, that judges must be able to do their duty without pressure or improper influence, that there should not be revision of judicial decisions outside appeal and that judges should have immunity from civil liability. Another key issue identified in this document is the selection, promotion, removal from office and disciplining of judges. All these matters require extensive safeguards to be put in place to shield the judiciary from undue influence from, in particular, the other branches of government. Further issues relate to the terms and conditions on which judges operate. The resources allocated to the courts need to be adequate, and the security of office provided by tenure and similar mechanisms, as well as the level of remuneration afforded the judiciary need to be guaranteed in law. Although the UN document has been characterized as no more than the most basic framework¹⁶, the principles capture most of the aspects included in other sets of principles.

10 COE, 'Recommendation of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities' (2010) CM/Rec(2010)12.

11 EC, Communication from the commission to the European parliament and the council a new EU framework to strengthen the rule of law /* com/2014/0158 final */

12 This argument was recently reiterated by the Lord Chief Justice of England and Wales, Lord Thomas, 'The Judiciary within the State - Governance and Cohesion of the Judiciary', Lionel Cohen Lecture (2017) <http://www.judiciary.gov.uk/wp-content/uploads/2017/05/lcj-lionel-cohen-lecture-20170515.pdf> accessed 13 August 2017. In particular p9.

13 See eg L van den Hauwe (2005). Constitutional economics. In: JG Backhaus, The Elgar companion to law and economics.

14 See EC (2017). Reasoned proposal in accordance with article 7(1) of the Treaty of European Union regarding the rule of law in Poland, Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law. This document gives the chronology of events in Poland.

15 UN General Assembly resolution 40/146, (1985).

16 EAJ, Judges' Charter in Europe (1997), p1.

Several international organizations of judges have also considered these matters. The European Association of Judges has developed a Judges' Charter in Europe¹⁷ and the Consultative Council of European Judges¹⁸ a Magna Carta for Judges, while the International Association of Judges has a Universal Charter of the Judge¹⁹. We focus here on what these documents add to the UN principles outlined above. The EAJ emphasizes that judges should not only be independent, but also be seen to be independent. That last element gives independence an extra dimension, as perceptions are of a different nature to formal, legal requirements.

The IAJ expands on internal independence: in their decisions, judges should be independent from other judges and from the judicial administration.²⁰ The EAJ introduces governance and administration of the judiciary as another factor that impacts on judicial independence. In its view, judicial administration should be carried out by a body which is representative of the judges and independent of any other authority. The CCJE addresses governance in a more specific manner: to ensure independence, each state should create a Council for the Judiciary or other specific body with broad competences that is independent from the legislative and executive branches of government.²¹ Another governance issue is raised: the judiciary should be involved in all decisions by government that affect the exercise of judicial functions such as the organization of the courts and the design of court procedures.

As mentioned above, the Committee of Ministers of the Council of Europe²² has made an important and authoritative statement about these matters. It stresses the importance of good governance for the judiciary and in particular the position and role of Councils for the judiciary. It also stresses the importance of internal independence: the existence of a hierarchical judicial structure should not undermine the independence of the individual judge. Its Recommendations set as principles that no cases be withdrawn from judges and that the judges themselves should be irremovable. Involuntary transfers to, for instance, other courts are unacceptable, with some exceptions, such as disciplinary measures and lawful re-organization. The Recommendation of the Committee of Ministers was informed by the Venice Commission of the same Council of Europe in a report that provides a summary of those principles. The Venice Commission addresses the need for adequate resources, as do most of the other documents, but it adds that the judiciary should be involved in the determination of its budget.²³

All these principles are generally formulated in an abstract manner, and in most cases do not specify what arrangements and mechanisms are needed for those principles to be met. Some aspects have been elaborated, for instance by the CCJE and the Venice Commission. See for instance the latter's report on judicial appointment.²⁴ Since Councils for the judiciary typically play an important role in putting the principles into practice, the European Network of Councils for the Judiciary has been working to develop those principles into standards and issue guidelines. An overview of its guidelines is given in ENCJ (2016)²⁵. Among other items, the selection, appointment and promotion of judges, their remuneration, the composition of Councils for the judiciary and court funding are addressed in the overview.

The above has implications for the design of a framework for the measurement of judicial independence. First of all, what is required for a judge to be independent is multi-dimensional, as there are many ways to improperly exert influence. It concerns the independence of the individual judge (e.g. human resource policies and internal judicial independence), but also of the judiciary as organization (e.g., governance and funding). In section IV About these dimensions broad consensus exists at the international level (UN, CoE, EU) between governments and judges organizations.

Secondly, the principles discussed above are largely derived from logic. For instance, judicial independence prevents state powers intervening in decisions related to the dismissal of judges. The dismissal of a judge for making a decision that goes against the interests of the executive would be directly contrary to the principle of judicial independence. Such principles are clear and can be strictly applied. Other principles reflect opinions about how the judicial system works or should work, based on, for instance, the shared views and experiences of judges. Matters surrounding the governance of the judiciary (Councils for the judiciary, other governance structures) fall into this category, and a framework should allow for situations where more than one solution exists.

Thirdly, the principles listed above consist mostly of formal requirements (i.e. how matters should be arranged in law), but also raise the issue of the perception of independence. Independence must be perceived by the population or, as suggested in the Bangalore Principles, by 'a reasonable observer', to exist.²⁶ This allows, for instance, for the possibility that a legal system may

17 EAJ, see fn 16.

18 CCJE, Magna Carta of Judges (2010). This document summarizes the main conclusions of the Opinions that the CCJE has already adopted.

19 International Association of Judges, The Universal Charter of the Judge (1999).

20 See also the Bangalore Principles about Judicial Conduct (1.3): 'A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free thereof.' As endorsed by UN ECOSOC 2006/23.

21 See also for a more elaborate view on judicial administration: OSCE ODIHR and Max Planck Minerva Research Group on Judicial Independence, 'Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability' (2010).

22 COE, 'Recommendation of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities' (2010) CM/Rec(2010)12.

23 Venice Commission, 'Report on the Independence of the Judicial System. Part 1: the Independence of Judges' (2010) CDL-AD(2010)004-e.

24 Venice Commission, 'Judicial appointments' (2007) CDL-AD(2007)028-e.

25 ENCJ, 'Distillation of ENCJ guidelines, Recommendations and Principles: report 2004-2016' (2016) https://www.encj.eu/images/stories/pdf/GA/Warsaw/encj_distillation_report_2004_2016.pdf accessed 13 August 2017.

26 Bangalore Principles about Judicial Conduct. See fn 20. Art 1.3.

possess all the formal requirements of independence and put these into practice, but nonetheless have judges who do not act independently. A framework needs to take this into account. In the literature, a related distinction is made between *de jure* and *de facto* independence, where perceptions may be a proxy for *de facto* independence (see the next section).

3. Empirical Data on Judicial Independence

Defining the elements that make up judicial independence is one thing, but assessing their actual implementation is another matter. Relatively little has been done in this area. The Council of Europe through CEPEJ provides data about some important matters such as the mechanisms and procedures for the selection and appointment of judges, terms of office (tenure and salaries) and the rules regarding the irremovability of judges.²⁷ The European Commission issues an annual EU Justice Scoreboard.²⁸ It pays attention to several aspects of independence, mentioned above. Data on the independence of courts and judges, as perceived by the general public and by companies, is presented. Sources are the Eurobarometer and the Global Competitiveness report of the WEF (see below). Descriptive information about the rules guiding the appointment of judges, the individual evaluation of judges, the transfer of judges without their consent and the dismissal of judges is provided. Also, some related quantitative data are included, for instance about dismissals. However, a systematic consideration and measurement of the matters discussed above does not exist.

Given this lack of systematic information, it is useful to examine different approaches for measuring independence.²⁹ There is a body of literature that considers how to measure formal (*de jure*) independence and the rather elusive actual (*de facto*) independence of judges and the relationship between these measurements. This literature views judicial independence as a variable to be measured for use in, especially, models of economic development. This is, of course, very different from our concerns. Rios-Figueroa and Staton summarize the literature in this field.³⁰ The indicators vary wildly and often concern very specific aspects. Nevertheless, they can provide insight into the wider ramifications of independence. '*De jure* independence' is usually measured by indicators of some of the elements discussed above.³¹ Fixed tenure, objective appointment procedures, budgetary autonomy, and judicial councils are used for this purpose.

De facto independence is conceptualised as judges not responding to undue pressure to resolve cases in a particular way. A second interpretation of *de facto* independence involves judges' decisions being enforced even when political actors would rather not comply with those decisions.³² Neither idea is easy to measure. Direct observation and analysis of decisions are cumbersome and may be misleading. Decision-making may appear autonomous when all the while there is some case selection at play and controversial cases are being removed from the court lists. Alternative approaches to measuring *de facto* independence have been developed. The first measures the conduct of actors in society as a reflection of the *de facto* independence of the judiciary. Indicators generally relate to actual constraints on executive authorities.³³ In a very specialized variant of this approach, Clague et al use the ratio of non-currency money to the total supply of money as a measure of the trust within society in judicial institutions that enforce contractual obligations set by the banking industry.³⁴ The second approach is based on perceptions of judicial independence as a proxy for *de facto* independence. These perceptions are derived from questionnaires circulated among respondents that have experience with the courts, such as lawyers and company executives. The World Economic Forum data mentioned above are based on this approach.³⁵ Another source is public opinion data, e.g. the European Barometers.³⁶

A third approach to measure *de facto* independence focuses on indicators based on 'objective' information about the actual processes in place within the judiciary.³⁷ This information is generally gathered by experts. Hayo and Voigt consider primarily the position of judges in the highest court (the court of last resort) in a country. Indicators are the average length of tenure of these judges, deviations from legal rules in this area, changes in the number of the judges, changes to the legal foundations establishing the highest court, and the degree of implementation of decisions of these courts. Additional factors include the growth in the income of judges and court budgets. However, the relevance of these indicators for actual judicial independence remains open

27 CEPEJ, 'European Judicial Systems - Efficiency and Quality of Justice' (2016) CEPEJ Studies No. 23.

28 EC, 'The 2017 EU Justice Scoreboard' (2017) COM 167 final.

29 This discussion draws on F van Dijk, F van Tulder, Y Lugten, 'Independence of Judges: Judicial Perceptions and Formal Safeguards' (2016) Netherlands Council for the Judiciary Working Paper 2016-1 <<https://www.rechtspraak.nl/SiteCollectionDocuments/Paper-independence-of-judges-160111.pdf>>

30 J Rios-Figueroa, JK Staton. See fn 7.

31 For instance, LC Keith(2002), 'Constitutional Provisions for Individual Human Rights: Are They More Than Mere Window Dressing' (2002) 55 Political Research Quarterly 111 and R La Porta, F López de Silanes, C Pop-Eleches, A Shleifer, 'Judicial Checks and Balances' (2004) 112 Journal of Political Economy 445.

32 Rios-Figueroa and Staton, see fn 7.

33 RM Howard, HF Carey, 'Is an Independent Judiciary Necessary for Democracy?' (2004) 87 *Judicature* 284. An important source of data are the Polity databases, developed by Gurr. These contain country data on the level of democracy and the extent of constraints on the executive. TR Gurr, 'Polity II: Political Structures and Regime Change, 1800–1989' (1990) Center for Comparative Politics. Another data source is CIRI human rights dataset: DL Cingranelli, DL Richards (2008), 'The Cingranelli-Richards (CIRI) Human Rights Dataset' (2008) <http://www.humanrightsdata.com>.

34 C Clague, Ph Keefer, S Knack, M Olson (1999). 'Contract-Intensive Money: Contract Enforcement, Property Rights, and Economic Performance' (1999) 4 Journal of Economic Growth 185.

35 World Economic Forum (2016), *The Global Competitiveness Report 2016 – 2017*.

36 EC, 'Perceived independence of the national justice systems in the EU among the general public' (2016) Flash Eurobarometer 435 and EC, 'Perceived independence of the national justice systems in the EU among companies' (2016) Flash Eurobarometer 436.

37 B Hayo, S Voigt, Explaining *de facto* Judicial Independence (2005) Marburg papers on economics 2005/7.

for discussion. As we saw in Section II, judicial independence is a multi-dimensional phenomenon, and it is questionable whether independence can be captured by a few limited variables.

An important issue addressed in the literature is the link between (indicators of) *de jure* and *de facto* independence. Hayo and Voigt (2005) find that their measures of *de facto* independence are partly dependent on '*de jure* independence', but also on factors such as the confidence of the public in the judiciary, the extent of democratisation, the degree of press freedom and other cultural factors, like the religious beliefs of the population. Melton and Ginsburg (2014) find that rules governing the selection and removal of judges are the only *de jure* protections that actually enhance judicial independence in practice. Other studies find that *de facto* independence and *de jure* independence are quite different phenomena. Rios-Figueroa and Staton conclude that Indicators of *de jure* and *de facto* independence are at best weakly correlated and that in some cases, these are even negatively related.³⁸ They also find that different *de jure* indicators are not strongly correlated with each other. The correlations between the various indicators of *de facto* independence are, according to these authors, reasonably strong, despite their differences in content. Also studies of specific countries indicate that both concepts of independence have weak links with one another. In Romania *de jure* independence could increase without substantial effects on *de facto* independence.³⁹ In Venezuela it was the other way round.⁴⁰

We conclude that, while the concepts of *de jure* and *de facto* independence have received recognition, the conceptualisation and measurement of both are complicated. The indicators for *de jure* independence coincide with some of the aspects of independence discussed in the previous Section, but not comprehensively. While capturing important aspects, they do not do full justice to the multi dimensionality of independence. *De facto* independence should essentially show in the content of the judgments, but that is extremely hard to grasp, and most studies resort to indirect measures. For the moment, we consider the perceptions of independence of different groups in society as relevant in itself and as approximation of *de facto* independence.

4. Independence and Accountability

From several perspectives, there are strong arguments against looking at independence in isolation. Here we focus on the link with accountability. Accountability is used here in the sense of the judiciary being morally obliged to inform society about all aspects of its functioning and explain its policies, procedures and decisions. Accountability and transparency are then closely linked, and we use these terms interchangeably. While it is sometimes suggested that the judiciary can best protect its independence by not being transparent, as transparency opens the door to interventions of the other branches of government and forces a managerial, bureaucratic and efficiency oriented approach on the courts⁴¹, there are arguments for the opposite.⁴² The positive link between independence and accountability has an ideological value-driven dimension (judges are public servants who fulfil their duties under public scrutiny), but stems also from the functioning of democracies. From a political science perspective, laws and their proper implementation are the result of functioning political processes.⁴³ This also holds for the constitution and other entrenched laws that set out the arrangements for the organization and functioning of the judiciary and thereby establish formal independence. While political processes are outside the control of the judiciary, the outcome of these processes is affected by the way judges and judiciaries function. It seems reasonable to suggest that, while many factors play a role, governmental and political support for the independence of the judiciary - reinforced by popular support - will generally be stronger the better the judiciary is seen to fulfil its duties, despite the inevitable errors that will occur occasionally. The public can only be sure that judges are independent and impartial if the judiciary functions in a transparent manner and proves its willingness to be accountable to society. Accountability can, therefore, be seen as a necessary condition for independence, at least in the longer term. The internal argument for accountability is related: systems that are accountable to no one are likely to have weaker incentives to improve themselves than systems that open up to the outside world and tackle criticism seriously. By emphasizing and strengthening independence solely judiciaries risk insulating themselves from society and becoming irresponsive to justified demands of society.

In the view of the ENCJ a judiciary that is not accountable to society will not be trusted by society and will thereby endanger its independence: 'Independence must be earned. It is, by no means, automatic. The best safeguard is excellent and transparent

38 Rios-Figueroa and Staton. Fn 7.

39 M Mendelski, 'EU-driven judicial reforms in Romania: a success story?' (2012) 28 East European Politics 23.

40 MM Taylor, 'The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez' (2014) 46 Journal of Latin American Studies 229.

41 For an overview see Contini and Mohr (fn 3). Especially, the new public management approach often receives strong criticism from judges. For a balanced and empirical analysis see A. Lienhard and D. Kettinger, eds (2016), *The Judiciary between Management and the Rule of Law: Results of the Research Project 'Basic Research into Court Management in Switzerland'*. Part of the project was a survey among participants in the Judiciary. While congruence of the expectations about what constitutes a good judiciary of judges, management and other groups in the courts was found, the dominant culture is that of the judges expecting the judiciary to be impartial, non-arbitrary, independent, incorruptible and trustworthy. Court management puts more weight on a judiciary that is integrated in society, customer-friendly, accessible, impact oriented and well-equipped.

42 See for a similar discussion about independence and accountability of regulatory agencies: Hans Bredow Institute for Media Research, Interdisciplinary Centre for Law & ICT (ICRI), Katholieke Universiteit Leuven, Center for Media and Communication Studies (CMCS), Central European University, Cullen International Perspective Associates (2012), 'INDIREG FINAL REPORT: Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive.'

43 E.g., T. Koopmans (2003), *Courts and political institutions; a comparative view*. Cambridge University Press.

performance.⁴⁴ Recent events in Poland underline that legal safeguards do not always guarantee independence, as laws can be changed, sometimes surprisingly quickly⁴⁵.

On this basis, it is logical that the indicators should not only consider independence but also accountability. Consequently, the requirements for the judiciary to be accountable need to be identified. Transparency and accountability have, however, received much less attention than independence. Still, the sets of principles reviewed in Section II provide relevant context, albeit haphazard. The Recommendation of Ministers of the Council of Europe stresses the duty of judges to give clear reasons for their judgments in language which is clear and comprehensible.⁴⁶ It also states that ethical principles of professional conduct should be laid down in codes of judicial ethics that inspire public confidence in judges and the judiciary. Further, the Recommendation identifies the circumstances in which a judge is to withdraw from a case. This topic is considered in greater depth in the Bangalore Principles of Judicial Conduct that list these conditions, but also address acceptable accessory functions and seemingly conflicting financial interests judges may have without compromising their independence.⁴⁷ The Magna Carta of Judges of the CCJE suggests that transparency requires that information be published on the operation of the judicial system.⁴⁸ Also, the CCJE argues that it should be made clear what corresponds to judicial misconduct. We conclude that in this area accountability implies that the judiciary set clear rules accessible to the public to avoid its impartiality being compromised. This requirement does not only apply to individual behaviour. The Venice Commission pays much attention to case allocation that in its view should not be *ad hoc* or *ad personam*, but based on objective and transparent criteria.⁴⁹ Case allocation can be seen as a matter of internal independence, but it is also important from the perspective of transparency. Again, there need to be rules and these must be made public. The UN's basic principles refer to the need for a complaints procedure. While not comprehensive, these recommendations give an indication of the elements that need to be incorporated in a framework that not only aims to guarantee independence but also ensures judicial accountability.⁵⁰ This short discussion should also make clear that accountability goes well beyond managerial accountability, focused on production and efficiency.

As to perceptions or other empirical data about accountability, not much is available.⁵¹ We are not aware of data that measures the perceptions in society about the accountability of the judiciary.

IV. INDICATORS OF JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

1. Framework

Using the findings of Section III, a conceptual framework for the operationalization and measurement of independence and accountability has been developed. Table 1 lists the key aspects that have been identified. As discussed above, an important distinction is between formal or objective independence and subjective or perceived independence. Formal legal safeguards may make the judiciary objectively independent, but the subjective perception of judicial independence as viewed by different sections of society, including judges themselves, is equally important. The other major distinction is between the independence of the judge and that of the judiciary. The judge needs to be independent to decide cases impartially, but that also requires that the judiciary as a whole is independent, taking its interdependence with the other state powers into account. For instance, while parliament has budget right, insufficient and arbitrary funding of the judiciary can make individual independence an empty shell. Independence should therefore be defined at two levels. This distinction applies only to formal independence, as perceptions generally do not differentiate between the individual judge and the judiciary.

These two distinctions apply to accountability as well. There is a lack of data about subjective accountability, and this aspect has had for the moment to be excluded. The distinction between the individual judge and the judiciary is necessary. Systemic accountability requires transparency of procedure (e.g. case allocation and complaint procedures) and transparency of performance (e.g. timeliness and efficiency). Individual judges are accountable if their decisions are publicly available, properly reported and explained.

An indicator was devised for each key element of objective and subjective independence and objective accountability. Each indicator captures a complex phenomenon and consequently consists of several sub indicators. The next 5 paragraphs explain briefly each of the indicators. It needs to be stressed that the indicators are based on the common ground in published legal instruments and analyses of independence and accountability that we discussed in Section III and they reflect the consensus within the ENCJ in which nearly all judiciaries of Europe are represented. The indicators follow directly from the literature discussed in Section III.

44 ENCJ (2014), Independence and Accountability of the Judiciary; ENCJ Report 2013/2014, p9.

45 See also EC, Commission Recommendation of 26.7.2017 regarding the Rule of Law in Poland' (2017) C 5320 Final and fn 11 and 14.

46 CoE, Fn 22. Chapters VII and VIII.

47 UNECOSOC, Bangalore Principles of Judicial Conduct. Fn 20. Sections 2.5, 4.7 and 4.11, in particular.

48 CCJE, Fn 18.

49 Venice Commission, 'Report on the Independence of the Judicial System. Part 1: the Independence of Judges' (2010) CDL-AD (2010) 004-e, p15. This is also reflected in the Recommendation of the Committee of Ministers of the Council of Europe (chapter III).

50 For a similar combination of independence and accountability see also OSCE, Kyiv Recommendations. See fn 21.

51 Voigt arrives at the same conclusion, but chooses a different conceptualization of accountability than we do here. S. Voigt, The economic effects of judicial accountability: cross-country evidence (2008) European Journal of Law and Economics 25, 95-123,

Table 1. Overview of key aspects of judicial independence and accountability

Formal independence	Perceived independence	Formal accountability
<p>Judiciary:</p> <ul style="list-style-type: none"> · Legal basis of independence · Organizational autonomy · Funding · Management of court system <p>Judge:</p> <ul style="list-style-type: none"> · Human resource decisions about judges · Disciplinary measures · Non-transferability of judges · Internal independence 	<p>Judge and judiciary undifferentiated:</p> <ul style="list-style-type: none"> · Independence as perceived by citizens · Independence as perceived by court users · Independence as perceived by judges · Trust in judiciary, relative to trust in other state powers by citizens in general · Judicial corruption as perceived by citizens in general 	<p>Judiciary:</p> <ul style="list-style-type: none"> · Allocation of cases · Complaints procedure · Periodic reporting by the judiciary · Relations with the press · External review <p>Judge:</p> <ul style="list-style-type: none"> · Code of Judicial ethics · Withdrawal and recusal · Admissibility of external functions and disclosure of external functions and financial interests · Understandable procedures

2. Objective Independence of the Judiciary as a Whole

Applying the principles and their elaboration in guidelines discussed in section III, the key aspects of Table 1 have been developed into indicators, generally consisting of sub indicators to capture the diverse elements that are relevant for a key aspect. The sets of principles about judicial independence overlap to such an extent that references for each indicator to specific sets of principles is irrelevant. The elaboration of the indicators is based on an analysis of the elements that are of practical importance in the judiciaries of Europe, utilizing the guidelines that have been drawn up by the ENCJ in particular (see fn 25; the guidelines are summarized in the Appendix of this article).

Table 2. Indicators of the objective independence of the judiciary as a whole

1. Legal basis of independence, with the following sub-indicators:

- Formal guarantees of the independence of the Judiciary
- Formal assurances that judges are bound only by the law
- Formal methods for the determination of judges' salaries
- Formal mechanisms for the adjustment of judges' salaries
- Formal guarantees for involvement of judges in the development of legal and judicial reform

2. Organisational autonomy of the Judiciary, with the following sub-indicators where there is a Council for the Judiciary or equivalent independent body:

- Formal position of the Council for the Judiciary
- Compliance with ENCJ guidelines
- Scope of responsibilities of the Council

Sub-indicator when there is no Council for the Judiciary or an equivalent body:

- Influence of judges on decisions in areas of responsibility

3. Funding of the Judiciary, with the following sub-indicators:

- Budgetary arrangements
- Procedure for resolution of conflicts about budgets
- Objectivity of funding system
- Sufficiency of actual budgets for categories of tasks

4. Management of the court system.

- Management responsibility of the courts for categories of tasks

There are the following indicators about the independence of the judiciary as a whole:

- the legal basis of judicial independence, which includes an enquiry about formal statutory guarantees of judicial independence and formal assurances that judges are bound only by the law. In addition, the indicator looks at the existence and application of formal processes for the determination and adjustment of judges' salaries, and for the involvement of judges in government decisions about legal and judicial reforms that affect directly their tasks and functioning. In the absence of these guarantees the independence of the judiciary can be easily compromised and less readily enforced. Also, the nature of formal guarantees is relevant with constitutional guarantees providing the strongest protection.
- the arrangements that are in place to ensure the organizational autonomy and self-governance of the judiciary. The indicator examines the design and responsibilities of Councils for the Judiciary and of alternative institutional arrangements.⁵² Apart from the way the formal position is arranged which determines the ease with which a Council can be abolished or altered, the indicator addresses whether arrangements are consistent with ENCJ guidelines about the set-up of an independent Council.⁵³ These guidelines elaborate the existing principles and concern for instance the composition of a Council. Among other: at least 50% of the members of the Council are judges and are chosen by their peers (see Appendix). This determines to a large extent whether a Council is part of the judiciary or an extension of government, and is a flashpoint in several countries (Poland, Spain). In addition, the indicator deals with the responsibilities of a Council. Even a perfectly appointed Council has little impact if its responsibilities are limited. The indicator allows for other institutional arrangements than Councils for the judiciary, in as far as these provide for decisive influence of the judges.
- the funding of the judiciary, including questions concerning the formal budgetary arrangements for both the judiciary as a whole and for court management, the processes in place to resolve budgetary conflicts, and the objective sufficiency of the actual budgets themselves to fund defined key tasks (see Appendix). As to the funding system, the use of objective criteria such as case load is seen as particularly important for independence, as this protects the Judiciary against arbitrary decisions by budget authorities.
- the method by which the court system is managed. In several countries the Minister of Justice is directly responsible for court management. The more that decisions in defined key areas are taken by the judiciary, the better independence is served, as will be discussed further in section 7.

3. Indicators of Objective Independence of the Individual Judge

Table 3. Indicators of the objective independence of the individual judge

5. Human resource decisions about judges, with the following sub-indicators:

- Selection, appointment and dismissal of judges and court presidents: authority to decide
- Selection, appointment and dismissal of Supreme Courts judges and the President of the Supreme Court: authority to decide
- Compliance with ENCJ guidelines about the appointment of judges
- Evaluation, promotion, disciplinary measures and training of judges: authority to decide
- Compliance with ENCJ guidelines about the promotion of judges

6. Disciplinary measures, with the following sub-indicators:

- Compliance with ENCJ standards about disciplinary measures against judges
- Competent body to make decisions about disciplinary measures against judges

7. Non-transferability of judges, with the following sub-indicators:

- Formal guarantee of non-transferability of judges
- In the absence of a formal guarantee: arrangements for the transfer of judges without their consent

⁵² The ENCJ not only represents the perspective of Councils for the judiciary; its observers have equal status in its project teams.

⁵³ ENCJ (2011). Councils for the Judiciary; Report 2010/2011. https://www.encj.eu/images/stories/pdf/workinggroups/report_project_team_councils_for_the_judiciary_2010_2011.pdf. The Appendix gives a summary.

8. Internal independence, with the following sub-indicators:

- Influence by higher ranked judges
- Use and status of guidelines
- Influence by the management of the courts

The indicators here include:

- the way in which human resources decisions are taken in relation to judges. Who decides, on what grounds and are safeguards in place? The questions relate to judicial selection, appointment and promotion procedures, the dismissal of judges, and to processes for the evaluation and training of judges. Compliance with ENCJ guidelines that define elementary standards of transparency and objectivity is a major element here.
- the way in which disciplinary measures are taken against judges. This extremely sensitive area requires safeguards in terms of procedures and governing bodies. Also, in this area the ENCJ has developed guidelines.
- the ability to transfer judges between courts without their consent for other than for disciplinary reasons. There should be formal safeguards in place to prevent judges being moved or removed from office, as this can be easily used to affect the outcome of cases.
- the influence that senior judges and court management can wield over judges generally. Obviously, attempts of court management to affect the outcome of cases can only be viewed as very negative, while pressure to decide cases in a timely manner may be warranted in some cases but is still problematic from the perspective of independence. The indicator also addresses the development of guidelines for matters such as uniformity, consistency, timeliness and efficiency by judges at the same level. The indicator seeks to identify such practices, as these are from the perspective of independence problematic in particular if guidelines are binding.

4. Indicators of Subjective Independence of the Judiciary and Individual Judges

The indicators of the two previous paragraphs are about the degree to which formal and factual requirements of judicial independence are met. The current paragraph is about perceptions of independence, and requires a different methodology, using surveys amongst relevant stakeholders.

Table 4. Indicators of the subjective independence of the judiciary and the individual judge

9. Independence as perceived by society;

- Flash Eurobarometer 435 2016 'Perceived independence of the national justice systems in the EU among the general public and Flash Eurobarometer 436 2016 'Perceived independence of the national justice systems in the EU among companies'
- Global competitiveness report 2016-2017
- World Justice Rule of Law Index 2016

10. Independence as perceived by courts users at all levels;

- National surveys

11. Independence as perceived by judges;

- ENCJ survey, question 13

12. Judicial corruption as perceived by citizens in general;

- EU Anti-Corruption Report 2014

13. Trust in Judiciary, relative to trust in other state powers by citizens in general;

- National surveys

The indicators address perceptions of judicial independence amongst the population and business sector in general, court users and judges. The first two indicators are separate because many citizens will not have recent or direct experience of the courts. The perceptions of judges about their (and their colleagues') independence are relevant, as these perceptions provide direct insight into the workings of the formal mechanisms that should guarantee independence. A comparison of perceptions of judges with those of the population and court users is relevant, if only to check the consistency of perceptions. Perceptions amongst the population about judicial corruption are also included, as corruption is a fundamental breach of independence. As discussed in Section III, judges must be able to do (and must do) their duty without pressure and improper influence. Lastly, in-country comparisons between the

trust of citizens in the judiciary and their trust in the executive and the legislature give a different, but relevant perspective. While it should be recognized that trust is circumstantially linked to independence⁵⁴ and it is a complex notion in itself, it is the only measure that is available in many countries about the relative performance of the judiciary within a country. The other indicators provide cross country data. These cross country comparisons will to some extent be affected by the perceptions about public institutions in general. The in-country comparison allows a more nuanced view.

There are, therefore, the following indicators under this heading:

- the perceptions of citizens, ideally breaking them down into different economic, status and ethnic groups, but for now undifferentiated: reliance was placed on the Eurobarometer surveys about independence among citizens and companies,⁵⁵ the World Economic Forum's Global Competitiveness Report⁵⁶ and the World Rule of Law Index.⁵⁷
- court users' perception of judicial independence. This requires national sources.
- judges' own views of their independence. The ENCJ undertook an extensive survey of EU judges at the end of 2016.⁵⁸
- perceived judicial corruption, as reported by the Eurobarometer 2014.⁵⁹ Since there are obvious difficulties in measuring the level of actual corruption, the perceptions in society are a good secondary indicator.
- the trust that citizens place in the judiciary compared with their trust in the other branches of government. This requires national sources.

5. Indicators of Objective Accountability of the Judiciary as a Whole

This and the next paragraph are about the formal and factual aspects of accountability. In section III we discussed that, while broad consensus exists about the need and requirements of independence, accountability has received much less attention. Managerial accountability about production and efficiency is even a source of controversy. Still, in paragraph 3 of that section we were able to distinguish aspects of accountability in a broad sense on the basis of existing sets of principles. It should be recognized, however, that the indicators presented in these paragraphs are more open for debate than those about independence.

Table 5. Indicators of the objective accountability of the judiciary as a whole

1. Allocation of cases, with the following sub-indicators:

- Existence of a transparent mechanism for the allocation of cases
- Content of the mechanism for the allocation of cases

2. Complaints procedure, with the following sub-indicators:

- Existence of a complaints procedure
- External participation in the complaints procedure
- Scope of the complaints procedure
- Appeal against a decision on a complaint

3. Periodic reporting by the Judiciary, with the following sub-indicators:

- Availability of annual reports
- Publishing of the annual reports
- Scope of the annual reports
- Existence of periodic and public benchmarking of the courts

4. Relations with the press, with the following sub-indicators:

- Explanation of judicial decisions to the media

54 Trust is a broader and less precise concept than perceptions of independence. For instance, Jackson et al. define trust in the criminal justice system as follows: 'To trust in the police and the criminal courts is to assume that criminal justice agencies and agents are *willing* and *able* to do what they are tasked to do (...). Spanning both intentions and abilities, trust is the belief that individuals working for criminal justice institutions have appropriate shared motivations and are able to fulfil their roles competently (...)' J Jackson, J. Kuha, M Hough, B Bradford, K Hohl, M Gerber, Trust and Legitimacy across Europe: A FIDUCIA Report on Comparative Public Attitudes towards Legal Authority (2013) Fiducia.

55 EC, Eurobarometers. See fn 36.

56 World Economic Forum, see fn 35.

57 World Justice Project, *Rule of Law Index 2016* (2016).

58 ENCJ, 'Data ENCJ Survey on the Independence of Judges 2016/2017' (2017) <https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_survey_2016_2017.pdf>.

59 EC, 'Eurobarometer Special Surveys: EB79.1 Corruption' (2014) http://ec.europa.eu/commfrontoffice/publicopinion/archives/eb_special_399_380_en.htm

- Existence of press guidelines
- Broadcasting of court cases

5. External review, with the following sub-indicators:

- Use of external review
- Responsibility for external review

The indicators in this category are as follows:

- case allocation, which should guarantee the impartial and expert treatment of every case. The allocation of cases to judges can be misused by, for instance court management, to affect the outcome of cases by giving cases to judges that can be influenced or of which the opinions are in line with desired outcomes. The indicator questions the existence, nature and transparency of the case allocation mechanism. In this area ENCJ-guidelines exist. It should be noted that case allocation is also relevant from the perspective of judicial independence.
- the existence, scope and nature of complaints procedures for parties or their legal representatives in relation to matters such as the judges' case handling methods and the behaviour of court staff. The indicator also addresses external participation in complaints procedures and the number of complaints actually made.
- periodic reporting by the judiciary. Reporting at system level provides insight in the performance of the judiciary as a whole and makes external scrutiny possible. Performance is about judicial matters as well as managerial matters such as the use of funds and timeliness. See the Appendix.
- the relationship between the judiciary and the media. The indicator questions the existence of a transparent dialogue with the media to explain judicial practices and decisions, and the judiciary's participation in education so as to explain the role of the judicial decision-making in society.
- the extent to which the judiciary is open to external review, including audit, quality and efficiency evaluations. The indicator considers the types of external review undertaken and the uses made of them.

6. Indicators of Objective Accountability of the Individual Judge

Table 6. Indicators of the objective accountability of the individual judge

6. Code of judicial ethics, with the following sub-indicators:

- Existence of a code of judicial ethics
- Availability of training on judicial ethics
- Responsible body to provide judges with guidance or advice on ethical issues

7. Withdrawal and recusal, with the following sub-indicators:

- Obligation of voluntary withdrawal
- Sanction on breach of an obligation to withdraw
- Procedure for request for recusal

8. Admissibility of external functions and disclosure of external functions and financial interests, with the following sub-indicators:

- Existence of policy on admissibility of external functions
- Authorisation of the exercise of accessory functions
- Existence of a (public) register of external functions of judges
- Existence of a (public) register of financial interests of judges

9. Understandable proceedings, with the following sub-indicators:

- Duty of judges to make proceedings intelligible to the parties
- Duty of judges to make proceedings intelligible to categories of court users such as children, youth, disabled people (physically/mentally), victims, those for whom the national language is not their mother tongue and self-represented litigants
- Training of judges

There are the following indicators under this heading:

- the existence of a code of judicial ethics that lays down the standards of conduct that society and parties in particular can expect from judges, and for which judges can be held accountable. Such an ethical code may promote a better understanding of the role of the judge in society, and thereby promote public confidence. The indicator also covers training on judicial ethics, as the mere existence of a judicial code is not sufficient to affect the behaviour of all judges.
- the circumstances in which an individual judge will voluntarily withdraw from a case and recuse himself. These circumstances may relate to objective matters such as family or friendship ties or to subjective issues such as expressed opinions. The indicator also queries the consequences of a breach of an obligation to withdraw, when citizens can request recusal, which authority decides on recusal, and appeals against recusal decisions.
- the policies on judges undertaking external paid and unpaid offices and functions, the types of permitted activities and interests, and the availability of a public register of such matters and of the disclosure of financial interests of judges. Judiciaries follow different strategies. In some countries judges are not or in very limited cases allowed to fulfill functions outside the judiciary; in other countries judges have much more possibilities. In the latter situation a public register of functions is needed. Both strategies are acceptable, and the indicator allows for this.
- the intelligibility of judicial proceedings, querying the existence of a duty on individual judges to make proceedings understandable to the parties and, in particular, vulnerable parties, and the training of judges in accessibility generally.

Assessment of subjective indicators of judicial accountability requires the existence of opinion surveys, preferably amongst a wide range of relevant groups. Whilst survey data exists in relation to independence, it does not to our knowledge at the moment exist in relation to judicial accountability, and the lacuna is less easy to fill than that in relation to the perceptions of judges. Accordingly, this aspect will require further attention in due course.

7. Methodology of the Measurement of the Indicators

The indicators about objective independence and accountability, as described in the paragraphs 2, 3, 5 and 6 of this section, have been developed into a precise set of questions that were answered by the Councils for the judiciary and other governing bodies. The questionnaire is available on the ENCJ's website.⁶⁰ A points system, consisting of scoring rules, was used to evaluate the answers to the questions. Above, we indicated already for most indicators what is good and what is bad practice. The underlying principles that were applied are discussed here.

First, the key issue in general about formal safeguards is the ease with which such safeguards can be altered or removed. A safeguard embedded in a constitution offers more protection than one contained in normal legislation. Legislative safeguards are more effective than those contained in subordinate legislation, general jurisprudence or tradition. This principle lies at the heart of formal independence. All sets of principles and other documents discussed in Section III require protections in law and often in the constitution.

Secondly, judicial self-government is in principle desirable.⁶¹ Where - on the contrary - other branches of government have the authority to make decisions about the judiciary, decisions based on objective criteria are to be preferred to discretionary decisions.

Thirdly, in every area, transparent rules are to be preferred to ad hoc reactions to particular situations. This applies equally to independence (i.a. funding of the judiciary) and accountability (i.a. case allocation and complaint procedures). Judicial decisions and procedures should all be formalised, public and transparent. In addition, transparency requires active dissemination of information, rather than simply making information theoretically available.

Finally, in several areas, such as the appointment and promotion of judges but also the autonomy of the judiciary, guidelines have been developed by the ENCJ, taking into account opinions by *inter alia* the CCJE and the Venice Commission. Adherence to the guidelines is obviously to be preferred.

Applying these principles results in a points system by which all aspects of objective independence and accountability can be evaluated.⁶² Equal weight was given to all sub-indicators. The actual allocation of points to the possible answers to each question was developed by a common understanding within the ENCJ, which proved possible despite the differences between legal systems and cultures. The points system is given in the Appendix.

The scores for the indicators of objective independence and accountability were derived from the questionnaire, whilst those for subjective independence were based on international opinion surveys. Those surveys included the survey undertaken by

60 ENCJ, 'Independence, Accountability and Quality of the Judiciary: Performance Indicators 2017' (2017) ENCJ Report 2016/2017 <https://www.encj.eu/images/stories/pdf/GA/Paris/encj_report_ia_ga_adapted_ga_12_6.pdf>. Annex 1.

61 See Lienhard and Kettinger (fn 41) about the courts' right of self-administration, as included in the federal constitution of Switzerland for the Federal Supreme Court.

62 As an example: the first item of the questionnaire asks whether and, if yes, how independence of the judiciary or the judge is formally guaranteed: (1) constitution or equivalent document where equivalence means that the position of the judiciary cannot be changed by simple majority, (2) law that can be changed by simple majority and (3) constitutional court. Option 1 earns 3 points, option 2 earns 2 points, option 3 earns 1 point and no formal protection earns 0 points.

the ENCJ itself about the independence of judges. International surveys were, however, not available about the opinions of court users and the trust of citizens in the judiciary relative to their trust in the other state powers. For these perceptions national sources, as reported by Councils for the judiciary and, where these do not exist, other governing bodies such as Ministries of Justice, had to be relied on.

The questionnaires were completed either by Councils for the judiciary or other governing bodies such as Ministries of Justice. The answers were scored by the project staff. Thus, while the indicators measured in this way are objective in the sense that they capture the formal arrangements of a legal system, the method is self-evaluation. In some situations, this may lead to self-serving bias. This is difficult to avoid, but a group of experts from within the ENCJ responded to queries about the interpretation of the questions, checked the logic and plausibility of the answers, and resolved ambiguities, ensuring as far as possible that the indicators were measured uniformly and correctly.

V. Outcome of the application of the indicators

We have now described the indicators that were applied and the method by which they were measured. The indicators are primarily intended to allow individual Councils for the Judiciary to improve themselves by assessing their institutional design from the perspective of independence and accountability and their performance in these respects against a standard. The outcomes are, therefore, presented in the form of country profiles,⁶³ but we first examine the average results across all participating judiciaries (see Figure 1). In total 23 judiciaries participated in 2016/2017.⁶⁴ The outcomes for each indicator are presented as a percentage of the maximum possible score that reflects the best possible arrangements. Statistics such as mean and standard deviation can be calculated for each sub indicator as well as indicator over all countries.⁶⁵ It is not possible to do this across the indicators. The score per indicator is given in combination with the minimum and maximum scores achieved by any of the participating judiciaries.

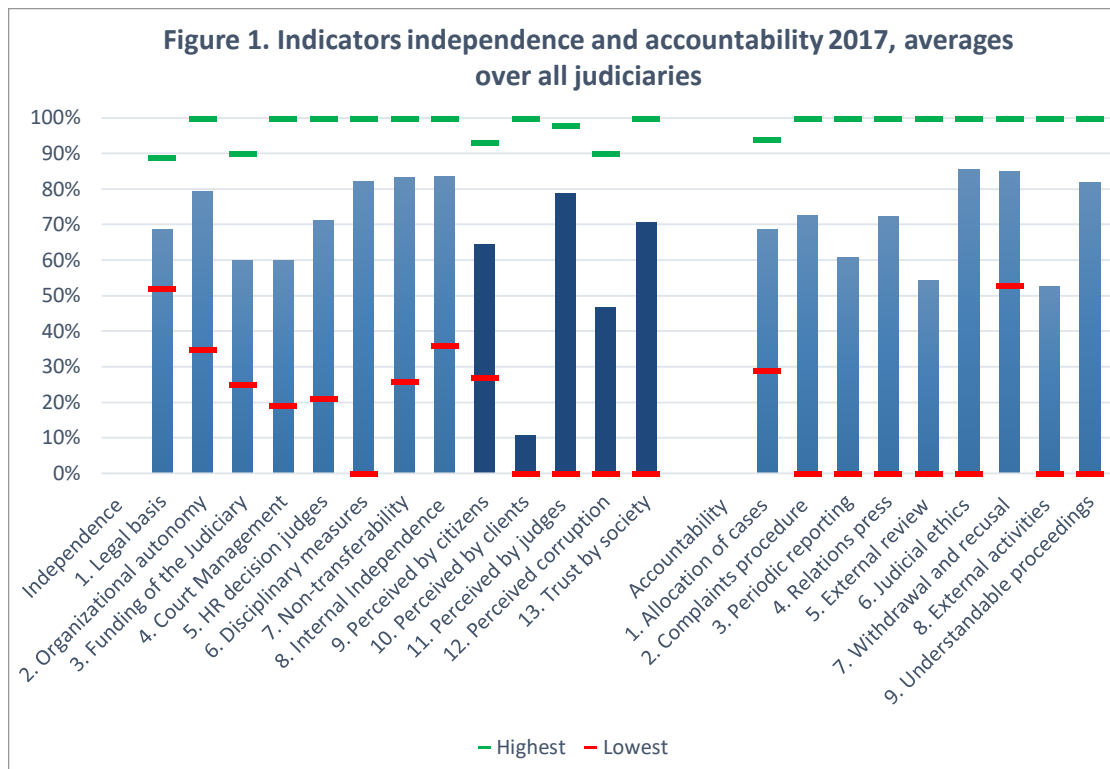
As to the availability of data, all indicators could be measured for nearly all countries, except for the independence of the judiciary as perceived by court users. Surveys among court users are unfortunately still quite rare. As a result, most judiciaries have a minimum score on this indicator. Given the crucial importance of court user feedback, the indicator was retained.

The average outcomes for the indicators show tendencies within the judiciaries in Europe. Given the differences between the judiciaries that we will discuss later, the average scores give only a rough indication. Nevertheless, some general conclusions can be drawn from the averages in combination with a global inspection of the country outcomes. In the *first* place, there is much room for improvement with respect of independence as well as accountability, judging from the difference between the actual scores and what are deemed best arrangements (100%). For most indicators at least one judiciary reaches this best level (see the position of the green dashes in Figure 1), showing that these best arrangements are achievable. On the other hand, very low minimum scores also occur (red dash), especially in the area of accountability. In the *second* place, with regard to objective independence (shown in light blue on the left side in the figures), the funding of the judiciary and court management score lowest by far. The funding of the judiciary is generally not well arranged, and judiciaries are dependent on discretionary budget decisions by the other branches of government. Court management is still often in the hands of Ministries of Justice. It has proven difficult to change financial and organisational arrangements.

63 All profiles can be found online: ENCJ (2017), Independence, Accountability and Quality of the Judiciary: Performance Indicators 2017. See fn 60. <https://www.encj.eu/images/stories/pdf/GA/Paris/encj_report_ia_ga_adopted_ga_12_6.pdf>

64 Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, UK England and Wales, UK Scotland.

65 As interval scales are used (per sub-indicator points can be earned on a scale with equal intervals: the distance between 1 and 2 is the same as between 2 and 3), percentages are allowed.

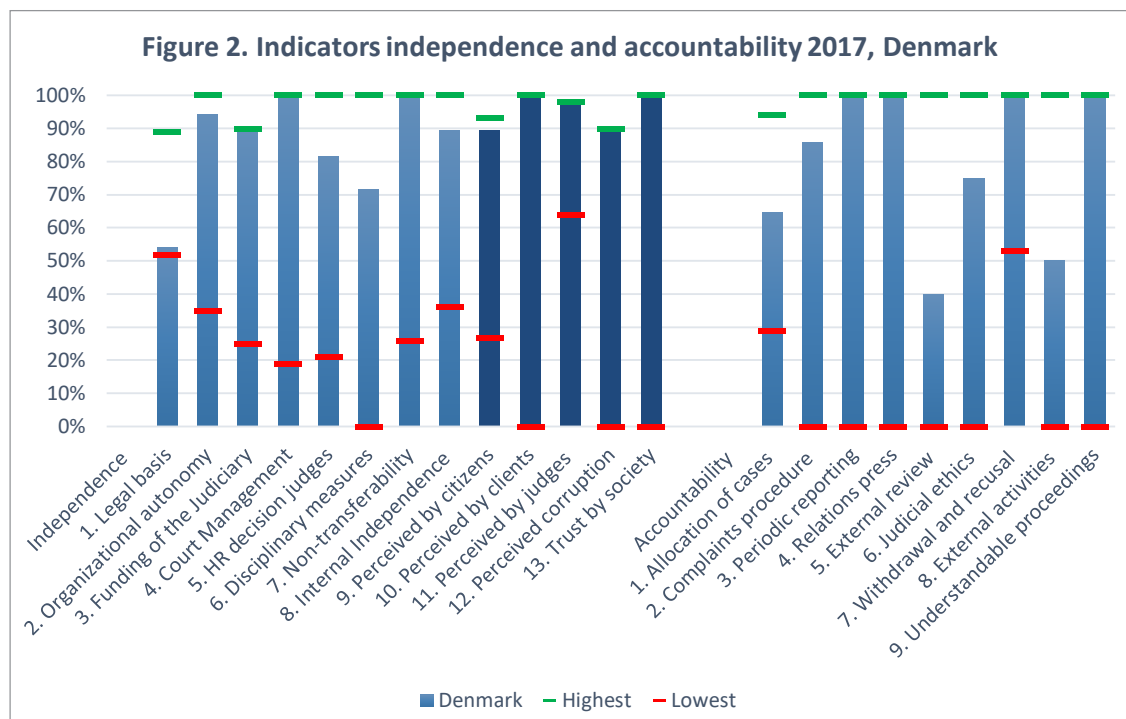


In the *third* place, the lowest mean scores concern subjective independence (shown in dark blue in the figures). As mentioned already, most judiciaries do not conduct court user surveys. As a result, the average score on indicator 12 is very low. The score on corruption is also low. The scores on the other subjective indicators are, however, at similar levels as the indicators about objective independence. These indicators concern judicial independence as perceived by citizens and independence as perceived by judges themselves. The correlation between both types of perceptions is high⁶⁶, showing that the perceptions of judges of their actual independence are reasonably in agreement with those of citizens. Indicator 10 warrants specific attention, because it provides an in-country perspective. It concerns trust of citizens in the judiciary relative to trust in the other state powers. In nearly all countries the trust in the judiciary is higher than the trust in the other state powers (16 of the 18 countries for which data exists).

In the *fourth* place, with respect to accountability (shown on the right side in light blue), outcomes vary considerably among countries. For instance, about half of the countries score very low on periodic reporting, whilst the others score very high. More generally, external review and (disclosure of) external functions of judges get low scores, again with substantial country exceptions. The external nature of external review is a complicated issue, because it obviously is essential, but, if review is not commissioned by the judiciary itself, it opens the door for outside interference with the judiciary and thus detracts from independence.

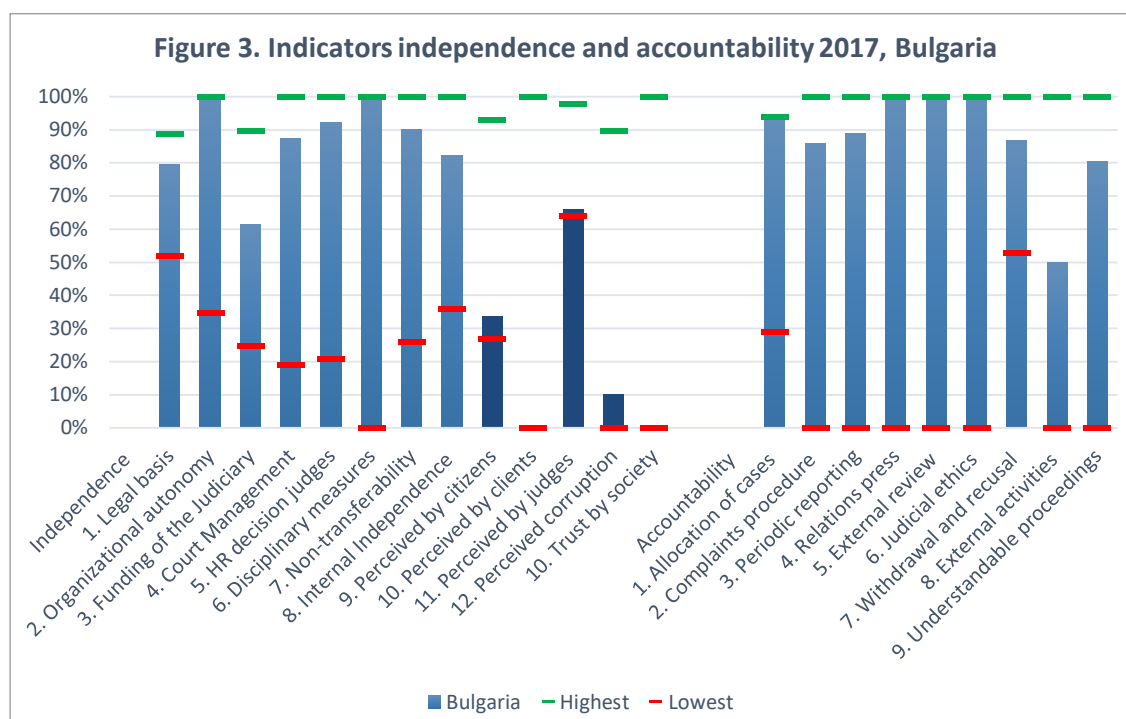
Turning to the country profiles, we focus on the highlights. It is not surprising that differences are large among countries given their recent histories. Tables 2 and 3 illustrate this for Denmark and Bulgaria.

⁶⁶ Pearson correlation: 0.83 (N=24). This indicator of perceived independence by citizens is an average of three separate data sets. The correlation with these data sets separately is also high: 0.90 (N=26) with judicial independence in the Global Competitiveness Report of the World Economic Forum and 0.84 (N=22) with the impartiality of the criminal law system measured by the Rule of Law Index. Finally, the correlations with the European Barometer percentages of respondents that rate the independence of courts and judges as (fairly) good are 0.67 (N=24). Note that, while 23 judiciaries answered the questionnaire, 26 participated in the survey among judges (N is maximally 26).

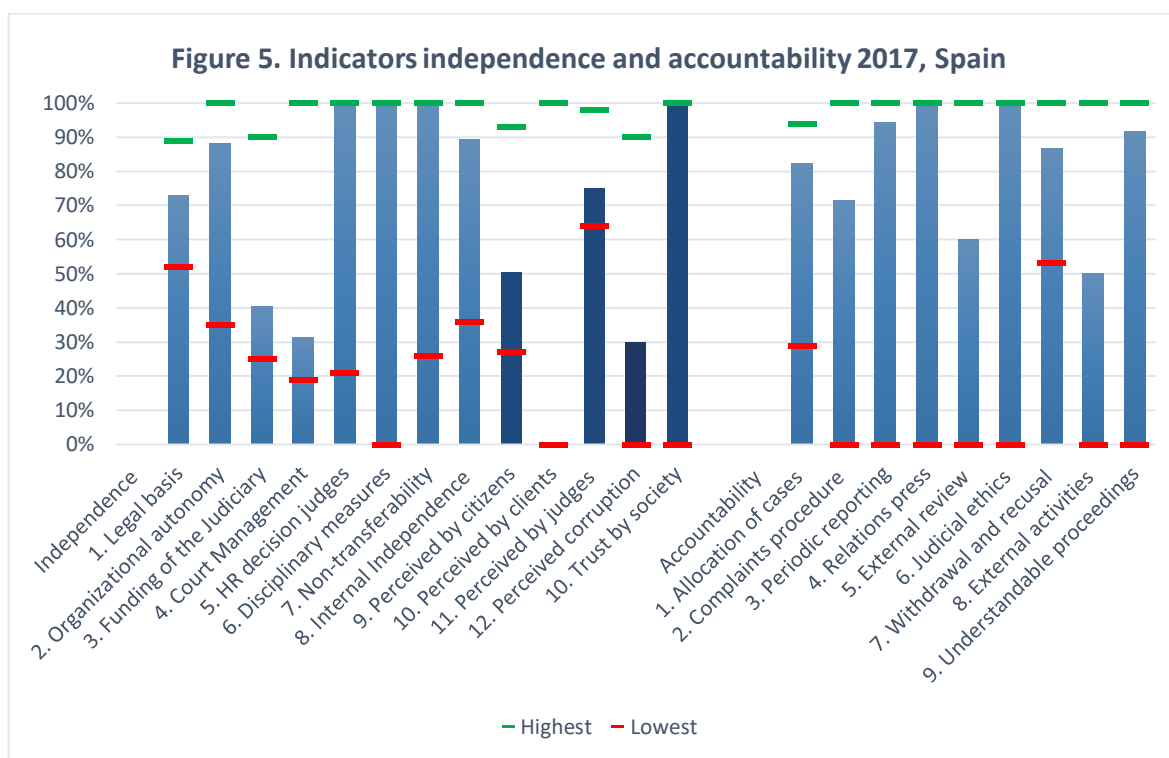
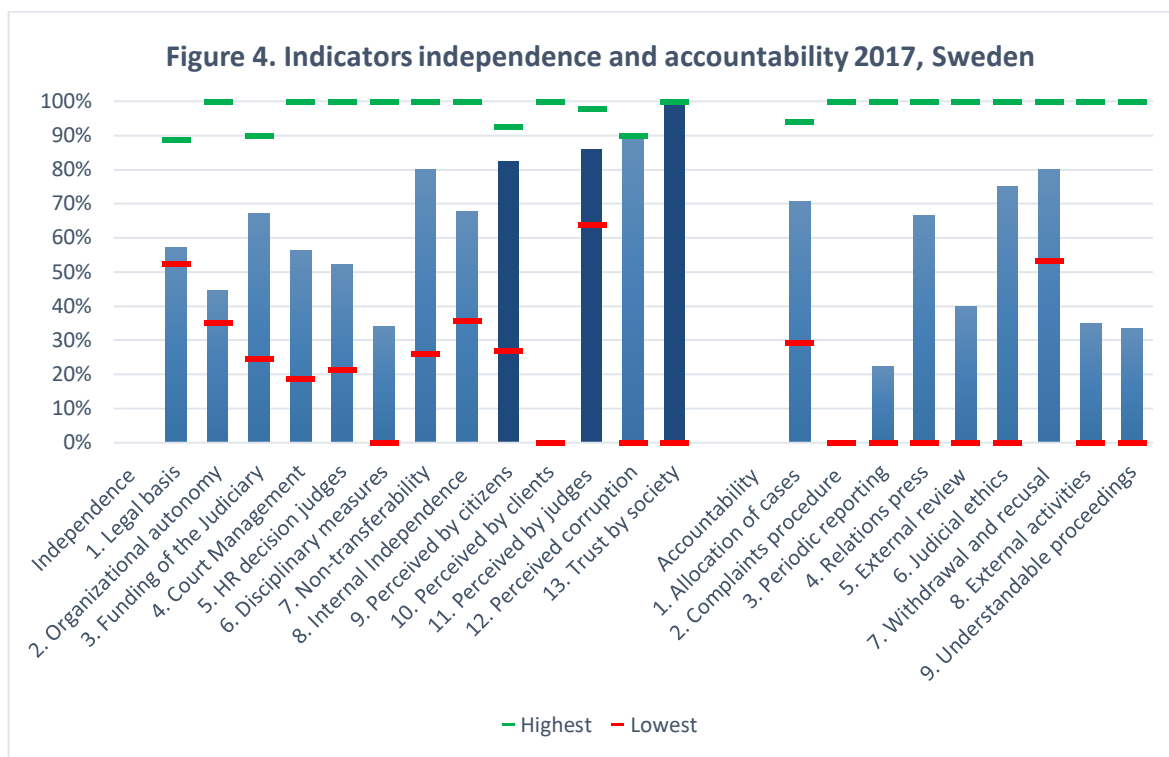


Denmark shows a strong performance across the board with respect to objective and subjective independence and a strong, but less consistent, performance on accountability, while in Bulgaria objective independence and accountability are well arranged, but subjective independence scores are low. In Bulgaria many of the formal arrangements are state of the art, due to the need to rebuild judicial institutions after communism and due to the EC that demanded these arrangements as part of entry negotiations. There is a strong legal basis for an independent judiciary. Typical arrangements for this type of judiciary are random case allocation to reduce possibilities of corruption and the existence of mechanisms for external review of the judiciary. The perceptions of independence lag behind, which is likely to reflect reality, but to some degree may also have to do with slow adaptation of perceptions.

As to objective aspects, Denmark has an informal approach, showing in relatively low scores with regard to the constitutional position of the judiciary, case allocation, external activities of judges and reporting. This is more pronounced in the UK with its informal common law tradition, and even more so in Sweden and Finland. Table 4 gives the profile for Sweden. Weak formal arrangements of independence and accountability go together with positive perceptions in society and among judges about independence.



The profile of Bulgaria, which is similar to other countries in Eastern Europe, is not confined to Eastern Europe. Table 5 gives the profile of the Spanish judiciary, which scores low on subjective independence, although trust in the judiciary is higher than in the other branches of the state.



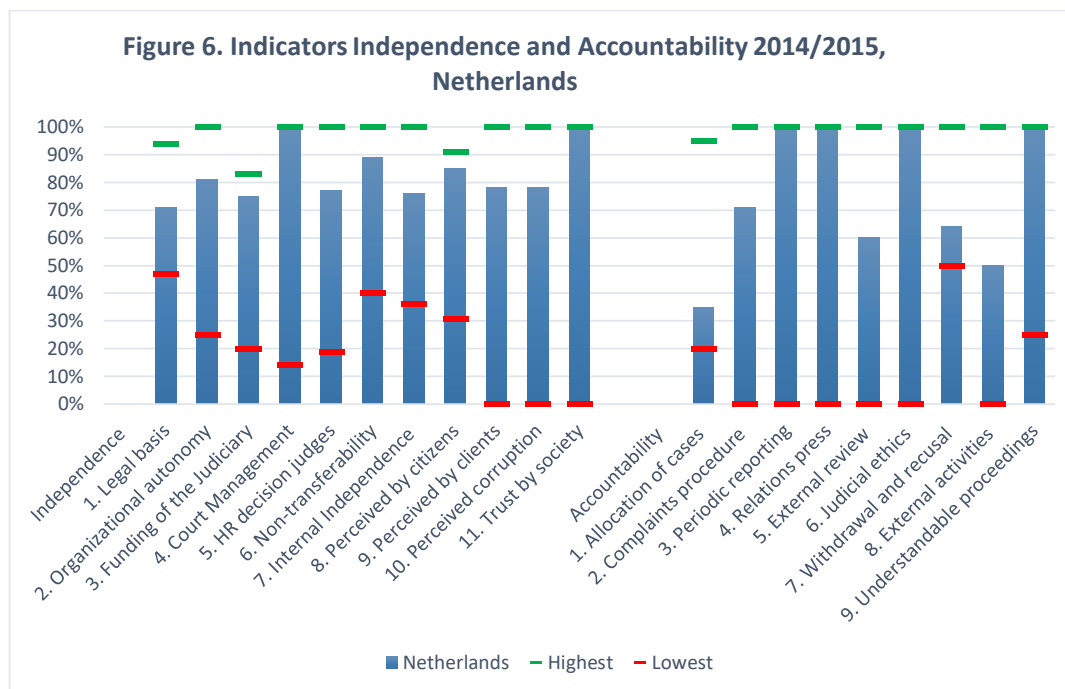
The results demonstrate that in order to improve outcomes more emphasis is required across Europe on subjective independence. The absence of data tells much about the importance attached to the opinions of court users; there should at least be systematic measurement of the views of court users to start to address this blind spot. From the views of the court users strategies can be

developed to deliver justice in a way that citizens really want. From an analytical point of view it is striking that there seems to be no relation between objective and subjective independence. High levels of formal independence and accountability can go together with a high level of subjective independence (Denmark) and a low level (Bulgaria, Spain) and a low level of formal independence with a high level of subjective independence (Sweden) and a low level (Portugal⁶⁷). This finding was also noted in the literature discussed in Section II(2) and seems to be robust. One explanation was already hinted at: negative perceptions may trigger the response to strengthen formal safeguards. Another explanation has to do with the different recent histories of nations. Both explanations imply that strengthening formal independence can help to improve subjective independence.⁶⁸ The outcomes are relevant at the national level and at the European level. In the next Section we will illustrate these uses.

VI. USE OF THE OUTCOME OF THE INDICATORS

1. Use at National Level: Example of the Netherlands

Since the results have only recently become available, the actions of Councils and other governing bodies, let alone the results of these actions, as a response to the report still have to follow. We take recourse to the first comprehensive measurement of the indicators in 2014/2015⁶⁹, albeit that the system of indicators was then still being developed. Figure 6 gives the country profile of the Netherlands.⁷⁰ The profile has led the Council for the judiciary to a critical evaluation of all aspects covered by the indicators, and a selection of issues that had the highest priority and chance of success. It was concluded that in the area of independence the weak legal basis of the judiciary is an important issue, as the constitution does not guarantee the independence of the judge. The other issue is the appointment of members of the Council: the current mechanism does not meet the ENCJ guidelines of judicial members being elected by their peers (compliance with the ENCJ guidelines is part of indicator 2). As to accountability, the mechanism for case allocation received priority. All three weaknesses are currently addressed. In a parallel development which is strongly supported by the Council, there is a proposal to include in the constitution the right of everyone to a fair trial before an independent and impartial judge. This proposal is now going through the parliamentary process.⁷¹ As to the appointment of members of the Judiciary, the Council has requested the Minister for Security and Justice to propose a new law. As to case allocation, the mechanism is determined by the individual courts in the form of a case allocation protocol. A committee has been set up by the presidents of the courts to prepare a protocol for all the courts. The committee has developed a proposal for random case allocation for simple cases, while retaining discretionary power to allocate complex cases taking into account, for instance, the field of expertise of individual judges.



67 Not presented here. See ENCJ, *Independence, Accountability and Quality of the Judiciary: Performance Indicators 2017*. See fn 60, p30.

68 See F van Dijk, F van Tulder, Y Lugten, 'Independence of Judges: Judicial Perceptions and Formal Safeguards' (2016) Netherlands Council for the Judiciary Working Paper 2016-1 <https://www.rechtspraak.nl/SiteCollectionDocuments/Paper-independence-of-judges-160111.pdf>. Using the 2015 data of the indicators, it is found that in the new democracies of Europe objective and subjective independence are positively correlated.

69 ENCJ, 'Independence and Accountability of the Judiciary and the Prosecution, Indicators 2015' (2015) ENCJ Report 2014/2015 <https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_2014_2015_adopted_ga_corr_2016.pdf>

70 This profile is not fully comparable with the recent profiles presented in Section IV due to improvements in the indicators and the methodology.

71 Proposal of law 34517.

2. Use of the Indicators at European Level: Risks to judicial independence

The outcomes of the indicators and the patterns they produce provide insight into the functioning of judiciaries in their democratic context. From the perspective of courts striving for independence, important risks for judicial independence are diminishing popular and governmental or political support. In diverse countries, governments and politicians criticise the judiciary either for electoral or policy reasons.⁷² There is, perhaps, decreasing self-restraint by both the media and politicians. Attacks have the effect, intended or otherwise, of discrediting the judiciary.⁷³ In some cases, attacks are aimed at bringing the judiciary under the control of the other state powers. The indicators identify weaknesses in independence and accountability that make judiciaries vulnerable to such attempts. In the previous Section we identified two situations that pose risk.

- Strong formal arrangements that go together with negative perceptions in society of the judiciary and its independence. This situation makes the judiciary vulnerable to attempts by governments to remove formal protections and to intervene in the judiciary. Hungary and Poland are cases in point.
- Weak formal arrangements that go together with positive perceptions of the judiciary. If such judiciaries (mainly in Northern Europe) were to start losing popular support, the weak institutional arrangements offer limited protection against direct interference.

In both situations maintaining and strengthening popular support for the judiciary is important. While the determining factors of support are not well known, it is more than likely that excellent performance of the courts in the form of timely, impartial and well-reasoned decisions is helpful. This requires the courts to focus on their users, which they do not always currently do, as we found in Section V. Striving for accountability to society is a prerequisite. The findings of Section V can then give guidance on what to do. As to underlying motivations, the ENCJ has noted that an important risk to the independence of both the judiciary as a whole and the individual judge is the failure of judges to reflect changes in civil society, and their being out of touch with ordinary citizens.⁷⁴

Sufficient funding of the judiciary is also a pre-requisite to an excellent service to court users. In the previous Section we saw that the funding systems and the court management are the weakest aspects from the perspective of objective independence. Many judiciaries in Europe are entirely dependent on arbitrary decisions of government and are, as a result, underfunded. Furthermore, in allocating the budget, they are often dependent on court management by or under the control of the Minister of Justice. Finally, as to criticism of judicial decisions by the media, politicians, parliamentarians and the executive that is felt to be gratuitous by the judiciary, the courts can do more to strengthen their relationship with the press. Section V (Accountability, indicator 4) shows that, while some judiciaries are already effective in this area, there is generally room for improvement.

VII. DISCUSSION

The ENCJ developed a set of indicators to assess the state of independence and accountability of judiciaries, based on the notion that the two concepts were linked. Independence without accountability will not be accepted by society. Accountability without independence is bureaucratic decision-making. It needs to be emphasized that accountability to society is interpreted in a broad sense. It deals primarily with the transparency of procedures such as case allocation and withdrawal and recusal of judges and the transparency of judicial decisions. Only a small part of the accountability indicators is about managerial accountability regarding production and efficiency. In our view this interpretation reduces the tension between independence and accountability, as is regularly put forward in the literature. As to independence, the set consists of indicators of objective independence (formal, mostly legal, characteristics) and subjective independence (perceptions). The outcomes confirm that both aspects of independence are essential; objective and subjective independence often diverge in the profiles of individual countries. It cannot be taken for granted that countries that adopt best practices for formal judicial independence safeguards will achieve high levels of perceived independence. Conversely, it cannot be assumed that high levels of perceived independence will last forever so that strong formal arrangements are not necessary.

As to the way forward, making a systematic assessment of the level of independence and accountability achieved in practice by national legal systems is a crucial starting point for improving justice systems across the EU. Justice systems do not exist to benefit judges; they exist for the benefit of every citizen. Shining a light on systems that lack either or both of independence and accountability should enable their shortcomings to be more appropriately addressed. From a research perspective, this approach helps to make independence and accountability measurable, taking into account the complexity and many dimensions of both concepts. At the same time it must be recognized that the methodology contains (inter)subjective elements, for instance with regard to the scoring of the indicators, and it is based on self-evaluation which could make outcomes dependent on the incentives of those who conduct the evaluation. The latter aspect should not be a risk, as the indicators are about the formal arrangements in a country and otherwise observable phenomena, and can be readily checked by any knowledgeable observer. Still, there are no guarantees.

⁷² Poland is the most recent case in point. Hungary and Turkey went before. The criticism of the UK judges who decided the case on triggering the Brexit process is also relevant.

⁷³ Poland, see EC, fn 14.

⁷⁴ ENCJ 2014, p40. See fn 44.

In the coming years, the ENCJ and its members and observers will, on the one hand, use the lessons that can be drawn from the country profiles to improve the functioning of the specific judicial systems and, on the other hand, seek external scrutiny of the methodology and outcomes of the indicators. It will also focus on getting information about the perceptions of court users on independence as well as accountability. Also, other ways to measure the 'de facto' independence of the courts will be considered. The latter aspect requires, in particular, further research.

To conclude, it is hoped that the move from debating the theoretical importance of judicial independence to the development of a practical analytical method for measuring it will enable justice systems across Europe better to uphold the rule of law and to improve the services they deliver to their citizens. At the same time, the method provides a more solid basis for research on independence and accountability.



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